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The Islamic Obligation to Emigrate:
Al-Wansharīsī's *Asnā al-matājir* Reconsidered

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An abstract of
A dissertation submitted to the Faculty of the Graduate School of Emory University
in partial fulfillment of the requirements for the degree of
Doctor of Philosophy
Graduate Division of Religion
2009

ABSTRACT

The Islamic Obligation to Emigrate:
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By Jocelyn N. Hendrickson

This dissertation re-examines a *fatwā* (formal response to a legal question) issued in 1491 C.E. by Aḥmad al-Wansharīsī (d. Fez, 914/1508) confirming the obligation of Iberian Muslims to emigrate from their conquered homelands, which had become non-Muslim territory (*dār al-ḥarb*) as a result of the Christian 'Reconquista,' and to settle in Muslim territory (*dār al-Islām*). Al-Wansharīsī's primary *fatwā*, "*Asnā al-matājir*," and a shorter text, "the Marbella *fatwā*," are among the most prominent pre-modern *fatwā*s on Muslims living under non-Muslim rule, and have attracted considerable scholarly attention. While previous scholars have placed al-Wansharīsī's rulings in exclusive conversation with other *fatwā*s related to the status of Muslims under Christian rule in Iberia or Sicily, this dissertation argues that *Asnā al-matājir* in particular must be understood in its North African context.

Chapter one reviews and critiques the existing literature and establishes that the primary audiences for these *fatwā*s consisted of 1) the North African jurist who posed the questions, and 2) the professional legal readership of the *Miʿyār*, the compendium of Mālikī *fatwā*s compiled by al-Wansharīsī. *Asnā al-matājir* likely was not intended to encourage Iberian Muslim emigration.

Chapter two argues that the Christian occupation of parts of Morocco, and the fifteenth-century juristic discourse to which it gave rise, represent the most immediate historical and intellectual contexts in which al-Wansharīsī's *fatwā*s on emigration must be understood. The relevant *fatwā*s contained in al-Zayyātī's (d. 1055/1645) *Al-Jawāhir al-mukhtāra*, including one by al-Wansharīsī, are analyzed and compared.

Chapter three critiques the conception that al-Wansharīsī's *fatwā*s were especially strict or unimaginative. An examination of the jurist's use of past precedent demonstrates his agility in adapting previous rulings to his present context, and reveals aspects of these rulings to be more lenient than those of his predecessors and contemporaries.

Chapter four confirms the success of al-Wansharīsī's rulings in becoming authoritative precedents by analyzing *fatwā*s for and against emigration from colonial Algeria and Mauritania. Specific reasons are advanced for *Asnā al-matājir*'s impact on later Mālikī thought on this issue.

The appendices include translations and editions of important *fatwā*s discussed in this dissertation, including *Asnā al-matājir* and the Marbella *fatwā*.

The Islamic Obligation to Emigrate:
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ACKNOWLEDGEMENTS

I am indebted to innumerable individuals and institutions for the generous advice and support that have made this dissertation possible. My thanks go first and foremost to my committee for their patience, encouragement, and exemplary guidance. I am particularly grateful to my advisor, Devin Stewart, for sparking my interest in the central *fatwā*s examined here and for his meticulous attention to the results; his comments have led to improvements on nearly every page. I am especially thankful for the continually high expectations he has set for my work, and the attempt to meet them has been an honor and adventurous challenge. I owe the decision to pursue my graduate training at Emory to Richard Martin, whose critical support and good cheer have been invaluable since well before I began this program. I am grateful to Gordon Newby for his judicious advice and steadfast encouragement, especially at crucial junctures.

I have had the fortune of working with a great many wonderful professors, and would like to express my gratitude to three of them in particular. Joyce Flueckiger embraced the task of mentoring me early on and helped ensure that I developed a global understanding of Islam. Her methods seminar inspired me to meet the most difficult challenges of fieldwork with resilience and flexibility. I am grateful to Carl Ernst for introducing me to the joys and frustrations of manuscript editing, and to the Carolina Duke Emory Institute for the Study of Islam for the opportunity to spend a semester at Duke and UNC Chapel Hill. I also owe a special thanks to Emad Abou Ghazi of Egypt's Supreme Council of Culture for his invaluable seminar on paleography and for assistance with accessing Egyptian libraries.

This work would not have been possible without the generosity of Sjoerd van Koningsveld, Gerard Wiegers, and Umar Ryad, who shared with me their unpublished draft of a text essential to accomplishing the primary aims of this dissertation. I also wish to express my gratitude to the following individuals who provided copies of unpublished work or who offered valuable comments on drafts and presentations of parts of this work: Amira Bennison, Ziad Bentahar, Vincent Cornell, Ben Ehlers, Mohammad Fadel, Justin Stearns, and Natalie Zemon Davis.

I am also indebted to countless individuals who assisted me during my fieldwork. In Fez, I am especially thankful for the enthusiastic guidance of Hamid Lahmer of the Sidi Ben Abdullah University and for the innumerable hours Muhammad Wassu spent illuminating my path through difficult texts. In Rabat, MACECE's Daoud Casewit and Saadia Maski facilitated the Moroccan components of my research. In Tunisia, I am grateful for the assistance of Jim Miller, Larry Michalak, and Riadh Saadaoui of CEMAT, and in Algeria, I thank Bobby Parks of CEMA. In Spain, I am especially grateful for the help and advice of Maríbel Fierro of CSIC. In addition, I am thankful for the generous assistance and access to manuscripts extended by the directors and staff of the archives where I worked. I wish to specially acknowledge the assistance of Ahmed Chouqui Binebine, director of Morocco's Ḥasanīya (Royal) Library.

I am honored and humbled to have received an abundance of material and financial support for this project. My research abroad was supported by a Fulbright Islamic Civilization fellowship; a fellowship from the Center for Arabic Study Abroad II; the Social Science Research Council's International Dissertation Research Fellowship; a Fulbright-Hays Doctoral Dissertation Research Abroad Fellowship; and a travel grant

from the American Institute for Maghrib Studies. The writing phase was supported by a Charlotte W. Newcombe Doctoral Dissertation Fellowship. The University of Washington provided me with full library access as a Visiting Scholar during two years of writing; for this I offer my profuse thanks to James Wellman of the Jackson School of International Studies.

A great many friends and colleagues have shared the trenches and archives with me, critiqued my work, shared their own, offered moral support, led me to libraries, or guided me through stages of this long journey. Special thanks are owed to Sayeed Rahman, Matt Melvin-Koushki, Camilo Gómez-Rivas, Cassie Chambliss, Brett Wilson, Tom DeGeorges, Luke Whitmore, Amy Allocco, David Vishanoff, and Karen Bauer. I have had the particular fortune of being one step behind Adriana Valencia from the time we shared a Cairo apartment in 1997-98 until we completed our dissertation research nearly a decade later in Spain and Morocco; her friendship and guidance have been invaluable. I also thank James for over a decade of companionship and support at home and abroad.

Above all, I thank my family for their unwavering love and support.

CONTENTS

NOTES

The system of Arabic transliteration used here combines elements of the most common systems, and should be readily understandable. The *tā' marbūta* is not represented except in rare cases; where necessary to avoid confusion, it is indicated by an *h*.

Where single dates appear, they are Common Era dates unless otherwise specified. Dual dates list the *hijrī* (A.H.) year followed by the Common Era year. Where only the *hijrī* year is known, both possible Common Era equivalents are given.

Most biographical sources are given only as abbreviations, according to the list on page 468. Less common sources are fully noted and included in the bibliography.

Other abbreviations:

ms.	manuscript
mss.	manuscripts
2a	*a* refers to the front side of a manuscript folio (*recto*)
2b	*b* refers to the back side of a manuscript folio (*verso*)

INTRODUCTION

In 1491 C.E. or shortly prior, a group of Muslims decided to abandon their homes, property, and former lives somewhere in the southeastern Iberian peninsula. They were erstwhile residents of the Naṣrid Kingdom of Granada who had found themselves subjects of the Crown of Castile as the Christian 'Reconquista' neared completion and the Christian-Muslim frontier moved ever closer to the city of Granada, which would surrender to Ferdinand of Aragón and Isabella of Castile in January 1492. Fearing what their future might hold as Muslims in a Christian land, and mindful of their Islamic legal obligation to emigrate to Muslim territory rather than remain under non-Muslim rule, they crossed the Mediterranean and landed somewhere in the Maghrib (North Africa), most likely in modern-day Morocco.

After successfully completing their emigration, or *hijra*, these Andalusī Muslims (from al-Andalus, or Muslim Iberia) were dismayed that they could find no replacement for the security, prosperity, or community they had left behind. They changed their minds, regretted having emigrated, and wanted to go back.

Thus far the story of these emigrants is remarkable but not unique; waves upon waves of refugees fled or were expelled from Iberia during and after the 'Reconquista,' and some of them subsequently returned home.[1] It is when these particular Andalusīs began to mock the Maghrib and the very idea of *hijra*, and to conspicuously broadcast

[1] For an overview of population movements in medieval and early modern Iberia, see Mercedes García-Arenal, *La Diaspora des Andalousiens*, L'Encylopédie de la Méditerrané 13 (Aix-en-Provence, France: Édisud, 2003). For Valencian Muslims returning after having emigrated, see Mark D. Meyerson, *The Muslims of Valencia in the Age of Fernando and Isabel: Between Coexistence and Crusade* (Berkeley: University of California Press, 1991), 97. For an Andalusī who was accused of being a spy in Fez and who later returned to Iberia, see Scott Kugle, *Rebel between Spirit and Law: Ahmad Zarruq, Sainthood, and Authority in Islam* (Bloomington: Indiana University Press, 2006), 82-83.

their hopes that the King of Castile would allow their return to his 'infidel' kingdom, that the group caught the attention of the authorities and of history. Their insults against Islam and offenses against the public order constituted *fitna*, or the spread of corrupting ideas. Their case angered and perplexed a local jurist, who sent a description of their offenses to Fez, the capital of the Waṭṭasid state, with a request for further counsel.

Aḥmad b. Yaḥyā al-Wansharīsī (d. 914/1508), the chief *muftī* (a jurist who issues *fatwā*s, or legal opinions) of Fez, wrote a lengthy *fatwā* confirming the obligation of these and other Muslims to emigrate to Muslim territory and prohibiting their voluntary residence under non-Muslim rule. This treatise, known as *Asnā al-matājir*,[2] has become one of the most widely discussed pre-modern *fatwā*s, attracting scholarly and popular attention alike from those seeking to explore Muslim identity and Christian-Muslim relations at a significant moment in Islamic history – the permanent loss of al-Andalus and the creation of a major Muslim diaspora. These Andalusī emigrants have captured the imaginations and sympathies of those sensitive to the plight of religious minorities in post-'Reconquest' Spain and of those eager to spread the blame for the near-extinction of Islam in Iberia to the Muslim world and its jurists. Al-Wansharīsī has also inspired the anger and scorn of those who accuse him of deliberate cruelty in the name of strict adherence to an outmoded system of law.

Most recently, the rise in the number of Muslims living as members of minority religious communities in majority non-Muslim states – now nearly a third of the world's 1.3 billion Muslims – has prompted the development of a largely *fatwā*-based

[2] For the full title and translation, see chapter one.

body of law responsive to the needs of minority Muslims. Those hoping to place this recent development in historical context or to explore the compatibility of Islamic law and liberal citizenship have likewise looked to al-Wansharīsī and his *fatwā* as one of the most prominent pre-modern legal responses to Muslims living outside of Muslim territory.

This dissertation re-tells the story of this *muftī* and his *fatwā* – or rather his three *fatwā*s, as will be seen – on the obligation to emigrate to Muslim territory. Previous studies of al-Wansharīsī's rulings have tended to assign an undue exceptionalism to the situation of Muslims living under Christian rule in Iberia, and have often been based on a superficial understanding of Islamic law in general and this jurist's rulings in particular. The present study argues that al-Wansharīsī's *fatwā*s must be understood in their North African context, and places them at the center of a lively and previously unexplored contemporary juristic discourse on the position of Muslims living under foreign occupation in Morocco itself. Further, this dissertation will demonstrate that al-Wansharīsī exercised considerable juristic discretion in crafting his rulings, employing a careful selection of precedents, proof-texts, and original arguments, with the intent that his *fatwā*s would shape the legal discourse on emigration both in his own time and for future generations. The success of his opinions in becoming the authoritative precedents for later jurists responding to similar questions will be confirmed by tracing the legacy of these *fatwā*s through the colonial period in North and West Africa.

Islamic Legal Genres and the Study of Fatwās

This project is framed by and contributes to an important emergent subfield within Islamic legal studies and historiography: the study of *fatwā*s, the non-binding legal rulings issued by qualified jurists in response to specific questions posed by individuals, judges, or governments. This genre of Islamic legal literature has begun to receive increasing scholarly attention over the past thirty years for at least three reasons: 1) *fatwā*s offer a unique window into the intersections of law and society at particular historical moments; 2) studies based on this genre have successfully challenged one of the most widely held assumptions concerning Islamic law, and 3) essential primary texts are becoming far more accessible.

First, scholars such as David Powers, Brinkley Messick, Muhammad Khalid Masud, Mohammed Fadel, and Jakob Skovgaard-Petersen have argued for the importance of *fatwā*s as sources for social, economic, and legal history.[3] As opposed to works of legal theory (*uṣūl al-fiqh*), which treat the principles governing the derivation of law from the revealed sources, or manuals of substantive law (*mutūn* and *mukhtaṣar*s), which set forth the basic, agreed-upon laws within a given school of law, *fatwā*s treat actual personal or public concerns which have arisen within specific

[3] This is of course a very partial list of those who have contributed to the recent elaboration of this field. For some of their most important works, see: David S. Powers, *Law, Society, and Culture in the Maghrib, 1300-1500* (Cambridge: Cambridge University Press, 2002); *idem*., "*Fatwās* as Sources for Legal and Social History: A dispute over Endowment Revenues from Fourteenth-Century Fez," *Al-Qanṭara* 11, no. 2 (1990): 295-341; Brinkley Messick, *The Calligraphic State: Textual Domination and History in a Muslim Society* (Berkeley: University of California Press, 1993), esp. ch. 7; Muhammad Khalid Masud, Messick, and Powers, "Muftis, Fatwas, and Islamic Legal Interpretation," in *Islamic Legal Interpretation: Muftis and Their Fatwas*, ed. Masud, et al. (Cambridge: Harvard University Press, 1996), 3-32; Mohammad Fadel, "Rules, Judicial Discretion, and the Rule of Law in Naṣrid Granada: An Analysis of *al-Ḥadīqa al-mustaqilla al-naḍra fī al-fatāwā al-ṣādira ʿan ʿulamāʾ al-ḥaḍra*," in *Islamic Law: Theory and Practice*, ed. R. Gleave and E. Kermeli (London: I.B. Tauris, 1997), 49-86; and Jakob Skovgaard-Petersen, *Defining Islam for the Egyptian State: Muftīs and Fatwas of the Dār al-Iftā* (Leiden: Brill, 1997), esp. 1-35.

historical and geographic contexts. As new legal issues arise, *fatwā*s serve as sites for the active negotiation of moral boundaries and changing legal and ritual practices.

*Fatwā*s consist of two parts, the *istiftā'* (question) posed by a *mustaftī* (questioner), and the jurist's response. Where the questions have been preserved, they reveal the types of legal issues that led to interpersonal conflicts or weighed on the individual's conscience, providing fertile material for the study of social and economic history as well as religious practices. The *muftī*s' answers help us to understand the procedures by which a given corpus of legal texts was applied to specific cases; this material is particularly important for exploring the ongoing development of legal thought, the functions and discretionary powers of jurists, and the inter-relationships of religious scholars, society, and the state.

Second, scholars such as Wael Hallaq, Baber Johansen, Sherman Jackson, and Haim Gerber have argued convincingly, in large part through the analysis of *fatwā*s, that Muslim jurists continued to engage in independent reasoning (*ijtihād*) and to contribute to the development of legal thought and practice in the post-formative period.[4] These studies have been crucial in disproving the long-standing theory of the 'closing of the gate of *ijtihād*.' Building on the work of Joseph Schacht, Western and Muslim scholars alike had long held that following the consolidation of the four existing Sunni schools of law in the fourth/tenth century, jurists were stripped of their

[4] For examples, see: Wael Hallaq, "Was the Gate of Ijtihad Closed?" *International Journal of Middle East Studies* 16 (1984): 3-41; *idem*., "From *Fatwā*s to *Furūᶜ*: Growth and Change in Islamic Substantive Law," *Islamic Law and Society* 1, no. 1 (1994): 29-65; *idem*., "Murder in Cordoba: *Ijtihâd*, *Iftâ'*, and the Evolution of Substantive Law in Medieval Islam," *Acta Orientalia* 55(1994): 55-83; *idem*., *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), esp. ch. 6; Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim* Fiqh (Leiden: Brill, 1999), esp. ch. 8; Sherman Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: Brill, 1996); Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (Albany, NY: State University of New York Press, 1994).

former interpretive freedom; that Islamic law from then on steadily ossified; and that, unable to adapt to new historical realities, this outmoded legal system became increasingly irrelevant to the changing needs of society.[5] Research in the last twenty-five years, since Hallaq's seminal article critiquing this theory ("Was the Gate of Ijtihad Closed?"), has demonstrated the interpretive dexterity of post-formative jurists, particularly in their activities as *muftī*s; Jackson even suggests that some later jurists exhibited more advanced intellectual achievements than their predecessors by producing novel rulings based on an ever-growing body of school literature.[6]

The third factor contributing to the recent rise of *fatwā* studies is the availability of published collections of jurists' rulings. For the region and legal school considered in this dissertation, Mālikī law in Andalusia and in North and West Africa, modern printed collections did not begin to appear until the 1980's. The most important Mālikī compilation, al-Wansharīsī's (d. 914/1508) *al-Miʿyār*, was published between 1981 and 1983; more numerous scholarly studies of its *fatwā*s, which were issued by hundreds of jurists over a 500-year period, followed beginning in the early 1990's.[7] The publishing of additional collections is rapidly outpacing scholarly analyses; in a 1992 article classifying major Mālikī *fatwā* compilations, Muḥammad al-Hīlah listed primarily manuscript works; most of these texts are now readily available in printed editions. Nonetheless, many of the sources for this dissertation remain only in manuscript, and my findings will no doubt require revision as additional works become accessible.

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[5] Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), esp. pp. 69-75. The most succinct and oft-quoted statement of Schacht's thesis is found on pp. 70-71.
[6] Jackson, *Islamic Law and the State*, 227.
[7] A number of earlier pioneering studies, such as those of Roger Hady Idris and Jacques Berque, were based on lithograph editions prior to the publication of modern editions.

In the introduction to his study of Egyptian state *muftī*s, Skovgaard-Petersen presents a useful, if now somewhat outdated, classification and critique of approaches to the study of *fatwā*s.[8] Among the types of studies he identifies are: 1) those that mine *fatwā* collections for information regarding the customs and traditions of particular groups; 2) analyses of individual *fatwā*s which are of particular intellectual or historical significance; 3) thematic studies of *fatwā*s issued by different *muftī*s in different times and places; and 4) studies which examine one entire *fatwā* collection or all of the rulings issued by one *muftī*, in order to evaluate that corpus' role in an historical movement or to better understand the worldviews which gave rise to the collected *fatwā*s. Skovgaard-Petersen's primary criticism of the literature on Egyptian *muftī*s is that scholars have often failed to place these *muftī*s' *fatwā*s in sufficient historical context.[9] He argues that if *fatwā*s are to be valued for revealing the intersections between legal theory and practice, understanding the real-world context in which they are issued is of crucial importance. This context includes the *muftī*'s background, training, status, and methods; any external pressures exerted upon him in the issuing of particular rulings; and his intentions and expectations with regard to the circulation and impact of his opinions.

This Dissertation

Although Skovgaard-Petersen is primarily concerned with *fatwā*s as sources for the study of social history, his observations regarding the importance of context are equally valid for *fatwā*-based studies of legal history such as the present dissertation. It

[8] Skovgaard-Petersen, *Defining Islam*, 10-19.
[9] Ibid., 19-20.

is a primary aim of this study to identify and explore the contextual factors most relevant to understanding each of the *fatwā*s discussed here, and especially those of al-Wansharīsī. While previous scholars have certainly understood al-Wansharīsī's *fatwā*s on emigration to be responses to an historical event, the fall of al-Andalus, they have neglected to explore such contextual factors as al-Wansharīsī's audience, the contemporary juristic discourses to which he contributed, and the foreign occupation of Maghribī ports during his lifetime. These omissions, among others, have resulted in significant misreadings of al-Wansharīsī's *fatwā*s and a range of unsupported assumptions regarding the purpose and impact of these texts.

Chapter one reviews and critiques the existing literature on these *fatwā*s and explores those contextual factors most relevant to Skovgaard's second type of study, the analysis of individual *fatwā*s of particular historical importance. This includes al-Wansharīsī's life and works, the intended audiences for the *fatwā*s examined here, the specific parameters of the legal issues they treat, the jurist's knowledge of the human and legal dimensions of his subject matter, and his expectations regarding their purpose and circulation.

Chapter two widens this scope of inquiry to examine the late fifteenth-century juristic discourse on Muslims subject to Christian authority in Morocco itself, including al-Wansharīsī's own contribution to this discourse (the 'Berber *fatwā*'). This chapter more closely resembles Skovgaard-Petersen's third category of study, the analysis of a thematically unified group of *fatwā*s; in this case, the *fatwā*s respond to one ongoing event, the foreign occupation of Moroccan ports, and the majority of the rulings were issued in or near Fez in the final decades of the fifteenth century. While previous

studies have placed *Asnā al-matājir* and its companion *fatwā* (the 'Marbella *fatwā*') in exclusive conversation with other rulings related to the status of Muslims living under Christian rule in Iberia or Sicily, I argue that this foreign occupation and the juristic discourse to which it gave rise represent the most immediate historical and intellectual contexts in which all three of al-Wansharīsī's *fatwā*s on emigration must be understood.

Chapters three and four move beyond Skovgaard-Petersen's categories to treat two issues related to the construction and maintenance of authoritative precedents in *fatwā* literature, using al-Wansharīsī's *fatwā*s on emigration as a case study. The multiple contexts for al-Wansharīsī's *fatwā*s established in chapters one and two serve as a foundation for the argument advanced in chapter three, which is that rather than cruelly or mindlessly repeating past precedents, al-Wansharīsī skillfully adapted the precedents available to him in order to craft rulings responsive to the needs of both his immediate and future audiences; and that some aspects of these rulings are even more lenient than those of his predecessors. While most scholars who have argued for continued juristic discretion in the post-formative period have done so by pointing to jurists' overt departures from standard school doctrine or to their innovative solutions to novel cases, al-Wansharīsī's *fatwā*s show that a later jurist could exercise considerable discretion in adapting existing precedents to fit his present context, all the while grounding the authority of his rulings in a claimed continuity with received tradition and maintaining the appearance of applying established precedents to recurring cases.

Chapter four examines the success of al-Wansharīsī's rulings in becoming the authoritative precedents for later jurists that chapter three argues he intended for

them to become. While his *fatwā*s on emigration often have been described in the existing literature as either the orthodox position of the Mālikī school or as just one of many opinions, I argue that it is possible to evaluate the authoritative status of these opinions by examining their legacy in later Mālikī rulings. This chapter presents a study of the positions adopted and arguments deployed by jurists writing in response to Muslims living in French colonial Algeria and Mauritania, and confirms that al-Wansharīsī's *fatwā*s did become the authoritative precedents for these later jurists, even for those who opposed emigration. A number of specific reasons are advanced for the success of al-Wansharīsī's *fatwā*s in shaping later legal discourse on this subject.

CHAPTER ONE

The *Muftī* as Villain: Al-Wansharīsī and his *Fatwā*s on the Obligation to Emigrate

When the Kingdom of Granada surrended in January 1492, nearly eight centuries of Muslim rule in Iberia were brought to a close. Muslim armies first crossed the Straights of Gibraltar[1] in 711, defeated the Visigothic King Roderic, and established control over much of the Iberian peninsula by the mid-eighth century. Following the Abbasid defeat of the Umayyad dynasty in the east in 750, a surviving member of the Umayyad family established a new emirate in Iberia, which would later become the independent Umayyad caliphate of Córdoba (929-1031). A period of intellectual and artistic florescence, this caliphal period has been praised as the golden age of al-Andalus. After the caliphate disintegrated into rival Muslim kingdoms, two successive Moroccan dynasties, the Almoravids and the Almohads, attempted to reunite Muslim Iberia in the twelfth century. Meanwhile, the Christian kingdoms steadily gained territory, conquering most of the peninsula by the mid-thirteenth century.

From roughly 1260 until 1492, Iberian Muslims fell into two major groups: those who lived under Christian rule and those who lived in or immigrated to Naṣrid Granada, which survived for nearly two and a half centuries as the last Muslim kingdom in Iberia. The former became known as Mudéjars and were allowed to continue practicing Islam, subject to certain restrictions which varied over time and from region

[1] Gibraltar ("Jabal Ṭāriq") and the straights were subsequently named after Ṭāriq b. Ziyād, the commander who led the 711 invasion.

to region. With the fall of Granada, all Iberian Muslims became Mudéjars[2] until forced conversions and regional expulsions began in the early sixteenth century.[3] By 1526, all Muslims remaining in the Iberian peninsula had in theory been converted to Christianity. These converts, who became known as Moriscos, were subject to a number of royal decrees, missionary campaigns, and relocations aimed at ensuring their sincere conversion to Christianity and full assimilation into Christian society. When these efforts were ultimately deemed unsuccessful, the Moriscos were expelled from Spain between 1609 and 1614.

The persistence of substantial Mudéjar communities in Iberia presented Muslims with a number of difficult legal questions regarding territory, identity, and Christian-Muslim relations. Perhaps the most fundamental of these was the question of Muslims' obligation to perform *hijra*, or to emigrate from their conquered homelands, now considered *dār al-ḥarb*, the 'land of war,' or non-Muslim territory, to *dār al-Islām*, 'the land of Islam,' or Muslim territory. The regretful Andalusī emigrants with which this dissertation opened were not the first Muslims to complicate this theoretically straightforward obligation, nor was al-Wansharīsī (d. 914/1508) the first or the only jurist to address these issues. Yet his two *fatwā*s on the obligation to emigrate are the rulings that have garnered the most scholarly attention because of their accessibility,

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[2] The Arabic term is *mudajjanūn* or *ahl al-dajn*, meaning 'domesticated' for animals and indicating submissivness for humans. For a discussion of the term, see Gerard Wiegers, *Islamic Literature in Spanish and Aljamiado: Yça of Segovia (fl. 1450), His Antecedents and Successors* (Leiden: Brill, 1994), 3.

[3] Muslims were expelled from Portugal in 1497. In Castile, they were subject to mass conversions in 1500-1502, accompanied by a 1501 decree (officially proclaimed in 1502) requiring conversion or expulsion of the remaining Muslim population; this policy was extended to Navarre upon the territory's incorporation into the Spanish Crown in 1515. In Aragón, a large number of Muslims were forcibly baptized in 1520-22, and the conversions were confirmed as valid in 1525. In 1525, Charles V decreed that Muslims in Catalonia, Aragón, and Valencia must choose conversion or expulsion. By 1526, when the last of these decrees took effect, all Muslims in Spain had become Moriscos, or 'crypto-Muslims.' These dates are taken from L. P. Harvey, *Muslims in Spain: 1500-1614* (Chicago: University of Chicago Press, 2005).

their elaborate treatment of the subject, and their perceived insensitivity to the plight of the Mudéjars. In his lengthy 1491 treatise, *Asnā al-matājir*, and in the shorter, companion text I will call 'the Marbella *fatwā*,' al-Wansharīsī states categorically that Muslims may not remain under Christian rule if they are capable of emigrating to Islamic territory.

Scholars have debated the significance of al-Wansharīsī's two *fatwā*s both independently and in comparison, almost always unfavorable, with several other opinions. The most notable of these are the *fatwā*s of al-Māzarī (d. 536/1141) and of Ibn Abī Jumᶜa al-Wahrānī (d. 917/1511), although neither of these two jurists directly addresses the question of *hijra*. In the former, al-Māzarī rules that the decisions and documents issued by Sicilian Muslim judges are in most cases legally valid despite those judges' presence in non-Muslim territory and despite their appointment by non-Muslim rulers.[4] In the latter *fatwā*, issued in 1504, al-Wahrānī advises Iberian Muslims – who were by then Moriscos, forced converts to Christianity – as to how they might continue to practice Islam in secret.[5]

Ḥusayn Mu'nis has argued that al-Wansharīsī's *Asnā al-matājir* had a disastrous effect on the viability of Spanish Muslim communities, and has praised al-Māzarī for assisting Sicilian immigrants arriving in Ifrīqiyā.[6] Scholars such as L.P. Harvey and Hossein Buzineb have similarly championed al-Wahrānī as a voice of openness and compassion for the Moriscos, in contrast to al-Wansharīsī's strictly 'orthodox' and

[4] For al-Māzarī's biography, see chapter three, where this *fatwā* is discussed in detail.
[5] For al-Wahrānī's biography, see chapter four, where this *fatwā* is discussed in greater detail.
[6] Ḥusayn Mu'nis, "Asnā al-matājir fī bayān aḥkām man ghalaba ᶜalā waṭanihi al-Naṣārā wa-lam yuhājir, wa-mā yatarattabu ᶜalayhi min al-ᶜuqūbāt wa'l-zawājir," *Revista del Instituto Egipcio de Estudios Islamicos en Madrid*, 5 (1957): 15-18. References to Mu'nis's study and edition of al-Wansharīsī's text will use Mu'nis's name, to avoid confusion and because it is his editorial choices which will often be at issue. References using "al-Wansharīsī" as author will be reserved for the Rabat-Beirut edition of the *Miᶜyār*, discussed below. Ifrīqiyā as used here corresponds roughly to modern-day Tunisia.

authoritarian point of view.[7] Al-Wahrānī is often characterized as having provided crucial aid to Moriscos resisting assimilation,[8] and Harvey has even called this latter *fatwā* "the key theological document for the study of Spanish Islam" in the Morisco period.[9]

Although al-Wansharīsī's *fatwā*s have received generous scholarly attention over the past fifty years, beginning with Mu'nis's seminal 1957 edition and analysis of both texts and continuing most recently with Andrew March's 2009 monograph *Islam and Liberal Citizenship*,[10] serious gaps remain in the literature. The present chapter will review and critique previous characterizations of al-Wansharīsī and his *fatwā*s, and begin to fill some of these gaps; full, annotated translations of *Asnā al-matājir* and the Marbella *fatwā* are also included as Appendices A and B. Despite the importance of these texts, and in spite of more than one scholar's stated intent to publish a full translation of *Asnā al-matājir*, none has as of yet appeared.[11] The existing partial translations of both *fatwā*s, and the one full Spanish translation of the Marbella *fatwā*

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[7] L.P. Harvey, *Islamic Spain, 1250 to 1500* (Chicago: University of Chicago Press, 1990), 56 (al-Wansharīsī as orthodox); *idem*., *Muslims in Spain*, 60-64 (al-Wahrānī as acutely sympathetic and boldly innovative); Hossein Buzineb, "Respuestas de Jurisconsultos Maghrebies en Torno a la Inmigración de Musulmanes Hispánicos," *Hespéris Tamuda* 16-17 (1988-89): 60 (al-Wahrānī as supportive and original).

[8] In addition to Harvey and Buzineb, see for example: Louis Cardaillac, *Morisques et Chretiens: Un affrontement polemique (1492-1640)*, 2nd ed. (Zaghouan, Tunisia: Centre d'Etudes et de Recherches Ottomanes, Morisques, de Documentation et d'Information, 1995), 79; Leila Sabbagh, "La religion des Moriscos entre deux fatwas," in *Les Morisques et leur Temps. Table Ronde Internationale 4-7 Juillet 1981, Montpellier* (Paris: Éditions du Centre Nationale de la Recherche Scientifique, 1983), 52.

[9] Harvey, *Muslims in Spain*, 60.

[10] Andrew March, *Islam and Liberal Citizenship: The Search for an Overlapping Consensus* (Oxford: Oxford University Press, 2009). Al-Wansharīsī's *fatwā*s are discussed at length and partially translated in chapter 3, "Islamic Objections to Citizenship in Non-Muslim Liberal Democracies," 103-33.

[11] Emilio Molina Lopez, "Algunas consideraciones sobre los emigrados andalusies," in *Homenaje al prof. Darío Cabanelas Rodríguez, O.F.M., con motivo de su LXX aniversario* (Granada: Universidad de Granada, 1987), 425, n. 12; Felipe Maíllo Salgado, "Del Islam residual mudejar," in *España, al-Andalus, Sefarad: Síntesis y nuevas perspectivas*, 134 (Salamanca: Universidad de Salamanca, 1988). Molina Lopez notes the intention of another Spanish scholar (Dr. Arsenio Cuella Marqués) to publish a translation and commentary, while Maíllo Salgado states that he himself plans to publish a translation soon.

which has been published, also contain a number of errors.[12] As should become evident below, the lack of access to an accurate translation of the texts has clearly contributed to a large number of misrepresentations and misunderstandings in the scholarly literature.

In addition to rendering these texts accessible to a wider audience and correcting a number of errors in existing understandings of them, these translations fill an additional gap in the literature. In 1996, P.S. van Koningsveld and G.A. Wiegers published an article announcing their discovery of a manuscript which shows that the bulk of al-Wansharīsī's two emigration *fatwā*s consist of unacknowledged citations drawn from a previous *fatwā* issued by Muḥammad b. Rabīʿ (d. 719/1319), an Andalusī jurist active in Malaga.[13] While these authors offered a generous paraphrase of Ibn Rabīʿ's *fatwā* in their article, they stated that it was beyond the scope of their present work to analyze the differences between al-Wansharīsī's and Ibn Rabīʿ's texts. No one has as of yet taken up this task, but these scholars have generously shared with me the unpublished, draft edition of Ibn Rabīʿ's *fatwā* which they prepared together with Umar Ryad.[14] Working from this edition, I have made a preliminary effort to identify those parts of al-Wansharīsī's *fatwā*s which consist of unacknowledged citations from Ibn Rabīʿ, as opposed to those portions of the *fatwā*s original to al-Wansharīsī. In the appended translations, the text in bold represents quotations or very close paraphrases of Ibn Rabīʿ's *fatwā*, while regular typeface represents either material originally

[12] Maíllo Salgado's Spanish translation of the Marbella *fatwā* is the only full translation to date of this shorter text. It contains a number of errors, some of which I note in my own translation. Maíllo Salgado, "Consideraciones acerca de una fatwà de al-Wanšarīšī," *Studia Historica* 3, no. 2 (1985): 186-91.
[13] P. S. van Koningsveld and G. A. Wiegers, "The Islamic Statute of the Mudejars in the Light of a New Source," *Al-Qanṭara* 17, no.1 (1996): 19-58.
[14] This edition was prepared by Drs. Sjoerd van Koningsveld (Leiden, NL) and Gerard Wiegers (Nijmegen, NL) in cooperation with Dr. Umar Ryad (Leiden, NL).

composed by al-Wansharīsī or the latter's independent citations of other jurists' works. My analysis of these differences will follow in chapter three, which examines the use of authoritative precedent in *Asnā al-matājir* and the Marbella *fatwā*.

This chapter will begin with a brief overview of al-Wansharīsī's biography and of his two *fatwā*s on emgiration, then proceed to review and critique a number of significant trends in prior academic treatments of these texts.

Al-Wansharīsī and Asnā al-matājir

Life and Works of al-Wansharīsī

Abū al-ᶜAbbās Aḥmad b. Yaḥyā al-Wansharīsī was born in approximately 834/1430-31 and spent the first half of his life in Tlemcen, located in what is now northwestern Algeria.[15] There he completed his studies with some of the Zayyānid capital's most illustrious scholars and began his legal career, but at some point ran afoul of Sultan Muḥammad IV b. Muḥammad al-Mutawakkil (r. 873-910/1468-1504). For reasons unspecified in the biographical notices, al-Wansharīsī's home was plundered, and he fled to Fez in 874/1469. Ibn ᶜAskar (d. 986/1578) notes that the jurist was unyielding in matters of religion and thus did not maintain close relations with the

[15] Al-Wansharīsī's family name is derived from the Wansharīs (Fr. Ouarsenis) mountain range, where he may have been born prior to moving to Tlemcen at a young age. For al-Wansharīsī's life and works, see: Francisco Vidal Castro, "Aḥmad al-Wanšarīsī (m. 914/1508): Principales aspectos de su vida," *Al-Qanṭara* 12, no. 2 (1991): 315-52; *idem*, "Las obras de Aḥmad al-Wanšarīsī (m. 914/1508): Inventario analítico," *Anaquel de Estudios Árabes* 3 (1992): 73-112; *idem*., "El *Mi'yār* de al-Wanšarīsī (m. 914/1508). I: Fuentes, manuscritos, ediciones, traducciones," *Miscelánea de Estudios Árabes y Hebráicos* 42-43, no. 1 (1993-1994): 317-61; *idem*., "El *Mi'yār* de al-Wanšarīsī (m. 914/1508). II: Contenido," *Miscelánea de Estudios Árabes y Hebráicos* 44, no. 1 (1995): 213-46; Powers, *Law*, 4-7; Mohamed Benchekroun, *La vie intellectuelle marocaine* (Rabat, n.p., 1974), 79, 395-401; Aḥmad al-Manjūr, *Fihris Aḥmad al-Manjūr*, ed. Muḥammad Ḥajjī (Rabat: Dār al-Maghrib li'l-Ta'līf wa'l-Tarjama wa'l-Nashr, 1976), 50-51; DN, 48; JI, 1:156-57; NI, 1:144-45; SF, 2:171-73; SN, 2:397.

rulers of his time; some later scholars have speculated that al-Wansharīsī's issuance of *fatwā*s that ran counter to state interests may have been what angered the sultan.[16]

Al-Wansharīsī lived the remainder of his life in Fez, where he died in 914/1508 and was buried. His arrival in Fez coincided with a brief period of Idrīsid rule between the reign of the last Marīnid sultan, ᶜAbd al-Ḥaqq II (ruled directly 1459-1465), and the first independent Waṭṭasid sultan, Muḥammad al-Shaykh al-Waṭṭās (r. 1472-1504). The Waṭṭasids, who had formerly acted as regents for the Fez-based Marīnids, ruled independently thereafter (from 877/1472 until 956/1549). Al-Wansharīsī was well received upon arrival as an accomplished teacher, *muftī*, and author. He held posts in a number of Fāsī *madrasa*s, foremost among them the Miṣbāḥīya, and taught law to a number of distinguished students. These included his son ᶜAbd al-Wāḥid (d. 955/1549), who later served as chief judge of Fez for eighteen years.[17] Al-Wansharīsī's biographers stress the praise he garnered among his contemporaries for his exceptional knowledge of the law and of the Arabic language.

In additional to his teaching responsibilities, al-Wansharīsī issued *fatwā*s and authored a number of legal works. He was recognized as chief *muftī* of Fez, although

[16] DN, 48; this description of al-Wansharīsī is repeated by al-Kattānī (SF, 2:170). As Vidal Castro notes ("Aspectos," 329 n. 71), the editors of the *Miᶜyār*, commenting on a *fatwā* issued by al-Wansharīsī condemning construction in a Tlemcen cemetery, suggest that such critical rulings may have provoked Tlemcen's rulers (al-Wansharīsī, *al-Miᶜyār*, 1:329). Al-Ṣādiq b. ᶜAbd al-Raḥmān al-Ghiryānī, editor of al-Wansharīsī's *Īḍāḥ al-masālik*, similarly argues that the jurist's insistence on what was right might well have led to his speaking out against political corruption among the Banū ᶜAbd al-Wādids (the Zayyānids). Al-Ghiryānī, ed., *Īḍāḥ al-masālik ilā qawā'id al-Imām Mālik*, by Abū al-ᶜAbbās Aḥmad b. Yaḥyā al-Wansharīsī (Beirut: Dār Ibn Hazm, 2006), 14.

[17] Vidal Castro, "Aspectos," 330-38; *idem*., "ᶜAbd al-Wāhid al-Wansharīsī (m. 1549): Adul, cadí y muftí de Fez," in *Homenaje a la Profesora Elena Pezzi*, ed. Antonio Escobedo Rodríguez (Granada: Universidad de Granada, 1992), 147-49; Fernando R. Mediano, *Familias de Fez (SS. XV-XVII)* (Madrid: Consejo Superior de Investigaciones Científicas, 1995), 246-49.

the biographical sources do not specify the exact dates of this designation.[18] Vidal Castro identifies nearly thirty treatises, books, and compilations attributed to al-Wansharīsī, of which the most important and best-known is *Al-Miᶜyār al-muᶜrib waʾl-jāmiᶜ al-mughrib ᶜan fatāwī ahl Ifrīqiyā waʾl-Andalus waʾl-Maghrib* (The Clear Standard and Extraordinary Collection of the Legal Opinions of the Scholars of Ifrīqiyā, al-Andalus, and the Maghrib).[19] This vast compilation of *fatwā*s includes approximately 6000 opinions issued by hundreds of *muftī*s in the Islamic West over nearly five hundred years, from approximately 391/1000 to at least 896/1491.[20] Al-Wansharīsī spent approximately a quarter century selecting, copying, arranging, and revising this material, drawn from earlier *fatwā* collections and other legal works in a number of libraries; al-Wansharīsī's own books had been left behind or confiscated in Tlemcen.[21] He was especially reliant on the extensive private library maintained by the family of one of his students, Ibn al-Ghardīs (d. 897 or 899/1491-2 or 1493-4).[22] The *Miᶜyār* is organized according to the conventional chapters of legal manuals and was meant to serve as a reference for legal professionals.[23] The compilation achieved a widespread

[18] For a list of chief *muftī*s of Fez from the mid-fifteenth to mid-sixteenth century, see Devin Stewart, "The Identity of 'The *Muftī* of Oran,' Abū l-ᶜAbbās Aḥmad b. Abī Jumᶜah al-Maghrāwī al-Wahrānī (d. 917/1511)," *Al-Qanṭara* 27, no. 2 (2006): 297-98.
[19] See Vidal Castro, "Las obras."
[20] See Powers, *Law*, 4-7. Powers states that the *fatwā*s were authored between approximately 391/1000 and 890/1495, however, 890 does not correspond to 1495 (*Law*, 4-5). Two paragraphs later, he suggests that al-Wansharīsī began his work in about 890/1485. I have used 896/1491 as an earliest possible end date for continuing authorship of the *fatwā*s included *Miᶜyār*, as this is the date of *Asnā al-matājir*. Powers also notes that while the colophon to the *Miᶜyār* indicates that the work was completed in 901/1496, al-Wansharīsī appears to have continued to add new material until his death in 914/1508 (*Law*, 5).
[21] For the sources of the *Miᶜyār*, see Vidal Castro, "Fuentes," 323-36.
[22] Abū ᶜAbd Allāh Muḥammad b. Muḥammad b. al-Ghardīs al-Taghlibī (d. 897 or 899/1491-2 or 1493-4) hailed from an established scholarly family in Fez. He served as a deputy judge of Fez until dying from plague at a young age. His father had served as chief judge of Fez al-Jadīd. See Vidal Castro, "Aspectos," 333; al-Manjūr, *Fihris*, 51-52; DH, 205; Mediano, *Familias*, 160-62; al-Wansharīsī, *al-Miᶜyār*, 1:*iv* (death date in this introduction is incorrect).
[23] See al-Wansharīsī's introduction (*al-Miᶜyār*, 1:1), partially translated by Powers (*Law*, 6.)

distribution, was taught in colleges of law, and became a standard reference for Mālikī doctrine.[24]

One lithograph edition and one modern edition of the *Miʿyār* have been published.[25] The lithograph edition, published in Fez in between 1314/1896 and 1315/1897, is based on five manuscripts edited by a team of eight scholars, headed by Ibn al-ʿAbbās al-Būʿazzāwī (d. 1337/1918). As Vidal Castro points out, this is not a critical edition and is often less legible than many manuscripts.[26] The modern edition was published by the Moroccan Ministry of Islamic Affairs in Rabat and by Dār al-Gharb al-Islāmī in Beirut. The first eleven volumes appeared from both presses in 1981, followed by the twelfth volume, consisting of indices, in 1983. The modern edition, like the lithograph, was edited by a team of eight scholars, this time headed by Muḥammad Ḥajjī.[27] These editors based their text on the lithograph, resorting to manuscripts only where necessary for clarification; they were primarily concerned, according to Ḥajjī's introduction, with increasing public accessibility to the entire text of the *Miʿyār*. Thus the modern edition, like the lithograph, is not a critical edition; the manuscripts relied upon are neither specified nor their variants noted, the Qur'ānic verses and *ḥadīth* reports are not referenced, technical terms are not defined, jurists' biographies and references to their published works are not provided, and there are very few editorial notes of any kind. The Beirut edition features corrections to a number of errata listed in the Rabat edition, but both editions are nonetheless notoriously riddled with

[24] For a list of extant manuscripts of the *Miʿyār*, see Vidal Castro, "Fuentes," 336-43. *Al-Miʿyār* is placed among other standard Mālikī works by time period in IM, 440-41 and 587. Muḥammad Ḥajjī, editor of the Rabat edition, notes that it was the work that most scared him during his own studies (*al-Miʿyār*, 1:*ix*).
[25] For more on these editions, see Vidal Castro, "Fuentes," 344-47.
[26] Castro, "Fuentes," 345.
[27] For a list of the other scholars, see *al-Miʿyār*, 1:*xi*.

printing errors; despite the difficulty of using the lithograph edition, many scholars consider the latter more reliable. Although a critical edition of the entire *Miᶜyār* would be an immense undertaking and is not imminent, a number of scholars have begun to produce critical editions of individual *muftī*s' rulings, such as those of Abū al-Isḥāq al-Shāṭibi and Abū al-Ḥasan al-Lakhmī, based partly on the *Miᶜyār* and partly on other manuscript sources.[28]

Aside from the *Miᶜyār*, al-Wansharīsī's nearly thirty other works include a biographical dictionary, a manual on the functions and powers of judges, a summary of al-Burzulī's (d. 841/1438) *fatwā* collection, a study of legal maxims espoused by Imām Mālik, a study of the technical terms employed by an earlier master, a manual for notaries, commentaries on other notarial manuals and legal works, and a number of treatise-length *fatwā*s, often refutations of his contemporaries' opinions.[29] Al-Wansharīsī included many of these long *fatwā*s in the *Miᶜyār*, in addition to his occasional comments appended to the *fatwā*s he recorded from other jurists. *Asnā al-matājir* is al-Wansharīsī's most famous, or perhaps infamous, ruling; aside from this treatise and the Marbella *fatwā*, only one other of al-Wansharīsī's rulings has received serious scholarly attention.[30]

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[28] Abū al-Ḥasan ᶜAlī b. Muḥammad al-Rabᶜī al-Lakhmī (d. 478/1085-6), *Fatāwā al-Shaykh Abī al-Ḥasan al-Lakhmī al-Qayrawānī*, ed. Ḥamīd Laḥmar (Casablanca: Dār Maᶜrifa, 2006); Abū al-Ishāq al-Shāṭibī (d. 790/1388), *Fatāwā al-Imām al-Shāṭibī*, ed. Muḥammad Abū al-Ajfān, 4th ed. (Riyadh: Maktabat al-ᶜUbaykān, 2001).

[29] For more details on al-Wansharīsī's works, see Vidal Castro, "Las obras."

[30] Powers examines another of al-Wansharīsī's rulings in "On Judicial Style: Two Fatwās on *Tawlīj* (*ca.* 880/1475)," chapter six in *Law*, 206-28.

Asnā al-matājir

Al-Wansharīsī titled his primary *fatwā* on the obligation to emigrate from non-Muslim to Muslim territory *Asnā al-matājir fī bayān aḥkām man ghalaba ᶜalā waṭanihi al-Naṣārā wa-lam yuhājir, wa-mā yatarattabu ᶜalayhi min al-ᶜuqūbāt wa-l'zawājir*, or "*The Most Noble Commerce, an Exposition of the Rulings Governing One Whose Native Land has been Conquered by the Christians and Who Has not Emigrated, and the Punishments and Admonishments Accruing to Him.*" The ruling is included in the chapter on *jihād* in the *Miᶜyār*, where rulings on relations with *dhimmī*s (Christians and Jews living under Muslim rule) and with non-Muslim territories are generally found alongside those more directly concerned with the conduct of war.[31] *Asnā al-matājir* also circulated as an independent treatise, of which there are at least two extant manuscripts.[32] Immediately following this *fatwā* in the *Miᶜyār*, but not included in these two independent manuscripts, is a second *fatwā* issued by al-Wansharīsī on the obligation to emigrate, this time answering a question about a man from Marbella who wished to remain under Christian rule in Spain in order to assist those unable to migrate (the 'Marbella *fatwā*'). Although these two *fatwā*s are often thought of as one long treatise, every attempt will be made to differentiate them here, as appropriate.

Egyptian historian Ḥusayn Mu'nis published the first and best known edition of *Asnā al-matājir* in the *Revista del Instituto Egipcio de Estudios Islamicos en Madrid* in 1957; this was later republished in book form in Egypt.[33] Mu'nis includes the Marbella *fatwā*

[31] In the lithograph, *Asnā al-matājir* and the Marbella *fatwā* (see below) are found in volume two, pp. 90-110; in the Rabat edition, 2:119-41.
[32] Escorial ms. 1758, fol. 83b-94a; Mu'assasat al-Malik ᶜAbd al-ᶜAzīz Āl Saᶜūd ms. 10-164. In addition, Moroccan National Library ms. 1071K, fol. 161a-171a, which is labeled in the card catalogue as "*fatwā* by al-Wansharīsī on *hijra*" appears to be a partial copy of *Asnā al-matājir*.
[33] Mu'nis, "Asnā al-matājir," 1-63 (also numbered 129-91); book edition published in al-Ẓāhir [Cairo], Egypt: Maktabat al-Thaqāfa al-Dīnīya, 1996.

in his edition as an appendix to *Asnā al-matājir*, although his analysis focuses almost entirely on *Asnā al-matājir*. He bases his edition primarily on the manuscript of *Asnā al-matājir* preserved in the library of the El Escorial monastery outside of Madrid, with the Fez lithograph edition serving as a second reference for *Asnā al-matājir* and Mu'nis's sole reference for the Marbella *fatwā*. Although Mu'nis notes many of the variants between the manuscript and lithograph versions of the first text, and includes a number of helpful notes, this is not a comprehensive critical edition.

At least three subsequent Arabic editions of *Asnā al-matājir* have appeared, attesting to the continued relevance of this text to contemporary discussions regarding the status of Muslims living in non-Muslim territory; all include the Marbella *fatwā*. First, in 1981 Algerian scholar Muḥammad b. ᶜAbd al-Karīm published a collection of three treatises on *hijra*, in which he compares al-Wansharīsī's rulings to those of Algerian resistance leader ᶜAbd al-Qādir (d. 1883), who argues for the obligation to emigrate from French-controlled territory, and of Muḥammad b. al-Shāhid al-Jazā'irī (d. *ca.* 1255/1839), who argues the opposite.[34] Ibn ᶜAbd al-Karīm's edition of *Asnā al-matājir* is based on the Fez lithograph alone.[35] A second edition completed by Abū Yaᶜlā al-Bayḍāwī in 2005 has been circulated on numerous Islamic web sites, but appears to be otherwise unpublished.[36] Al-Bayḍāwī's document is the most clearly responsive to contemporary debates on Muslim minorities; appended to his edition of *Asnā al-matājir* are four *fatwā*s supporting the necessity of emigration from non-Muslim to Muslim

[34] Muḥammad b. ᶜAbd al-Karīm, *Ḥukm al-hijra min khilāl thalāth rasā'il Jazā'irīya* (Algiers: Al-Shārika al-Waṭanīya lil-Nashr wa'l-Tawzīᶜ, 1981).
[35] Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 67-103.
[36] Abū Yaᶜlā al-Bayḍāwī, *Asnā al-matājir fī bayān aḥkām man ghalaba ᶜalā waṭanihi al-Naṣārā wa lam yuhājir, wa-mā yatarattabu ᶜalayhi min al-ᶜuqūbāt wa'l-zawājir*, by Aḥmad b. Yaḥyā Al-Wansharīsī (n.p, 2005). The document may be downloaded from (www.merathdz.com).

states, one by Saudi Arabia's Permanent Committee for Research and Iftā' and three by prominent Saudi *muftīs*.[37] This edition of *Asnā al-matājir* is based on Mu'nis's edition, the Rabat edition of the *Miᶜyār*, and the version reproduced by Egyptian Mālikī jurist Muhammad ᶜUlaysh (d. 1299/1882) in his own *fatwā* collection, *Fatḥ al-ᶜAlī al-mālik fī al-fatwā ᶜalā madhhab al-Imām Mālik*.[38]

In 2006, Dublin-based Syrian scholar Aḥmad b. ᶜAbd al-Karīm Najīb published the first thorough critical edition of *Asnā al-matājir*.[39] Najīb's edition is based on the Escorial manuscript (as recorded by Mu'nis), a manuscript of *Asnā al-matājir* in the Mu'assasat al-Malik ᶜAbd al-ᶜAzīz Āl Saᶜūd library in Casablanca, a manuscript of the *Miᶜyār* in the Moroccan National Library,[40] and on the lithograph and Rabat-Beirut editions of the *Miᶜyār*. Najīb's edition has also been published on the internet.[41]

Although no complete translation of *Asnā al-matājir* has been published previously, Vidal Castro notes a number of partial French and Spanish translations.[42] Most of the scholars discussed below who have commented on al-Wansharīsī's *fatwā*s have translated excerpts of the texts, and Maíllo Salgado has published a complete Spanish translation of the Marbella *fatwā*. My complete English translations of *Asnā al-matājir* and the Marbella *fatwā*, attached as Appendices A and B, are based primarily on Najīb's edition. I have noted a number of errors in previous translations.

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[37] The three *muftīs* are former Grand Muftī of Saudi Arabia Shaykh ᶜAbd al-ᶜAzīz b. ᶜAbd Allāh b. Bāz, known as Bin Bāz (d. 1999), Shaykh Muḥammad b. Ṣāliḥ b. ᶜUthaymīn (d. 2001), and Shaykh Ṣāliḥ b. Fawzān (1933-).

[38] Abū ᶜAbd Allāh Muḥammad Aḥmad ᶜUlaysh, *Fatḥ al-ᶜAlī al-mālik fī al-fatwā ᶜalā madhhab al-Imām Mālik*. 2 vols. Cairo: Musṭafā al-Bābī al-Ḥalabī, 1958. ᶜUlaysh's treatment of *Asnā al-matājir* will be discussed in chapter four.

[39] Aḥmad Najīb, ed., *Asnā al-matājir fī bayān aḥkām man ghalaba ᶜalā waṭanihi al-Naṣārā wa lam yuhājir, wa-mā yatarattabu ᶜalayhi min al-ᶜuqūbāt wa'l-zawājir*, by Abū al-ᶜAbbās Aḥmad b. Yaḥyā al-Wansharīsī (n.p: Al-Markaz al-Iᶜlāmī lil-Dirāsāt wa'l-Nashr, 2006).

[40] Moroccan National Library ms. 6002, 2:88-92.

[41] The text may be downloaded from (www.saaid.net); Najīb also maintains a site at (najeebawaih.net).

[42] Vidal Castro, "Fuentes," 349-52.

Most scholars agree that al-Wansharīsī completed *Asnā al-matājir* in 896/1491, several months prior to the fall of Granada. The date of composition, which will be discussed further below, indicates that before emigrating, the Andalusīs described in the question would have been living as Mudéjars in that part of the kingdom of Granada already conquered by Castile.[43] The *fatwā* will only be summarized very briefly here, and discussed in more detail in chapter three.

Asnā al-matājir opens with the text of the question posed to al-Wansharīsī. The questioner, who was also a jurist living somewhere in the North Africa, describes a group of Andalusīs who had left behind everything they owned and exerted great effort in order to migrate to North Africa, after their own territory was conquered. Once they arrived, however, they found themselves with no means of support or survival, nor did they feel safe. These Andalusīs not only regretted having emigrated, but publicly expressed their preference for *dār al-ḥarb* – the land of war – and its inhabitants, and mocked the idea of obligatory migration to North Africa. Many of them wanted to go back to Christian Castile. The jurist submitting their case to al-Wansharīsī solicits the latter's opinions as to the punishment deserved by these immigrants, and requests confirmation that emigration, *hijra*, must be performed out of a sincere desire to protect religion, rather than in pursuit of material comfort.

In his response, one of the longest in the *Miʿyār*, al-Wansharīsī cites a dozen Qur'ānic verses, several prophetic *ḥadīth* reports, and the unanimous consensus of jurists in support of his position that it is absolutely prohibited for Muslims to reside in

[43] Al-Wansharīsī does not himself use the term Mudéjars or any other technical term for Muslims living under non-Muslim rule, although the term *ahl al-dajn* appears in *Asnā al-matājir* when he cites an earlier jurist's work. In the question component of the Marbella *fatwā*, Muslims in Iberia are described as *Muslimūn dhimmīyūn*, or Muslim *dhimmi*s, using the term (*dhimmi*s) normally associated with Jews and Christians living under Muslim rule.

infidel territory. Just as the Prophet Muḥammad had emigrated from Mecca to Medina in order to escape persecution and to found the first Islamic polity, so too must Iberian Muslims refuse the multiple humiliations of subjection to Christian rule and show their solidarity with Muslims by emigrating to *dār al-Islām*. Fearing that these Andalusīs could create serious communal discord, al-Wansharīsī urges severe punishment of the group in this world and predicted hellfire for them in the next; they fell just short of apostasy and would dwell in hell, although not eternally.

In the Marbella *fatwā*, al-Wansharīsī responds to a second question sent to him by the same North African jurist: may a man from Marbella remain there under Christian rule, in order to assist those less educated than he in their dealings with the Christian authorities? Al-Wansharīsī responds that the man's motives for remaining in non-Muslim territory do not amount to legitimate grounds for a dispensation from the obligation to emigrate. As in *Asnā al-matājir*, he emphasizes this obligation for all who are capable of it, supporting his answer in this case not with scriptural proof-texts but with a detailed demonstration of why the Mudéjars are unable to fulfill correctly their ritual obligations.

Previous Characterizations of Asnā al-matājir *and the Marbella* Fatwā

Al- Wansharīsī's *fatwā*s on the obligation to emgirate have been a primary focus of over a dozen scholarly articles, and have been addressed in at least twenty other works devoted to Islamic legal rulings on the obligation to emigrate or to Mudéjar or Morisco history. Despite the generous attention these texts have received, no study

has yet placed *Asnā al-matājir* in its North African context by exploring the Maghribī audiences for this ruling, the contemporary political situation in the Far Maghrib (modern-day Morocco), or contemporary Maghribī opinions on the obligation to emigrate. Rather, scholars have tended to focus on what this text might tell us about Mudéjar life, including the pressures placed on this population to emigrate and the extent to which such demands may have been reasonable, given the economic and political constraints faced by most Iberian Muslims. What the modern scholar deems reasonable is of course subjective, and many evaluations of *Asnā al-matājir* have displayed a far-from-dispassionate hostility toward al-Wansharīsī and a marked preference for those rulings deemed more sympathetic to the difficulties faced by Mudéjars and Moriscos. In a 2003 article, Peter Pormann argues that many of the positions adopted in the literature strongly reflect scholars' political orientations with regard to Muslim integration in modern-day Western societies; those who favor integration and co-existence condemn al-Wansharīsī and praise al-Wahrānī, while a much smaller number of scholars, presumably those who favor the retention of Muslim cultural identities in modern-day Europe, note that al-Wansharīsī's fears of assimilation and conversion turned out to be well-founded.[44] While Pormann's identification of a single modern-day political issue as the principle bias influencing scholarly appraisals of *Asnā al-matājir* is unconvincing, it is not unreasonable to conclude that a number of modern assumptions regarding inter-religious co-existence, 'church-state' relations, and Islamic law have contributed greatly to the dominant negative valuation of al-Wansharīsī's treatise. These assumptions might include the belief that Muslim and

[44] Peter Pormann, "Das Fatwa *Die Herrlichsten Waren* (*Asnā l-matāǧir*) des al-Wanšarīsī," *Der Islam* 80 (2003): 303, 322-28.

Christian religious authorities ought to promote tolerant co-existence, that religious practices should be pursued privately and government should be secular (thus Muslims should not prefer Islamic rule and certainly should not emigrate in pursuit of such – even, apparently, if forced to convert – inner faith should suffice), and that more lenient, liberal views reflect greater intelligence and humanity.

While no attempt will be made to link such underlying biases to specific scholars, a number of more concretely traceable trends and assumptions may identified in the literature. This section will begin with Ḥusayn Mu'nis's seminal study of al-Wansharīsī and *Asnā al-matājir* (including the Marbella *fatwā*), and proceed to analyze the development of several themes in approaches to the jurist and his *fatwā*s through present day scholarship. Although scholars have since moved away from some of Mu'nis's more colorful condemnations of al-Wansharīsī, his study is nonetheless a useful starting point because of its lasting impact on the tone and content of later studies. For nearly a quarter century between the 1957 publication of Mu'nis's article and the 1981 publication of the Rabat-Beirut printed edition of the *Miʿyār*, Mu'nis's edition of *Asnā al-matājir* was the most accessible version of these *fatwā*s; it remained the best edited version until the 2006 publication of Najīb's critical edition.[45] Mu'nis's study has thus served as a starting point for most scholars writing on these *fatwā*s, many of whom exhibit an over-reliance on summaries and prior studies of these texts, including Mu'nis's own study, a partial paraphrase translation by Emile Amar, and a brief notice by Vincent Lagardère.[46]

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[45] Mu'nis's edition arguably remains the most accessible, as the 1996 Egyptian reprint of his article is included in a number of popular electronic databases of Islamic texts, while the *Miʿyār* is not.

[46] Emile Amar, "La pierre de touche des Fétwas de Aḥmad al-Wanscharîsî: Choix de consultations des faqîhs du Maghreb," *Archives Marocaines* 12 (1908): 192-200; Vincent Lagardère, *Histoire et Société en*

Mu'nis's Study and Edition

Mu'nis begins his article by noting the prior publication of a single page of the question posed to al-Wansharīsī, by describing the sources for his edition, and by giving a short biography of the Fāsī jurist. He then launches into a scathing excoriation of al-Wansharīsī, whom Mu'nis takes to represent the deteriorated state of knowledge in the late medieval Maghrib. The passage is worth quoting at length for its influence on later scholarship:

> If we consider this biography in light of the text of the *fatwā* which we are publishing, we get a picture of the level and type of knowledge in the Far Maghrib during the ninth century A.H.; we see that knowledge at that time reached no farther than the level of collection, memorization, and repetition, just as was the case in the east at the time. The days of creative scholars capable of *ijtihād* (independent legal reasoning) had vanished . . . all that remains before us are *muqallidūn* [who apply previous scholars' opinions] in the derivative branches of *fiqh*, or collators and compilers, who take from here and put there . . . they make mistakes or are reckless in *qiyās* [analogical reasoning]. They apply rulings haphazardly without analyzing the contingent circumstances or changing conditions. They are convinced of a resemblance of sources without bothering to study the current conditions . . . all this, and the *sharīʿa* before them is lenient, with ample room for consideration.
>
> This *shaykh* who undertook to produce an opinion regarding the fate of the Muslims remaining in al-Andalus did not go to the trouble, while sitting and writing this *fatwā*, of researching the conditions of those upon whose affairs he was ruling. [Nor did he bother to] thoroughly investigate their history or to acquaint himself with the reasons which compelled them to stay in al-Andalus and which prevented them from emigration to the Maghrib. He did not mention that they are, first and foremost, weak humans, for whom it is difficult to leave their lands and the places familiar [to them] throughout a long life, those places where their fathers and grandfathers spent long centuries . . . but our *shaykh* memorizes rather than investigates, and treats with severity our brothers in religion whose situation, the misfortunes of the times, is between two millstones grinding without mercy.[47]

Mu'nis presents al-Wansharīsī as cruel, ignorant, and lazy; not only does the jurist typify an age in which jurists with little real grasp of the once-great craft of legal reasoning are continually making 'mistakes,' and misunderstanding the fundamentally lenient nature of the law, but al-Wansharīsī in particular has presumed for himself the authority to wield arbitrarily a memorized body of law in the service of the senseless,

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Occident Musulman au Moyen Âge: Analyse du Miʿyār *d'al-Wanšarīsī* (Madrid: Consejo Superior de Investigaciones Científicas, 1995), 48.

[47] Mu'nis, "Asnā al-matājir," 5-6. My translations throughout.

inhumane condemnation of a beleaguered and helpless population. Mu'nis does not suggest any possible motivations for al-Wansharīsī's ruling beyond the jurist's ignorance and vile character.

One of the mistakes Mu'nis ascribes to al-Wansharīsī concerns the jurist's claim that the case of Muslims living under non-Muslim rule had not arisen prior to the fifth/eleventh-century losses of Sicily and parts of al-Andalus, and that the master *mujtahid*s (jurists capable of independent legal reasoning) of the past thus had left no legal precedents explicitly addressing this specific issue.[48] Mu'nis argues that al-Wansharīsī clearly has a weak grasp of Islamic history, and proceeds to list a number of instances from the second through fourth centuries *hijrī* during which Muslims were subject to non-Muslim rule. Although most of the historical cases he cites appear to have been of relatively temporary duration, and Mu'nis indeed describes them as the natural consequence of continuous war between Muslims and Christians throughout the medieval period, he nonetheless states that any analogy based on past precedent must be grounded in the writings of jurists active in these periods. Al-Wansharīsī's analogy based on the *hijra* of the early Meccan Muslims is, according to Mu'nis, nonsensical. Mu'nis does not clarify why he finds the experiences of the first Muslims to be in principle unworthy models on which to base analogies, nor does he cite any specific legal precedents which arose from the historical circumstances he describes. Rather, Mu'nis then states that Muslims living under Christian rule in a *dhimmī*-like status had not been considered much of a problem in the east, or even in al-Andalus itself through the fall of Toledo in 1085 CE.[49]

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[48] Ibid., 6-8.
[49] Ibid., 9.

Following a discussion of such terms as Mudéjar and Morisco, Mu'nis then describes the worsening of Christian-Muslim relations in the Christian kingdoms, the loss of Muslim rights, and increased Muslim emigration toward *dar al-Islām*.[50] He notes that the rich and powerful were the first to emigrate, leaving the weak behind. Drawing a parallel with the Mozarabs (Arabized Christians under Islamic rule), whose cultural survival Mu'nis attributes to the retention of their leadership, the author argues that had the Mudéjars' leaders stayed, things may have turned out differently.[51] Mu'nis further suggests that most of the Mudéjars' afflictions might be attributed to their lack of civil and religious leadership; this leads directly to the author's observation that in the Marbella *fatwā*, al-Wansharīsī forbade the leaders to stay and demanded that they emigrate, thus leaving the weak at the mercy of the enemy.

Mu'nis then describes the financial and physical obstacles and dangers that Mudéjars faced in their attempts to emigrate, and contends that al-Wansharīsī did not realize that those incapable of migration were the vast majority.[52] Here Mu'nis introduces a comparison of al-Wansharīsī's lack of concern for Andalusī emigrants with what he describes as al-Māzarī's sympathetic and informed assistance to Sicilian emigrants to Ifrīqiyā in the latter's own time. Rather than offering the Andalusīs any aid or considering the human dimensions of their plight, al-Wansharīsī passes judgment on their faith from the comfort of his own home in Fez, ruling that they were unbelievers (*kuffār*).[53] Mu'nis concludes by claiming that "al-Wansharīsī's *fatwā* and those like it had the worst possible effect on the fate of the Islamic groups remaining in

[50] Ibid., 11-16.
[51] Ibid., 15.
[52] Ibid., 16.
[53] Ibid., 16-18.

al-Andalus, for they were judged with unbelief . . . and as long as the jurists of Islam have ruled on their unbelief, what could be easier for them than to convert to Christianity?"[54] The historian thus presumes al-Wansharīsī's *fatwā*s to have circulated in Iberia, where they convinced elite Muslims to abandon their weaker brethren, in turn propelling the forsaken majority to commit apostasy.

Mu'nis's article is replete with exaggerated claims, undocumented assumptions, and misrepresentations of al-Wansharīsī's treatise. Yet despite the questionable academic quality of Mu'nis's study, many of his core assumptions and arguments have remained central to scholarly discussions of this text. The following will examine the extent to which Mu'nis's assumptions and ideas have been implicitly or explicitly endorsed, rejected, or modified in the literature.

Dating the Fatwās

A discussion of the dates of composition of al-Wansharīsī's *fatwās* serves as a logical starting point and will begin to demonstrate later scholars' uncritical reliance on Mu'nis's study. In the introduction to his edition, Mu'nis incorrectly states that al-Wansharīsī composed *Asnā al-matājir* on 19 Dhū al-Qaʿda 890. This is despite the fact that in his own edition of the text – his source for the date of composition – that date is given as 19 Dhū al-Qaʿda 896/22 September 1491.[55] Despite the discrepancy, and despite the fact that the earlier date would correspond to 26 November 1485, at least four later authors report *Asnā al-matājir*'s composition date as 890/1484: Leila Sabbagh (1983), Muḥammad Razūq (1989), Míkel de Epalza (1995), and María Jesús Rubiera Mata

[54] Ibid., 18.
[55] Ibid., 2, 54.

(2004).[56] These same four authors state that the Marbella *fatwā* was written in 901/1495, apparently because Mu'nis noted this as the date of al-Wansharīsī's compilation of the *Miʿyār*. Not only was Mu'nis's date conversion incorrect (taking into consideration the month of composition, the date should be 901/1496), but he did not claim any link between this date and the date of the Marbella *fatwā*.[57] It would appear that Sabbagh misread Mu'nis's introduction and failed to take note of the date given in the actual text of *Asnā al-matājir*, and that these later scholars repeated her error without noticing the discrepancy themselves.

A second alternative to an 896/1491 date for *Asnā al-matājir* was advanced by Van Koningsveld and Wiegers in 1996, based on historical and textual considerations.[58] They privilege the Rabat-Beirut printed edition of the *Miʿyār*, which records *s.n.h* (*sīn.nūn.tā' marbūṭa*) as part of the year of composition, over the lithograph edition's *s.t.h.* (*sīn.tā'.tā' marbūṭa*). They are also troubled by a lack of correspondence between al-Wansharīsī's statement that he composed *Asnā al-matājir* on a Sunday, and the fact that 23 September 1491 appears to have been a Friday. They suggest a modified date of 898/1493, a year in which 19 Dhū al-Qaʿda appears to have fallen on a Friday, and further argue that a post-1492 date makes sense because al-Wansharīsī does not mention the possibility that the dissatisfied Andalusī emigrants might relocate to

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[56] Sabbagh, "La religion des Moriscos," 46; Muḥammad Razūq, *Al-Andalusīyūn wa-hijrātuhum ilā al-Maghrib khilāl al-qarnayn 16-17* (Rabat: Ifrīqiyā al-Sharq, 1998), 148 n. 43; Míkel de Epalza, "La voz official de los musulmanes hispanos mudéjares y moriscos, a sus autoridades cristianas: cuatro textos, en árabe, en castellano y en catalán-valenciano," *Sharq al-Andalus* 12 (1995): 293; María Jesús Rubiera Mata, "Los moriscos como criptomusulmanes y la taqiyya," in *Mudéjares y moriscos: cambios socials y culturales: Actas de IX Simposio Internacional de Mudejarismo*, (Teruel, Spain: Centro de Estudios Mudéjares, 2004), 541.

[57] Sabbagh, "La religion," 46; Razūq, "149; Epalza, "La voz official," 293; Rubiera Mata, "Los moriscos," 541; Mu'nis, "Asnā al-matājir," 130. While Mu'nis did not specify the source of this date, Powers refers to the colophon of the *Miʿyār* (12:395) where the date of completion is given as 28 Shawwāl 901, which corresponds to 10 July 1496. Powers, *Law*, 5.

[58] Van Koningsveld and Wiegers, "The Islamic Statute," 53-55.

Granada, which would still have been a part of *dār al-Islām* had the jurist composed his treatise in 1491.

I find Van Koningsveld and Wiegers' argument unconvincing for a number of reasons. Most importantly, we have no evidence that any manuscript copy of *Asnā al-matājir* records the date as anything other than 19 Dhū al-Qaᶜda 896. Such is the case with the Escorial and Mu'assasat al-Malik ᶜAbd al-ᶜAzīz Āl Saᶜūd manuscripts of *Asnā al-matājir*, the Moroccan National Library manuscript of the *Miᶜyār* consulted by Najīb, and, we can assume, the unspecified manuscripts of the *Miᶜyār* consulted by the eight editors of the Fez lithograph edition, which gives the year as 896.[59] These manuscripts and the lithograph edition of the *Miᶜyār* must furthermore be privileged over the Rabat-Beirut printed edition, which was based primarily on the lithograph and is notoriously riddled with printing errors. The Rabat-Beirut edition's *s.n.h* does not form a word appropriate for the context, and is a mere dot away from *sitta* (six), attested in more numerous and reliable sources. Van Koningsveld and Wiegers refer to only one prior source which records a date of 898, Michaelis Casiri's catalogue of the Escorial's Arabic manuscripts, which states that this is the composition date of the monastery's manuscript of *Asnā al-matājir*.[60] That manuscript itself, however, clearly reads 896 (A.H.). A subsequent version of the Escorial catalogue, begun by Hartwig Derenbourg and completed by E. Lévi-Provençal and H.P.J Renaud (1884-1941), corrects the error; a description of the manuscript inserted at the front of the Escorial's microfilm copy of

[59] Escorial ms. 1758, folio 94a; Mu'assasat al-Malik ᶜAbd al-ᶜAzīz Āl Saᶜūd ms. 10-164, page 17 (unnumbered). Najīb lists his manuscript and printed sources in the introduction to his edition and notes no variants on the date of composition (896) given in the text. Najīb, "*Asnā al-matājir*," 20-21, 110. For the date in the lithograph editions, see al-Bū-ᶜAzzāwī, et al., eds., "*al-Miᶜyār*," 2:106.

[60] Van Koningsveld and Wiegers, "The Islamic Statute," 53. Although Vidal Castro favors sources giving the *fatwā*'s date as 896, he notes Casiri's date and quotes from his catalogue. The passage in Vidal Castro shows an internal inconsistency in Casiri's date, which is given as 898/1492. Vidal Castro, "Las obras," 81 n. 17.

the manuscript gives the date of *Asnā al-matājir* as 896/1491 and refers to both Casiri's old number for the manuscript (1753) and Derenbourg's new number (1758).[61]

Van Koningsveld and Wiegers' concerns regarding the day of composition and Granada's continued status as part of *dār al-Islām* furthermore fail to require that we read against the year given in the manuscripts. The discrepancy between al-Wansharīsī's specification of Sunday and the Friday correspondence given by contemporary date conversion methods is within the margin of error of these conversions, depending upon the method of conversion used, the actual sighting of the new moon at a given geographical location at a given time, and the time of day, as the day began at sundown. Finally, it would not seem that there is any compelling need for al-Wansharīsī to suggest that these emigrants might travel to Granada in order for the *fatwā* to have been composed prior to that city's surrender less than four months later. Al-Wansharīsī clearly felt that the emigrants should be content within the Maghrib, but the focus of the question and answer is not where specifically they should be sent, but what punishment should accrue to them for continuing to slander *dār al-Islām* publically. The *mustaftī* (questioner), a jurist identified as Ibn Qaṭīya (discussed below) does not even specify where within the Maghrib the emigrants are currently located, and there is no discussion on the part of either Ibn Qaṭīya or al-Wansharīsī of where geographically they ought to be headed next. Nor do the emigrants' statements, as recorded by Ibn Qaṭīya, indicate that their hope is to return to Iberia in the abstract; they boldly state that if the king of Castile came to the Maghrib they would beg him to allow their return, presumably to their own abandoned homes. In the absence of such

[61] Escorial ms. 1758 microfilm; this descriptive table of contents is most likely a copy of the relevant page in Derenbourg, which I have not consulted directly.

an opportunity, there does not appear to be a compelling reason why these emigrants should prefer, or that al-Wansharīsī should prefer for them, re-crossing the Mediterranean to Granada, where they would similarly be settling in a new land – one more threatened by war – without possessions or a means to earn a living.

Unlike *Asnā al-matājir*, al-Wansharīsī did not date the Marbella *fatwā*. Aside from the erroneous date of 901/1495 recorded by Sabbagh and those who followed her, only Harvey advances a possible date for this text, which he partially translates in *Islamic Spain: 1250-1500.*[62] Harvey reasons that "the problem concerns a man who stayed on in Marbella after its conquest, and therefore is chronologically to be situated in the 1480's or even 1490's."[63] While Harvey thus dates this text based the historical situation described in the *istiftā'*, I suggest we can more accurately date the text by also taking into account considerations based on the production and circulation of the *fatwā.*

Specifically, I argue that the Marbella *fatwā* must have been written in approximately 896/1491, possibly 897/1492. Al-Wansharīsī places this *fatwā* directly after *Asnā al-matājir* in the *Miᶜyār*, introducing the question as follows: "The aforementioned jurist Abū ᶜAbd Allāh also wrote to me with the following text: . . ."[64] This wording strongly suggests that al-Wansharīsī's placement of the Marbella *fatwā* after *Asnā al-matājir* reflects the order of their composition. One might imagine that as Ibn Qaṭīya was receiving complex questions regarding the obligation to emigrate, he at some point decided to seek confirmation of his opinions by writing to the leading *muftī* of his time, al-Wansharīsī. Ibn Qaṭīya most likely sent the two questions together, or perhaps he received and forwarded the Marbella question while al-Wansharīsī was still

[62] Harvey, *Islamic Spain,* 56-57.
[63] Ibid., 56.
[64] Al-Wansharīsī, "*al-Miᶜyār*," 2:137.

drafting his response to the situation of the Andalusī emigrants. As noted earlier, Van Koningsveld and Wiegers have shown that al-Wansharīsī's responses to these two *fatwā*s draw heavily from a previous *fatwā* by Ibn Rabīʿ (d. 719/1319), of which they have published a summary paraphrase.[65] Al-Wansharīsī appears to have distributed material from Ibn Rabīʿ's text between his two answers to Ibn Qaṭīya's questions; he most likely had both questions in front of him at the same time and was able to weigh carefully the distribution of his available arguments and proof-texts between the two responses. He may also have completed *Asnā al-matājir*, using the bulk of his available material on the obligation to emigrate, shortly prior to receiving the Marbella question. He would then have answered the latter with some of his remaining material, such that it was not redundant with the contents of *Asnā al-matājir* and provided another opportunity to emphasize the obligation to emigrate from non-Muslim to Muslim territory.

The Question: Audience, Circulation, and the Ability to Emigrate

This section reviews and critiques Mu'nis's core assumptions regarding the questions posed to al-Wansharīsī. The historian writes as though al-Wansharīsī were addressing both of his responses to Iberian Muslims who wished to know if they were obligated to emigrate despite being incapable and undesirous of doing so. Mu'nis continually refers to the numerous obstacles to emigration facing Mudéjars, the fact that most of them were weak (presumably meaning that they lacking the physical or financial means to emigrate, or the political influence to obtain a permit where necessary), that they were attached to their homelands, and that al-Wansharīsī's *fatwā*

[65] Van Koningsveld and Wiegers, "The Islamic Statute," 22-38 (summary), 52 (relationship with al-Wansharīsī's *fatwa*s).

(meaning both *Asnā al-matājir* and the Marbella *fatwā* as a combined treatise) had a disastrous effect on this population by (unjustly) commanding them to emigrate. The actual question that al-Wansharīsī is responding to in *Asnā al-matājir* makes only two brief cameos in Mu'nis study: on the first page, where he notes that at the time of writing only a part of the question had previously been published, despite the fact that the answer is more important; and again near the end of the article, as the historian is enumerating the difficulties facing *potential* emigrants. Here Mu'nis mentions that Mudéjar emigrants risked not finding work in the Maghrib, "as we see from the complaint of some of them, in the question to which al-Wansharīsī is responding."[66] This is Mu'nis's only reference to the actual content of the question, and even here it is far from explicit that the question involves Mudéjars who had already emigrated. The impression is maintained throughout that al-Wansharīsī has been asked a question by the Mudéjars themselves, and all but the most discriminating reader would assume that these Mudéjars were still located in Iberia.

In reality, in both *Asnā al-matājir* and the Marbella *fatwā*, al-Wansharīsī answers questions posed to him by Abū ᶜAbd Allāh b. Qaṭīya, a fellow *muftī* whom scholars have been unable to identify in the biographical sources, but who makes clear in the question that he is located in the Maghrib. In the first *istiftā'* (question), Ibn Qaṭīya asks what should be done about a group of Andalusīs who have already emigrated from Iberia to the Maghrib and who have been slandering *dār al-Islām* in public. Although this *muftī* asks al-Wansharīsī to clarify the stipulations of the obligation to emigrate, this part of the question remains clearly linked to the case of these particular

[66]Ibid., 17.

emigrants – Ibn Qaṭīya seems particularly interested in receiving confirmation that this group should not have expected an easy life upon arrival in the Maghrib, as material comfort is not a condition of the obligation to emigrate.

As the *mustaftī*, Ibn Qaṭīya is again the most immediate audience for the Marbella *fatwā*, although in this case the question at least directly relates to events occurring in Spain. Ibn Qaṭīya asks if a man from Marbella might remain in *dār al-ḥarb* in order to assist other Muslims who are less adept at negotiating their affairs with the Christian authorities. Specifically, Ibn Qaṭīya asks if this man, and those he is with (the Muslim population of the town), might be granted a dispensation to remain in Marbella *despite the fact that they have received permission to emigrate and most of them are capable of doing so at anytime they wish.*[67] Thus, not only are *Asnā al-matājir* and the Marbella *fatwā* not directly addressed to Mudéjars, but al-Wansharīsī was also asked in both questions to discuss the status of Mudéjars who had already emigrated or who were described as quite capable of doing so. This distinction is of vital importance, as both the function and content of *fatwā*s are dependent to a large extent on the audience to which they are addressed.

In tracing the persistence of Mu'nis's assumptions regarding al-Wansharīsī's audience, scholars' approaches to two sets of questions may be explored: 1) Were these *fatwā*s addressed to, and meant to circulate among, Iberian Muslims? Did they in fact circulate in the Christian kingdoms? If so, what impact did they have on Muslims' decisions to emigrate? 2) What exceptions to the obligation to emigrate does al-Wansharīsī allow, and how much of his treatise does he devote to discussing them?

[67] Ibid., 56; Appendix B, 384.

Audience and Circulation

As for this first set of issues, many later scholars have continued to treat al-Wansharīsī's *fatwā*s as though they were addressed to lay Mudéjars, and as though we know that they were meant to and did in fact circulate in Iberia, where they influenced Mudéjar actions. Historian Louis Cardaillac, citing Mu'nis, wrote in his 1977 *Morisques et Chretiens: Un affrontement polemique (1492-1640)* that al-Wansharīsī had responded to some Granadan Muslims who had asked him about the obligation to emigrate to Islamic territory.[68] Cardaillac states that although al-Wansharīsī advised them that remaining in non-Muslim territory was a grave sin, and informed them of their religious obligation to emigrate, this text was of limited impact. This is because most Moriscos – Cardaillac assimilates Mudéjars and Moriscos here – chose dissimulation over emigration. Cardaillac's speculation regarding this text's impact on the choices made by all 'Moriscos' reveals his assumption that the *fatwā* circulated widely in Iberia.

Sabbagh, in her 1983 article, similarly states that in *Asnā al-matājir*, al-Wansharīsī "responds to some Muslims who had emigrated from al-Andalus," and that in the Marbella *fatwā*, he "responds to a Muslim who wanted to stay in conquered Spain."[69] These statements, coupled with her suggestion that al-Wahrānī's 1504 *fatwā* was meant to be a supplement to *Asnā al-matājir*, further imply that al-Wansharīsī's *fatwā* was meant to circulate among an Iberian Muslim audience.[70] Sabbagh argues that al-Wahrānī's *fatwā*, which does appear to address directly Granadan Moriscos, was

[68] Cardaillac, *Morisques et Chretiens,* 80. The former territory of the Naṣrid Kingdom of Granada was conquered piece by piece prior to the final conquest of the city of Granada in 1492. The Andalusīs referred to in Ibn Qaṭīya's question can reasonably be assumed to have hailed from some part of the kingdom of Granada's former extent, but not from the city itself, which had yet to be conquered when they arrived in the Maghrib.
[69] Sabbagh, "La religion," 46.
[70] Ibid., 52-53.

meant to concern only those described as too weak to emigrate al-Wansharīsī's *fatwā*; thus presumably al-Wahrānī's audience were those left behind after those readers of *Asnā al-matājir* who could emigrate had left town.

In a 1984 article introducing and translating the *fatwā* of al-Māzarī which al-Wansharīsī includes in *Asnā al-matājir*, Abdel-Majid Turki cites approvingly Mu'nis's conclusion that, in contrast to al-Māzarī's generosity, al-Wansharīsī's *fatwā* was nothing but grievous and fateful for those Moriscos the jurist had condemned.[71] In a pair of articles in 1985 and 1988, Felipe Maíllo Salgado also repeats most of Mu'nis's harshest criticisms of al-Wansharīsī, including the charge that this jurist's *fatwā*s, among others, contributed to the downfall of Spanish Islam.[72] Maíllo Salgado takes Mu'nis's argument one step further in this regard, arguing that "it was not Christian intolerance which did away with the Spanish Muslims in the Middle Ages, [this] was merely the final deathblow of a process in which the Muslims themselves did everything possible for it to end this way."[73] Despite his sweeping claims that Muslims and Christians must share responsibility for the end of Spanish Islam, however, Maíllo Salgado is also one of few authors to recognize that a primary function of *Asnā al-matājir* was to determine the guilt and appropriate punishment for actions occurring within the Maghrib.[74] For this reason, he focuses most of this attention on the Marbella *fatwā*, which he translates into

[71] Abdel-Majid Turki, "Consultation Juridique d'al-Imam al-Mazari sur le Cas des Musulmans Vivant en Sicile sous l'Autorité des Normands," *Mélanges de l'Université Saint-Joseph* 50 (1984): 696 n. 22.
[72] Maíllo Salgado, "Consideraciones," 181-191, esp. 184-5; idem., "Del Islam residual,", 129-40, esp. 137.
[73] Maíllo Salgado, "Consideraciones," 185; see also "Del Islam residual," 137.
[74] Maíllo Salgado, Del Islam residual," 135-6.

Spanish in full.[75] He takes this text to be representative of the legal opinions Spanish Muslims would have been exposed to during the Mudéjar period.

Like Maíllo Salgado, Harvey pays considerable attention to the Marbella *fatwā*, and offers a partial English translation of the text in *Islamic Spain* (1990).[76] Nonetheless, he writes that this text concerns "a case that arose in al-Wansharīsī's day, a case that must have been brought to him direct." By "direct," Harvey must mean that the man from Marbella asked al-Wansharīsī this question, rather than Ibn Qaṭīya, and that al-Wansharīsī would be responding directly to the original *mustaftī*.[77]

Characterizations of these two *fatwa*s in the 1990's remained somewhat misleading without, however, making any unsubstantiated claims regarding al-Wansharīsī's audience. The only exceptions to this are Vidal Castro's article on al-Wansharīsī's works (1992) and Lagardère's brief entry in his *Histoire et Société en Occident Musulman*; both authors succinctly describe *Asnā al-matājir* as responding to a question posed by Ibn Qaṭīya regarding the unsatisfied Andalusī emigrants.[78] In contrast, Khaled Abou El Fadl's masterful survey of opinions on the obligation to emigrate across legal schools and over time (1994), in which he devotes several pages to al-Wansharīsī's *fatwā*s, glosses over the circumstances under which the two questions reached this jurist.[79] Abou El Fadl writes that the *Asnā al-matājir* question "deals with Mudejars . . ." that "the questioner asks . . ." and "al-Wansharīsī rejects . . ." without specifying who is

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[75] Maíllo Salgado, "Consideraciones," 186-91 (translation). "Consideraciones" deals primary with the Marbella *fatwā*, while "Del Islam residual" discusses both of al-Wansharīsī's *fatwā*s on the obligation to emigrate. "Del Islam residual" repeats much of the author's previous article.
[76] Harvey, *Islamic Spain*, 56-58.
[77] Ibid., 56.
[78] Vidal Castro, "Las obras," 80; Lagardère, *Histoire et Société*, 48.
[79] Khaled Abou El Fadl, "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries," *Islamic Law and Society* 1, no. 2 (1994): 154-56.

addressing whom.[80] Similarly, "the question . . . mentions . . ." the case of the man from Marbella and "Al-Wansharīsī responds unequivocally . . ." again, to an unspecified addressee who the uninitiated reader might reasonably assume is the man from Marbella himself.[81] Van Koningsveld and Wiegers employ similar language: "In the second *fatwā* al-Wansharīsī answered the question of a man from Marbella . . ." and, in relation to *Asnā al-matājir*, "The *fatwā* deals with some Andalusian Muslims who had emigrated to Morocco but regretted having left Spain and wanted to return."[82] While correct, these simplified characterizations not only give the impression that these questions were posed directly to al-Wansharīsī by the Andalusīs, and were therefore more likely to have circulated in Iberia, but also underemphasize the importance of the *mustaftī*'s identity and the *muftī*'s audience for our interpretation of *fatwā*s.

Misunderstandings and drastically inaccurate characterizations of the questions posed to al-Wansharīsī have persisted. In a 2000 article devoted to two other fifteenth-century *fatwā*s on the obligation to emigrate, Kathryn Miller claims that in *Asnā al-matājir*, "Al-Wansharīsī, in fact, was asked by recent emigrants to the Maghrib whether they might be permitted to return to Christian Spain."[83] Imagining that these emigrants had presented such a case to the jurist, Miller further speculates, somewhat ironically, that al-Wansharīsī may have selectively edited the question to weaken the emigrants' case and to further his own judgmental purposes.[84] Although Miller's footnote refers to the *Miʿyār* directly here, suggesting that she misread the Arabic text

[80] Ibid., 154.
[81] Ibid., 155.
[82] Van Koningsveld and Wiegers, "Islamic Statute," 53.
[83] Kathryn Miller, "Muslim Minorities and the Obligation to Emigrate to Islamic Territory: Two *Fatwās* from Fifteenth Century Granada," *Islamic Law and Society* 7, no. 2 (2000): 264.
[84] Ibid., 264.

herself, her failure to grasp the role played by Ibn Qaṭīya may well have been reinforced by the characterizations of this question by previous scholars.[85]

Miller's description of the Marbella *fatwā* is more puzzling: "Al-Wansharīsī was asked by a recent emigrant – a *faqīh* (jurist) who specialized in both Islamic and Christian law – whether it was permissible to return to *dār al-Ḥarb* with the express aim of helping the Mudejars protect themselves against illegal confiscation of their property."[86] Although she again refers only to the text of the question in the *Mi'yār*, *none* of the details Miller provides here is substantiated by that text, nor are many of them suggested by any other author's summary that I have seen.[87] Undaunted by the fact that that the man from Marbella was not an emigrant, did not ask al-Wansharīsī anything, was not a jurist, was already in Christian territory, and wished to assist Mudéjars with unspecified matters, Miller repeats this description for good measure later in the same article.[88]

Against the trends outlined here, I argue that it is essential to understand that the primary audiences for al-Wansharīsī's *fatwā*s are Ibn Qaṭīya and other North African jurists, that these *fatwā*s did not necessarily circulate in Iberia, and that even if they did, it would be anachronistic to attribute significant levels of Mudéjar emigration to al-Wansharīsī's rulings. First, we can reasonably assume only two immediate audiences for *Asnā al-matājir* and the Marbella *fatwā*: Ibn Qaṭīya as the *mustaftī*, and the wider

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[85] Ibid., 264, n. 23. On the following page of this article (265), Miller also appears to quote from *Asnā al-matājir*, translating a statement of the jurist Ibn al-ᶜArabī. The text that she places between quotation marks, and that she footnotes as coming from the *Miᶜyār*, is in fact Abou El Fadl's loose paraphrase of Ibn al-ᶜArabī's statement, taken from his article on the obligation to emigrate ("Muslim Minorities," 169).
[86] Miller, "Obligation to Emigrate," 264-65.
[87] It was Ibn Qaṭīya who asked this question of al-Wansharīsī, and the question mentions nothing of this man's particular occupation or skills other than a facility for negotiation with the Christians on behalf of the Mudéjars; we also hear nothing of the specific issues concerning which he is negotiating (*al-Miᶜyār*, 2:137; Appendix B, 383-84).
[88] Miller, "Obligation to Emigrate," 275 n. 58.

Mālikī community of legal professionals who would have consulted the *Miʿyār* once it was completed and began to circulate. In addition, al-Wansharīsī most likely circulated a written version of his views on the obligation to emigrate among his peers in Fez, where the obligation was a matter of contemporary concern; this point will be taken up in more detail in chapter two.

We do not know what Ibn Qaṭīya did with al-Wansharīsī's responses. He may have solicited more than one jurist's opinions on these questions, which he then weighed against each other; or he may have had ideas of his own which did not accord entirely with al-Wansharīsī's positions. If this *muftī* did agree completely with al-Wansharīsī – which seems likely, given that the tone of his questions suggests that he seeks robust support for views he already holds – he nonetheless may have written distinct *fatwā*s to return to his own *mustaftī*s. We do not have Ibn Qaṭīya's *fatwā*s, nor do we know the identity of his own *mustaftī*s, nor do we know where in the Maghrib he lived.

We can rule out, however, the unhappy Andalusīs of *Asnā al-matājir* as potential original *mustaftī*s. Even a cursory reading of the *istiftā'* reveals that for the group that wishes to return to Iberia, the only person whose permission they would consider seeking is the King of Castile himself. The disgruntled Andalusīs are described as "looking for any kind of scheme by which they may return to the land of unbelief, thereby reverting, by any means possible, to living under infidel rule."[89] They presumably quit asking *muftī*s for advice after arriving in the Maghrib and commencing their "cursing and defaming [of] that which had prompted their emigration," i.e., *muftī*s

[89] Al-Wansharīsī, *al-Miʿyār*, 120; Appendix A, 342.

and their obligation to emigrate.[90] These emigrants did not pose this question to Ibn Qaṭīya, and they certainly did not pose it directly to al-Wansharīsī.

Given that Ibn Qaṭīya is centrally concerned with the crimes and punishment of the disgruntled Andalusī emigrants, and that al-Wansharīsī sanctions their corporal punishment or imprisonment, the original *mustaftī* here is more likely to have been a judge or other representative of the coercive powers of the state.[91] Maghribī and Andalusī judges were often required to consult *muftī*s on points of law.[92] Or it may be that Ibn Qaṭīya was outraged at the behavior of these emigrants and wished to gather support for his views prior to requesting that a formal case be pressed against them himself. Again, the *istiftā'* for *Asnā al-matājir*, as we have it, is concerned entirely with describing the blameworthy actions of these people – including slandering *dār al-Islām*, preferring infidels and infidel rule, cursing *muftī*s and the laws of Islam, failing to have emigrated for the correct reasons, failing to believe that emigration should have been obligatory for them, and causing *fitna*, which I take to mean here the spread of all these dangerous ideas. That scholars have been able to read this as a question posed by either would-be emigrants or repentant ones, despite all evidence to the contrary (why would they describe themselves in this way?) is a testament to the strength and persistence of a complex of overwhelmingly negative assumptions regarding al-

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[90] Al-Wansharīsī, *al-Miᶜyār*, 2:120; Appendix A, 342.

[91] Al-Wansharīsī, *al-Miᶜyār*, 2:120 (question regarding punishment), 2:132 (answer addressing corporal punishment and imprisonment); Appendix A, 342-43, 371-72. This would also help to explain why al-Wansharīsī uses so many formal terms of praise in addressing Ibn Qaṭīya, despite the fact that this jurist was not significant enough to be found in any of the biographical dictionaries (although his name as appears in these *fatwā*s may be corrupted); al-Wansharīsī may be expressing respect for the former's office as a *mushāwar* (advisor) to the court. This position could also explain why Ibn Qaṭīya does not have a literary output himself, at least that we are aware of; his *fatwā*s would have been seen primarily by the judge of the court he advised, rather than circulating among a community of jurists.

[92] Based on his survey of the contents of the *Miᶜyār*, Powers even suggests that most of the *fatwā*s contained therein were issued at the request of judges. Powers, *Law*, 20.

Wansharīsī and his response, if not the Islamic legal tradition as a whole. The scholarly literature often leaves us with an image of this jurist raining condemnation down on impoverished Mudéjars who had approached him with sincere questions about how best to survive as beleaguered but pious Muslims. These misunderstandings are also indicative of scholars' overwhelming focus on the social, economic, and religious history of Iberian Muslims, rather than on the development of Islamic legal thought.

In the case of the Marbella *fatwā*, it is more plausible that the original *mustaftī* might have been this man from Marbella himself. The man may have sent a letter to Ibn Qaṭīya asking if he might be granted a dispensation from the obligation to emigrate, in order to remain and serve as spokesman for other non-emigrating Mudéjars. The first portion of this *istiftā'* is careful to present the man's current status as legitimate – he has up until now remained in *dār al-ḥarb* in search of a brother who had gone missing in battle, presumably quite aware that ransoming a captive is one of the few permitted reasons for remaining in enemy territory.[93] We might assume that this material resembles the man's own *istiftā'*, while the second portion of the question put to al-Wansharīsī, which stresses the Marbellans' ability to emigrate and the impurity of mixing with Christians, more likely communicates Ibn Qaṭīya's opinion and his request for authoritative confirmation of his views. We may speculate that Ibn Qaṭīya was quite satisfied with al-Wansharīsī's response, but here again we do not know what the *fatwā* looked like that the former jurist might then have drafted to be sent back to the man

[93] Ibn Rushd, for example, writes that "It is not permissible for any Muslim to enter the land of polytheism for trade or any other reason, except to ransom a Muslim." Abū al-Walīd Muḥammad b. Aḥmad Ibn Rushd (the grandfather, d. 520/1126), *al-Muqaddimāt al-mumahhidāt li-bayān mā iqtaḍathu rusūm al-Mudawwana min al-aḥkām al-sharʿīyāt wa'l-taḥṣīlāt al-muḥkamāt li-ummahāt masā'ilihā al-mushkilāt*, ed. Saʿīd Aḥmad Aʿrāb (Beirut: Dār al-Gharb al-Islāmī, 1988), 2:153.

from Marbella; nor do we know whether this man kept any answer he successfully received to himself or if it was copied and circulated.

We cannot assume that al-Wansharīsī's responses to Ibn Qaṭīya as recorded in the *Miʿyār* were necessarily supplied directly to Ibn Qaṭīya's *mustaftī*s. Masud, Messick, and Powers have noted that the professional standards of *iftā'* call for *muftī*s to present clear and concise answers to lay *mustaftī*s, generally free of detailed rationales.[94] When writing to fellow *muftī*s, however, jurists were to support their arguments with reference to the proof-texts on which these arguments were based and the modes of legal reasoning through which they were derived.[95] Al-Wansharīsī's *fatwā*s on the obligation to emigrate, especially *Asnā al-matājir*, are extremely long and detailed, and contain numerous references to legal opinions and methods of reasoning which would have been considered inappropriate for a lay audience.

What we have here is *muftī-muftī* communication. This is in fact at least triply so: as Van Koningsveld and Wiegers have shown, in both the Marbella *fatwā* and in *Asnā al-matājir*, al-Wansharīsī draws heavily upon a response Ibn Rabīʿ had issued to a law student who had requested a detailed argument engaging another *muftī*'s ruling;[96] al-Wansharīsī then adds to this material in crafting his response to Ibn Qaṭīya; and in doing so, he also has in mind the wider professional audience of the *Miʿyār*. The latter may well have been the audience al-Wansharīsī was most concerned with addressing; he was at the time compiling the *Miʿyār*, and this pair of questions from Ibn Qaṭīya must

[94] Masud, et al., "Muftis," 24-25.
[95] Ibid., 24-25. Skovgaard-Petersen (*Defining Islam*, 3-4) also writes that in contrast to the simple answers given to lay Muslims, those *fatwā*s selected for preservation in collections, which were to be studied in *madrasa*s or used as references for jurists, were generally "longer and better argued, systematically arranged and didactically departing from general rulings of the *madhhab*."
[96] Van Koningsveld and Wiegers, "The Islamic Statute," 23 (description of the question posed to Ibn Rabīʿ).

have been a convenient way for him to organize and present a large amount of material on both the general obligation to emigrate, and on a possible exception to the general obligation. Both issues were furthermore matters of current concern among the jurist's immediate peers in Fez, as will be demonstrated in the next chapter.

If Ibn Qaṭīya's *mustaftī* for the *Asnā al-matājir* question was indeed a judge, he may well have passed on al-Wansharīsī's ruling intact. It is also plausible that Ibn Qaṭīya sent al-Wansharīsī's *fatwā* to the man from Marbella; this text is much shorter (although still quite long for a *fatwā* to a lay Muslim), is based largely on rational arguments rather than legal precedents, includes few technical terms, and relates primarily to the basic obligations of Islam with which any Muslim should have been familiar. Alternatively, Ibn Qaṭīya may have written his own *fatwā*s for his *mustaftī*s, in which he merely referred to the supporting *fatwā*s he had obtained from al-Wansharīsī; or he may have edited the latter's *fatwā*s and passed on much more succinct versions to his questioners. What is important to recognize is that we do not know, and have ample reason to question, whether al-Wansharīsī's *fatwā*s were ever seen by those so inistently but erroneously assumed to be his *mustaftī*s: the disgruntled Andalusī emigrants and the man from Marbella.

We likewise cannot assume that al-Wansharīsī's *fatwā*s circulated within Mudéjar communities. Although one individual manuscript of *Asnā al-matājir* is held by the Escorial monastery library in Spain, the manuscript is undated, written in Maghribī rather than Andalusī script, and bears no copyist's name. No other dates or names of copyists in the volume as a whole (*Asnā al-matājir* is bound together with several other texts in a manuscript volume) aid in determining the provenance of the text. There is

really no compelling reason to believe this copy of *Asnā al-matājir* was copied or circulated in al-Andalus; many of the manuscripts in the Escorial were acquired quite famously by the Spanish Crown directly from Morocco.[97] If this particular manuscript is 'native' to Spain, no scholar has demonstrated this. The same may be said of the one copy of the *Miʿyār* that Vidal Castro notes is held by the Biblioteca Nacional in Madrid which contains al-Wansharīsī's chapter on *jihād*: it is undated and written in Maghribī script.[98] No individually-circulating copy of the Marbella *fatwā* has been noted in the literature, nor have I come across one in any manuscript libraries or even in other North African *fatwā* collections aside from the *Miʿyār*.[99] Finally, neither these *fatwā*s nor the *Miʿyār* are included in Harvey's or Wieger's lists of materials known to have survived and circulated in Spain in the Morisco period – which had begun, at least in Castile, prior to al-Wansharīsī's death and the final completion of the *Miʿyār*.[100]

In a telling passage, Harvey compares al-Wansharīsī *fatwā*s to a document addressing emigration that we do know to have been in Mudéjar and then Morisco

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[97] For example, roughly 4,000 Arabic manuscripts were seized from a ship carrying the Saʿdī Sultan Mawlāy Zaydān's (r. 1603-1627) private library, and sent to El Escorial. Mercedes García-Arenal and Gerard Wiegers, *A Man of Three Worlds: Samual Pallache, a Moroccan Jew in Catholic and Protestant Europe,* trans. Martin Beagles (Baltimore: The Johns Hopkins University Press, 1999), 79-80.

[98] Vidal Castro, "Fuentes," 336-37. Vidal Castro lists a number of partial copies of the *Miʿyār*; only ms. 4883 contains the first and second parts of the work (which should correspond to the first four volumes of the modern edition).

[99] Libraries consulted include El Escorial, the National Libraires of Spain, Algeria, Tunisia, Egypt, and Morocco, and the following additional Moroccan libraries: The Ḥasanīya (Royal) Library, Rabat; the ʿAllāl al-Fāsī Institute, Rabat; the Ṣbīḥī Library, Salé; the Qarawīyīn Library, Fez; the Ibn Sūda Library, Fez; the Library of the Great Mosque of Meknes; the General Library and Archives, Tetouan; the Dāwūdīya Library, Tetouan; the King ʿAbd al-ʿAzīz Āl Saʿūd Foundation (Mu'assasat al-Malik ʿAbd al-ʿAzīz Āl Saʿūd), Casablanca; the Ibn Yūsuf Library, Marrakesh; and the printed catalogues only for a number of smaller libraries.

[100] Harvey, *Muslims in Spain*, 142-203, esp. 154-56 (*fiqh*); Wiegers, *Islamic Literature*, 223-29. Forced conversions to Christianity began in Castile in 1500-1502; as noted above, Powers estimates that al-Wansharīsī continued to modify his compilation until his death in 914/1508. I am unaware of any studies which determine when and where the *Miʿyār* first circulated.

hands.[101] Harvey introduces his partial translation of the text by describing this as "an excellent example of how the sort of teachings set out so forcefully by al-Wansharīsī reached Mudejars," and stating again that the document is "best considered at this point in connection with al-Wansharīsī's teachings."[102] The text is excerpted from a circular issued by Yūsuf III of Granada (r. 1408?-1417) and sent to all Mudéjars, encouraging them to emigrate to Granada in order to participate in the *jihād* against Christians. The Naṣrid ruler refers to the Qur'ānic injunctions to emigrate and to a *ḥadīth* encouraging *jihād* and martyrdom.

Harvey acknowledges in this passage that we cannot claim that al-Wansharīsī's *fatwā*s themselves circulated in Iberia, but demonstrates a strong desire to connect al-Wansharīsī to earlier rulings on emigration nonetheless. There appears to be a fine line in the literature between, on the one hand, using al-Wansharīsī's later, highly developed opinions as a lens through which to understand of the logic of earlier opinions and the religio-legal dimension of Mudéjar emigration, and on the other hand, claiming that al-Wansharīsī's opinions played a direct role in Mudéjar decisions regarding emigration. Although the scholars surveyed above show a marked shift away from the views of Mu'nis, and Turki and Maíllo Salgado after him, who explicitly blame al-Wansharīsī for rendering Spanish Muslim communities unviable, it is nonetheless important to note that neither *Asnā al-matājir* nor the Marbella *fatwā*, even if they had circulated in Spain, would necessarily have had much effect on emigration.

Al-Wansharīsī's rulings likely would have had little formative impact in Iberia for two primary reasons: the obligation to emigrate was already well known among

[101] This text was discovered, along with a valuable collection of Morisco texts, walled up in a house in Aragón. See Harvey, *Muslims in Spain*, 143.
[102] Harvey, *Islamic Spain*, 59.

Mudéjar communities, and, by his own count, al-Wansharīsī was writing four hundred years after the start of the Mudéjar period; Iberian Muslims had been making their decisions regarding emigration without his help for centuries.[103] The Naṣrid circular just cited shows that the obligation to emigrate was proclaimed across Mudéjar lands by the Granadan king in the early fifteenth century. In both of the questions posed to al-Wansharīsī, the Andalusīs involved also have already decided to emigrate; in *Asnā al-matājir*, they were so convinced of their obligation that they had given up all of their property and possessions in order to leave Castile. These emigrants also refer explicitly to the legal obligation of *hijra* in their mocking statements reported by Ibn Qaṭīya. In the Marbella *fatwā*, the man appears to have presented his case to Ibn Qaṭīya carefully, so as not to appear as if he has already violated the obligation to emigrate. That the question refers to this man's request for a *rukhṣa* (dispensation) to stay and assist other Mudéjars further indicates his awareness that he would be obligated to emigrate under most circumstances, and that his situation may or may not constitute a justified exception to the general rule. It is also clear from this man's situation that the whole town was well aware of the obligation to emigrate – all of their more capable leaders had already emigrated, leaving this man in his new position of importance. Al-Wansharīsī is addressing questions related to Muslims who had already accepted the obligation to emigrate, even if the Andalusīs of *Asnā al-matājir* subsequently changed their minds.

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[103] In *Asnā al-matājir* (2:125, Appendix A, 404), al-Wansharīsī states that the phenomenon of Muslims living under non-Muslim rule began in the fifth century AH (eleventh century C.E.) with the fall of Sicily and parts of al-Andalus (Toledo fell in 1085). In a text which al-Wansharīsī places immediately after *Asnā al-matājir* and the Marbella *fatwā* in the *Miʿyār*, Ibn ʿĀṣim (d. *ca.* 857/1453) also states that *tadajjun*, living as Mudéjars, had begun four hundred years previously, or in the fifth/eleventh century (2:151). For a discussion of the term Mudéjar and jurists' selection of this date as the beginning of Mudéjar Islam, see Wiegers, *Islamic Literature*, 2-6.

Islamic legal responses to Muslims living under Christian rule in Spain began even before the Mudéjar period and can be expected to have continued throughout. As Van Koningsveld and Wiegers suggest, an opinion included in *Asnā al-matājir* itself regarding the legal status of Muslims who remained in Barcelona following its conquest in 185/801 is likely a product of the first juristic deliberations on this issue as regards Spain.[104] Abou El Fadl's survey of opinions on the obligation to emigrate notes numerous other Mālikī opinions encouraging emigration prior to al-Wansharīsī's two *fatwā*s, which Abou El Fadl considers representative of the school's 'developed' position, reached only after centuries of prior Mālikī thought and rulings on the issue.[105] Buzineb, Maribel Fierro, Van Koningsveld and Wiegers, and Miller likewise survey a range of Mālikī opinions on the obligation to emigrate, issued throughout the Mudéjar period and beyond.[106] It is often contended in the literature that al-Wansharīsī's *fatwā*s were stricter than previous rulings, but if so – and the extent to which this is true is debatable – and if one or both of these *fatwā*s actually circulated in the Iberian Christian kingdoms, it would have been only this degree of strictness which set al-Wansharīsī's opinions apart and which would have to account for any special impact of his writings on Iberian Muslims' decisions. Al-Wansharīsī's *fatwā*s certainly could not have been the Mudéjars' first or only sources of information regarding the obligation to emigrate.

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[104] Van Koningsveld and Wiegers, "The Islamic Statute," 49; al-Wansharīsī, *al-Miʿyār*, 2:129-30, Appendix A, 365-66. See also Jean-Pierre Molénat, "Le problem de la permanence des musulmans dans les territories conquis par les chrétiens, du point de vue de la loi islamique," *Arabica* 48, no. 3 (2001): 396-97.
[105] Abou El Fadl, "Muslim Minorities," 153-57.
[106] Buzineb, "Respuestas," 54-60; Maribel Fierro, "La Emigración en el Islam: Conceptos Antiguos, Nuevas Problemas," *Awrāq* 12 (1991): 11-41; Van Koningsveld and Wiegers, "The Islamic Statute," 49-52; Miller, *Guardians of Islam: Religious Authority and Muslim Communities in Late Medieval Spain* (New York: Columbia University Press, 1998), ch. 2: "On the Border of Infidelity," 20-43.

Nor would these *fatwā*s necessarily have been Mudéjars' most relevant sources of information on the obligation to emigrate. Judging by the questions, the texts could be assumed to deal with specific, unusual situations (a community leader, emigrants already in the Maghrib) rather than the circumstances of the average Mudéjar. Or one might even imagine a potential reader of *Asnā al-matājir* making up his mind to stay in Iberia by the end of the question's unflattering description of emigrant life in the Maghrib, including potential conflicts with legal authorities and local Muslim culture. Not only should we assume that Muslim jurists and their audiences find the *istiftā'* portion far more significant than most modern scholars, but the details provided in these two questions appear to have been particularly important. Although we know that *muftī*s often edited the texts of the questions they received in order to focus on legally relevant facts and generalizable cases, in *Asnā al-matājir* Ibn Qaṭīya chose to write, and al-Wansharīsī chose to reproduce and preserve, an *istiftā'* longer than a great many of the combined question-and-answer texts preserved in the *Miʿyār*.[107] The specifics of the question provide the parameters for the response and are thus of utmost importance for evaluating that response.[108]

Not only was al-Wansharīsī unlikely to have been a prime resource for Mudéjars contemplating emigration, but religio-legal considerations were also not the only factors encouraging or discouraging Muslim emigration within and from Spain. The Mudéjar period witnessed large-scale population transfers as Muslims departed from conquered areas and resettled in still-Muslim territories, and as Christians relocated

[107] See for example Wael Hallaq, "From *Fatwā*s to *Furūʿ*."
[108] See below, pp. 60-61.

from previously-held areas to settle in newly-conquered territories.[109] The fate of a conquered region's Muslim inhabitants varied greatly depending on historical, demographic, and geographic factors, among others, and on the difficulty of the conquest: often the inhabitants of a conquered city would be given the option of leaving or of accepting a Mudéjar status which guaranteed to them their safety and a number of religious freedoms (as in Toledo); or the local population might be given a grace period, often of one year, to leave or to relocate in a particular neighborhood (as in Saragossa); or the population might be expelled (as in Seville and Cordoba); or the men might be killed and women and children imprisoned, particularly if the town was taken by force rather than surrender (as in Almería); and even after leaving, many Muslims might return if the town was re-conquered (as in Úbeda) or if the new rulers re-admitted the former population (as in Seville).[110] Even where Muslim populations were permitted to remain, the terms of their surrender treaties were often broken and their rights curtailed within a year or two of the conquest. The uncertain historical track record of these treaties – as highlighted in the Marbella *fatwā* – would certainly have begun to have an impact on the choices made by Muslims whose towns were threatened or conquered.

In an article analyzing the biographies of Andalusī scholars contained in Ibn al-Abbār's *Takmila*, which covers the sixth/twelfth through mid-seventh/thirteenth centuries, Manuela Marín notes a range of choices made by individual scholars as their

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[109] For an overview of emigrations in Iberia from the Muslim conquest through the Morisco period and beyond, see García-Arenal, *La Diaspora des Andalousiens*.

[110] All but the last example are all taken from Manuela Marín, "Des migrations forcées: Les 'Ulema d'Al-Andalus face à la conquête chrétienne," in *L'Occident musulman et l'Occident chrétien au Moyen Âge*, ed. Mohammed Hammam, 43-59 (Rabat: Faculté des Lettres, 1995). For the mid-thirteenth century through the 1500, see Harvey, *Islamic Spain*, and Rachel Arié, *L'Espagne Musulmane au Temps des Naṣrides (1232-1492)* (Paris: Éditions E. de Boccard, 1973).

towns were conquered by Christian armies.[111] In this earlier period of the 'Reconquest,' a number of scholars chose to remain under Christian rule as Mudéjars, especially where the surrender treaties were relatively favorable, while other scholars chose to emigrate, often from city to city as the conquest progressed. On the one hand, some jurists rose to positions of greater importance within their communities as religious leaders replaced the Muslim communities' defeated political and military leaders as sources of cohesion and authority.[112] On the other hand, the circumstances often meant that religious leaders were compelled to migrate in order to continue their professional activities, as restrictions on Mudéjar religious practices drastically reduced the numbers of judges, *imām*s, *khaṭīb*s, *mu'adhdhin*s, and the like who could find work.[113] Thus even many jurists would have had compelling personal and professional reasons to emigrate, quite apart from – although perhaps supporting – their convictions regarding the legal obligation to do so. Where emigration was voluntary, scholars and others chose to relocate for a variety of economic, political, social, and religious reasons; Marín notes that the 'theological' debate concerning emigration began relatively late, after a considerable amount of Muslim territory had been lost and the affected populations had stayed or emigrated.[114]

Despite al-Wansharīsī's scorn for the material motivations of *Asnā al-matājir*'s unsatisfied emigrants, it appears that this particular group may actually have prioritized religious considerations in choosing to emigrate to the Maghrib. Ibn Qaṭīya

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[111] Marín, "Des migrations," 43-59.
[112] Ibid., 55.
[113] Ibid., 51-52
[114] Ibid., 58. This is not to say that Muslims did not emigrate for religious reasons from the beginning of the 'Reconquest.' Marín cites one biography in which an *imām* emigrated from Valencia in about 488/1095 along with his fellow townspeople, all "fleeing with their religion." Marín, "Des migrations," 49.

reports that they left behind houses, property, fields, and other types of immovable property, which seems to indicate that they had been quite well off, that their property had not been seized by their conquerors, and that they had been given the choice to remain on their own land and in possession of their homes and property; it was their choice to leave all of this, and they say they made this choice because of their obligation to emigrate to preserve their religion. Their desire to return and to live under non-Muslim rule further indicates that they had most likely already been living under Christian rule long enough to judge it preferable to life in the Maghrib.

Iberian Muslims had thus been weighing a well-known religious obligation to emigrate alongside other considerations for centuries when al-Wansharīsī wrote *Asnā al-matājir*, and the Marbella *fatwā*, whose circulation in Spain is undocumented and perfectly questionable. While Abou El Fadl argues that the legal discourse supporting this obligation become more developed over time, Van Koningsveld and Wiegers' discovery of Ibn Rabīʿ's *fatwā* shows that most of the ideas found in al-Wansharīsī's *fatwā*s had already developed by the early eighth/fourteenth century, rather than the late ninth/fifteenth century. The obligation to emigrate, even if expressed more forcefully by al-Wansharīsī than by many earlier jurists, would have been old news in Iberia on the eve of Granada's surrender. I will argue in chapter two that al-Wansharīsī most likely was inspired to write with such force and elaboration not necessarily because he hoped to circulate his opinions in Iberia and convince Mudéjars to emigrate to the Maghrib, but because the possibility of remaining in Christian-occupied territory was of recent origin and immediate significance in Morocco itself.

The Issue of Ability

The foregoing section has traced the persistence of Mu'nis's assumptions regarding al-Wansharīsī's *mustaftī*s and the circulation of his *fatwā*s on emigration; this section will explore a second set of issues related to al-Wansharīsī's audience as envisioned by Mu'nis as well as by later scholars. As shown above, Mu'nis wrote as though al-Wansharīsī was addressing, both directly as *mustaftī*s and in the sense of treating a topic, Mudéjars who were incapable of emigrating. Although later scholars have not necessarily made this same set of assumptions, many have approached al-Wansharīsī's *fatwā*s as though he wrote them in response to questions regarding the general obligation of all Mudéjars, capable or incapable, to emigrate to Muslim territory. I argue that al-Wansharīsī, as noted above, was asked only about Mudéjars who had already emigrated or were described as perfectly capable of doing so; and that failing to recognize this has led to exaggerated claims concerning al-Wansharīsī's severity and inhumanity.

In the *istiftā'* portion of *Asnā al-matājir*, Ibn Qaṭīya poses a large number of questions to al-Wansharīsī, which may be divided into four categories: moral, civil, criminal, and doctrinal. The first two questions relate to the moral and what I will term 'civil' consequences of the offenders' actions:

> What [consequent] sin, diminished religious standing, and loss of credibility (*al-jurḥa*) attaches to them in this matter? Have they, through this, committed the very act of disobedience [to God] that they were fleeing from, if they persist in this behavior without repenting of it and returning to God the Exalted?[115]

Here Ibn Qaṭīya asks if the unhappy emigrants have through their actions sinned in ways that affect their standing in both this world and the next; the loss of credibility

[115] Al-Wansharīsī, *al-Mi^{c}yār*, 2:120; Appendix A, 342.

referred to in this passage means that this group would be unfit to serve as legal witnesses or to serve in positions of religious leadership, such as leading prayer. It is essential to realize that Ibn Qaṭīya is not asking about Mudéjars who have failed to emigrate, or who might be incapable of emigration, or even necessarily Mudéjars who might have emigrated but then slipped quietly back to Spain without a public display. Rather, Ibn Qaṭīya is asking about the specific group of people he has just described at great length, who emigrated to the Maghrib, who complained that they could not find any work or support, who then began to mock the land of Islam, its inhabitants and the obligation to emigrate, and who have been openly praising infidels and infidel rule and conspicuously attempting to return to their preferred land, *dār al-ḥarb*.

The next set of Ibn Qaṭīya's questions relate to criminal as well as additional moral consequences of these emigrants' actions:

> And what of those among them who, after reaching the land of Islam – may God protect us! – return to the land of unbelief? Is it obligatory to punish those among them who have been witnessed making these or similar statements? Or rather [should they not be punished] until they have been presented with exhortations and warnings concerning this matter? And then whoever repents to God the Exalted is left alone, and it is hoped that his repentance will be accepted, whereas whoever persists in this is to be punished? Or are they to be shunned and each one left with what he has chosen? And thus for whomever of them God establishes contentedly in the land of Islam, his emigration is [considered to have been performed] with valid intention and God the Exalted will owe him his due reward? But whoever of them chooses to return to the land of unbelief and to infidel rule takes upon himself the anger of God? And whoever among them maligns the land of Islam explicitly or implicitly is to be left to his own devices?[116]

In this section, Ibn Qaṭīya asks the questions which would have the most concrete implications for the emigrants; he is attempting to determine to what extent this group has committed criminally prosecutable offenses and to what extent they have merely sinned, in which case they would be answerable to God but would not require any action on the part of local law enforcement. Ibn Qaṭīya assumes the emigrants must be

[116] Al-Wansharīsī, *al-Miᶜyār*, 2:120; Appendix A, 342-43.

witnessed making the slanderous and offensive statements described above prior to being considered for punishment. He appears to consider that the group may not be fully aware of the gravity of their actions, as he asks if they should be warned, counseled, and given the opportunity to repent prior to being punished. Ibn Qaṭīya also suggests social avoidance as a possible punishment, or even a delay in judgment until the emigrants have had more time to settle in and hopefully to change their minds and become content in the Maghrib.

At this point he returns to moral considerations regarding the validity of the *hijra* previously performed by these emigrants, and wonders if the emigrants' slanderous statements should be left to God to punish. In this section, it is clear that Ibn Qaṭīya is weighing a range of approaches to the problem of these emigrants, and would derive practical benefit from obtaining a second opinion on these issues from a respected *muftī* of higher standing.

In the final set of questions, Ibn Qaṭīya asks for a clarification as to whether or not finding material comfort in the Maghrib had been a condition of this group's obligation to emigrate:

> Is it a condition of [the obligation to] emigrate that no one [is required to] emigrate other than to a standard of living guaranteed to be in accordance with his desires, immediately upon arrival and in whatever region of the Islamic world he has alighted? Or is this not a condition? Rather, emigration is obligatory upon them, from the land of unbelief to the land of Islam, whether to sweetness or bitterness, abundance or poverty, hardship or ease, with respect to worldly conditions. The true purpose of emigration is the protection of religion, family, and offspring,[117] for example, and escape from the rule of the infidel community to the rule of the Muslim community, to whatever God wills by way of sweetness or bitterness, poverty or wealth, and so on with respect to worldly conditions.[118]

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[117] These are three of the five essential human interests (religion, life, intellect, lineage, and property) which the law is designed to protect according to the theory of *maqāṣid al-Sharīʿa* (objectives of the law), elaborated by jurists such as al-Ghazāli and al-Shāṭibī.

[118] Al-Wansharīsī, *al-Miʿyār*, 2:120; Appendix A, 343-44.

Unlike in the middle group of questions, here Ibn Qaṭīya is stating his own opinions and requesting al-Wansharīsī's confirmation of them. The former jurist indicates that, like any number of other legal obligations, there may be conditions under which certain groups of people become subject, or not, to the obligation to emigrate from non-Muslim to Muslim territory. Ibn Qaṭīya seeks confirmation of his conviction that the promise of material wealth in the *mahjar* (emigrants' destination) is not a variable which meets the legitimate criteria for being a condition of this obligation's applicability to Muslims living in non-Muslim territory. This is a very specific question that does not preclude the existence of other variables and circumstances which might, unlike material wealth, be considered relevant to an assessment of the applicability of this obligation to particular individuals. At this point Ibn Qaṭīya's question becomes both specific to "them," the slandering emigrants, and abstract; on this particular point, he wishes to receive a response cast as a general rule regarding material wealth as a condition of the obligation to emigrate.

In the *istiftā'* portion of the Marbella *fatwā*, Ibn Qaṭīya's question is far more straightforward. After describing the current situation of the man in question, who has remained in Marbella in order to negotiate with the Christian authorities on behalf of other Mudéjars, the jurist asks:

> Is residing with them under infidel rule permitted for him, on account of the benefit (*maṣlaḥa*) his residence entails for those unfortunate [Muslim] *dhimmī*s, even though he is capable of emigration anytime he wishes? Or is this not permitted for him, as they also have no dispensation for their residing there subject to infidel laws, especially considering that they have been granted permission to emigrate and that most of them are capable of doing so whenever they wish? And presuming that this were permitted to him, would he thus also be granted a dispensation, based on what he is capable of, to pray in his garments [as they are], seeing as they generally would not be free from major ritual impurities (*najāsa*) as a result of his frequent interactions with the

> Christians, his conducting his affairs among them, and his sleeping and arising in their homes in the course of serving these subject Muslims in the manner stated?[119]

Here Ibn Qaṭīya is asking only about the specific circumstances of this one man from Marbella, without moving to a more general question whose response would be applicable to the other Mudéjars mentioned here, or to Muslims under non-Muslim rule in general. Also, Ibn Qaṭīya is only seeking authoritative confirmation of his own opinion here, rather than guidance or a second opinion on a complicated legal question. This *mustaftī* clearly believes that this man's continued residence in Marbella is not justified by the circumstances described, a view that he supports primarily by emphasizing that this man and most of his townsfolk are perfectly capable of emigrating. Ibn Qaṭīya also supports his case by presenting the specter of a slippery slope of dispensations accommodating this man's (and by extension all Mudéjars') limited ability to execute his ritual obligations properly. Although Ibn Qaṭīya thus mentions in the course of his *istiftā'* the ability of these other Mudéjars to emigrate, he does not actually pose a question relating to their legal obligations; his questions technically relate only to one man from Marbella.

The importance of the *istiftā'* in determining the content of a *muftī*'s response has been overlooked by most commentators on these and other *fatwā*s. Only relatively recently have scholars devoted more attention to the formal aspects of this genre of legal literature. In their overview of the typical provisions of works on *adab al-muftī* (or *adab al-iftā'*), which set forth the professional standards of *fatwā* giving, Masud, Messick, and Powers write:

> It is a characteristic feature of fatwa giving that the question not only initiates the mufti's interpretive activity but also constrains it. As muftis must answer according to

[119] Al-Wansharīsī, *al-Mi*^{c}*yār*, 2:137; Appendix B, 384.

> what is asked, their field of response is largely determined by the formulation of the question. Since the mufti is not an investigator of the facts, these are taken as a given.[120]

*Muftī*s, in other words, must answer the question they are asked, using the facts they are given. While the inclusion of qualifying statements meant to guard against misuse or misinterpretation of the scope of the *fatwā* was encouraged,[121] *muftī*s were not to issue *fatwā*s related to hypothetical cases.[122] Thus we should not *expect* a *muftī* to describe and respond to a wide range of alternative scenarios beyond the one described in the actual question he has been asked to answer.

Although al-Wansharīsī's lengthy answers certainly extend beyond what might be necessary to address the narrow scope of Ibn Qaṭīya's questions, the Fāsī jurist nonetheless clearly frames his answers as responses to these specific questions; he does not present these *fatwā*s as stand-alone treatises on every aspect of the obligation to emigrate. After opening *Asnā al-matājir* with a prophetic *ḥadīth* and citations from a few earlier jurists regarding the general obligation to emigrate, al-Wansharīsī makes his first reference to the group in question:

> This [obligation to] emigrate does not lapse for those whose fortresses and cities have been overtaken by the tyrant – may God curse him – except in a situation of complete inability [to emigrate] by any means. [This obligation does] not [lapse out of concern for one's] homeland or wealth, for all of that is invalid in the view of the revealed law (*al-shar^{c}*).[123]

Here the jurist begins to address Ibn Qaṭīya's request for a ruling as to whether or not material concerns are legitimate considerations in determining a Muslim's ability, and thus obligation, to emigrate. Al-Wansharīsī confirms the obligation to emigrate for

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[120] Masud, et al., "Muftis,"22.
[121] Sherman Jackson, "The Second Education of the *Muftī*: Notes on Shihāb al-Dīn al-Qarāfī's Tips to the Jurisconsult," *The Muslim World* 82, no. 3-4 (1992): 209-10; Hallaq, "From *Fatwā*s to *Furū^{c}*," 34-35.
[122] Hallaq, "From *Fatwā*s to *Furū^{c}*," 37.
[123] Al-Wansharīsī, *al-Mi^{c}yār*, 2:121; Appendix A, 346; see n. 21 in the translation for one scholar's misleading rendering of this passage.

those whose territory is conquered, duly notes the exception for those who are unable to do so, and rules that having to abandon one's homeland or forfeit one's wealth do not in and of themselves constitute an inability to emigrate. As homeland and wealth are the only two reasons suggested in the question as to why these particular emigrants might be considered not to have been obligated to perform the emigration that they in fact completed, al-Wansharīsī may at this point have assumed the question of ability to have been addressed adequately. Yet he also defines standards of both inability and ability to emigrate near the beginning and end of the text, and at numerous other points qualifies his statements (or quotes qualified statements) to note an exemption for those truly incapable of emigrating.

Al-Wansharīsī presents a standard for the *inability* to emigrate immediately following the statement quoted above and at the start of a section listing Qur'ānic verses relevant to emigration and to alliances with non-believers. Although the bulk of this section is quoted from Ibn Rabīʿ's earlier *fatwā*, al-Wansharīsī re-arranges the citation of these verses in order to begin with a discussion of the issue of ability. This discussion cites the following core verses, referred to in whole or part several times in *Asnā al-matājir*:

> {Those whom the angels take in death while they are wronging themselves, the angels will say to them: 'In what circumstances were you?' They will say, "We were abased in the earth." The angels will say, "Was God's earth not spacious enough for you to have migrated therein?" Hell will be the refuge for such men – a wretched end (4:97)! Except for the weak among men, women, and children, who are unable to devise a plan and are not guided to a way (4:98); as for these, perhaps God will pardon them. God is Most Clement, Oft Forgiving (4:99).}[124]

[124] Qur'ān 4:97-99; at this point in the *fatwā*, al-Wansharīsī only cites Qur'ān verses 4:98-99, which begin with "Except . . ." I have added 4:97 here to aid with understanding the implicit context of this discussion; these three verses are often cited together as the primary Qur'ānic evidence of the obligation to emigrate, as occurs slightly later in *Asnā al-matājir* (Appendix A, 349). Ibn al-Rabiʿ, on the other hand, begins his section on Qur'ānic verses with 3:118 and 3:28, which prohibit alliances with non-Muslims.

Significantly, al-Wansharīsī begins his treatment of these verses, and the Qur'ān in general, not by explaining that verse 4:97 commands emigration, but by discussing the import of 4:98, designating the weak as exempt from this obligation. The jurist's commentary is worth quoting at length because so many scholars have insisted that al-Wansharīsī countenanced no exceptions to the obligation to emigrate:

> This weakness which characterizes those who are forgiven is not the same weakness that is offered as an excuse at the beginning and fore parts of the verse. This [other type of weakness] is the statement of those who wronged themselves, "We were abased in the earth." God Most High did not accept their words as an excuse, and indicated that they were capable of emigrating by some means. He offered forgiveness for that weakness which renders one incapable of devising a plan or being guided to a way, through His words {as for these, perhaps God will pardon them}; for 'perhaps' on the part of God indicates necessity [of action, rather than mere probability]. The weak man who is punished in the fore part of the verse is the one who is capable [of emigrating] by some means, and the weak man who is forgiven in the latter part of the verse is the one who is incapable [of doing so] by any means.
>
> Thus if the one who is afflicted with this residence is incapable of fleeing with his religion and unable to find a way to do so; and no scheme appears to him, nor any power to devise such a scheme by any way or means; or if he is in the condition of one who is confined or imprisoned; or if he is very sick or very weak; then it is hoped that he will be forgiven, and he comes to occupy the same [legal status] as one who is forced to utter words of unbelief. However, he must also maintain a steadfast intention that, if he had the power or ability, he would emigrate. Accompanying this intention must be a sincere resolve, that if he gains the power to emigrate at any point, he will use that [power] to do so. As for the one who is capable [of emigrating], in any way and by any possible means, he is not excused [from doing so]. He wrongs himself if he remains, according to what is indicated in the relevant Qur'ānic verses and *aḥadīth*.[125]

In the first paragraph here, al-Wansharīsī (quoting Ibn Rabīʿ) offers an interpretation of the verse itself, explaining that a group could be "abased" but not "weak," meaning that they are still capable of, and obligated to, extract themselves from that situation of abasement. In the second paragraph the import of this verse is applied to those Muslims whose territory has been conquered; they are like the abased Muslims in the verse and must emigrate, unless they are too weak to do so, with 'too weak' here defined as being confined, very sick, or very weak. Although 'very weak' is not further defined, al-Wansharīsī may well have had in mind a state of complete powerlessness or

[125] Al-Wansharīsī, *al-Miʿyār*, 2:121-22; Appendix A, 346-47.

fear rather than a simple physical incapacity. Al-Wansharīsī stresses that even those who are thus forgiven – or hoped to be forgiven – are nonetheless obligated to continually maintain the firm intention to emigrate whenever this becomes possible.

Near the end of the *fatwā*, al-Wansharīsī revisits the issue of ability, this time further defining the *ability* to emigrate:

> Once this is established [that forfeiture of wealth is not a legitimate reason not to emigrate] , there can be no dispensation for any one of those whom you mentioned to return [to Spain] or not to perform the *hijra* – not by any means; and he is not excused [from this obligation], no matter what he must do to fulfill it, through burdensome toil or delicate strategy – rather, [he must pursue] whatever he finds to be a means of escape from the infidel noose; and where he does not find a tribe to defend him or protectors to guard him, and he is content [nonetheless] to remain in a place detrimental to religion, where it is prohibited to manifest Muslim practices, then he has strayed from the religion and joined with the unbelievers (*mulḥidīn*).
>
> The obligation is to flee from a land conquered by adherents of polytheism and depravity to the land of safety and faith. For this reason they [viz., the early non-emigrants] were countered in response to [their] offering an excuse, by His words {Was God's earth not spacious enough for you to have migrated therein? Hell will be the refuge for such men – a wretched end!}. This means that wherever the emigrant turns, even if he is weak, he will find a vast and uninterrupted earth. So there is no reason of any kind for the one who is capable [of emigrating], even if this involves hardship as to work or strategy, or in making a living, or [if it results in] poverty; except for the [truly] weak who are fundamentally incapable, who can devise no means and are not guided to a path.[126]

Here it becomes clear that the minimum standard of capacity which must be met for a Muslim to be obligated to emigrate, at least according to al-Wansharīsī and in answer to this question from Ibn Qaṭīya,[127] is very different from the standard often operative in relation to other obligations. For example, Mālikī jurists often declared all Andalusī and Maghribī Muslims to be exempt from the obligation to perform the pilgrimage to Mecca in part because the journey was far too difficult.[128] Al-Wansharīsī again stresses that financial loss does not constitute legitimate grounds for a dispensation from the

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[126] Al-Wansharīsī, *al-Miᶜyār*, 2:132; Appendix A, 371-72.

[127] This passage is largely quoted from Ibn Rabīᶜ, but with some tailoring to fit the question al-Wansharīsī is answering; see Appendix A.

[128] For one such example, see Ibn Rushd (d. 520/1126)'s *fatwā* declaring *jihād* to be a higher priority than pilgrimage for the people of al-Andalus and the Maghrib. *Fatāwā Ibn Rushd*, ed. al-Mukhtār b. al-Ṭāhir al-Talīlī (Beirut: Dār al-Gharb al-Islāmī, 1987), 2:1021-27; al-Wansharīsī, *al-Miᶜyār*, 1:432-33. Al-Wansharīsī's chapter on pilgrimage in the *Miᶜyār* opens with a number of similar rulings.

obligation to emigrate, and he further indicates that fulfilling this obligation is of such vital importance that even a considerable degree of physical, financial, and emotional hardship must be endured if necessary. It remains unclear from this passage where al-Wansharīsī stands on the issue of danger which is so prevalent in Mālikī *fatwā*s on pilgrimage, but it should not be assumed that he advocates that Muslims risk their lives in order to emigrate. As will be shown in chapter two, al-Wansharīsī issued another, related *fatwā*, in which he clearly considers those whose lives would be at risk too weak to emigrate. Al-Wansharīsī might strategically fail to note such an exemption here because it could be so widely and indiscriminately claimed (as in the blanket applications of inability proclaimed by Maghribī jurists regarding the pilgrimage), or he might find it irrelevant to the type of Mudéjars he is confronted with: those so unafraid of the enemy and so capable of migration that they are clamoring to migrate for a second time, this time in reverse.

In the Marbella *fatwā*, al-Wansharīsī's references to the issue of ability are fewer and less direct, presumably because the man from Marbella's ability to emigrate is never in doubt and the jurist has not been asked a more general question. Near the beginning of his response, al-Wansharīsī simply states that the reason proposed for the man's remaining in Marbella does not merit an exemption from the obligation to emigrate.[129] The bulk of the response then quotes material taken from Ibn Rabīʿ's *fatwā* demonstrating that what Muslims living under Christian rule are more clearly incapable of is performing their ritual obligations. In the course of describing Mudéjars' failure to fulfill two of these obligations, elevating the word of God and

[129] Al-Wansharīsī, *al-Miʿyār*, 2:138; Appendix B, 385.

performing *jihād*, al-Wansharīsī explicitly limits his criticism to those who do so in the absence of any compulsion or necessity. Finally, in the conclusion, al-Wansharīsī rules that "there is no room for the aforementioned virtuous man to reside in the place mentioned for the stated motive," and that the conduct of the man from Marbella and of his companions cannot be forgiven, considering their "voluntary choice of residence and deviant course of action."[130] While al-Wansharīsī does not make an explicit point of exempting those incapable of emigrating from this overall ruling, he also does not apply the Marbella ruling to all Mudéjars everywhere; the jurist makes clear that he is responding to the specific situation presented in Ibn Qaṭīya's question, which describes this man and the Marbellans in general as a people permitted to emigrate by the authorities and capable of doing so.

Given that the questions posed to al-Wansharīsī primarily concern specific groups of people who are *capable* of emigrating, it would not be unreasonable to conclude that his responses contain sufficient references to and explanations of the dispensation granted to those *incapable* of emigration. Unlike other genres of legal literature, *fatwā*s respond to very specific concerns; they do not necessarily summarize generally applicable rules, as in *mukhtaṣar*s (concise manuals), nor offer an overview of rule variations for a full range of circumstances or individuals. With regard to the question of ability, in *Asnā al-matājir* al-Wansharīsī need only demonstrate that the Andalusīs indeed had been capable, in a legal sense, of the emigration they undertook. This is the extent of what it would be necessary for him to prove in order to refute the suggestion that an impoverished state in the Maghrib might have meant that these

[130] Al-Wansharīsī, *al-Miᶜyār*, 2:141; Appendix B, 393-94.

Muslims had been exempt from the obligation to emigrate, and are thus undeserving of punishment for wanting to return to Spain or for publicly disparaging their just-completed emigration.

Al-Wansharīsī takes these emigrants to have been capable and obligated to emigrate, and so we might expect his answer, at least to this part of the question, to focus entirely on showing just how capable and how obligated to emigrate these Andalusīs were; not on offering reasons why other Muslims in other times and places might not have been capable or obligated to emigrate. Nonetheless, the scope of al-Wansharīsī's rulings are fairly wide, including lengthy citations of textual evidence and earlier jurists' opinions in support of the importance and necessity of emigration in general, and as applicable to Muslims living under non-Muslim rule in the abstract. It is most often in the context of this more generally applicable material that al-Wansharīsī includes qualifying statements exempting those who are incapable from the obligation to emigrate.

Al-Wansharīsī's venture beyond the confines of what might have been necessary in order to answer only the specific questions posed to him have led some scholars to assume – inappropriately for this genre of legal literature – that his two *fatwā*s on emigration, especially when taken together, represent a comprehensive treatise on the rules, evidence, and exceptions relating to the obligation of Muslims to emigrate from non-Muslim to Muslim territory. The jurist is then faulted for not noting enough exemptions from the obligation to emigrate. For example, Turki states that al-Wansharīsī accuses "of infidelity, in the most categorical and dogmatic way, *all*

Muslims continuing to live in Spain after the fall of what remained of al-Andalus."[131] Yet al-Wansharīsī's ruling concerns one particular group, not *all* Iberian Muslims. Referring to the Marbella *fatwā*, Miller notes that al-Wansharīsī did not allow the man to remain in Spain and that "there were no more 'it depends' for al-Wansharīsī, with the single exception of the Maliki line that the ill or disabled were excluded from the obligation to leave."[132] Although Miller thus acknowledges that al-Wansharīsī does mention some exemptions from the obligation to emigrate, she makes the unwarranted assumption that this must be al-Wansharīsī's comprehensive statement on all possible exceptions to the obligation to emigrate. Yet these are the standard exceptions that al-Wansharīsī notes in a *fatwā* responding to a question about a man who is described as perfectly capable of emigrating but who would prefer to stay in conquered Marbella, if permitted, in order to assist other people, the majority of whom are likewise capable of emigrating. We should expect that al-Wansharīsī may have treated the topic of exemptions in greater depth if he were asked if an unaccompanied woman meets the standard of ability to emigrate, or asked at what age Muslims become capable of emigrating, or asked about someone staying behind to care for the sick and disabled, or

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[131] Turki, "Consultation," 6; my translation and emphasis. By 'infidelité' Turki probably means disloyalty rather than unbelief, as he correctly states in a later article that Mu'nis was wrong to describe al-Wansharīsī as having condemned all non-emigrant Mudéjars as *kuffār*. Turki, "Pour ou contre la légalité du séjour des musulmans en territoire reconquis par les chrétiens: Justification doctrinale et réalité historique," in *Religionsgespräche im Mittelalter*, ed. Bernard Lewis and Friedrich Niewöhner (Wiesbaden: Harrassowitz, 1992), 322.

[132] Miller, *Guardians*, 37. Here she describes the Marbella question as follows: "When a faqih asked him whether he might stay and work on behalf of needy Mudejars, al-Wansharisi made it plain that 'even though someone resides in dar al-harb for lofty purposes, he exposes himself to degradation.'" Although Miller has thus realized (since her 2000 article on the obligation to emigrate) that the man from Marbella was in Marbella, she still believes him to be a 'faqih' and to have asked al-Wansharīsī for a *fatwā*; she does not footnote her quotation here, which does not match any text in the actual *fatwā*. Her use of the term 'faqih' here most likely reflects her understanding that any learned man could be thus termed in Mudéjar usage. This usage is inappropriate in this context, which is grounded in correspondence between two Maghribī *muftīs*; Ibn Qaṭīya describes the man as a 'virtuous man,' and there is no reason to override this description with a term he does not choose and probably would not recognize as appropriate.

asked to weigh *hijra* against *jihād* in a place where *jihād* was feasible, or asked about a group of Muslims scared to emigrate because most would-be emigrants from their town had been killed or enslaved in the attempt. Al-Wansharīsī was asked none of these things; he was asked to rule on a specific group of emigrants who were capable of emigrating, had done so, and had then proceeded to commit offenses in North Africa (primarily spreading *fitna*) considered by al-Wansharīsī to be criminally prosecutable. He should not be assumed to have written a treatise on emigration from Iberia unrestricted by the parameters or immediate needs of any particular question.

Sabbagh comes the closest to arguing that al-Wansharīsī is primarily or only addressing those Muslims considered capable of emigration, although she bases her argument not on the textual evidence within al-Wansharīsī's *fatwā*s themselves, but on the contents of another *fatwā*, that of al-Wahrānī.[133] Al-Wahrānī's *fatwā*, which responds to an unspecified question, advises Moriscos as to how to approximate adherence to selected Islamic ritual obligations in secret. Against other scholars who had suggested an opposition between the views of al-Wansharīsī (as expressed in *Asnā al-matājir*) and al-Wahrānī, Sabbagh urges reading the two jurists' opinions as complementary: al-Wansharīsī addressed those capable of emigration, while al-Wahrānī addressed those incapable of doing so. Buzineb and Razūq both argue against Sabbagh, claiming that al-Wahrānī's *fatwā* cannot be addressed only to the weak because not all Moriscos were powerless.[134] In an article identifying al-Wahrānī, long known only as the 'Muftī of Oran,' Devin Stewart supports Buzineb's characterization of

[133] Sabbagh, "La religion," 52-55.
[134] Buzineb, "Respuestas,"53-54; Razūq, *al-Andalusīyūn*, 151.

these two jurists' *fatwā*s as 'diametrically opposed,' and argues, against Sabbagh, that al-Wahrānī's opinion was a rebuttal to that of Wansharīsī.[135]

Although more sympathetic to Sabbagh, I am convinced neither by her reasoning nor by that of Buzineb, Razūq, or Stewart. As noted above and as will be addressed in more detail in chapter four, the circumstances of *Asnā al-matājir* and al-Wahrānī's *fatwā* have so little in common that it does not make sense to argue that they are either in opposition to one another nor complementary; the former explicitly addresses emigration and was most likely requested in conjunction with a criminal court case in North Africa, while the latter details modifications to ritual practice in times of necessity and was most likely sent to Granadan Moriscos. With regard to al-Wansharīsī, we can assume that he was addressing those capable of emigration because both he and Ibn Qaṭīya explicitly state this to be the case. With regard to al-Wahrānī, we do not have the question he was asked and so can know little about his specific audience.

The historical reality of the Moriscos' average capacity or incapacity to emigrate throughout Spain and over the length of the Morisco period has absolutely no bearing on al-Wahrānī's *fatwā* unless it can be shown not only that al-Wahrānī was aware that some Moriscos might be capable of emigrating, but also that his particular audience included such capable Moriscos, or that he was asked to address the obligation to emigrate as relates to all Moriscos, capable or incapable. Al-Wahrānī's *fatwā*, however, is addressed to a group that he clearly believes is in distressed circumstances and thus eligible for a wide range of dispensations that go beyond even those classically reserved

[135] Devin Stewart, "The Identity of 'The *Muftī* of Oran,' Abū l-ᶜAbbās Aḥmad b. Abī Jumᶜah al-Maghrāwī al-Wahrānī (d. 917/1511)," *Al-Qanṭara* 27, no. 2 (2006): 299-300.

for Muslims whose lives are in danger, such as eating pork and drinking wine. It is highly unlikely that a Mālikī jurist would allow these behaviors alongside a firm belief that the group in question retained the option of removing themselves from the situation. It is important to remember that we do not have a *fatwā* by al-Wansharīsī addressing the situation of Moriscos or of any group described to him as incapable of emigrating, and that we similarly do not have a ruling by al-Wahrānī addressing either emigration or the circumstances of a group which he should reasonably have believed capable of emigration.

A *fatwā* issued by al-Māzarī on trading with Norman Sicily, which will also be relevant to chapter three's discussion, is instructive of this need to examine carefully the circumstances of each question-and-answer pair and serves as a reminder that not every *fatwā* records a jurist's comprehensive treatment of rules and opinions related to an entire area of law. In response to a set of questions about merchants travelling to Sicily to buy food, al-Māzarī first rules that such travel to *dār al-ḥarb* is prohibited; he then duly answers each of the other questions asked, which relate to the re-minting of coins and the division of shares of a joint purchase.[136] In a substantial *fatwā* compilation which was one of al-Wansharīsī's primary sources for the *Miʿyār*, Tunisian jurist Abū al-Qāsim al-Burzulī records the segment of al-Māzarī's response prohibiting travel to Sicily independently of his answers to the rest of the questions.[137] Al-Wansharīsī and

[136] In the *Miʿyār*, al-Wansharīsī includes the full question (6:305-307) and answer (6:317-19) once, in the chapter on sales.

[137] In al-Burzulī's *Jāmiʿ masā'il al-aḥkām*, the entire question and answer appear in the chapter on pilgrimage (1:595-98). The full question, which addresses several legal issues, is again included in the chapter on sales, along with al-Māzarī's answers to each of the question (3:157-58), but without his initial ruling prohibiting travel to Sicily. In his chapter on *jihād*, al-Burzulī states simply that al-Māzarī was asked about travel to Sicily, and records only that part of his answer prohibiting this (2:45-46). Abū al-Qāsim b. Aḥmad al-Balawī al-Qayrawānī al-Burzulī (d. 841/1438), *Fatāwā al-Burzulī: Jāmiʿ masā'il al-aḥkām*

al-Burzulī also include in their collections two other *fatwā*s by al-Māzarī addressing trade with Christian Sicily.[138] Al-Māzarī apparently did not declare his opposition to trade with non-Muslims in every related *fatwā*, nor did later compilers consider this an integral part of his answers; his answers to each discrete question were considered valuable as such and reproduced in the appropriate chapters of these larger collections. A reader of just that part of al-Māzarī's ruling regarding the potential for usury when paying for the re-minting of coins in Sicily, for example, might erroneously assume that the jurist had no objection to travelling to Sicily for trade.

*Fatwā*s have been hailed for providing researchers with a greater opportunity to understand the types of legal dilemmas that actually arose within particular contexts; but it must be understood that in addition to opening new windows on life in Muslim societies, this same genre can also be profoundly limited. These texts most often present and interpret a narrow set of legal rules applicable to those very particular cases, even if they may then serve as authoritative precedents in the event that a similar case recurs or a similar mode of reasoning is required in a later response. *Muftī*s are above all responsible for answering the questions asked of them, and *adab al-iftā'* manuals recommend careful observation of these parameters.

This section has endeavored to explore the persistence in the scholarly literature of the assumptions, first recorded by Mu'nis, that al-Wansharīsī's *fatwā*s were addressed to Iberian Muslims, were meant to circulate in Mudéjar communities, and that they represent a comprehensive treatment of the obligation to emigrate as it applies to all Mudéjars, including and even especially those unable to emigrate. Later

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li-mā nazala min al-qaḍāyā bi'l-muftīn wa'l-ḥukkām, ed. Muḥammad al-Ḥabīb al-Hīla [al-Hīlah], 7 vols. (Beirut: Dār al-Gharb al-Islāmī, 2002).

[138] Al-Wansharīsī, *al-Miʿyār*, 8:207-208; al-Burzulī, *Jāmiʿ masā'il al-aḥkām*, 3:462-64, 5:272.

scholars, particularly those relying on partial, biased, or inaccurate prior summaries of these texts, have indeed perpetuated these assumptions. The actual circumstances of the question posed to al-Wansharīsī, including the professional identity of the *mustaftī* and Ibn Qaṭīya's explicit requests for responses regarding specific Mudéjars described as capable of emigration, have received very little attention; the *implications* of these circumstances have been all but ignored.

Al-Wansharīsī's Rulings as Illiberal and Uninformed

Mu'nis's second set of assumptions regarding al-Wansharīsī's emigration *fatwā*s concern the appropriateness of his rulings and the methods and rationales by which he arrived at them. This closely-related set of assumptions includes the idea that al-Wansharīsī had a moral responsibility to endorse Mudéjars' living under non-Muslim rule, but failed to do so because he was cruel and negligent; the assumption that al-Wansharīsī willfully knew nothing of the circumstances facing Mudéjars, and would have been compelled to rule differently had he known more; and the assumption that he was ignorant of Islamic law, was ruling out of emotion, and would have ruled differently had he had a better grasp of his legal tradition.

Mu'nis makes no secret of his condemnation of al-Wansharīsī's ruling, which he misunderstands to be a directive to all Mudéjars to emigrate regardless of their circumstances. As demonstrated above (pp. 27-30), Mu'nis writes that al-Wansharīsī treated the Mudéjars with severity, accused any who failed to emigrate of apostasy, did not bother to research or to understand the human aspects of the Mudéjars' plight, likewise did not care to apply proper legal analogies or avail himself of the law's

tolerant nature, stripped the Mudéjars of their leadership, and contributed significantly to the destruction of Spanish Islam. Mu'nis's characterization of al-Wansharīsī's reckless lack of research and investigation into both historical and legal realities, paired with the historian's clear condemnation of the jurist's ruling as irresponsible and morally reprehensible, indicate that Mu'nis believes there to have been a far more lenient, 'correct' answer to the Mudéjar problem that should have been self-evident to anyone who took the time to study their circumstances. Al-Māzarī, whom Mu'nis describes as having allowed Muslims to remain in Christian Sicily and as having materially and physically assisted those Muslims who did emigrate to Ifrīqiyā, is held up as Mu'nis's model of a sympathetic and humane approach to the problem of emigration.

While many of these assumptions and attitudes have continued to appear in the literature, later scholars have not perpetuated them to nearly the same degree as they have Mu'nis's views regarding al-Wansharīsī's audience. Scholars such as Maíllo Salgado and Turki, who shared Mu'nis's conviction that al-Wansharīsī's *fatwā*s had a direct and disastrous effect on the lives of Mudéjars, also share his overt condemnation of the jurist's positions. Razūq implicitly endorses Mu'nis's most scathing comments by citing them in his own footnotes without comment, accompanied by a favorable evaluation of al-Wahrānī's *fatwā*, which he characterizes as being in opposition to that of al-Wansharīsī.[139] Most later commentators, however, began to move away from Mu'nis's bold value judgments in favor of a model which simply held the jurist's

[139] Razūq, *al-Andalusīyūn*, 148-52.

opinions to be stricter than other rulings; this trend will be taken up in greater detail below.

Al-Wansharīsī's Knowledge of Mudéjar Life

Mu'nis's claim that al-Wansharīsī knew little of the Mudéjars' history and circumstances, and that this ignorance contributed greatly to his unsympathetic rulings, has been the most persistent of this set of assumptions regarding al-Wansharīsī's rulings and rationales. The arguments used to support this conviction have often resembled Mu'nis's good jurist-bad jurist comparison between al-Māzarī and al-Wansharīsī, although al-Māzarī was soon replaced with al-Wahrānī as the model of the sympathetic and liberal jurist. Epalza, who believed al-Wahrānī to have lived in Almagro, Spain, prior to emigrating to Oran, attributed this jurist's more open-minded ruling (in comparison with al-Wansharīsī's) to his much greater knowledge of Andalusī life.[140] Rubiera Mata similarly contrasted al-Wansharīsī's 'fierce' ruling with that of al-Wahrānī, explaining that only a jurist such as the latter, who shared the Mudéjars' experiences of emigration and of life under Christian rule, could really understand their situation.[141]

Yet Stewart has recently demonstrated that al-Wahrānī grew up in Oran, on the Mediterranean coast of modern-day Algeria, and probably wrote his *fatwā* from Fez, the same city in which al-Wansharīsī was active.[142] This greatly weakens the assumptions that al-Wahrānī's ruling was shaped by personal experience of Mudéjar or Morisco life, that such personal familiarity facilitates or requires lenient rulings, and that al-

[140] Epalza, "La voz official," 293-94.
[141] Rubiera Mata, "Los moriscos," 539, 547.
[142] Stewart, "Identity," 295-97 (summary of al-Wahrānī's biography).

Wansharīsī's ruling was unsympathetic as a result of his comparative ignorance of the realities of the Mudéjar experience. This familiarity-breeds-leniency argument is further undermined by the fact that al-Wansharīsī himself was a political refugee who had left Tlemcen after the sultan had ordered his home plundered, and who emigrated to Fez where he resettled, rebuilt his life, and relied on other scholars' un-plundered libraries. It is quite plausible that al-Wansharīsī had a far clearer grasp of the dangers of living under hostile rule and of the realities of emigration than did al-Wahrānī. One could just as easily claim that al-Wansharīsī's intimate knowledge of emigration made him more likely to expect of others the same willingness to emigrate.

In contrast to Mu'nis, Sabbagh and Harvey both argue that al-Wansharīsī appears very well informed of historical events and builds them into his arguments. Harvey even writes that "what is particularly valuable is al-Wansharīsī's firmly historical grasp of the context within which the problems he is studying evolved, and his *consulta* fill in at times considerable detail with regard to the general conditions of the Spanish Muslim communities."[143] Sabbagh notes al-Wansharīsī's profitable use of examples such as that of Ávila, whose Mudéjars eventually lost their Arabic, and argues that he speaks as though he foresees exactly what will happen to Spanish Muslim communities as soon as their conquerors break the various treaties of surrender protecting Muslim rights.[144]

Van Koningsveld and Wiegers' discovery of Ibn Rabīᶜ's *fatwā* has made it possible to investigate more fully al-Wansharīsī's use of historical precedents in his two *fatwā*s on emigration. What this analysis demonstrates is that the historical examples

[143] Harvey, Islamic Spain, 56.
[144] Sabbagh, "La religion," 47-48.

cited by al-Wansharīsī, including those which occurred prior to his predecessor's life time, are largely his own additions and represent his own priorities. These include the case of Muslims who remained in Barcelona after it was conquered in 185/801 and who participated in battles against other Muslims;[145] al-Māzarī's discussion regarding Muslim judges in conquered Sicily;[146] some unspecified jurists' ruling regarding those loyal to the rebel leader ᶜUmar b. Ḥafṣūn;[147] and the example of the 'Mora Zayda,' the daughter-in-law of al-Muᶜtamad b. ᶜAbbād who converted to Christianity.[148] The case of Ávila noted by Sabbagh was present in Ibn Rabīᶜ's *fatwā*. Although most of these additions are taken from prior legal discussions rather than based on al-Wansharīsī's own historical research, they nonetheless support the view that this jurist showed an interest in the historical and legal details of prior cases of Muslims living under Christian rule.

Al-Wansharīsī also includes in the *Miᶜyār*, directly following *Asnā al-matājir* and the Marbella *fatwā*, a lengthy debate between Abū Yaḥyā b. ᶜĀṣim (d. *ca*. 857/1453) and Abū ᶜAbd Allāh al-Saraqusṭī (d. 861/1459) regarding the legal status of the property of the Muslims of Galera, a village in the kingdom of Granada which negotiated Mudéjar status with Castile in approximately 1436.[149] This is the exchange mentioned earlier in which Ibn ᶜĀṣim states that the Mudéjar period had begun four hundred years earlier;

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[145] Appendix A, 365-66.
[146] Appendix A, 373-76.
[147] Appendix A, 376.
[148] Appendix B, 392.
[149] Al-Wansharīsī, *al-Miᶜyār*, 2:142-58; see also José López Ortiz, "Fatwas granadinas de los siglos XIV y XV," *Al-Andalus* 7 (1941): 90-94. This date is suggested by López Ortiz. This important *fatwā* remains understudied, primarily because it is long, difficult, and unedited. López Ortiz's summary is the longest treatment I have seen in the literature, but he does not accurately grasp the situation and admits that the text is obscure and difficult. Wiegers briefly mentions the text in *Islamic Literature* (5), but misidentifies Ibn ᶜĀṣim's death date. Finally, Amar also offers a short summary of part of the exchange: "La Pierre de Touche," *Archives Marocaines* 12 (1908): 216-18.

this jurist goes on to argue that the Christian rulers will inevitably abuse their power over those Muslims whom they claim to have granted Mudéjar status.[150] Although this exchange provides few historical details of what was actually occurring in Galera – it appears that the Christians seized the property of the Galeran Muslims and began to sell it, at which point the legal question of the permissibility of other Muslims' buying this property from them arose – al-Wansharīsī's inclusion of this text is further indication of his engagement with and knowledge of the Mudéjars' varied circumstances. Ibn ᶜĀṣim's complaint regarding *alleged* Mudéjar status, and his lengthy discussion with al-Saraqusṭī regarding the nature and necessity of the pacts concluded between Mudéjars and their Christian overlords, indicates an understanding among Mālikī jurists of Mudéjars as Muslims who ideally enjoyed a number of legal protections, but who were under the constant threat that the provisions of their treaties would be revoked or violated.

This calls into question Epalza's assertion that the distinction between Mudéjars and Moriscos was meaningful only for the Christian authorities because, according to Epalza, Muslims considered themselves Muslims in both periods.[151] The legal literature, including the *fatwā*s of Ibn Rabīᶜ, al-Wansharīsī and al-Wahrānī, among others, points to a legally significant progression from Mudéjars who are under treaty and enjoy particular rights, to Mudéjars whose relevant treaty has been broken in whole or part (which was considered inevitable), to Moriscos (although not termed as such by al-Wahrānī) who have lost any pretense of rights or freedoms, have been forcibly

[150] Al-Wansharīsī, *al-Miᶜyār*, 2:151.
[151] Epalza, "La voz oficial," 280; *idem*., "L'Identité onomastique et linguistique des morisques." In *Actes du II symposium international du C.I.E.M. sur religion, identité et sources documentaries sur les morisques andalous*, ed. Abdeljelil Temimi (Tunis: ISD, 1984), 270.

converted, and are regularly coerced into violating their own religious precepts. As argued above, al-Wansharīsī was addressing in *Asnā al-matājir* the case of a group of emigrants who had made a voluntary choice to abandon property which had remained in their possession, and to which they apparently felt confident they could return; thus they fall under this first category of having been true Mudéjars. The Marbellans also fit into this category, but appear to be on the verge of slipping into the second category, those whose treaty has been broken. This can be gathered from Ibn Qaṭīya's description of the situation of the man in question, which reveals that while the authorities remained somewhat responsive to his negotiations, the Christian inhabitants or authorities were also continually attempting to usurp the Mudéjars' rights. Al-Wansharīsī's answer likewise indicates that the Marbellans were still under a valid treaty – he warns that the ruler's word concerning his fidelity to the treaty should not be trusted,[152] that other wrongdoers will seize control of Muslims' properties and families even if the authorities keep to the treaty;[153] and that Mudéjars are unable to complain against unjust taxes for fear of the treaty then being broken.[154] Ibn Qaṭīya's description of the Marbellans as not only capable of emigrating, but as having received permission to do so, further indicates an awareness that Mudéjars were often required to secure official permission to leave, which also may explain Ibn Rabīʿ's and al-Wansharīsī's references to schemes and strategies for leaving, possibly to acquire a permit or to evade the need for one. The seizure of the Galerans' property, the Marbellans' need for an advocate, and the Andalusī emigrants' trouble finding work in

[152] Appendix B, 390.
[153] Appendix B, 391.
[154] Appendix B, 393.

the Maghrib would also have contributed to al-Wansharīsī's knowledge of the difficulties facing them.

What this shows is not only that al-Wansharīsī's minimum knowledge of Mudéjar circumstances extended well beyond what some scholars have been eager to dismiss as negligible, but also that the jurist likely understood Ibn Qaṭīya's questions to relate to Mudéjars who were living in or had emigrated from communities which were relatively empowered, in comparison with the Galerans for example. He clearly found it impermissible for Mudéjars like the Marbellans to voluntarily endure subjection to Christian rule even under seemingly generous or relatively intact treaties, but more importantly, he also makes it clear that he expects their situation to worsen: their property would be seized, their rights curtailed, and presumably their ability to emigrate would accordingly diminish. Given the views that al-Wansharīsī quotes from Ibn Rabiᶜ and Ibn ᶜĀṣim concerning the inevitability of large-scale treaty violations and steadily worsening conditions, the idea that this one man from Marbella, who had become an accidental mediator after failing to find his brother, could single-handedly stem the tide of injustices being committed against his townsfolk must have seemed short-sighted at best.

While Sabbagh and Harvey both argued for al-Wansharīsī's grasp of past events, they part ways regarding the jurist's future predictions. As noted above, Sabbagh remarks that it was as though al-Wansharīsī had foreseen exactly what was to transpire; the Morisco period began just a decade after the composition of *Asnā al-matājir*. Harvey, on the other hand, seeks to defend Mudéjars and Moriscos against al-Wansharīsī with recourse to their actual conditions:

> The piety of the Mudejars fell below the standard of the most authoritative teachers, but it was Islamic piety nevertheless. The rigorists, such as al-Wansharīshī (sic), put forward the view that Islamic piety became dangerously weakened by contact with Christians. No doubt many cases would have backed up the view that all contact with a Christian-dominated society was ultimately corrosive, but even the sparse evidence available to us from within Mudejar Islam gives ample proof that Islamic devotion and Islamic virtues could also flourish under the conditions which people like al-Wansharīshī feared so much. Probably the most cogent arguments against him would come from the numerous Morisco documents from the sixteenth century, which show that under conditions of close contact, when Muslims were being forced willy-nilly to attend Christian services, they remained deeply attached to the basic tenets of their faith, and that ignorance of Arabic, cited by him as a sign of spiritual decay, could go along with a stubborn determination to preserve the old religion, even under extremes of persecution . . . Islam did survive among the Mudejars as a structural and organized faith, preserving the essential virtues and pieties in spite of the misgivings expressed so forcefully by *muftī*s, such as al-Wansharīshī.[155]

Harvey continues by offering an example of a fifteenth-century *istiftā'* from Ávila which demonstrates a concern for following Mālikī law regarding the permissibility of praying on a particular type of prayer rug. Noting that al-Wansharīsī had singled Ávila out as an example of the religious decline accompanying subject status, Harvey argues that the persistence of such concerns shows that "Al-Wansharīshī was mistaken in thinking of Ávila as a place where laxity prevailed."[156]

Harvey fundamentally misunderstands al-Wansharīsī's *fatwā*s, takes it upon himself to define what Islamic "virtues and pieties" should be considered the essential ones, and clearly believes that, had al-Wansharīsī only been able to see how steadfastly Moriscos clung to Islam, he could not have described them as weak in faith. In my reading of al-Wansharīsī, the jurist condemns as weak in faith or even as borderline apostates only those Muslims whom he views as voluntarily choosing to live under Christian rule despite having the capacity to emigrate; or who do not have the capacity to emigrate but who are 'content' with the humiliations, impurities, and deficiencies in

[155] Harvey, Islamic Spain, 60-61.
[156] Ibid., 62-63.

practice that their subject status entails. Again, we do not have any *fatwā*s from al-Wansharīsī addressing the situation of Muslims who were described as incapable of emigrating, but from what may be cautiously gathered from *Asnā al-matājir* and the Marbella *fatwā*, there appears to be no evidence that he would similarly condemn those who were experiencing "the extremes of persecution" if that persecution rendered them incapable of emigrating, and especially if they maintained a steadfast desire to be somewhere else where they could pursue their ritual obligations more fully and openly.

What we do have from al-Wansharīsī is a fairly clear picture of what he considers to be optimal expressions of "Islamic devotion and Islamic virtues." He specifies standards for the performance of a number of ritual obligations, stating for example that alms must be collected and distributed on behalf of a legitimate ruler and that the beginning and end of the month of Ramadan must be officially certified by a reliable witness charged with that task. Al-Wansharīsī also elaborates upon a number of essential values, including a preference for improving one's standing with God and in the hereafter over improving or maintaining a life of material comfort in this world; a trust in God that He will provide a new homeland and livelihood for those who emigrate for His sake; a preference for Muslim rather than Christian supremacy and allegiance; and of course, emigration or the firm intention to emigrate if and when that becomes possible. The jurist does not make the claim that Mudéjars were unable or unwilling to pray, fast, pay alms, or verify the purity of their prayer rugs; he was stating that their performance of these actions while under Christian rule and surrounded by Christians who were politically and socially dominant inevitably would be incomplete or invalid, and that contentment with this failure to perform valid acts

of worship in the absence of any compelling need to endure this state of affairs was unacceptable, impermissible, and ought to be unconscionable for Muslims with the right priorities. It is unclear how concern for a ritually pure prayer rug coupled with ignorance of Arabic, forced church attendance, or the willful endurance of extreme persecution would have impressed al-Wansharīsī or proved him wrong; if anything, such conditions would confirm the jurist's conviction that these Muslims must try to emigrate if possible, or that their ancestors should have emigrated while they had the chance and spared their progeny this humiliation.

It is also unclear why al-Wansharīsī should need to be proved right or wrong on moral grounds. His *fatwā*s on the obligation to emigrate offer us an invaluable window into the convictions, legal opinions, and legal methodology of one important, fifteenth-century Fāsī jurist who was writing just prior to the permanent fall of al-Andalus. It is hoped that examination of the reception of his *fatwā*s among later jurists – taken up in chapter four – will also offer profitable insight into the continued trajectory of Islamic legal thought on the issue of Muslims living under non-Muslim rule. Yet the attempt to 'prove' that the piety of a particular group of Moriscos, who lived under very different circumstances than did the Mudéjars of al-Wansharīsī's time, ought to have been considered sufficient and impressive by this particular jurist is a curious endeavor. Even prior to examining the contemporary situation in North Africa, it should not surprise us that al-Wansharīsī required Muslims to exert their utmost effort in order to avoid and denounce living under Christian rule and compromising the fulfillment of their religious obligations. It should also not surprise us that al-Wansharīsī's criteria for adherence to Islamic law might reach beyond such concepts as 'piety,' 'virtues,'

'faith,' 'devotion,' 'values,' 'tenets,' and 'spiritual' health; in other words, that he might consider inner faith and beliefs to be insufficient or invalid in the absence of valid ritual performances, and that he does not share the modern West's enthusiasm for the privatization and secularization of religion or the pursuit of religious pluralism as an end in itself. Harvey admits at the beginning of the quoted passage above that Mudéjar (and Morisco) adherence to Islamic practices would have fallen below the standards of jurists such as al-Wansharīsī, but he clearly disapproves of the latter's application of those standards to Iberian Muslims and feels al-Wansharīsī ought to have realized that the Mudéjars were perfectly devout Muslims – that is, that al-Wansharīsī ought to have had a different vision of Islam and its place in the world.

While Pormann and others have critiqued this type of approach, Miller has been the most recent to pursue the moral case against al-Wansharīsī in *Guardians of Islam: Religious Authority and Muslim Communities of Late Medieval Spain* (2008), which explores the efforts of Mudéjar religious leaders in fifteenth-century Aragón to preserve Islamic traditions. Miller successfully draws on a range of Mudéjar documents to demonstrate that the communities in her study diligently strove to adhere to Islamic law and to maintain Islamic cultural norms to the extent possible, and she argues that Mudéjar jurists could be quite cautious and methodical in their adaptations of Islamic law to their own contexts. Miller writes that al-Wansharīsī belonged to a rigorist group of jurists who, despite this reality, "refused to envision a Muslim exclave as a legitimate community and so dismissed the Mudejars as disobedient exiles."[157] Within this group, al-Wansharīsī further "was less willing than any of his colleagues to accept and explore

[157] Miller, *Guardians*, 23. I would argue that al-Wansharīsī did not 'dismiss' the Mudéjars; rather he appears to have found their situation quite serious.

sympathetically the Mudejar predicament."[158] Finally, Miller (erroneously) describes the jurist as having directly confronted Mudéjars who described themselves as incapable of emigration, and accused them of deception:

> The Mudejars protested that the conditions of their lives made it impossible to emigrate; al-Wansharīsī accused them of being disingenuous. They might complain that they could not support themselves in dar al-Islam, but it was a "fallacious supposition [that things were bad in North Africa]" . . . Unwilling to condone the Mudejar as a hero or guardian of Islam, Al-Wansharisi promoted the opposite interpretation: the Mudejar as collaborator.[159]

Miller, like Harvey, seeks to show that Mudéjars were not weak in faith, and argues on this basis against the stance that she interprets al-Wansharīsī to have adopted in his *fatwā*s. Unlike Harvey, however, Miller does not imply that al-Wansharīsī might have seen that he was mistaken had he realized how devout the Mudéjars really were. Rather, she characterizes al-Wansharīsī as someone who ought to have known better already, but who willfully refuses to envision, accept, condone, or show any sympathy toward Mudéjar efforts to maintain their religious practices.

All heroes need villains, and Miller, like many before her, finds ample reasons to cast al-Wansharīsī in this latter role. Although her depiction of al-Wansharīsī remains less dramatic than that of Mu'nis, her approach nonetheless demonstrates the persistence of the idea that the jurist was willfully ignorant of Mudéjar realities; while Mu'nis had focused on al-Wansharīsī's refusal to acknowledge Mudéjar suffering, Miller stresses his refusal to accept them as devout Muslims. Although scholars have long since abandoned Mu'nis's claim that al-Wansharīsī ruined Iberian Islam, Miller does advance one new argument that even Mu'nis might have considered an exaggeration:

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[158] Ibid., 39.

[159] Ibid., 39. Brackets are in the original. The emigrants in *Asnā al-matājir* are not described by Ibn Qaṭīya as having claimed that it was impossible for them to emigrate, and they had of course already emigrated. What they are reported as having complained about is their impoverished state in the Maghrib, on the basis of which they renounced the obligation to emigrate and wished to return to Castile.

"He cited qur'anic verses that condemn harmonious coexistence – very much what some Spanish historians would idealize as *convivencia* – as an illness of the heart."[160] Without conducting a thorough review myself, I suspect one would be hard pressed to find an exegete who would interpret these verses –presumably those prohibiting Muslims from taking unbelievers, Jews, and Christians to be *awliyā'* – as prohibiting "harmonious coexistence." The term *awliyā'* is best understood to mean allies or protectors in a political sense; it does not mean 'friends,' although this is a common fallacy.[161] Miller's statement that al-Wansharīsī considers the Mudéjars to be rebels is more on the mark here, although this remains an exaggeration, and this characterization must of course be qualified to include only those Muslims who are capable of emigrating but who refrain from doing so. Al-Wansharīsī and other Mālikī jurists argued that residence in non-Muslim territory amounted to political allegiance to the non-Muslim ruler of that territory, especially where a pact had been signed between the Muslims and non-Muslims. A profession of allegiance to an enemy power could indeed be considered treacherous – but this is not a major focus of al-Wansharīsī's *fatwā*s on emigration; in *Asnā al-matājir* and the Marbella *fatwā*, living as subjects of the enemy is more often described as disobedience to God and the wilfull disgracing of Islam than as palpable military assistance to the enemies.

Miller's assertion that al-Wansharīsī's citation of these Qur'ānic verses amounts to a prohibition of harmonious coexistence is also misleading on two further counts. First, al-Wansharīsī makes clear that what he finds unacceptable is the submission of Muslims to Christian rule – not the mere fact of Muslims and Christians living in

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[160] Ibid., 39.
[161] Some translations of the Qur'ān render *awlīyā'* as 'friends,' which is unfortunate. In Sufi parlance, *awlīyā' Allāh* is also often rendered "friends of God."

proximity. He repeatedly stresses that it is Islam which must have the upper hand and that it is only permissible to live among non-Muslims when they have accepted an inferior, *dhimmī* status. Second, 'harmonious coexistence' bears absolutely no resemblance to the state of affairs al-Wansharīsī and others describe as prohibited in the legal literature, or that which unfolded as the Mudéjar period came to a close and Iberian Muslims were first forcibly converted to Christianity and then expelled.

Unfortunately, Miller is not alone in characterizing Mālikī jurists' complaints as centering on a mere coexistence with Christians. Rubiera Mata, despite writing primarily about Moriscos, claims that "the fundamental problem of these Muslims, aside from the pressures of all types that they had to suffer from the Christian authorities and society, is that their own religion prohibited their coexistence with Christianity."[162] This position echoes that of Maíllo Salgado, who urged greater recognition of Muslims jurists' role in the downfall of Spanish Islam, and of course Mu'nis, who likewise found al-Wansharīsī himself to be liable for this extinction. Rubiera Mata further asserts in the same passage that Islamic law allowed no exceptions to the obligation to emigrate from Christian territories.[163] Although a number of scholars have described al-Wansharīsī's strict *fatwā*s as reflecting the jurist's angry, emotional reaction to the devastating loss of al-Andalus, it may well be that some of the least flattering, exaggerated characterizations of Mālikī jurists' positions which have been adopted in the literature reflect the offensiveness of those positions to modern liberal sensibilities.

[162] Rubiera Mata, "Los Moriscos," 537; my translation.
[163] Ibid., 537.

Al-Wansharīsī's Knowledge of Islamic Law

The last of Mu'nis's assertions regarding al-Wansharīsī's *fatwā*s whose legacy is to be examined here is the assumption that this jurist was relatively ignorant of Islamic law, and that had he been more skilled in his profession, he surely would have ruled more leniently. For Mu'nis, Islamic law was essentially tolerant and flexible, and amendable to adaptation to fit the changing circumstances of Muslim communities and individuals. While most authors of *adab al-iftā'* literature would agree that *fatwā*s must be grounded in the concrete realities of the present situations and that they therefore change with time and place, this does not mean that all types of circumstances are legally relevant reasons for change or that the adjustments required by legally valid considerations would necessarily produce a more 'tolerant' ruling than the standard Mālikī rule. Thus, although part of Mu'nis's statement correlates to a known legal principle, his questionable assumption here is that the circumstances of the Mudéjars were such that any truly competent jurist would have been compelled to issue a more lenient ruling than that of al-Wansharīsī. The historian takes al-Wansharīsī to be representative of the deteriorated state of knowledge in the ninth/fifteenth century, when lesser jurists (*muqallid*s) merely memorized and repeated the legal pronouncements of earlier authorities (*mujtahids*, jurists capable of independent legal reasoning) without understanding them or realizing that they are inappropriate for the current context.

Although several later scholars have indeed perpetuated this line of thinking, these assumptions have more often been replaced with the argument that al-Wansharīsī was stricter or more orthodox than other jurists, rather than mistaken, in

his understanding of the law. Those scholars who have directly or indirectly agreed with Mu'nis as to al-Wansharīsī's inferior legal ability include Maíllo Salgado, Molino Lopez, and Turki, who all agree that the jurist's *fatwā*s are proof of the lack of *ijtihād* in his time.[164] Molina Lopez and Harvey both consider some of the Qur'ānic verses cited by the jurist to have been misinterpreted or misapplied. Molina Lopez, who repeats (with little acknowledgement) most of Mu'nis's critiques of al-Wansharīsī, argues that while the jurist may have found justification for his heartless rulings by repeating earlier jurists' opinions, in so doing he failed to apply the spirit of the law, refused to take into account the special predicament of the Mudéjars, and botched the legal analogies which he based on particular Qur'ānic verses.[165] According to Molina Lopez, al-Wansharīsī erred by repeating the analogies of his predecessors, who had "claimed that the Qur'ān commanded, in various places, the obligation to emigrate for true believers, when in reality the cited passages only contain vague allusions to events from the Medinan period."[166] Harvey makes a remarkably similar comment: "The Koran, of course, does include very many references to *hijra* (exile), but the exile in question is that of the Prophet who left Mecca to take refuge in Medina; so these are not strictly relevant to the exile of Muslims who might think of leaving Christian Spain."[167] In this passage, Harvey was commenting on a reference made in the Granadan circular mentioned above, and not directly on *Asnā al-matājir*, but the circular refers to the same verses that al-Wansharīsī cites at great length.

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[164] Maíllo Salgado, "Consideraciones," 181-82; Molino Lopez, "Algunas consideraciones," 429; Turki, "Pour ou contre," 323.
[165] Molina Lopez, "Algunas consideraciones," 427-30.
[166] Ibid., 429; my translation.
[167] Harvey, *Islamic Spain*, 60. Exile is not the best translation of *hijra*, because *hijra* often required a severing of ties with the land left behind, as well as with its inhabitants; exile, on the other hand, suggests a continued centering around the place which the emigrant has left.

In *Asnā al-matājir*, al-Wansharīsī not only lists those *ḥadīth* reports and Qur'ānic verses considered most relevant to this obligation, but explains several types of *hijra*, specifies which of those types remain valid for Muslims in later times, and emphasizes what the Companions gave up in order to emigrate and how that relates to the disgruntled emigrants in question; in other words, he presents a sophisticated legal argument for the use of those verses in support of emigration from non-Muslim territory. What makes his argument authoritative is the extent to which his peers and other readers would have found it convincing, methodologically sound, and consistent with other legal sources – including works of Qur'ānic exegesis, *ḥadīth* commentary, jurisprudence, and substantive law – which they held to be authoritative. Harvey at some point realized his error and stated matter-of-factly in his more recent volume that most Muslim jurists had required emigration from Christian territories, and that "this duty to emigrate was regarded as imperative, particularly because the Prophet himself, when his followers were subjected to persecution by the rulers of Mecca, had led them into that emigration to Yathrib (Medina) that marked a vital stage in the unfolding of Islamic history."[168] The comments of Molina Lopez and Harvey, Harvey's about-face, and a great many of the examples given throughout this chapter, all illustrate that modern scholars' critiques of the legal arguments advanced and positions adopted by such jurists as al-Wansharīsī often reveal more about these modern scholars' lack of familiarity with Islamic law than they do about the jurists' abilities, the soundness of their evidence or rulings, or the extent to which their audiences would have found their rulings authoritative.

[168] Harvey, *Muslims in Spain*, 64.

Al-Wansharīsī's Opinions in Comparison to Those of Other Jurists

Many scholars, on the other hand, have now moved decisively away from Mu'nis's characterizations of al-Wansharīsī as incompetent, representative of all that is wrong with a purported post-*ijtihād* Islamic legal practice, or, explicitly at least, as the villainous 'bad jurist,' who condemned as infidels even those Mudéjars incapable of emigrating, in contrast to the selected 'good jurist' of the day, sympathetic to human suffering and desirous of harmonious coexistence. The shift away from stark condemnations of al-Wansharīsī – or at least from their dominance – occurred through two primary stages. First, a number of articles written in the late 1980's and early 1990's examined Islamic legal positions on *hijra* in a broader context, taking into account contexts other than the fall of al-Andalus and in some cases including schools of law other than the Mālikī one. The first such article, that of Buzineb, deserves mention here because he cites a number of Mālikī opinions which also insisted upon emigration, and thus challenge the idea that al-Wansharīsī was uniquely strict.[169] Buzineb presents an edition and summary of a *fatwā* issued in Oran in approximately 794/1392 by Ibn Miqlāsh, who prohibited residence in non-Muslim territory, but who nonetheless answered a number of Mudéjar questions regarding prayer. The historian also summarizes a number of *fatwā*s on emigration which al-Zayyātī (d. 1055/1645) includes in his *fatwā* collection, *Al-Jawāhir al-mukhtāra*,[170] and compares all of these rulings with that of al-Wahrānī, which he declares to be encouraging and supportive, revolutionary, and the only original position on the question of emigration.[171] Although Buzineb's references to the opinions recorded by al-Zayyātī were themselves

[169] Buzineb, "Respuestas," 53-67.
[170] This jurist and his compilation will be discussed in chapter two.
[171] Ibid., 60.

original and invaluable, they were also unfortunately ignored, and his analysis failed to influence scholarly treatments of al-Wansharīsī, for an understandable reason: he offered absolutely no context for either this *fatwā* collection or the opinions contained therein. Some of these opinions are of Andalusī provenance, some Maghribī; some treat Mudéjars and some Muslims in occupied territory within Morocco; some are contemporary to al-Wansharīsī, and some are not; but Buzineb offered mere partial names with no death dates, not even for al-Zayyātī. He also failed to challenge the notion that al-Wahrānī was addressing the same essential question posed to these other jurists. I take up the task of placing al-Wansharīsī's *fatwā*s in the context of his peers' opinions on emigration, as recorded in this important compilation, in the next chapter.

Masud then traced the doctrinal development of the obligation to emigrate from its earliest foundations through modern-day political movements and emigration from Muslim to non-Muslim countries. He concluded that the doctrine of *hijra* "has been quite adaptable to varying political contexts. The same texts have been interpreted to justify widely different views;" meaning that no one strict and static interpretation of this doctrine prevailed.[172] Maribel Fierro followed with another overview of the concept of *hijra*, drawing on Masud but offering much more comprehensive coverage of the modern and contemporary periods.[173]

Citing Masud's conclusions, along with recent work refuting the long-held myth of the 'closure of the gate of *ijtihād*,' she too emphasized the adaptability of the doctrine of *hijra* and may have been the first to propose a points-on-a-spectrum model of jurists'

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[172] Masud, "The Obligation to Migrate: The Doctrine of *Hijra* in Islamic Law," in *Muslim Travellers: Pilgrimage, Migration, and the Religious Imagination*, ed. Dale F. Eickelman and James Piscatori (Berkeley: University of California Press, 1990), 45.
[173] Maribel Fierro, "La Emigración," 11-41.

positions regarding emigration from Christian territory in the Iberian peninsula. Fierro placed al-Wansharīsī and a number of other jurists – many of whom he cites in *Asnā al-matājir* -- in a group requiring emigration for those who are capable of leaving, and lists as this group's primary rationales a list matching the reasons given in al-Wansharīsī's Marbella *fatwā*.[174] According to Fierro, this first group was distinct from another group which allowed residence in non-Muslim territory as long as the religion was not threatened; al-Wahrānī is taken to be an extreme representative of this second group, despite the author's apparent agreement with Sabbagh that al-Wahrānī was addressing Muslims unable to emigrate, and thus a different type of Muslim than those whom al-Wansharīsī had required to emigrate.[175] Fierro's treatment of al-Wansharīsī is refreshingly balanced, not only because he is not singled out as particularly evil, but because she is one of the first to portray his ruling as rational and understandable, as opposed to cold-hearted, emotional, or based on flimsy or fabricated evidence. Nonetheless, I disagree with her assessment that al-Wansharīsī and al-Wahrānī tackled the same basic problem, which she describes as the danger of Muslims' acculturation into Christian society, with two different solutions: emigration and dissimulation (*taqīya*). Rather, these two jurists were addressing distinct problems, a point which will be addressed further in the chapter four.

Abou El Fadl then published an overview and analysis of legal positions held on a number of issues related to Muslim minorities, across all four major law schools and stretching from the second/eighth to the eleventh/seventeenth centuries.[176] The permissibility of residence in non-Muslim territory, or the obligation to emigrate,

[174] Fierro, "La emigración," 20-21.
[175] Ibid., 21-22.
[176] Abou El Fadl, "Muslim Minorities," 141-87. The author does treat other law schools to a lesser extent.

formed a major portion of Abou El Fadl's examination, and his treatment of Mālikī opinions included in large part al-Wansharīsī's *fatwā*s and the earlier authorities cited therein. This article is particularly valuable not only for its comparative treatment of doctrinal controversies and opinions, but for the author's intimate knowledge of Islamic law and legal history. With respect to Mālikī positions on the obligation to emigrate, Abou El Fadl posited a doctrinal development over time and in response to historical conditions, especially territorial losses in the Iberian peninsula. Relative to the other schools, he stated that the developed position of the Mālikīs was particularly uncompromising, and is best represented by al-Wansharīsī's two *fatwā*s; thus for Abou El Fadl, al-Wansharīsī was not necessarily particularly strict in comparison to other Mālikīs, but the developed Māikī position was nonetheless strict in comparison to contemporary opinions within the other schools.[177] Abou El Fadl's most important contribution here is his emphasis on a plurality of context-dependent positions.

The second development which contributed to the shift away from characterizations of al-Wansharīsī as uniquely reprehensible was Van Koningsveld and Wiegers' 1996 article introducing two new sources into the discussion: Ibn Rabīʿ's *fatwā* discussed above, and a *fatwā* issued by the four chief judges of Cairo (representing the four Sunnī schools of law) in approximately 1510 C.E.; this latter ruling also addressed a series of issues related to Muslim residence in Christian Spain.[178] Following generous summaries of each *fatwā*, Van Koningsveld and Wiegers present a typology of Islamic thought on the legal status of Mudéjars by dividing jurists into two general categories:

[177] Ibid., 153-54.
[178] Van Koningsveld and Wiegers, "Islamic Statute," 19-58.

pragmatists and hardliners.[179] They list the following jurists as among the pragmatists: Cordóban judge Ibn al-Ḥājj (d. 529/1134), because he did not agree that the property of conquered Muslims should follow the rule for that of new converts in *dār al-ḥarb*; Moroccan *muftī* al-ᶜAbdūsī (d. 849/1446), because he allowed Muslims to stay in Iberia if their lives were threatened and accepted the testimony of those who had stayed behind for this reason;[180] and the opinions of the four judges in Cairo, because they allowed Mudéjars to postpone emigration until conditions for this were favorable, and because the Mālikī *muftī* specified that Muslims were only required to emigrate if this would cost them up to one third or less of their wealth.

Among the hardliners, Van Koningsveld and Wiegers place the following: Ibn Rabīᶜ, whose opinions largely overlap with those of al-Wansharīsī; Ibn Miqlāsh, noted above; Ibn ᶜArafa (d. 803/1401), because he did not accept the legitimacy of documents whose validity had been attested to by Mudéjar witnesses; and al-Wansharīsī, whom these scholars describe as "the last representative of the hard line with respect to the position of Muslims under Christian rule in Spain."[181] It is important to note that these authors take particular care throughout to specify that they are discussing only in rulings related to the position of Muslims under non-Muslim rule in Spain. They do not give the impression that Spain was the only such case at the time, and they may well have been aware that many of the jurists mentioned in Buzineb's article had ruled on the status of Muslims under Christian rule in Morocco.

After establishing this typology, Koninsgveld and Wiegers conclude that the pragmatic line of thought tended to prevail during peaceful times, while the hard line

[179] Ibid., 49-55.
[180] On ᶜAbdūsī, see also Wiegers' analysis and partial translation of this *fatwā* in Islamic Literature, 86-87.
[181] Van Koningsveld and Wiegers, "Islamic Statute," 52.

predominated during times of war or confrontation. Although this theory shared with that of Abou El Fadl an emphasis on historical context, Koninsgveld and Wiegers specify political context to be the most influential such context, and suggest a back-and-forth shifting of opinions rather than a linear progression from more lenient to more strict.

Although later scholars have tended to adopt Van Koningsveld and Wiegers' typology, this has co-existed alongside a still-powerful impulse to single out al-Wansharīsī as in some measure more 'orthodox' or representative of Mālikī thought. Miller, in her 2000 article on the obligation to emigrate, described al-Wansharīsī's opinion as "one extreme in a continuum of rulings on the Mudejar question."[182] Although she appears to soften this assessment in her 2008 book, where she initially presents the jurist as one member of a rigorist group of jurists who required Mudéjars to emigrate at the expense of all their possessions, she later identifies him as the least sympathetic member of this group, i.e., the most extreme.[183] Miller's argument that al-Wansharīsī remains more extreme than other jurists rests in part on her analysis of two previously unexamined *fatwā*s which she had introduced in her article and which she places squarely among the pragmatist rulings (she adopts Van Koningsveld and Wiegers' rough categories of pragmatists and rigorists, although she notes that these classifications are not water-tight).[184] Her case for considering one of these jurists a pragmatist, Granadan *muftī* Muḥammad b. ᶜAlī al-Anṣarī al-Ḥaffār (d. 811/1408),

[182] Miller, "Obligation to Emigrate," 258.
[183] Miller, *Guardians*, 22-23, 39; see quote above. Miller also notes that other scholars have characterized al-Wansharīsī as "representative of the party line of Islamic authorities," 22.
[184] Ibid., 28 (on rigorist and pragmatist categories), 37 (on these jurists as pragmatists). For her introduction of these two rulings, see Miller, "Obligation to Emigrate," 266-88 (pages 278-88 consist of translations, transcriptions and images of the *fatwā*s).

elaborated most fully in her article, will serve to demonstrate the questionable nature of this comparison.[185]

Al-Ḥaffār was asked if one spouse may emigrate without the other, and if so, if the husband must pay his wife her *ṣadāq* (dower). Although the jurist "unequivocally endorsed emigration," Miller classifies the ruling as pragmatic because al-Ḥaffār requires the husband to pay his wife's dower prior to emigration, regardless of which of the spouses emigrates without the other.[186] Miller makes much of this requirement that a husband must pay his wife her dower if they divorce as a result of emigration, comparing al-Ḥaffār's opinion to those of al-Māzarī, al-ᶜAbdūsī, and others who upheld under certain circumstances the legal probity of Mudéjars and the validity of their witnesses' testimony and judge's pronouncements.[187] Al-Ḥaffār, however, was not asked specifically about contracts, testimony, or probity, nor does he discuss these issues in his response; he simply states that a Mudéjar man must pay to his wife anything he owes her, dower or otherwise, if one of them emigrates without the

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[185] Miller's other case, concerning a *fatwā* issued by Granadan chief judge Yūsuf b. Abī al-Qāsim al-ᶜAdārī al-Mawwāq (d. 872/1492), is difficult to pin down and thus does not make a good example, even though it appears that al-Mawwāq in fact issued a more lenient ruling. Al-Mawwāq's ruling ("Obligation," 284-88) includes within it the *fatwā* of another jurist, Ibrahīm al-Basṭī, whom Miller describes as a contemporary of al-Mawwāq ("Obligation," 273). In her article, Miller makes the unconvincing case, based only on al-Mawwāq's own words, that his *fatwā* is pragmatic because al-Mawwāq allowed a man to enter Christian territory in order to pay his for his parents' emigration and because the jurist concluded that anyone entering enemy territory would be judged on the strength of his reason for doing so (273-75; 278-80). The argument that this is a flexible, pragmatic ruling is weak because the details in the *fatwā* make it seem as though al-Mawwāq has conceived of rescuing one's parents as a type of captive ransoming, the classic one valid excuse among Mālikī jurists for entering enemy territory. As Miller erroneously interprets the question posed to al-Mawwāq to request that he "present both sides of the issue," (272) she may have thought that al-Basṭī's opinion represented the 'other side.' In her book, she swings the other way without explanation, using al-Basṭī's *fatwā* to prove the pragmatism of al-Mawwāq's opinion as though al-Mawwāq had authored the entire *fatwā*; here Miller does not mention al-Basṭī at all (37-38). Al-Basṭī stated that Mudéjars must be 'faqihs of themselves' and judge whether the benefits of entering enemy territory outweigh the negative consequences of doing so.

[186] Miller, "Obligation to Emigrate," 267.

[187] Ibid., 266-71.

other.[188] The jurist does not explicitly tie this to the terms of their marriage contract, nor does he require the man to honor any other contracts he might be party to, nor does the jurist face the question of what a man should do if settling up with his wife would then result in his having insufficient funds with which to emigrate. Rather, al-Ḥaffār may have obligated the man to pay his wife her dower on ethical grounds or out of interest for the common good (*maṣlaḥa*); what is important to note is that he does not offer an explanation, moral, legal, or otherwise, as to why the man should honor his wife's rights prior to emigrating. Assuming that this *fatwā* sets forth al-Ḥaffār's considered position on a contested issue – the legal probity of Mudéjars – is an unjustified stretch of the evidence. Miller's case that this *fatwā* is pragmatic in comparison with al-Wansharīsī's rigorism or extremism is thus unconvincing.

Conclusion

Scholarly positions on the relationship of al-Wansharīsī's *fatwā*s to other Mālikī rulings on the obligation to emigrate have thus evolved over time, moving away from an explicit condemnation of the jurist as unusually cruel, uninformed, and illiberal. This shift has largely been effected by the introduction of additional rulings into the discussion, forcing scholars to account for a range of opinions rather than simply those of al-Wansharīsī and the jurists whom he cites, such as al-Māzarī. Abou El Fadl and Molénat suggest that the positions adopted in these *fatwā*s hardened over time and that al-Wansharīsī's opinions came to be the representative or dominant ones, while Harvey

[188] Ibid., 278-79 (translation), 280 (transcription).

refers to the jurist's *fatwā*s as orthodox and Miller locates them at the far rigorist end of a continuum of rulings.[189] Van Koningsveld and Wieger's introduction of a 'pragmatist' and 'hardliner,' or rigorist, typology of rulings has been influential, but as of yet no clear consensus on how to represent al-Wansharīsī's opinions has emerged.

In the following chapters, analysis of al-Wansharīsī's arguments and strategic choices will show that *Asnā al-matājir* and the Marbella *fatwā* are not necessarily any more strict or rigorist than the opinions of al-Māzarī, al-ᶜAbdūsī, or al-Wahrānī, the three jurists whose opinions are held most often to be more lenient or pragmatist than those of al-Wansharīsī. A comparison of al-Wansharīsī's *fatwā*s to those of his Moroccan contempories will further show that his was not the most strict ruling on the obligation to emigrate in his time; and an examination of later Mālikī opinions on the obligation to emigrate will demonstrate that al-Wansharīsī's opinions did go on to become the recognized authoritative precedent on this issue, for identifiable reasons.

[189] For Molénat, see "Le problème," 394, 399; the positions of the others are cited above. Molénat's arguments will be taken up in chapter five.

CHAPTER TWO

Al-Wansharīsī in Contemporary North African Context

Chapter one aimed to establish that the immediate audiences for al-Wansharīsī's two *fatwā*s on emigration consisted of North African legal professionals rather than lay Iberian Muslims, and that these two texts must be understood as responses to specific questions posed by Ibn Qaṭīya, rather than as independent or comprehensive treatises on the obligation to emigrate. The present chapter continues this re-assessment of al-Wansharīsī's *fatwā*s by placing them in their contemporary intellectual and historical contexts. Understanding the contemporary context will lay the foundation for looking back in chapter three, in order to examine al-Wansharīsī's choices of precedent, and then forward in chapter four, to explore the legacy of these *fatwā*s as legal precedents.

As shown in the previous chapter, a number of scholars have critiqued al-Wansharīsī for demonstrating little concern for the plight of the Mudejars in his *fatwā*s on emigration. This assessment is correct in the sense that Mudejars who were incapable of emigration clearly are not a major focus of either *Asnā al-matājir* or of the Marbella *fatwā*. Not only does this group fall outside the scope of the questions posed by Ibn Qaṭīya, but al-Wansharīsī's responses also must not be viewed being exclusively informed by and concerned with Muslims in the Christian kingdoms of Iberia. Rather, the present chapter argues that these *fatwā*s are best understood as contributions to a lively contemporary juristic discourse focused primarily on the status of Muslims living under Christian rule within Morocco itself; this is especially true of *Asnā al-matājir*.

This chapter will offer a brief political history of fifteenth and sixteenth century Morocco, a preliminary inventory of one collection of *fatwā*s issued by al-Wansharīsī and his contemporaries related to Muslims living under Christian rule in Morocco, and begin to explore al-Wansharīsī's place within the intellectual milieu of late fifteenth and early sixteenth-century Morocco.

Political History of Fifteenth and Sixteenth Century Morocco

Al-Wansharīsī lived in Fez from 874/1469 to 914/1508, while some of his contemporaries who will be discussed below lived further into the sixteenth century. As the *fatwā*s themselves offer few specifics as to the dates or locations of the events they describe, a broad overview of the political history of Morocco in the fifteenth and sixteenth centuries will provide the historical context for understanding these rulings and the reasons for their compilation. This period witnessed the rise of two dynasties, numerous internal revolts and rebellions, significant foreign occupation, the transition to gunpowder warfare, and an influx of Muslim and non-Muslim refugees and emigrants from Spain.

At the opening of the fifteenth century, Sultan Abū Saʿīd ʿUthmān III (r. 800-823/1398-1420) of the Marīnid dynasty (r. 614-869/1217-1465) ruled Morocco from the dynasty's capital in Fez.[1] Marīnid rule was in decline, and Abū Saʿīd faced a number of

[1] This overview is drawn primarily from the following sources: Weston F. Cook, Jr., *The Hundred Years War for Morocco: Gunpowder and the Military Revolution in the Early Modern Muslim World* (Boulder, CO: Westview Press, 1994); Jamil Abun-Nasr, *A History of the Maghrib in the Islamic Period* (Cambridge: Cambridge University Press, 1987), esp. 103-118 and 206-227; Vincent Cornell, "Socioeconomic Dimensions of Reconquista and Jihad in Morocco: Portuguese Dukkala and the Saʿdid Sus, 1450-1557," *International Journal of Middle East Studies* 22 (1990): 379-418.

serious internal and external challenges, not the least of which was the expansion of Portugal into Morocco. In 1415, King João I ordered the occupation of Ceuta (Sabta), a major port, trading center, and destination for West African gold caravans. The failure of an attempt in 1419 to drive out the Portuguese contributed to widespread dissatisfaction with the Marīnid state.[2]

The gradual transition from Marīnid to Waṭṭāsid rule began after the assassination of Abū Saʿīd in 1420. Abū Zakarīyā' Yaḥyā I, the Waṭṭāsid governor of Salé, became regent and proclaimed Abū Saʿīd's year-old son ʿAbd al-Ḥaqq II heir to the Marīnid throne. Abū Zakarīyā' successfully defended Tangier from Portuguese invasion in 1437, a feat which helped him to remain in power until his death in 1448. Although ʿAbd al-Ḥaqq II had meanwhile come of age, two more Waṭṭāsids acted as viziers and *de facto* rulers until this last Marīnid sultan established direct rule from 1459 to 1465.

Portugal considerably expanded its holdings and influence in Morocco during the final years of Marīnid rule. Under King Affonso V, Lisbon concluded direct commercial treaties and contracts with a number of client towns on Morocco's Atlantic coast, including Salé, Anfa (now Casablanca), Safi, and Azammur.[3] In 1458, Portugal occupied the port of Al-Qsar al-Saghir (al-Qaṣr al-Ṣaghīr), between Tangier and Ceuta; a siege to recover the town was unsuccessful.[4] Two years later, Safi formally seceded from Morocco and allied with Portugal.[5] Affonso also launched the first of several

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[2] Abun-Nasr, *History of the Maghrib*, 114.
[3] Cook, *Hundred Years War*, 86-87; Cornell, "Reconquista," 381.
[4] Cook, *Hundred Years War*, 88, 93. Abun-Nasr's *History of the Maghrib* (115) incorrectly records this as al-Qaṣr al-Kabīr, an inland town further south.
[5] Cornell, "Reconquista," 381.

unsuccessful attempts to take Tangier in 1460, and authorized raids against several ports, including Asilah (Arzila), al-ᶜArā'ish (Larache), and Tetouan.[6]

After seizing control from his Waṭṭāsid vizier in 1459, ᶜAbd al-Ḥaqq had ordered most of the Banū Waṭṭās in Fez killed.[7] According to the traditional Moroccan account, ᶜAbd al-Ḥaqq then appointed a Jew, Hārūn, as vizier.[8] This deeply unpopular move was made the more so when Hārūn, the Jewish vizier, extended taxation to two traditionally exempt groups, the *sharīf*s (those who could claim descent from the Prophet Muḥammad) and the ᶜ*ulamā'*. In 1465, ᶜAbd al-ᶜAzīz al-Waryāglī, a preacher at the Qarawīyīn mosque, responded by leading a general revolt in Fez. The Idrīsid Muḥammad al-Ḥafīd al-ᶜImrānī al-Jūṭī, the leader of the *sharīf* community in Fez, was proclaimed the new ruler, and ᶜAbd al-Ḥaqq was assassinated upon his return from a military campaign. While Mercedes García-Arenal has analyzed the available sources and found much of this account to be legendary, it is clear that the people of Fez were heavily burdened by the taxes required to support ᶜAbd al-Ḥaqq's campaigns against the Portuguese, the Spanish (who reclaimed Gibraltar in 1462), and those Waṭṭāsids who controlled cities outside of Fez.[9] Among a number of competing interests and alliances within Fez, the *sharīf*s managed to seize power when this discontent turned into rebellion and brought the Marīnid line of sultans to an end.

Idrīsid rule was limited to Fez and lasted only a few years; in 876/1472, Muḥammad al-Shaykh al-Waṭṭās (r. 1472-1504) overthrew al-Jūṭī and installed himself

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[6] Cook, *Hundred Years War*, 88.
[7] Mercedes García-Arenal, "The Revolution of Fās in 869/1465 and the Death of Sultan ᶜAbd al-Ḥaqq al-Marīnī," *Bulletin of the School of Oriental and African Studies* 41, no. 1 (1978): 43.
[8] Ibid., 45.
[9] Ibid., 65.

in Fez as the first independent Waṭṭāsid sultan.[10] In this interim between the Marīnid and Waṭṭāsid dynasties, a plague ravaged Fez (1468), the Portuguese destroyed Anfa in retaliation for a trade embargo (1468-69), and al-Wansharīsī took up residence in Fez (1469). While besieging Fez, Muḥammad al-Shaykh was forced to cede Asilah and Tangier to the Portuguese (1471); he also signed a twenty-year peace treaty with Affonso.

For the remainder of the fifteenth century, the Waṭṭāsid state continued to face rivals for power, conducted regular raids against Portuguese holdings, and began to absorb a large number of Andalusī refugees as the 'Reconquista' came to an end in 1492.[11] Portugal's commercial penetration in Morocco grew through warfare as well as through economic incentives which were offered to nobles or whole populations which agreed to subordinate themselves to Portuguese rule. Affonso took al-ᶜArā'ish in 1473 and King João II (r. 1481-1495) established armed forts (*feitoria*s) in Azammur and Safi in the 1480's. Muḥammad al-Shaykh was able to prevent the construction of a fort inland from al-ᶜArā'ish in 1489, but only in exchange for a ten-year extension of the peace treaty set to expire in 1491. Portuguese expansion continued under King Manuel (1495-1521), along with frequent raids of the countryside, while Spain occupied Melilla in 1497. An Idrīsid *sharīf* founded Chefchaouen in the Rīf in the 1470's and encouraged Andalusī emigrants to join in a *jihād* against the Portuguese and their Moroccan tribal allies; these attacks amounted primarily to raids. While welcomed in areas such as Chefchaouen, where they contributed valuable military expertise, Andalusī emigrants

[10] Cook, *Hundred Years War*, 98.
[11] Ibid., 109-127.

were met with resentment and hostility elsewhere; a number of tribes near Tetouan even appealed to the Portuguese in Ceuta to help dispatch these refugees.[12]

In the early sixteenth century, Leo Africanus described Moroccans as suffering such misery as a result of war and famine that "many gladly became slaves to escape."[13] Historian Weston Cook characterizes the Portuguese and Waṭṭāsids in this period as competing "to co-opt, raid, loot, tax, and protect towns, tribes, and territories which had attained a level of self-government that the King, the Sultan, and many modern historians described as anarchic."[14] While some regions were conquered militarily, in others, largely autonomous towns and tribes sought protection from a range of masters. In 1504 Spain occupied Agadir, which Portugal quickly seized in 1505; as of 1509, a treaty between the two powers restricted Spain's activities in Morocco to the Mediterranean coast and gave Portugal a free hand on the Atlantic.[15] The Waṭṭāsids attempted to recapture ports such as Asilah and Safi in 1508 but were unsuccessful; a second attempt on Safi by a Moroccan leader form the south was thwarted in part by tribal informants to the Portuguese. Moroccan mercenaries also fought and spied for Portugal under Moroccan tribal leaders, or *qā'id*s.[16] Fearing this type of collaboration with the enemy, Sultan Muḥammad al-Burtuqālī (r. 1504-1526) forcefully evacuated several towns near Safi and Azammur and relocated disloyal tribes near Maᶜmūra prior to battles in 1514 and 1515.[17]

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[12] Ibid., 113, 147.
[13] Quoted in Cook, *Hundred Years War*, 137.
[14] Ibid., 137.
[15] Ibid., 138.
[16] Ibid., 146.
[17] Cook, *Hundred Years War*, 153-54.

Tribal leaders serving as regional rulers also assisted the Portuguese in the economic exploitation of inland areas.[18] The most prominent such *qā'id* was Yaḥyā b. Taᶜfuft (d. 1518), whom King Manuel invested as ruler of Safi and the surrounding Dukkāla region in 1516.[19] Yaḥyā b. Taᶜfuft was paid a generous salary, received bribes from regional merchants in exchange for favors, and supervised troops who collected taxes from the willing 'Moors of peace' while raiding unwilling or suspect areas. Manuel even planned to petition the Pope to allow Portugal to arm loyal Muslims, an act as prohibited by Christian law as was selling arms to Christians under Muslim law.[20]

The first half of the sixteenth century was also marked by the rise of the Saᶜdian *sharīf*s in the Sūs region of southern Morocco.[21] Muḥammad al-Qā'im b. ᶜAbd al-Raḥmān's (d. 1517) recognition as chief of Sūs in 1510 was partly a result of Portugal's need for a local representative with whom to negotiate. With the support of the Jazūlīya Sufi order, al-Qā'im organized a movement opposed to both the Portuguese and their tribal allies (including Yaḥyā b. Taᶜfuft) and to the Waṭṭāsids. The Saᶜdians acquired weaponry through trade with Spanish, French, and Genoese merchants, and came to dominate the Sūs by 1514. After al-Qā'im's death in 1517, his son Aḥmad al-Aᶜraj succeeded him and took control of Marrakesh in 1524. When Waṭṭāsid al-Burtuqālī then died in 1526, his successor Abū al-ᶜAbbās Aḥmad al-Waṭṭās (r. 1526-1545) led a series of unsuccessful military campaigns against the Saᶜdīans in response to the latter's refusal to submit taxes to the Waṭṭāsid state.

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[18] Cornell, "Reconquista," 386.
[19] Ibid., 386; Cook, *Hundred Years War*, 149.
[20] Ibid., 155.
[21] Cook, *Hundred Years War*, 167-87; Abun-Nasr, *History of the Maghrib*, 209-13.

The Waṭṭāsids and Saᶜdians each signed initial pacts with Portugal in 1526 in order to focus on the conflict with each other.[22] After Portugal's truce with the Saᶜdīans expired in 1532, al-Aᶜraj and his brother Muḥammad al-Shaykh resumed attacks on the *feitoria*s, and in 1541 succeeded in taking control of Fort Santa Cruz (Agadir).[23] From this point forward Portugal's presence in Morocco steadily declined; King João III (r. 1521-1557) withdrew from Safi and Azammur the same year, and from al-Qaṣr al-Ṣaghīr and Asilah five years later. The Waṭṭāsids meanwhile had signed a new truce with Portugal in 1536 after their own defeat in a battle with the Saᶜdians, and in 1538 Sultan Abū al-ᶜAbbās secured the support of Fez's chief judge ᶜAbd al-Wāḥid b. al-Wansharīsī (Aḥmad al-Wansharīsī's son) for the Treaty of Fez, a formal Portuguese-Waṭṭāsid peace treaty.[24] Abū al-ᶜAbbās was forced to renounce the treaty in 1543 in the face of widespread resentment.[25]

A Saᶜdian civil war which resulted in Muḥammad al-Shaykh's 1544 victory over his brother al-Aᶜraj preceded the former's conquest of Morocco from his capital at Marrakesh.[26] Muḥammad al-Shaykh captured the Waṭṭāsid sultan in the 1545 Battle of Darna, released him in exchange for the control or vassalage of most major cities in the north, and later recaptured him while conquering Fez in 1549-50. Chief judge ᶜAbd al-Wāhid al-Wansharīsī was ordered assassinated during this conquest because of his opposition to the incoming Saᶜdians.[27] The Waṭṭāsids reclaimed power for several years with help from the Ottomans in Algeria, but suffered a more decisive defeat in 1554; in

[22] Cook, *Hundred Years War*, 177.
[23] Ibid., 182-199.
[24] Ibid., 185, 194-95.
[25] Ibid., 203.
[26] Ibid., 200-11.
[27] Vidal Castro, "ᶜAbd al-Wāḥid," 153.

the course of this final Saᶜdian-Waṭṭāsid conflict, both sides hired Christian mercenaries from Spanish and Portuguese territories in Morocco.[28]

In the second half of the sixteenth century, the Saᶜdians consolidated their rule over Morocco and then expanded southward under the dynasty's greatest ruler, Aḥmad al-Manṣūr (r. 1578-1603).[29] After Muḥammad al-Shaykh was assassinated in 1557 by Ottoman Turks in his bodyguard, his successor ᶜAbd Allāh al-Ghālib (r. 1557-1574) made peace with France in 1559 and with Spain in 1564, despite the latter's seizure of an island off Morocco's Mediterranean coast. ᶜAbd Allāh al-Ghālib's son and heir Muḥammad al-Mutawakkil (r. 1574-76) ruled only briefly prior to defeat at the hands of his uncle ᶜAbd al-Mālik (r. 1576-78), who was supported by the Ottomans. The mixture of contending forces and demographic influences in Morocco at the time were well represented in the Battle of Wādī al-Makhāzin two years later, where al-Mutawakkil attempted to regain power from ᶜAbd al-Mālik with the help of Portugal. King Sebastian (r. 1557-78) of Portugal was killed in battle along with both Saᶜdian sultans; al-Mutawakkil was undermined in part by the defection of a large number of Andalusī soldiers to ᶜAbd al-Mālik's camp, where they fought alongside or against Turks, Berbers, foreign mercenaries, and European renegades and converts (ᶜ*ulūj*). After the dust settled, ᶜAbd al-Mālik's brother Aḥmad al-Manṣūr presided over a quarter century of relative peace within Morocco and profitable expansion, in the 1590's, into the Songhay empire to the south.

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[28] Ibid., 218-24.
[29] Ibid., 224-65; Abun-Nasr, *History of the Maghrib*, 212-17.

Al-Zayyātī's al-Jawāhir al-mukhtāra

The fifteenth and sixteenth centuries thus witnessed the founding and rapid expansion of Portuguese *feitoria*s and Spanish *presidio*s, along with the alliances and treaties with Moroccan cities, tribes, and sultans which allowed Portugal to maintain profitable trade relations in North and West Africa. Moroccan Muslims had been paying tribute to Portuguese rulers, serving in their armies, spying for them, and strengthening their economy through trade for the better part of a century when al-Wansharīsī wrote *Asnā al-matājir* from the Waṭṭāsid capital where Muḥammad al-Shaykh had just agreed to extend for another ten years a twenty-year peace treaty with Portugal. The Spanish would capture Melilla a few years later (1497), and Portugal would continue to expand its holdings in Morocco until the 1541 evacuations of several prominent *feitoria*s.

Given this historical context, it should not surprise us that the proper relationships between Moroccan Muslims and Christian conquerors should have been the subject of legal rulings or of a developed juristic discourse among al-Wansharīsī's contemporaries. Nor should we be surprised necessarily that this body of rulings is not included in the *Miʿyār*; al-Wansharīsī had already chosen to devote substantial space in his collection to *Asnā al-matājir* and to the Marbella *fatwā*, which address similar concerns. He also could not have included those rulings which were drafted subsequent to the completion of the *Miʿyār*.

The present study is limited to a preliminary inventory and analysis of the relevant rulings contained in the *jihād* chapter of one Maghribī *fatwā* collection, al-

Zayyātī's *Al-Jawāhir al-mukhtāra fī-mā waqaftu ᶜalayhi min al-nawāzil bi-Jibāl Ghumāra* (Selected Jewels: Legal Cases I Encountered in the Ghumāra Mountains). There are two reasons for this limitation. First, this compilation appears to contain the largest number of *fatwā*s related to Muslims living under Christian rule, or otherwise interacting with foreign occupiers, in Morocco. Mubārak Jazā' al-Ḥarb, a professor of Islamic Law at the University of Kuwait, lists nearly eighty Maghribī *fatwā* collections in a recent article, about three dozen of which post-date the Portuguese occupation of Ceuta.[30] Yet many of these are fairly inaccessible or have been lost, or include the *fatwā*s of only one or a few selected jurists, or do not include rulings on *jihād*, among other qualifying factors.[31] After preliminary consultation of a handful of the most accessible and promising compilations, I found *al-Jawāhir al-mukhtāra* to be the most fertile source of rulings on the status of Muslims under Christian rule in fifteenth and sixteenth century Morocco.[32] While al-Wazzānī's larger and smaller *fatwā* compilations (*al-Miᶜyār al-jadīd* and a*l-Minaḥ al-sāmiya*) include a substantial number of rulings related to foreign occupation in the Maghrib from the

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[30] Mubārak Jazā' al-Ḥarb, "Namādhij min juhūd fuqahā' al-Mālikīya al-Maghāriba fī tadwīn al-nawāzil al-fiqhīya," *Majallat al-Sharīᶜa wa'l-Dirāsāt al-Islāmīya* 21, no. 64 (2006): 339-47. The late Moroccan professor ᶜUmar al-Jīdī included a similar list in his *Muḥāḍarāt fī tārīkh al-madhhab al-Mālikī fī al-gharb al-Islāmī* ([Rabat]: Manshūrāt ᶜUkāẓ, 1987), 105-110.

[31] By fairly inaccessible I mean, for example, those compilations for which al-Ḥarb and al-Jīdī list only one known manuscript located in a remote manuscript library. For many of the collections, these authors do not refer to any known extant copies. It may be that some of the works listed, especially those which consist of the *fatwā*s of a single jurist, may never have existed as independent collections; the authors may presume the possible existence of these collections because of the inclusion of a large number of a given jurists' rulings in other compilations.

[32] Al-Tusūlī's *fatwā* compilation, *Al-Jawāhir al-nafīsa fī-mā yatakarraru min al-ḥawādith al-gharība* ("Precious Jewels, Concerning Difficult Recurring Cases") is the next most promising compilation for rulings relevant to this time period and issues, but it is also unpublished. As *al-Jawāhir al-nafīsa* is larger and later, it will require greater effort to identify those rulings relevant to this period. Al-Tusūlī identifies a*l-Jawāhir al-mukhtāra* as one of the primary sources for his own compilation, so I have thus far restricted my exploration of *al-Jawāhir al-nafīsa* to this same section of al-Zayyātī's chapter on *jihād* as it is reproduced in the later jurist's text. I have consulted two manuscript copies of *al-Jawāhir al-nafīsa*: Ms. 12575, Ḥasanīya Library, Rabat; Ms. 5354, Tunisian National Library, Tunis.

fifteenth century through the colonial period, those relating to fifteenth and sixteenth century Morocco are taken from *al-Jawāhir al-mukhtāra* and tend to be presented in summary form. Second, al-Zayyātī's collection contains enough rulings to contribute substantially to our knowledge of the juristic discourse on Muslims living under Christian rule during or shortly after al-Wansharīsī's lifetime. This is not an exhaustive study; our understanding of rulings during this period will increase further as additional collections are examined.

Biography of al-Zayyātī

ᶜAbd al-ᶜAzīz b. al-Ḥasan b. Yūsuf al-Zayyātī (d. 1055/1645) appears in a limited number of biographical notices, none of which lists his place or date of birth. In *Nashr al-Mathānī*, Muḥammad al-Qādirī (d. 1187/1773) includes a brief entry for ᶜAbd al-ᶜAzīz and a longer notice for his father, Abū al-Ṭayyib al-Ḥasan b. Yūsuf b. Mahdī al-Zayyātī (d. 1023/1614).[33] Al-Ḥasan was born in 964/1557 in a village near Tetouan, after his family, members of the Banū ᶜAbd al-Wādd, a Zanāta Berber tribe from Tlemcen, fled political unrest. Once in Morocco, the family joined the Banū Zanāta tribe from the Ghumāra region in the north. ᶜAbd al-ᶜAzīz was most likely born in Fez, where his father acquired a thorough education in the religious sciences and authored a number of commentaries on legal and other works. The year prior to his death in 1023/1614, al-Ḥasan left Fez for Jabal Kurt, where he lived alone until he fell ill and died. Al-Qādirī notes only that he left when the country came to be in turmoil and the situation in Fez became serious, by which he appears to mean politically unfavorable for jurists.

[33] NM 2:30 (ᶜAbd al-ᶜAzīz), NM 1:198-99 (al-Ḥasan). Both notices are reproduced in MA (4:1421 and 3:1218-19).

Al-Nāṣirī elaborates on this turmoil in his chronicle *al-Istiqṣā*, listing al-Ḥasan al-Zayyātī among those scholars who fled Fez because of a *fatwā* issued by a number of the city's scholars in the wake of the Spanish occupation of al-ᶜArā'ish.[34] After Sultan Aḥmad al-Manṣūr's death in 1603, his three sons fought for control of the Saᶜdian state. One of them, Muḥammad al-Shaykh II al-Ma'mūn (d. 1613), helped Spain to occupy al-ᶜArā'ish in 1610, in exchange for military assistance in Morocco; he succeeded in intimidating the ᶜ*ulamā'* of Fez into recognizing his authority.[35] Facing general outrage for this act, al-Ma'mūn subsequently demanded a ruling from the jurists of Fez as to the permissibility of his having surrendered al-ᶜArā'ish in order to ransom his sons, whom he had been forced to leave behind in Spain.[36] While many of the city's jurists duly authored a *fatwā* justifying the exchange of a city for the ruler's sons, al-Qādirī notes that they did so out of fear, while other jurists fled so that they would not be forced to lend their names to the document, or simply fled because of the ruling, presumably in fear or disapproval. Al-Ma'mūn was killed in 1022/1613, the same year in which al-Ḥasan al-Zayyātī left Fez; al-Ma'mūn's son ᶜAbd Allāh then assumed control of Fez but continued to be shunned by many of the city's leaders.[37]

Al-Qādirī's brief notice for ᶜAbd al-ᶜAzīz describes him as a distinguished jurist, professor, and Qur'ān reciter.[38] His maternal grandfather was Abū al-Maḥāsin al-Fāsī

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[34] Aḥmad b. Khālid al-Nāṣirī al-Salāwī (d. 1897), *Kitāb al-Istiqṣā li-akhbār duwal al-Maghrib al-Aqṣā*, ed. Muḥammad Ḥajjī, et al. (Casablanca: Manshūrāt Wizārat al-Thaqāfa wa'l-Ittiṣāl, 2001), 5:238. In addition to this dynastic crisis, a cholera epidemic lasted from 1598-1608, was accompanied by a famine in 1604-1608, and was followed by the temporary influx of an estimated 300,000 Moriscos during the expulsions of 1609-1614. Cook, *Hundred Years War*, 273-278.
[35] Abun-Nasr, *History of the Maghrib*, 219-20.
[36] Al-Nāṣīrī, *al-Istiqṣā*, 5:238.
[37] Abun-Nasr, *History of the Maghrib*, 220
[38] NM, 2:30; MA, 4:1421.

(d. 1013/1605), founder of the al-Fāsīya Sufi order.[39] ᶜAbd al-ᶜAzīz died in Tetouan in 1055/1645 and was buried outside of Bāb al-Maqābir where a domed shrine marks his burial site. Muḥammad al-Ṣaghīr al-Ifrānī (d. *ca.* 1154/1741) notes that ᶜAbd al-ᶜAzīz was a man of great piety and asceticism, and that his shrine is well-known and visited.[40]

Muḥammad Ḥajjī, Muḥammad Dāwūd, Ziriklī, and Kaḥḥāla all present composite notices drawn from those of al-Qādirī, al-Ṣaghīr al-Ifrānī, and a variety of less-accessible printed and manuscript sources which provide additional details.[41] ᶜAbd al-ᶜAzīz's *kunyā* is given as Abū Muḥammad in some sources and Abū Fāris in others; Kaḥḥāla notes both variants. The jurist studied a variety of subjects in Fez and Tetouan, especially with his maternal uncle Muḥammad al-ᶜArabī al-Fāsī (d. 1052/1642),[42] prior to travelling to Marrakesh and to Egypt to learn from the most renowned scholars in the field of *qirā'āt*, or the 'readings' of the Qur'ān. Upon completion of his education, ᶜAbd al-ᶜAzīz devoted himself to teaching and writing in Tetouan. He also served as the *imām* of Tetouan's Jāmiᶜ al-Qaṣaba.[43] ᶜAbd al-ᶜAzīz authored a number of works, including a commentary on a work by his aforementioned uncle, a work on the *qirā'āt*, and *al-Jawāhir al-mukhtāra.*

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[39] Abū al-Maḥāsin Yūsuf b. Muḥammad al-Fāsī (d. 1013/1605). SN, 1:428.
[40] Muḥammad b. al-Ḥājj b. Muḥammad b. ᶜAbd Allāh al-Ṣaghīr al-Ifrānī (d. *ca.* 1154/1741), *Ṣafwat man intashara min akhbār ṣulaḥā' al-qarn al-ḥādī ᶜashar*, ed. ᶜAbd al-Majīd Khayyālī (Casablanca: Markaz al-Turāth al-Thaqāfī al-Maghribī, 2004), 157.
[41] Muḥammad al-Ḥajjī, *al-Ḥaraka al-fikrīya bi'l-Maghrib fī ᶜahd al-Saᶜdīyīn* (Rabat: Dār al-Maghrib li'l-Ta'līf wa'l-Tarjama wa'l-Nashr, 1977-78), 2:421; Muḥammad Dāwūd, *Mukhtaṣar Tārikh Tiṭwān* (Tetouan: Maᶜhad Mawlāy al-Ḥasan, 1953), 279-80; ZK, 4:16; MM, 2:159.
[42] Abū ᶜAbd Allāh Muḥammad al-ᶜArabī al-Fāsī (d. 1052/1642). SN, 1:437-38.
[43] Abū al-ᶜAbbās Aḥmad al-Rahūnī (d. 1373/1953), *ᶜUmdat al-Rāwīyīn fī tārikh Tiṭṭāwīn*, ed. Jaᶜfar b. al-Ḥājj al-Sulamī (Tetouan: Manshūrāt Jamᶜīyat Tiṭwān Asmīr, 1998-2006), 4:77-78; Dāwūd, *Mukhtaṣar Tārikh Tiṭwān*, 279-80.

Al-Jawāhir al-mukhtāra

Despite the fact that this *fatwā* collection remains unedited, the large number of manuscript copies preserved in Moroccan libraries suggests that the work was popular. Dāwūd notes the presence of a 400-page copy in his own library, al-Khizāna al-Dāwūdīya in Tetouan; other libraries holding at least one copy of the compilation include the General Library and Archives in Tetouan; the Ḥasanīya Library, the Moroccan National Library, and the ᶜAllāl al-Fāsī Institute, all in Rabat; and the Mu'assasat al-Mālik ᶜAbd al-ᶜAzīz Āl Saᶜūd (Fondation du Roi Abdul Aziz) in Casablanca.[44] I did not encounter any copies of the work in the Algerian or Tunisian national libraries or their catalogues. In Morocco, I was able to obtain three copies of al-Zayyātī's chapter on *jihād*, selected from among those copies of *al-Jawāhir al-mukhtāra*'s second volume that I was able to consult.[45] Based on these three manuscripts, I have prepared a partial edition of this chapter, included here as

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[44] Dāwūd, *Mukhtaṣar Tārikh Tiṭwān*, 279-80. The **General Library and Archives** in Tetouan holds at least three copies of this work, under manuscript numbers 178, 1041, and 897. According to the card catalogue, the **Ḥasanīya** library holds copies under the following manuscript numbers: 1436, 2476 (vol. I), 2500 (vol. I), 2837, 5862 (vols. I-II), 8509 (vol. II), 9540 (vol. II), and 9993 (falsely identified; this is not *al-Jawāhir al-mukhtāra*). The **Moroccan National** library holds copies under the following manuscript numbers: 1698D (vols. I and II), 3832D, 66J. All three copies are listed in the card catalogue, while the first is additionally catalogued in: Y. S. ᶜAllūsh and ᶜAbd Allāh al-Rajrājī, *Fihris al-makhṭūṭāt al-ᶜArabīya al-maḥfūẓa fī al-Khizāna al-ᶜĀmma bi'l-Ribāṭ*, al-Qism al-Thānī [Part Two] (1921-1953), 2nd ed., (Casablanca: Al-Khizāna al-ᶜĀmma lil-Kutub wa'l-Wathā'iq, 2001), 1:274. The **ᶜAllāl al-Fāsī Insitute** holds one volume under manuscript number 621; the volume is included in the library's catalogue: ᶜAbd al-Raḥmān b. al-ᶜArabī Al-Ḥurayshī, *al-Fihris al-mūjaz li-makhṭūṭāt Mu'assasat ᶜAllāl al-Fāsī* (Rabat: Mu'assasat ᶜAllāl al-Fāsī, [1992]-1997), 3:191. The **Mu'assasat al-Mālik ᶜAbd al-ᶜAzīz Āl Saᶜūd** holds one copy of the second volume under manuscript number 584, which may be found in the library's online catalogue or in: Muḥammad al-Qādirī, Aḥmed Ayt Balᶜīd, and ᶜĀdil Qībāl, *Fihris al-makhṭūṭāt al-ᶜArabīya wa'l-Amāzighīya* (Casablanca: Fondation du Roi Abdul Aziz Al Saoud pour les Etudes Islamiques et les Sciences Humaines, 2005), 1:169-70.

[45] This chapter was consistently located at the beginning of the second volume. The three manuscripts from which I obtained copies of this chapter are: General Library and Archives, Tetouan, ms. 178 (vols. I-II, 412 pages total, Maghribī script, copied 1102/1691); Ḥasanīya Library ms. 5862 (vols. I-II, 401 pages total; Maghribī script; no date or copyist's name); Moroccan National Library ms. 1698D (vols. I-II, 394 and 318 pages respectively, Maghribī script, no date or copyist's name). For the manuscript page numbers of the chapter on *jihād*, see Appendix D. I selected these three manuscript copies based on readability, condition, prior references in the existing literature, and library policies regarding reproductions.

Appendix D, covering those *fatwā*s relating to emigration and to the status of Muslims living under Christian rule or paying tribute to foreign occupiers. Appendix C consists of translations of selected *fatwā*s included in the edition.

Thus far, very little has been written on *al-Jawāhir al-mukhtāra*. Hossain Buzineb's article summarizing some of the opinions contained in al-Zayyātī's chapter on *jihād* has been discussed in chapter one.[46] In an unpublished thesis submitted to the University of Muḥammad V in Rabat, Omar Benmira listed this collection among his primary sources for a study on rural Morocco in the fourteenth and fifteenth centuries.[47] Nonetheless, he devoted only a paragraph to a description of the work, noting that al-Zayyātī is the only source for a large number of *fatwā*s issued in the fourteenth and fifteenth centuries, that the collection is a particularly good source of rulings related to the countryside, and that the generous historical details provided by these rulings make up for a lack of elaborate legal excursuses.[48] Mohamed Monkachi authored a short article analyzing seven *fatwā*s pertaining to rural women included in *al-Jawāhir al-mukhtāra*.[49] Mohamed Mezzine also drew upon this compilation as part of his dissertation research, and later wrote a number of articles based on the rulings contained in particular chapters of *al-Jawāhir al-mukhtāra*, including a chapter analyzing funeral practices and beliefs about death in ninth/fifteenth century Morocco and two articles directly related to the topic at hand: one concerning the relations between

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[46] See above pp. 91-92.
[47] Omar Benmira, "*Al-Nawāzil wa'l-Mujtamaᶜ: musāhimat fī dirāsat tārīkh al-bādīya bi'l-Maghrib al-Wasīṭ (al-qarnān al-thāmin wa'l-tāsiᶜ/14 wa 15)*" (Master's thesis, University of Muḥammad V, Rabat, 1988-89), 24.
[48] Benmira was writing prior to the publication of modern editions of al-Wazzānī's larger and smaller *fatwā* collections, but lithograph editions would have been available. The author suggests that al-Wansharīsī tended not to include many rulings issued by his contemporaries in Fez, unless those rulings were part of a juristic discourse in which al-Wansharīsī himself was involved (39 n. 19; 40, n. 22).
[49] Mohamed Monkachi, "Lecture des moeurs de la femme rurale marocaine à travers les nawazil de Ziyati: La region de Ghomara au XVII[e] Siècle," in *Femmes rurales*, ed. Aïcha Belarbi, et al. (Casablanca: Fennec, 1996), 119-126.

foreign-occupied territories and the communities surrounding them in Fez's region of influence in the ninth/fifteenth and tenth/sixteenth centuries, and one on *jihād* in the tenth/sixteenth and eleventh/seventh centuries.[50]

In the first of these articles, Mezzine surveys all of the *fatwā*s contained in al-Zayyātī's chapter on *jihād*, noting that most of the cases date to the sixteenth century and that the Ghumāra region[51] in northern Morocco, which was continually assailed by Portuguese incursions, and was home to numerous centers of *jihād* directed toward the foreign occupied territories.[52] Mezzine argues that warfare, in the form of raids and ambushes, was a constant reality in this region and period, but that Christian and Muslim communities also adapted to one another over time and were concerned to maintain mutually beneficial exchanges.[53] The cases recorded by al-Zayyātī treat a range of topics, including the conduct of raids, the sincerity of converts to Islam who return to *dār al-ḥarb*, converts who remain among Muslims but are suspected of espionage, the sale of cows and weapons to the Christians, buying wine and Arabic books from them, Jewish traders suspected of espionage, and other such concerns.

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[50] Monkachi ("La région," 121 n. 5) refers to Mezzine's dissertation, and Benmira ("Al-Nawāzil," 40 n. 23) refers to another of Mezzine's articles, neither of which I was able to consult. The other articles are: Mohammed Mezzine, ""Al-Mawt fī Maghrib al-qarn al-ᶜāshar min khilāl kitāb 'al-Jawāhir' lil-Zayyātī," in *al-Tārīkh wa-Adab al-Nawāzil: dirāsāt tārīkhīya muhdāh lil-faqīd Muḥammad Zunaybar*, ed. Muḥammad al-Manṣūr and Muḥammad al-Maghrāwī (Rabat: Manshūrāt Kullīyat al-Ādāb wa'l-ᶜUlūm al-Insānīya, 1995), 101-117; Mezzine, "Les relations entre les places occupies et les localités de la region de Fès aux XVIéme siècles, a partir de documents locaux inédits: Les Nawāzil," in *Relaciones de la Peninsula Ibérica con el Magreb, siglos XIII-XVI: Actas del coloquio celebrado en Madrid, 17-18 de diciembre de 1987*, ed. Mercedes García-Arenal and Maria Viguera (Madrid: Consejo Superior de Investigaciones Científicas, 1988), 539-60; Mezzine, "Jihād au pays Jbala (XVIème siècles): Effervescence et regulation," in *Jbala: histoire et société: études sur le Maroc du Nord-ouest*, ed. Ahmed Zouggari, et al. (Paris: Editions du CNRS, 1991), 61-87.

[51] This region is defined inconsistently in the literature. Monkachi ("Lecture," 119) defines the area most broadly, as inclusive of the Kingdom of Fez, Salé, Meknes, eastern Morocco, and the Rif. Mezzine ("Jihād," 62-63) defines the Ghumāra as the northern region which was once associated with the confederation of Berber tribes of the same name, and which is now known as Jbala. This includes the mountains and ports in the north and northwest of the country.

[52] Mezzine, "Les relations," 544-45.

[53] Ibid., 545-46, 549.

Mezzine concludes that over the period 1415-1578, jurists' responses tended to become more moderate or liberal as a focus on *jihād* gave way to diplomacy between the Christian-occupied territories and the surrounding communities or central authorities; unfortunately, the author does not support these impressions with a comparison of particular *fatwā*s issued at different times.[54]

Al-Jawāhir al-mukhtāra is less central to Mezzine's second article on *jihād*, in which he argues that the mountainous Ghumāra region, long seen as a refuge for rebels fleeing defeat or fomenting revolt, witnessed a shift in the sixteenth and seventeenth centuries from a center of rebellion against the central state to one of *jihād* against the foreign enemies of the Waṭṭāsid, Saᶜdian, and ᶜAlawī dynasties.[55] Mezzine also argues that this *jihād* developed from independent efforts led by local marabouts, to a more regularized movement justified and promoted by the elite juristic class, which attempted to balance the interests of the *mujāhidūn* with those of the central state.[56] As an example of this last point, the author cites al-Zayyātī's inclusion of a long *fatwā* issued by his uncle Muḥammad al-ᶜArabī al-Fāsī (d. 1052/1642) in response to a five-part question submitted to a number of Maghribī scholars in 1040/1630. Al-ᶜArabī al-Fāsī's answers that fighting to recover foreign-held territories is an individual obligation, and that *jihād* is not dependent upon the leadership of the sultan in northern Morocco, although it must await his command on the south; for Mezzine, this response is indicative of a developed scholarly discourse which encouraged *jihād* without seriously threatening the treaties signed by the central power.

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[54] Ibid., 554-56.
[55] Mezzine, "Jihād," 61-87
[56] Ibid., 81-84.

Finally, Laḥsan al-Yūbī's *al-Fatāwā al-fiqhīya fī ahamm al-qaḍāyā min ᶜahd al-Saᶜdīyīn ilā mā qabla al-ḥimāya* ("Legal Rulings on the Most Important Issues from the Saᶜdīan Era Until Just Before the Protectorate") engages many of the opinions included in al-Zayyātī's chapter on *jihād*, although he refers to these rulings as they appear in al-Tusūlī's and al-Wazzānī's later compilations [57] In a chapter analyzing Maghribī jurists' responses to foreign occupation in Morocco and to colonial expansion in Algeria, al-Yūbī identifies a number of discrete legal issues addressed by these jurists: the importance of *jihād*, the obligation to participate in efforts to recover Portuguese and Spanish-held territory, the permissibility of conducting *jihād* without the ruler's consent, the obligation to emigrate from the occupied territories, the permissibility of trading with the occupying powers, the consequences of Muslims' spying for the enemy, the status of those who fight for the enemy, the determination of apostasy, and the legality of treaties signed between Muslims and the enemy. Within each category, al-Yūbī briefly summarizes the positions held by a series of jurists during the Saᶜdian and ᶜAlawī periods; this often requires breaking complex *fatwā*s into a number of pieces which are addressed in separate sections according to each discrete legal issue.

In what follows, I treat the narrower set of *fatwā*s which are included in Appendix D, representing the section of *al-Jawāhir al-mukhtāra* which is most concerned with emigration from, and friendly relations with, Morocco's foreign-occupied territories. A brief biography of each jurist is presented along with a summary of his *fatwā* or *fatwā*s. It is hoped that this approach will help illuminate not only the positions adopted by Moroccan jurists, but also several features of *iftā'* and of the

[57] Laḥsan al-Yūbī, *al-Fatāwā al-fiqhīya fī ahamm al-qaḍāyā min ᶜahd al-Saᶜdīyīn ilā mā qabla al-ḥimāya* ([Rabat]: Wizārat al-Awqāf wa'l-Shu'ūn al-Islāmīya, 1998), 175-245.

dynamics of the juristic discourse on these issues during and shortly after al-Wansharīsī's lifetime.

Ibn Barṭāl

In the section of *al-Jawāhir al-mukhtāra* under discussion, al-Zayyātī includes three *fatāwā* issued by this same jurist, whose identity remains obscure. The fullest form of his name appears in the third *fatwā*, as "Abū al-Ḥasan ᶜAlī b. ᶜAbd Allāh b. ᶜAlī al-Aghsāwī, who I believe is known as Ibn Barṭāl."[58] Al-Zayyātī signals this same uncertainty regarding this jurist's *ism shuhra* (name by which he is known) in all three instances. The name appears in this same form in al-Tusūlī's *al-Jawāhir al-nafīsa*, but al-Wazzānī apparently misreads the name and renders it Abū al-Ḥasan ᶜAlī b. ᶜAbd Allāh al-Anṣārī in his *al-Nawāzil al-ṣughrā*.[59] Following al-Wazzānī, al-Yūbī records the *nisba* as al-Anṣārī, and further states that this jurist is known as Ibn Qarṭāl; I have been unable to locate the biographical notice which al-Yūbī cites for this figure.[60]

That the name that this jurist is purportedly known by is uncertain and inconsistent suggests that he was not very well known, and a search for all variants of his name has failed to produce any dedicated biographical notices. I have only been able to locate one mention of this jurist, in Ibn ᶜAskar's *Dawḥat al-nāshir li-maḥāsin man kāna bi'l-Maghrib min mashāyikh al-qarn al-ᶜāshir*, devoted to scholars active in the tenth/sixteenth century. In his entry for Abū ᶜImrān Mūsā b. al-ᶜUqda al-Aghsāwī (d.

[58] See Appendix C, 406; Appendix D, 418.
[59] Al-Wazzānī, *al-Nawāzil al-ṣughrā*, 1:419. Although Anṣārī and Aghṣāwī look alike, the manuscripts of al-Zayyātī and al-Tusūlī clearly record al-Aghṣāwī, which is not an uncommon Moroccan name.
[60] Al-Yūbī, *Ahamm al-Qaḍāyā*, 212. The reference is to an earlier edition of Makhlūf's *Shajarat al-nūr al-zakīya* than the one at my disposal, but after an extensive search in the newer edition I have not been able to find this entry, nor have I located a similar figure in any other biographical works.

911/1506), Ibn ᶜAskar states that this Fāsī jurist studied with al-ᶜAbdūsī and al-Mawāsī and that he was a contemporary of al-Waryāglī and Ibn Barṭāl.[61] The other three jurists named here are presumably Abū Muḥammad ᶜAbd Allāh al-ᶜAbdūsī (d. 849/1446), Abū Mūsā ᶜĪsā b. Aḥmad al-Mawāsī (d. 896/1491), and ᶜAbd Allāh al-Waryāglī (d. 894/1488-89), who will all be discussed below. Ibn ᶜAskar's notice is reproduced in al-Kattānī's *Salwat al-anfās wa-muḥādathat al-akyās bi-man uqbira min al-ᶜulamā' wa'l-ṣulaḥā' bi-Fās*, which provides further biographical details for Mūsā b. al-ᶜUqda but no additional mention of Ibn Barṭāl.[62] In an entry for another al-Aghsāwī, al-Kattānī writes that the Ghasāwa are one of the tribes of the Zabīb mountains, which the editors of al-Nāsirī's *al-Istiqṣā'* place south of the Ghumāra range.[63]

Although Van Koningsveld and Wiegers identify the Ibn Barṭāl whose *fatwā*s appear in *Jawāhir al-mukhtāra* with another Ibn Barṭāl who was a contemporary of Andalusī scholars Ibn Rabīᶜ (d. 719/1319) and Ibn al-Fakhkhār al-Judhāmī (d. 723/1323), these cannot be the same jurist.[64] The Ibn Barṭāl of *Jawāhir al-mukhtāra* answers a question about a man from (Portuguese-) occupied Asilah and praises the inhabitants of Jabal Ḥabīb (possibly a mistake for Zabīb); these references, along with his *nisba* (al-

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[61] DN, 37.

[62] SF, 3:109.

[63] SF, 1:299; al-Nāṣirī, *al-Istiqṣā'*, 5:266. The entry in *Salwat al-anfās* is for a family of Aghsāwīs all known as 'al-Baqqāl,' but I did not find a close enough match to suggest that Ibn Barṭāl is a corruption of al-Baqqāl. Al-Kattānī makes an ambiguous statement to the effect either that the Aghṣawīs are a Ghumāra tribe or that the Jibāl al-Zabīb are part of the Ghumāra mountains. The editors of *al-Istiqṣā'* also note that the Jibāl al-Zabīb are inhabited by the Banū Zarwāl. Although the manuscripts refer to a Jabal Ḥabīb, given Ibn Barṭāl's origins (and al-Zayyātī's), 'Ḥabīb' is likely a mistake for 'Zabīb.'

[64] Van Koningsveld and Wiegers, "Islamic Statute," 38. The Andalusī Ibn Barṭāl appears in two biographies of Ibn Luyūn al-Tujībī (d. Almeria, 750/1349-50), in which this latter jurist is said to have studied with both Ibn Barṭāl and Ibn al-Fakhkhār. SN, 1:308; FF, 1:509-11. Van Koningsveld and Wiegers give a full name for this Andalūsī jurist and refer to two passages in Ibn al-Khaṭīb's *al-Iḥāṭa fī akhbār Gharnāṭa*, neither of which I have been able to locate under the name they cite. Ibn al-Khaṭīb does include a biographical entry for an Aḥmad b. Muḥammad b. ᶜAlī, known as Ibn Burṭāl (d. 750/1349), who was a judge in Malaga and Granada and could be the jurist with whom al-Tujībī studied. Lisān al-Dīn Ibn al-Khaṭīb (d. 776/1374), *Al-Iḥāṭa fī akhbār Gharnāṭa*, ed. Yūsuf ᶜAlī Ṭawīl (Beirut: Dār al-Kutub al-ᶜIlmīya, 2003), 1:60-62.

Aghsāwī), place him firmly in Morocco and support the conclusion that this is the Ibn Barṭāl that Ibn ᶜAskar states is a contemporary of al-Waryāglī.[65]

Ibn Barṭāl's three *fatwā*s are similarly structured and appear to respond to the same questioner, even though al-Zayyātī does not group the three together in his compilation. The second and third *fatwā*s are even for the most part the same question-and-answer exchange. Near the end of the third response, Ibn Barṭāl remarks "We answered you prior to this, immediately upon the arrival of your question, and sent it [viz., the response] to you, but its arrival was not immediate."[66] The questioner had apparently re-submitted his question to Ibn Barṭāl, with somewhat different wording (as will be seen below), after the latter's response did not arrive in a timely manner. Ibn Barṭāl's third *fatwā* also contains several references to the questioner's earlier *istiftā'*, but some of the details he refers to appear in the question component of Ibn Barṭāl's first *fatwā* rather than in the second one which so closely resembles the third. Either we are missing part of the *istiftā'* for the second and third *fatwā*s, or the first one was also submitted by the same *mustaftī* and Ibn Barṭāl began to conflate the situations described in each set of questions. Regardless, the first *fatwā* differs from the second two in that it describes Muslims who are unambiguously living under Christian rule; the second and third *fatwā*s describe groups living on the Christian-Muslim frontier.

In the first *fatwā*,[67] an unknown questioner asks Ibn Barṭāl about a group of Muslims whose territory has been conquered by Christians, and who have agreed to a pact requiring these Muslims to pay tribute to their Christian overlords. The questioner divides these Muslims into five groups based on their relationship with the

[65] See the second and third *fatwā*s of Ibn Barṭāl, Appendices C and D.
[66] Appendix C, 409; Appendix D, 483.
[67] Appendix C, 395-97; Appendix D, 411-12.

Christians: 1) those who spy for them, 2) those who trade with them, 3) those who fight for them against Muslims, 4) those who only pay them tribute, and 5) those whom the Christians have exempted from paying tribute, which includes prayer leaders and callers to prayer. The questioner wishes to know these groups' legal statuses with respect to the inviolability of their lives and property, the validity of their leading prayer, and the admissibility of their testimony.

Ibn Barṭāl's response begins with an overall assessment of those who have agreed to pay tribute to the Christians, describing them as "a depraved people, disobedient to God and in violation of the *sunna* of His prophet."[68] The jurist then addresses each of the five groups, beginning with "those who keep to their houses, and who do not frequent them for trade or for any other [purpose], but who pay them the tribute." These Muslims are disobedient to God because of their submission and their payments to Christians. They may not testify or lead prayer, but their lives and property remain inviolable.

As for those who spy for the Christians, Ibn Barṭāl states that "the commonly accepted view is that the life of a spy is licit, that he should be killed, and that his killer should be rewarded." This ruling renders unnecessary any mention of property, testimony, or prayer; a group whose lives are forfeit clearly cannot lead prayer or offer testimony.

The status of third group, whom Ibn Barṭāl describes as those who fight for the enemy and who sell weapons to them, is similarly straightforward: they have "deviated

[68] Appendix C, 396; Appendix D, 412.

from the religion, and their status is that of the Christians." The implication is that this group has committed apostasy and that their lives and property are licit.

Fourth, Ibn Barṭāl addresses the group whose members pay tribute to and trade with the Christians, but who do not spy or fight for them. While stating that they sin more gravely than those who do not trade with the enemy, the jurist does not indicate that the worldly consequences of their actions are any different from those of the first group, who kept to their houses. Finally, Ibn Barṭāl states that the prayer leaders and callers likewise sin more gravely than the others, presumably also in comparison with the first group of Muslims. The reason for this last group's greater sin is that lay Muslims look to them for guidance. Despite not paying tribute, this last group thus loses their probity and may not testify or lead prayer. They must relocate and repent.

In the second[69] and third *fatwā*s,[70] Ibn Barṭāl is again asked by an unidentified questioner to differentiate between the legal statuses of specific Muslim groups whose relations with the Christians take varying forms. Unlike in the first *fatwā*, all of the Muslims in question are described in the second and third *fatwā*s as living close to, rather than under the direct control of, the Christians. The first group is engaged in some form of resistance against the Christians; in the first version of the question (in Ibn Barṭāl's second *fatwā*), this group is described as causing strife and waging war "like the people of Mount Ḥabīb."[71] In the second version of this question (in the third *fatwā*), the *mustaftī* appears to downgrade this group's activities, stating that they are

[69] Appendix C, 401-402; Appendix D, 415-16.
[70] Appendix C, 406-410; Appendix D, 419-21.
[71] According to al-Ḥasan al-Wazzān (Leo Africanus), writing in the early sixteenth century, this is one of the mountains of the al-Ḥabt region of northwestern Morocco, inhabited by the Ghumāra and other tribes. After the Portuguese seizure of Tangier in 1471, many Tangerines moved to this mountain, but remained poorly protected and were often raided by the Portuguese. Jean-Léon L'Africain, *Description de l'Afrique*, ed. and trans. E. Épaulard, et al. (Paris, Adrien-Maisonneuve, 1956), 1:268-70. I have not found other references to a Jabal Ḥabīb, though, and this may be a mistake for Jabal Zabīb; see above n. 63.

cultivating land which, according to the terms of a treaty, belongs to the Christians. The treaty here may be a Waṭṭāsid-Portuguese treaty granting Portugal control of one or more of the northern port cities and its surrounding territory, or a local treaty between the Portuguese authorities and the Moroccan inhabitants in and around an occupied city. According to the *mustaftī*, this groups' cultivation of the land amounts to theft from the enemy.

The second group has signed a treaty with the Christians, but has vowed not to pay them any tribute. As described in the second version of the question, the treaty obligates the Muslims to pay a regular tribute to the Christians beginning in October. The lack of a year suggests that this must have been less than a year away, and a rapidly approaching deadline would help explain the urgency which resulted in the *mustaftī*'s re-submission of this question. In the first version, the questioner states that this group's plan is to flee if and when they are asked for the payment. In the second version, the group will also ultimately flee rather than pay, but they are additionally described as well disposed to serve at the frontlines of a *jihād* if other Muslims should meanwhile come to their aid. The third group also signed this treaty, but is perfectly happy to stay and pay the required tribute "for as long as the world remains."[72]

Ibn Barṭāl opens each of his two responses by describing this as a "horrifying affair which has threatened the pillars of Islam and obscured the very days and nights."[73] He then responds to both versions of the question as though they consisted of the three categories set forth in the first version – a first group engaged in *jihād*, a second group which has signed a treaty but will leave if necessary rather than pay

[72] Appendix C, 401; Appendix D, 416.
[73] Appendix C, 401 and 407; Appendix D, 416 and 419.

tribute, and a third group which is content to remain under Christian rule and pay the tribute. Ibn Barṭāl praises the first group, writing that

> The third who remain in a state of war with the enemy and of preparation for *jihād* against them, and who are in waiting to attack them – they are the Muslims whose intercession is accepted by [the strength of] their Islam, and from the dust of whose footsteps we must seek a blessing; for they are engaged in the greatest act of devotion to God. I only wish I were with them, so that I could attain a great victory.[74]

This passage is taken from the second version of Ibn Barṭāl's response, in which his fuller description of this praiseworthy group's actions is clearly meant to signal his re-arrangement of the groups set forth in the second version of the question. Rather than aggressive farmers in the first group and those waiting to flee or fight in the second, which would be a more complicated arrangement, Ibn Barṭāl thus restores the neat categories presented in the first version of the question.

The second group – reduced in both versions of the answer to those who will flee rather than pay – is neither completely praiseworthy nor completely blameworthy. Ibn Barṭāl writes that they have committed a reprehensible act by living under Christian rule, but still have the opportunity to be among the saved as long as they fulfill their intention by fleeing as soon as the tribute is imposed.

The third group is wholly blameworthy. Ibn Barṭāl's response regarding this group contains several elements and is not wholly consistent between the two versions preserved in *al-Jawāhir al-mukhtāra*. In the first version, the jurist writes:

> As for the third third, they have lost their religion and their [standing in this] world, and have violated what their master [viz., Muḥammad] has commanded of them; thus they deserve a severe punishment. There is disagreement as to their punishment, [divided] among five opinions. The commonly accepted one is that which was held by Ibn al-Qāsim and Saḥnūn, which is that he should be killed without being asked to repent – may God protect us from this calamity. While the Muslim's life is inviolable, through this [viz., intending to reside permanently among infidels] he makes his [own] life licit.

[74] Appendix C, 407; Appendix D, 419.

> Likewise, it is not permissible for a Muslim to buy and sell [goods] with the Christians, as through this they [viz., the Christians] are made stronger against the Muslims. The people in these lands should have patiently endured their affliction [rather than engaging in trade with Christians] until God provided an effective end to [the situation].[75]

In this version of the answer, Ibn Barṭāl appears to pronounce this final third, who were described in the question as those are content to live under Christian rule and to pay the tribute indefinitely, as traitors and apostates deserving of death. This is incongruous with the jurist's earlier response in his first *fatwā*, in which he judged a similar group described as merely paying tribute to the enemy as the least sinful of the five groups in question. In that earlier response, Ibn Barṭāl had disallowed their testimony and their leading of prayer, but had upheld the inviolability of their lives and property. This response quoted here more closely resembles Ibn Barṭāl's earlier ruling regarding those who spy or fight for the enemy.

That something has been lost or garbled in either Ibn Barṭāl's responses to these questions, or in their copying and preservation, is confirmed by his second response to this same question of the three groups:

> As for the third third, they are a truly vile third, because they have lost their religion and their [standing in this] world, and have violated what their master [viz., Muḥammad] has commanded of them; for it is not permissible for a Muslim to conclude a treaty with the infidels which stipulates that he pay them a tribute; [this is] by agreement within the school of Mālik. Thus anyone who does this been disobedient to God Most High and gone against His messenger – may God bless him and grant him salvation. What is obligatory upon you and upon our masters who reside there is to inform this third of their error and to rebuke, as much as they can, those among this third who have power and authority. Then if they disobey, they should be renounced; and it will not be permissible for you to act as their guardians or executors, nor for you to witness for them, nor to pray the funeral prayer for their dead, nor to attend to their (legal) affairs, unless they turn back from their sinful action and their contemptible depravity.
>
> You had informed us in your question before this that the third category contains groups who convey news of the Muslims to the Christians, and inform them as to their weaknesses, and work with them in matters damaging to the Muslims; this group deserves a severe punishment. There is disagreement as to their punishment, [divided] among five opinions. The commonly accepted one is that which was held by Ibn al-Qāsim and Saḥnūn, which is that the punishment for whoever does this is death,

[75] Appendix C, 402; Appendix D, 416.

> without his being asked to repent – may God protect us from this great calamity. While the Muslim's life is inviolable, through this [viz., informing against Muslims] he makes his [own] life licit.
>
> You also had informed us that they pay tribute to the Christians, they trade with them, and they bring to them things from which they can benefit. We answered you, saying that it is not permissible for a Muslim to bring to the Christians anything that strengthens them against the Muslims, nor is it permissible for him to sell to them, or to buy from them, in a place where he is humiliated by them, such as in your lands, because Islam should be elevated, and [no other religion] should be elevated above it. The people in these lands should have been patient in their religion until they had completely despaired of any hoped-for assistance.[76]

In this version of his answer, Ibn Barṭāl is more clearly dividing this last group – those content to pay tribute – into three categories. The first category, those who do no more than pay tribute, is indeed guilty of a lesser offense than are those who spy for the enemy. Ibn Barṭāl considers that the ordinary lay Muslims in this first category may be unaware of the implications of their actions, or may have been lead astray by their local leaders. The jurist demands that the *mustaftī* and his honorable peers residing in this area do all they can to inform these people of their sins, rebuke their leaders, and guide them all from error. For those who persist in their ways, Ibn Barṭāl recommends not the death penalty but a loss of membership in the Muslim community: he instructs the *mustaftī* and his peers not to act as guardians or executors for them, not to pray the funeral prayer for their dead, not to witness for them, and not to attend to their legal issues. From this, we may conclude that the *mustaftī* is a jurist, most likely a *muftī*, and that his fellow addressees are also religious leaders or legal professionals. This set of *fatwā*s thus not only reinforces the impermissibility of paying tribute to

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[76] Appendix D, 408-409; Appendix D, 420-21. This passage is followed by a statement that these people should have been patient especially because their territory is adjacent to Muslim territory and ʿUthmān al-Marīnī's victory is still anticipated. This appears to refer to Marinid sultan Abū Saʿīd ʿUthmān III (r. 800-823/1398-1420), who was in power when Ceuta was captured by the Portuguese in 1415. This anachronistic element suggests a further level of corruption in the text. While it is possible that I have misidentified Ibn Barṭāl and that this jurist was actually writing at the time of Ceuta's capture – which would help explain the messiness of the three *fatwā*s, if this was the first response to such an event – this third *fatwā* also refers to Asilah as occupied, which was not the case until 1471. It seems most likely that Ibn Barṭāl was indeed writing in the late fifteenth century, but that he (or a later editor) may have added into his *fatwā* pieces of an earlier jurist's response to the occupation of Ceuta.

Christians, but also tasks religious leaders with convincing residents of these areas to move and instructs them to refuse these residents' requests for counsel, services, and recognition as Muslims.

Ibn Barṭāl's second category of those who fall within the final third consist of those who, in addition to paying tribute, actively spy for the Christians. This faction deserves a severe punishment, and although there is disagreement as to that punishment, the commonly accepted view is that spies should be killed. Acknowledging that spies were not mentioned in this version of the question, the jurist explains his discussion of their status by stating that the *mustaftī* had asked about them in an earlier question. As there are no spies in either version of this question (Ibn Barṭāl's second and third *fatwā*s), the jurist may well be referring to the five-part question submitted to him in the first *fatwā*. This above-quoted statement on the spy's fate matches both the penalty prescribed for spying in that first *fatwā* and the penalty for simply paying tribute to Christian rulers in the second *fatwā.* This correlation confirms that the analogous passage in the middle *fatwā* is a product of confusion, either Ibn Barṭāl's or that of a later transmitter of his opinions.

Following the section on spies, Ibn Barṭāl addresses the status of those who trade with the Christians, a category which he likewise acknowledges was not part of the immediate question he is answering, but which he says the same *mustaftī* had described in an earlier communication. As in the case of the spies, trading with the enemy was only mentioned in the first question posed to Ibn Barṭāl, not in the second one, at least as they are recorded in al-*Jawāhir al-mukhtāra*. Unlike spying, though, the jurist had also addressed trading with the enemy in second *fatwā*, seemingly

gratuitously. In both his second and third *fatwā*s, Ibn Barṭāl stresses that Muslims must not trade with Christians, as both buying from them and selling to them can strengthen their domination over the Muslims. Rather, the Muslims in these areas should have waited patiently, apparently for military assistance from other Muslims or for delivery of the goods they resorted to buying from the Christians.

Although unclear throughout, the exact relationship to Christian authority of the Muslims under discussion in the second and third *fatwā*s becomes even less clear in this last section on trade. Ibn Barṭāl's statement that one should not trade with Christians "in a place where he is humiliated by them, such as in your lands" suggests that the *mustaftī* is currently living under Christian rule, not simply in an area which is adjacent to Christian-controlled territory or that will come to be considered Christian-controlled once the tribute demanded of the residents falls due. It may be that this distinction was also lost in the shuffle of three hurried questions and answers. What we can safely conclude is that the question of what exactly constituted living under Christian authority was not clear-cut in this period, and that this situation added further complexity to an already-difficult set of legal issues regarding Muslim-Christian relations in Morocco.

Finally, in this last *fatwā*, Ibn Barṭāl also responds to a question he is asked regarding a separate issue, concerning a man from Asilah who has been captured as a prisoner of war. The man is in debt, and the *mustaftī* wants to know if the money he has left behind may be used to pay his ransom, or if the man's debts must first be paid. Ibn Barṭāl states that the money must be put toward the man's debts, and offers detailed instructions as to how this should be done. The jurist may have found this man's case

far less urgent than the case of frontier Muslims, as this issue is not included in Ibn Barṭāl's second *fatwā* (the first version of this question and answer). Either this part of the exchange was edited out of the first version, or Ibn Barṭāl had hastily replied to the first case only and was still preparing his answer to the Asilah case when the re-submitted version of the question arrived and required him to re-write the entire answer.

Before proceeding to summarize the other opinions included in *al-Jawāhir al-mukhtāra*, a few preliminary observations may be made on the basis of this first series of *fatwā*s issued by Ibn Barṭāl. First, these three *fatwā*s provide us with a rich set of repetitions and discrepancies, historical details, and *muftī*'s comments which all shed light on the actual process by which these questions were asked and answered. Although the structure and content of these texts strongly suggest they were shaped by a formal juristic discourse – as will become more apparent below – they nonetheless clearly reflect direct responses to issues of immediate practical importance. The *mustaftī* so urgently desired a response to his questions that he submitted one set of them twice, despite Ibn Barṭāl's protest that he had answered and returned them immediately upon receiving them the first time. Either Ibn Barṭāl composed, or someone else copied, that first set of answers (in the second *fatwā*) so hastily that the resulting text is not even an accurate statement of the jurist's opinion, if the answers given in his other two *fatwā*s can be taken to represent his actual position. The messiness of these *fatwā*s does as much to demonstrate the contemporary importance of the legal issues under discussion as does the highly polished and comprehensive nature of *Asnā al-matājir*.

Ibn Barṭāl's instructions to the *mustaftī* in the third *fatwā* also reveal an expectation that these *fatwā*s would inform the concrete actions of local religious leaders in changing the attitudes and behaviors of the general public. We can thus identify at least one of the practical purposes this set of *fatwā*s was meant to serve – public awareness – which is a useful aid in making sense of such a complex set of questions and answers. Ibn Barṭāl's use of the second person in delivering these instructions, rather than the *fatwā*'s usual third person form of address, gives the exchange an added immediacy.

This sense of urgency and specificity of purpose is greatly reduced in al-Wazzānī's (d. 1342/1923) smaller collection of *fatwā*s (*al-Nawāzil al-ṣughrā*), where Ibn Barṭāl's three rulings appear as one composite, orderly text.[77] This concise version lacks, among other details, Ibn Barṭāl's instructions to the *mustaftī*. Al-Wazzānī most likely edited the *fatwā* in order to increase its usefulness to the professional legal audience of his compilation, either by presenting a more generally applicable precedent or a clearer summary of the positions which had been adopted in Ibn Barṭāl's time. Nonetheless, it is the unpolished set of three partially contradictory *fatwā*s preserved by al-Zayyātī and later by al-Tusūlī that afford us a more generous sense of how jurists grappled with the complexities of Moroccans' relationships to Portuguese authority in the late fifteenth and early sixteenth centuries.

[77] Al-Wazzānī, *al-Nawāzil al-ṣughrā*, 1:419. Al-Wazzānī erroneously records the jurist's name as Abū al-Ḥasan ʻAlī b. ᶜAbd Allāh al-Anṣārī.

Al-Waryāglī

Abū Muḥammad ᶜAbd Allāh b. ᶜAbd al-Wāhid al-Waryāglī (d. 894/1488-89), whom Ibn ᶜAskar noted above as a contemporary of Ibn Barṭāl, issued the next *fatwā* to be considered in this section of *al-Jawāhir al-mukhtāra*. Al-Waryāglī's *fatwā* on Muslims living under Christian rule in Morocco follows Ibn Barṭāl's first *fatwā* in al-Zayyātī's compilation and likewise appears in al-Tusūlī's *al-Jawāhir al-nafīsa*, but it was not reproduced in either of al-Wazzānī's compilations, nor does it appear in any other work of which I am aware. That this *fatwā* does not appear in al-Wansharīsī's *Miᶜyār* will not be surprising, given the relationship between al-Wansharīsī and al-Waryāglī.

ᶜAbd Allāh al-Waryāglī is included in a number of biographical works, but is treated most substantially in Ibn ᶜAskar's *Dawḥat al-nāshir* and in Ibn al-Qāḍī al-Miknāsī's *Jadhwat al-Iqtibās*.[78] Although Ibn ᶜAskar errs (according to the other sources) in placing al-Waryāglī's death in the first decade of the tenth century *hijrī*, his entry nonetheless provides some of the most useful information for interpreting the jurist's *fatwā*. Ibn ᶜAskar writes that al-Waryāglī was one of the foremost jurists of his time, who came close to or indeed attained the level of *ijtihād*. His masters included Muḥammad b. Qāsim al-Qawrī (d. 872/1468)[79] and Abū Muḥammad ᶜAbd Allāh al-ᶜAbdūsī (d. 849/1446), with whom he must have studied in Fez, and Muḥammad b. Aḥmad b. Marzūq (d. 842/1439), whose lessons he travelled to Tlemcen to attend. According to Ibn ᶜAskar, when al-Waryāglī returned from Tlemcen he found that the

[78] DN, 34-37; JI, 2:439-40. While in most notices the jurist's name is spelled with a *jīm*, this letter is replaced with a three-pointed *kāf* in *Jadhwat al-Iqtibās*. These two variants are often used interchangeably in Maghribī orthography to represent the equivalent of a hard 'g' in English. The index to *Mawsūᶜat aᶜlām al-Maghrib* also lists one al-Waryāglī whose name is spelled with a *ghayn* and one with a modified *kāf* which has a second upper slash rather than three points. See also SN, 1:384; NI, 1:251-52; DH, 317; SF, 3:386-87; TD, 111 (spelled al-Wazyāḥī).

[79] SN, 2:130-31.

Christians had descended upon Tangier and Asilah; this must refer to early Portuguese raids and attacks rather than occupation, as it was not until 876/1471 that Waṭṭāsid sultan Muḥammad al-Shaykh signed control of these cities over to King Affonso V. In this account, al-Waryāglī then joined the defensive outposts in the northwestern al-Habṭ region, devoting himself to teaching, judging, and issuing *fatwā*s throughout the region and especially in Qaṣr al-Kutāma (al-Qaṣr al-Kabīr) each winter and spring, and to *jihād* each summer and fall. He eventually settled in Fez, where he assumed a position of leadership in the scholarly community and was only asked to respond to the most difficult and important legal issues. He studied all four legal *madhhab*s, but limited himself to Mālikī doctrine, "as though he were al-Māzarī, on his level."[80]

Ibn al-Qāḍī al-Miknāsī's account of al-Waryāglī's life is drawn primarily from the *fihris* of Ibn Ghāzī (d. 919/1513),[81] one of al-Waryāglī's most prominent students. Ibn Ghāzī completed his studies with al-Waryāglī in 876/1471-72, the same year in which the latter was dismissed from his teaching post at one of the *madrasa*s (colleges of law) in Fez. His post was given to al-Wansharīsī, whose biographers date his arrival from Tlemcen to two years prior, in 874/1469. A dispute ensued between the two jurists as to which one was owed the salary for the teaching post. In an effort to bolster his own case, al-Wansharīsī requested *fatwā*s on the matter from the leading jurists of Tlemcen, including his former teacher and the city's chief judge Ibrahīm al-ᶜUqbānī. Although these jurists all ruled in al-Wansharīsī's favor, the scholars of Fez "turned a deaf ear" to

[80] DN, 36.
[81] Muḥammad b. Aḥmad b. Ghāzī (d. 919/1513) was *imām* and *khaṭīb* of the Qarawīyīn mosque. SN, 1:398-99.

these *fatwā*s, leaving al-Wansharīsī so distraught he nearly died.[82] Although they were thus unsuccessful, the Tlemcen scholars' opinions are featured in the *Miᶜyār*, giving al-Wansharīsī and his supporters the final word.[83] From the compiler's introduction to this set of *fatwā*s, it appears that al-Waryāglī had taught the first two or three months of what he understood to be a year's contract, before the *Imām al-Muslimīn*, who must have been the last Idrīsid ruler of Fez prior to Muḥammad al-Shaykh's victory, gave the position to al-Wansharīsī, who promptly began his teaching duties. The legal issue at stake was whether the terms of the endowment governing the appointment and salaries of the *madrasa*'s employees required that the full year's salary be paid to al-Waryāglī, or if it should be pro-rated and split between the two jurists, or if the full amount should go to al-Wansharīsī. The Fāsī scholars at the time presumably chose to pay the full year's salary to al-Waryāglī, while al-Wansharīsī, having been appointed to the post by the ruler of his new city, quite likely continued to do the actual teaching.

It is thus easy to imagine that al-Wansharīsī left to other scholars the work of preserving al-Waryāglī's opinions for posterity. Yet apart from the personal rivalry between these two scholars, the latter's opinion regarding Muslims living under Christian rule is also of a very different tone than that adopted by al-Wansharīsī in *Asnā al-matājir* and in the Marbella *fatwā*. Of the rulings which have thus far come to light from this period, al-Waryāglī's is perhaps the least forgiving of Muslims who have found themselves under Christian rule.

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[82] JI, 2:439-40. Castro also translates part of Ibn Ghāzī's account in "Principales Aspectos" (330-31), but the translation contains errors, including in the date. See also Benchekroun, *La Vie Intellectuelle*, 79; al-Nāṣirī, *al-Istiqṣā*, 4:321 (al-Waryāglī is spelled with k rather than g).
[83] Al-Wansharīsī, *al-Miᶜyār*, 7:347-54.

As preserved in *al-Jawāhir al-mukhtāra*, the question posed to al-Waryāglī concerns "our Muslim brothers" who live in their own lands but are now subject to infidel laws.[84] This area is adjacent to territory which remains under Muslim rule, but despite this, the subject Muslims have not availed themselves of the opportunity to move to an area where they would not be subject to infidel laws and influences. The unidentified questioner wishes to know if these Muslims' lives, families, and property are forfeit and if their prayers, giving of alms, and fasting are valid.

Al-Waryāglī's response is worth quoting at length:

> What you mentioned of this vile, contemptible group, whose perceptive faculties God has obscured after [having granted them] vision, and whom He has led astray through the spread of unbelief into their hearts after [having given them] insight, and who are content to live under the impure infidels who do not believe in [God] the Compassionate and who insult our prophet and lord Muḥammad – may the best blessings and purest peace be upon him – upon my life, the likes of this could only arise from someone weak in faith, whom God has previously led into error and from whom He has withdrawn. This is in addition to their strengthening the infidels and exposing [the testification] "There is no God but God" to the scorn of those who worship idols; and all of this is by their choice, without compulsion. [The ruling] that our masters have chosen with regard to these people, and [which is adopted in] the *fatāwa* our *shaykh*s have issued concerning them, is that it is necessary to kill them and take their property as booty (*fay'*), because the land [they are in] is infidel territory and their property is under infidel control, not under their own control. This is because they can take it from them [viz., the infidels can seize the Muslims' property] whenever they wish, the territory is theirs, and they have the authority over it [viz., over the land and everything in it].
>
> Their women should likewise be captured and taken from them until they reach Muslim territory. They are then judged divorced and are prevented from [re-marrying] their spouses. They should be married off, and it is not permissible to have their wives remain with them.
>
> Oh questioner, you have committed a serious error by calling them "our Muslim brothers." Rather, they are our enemies and the enemies of the religion – may God frustrate their efforts and block their good fortune. They are the brothers and supporters of the infidels – may God strengthen the Muslims against them and enable their swords to [strike] their necks and the necks of the infidels – whose group they have joined and to whose side they have gone. Peace be upon you, Oh questioner, but not upon them.

Unlike Ibn Barṭāl's second *fatwā*, in which that jurist also appeared to rule that Muslims under non-Muslim rule forfeit their inviolability, al-Waryāglī's opinion bears no signs

[84] Appendix C, 397-99; Appendix D, 412-13.

of ambiguity or textual corruption which would suggest that he is referring only to spies or to those who fight on behalf of the enemy. Rather, these Muslims' offenses are largely those that are familiar from al-Wansharīsī's opinions: being content to live under infidel rule, thereby exposing themselves to impurities and to the slandering of the Prophet; strengthening the enemy; and exposing Islam to scorn. Yet the implications of these actions are far more serious than in previously examined *fatwā*s: Al-Waryāglī not only rules that Muslims who voluntarily remain under Muslim rule *may* be killed, but also encourages and even requires that they be killed. While the argument that these Muslims do not possess valid ownership of their property is familiar, al-Waryāglī's statement that this property must be taken as booty is similarly encouraging of militant activity which targets Muslims living under Christian rule rather than simply allowing them to be victims of collateral damage of campaigns aimed against Christians.

Al-Waryāglī also requires that these Muslims' wives be taken to Muslim territory, divorced from their husbands, and remarried to other men. The jurist goes on to chastise his questioner for even referring to Muslims under Christian rule as "our brothers," and he implies that they must not be greeted with the customary formula "peace be upon you." Al-Waryāglī even goes so far as to pray that God will strengthen the Muslims and guide their swords to the necks of both the Christians and the Muslims who live in their midst.

A number of preliminary conclusions may also be drawn on the basis of this *fatwā*. First, al-Wansharīsī's rulings in *Asnā al-matājir* and in the Marbella *fatwā*, which call for emigration and for the punishment of those who publically mock the idea of

emigrating to the Maghrib, may be described as moderate in comparison with al-Waryāglī's active encouragement of combat against Muslims living under Christian rule. Nonetheless, al-Waryaglī, like al-Wansharīsī, is careful to note that his *fatwā* concerns those Muslims remaining in Christian-controlled territory by choice, not by compulsion.

Second, two possible reasons for the severity of al-Waryāglī's ruling may be advanced, and may additionally help to illuminate some of the differences between North African jurists' attitudes toward Christians living under Muslim rule in Spain and the parallel phenomenon in Morocco itself. First, al-Waryāglī, along with other scholars, Sufi masters, and lay Muslims, was actively engaged at this time in defending against Portuguese encroachment in Morocco and in attempting to recover lost territory. While *jihād* to regain territory in Spain was no longer an option for Andalusī Muslims, it was still a viable and praiseworthy activity in Morocco. Muslims who remained in Portuguese territory, even without spying for them or selling them weapons, would have hampered the ability of *mujāhidūn* (warriors) to conduct raids and attacks without risking the possibility that they would harm fellow Muslims. Solutions to this ethical and logistical obstacle included convincing those resident Muslims to separate themselves from the enemy targets of attack by moving to Muslim territory, or removing the distinction between these two groups by stripping the inviolability of those Muslims who chose to remain intertwined with the enemy. While emigration has the added benefit from a military standpoint of increasing the ranks of those able to fight, as well as depriving the enemy of valuable resources, it is also a far more complex and time-consuming solution.

In fifteenth and sixteenth-century Morocco, Mālikī jurists' encouragement of *hijra* from Spain helped to channel Andalusī Muslims into the state army or local *jihād* movements without compromising Muslims' military efforts in Spain itself. In Morocco, the situation was far more complicated in this period, and jurists accordingly adopted a diverse range of opinions. As seen in Ibn Barṭāl's third *fatwā*, Muslims living at the edges of Christian-held territory could even argue that remaining where they were, despite their having signed an unfavorable treaty with the enemy, offered a strategic military advantage in the ongoing fight against Portuguese dominance. Al-Waryāglī's *fatwā*, in which he emphasizes the prohibition of living under Christian rule but wastes no time praising or encouraging further emigration, was most likely meant to assist warriors in the successful prosecution of *jihād* by alleviating any concerns regarding the wrongful infliction of death and damages upon fellow Muslims.

Al-Waryāglī may also have had personal reasons for his striking condemnation of Muslims living in Portuguese territory. In *al-Jawāhir al-mukhtāra*, al-Waryāglī is described as "one of the jurists of Tangier." Although his biographers do not state where or when this jurist was born, he may have lived in Tangier prior to pursuing his education in Fez and Tlemcen. According to Ibn ᶜAskar, al-Waryāglī committed himself to the seasonal pursuit of *jihād* upon returning from Tlemcen and finding Tangier and Asilah full of Christians; perhaps he had hoped to begin his career in Tangier and was forced to make other plans. His personal attachment to a city lost to the Portuguese could very well have contributed to his lack of sympathy for any Muslims thought to be hindering efforts to recapture the port, or worse, cooperating with and strengthening the enemy.

Al-Māwāsī

Following al-Waryāglī's *fatwā* is one issued by Abū Mahdī ᶜIsā b. Aḥmad b. Muḥammad al-Māwāsī al-Baṭṭū'ī (d. 896/1491),[85] who was recognized as the chief *muftī* of Fez following his teacher Muḥammad b. Qāsim al-Qawrī (d. 872/1468) and prior to Muḥammad ᶜAbd al-Raḥmān al-Ifrānī, known as al-Qāḍī al-Miknāsī (d. 917/1511). In addition to al-Qawrī, al-Māwāsī studied with Abū Muḥammad ᶜAbd Allāh al-ᶜAbdūsī and others in Fez and Tlemcen. Although his birth date is unknown, he is said to have died at a very old age, and most sources agree that he preached in Fez al-Jadīda for nearly sixty years.[86] Al-Māwāsī has a number of *fatwā*s recorded in the *Miᶜyār*, including one in which al-Wansharīsī describes him as the *faqīh* and *muftī* of Fez.[87] Al-Māwāsī thus appears to have been chief *muftī* at some point during al-Wansharīsī's compilation of the *Miᶜyār*.[88]

In al-Māwāsī's *fatwā*[89] as recorded in *al-Jawāhir al-mukhtāra*, he is simply described as a jurist and *muftī*; this may indicate that the text was composed prior to his being named *the muftī* of Fez. The question posed to al-Māwāsī, again by an unidentified *mustaftī*, is similar to the ones answered by Ibn Barṭāl and al-Waryāglī: a group of Muslims are living in their own lands, where they are now subject to infidel rule. The questioner asks if it is permissible for these Muslims to remain where they

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[85] For al-Māwāsī's biography, see: TD, 270; DH, 378; NI, 1:335; KM, 1:320-21; JI, 2:502-503; al-Ḥajjī, *Alf Sana*, 152, 272 (*Wafayāt al-Wansharīsī*, *Laqṭ al-Farā'id*); MM, 2:796. The jurist's name is misspelled in the manuscripts; see Appendix D, 414.

[86] In *Durrat al-ḥijāl*, Ibn al-Qāḍī al-Miknāsī, who spells the jurist's name al-Baṭūsī, writes that he was *khaṭīb* of the Qayrawīyīn.

[87] Al-Wansharīsī, *al-Miᶜyār*, 4:485-86. Although his name appears here as Abū Mahdī ᶜIsā al-Māwāsī, al-Wansharīsī and Aḥmad b. al-Qāḍī both write in their biographical compilations that the jurist was known as Ibn Māwās. See al-Ḥajjī, *Alf Sana*, 152, 272.

[88] For a tentative list of chief *muftī*s of Fez in this period, see Stewart, "Identity," 297-98. For the dates of composition of the *Miᶜyār*, see above p. 17 n. 20.

[89] Appendix C, 399-401; Appendix D, 414-15.

are, despite the ease with which they could move and their capability of doing so. As in the questions posed to Ibn Barṭāl, these subject Muslims are then divided into several groups based on their relationship to Christian authority. Although the manuscripts show some variants, the question appears to describe four groups: those who only pay a tribute to their infidel rulers, those who additionally trade with the enemy, those who provide the enemy with information about the Muslims, and those who happily fish with the enemy, praising the times and asking God to prolong them. Al-Māwāsī is asked to explain the legal status of each group.

The beginning of al-Māwāsī's response treats the overall permissibility of living under non-Muslim rule and addresses the first two groups described:

> As for Muslims' remaining under infidel rule, this is prohibited. Whoever frequents their homes has lost his religion and his [standing in the] world, and is in violation of what his master [viz., Muḥammad] has commanded of him; for it is not permissible for a Muslim to conclude a treaty with the infidel to the effect that he will pay him tribute. This is agreed upon within the Mālikī school, so for whoever does that [viz., lives under infidel rule], his testimony is not accepted, nor is his leading of prayer. This is the rule for the first category; for Islam should be elevated, and [no other religion] should be elevated above it.
>
> As for the judgment concerning the second category, which consists of those who frequent their places for trade, they are worse than the first category and their situation is more repugnant.[90]

This section of the answer is remarkably similar to Ibn Barṭāl's responses. The first paragraph here is nearly identical to the passage in Ibn Barṭāl's third *fatwā* which addresses the status of a group who is content to live under infidel rule and to pay them a tribute.[91] The second paragraph, concerning those who trade with the enemy, is nearly identical to Ibn Barṭāl's statement regarding such a group in his first *fatwā*.[92] These similarities, and those that will be noted below, strongly suggest a shared juristic discourse, perhaps centered around one common source of questions. It may be that

[90] Appendix C, 399-400; Appendix D, 414.
[91] See above, pg. 127.
[92] See Appendix C, 396; Appendix D, 412.

these jurists discussed and debated their answers together, or that each successive jurist to offer an answer was reading and in part responding to the previous answers.

The third part of al-Māwāsī's response conflates the third and fourth groups mentioned in the question, which consisted of those who inform the infidel enemy concerning the Muslims, and those who show affection toward the enemy and pray for the continuation of their rule. The jurist writes:

> As for the third category, which consists of those who frequent their places for trade and inform them of the Muslims' affairs, this is the most repugnant of the three groups and the closest in status to that of a spy who identifies the Muslims' weaknesses. Is his informing [the Christians] as to the Muslims' disadvantages similar [in status] to banditry, the perpetrators of which must be killed, in order to prevent the injury and corruption [this causes]? This is the considered view of those who say that the spy must be killed. [Others say] that he should not be killed, but that the ruler (*al-imām*) determines his punishment and admonishment, or [that] a distinction should be made between one who acted in this manner [during] a single lapse [in judgment, as opposed to repeatedly]; this is a well-known point of scholarly disagreement. Also, should his repentance be accepted or not? [As to this question, his case] resembles the religion of the heretic with regard to the concealment of his action – this is [regarding] the one who frequently visits them, who shows the most affection toward them and informs them of the routes conducive to threatening the Muslims; for this is the most malicious and repugnant group. [This group] is closer to the infidels than to the believers, because love for the infidel and praying for his strength and power over the Muslims are among the signs of unbelief. May God protect us from apostasy and a change of conviction.

Al-Māwāsī offers the most nuanced and detailed discussion thus far concerning the classification of this type of group and the punishment for their actions. The jurist appears to entertain the possibility that the information provided by these Muslims to their Christian overlords might not constitute spying. At the very least, al-Māwāsī sees fit to review the analogy with banditry which provides the basis for the view that spies should be killed. The jurist then lists a number of other considerations affecting the punishment of such informers. This is in contrast to Ibn Barṭāl, who had acknowledged the existence of five opinions regarding the punishment of spies but cited only the commonly accepted (*mashhūr*) one, that they be killed without an opportunity to

repent. Al-Māwāsī's lengthier discussion may indicate that he was concerned with an actual or potential legal case involving subject Muslims, unlike al-Waryāglī, for example, whose *fatwā* appeared to address the concerns of military leaders or soldiers attacking an occupied area.

Al-Wazzānī's smaller *fatwā* compilation includes a version of al-Māwāsī's ruling which has been edited such that it more clearly responds to all four categories listed in the question.[93] The fourth category begins with "the one who frequently visits them and informs them of the routes," with slight variations in wording from the edition presented here. Al-Wazzānī's modification fails to disjoin al-Māwāsī's conflation in this answer of those who spy for the enemy and those who are content to live under enemy rule and who pray for a continuation of the status quo. The discrepancies in the manuscripts as to the categories described in the question, and this conflation of groups in the answer, share to a lesser extent the untidy composition of Ibn Barṭāl's *fatwā*s, and again suggest that the expectations of an established discourse may have influenced the structure and content of these rulings.

Excerpts from al-Burzulī and Ibn Rabīʿ

Following Ibn Barṭāl's second *fatwā* in *al-Jawāhir al-mukhtāra* are two excerpts from lengthier writings.[94] Al-Zayyātī describes the first as taken from the chapter on *jihād* in a work of *fiqh* written by a jurist named Abū al-Qāsim; he is referring to Abū al-Qāsim al-Burzulī (d. 841/1438) and the chapter on *jihād* in his substantial *fatwā*

[93] Al-Wazzānī, *al-Nawāzil al-ṣughrā*, 4:418. The editor – either al-Wazzānī or an earlier source from which this jurist copied the text – signals that he has modified the text by noting at the end of the passage that he has reproduced the meaning, rather than the exact wording, of the original.
[94] Appendix C, 403-406; Appendix D, 417-19.

collection, *Fatāwā al-Burzulī*, which also served as one of al-Wansharīsī's primary sources for the rulings contained in the *Miʿyār*. The opinions excerpted from *Fatāwā al-Burzulī* relate to the debate over Mudéjars' ownership of their property, and also appear in two places in the *Miʿyār* as well as at different points in *Asnā al-matājir* and the Marbella *fatwā*.[95]

The second excerpt is part of the *fatwā* by Ibn Rabīʿ which al-Wansharīsī also quotes extensively in *Asnā al-matājir* and in the Marbella *fatwā*.[96] Al-Zayyātī must have selected these excerpts for their value in connection with the legal issues discussed in this group of *fatwās*. The issues addressed in the excerpts include the question of whether or not Muslims in enemy territory possess valid ownership of their property; the question of whether religion or territory guarantees inviolability of one's person and property; and the parallel drawn by Mālikī jurists between the case of one who converts to Islam in enemy territory and the Muslim whose territory is conquered by Christians.

Al-Wansharīsī's 'Berber Fatwā'

A lengthy opinion issued by al-Wansharīsī follows Ibn Barṭāl's third *fatwā*.[97] The question is nearly identical to the one posed to al-Māwāsī, with only slight variations in vocabulary and details. Al-Wansharīsī is asked about a group of Berbers who are

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[95] Al-Burzulī, *Fatāwā al-Burzulī*, 2:22-23; al-Wansharīsī, *al-Miʿyār*, 2:438-39; 6:156-57.
[96] Buzineb translates into Spanish part of this excerpt from Ibn Rabīʿ's *fatwā* ("Respuestas," 54-55). Van Koningsveld and Wiegers note that this jurist's name is misspelled in *al-Jawāhir al-mukhtāra* and therefore also in Buzineb's article; whereas the manuscripts record Ibn Rabīʿa, the relevant biographical notices give the jurist's name as Ibn Rabīʿ. Although Van Koningsveld and Wiegers believed this passage in *al-Jawāhir al-mukhtāra* to be the only known quotation of Ibn Rabīʿ's *fatwā* other than the private manuscript they consulted, al-Tusūlī also reproduces this section of *al-Jawāhir al-mukhtāra* in his *al-Jawāhir al-nafīsa*. Van Koningsveld and Wiegers, "Islamic Statute," 20.
[97] Appendix D, 421-27.

residing in their lands, subject to infidel rule, despite their ability to leave. The anonymous *mustaftī* wishes to know if this residence is permitted, and goes on to describe four categories into which these Muslims may be grouped: 1) those who continue to live there but who do not go to the infidel for trade or for any other reason; 2) those who go to them for trade, but not for any other reason; 3) those who go to them for trade and also inform them of the Muslims' affairs; and 4) those who fish with them, inform them concerning the Muslims, go to them with their legal disputes, and pray for the continuation of infidel rule.[98]

Additionally, the questioner asks if it is permissible for other Muslims to buy from the infidels property which they have seized from the Muslims under their control. In connection with this last question, the *mustaftī* notes that a student of the religious sciences has been going to the enemy and buying books from them, in order to remove these books from infidel hands.

Al-Wansharīsī treats each part of the question in turn. In response to the first issue, he states:

> Submission to infidel rule and residence in *dār al-ḥarb*, with the ability to move from there and to distance [oneself] from this, is prohibited; it is not permissible [even] for one moment or for one hour of one day. The prescribed, imperative obligation is to emigrate from infidel areas, to move away from them to *dār al-Islām* where their [infidel] laws do not apply.[99]

Al-Wansharīsī supports this statement with a much abbreviated version of the evidence presented in *Asnā al-matājir*: Qur'ān 4:97-99 enjoining *hijra*, the *ḥadīth* in which Muḥammad declares his innocence of any Muslim living among infidels, the consensus of the scholars that those who convert to Islam in *dār al-ḥarb* must emigrate, and

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[98] While the activity pursued with the Christians in al-Mawāsī's *fatwā* is clearly fishing, because it is done in boats, here the same verb may also refer to hunting.
[99] Appendix D, 422.

Mālik's disapproval of any Muslim's residence in non-Muslim territory. Significantly, in explaining the Qur'ān's exemption of those who are weak and oppressed from the obligation to emigrate, al-Wansharīsī notes here that this includes those who will perish if they attempt to go forth; this will be important to comparing al-Wansharīsī's and al-ᶜAbdūsī's opinions in the next section of this chapter.

Al-Wansharīsī goes on to address the amount of wealth a Muslim is obligated to spend in order to emigrate:

> The master jurists have stipulated that, if he does not find a means of freeing himself from the infidels' cords other than by expending what money he has, we have made this an added obligation upon him. If he does not do this, his inviolability is incomplete, his testimony is inadmissible, and he has no right to a share in the booty or divisible spoils of war.

This particular question is not as explicitly addressed in either *Asnā al-matājir* or the Marbella *fatwā*, although al-Wansharīsī makes it clear in *Asnā al-matājir* that the possibility of financial hardship does not exempt Muslims from the obligation to emigrate. As will be seen in the next section, al-ᶜAbdūsī also addressed this specific question, but placed further emphasis on Muslims' obligation to reduce themselves to ruin if necessary in order to emigrate from Christian territory.

Al-Wansharīsī concludes this first part of his response with the following assortment of precedents related to Mudéjars:

> For this reason, [scholars within] the *madhhab* have disagreed as to the status of the Mudéjars' property: Is its status that of the territory, and therefore like enemy property? Or is it still under their possession?
>
> According to one scholar, interacting with them is not permissible, nor is greeting them, similar to those with heretical beliefs (*ahl al-ahwā'*).
>
> The judge Abū al-Walīd al-Bājī[100] – may God have mercy upon him – stipulated that if a Muslim who lives in *dār al-ḥarb* despite the ability to leave is killed unintentionally, no blood money is owed [to his family] for him.
>
> Adherents of the [Mālikī] *madhhab* have also stipulated a refusal to accept the pronouncements of the Mudejars, such as the judges of the Mudéjars of Valencia, Tortosa, Pantelleria, and Majorca. They explained this by the fact that a condition for

[100] Abū al-Walīd al-Bājī (d. 474/1081), an Andalusī judge and jurist. SN, 1:178.

> accepting a judge [i.e., accepting his written documents as valid] is the validity of his appointment, by someone demonstrably entitled to appoint him.[101]

Like the proof-texts cited at the beginning of the response, much of this material, with slight variations, is also used to support the obligation to emigrate from non-Muslim territory in al-Wansharīsī's two *fatwā*s concerning emigration from Iberia.[102] His use of the same arguments here and in *Asnā al-matājir* and the Marbella *fatwā* indicate that al-Wansharīsī considered the two cases of Muslims living under Christian rule in the Maghrib and in Iberia to be equivalent violations of the Mālikī school's prohibition of living under non-Muslim rule. This last section further demonstrates that the jurist considered these earlier opinions related specifically to Mudéjars to be authoritative precedents for questions regarding Moroccans under Portuguese control.

As familiar as these arguments are, it might be noted that al-Wansharīsī's presentation of them here, in what I will call his Berber *fatwā*, appears slightly stricter than in *Asnā al-matājir* and the Marbella *fatwā*. His mention of the opinion prohibiting interactions with Muslims under non-Muslim rule, including greeting them, is unique to this *fatwā*. And whereas in *Asnā al-matājir*, al-Wansharīsī cites Ibn ᶜArafa's opinion that the documents of Mudejar judges were be treated with circumspection,[103] here Ibn ᶜArafa's opinion has been elevated to a widely-held school doctrine and intensified to an outright prohibition.

Following this answer regarding the overall permissibility of these Berbers' voluntarily living under Christian rule, al-Wansharīsī addresses the legal status of the second group, who were described in the question as those who, in addition to living

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[101] Appendix D, 423.
[102] In *Asnā al-matājir,* al-Bājī is not mentioned but a similar opinion held by Abū Ḥanīfa's regarding blood money is discussed. See Appendix A, 361-62.
[103] See Appendix A, 373.

under infidel rule, "go to them" for trade. Al-Wansharīsī appears to respond as though this group were not already living in enemy territory, as he states that it is prohibited to enter infidel territory for any reason other than the ransoming of prisoners. The consequences of doing so are a loss of legal probity, meaning the Muslim's testimony and leading of prayer are not valid.

Al-Wansharīsī then makes an explicit policy recommendation:

> What is obligatory upon the leaders of the Muslims and upon the community – may God provide for and assist them – is to prevent entry into the land of war for trade, and to place observation posts along the route for this [purpose], such that no one finds a way [to enter *dār al-ḥarb*]. This is especially [necessary] if it is feared that any of those things will be brought to them whose sale to [the enemy] is prohibited and which [would increase their] power over the Muslims, in order for them to make use of it in their wars.[104]

At this point al-Wansharīsī's Berber *fatwā* departs sharply from *Asnā al-matājir* and the Marbella *fatwā*. As with the other *fatwā*s included in this section of *al-Jawāhir al-mukhtāra*, this response clearly points to an ongoing state of war between those territories occupied by Christians and those that remain under Muslim control. Al-Wansharīsī not only links trading with the enemy to providing them with war materiel, but also rules that all Muslims are obligated to prevent such treachery by observing the roads and blocking anyone attempting to enter foreign-occupied areas.
Al-Wansharīsī concludes this section of his response by citing Mālik's strong dislike of travelling to *dār al-ḥarb* for trade, as well as several scholars' lists of materials which may not be sold to the enemy.

In the third section of his response, al-Wansharīsī addresses the status of spies, described here as those Muslims who inform the enemy of the Muslims' weaknesses.[105]

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[104] Appendix D, 424.
[105] In the question, this group was described as trading with the infidels and informing them of the Muslims' affairs in addition to living among them.

His answer regarding this group is similar to that of al-Māwāsī. Al-Wansharīsī begins with the opinion of Ibn al-Qāsim and Saḥnūn that the spy should be killed without an opportunity to repent, but the jurist then lists a number of other opinions as to the punishment of confirmed spies, ranging from beating to imprisonment to exile.

Al-Wansharīsī divides the fourth group described in the question into three categories: those who fish or hunt with the infidel, those who go to them with their legal disputes, and those who pray for the continuation of infidel rule. He states that the legal probity of those in the first two categories is compromised and that their actions are extremely reprehensible, almost prohibited. As with his treatment of the second group, this response suggests that al-Wansharīsī is treating these actions independently of these same Muslims' ongoing residence under non-Muslim rule.

Al-Wansharīsī's response regarding the third category within this fourth group is worth quoting in full:

> It is evident that this is a sign of the supplicant's apostasy and deviation from right belief, and of the corruption of his heart and of his convictions. [This is] because this [action] indicates contentment with unbelief; and contentment with unbelief is unbelief. Shaykh Abū al-Ḥasan al-Ashᶜarī – may God be pleased with him – put the desire for unbelief on par with unbelief, such as the construction of churches in which to engage in infidelity, or the killing of a prophet despite believing in the validity of his message, in order to do away with a legal code. According to al-Qarāfī,[106] delaying someone who comes to you to convert also constitutes [a desire to further infidelity], because you advise him to delay [conversion to] Islam, and the desire to prolong infidelity, meaning the desire for its continuation, is infidelity.
>
> A legal issue which arose during the Shihāb al-Dīn al-Qarāfī's days – may God have mercy upon him – is illustrative of this. One man said to another, "May God make you die as an infidel!" The *shaykh* Sharaf al-Dīn al-Karkhī issued a *fatwā* [confirming] this [first] man's infidelity, on account of the desire for infidelity implied by [his statement].
>
> This [desire for infidelity] is even clearer and more obvious in this case of yours. The best case for these deviants is that great lengths should be gone to in beating them, and the utmost effort applied to punishing them, such that they repent. [This should be done] just as [the Caliph] ᶜUmar – may God have mercy upon him – beat Ṣabīgh, whose conviction was suspected, until he said: "Oh Commander of the Muslims, if you

[106] Shihāb al-Dīn Aḥmad b. Idrīs al-Qarāfī (d. 684/1285) was a prominent Egyptian Mālikī scholar. DM, 128-130; SN, 1:270.

> wanted to heal me, you have cured my illness; and if you wanted to kill me, finish me off." So he let him go.[107]

This section of al-Wansharīsī's response is particularly significant because the group in question has committed the same basic offenses of which *Asnā al-matājir*'s Andalusī emigrants are found guilty: contentment with infidel rule, and the public expression of a desire for its continuance. In *Asnā al-matājir*, al-Wansharīsī likewise recommends severe punishment, including beating and imprisonment, but he stops short of declaring the emigrants to be apostates, stating merely that they border on infidelity.

In this *fatwā*, al-Wansharīsī is far less cautious. He accuses this Berber group directly of apostasy in his opening statement, and reinforces this verdict with several examples and opinions meant to show that even actions which promote infidelity amount to the commission of infidelity. And although the punishment recommended here resembles that prescribed for the Andalusī emigrants – a severe beating – its purpose is distinct. The Andalusīs were to be made an example of and prevented from continuing to spread *fitna* or from returning to Castile. In the Berber *fatwā*, the purpose of this punishment is to convince these Muslims to repent, the implied meaning of which is that they must repent of their apostasy and return to Islam. The consequences of not repenting are suggested in the form of a story: The caliph ʿUmar b. al-Khaṭṭāb beat a man until that man declared that he had been cured of his suspect convictions, but that if this had not been the caliph's intention, then he wished a speedy death. The commonly accepted punishment for apostasy is death following ample opportunity to repent.

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[107] Appendix D, 426.

Al-Wansharīsī may have judged this Berber group more severely for at least three reasons. First, the Andalusīs had at least emigrated to *dār al-Islām*, even if they subsequently expressed the desire to go back to Castile; in contrast, the Berbers in question were still happily living under Christian rule and praising their infidel masters. Second, the ongoing state of war in Morocco meant that Muslims remaining under Portuguese rule committed the additional offenses of failing to defend their own territories and of hindering other Muslims' military offensives actions against foreign rule. Third, *Asnā al-matājir* may simply reflect a more developed and tempered position, crafted in the wake of this initial round of *fatwā*s by the leading jurists of Fez.

Al-Wansharīsī almost certainly authored *Asnā al-matājir* subsequent to the Berber *fatwā*, which must have been written at the same time as the rulings issued by Ibn Barṭāl and al-Māwāsī. The questions asked of these three jurists, as well as their responses, share enough common elements to suggest that they represent a loosely defined set of questions circulated among a specific group of Fāsī jurists at a given point in time. Their answers may have been drafted over several months, varying in response to newly arising cases, more nuanced questions, and engagement of the other jurists' opinions. This formal discourse on Muslims living under non-Muslim rule in Morocco must have taken place at some time in the twenty-two years subsequent to al-Wansharīsī's arrival in Fez in 874/1469 and prior to al-Māwāsī's death in Rajab 896/May 1491. If al-Waryāglī's *fatwā*, which shares the concerns but not the language or structure of these other rulings, is assumed to have been issued in the same period as the others, the latest composition date for the group would be slightly earlier, prior to al-Waryāglī's death in 894/1488-89.

In either case, these *fatwā*s would all pre-date al-Wansharīsī's Dhū al-Qaʿda 896/September 1491 composition of *Asnā al-matājir*. This demonstrates that al-Wansharīsī's two rulings on emigration from Spain were shaped not only by the current state of war and the reality of extensive foreign occupation in Morocco at the time, but also by this formal juristic discourse concerning Muslims living under Christian rule in Morocco, a discourse which had taken place in Fez and in which al-Wansharīsī himself had participated in the years or even months prior to the composition of *Asnā al-matājir*. Al-Wansharīsī would have seen the questions posed to him in *Asnā al-matājir* through the lens of the ongoing situation in Morocco, and would have drafted his response as both a product of and contribution to the contemporary juristic discourse on Muslims living under non-Muslim authority in both the Maghrib and, arguably to a lesser extent, Iberia.

The Berber *fatwā* concludes with al-Wansharīsī's response regarding the permissibility of buying property from the infidels which has been seized from Muslims living under their control. The jurist first relates a precedent recorded in the *Mudawwana* and the *ʿUtbīya*, where it is stated that if a Muslim enters *dār al-ḥarb* under a safe passage agreement, and buys or is given a slave which had belonged to a Muslim but was taken prisoner by a *ḥarbī*, the former Muslim master of that slave has the right to buy the slave back from the traveler who purchased it from the *ḥarbī*. The original owner must pay to the new buyer the same price that that buyer paid to the *ḥarbī*. Al-Wansharīsī then notes a number of later opinions extending this precedent to any property purchased in *dār al-ḥarb* which had previously belonged to Muslims or *dhimmī*s; it is implied here that this discussion relates to property seized in *dār al-Islām*

during a raid and taken back to *dār al-ḥarb*. Mālikī jurists agreed that the original owners have the right to buy their property back from the new owners, although al-Wansharīsī notes some disagreement as to the determination of a fair price.

Al-Wansharīsī then states that this same principle applies to the case of a Muslim entering *dār al-ḥarb* in order to free these books from enemy hands, although he makes no mention of the possibility of the original owners' later re-acquiring the books. This analogy separates book-buying from the prohibited forms of trading with the enemy which are a dominant theme in these *fatwā*s, and creates a space for the ransom-like recovery of objects which al-Wansharīsī and others clearly felt should not be in infidel hands. Interestingly, al-Wansharīsī takes the opportunity to list the fields of knowledge in order of their importance, stating that the student in question must prioritize his book rescue efforts as follows: the Qur'ān (even if the rescuer is not in a state of purity), then *ḥadīth*, then *fiqh*, then *uṣūl al-fiqh* and *uṣūl al-dīn*, then Arabic, lexicography, medicine, *tafsīr* (especially that of Ibn ᶜAṭīya), and the readings of the Qur'ān.

Ḥamdūn

Following al-Wansharīsī's *fatwā* is a ruling issued much later by Abū al-ᶜAbbās Aḥmad b. Muḥammad al-Abbār al-Fāsī, known as Ḥamdūn (d. 1071/1660-61), who was a *muftī* and a preacher at the mosque of al-Andalus in Fez.[108] The pious formula used to introduce Ḥamdūn, who outlived al-Zayyātī, indicates that he was alive the time these *fatwā*s were compiled. In this *fatwā*,[109] Ḥamdūn is asked if a Sunni, Mālikī man must sell

[108] SN, 1:447; MM, 4:1490-91.
[109] Appendix D, 427-30.

his immovable property and emigrate from his current area of residence, where he lives among Muslims whose doctrine differs significantly from that of the four recognized Sunni *madhhabs*; the group described appears to be Kharijite. The unidentified questioner describes several of this group's beliefs but notes that they do not impose their doctrine upon this man; rather, they follow their doctrine and he follows his. Ḥamdūn responds that if the man is able to locate a land free of these beliefs and can move there without difficulty, then he must do so. If the widespread corruption of the times leaves him unable or uncertain of finding a better place, then he should remain where he is and keep to his house, making his home his refuge. This is if the heretical group is discreet and does not expose the man or his family to *fitna*, possibly corrupting their beliefs. Yet if these people openly implicate themselves in infidelity, Ḥamdūn states that they are judged to be infidels, and the prohibition of living with them is no different from that of living among infidels; the man must sell his property and emigrate.

Categories of Hijra

Following this *fatwā*, al-Zayyātī includes an excerpt describing several categories of *hijra*; I have not been able to identify the author or work, but the passage is similar in content to a passage from Ibn al-ᶜArabī's work cited by al-Wansharīsī in *Asnā al-matājir*. In *al-Jawāhir al-mukhtāra*, this section emphasizes Muslims' continuing obligation to emigrate from infidel territory, or from areas of widespread heresy and disobedience to God, to Islamic territory. The standard proof-texts for this obligation are discussed: Qur'ān 4:97-100, exempting only the weak from emigrating away from

oppression, and the *ḥadīth* report in which Muḥammad declares himself free of any Muslim living among the polytheists. Near the end of the passage, the author states that scholars are particularly obligated to emigrate because God has honored them with knowledge, and it is not permitted for them to disgrace themselves.

Al-Bijā'ī

This excerpt on *hijra* is followed by a *fatwā* issued by another contemporary of al-Wansharīsī. Al-Zayyātī identifies him as Aḥmad al-Lajā'ī, who must be the jurist Ibn ᶜAskar identifies as Abū al-ᶜAbbās Aḥmad b. Muḥammad al-Ḥājj, al-Bijā'ī then al-Tilimsānī (of Bougie then Tlemcen); he is also identified in some sources as Abū al-ᶜAbbās Aḥmad b. Muḥammad b. ᶜĪsā al-Lajā'ī.[110] His birth and death dates are unknown, but Ibn ᶜAskar in *Dawḥat al-Nāshir* places his birth at the beginning of the tenth century *hijrī*; in reproducing this notice in *Mawsūᶜat aᶜlām al-Maghrib*, Muḥammad al-Ḥajjī accordingly classifies al-Bijā'ī as having died in approximately 901/1495. The biographical notices for al-Lajā'ī state that he studied with the jurists of Fez, including ᶜAbd Allāh al-ᶜAbdūsī (d. 849/1446)[111] and other scholars of al-ᶜAbdūsī's generation. We are told that his students included Muḥammad b. Muḥammad b. Marzūq al-Kafīf (d. 901/1495),[112] and that al-Wansharīsī included some of his rulings in the *Miᶜyār*. In one of these rulings, al-Bijā'ī answers a question directed to the scholars of Fez concerning the legitimacy of a pious endowment created by a previous Marīnid sultan.[113] Al-

[110] For al-Bijā'ī, see: DN, 114-15; MA, 2:807-808 (same notice). The following sources record his *nisba* as al-Lajā'ī: JI, 1:122; NI, 1:121; SN, 1:345. Al-Wazzānī incorrectly records this jurist's name as Aḥmad al-Jāyy.
[111] SN, 1:367. Al-Waryāglī also studied with al-ᶜAbdūsī.
[112] SN, 1:387.
[113] Al-Wansharīsī, *al-Miᶜyār*, 7:305.

Wansharīsī records the responses of several of the questioned jurists, which also included al-ᶜAbdūsī.[114]

In *al-Jawāhir al-mukhtāra*, al-Zayyātī appears to introduce al-Bijā'ī as the author of the question rather than the answer; but Ibn ᶜAskar attributes the answer to al-Bijā'ī and includes that part of the text in his biographical entry for the jurist.[115] Al-Zayyātī, who records the full question, records the name of the jurist who must be the *mustaftī* (rather than the *muftī*) as Aḥmad b. al-Ḥājj al-Baydarī; I have not been able to identify this figure despite searching for a number of possible variants. Ibn ᶜAskar states that al-Bijā'ī composed the *fatwā* in response to a question posed to him by Abū al-ᶜAbbās al-Bijā'ī, a similarly obscure figure. It may be that al-Bijā'ī supplied this same answer to more than one questioner, or composed the *fatwā* in response to one original question but then circulated his answer among people who were later confused with the original *mustaftī*.

The questioner describes a region populated by oppressors and evildoers in which unlawful acts and taxes are widespread, in which Muslims are debased and infidels glorified, in which oppressors hold themselves high while the learned humble themselves, and in which Muslims pay taxes on all purchased goods. The matter is particularly problematic for those seeking guidance; none of the region's virtuous men speak out against what is happening around them, perhaps out of fear, and people are compelled to study with the scholars of this region, while fearing for themselves as well.

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[114] Ibid., 7:304-310.
[115] DN, 114-15.

The questioner, who notes at the end that he is writing urgently on his own behalf, wants to know if it is appropriate to remain in such a place, despite not having the ability to correct the inhabitants' behaviors. He also wishes to know if it is permissible, if he is compelled, to buy some of the taxed goods. Or is it necessary for someone in this position to sell his property and move to another location, especially to avoid continued exposure to negative influences?

Al-Bijā'ī begins his response by stating that it is obligatory for believers to flee with their religion from *fitna*, by which he means corrupting influences, and to settle only where traditional religious practices are upheld. One must acquire what is essential in terms of religious knowledge only from masters who are clearly worthy of submitting to; if necessary, one must travel for this purpose. In citing as evidence for this requirement Qur'ān 4:97, {Was God's earth not spacious enough for you to have migrated therein?}, al-Bijā'ī appears to place as much emphasis on the obligation to travel in search of correct knowledge as he does on the obligation to emigrate away from corruption and oppression. He states that this obligation applies if one has the ability to emigrate and can find the instruction he is looking for elsewhere.

If emigration is too difficult, on the other hand, or the man in question cannot locate exemplary masters or a virtuous land, then he should remain where he is and cultivate patience. He may be considered among the oppressed and weak in the earth, who are exempted from the obligation to emigrate by Qur'ān 4:98; and like those who have no supporter in religion, but who pray for a rescuer and protector in Qur'ān 4:75, saying {Our Lord! Bring us forth from this town whose people are oppressors, and

appoint to us from Thee a protector, and appoint to us from Thee a helper.}[116] Al-Bijā'ī thus advises his questioner to maintain an attitude of patience and hope, and provides him with a Qur'ānic framework within which to view his situation, justifying his need to remain in what appears to be non-Muslim territory.

The jurist continues with a few practical suggestions as to how someone in this situation might avoid, to the extent possible, contributing to and being influenced by the surrounding corruption. Al-Bijā'ī advises the man in question to study what he needs to, with anyone who advances himself as someone to be learned from. The jurist supports this advice with three sayings: "Many a man bears knowledge to those more knowledgeable than he," "The sick person might be cured with an infidel doctor's medicine," and "God might further the religion even through a sinful man." While the last is a well-documented *ḥadīth* report and the first appears to be a popular saying attested in a lesser-known *ḥadīth* collection, the middle statement appears lesser-known or may be original to al-Bijā'ī. Although the immediate purpose of all three statements is to encourage students to learn what they can from the masters available to them, al-Bijā'ī also implies that there is hope in general for those wishing to make the best of their circumstances under unjust rule.

Al-Bijā'ī then recommends that the man buy what clothing and food he requires, being sure not to act carelessly but to remain cautious and to exercise discretion. He should avoid buying from those who have taken the goods offered for sale as taxes, and instead should buy only from the original owners. The man must be careful to adhere to established laws and legal precedents and to remain within the

[116] In the Qur'ān, this is in the context of several verses encouraging *jihād* in the path of God and on behalf of the weak such as those who pray to be rescued from oppression.

bounds of necessity. He must not give in to whims or allow himself too many 'permitted' actions, let alone engage in prohibited acts. Al-Bijā'ī assures his questioner that if he limits himself to his needs, his religion will not be adversely effected; for "if the world were a corpse, that would be a permissible source of sustenance for the believer." This unpleasant but broadly permissive analogy was enough for al-Zayyātī or for an earlier editor of this *fatwā*; a note at the end of the ruling states "end of the necessary part" of this text, suggesting that al-Bijā'ī originally had more to say.

The exact context for al-Bijā'ī's *fatwā* is not entirely clear and will require further research which falls outside the scope of this study. In the first part of the *fatwā*, the questioner appears to be a student of religion who is concerned about the quality of masters with whom he can study in his region. Yet near the end of the response, al-Bijā'ī's advice that the man exercise discretion in availing himself of the dispensations allowed him out of necessity while adhering to the law to the extent possible suggests that this *mustaftī* is already quite learned. It may be that the questioner is at least in part complaining about the phenomenon of other, more junior students receiving knowledge from masters in this region who are not nearly as virtuous as they claim to be.

The region in question appears to be under non-Muslim rule and populated by both Muslims and non-Muslims, but this is likewise unclear. The questioner states that infidels are glorified while Muslims are debased and taxed, and al-Bijā'ī's doctor analogy supports productive exchanges with infidels in cases of necessity. Yet language related to 'oppressors' in this region and the feasibility of emigrating to a more 'virtuous,' rather than to a 'Muslim' territory leave the exact nature of this man's

region less explicitly defined than in most of the other *fatwā*s related to emigration. What appears most likely is that al-Bijā'ī is writing about a rural territory under the control of local Muslim leaders who have allied with the Portuguese authorities controlling a nearby port; as in Ibn Barṭāl's *fatwā*s, the line between infidel and Muslim territory here may not be clear-cut.

Al-Bijā'ī and his *mustaftī* may also be maintaining a cautious subtlety by using this less explicit language to address the concerns of a Muslim remaining under infidel rule. The apparent focus on a Muslim student studying with Muslim teachers of questionable piety allows al-Bijā'ī to respond indirectly and sympathetically to the questioner's underlying predicament of being a Muslim living under non-Muslim rule. The questioner's concern with the quality of religious instruction in his area may also help allay any suspicions regarding the purity of his motives for remaining where he is, by depicting him as a devout Muslim. Finally, by linking the obligation to emigrate to both ability and the existence of a suitable place to which to relocate, al-Bijā'ī is able to exempt the man from emigration on the grounds of this lack of a suitable destination; the implication is that even the unambiguously Muslim-ruled areas of Morocco did not necessarily constitute better places to settle at this time than did regions indirectly controlled by foreign powers.

Al-Zawāwī

Al-Bijā'ī's *fatwā* is followed by three rulings which appear to have been issued much earlier, by Abū al-Ḥasan ᶜAlī b. ᶜUthmān al-Zawāwī (d. 815/1412-13).[117] In two

[117] Al-Zayyātī gives the jurist's name as al-Zarwālī, but this appears to be a mistake. See Appendix D, 434 n. 256.

biographical notices for al-Zawāwī, Aḥmad Bābā al-Tinbuktī lists no birth or death dates but states that he was a jurist in Bijāya, that he was the father of Manṣūr b. ᶜAlī al-Zawāwī, and that his second *nisba* was al-Manjulātī.[118] In his notice for ᶜAlī 's son Manṣūr, Aḥmad Bābā states that Manṣūr was the *muftī* of Bijāya, that many of his *fatwā*s are in the *Miᶜyār*, and that he was still alive around 850/1446.[119] In *al-Ḍaw' al-lāmiᶜ*, al-Sakhāwī includes a more substantial entry for Manṣūr which gives his death date as 846/1442-43 and his *nisba*s as "al-Zawāwī then al-Bijā'ī;" 'al-Zawāwī,' a tribal name, is thus used here to refer to the family's area of origin, while 'al-Manjulātī' (short vowels uncertain) may refer to a village or a clan within the tribe.[120] Another notice in *al-Ḍaw' al-lāmiᶜ* for an ᶜAlī b. ᶜUthmān al-Manjulātī al-Bukhārī, giving no details other than a death date of 815/1412-13, must refer to Abū al-Ḥasan ᶜAlī, as 'al-Bukhārī' must be a mistake for 'al-Bijā'ī;' thus this may be advanced as a tentative death date for al-Zawāwī.[121]

In the first *fatwā*, al-Zawāwī is simply asked if those living in Christian territory must emigrate. The jurist responds that, according to Ibn Rushd, the scholars have come to a consensus that it is not permissible for Muslims to remain voluntarily in infidel territory, where they are subject to infidel laws. Thus, those who are able to flee must do so.

In the second question, al-Zawāwī is asked about the case of a man who lives in Christian territory and wants to emigrate, but is forbidden to do so by one or both of his parents. The questioner wishes to know whether this man may leave without their

[118] NI, 1:373; KM, 1:354.
[119] NI, 2:311; KM, 2:251.
[120] DL, 10:158.
[121] DL, 5:232.

permission, or if this might depend on whether or not he fears losing them, or if they have any other children. Al-Zawāwī responds that the man's departure does not depend upon his parents' permission, as he owes no obedience to them in their disobedience to God. Yet the jurist also states that he can find no textual precedent regarding the man's fear of losing his parents, and that this is certainly a case of two conflicting obligations. The principle to be followed then is to prioritize the stronger obligation. Al-Zawāwī does not explicitly state which this is, but he leaves room for the man in question to choose to remain with his parents, as he continues by stating that "if they have other children, then in that case the rule is what preceded of the obligation to flee, without seeking permission."[122] This implies that if the parents do not have other children, it might be preferable to remain. This question is very similar to a later *fatwā* issued by Granadan chief judge al-Mawwāq (d. 872/1492), who was asked if a man may return to *dār al-ḥarb* to visit his parents; in response, the jurist likewise stresses the obligation to emigrate and quotes another opinion allowing discretion in choosing the lesser of two evils between not emigrating or not honoring one's parents.[123]

In the third question, al-Zawāwī is asked to explain the meaning and virtues of *hijra*. He responds by saying that the well-known *hijra* was the obligation to emigrate to the Prophet, prior to the conquest of Mecca. After the conquest, that particular *hijra* lapsed, but the obligation remained to flee from places where one fears for the soundness of one's religion, or where there is no one to teach the essentials of the

[122] Appendix D, 434.
[123] See Miller, "Obligation to Emigrate," 284-88.

religion. Al-Zawāwī confirms that it is especially necessary to flee lands seized by the infidels, and anywhere their laws apply to Muslims.

Ibn Zikrī

These three short *fatwā*s by al-Zawāwī are followed by two rulings by Abū al-ᶜAbbās Aḥmad b. Muḥammad b. Zikrī al-Mānuwī al-Tilimsānī (d. 899/1493).[124] Ibn ᶜAskar describes Ibn Zikrī as the chief *muftī* of Tlemcen and most knowledgeable scholar of his time. He wrote a number of works in the fields of law, poetry, creed, and theology, including a work on judgments and *fatwā*s. A number of his rulings are in the *Miᶜyār*, and he was said not to restrict himself to *taqlīd* (applying precedents) because he had reached the level of *ijtihād* (independent legal reasoning).

The first question posed to Ibn Zikrī concerns a *sharīf* (descendant of the Prophet) engaged in *jihād* in the environs of Ceuta and 'her sisters,' presumably cities similarly under foreign control. The questioner wishes to know if the man's actions are permissible considering that the sultan, whose area of control extends to this man's region, has signed a treaty with the polytheists. He also asks if the treaty itself, which was signed for a term of over twenty years, is legitimate. Ibn Zikrī responds that the man may continue to fight the enemy if he is safe from those who might prevent him from engaging in combat and if he believes the enemy to be fighting Muslims elsewhere. The jurist also declares the treaty in question to be void because such treaties may only be signed for two or three years, and because it strengthens the enemy.

[124] DN, 108-109; SN, 1:386; NI, 1:136-37; KM, 1:125-26; DH, 48; MA, 2:798.

In the second question, Ibn Zikrī is asked what he thinks of those tribes of the Far Maghrib (Morocco), near Ceuta , Tangier, and Asilah, which have intermingled their affairs with those of the Christians. The questioner states that such friendship has developed between them that these tribes inform the Christians of impending Muslim attacks, and the Muslims find the enemy prepared for them. The Muslims must pass through these tribes' lands in order to fight the Christians, and often the tribes fight the Muslims alongside the Christians. Ibn Zikrī is asked to rule on the status of these tribes' lives, property, women, and children. The questioner also wishes to know if the tribes should be exiled from these areas, and if they refuse, if they may be fought. Ibn Zikrī states that these people should be fought and killed like the infidels with whom they have allied, and refers to the Qur'ānic statement that those who ally with the infidels are considered to be among them. These two *fatwā*s were most likely issued in the years following 1471, when Muḥammad al-Shaykh signed a twenty-year treaty with King Affonso of Portugal and ceded to him Asilah and Tangier.

Al-Nālī and Ibn Hārūn

After this group of *fatwā*s, al-Zayyātī's chapter on *jihād* begins to address the conduct of war and a range of rulings related to the status of *dhimmī*s, Christians and Jews living under Muslim rule. At a short remove from these *fatwā*s concerning emigration and relations with foreign-occupied territories are two final *fatwā*s which shed light on the contemporary discourse regarding Muslims living under Portuguese rule. In the question, Abū ʿAbd Allāh Muḥammad b. Aḥmad al-Nālī, known as al-Musfir

(d. 928/1521-22),[125] is asked about a thief who fled to a place called ᶜAyn Shams "with the other apostates" while his wife stayed in *dār al-Islām*.[126] She had been remarried to a Muslim for a couple of years when her ex-husband returned from the "land of the apostates" to Islamic territory. The man wanted his wife back and claimed to have fled from unjust laws; but the woman's agent countered that the man had chosen to flee to the land of the apostates (*arḍ al-murtaddīn*), and that if one spouse commits apostasy, the marriage is rendered invalid and ends in divorce. Al-Nālī responds that the people of ᶜAyn Shams and similar areas surrounding al-Qaṣr – presumably al-Qaṣr al-Ṣaghīr – and Tangier should not be referred to as apostates, and that only those who do not understand the meaning of apostasy would say this. These people in question should rather be referred to as disobedient to God, and if it cannot be proven that this man has decisively and happily become an infidel, his wife should be returned to him despite her subsequent remarriage. Even if this man settled in *dār al-kufr* for an extended period, as long as he remained Muslim his matrimonial authority over his wife would not be revoked; such a revocation may only take place if it is proven that he has broken from the religion of Islam.

This *fatwā* suggests a popular counterpart to the formal juristic discourse regarding the extent to which a Muslim's geographical location and associations determine his legal identity as an upright Muslim, sinner, or apostate. For the jurists discussed above, mere residence even in unambiguously Christian-controlled territory was insufficient to render Muslims equivalent in legal status to infidels; to incur this status, they additionally had to aid the enemy by spying or fighting for them, trading

[125] DN, 37; MA, 2:844. Ibn ᶜAskar states that al-Nālī was a prominent *muftī* in his time, to whom questions would be sent from afar. He was buried in the part of the Ghumārā region inhabited by the Banū Nāl.
[126] Al-Wazzānī, *al-Miᶜyār al-jadīd*, 3:49-50. This *fatwā* is outside the range of *fatwā*s edited in Appendix D.

with them, or contentedly paying them tribute and praising their rule. Whether as a result of broadly interpreting or ignoring these qualifications, it must have been a common assumption in this wife's region that moving to or even seeking temporary refuge in this *arḍ al-murtaddīn* automatically constituted apostasy. If the matter was at all unclear to them, the man's wife and her new husband would have risked committing *zinā* by marrying one another, her representative would have risked sanctioning marital infidelity, and the *mustaftī* posing this question might have used more careful language. The tone of al-Nālī's chastising response suggests he is frustrated with a widespread phenomenon of Muslims illegitimately holding other Muslims to be apostates based only on their geographical location.

A later jurist, Abū al-Ḥasan ᶜAlī b. Mūsā b. Hārūn al-Maṭgharī al-Fāsī (d. 951/1545),[127] does not appear to have shared al-Nālī's frustration. Ibn Hārūn was asked much more complicated question about a Christian prisoner of war who converted to Islam while captive, married a Muslim woman and had a child with her, fled to *dār al-ḥarb* for a year or so, and returned to find his wife remarried on account of his apostasy.[128] He then remarried another Muslim woman, had a child with her, and returned to *dār al-ḥarb* for ten months while she was pregnant with their second child. Upon return, he found her too engaged to another man; she stated that her first husband had made his apostasy apparent, that she would not return to him, and that he had gone to *dār al-ḥarb* without cause. Ibn Hārūn ruled that if this were the case, the man was an apostate who must repent or be killed, and that this second wife was free to

[127] DN, 51; KM, 1:368-69; DH 408. According to Ibn ᶜAskar, Ibn Hārūn was a teacher and *muftī* in Fez and the most prominent scholar of his time, whose funeral was attended by the Sultan Abū al-ᶜAbbās Aḥmad b. Muḥammad al-Waṭṭās (r. 1526-1545). Ibn Hārūn lived to over eighty years old.
[128] Al-Wazzānī, *al-Miᶜyār al-jadīd*, 3:50.

marry whomever she wished. Abū al-Qāsim b. Khajjū (d. 956/1549) indicated his agreement with Ibn Hārūn's ruling at the bottom of the *fatwā*. The difference in judgment between these two cases can be attributed to a number of factors; the legally pertinent ones would be the wife's presentation of evidence as to her husband's apostasy and the man's lack of a valid reason for being in enemy territory. Other considerations may have included the man's Christian origins and opportune original conversion, and the jurists' desire to register opposition to a culture of fluid conversions, border crossings, and unstable identities and loyalties.

Most importantly, these last two *fatwā*s, to the extent that they might be reflective of the late fifteenth century as well as the early sixteenth, suggest that the case of *man aslama wa-lam yuhājir*, "He who has converted to Islam but has not emigrated" was not an archaic legal precedent which al-Wansharīsī could only make relevant to the status of conquered Muslims through a forced analogy in *Asnā al-matājir*. Rather, they suggest that variants of this older type of case were alive and well alongside the more recent phenomenon of conquered Muslims living under Christian rule; in fact, the coexistence of these cases appears to have contributed a great deal to the blurring of identities, boundaries, and loyalties in and around Portuguese-occupied Morocco. Discussing the close of the fifteenth century and beginning of the sixteenth, Cook writes that "Religious line-crossing occurred everywhere, and persons might change faiths or sects several times en route to the Beyond. Christianity and Islam ordered death for apostasy, but fluid borders and the excuse of forced conversion gave maneuver room to the quick and the deft."[129] Alongside prisoners of war, those with

[129] Cook, *Hundred Years War*, 142-43.

incentives to maintain flexible loyalties included local Muslim leaders or merchants who allied with the Portuguese, European converts to Islam (*ʿulūj*) conducting trade in Morocco, and Andalusī refugees – some of whom had already been forcibly converted to Christianity – in pursuit of new lives. The ongoing state of war within Morocco, the influx of foreign merchants and refugees, and the phenomenon of shifting loyalties must have rendered the stark legal formula of territory-as-identity an attractive policy and measure of loyalty.

Conclusion

The foregoing material supports two primary conclusions and raises one important question. The first conclusion is that al-Wansharīsī's two *fatwā*s on emigration from Iberia, *Asnā al-matājir* and the Marbella *fatwā*, must be viewed as part of this larger contemporary juristic discourse on the status of Muslims living under non-Muslim rule in both Iberia and North Africa in the late fifteenth and early sixteenth centuries. The section of al-Zayyātī's *al-Jawāhir al-mukhtāra* analyzed here shows that al-Wansharīsī (d. 914/1508) and at least three of his immediate peers in Fez, al-Waryāglī (d. 894/1488-89), al-Māwāsī (d. 896/1491) and Ibn Barṭāl (d. *ca.* 900/1495?), were all writing *fatwā*s on the status of Muslims living under Portuguese rule and on Muslim-Christian relations in the years prior to al-Wansharīsī's composition of *Asnā al-matājir*. Two additional contemporaries, al-Bijā'ī (d. 901/1495) and Ibn Zikrī (d. 899/1493) addressed similar concerns from Tlemcen, and one Fāsī jurist, al-Nālī (d. 928/1521-22) ruled on Muslims living in *arḍ al-murtaddīn*, a region which can be

considered non-Muslim territory even if not formally under foreign rule. That these texts were not simply issued in the same time period but were products of a formal juristic discourse on a matter of shared concern is clear from the extent to which they overlap not only in content but in the specific phrasing of both questions and answers. This shared content is particularly evident in the *fatwā*s of al-Māwāsī and Ibn Barṭāl, and in al-Wansharīsī's Berber *fatwā*. We also know that important legal questions, especially those related to public policy and to the state's use of coercive force, tended to be posed to several of the capital's leading jurists, and that al-Wansharīsī in particular had a tendency to engage in protracted legal debates with other scholars through the issuance and solicitation of *fatwā*s.[130] The link between this group of *fatwā*s preserved by al-Zayyātī and *Asnā al-matājir* is provided most convincingly by al-Wansharīsī himself; the first half of the Berber *fatwā*, his own contribution to this shared discourse, reads like a rough draft for those parts of *Asnā al-matājir* he composed himself. In crafting this later response al-Wansharīsī would undoubtedly have had access to the range of opinions discussed here, and would have seen the question of emigration from Iberia through the lens of the ongoing war against foreign occupation in Morocco. Finally, the story of the unhappy emigrants explicitly links the question of Muslims living under non-Muslim rule in the Iberian Christian kingdoms and in Morocco, by making these Andalusīs players on the Moroccan stage, where they commit the same preference for infidel rule as their Moroccan coreligionists in al-Māwāsī's *fatwā* and the Berber *fatwā*. Placing *Asnā al-matājir* in the context of this wider discourse also casts doubt on the extent to which the predicament of Iberian Muslims

[130] These rulings include al-Wansharīsī's *fatwā* on construction in a Tlemcen cemetery (see chapter four, pg. 8, n. 12), his salary dispute with al-Waryāglī, his lengthy *fatwā* to his students on *iftā'*, and a *fatwā* answering his critics noted by Castro in "Principales aspectos," 38-39.

can be considered to have been viewed as exceptional by fifteenth and sixteenth-century Maghribīs.

The second conclusion to be drawn from this material is that *Asnā al-matājir* and the Marbella *fatwā*, placed in this larger context of rulings related to Muslims living under non-Muslim rule, appear to have been moderate for the time. This is in contrast to the common assertion that al-Wansharīsī's opinions were excessively strict, an argument often supported by comparing them to rulings issued by al-Māzarī, al-ᶜAbdūsī, or al-Wahrānī. While the validity of these comparisons will be revisited in the following two chapters, a primary aim of the foregoing analysis has been to demonstrate that the most immediate body of rulings with which to compare the positions adopted in *Asnā al-matājir* and the Marbella *fatwā* are the ones preserved by al-Zayyātī. The *Jawāhir al-mukhtāra fatwā*s treat the same basic legal questions as do these two rulings, they were issued in the same time period, many of them were also issued in Fez, and one of them was even issued by the same jurist, al-Wansharīsī.

The variety of questions contained in this group of *fatwā*s, and the remarkable range of responses to them, presents a much more complex and nuanced picture of the Mālikī discourse on Muslims living under and adjacent to Christian-controlled territories than has previously been discussed in the literature. If we were determined to classify these opinions on a scale of rigorist to pragmatist, we would first need to identify the one discrete legal question which most of these *fatwā*s have in common: the status of Muslims who remain subject to Christian authority (by paying them tribute) despite the ability to move, but who commit no further offenses related to trade, espionage, fighting, or the expression of contentedness with infidel rule. Al-

Waryāglī, who prays for divine assistance in killing such Muslims, would clearly be the 'rigorist,' although the term is ill-fitting; his position is quite pragmatic if we consider he is most likely writing for soldiers and local *mujāhidūn*. Ibn Barṭāl would be the 'pragmatist', as he rules that these Muslims are sinners who lose their legal probity, but retain the inviolability of their lives and property. Al-Mawāsī appears to agree with this position, but does not explicitly state that this group retains their inviolability.

If al-Wansharīsī's opinions should be considered 'moderate' rather than 'pragmatic,' it is primarily because he places far more emphasis than does Ibn Barṭāl on the necessity of emigration, and provides far more detail concerning the questionable status of conquered Muslims' lives and property. As for their property, al-Wansharīsī devotes a considerable portion of *Asnā al-matājir* to the scholarly disagreement over whether or not this may be confiscated. The closest he comes to taking a clear stance is his statement that if these Muslims support the enemy financially in their wars, the opinion that their property is licit becomes preponderant.[131] This implies that their property could very well be considered inviolable if they merely reside under enemy control, or if they contribute money to the enemy but that money is not used in fighting Muslims. Applied to the situation in Morocco, we would expect that paying tribute to the Portuguese thus would be reason enough for al-Wansharīsī to consider these Muslims' property to be licit. Yet in the Berber *fatwā*, al-Wansharīsī simply states that there is disagreement as to the status of Mudéjars' property;[132] he refrains from taking a stand or from elaborating as to which aspects of that disagreement might apply to the present situation. In an editorial comment in the *Miʿyār*, al-Wansharīsī also

[131] Appendix A, 367.
[132] Appendix D, 423.

states emphatically that the property of those Muslims who live adjacent to and have signed a treaty with *ahl al-ḥarb*, is inviolable; and that those jurists who have issued *fatwā*s to the effect that this property is licit are in clear error.[133] Although living near *dār al-ḥarb* and having signed a treaty is different from residing under direct Christian rule, al-Wansharīsī nevertheless clearly places himself in a position more moderate than that of his contemporaries in this comment.

As for the inviolability of Mudejars' and Moroccan Muslims' lives, in *Asnā al-matājir* al-Wansharīsī cites only Mālik's opinion that they are inviolable, without citing any opinion considering them violable.[134] Yet he also cites opinions to the effect that the accidental killing of a Muslim residing in *dār al-ḥarb* requires only atonement and not the payment of blood money, or the payment of only half of the standard blood-money.[135] In the Berber *fatwā*, al-Wansharīsī states that these Muslims' inviolability is not complete, and simply cites one jurist's opinion that no blood money is owed for the accidental killing of a Muslim voluntarily residing in *dār al-ḥarb*.[136] Thus in both fatwās, al-Wansharīsī appears to support the basic inviolability of conquered Muslims' lives, but also finds it important to clarify that the value of those lives for the purposes of compensation for accidental killing has been compromised. Aside from the question of lives and property, al-Wansharīsī's mention in the Berber *fatwā* of an opinion that these Muslims should not be greeted, as noted above, also renders the tone of this opinion

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[133] Al-Wansharīsī, *al-Miʿyār*, 2:439.
[134] Appendix A, 359, 360.
[135] Ibid., 356, 359, 362-63. Al-Wansharīsī discusses the issue of blood money in detail in *Asnā al-matājir*, in the sections on *ḥadīth* reports and the inviolability of lives and property. The opinion that only atonement rather than blood money is due is based on Qur'ān 4:92, which covers the atonement and compensation required for three categories of believers. The opinion that one-half of the blood money should be paid is based on a *ḥadīth* report in which Muḥammad orders one-half of the blood money paid in compensation for the accidental killing of some converts who were living among non-Muslims and whose conversion was unknown to the attacking expedition.
[136] Appendix D, 423.

somewhat stricter than that of *Asnā al-matājir* and of the *fatwā*s of Ibn Barṭāl and al-Mawāsī.

While it is important to recognize that al-Wansharīsī's opinions do not appear to have been particularly strict for his time, reducing these opinions to their lowest common denominator for the purposes of such a classification can also obscure their rich complexity. The *fatwā*s preserved by al-Zayyātī reveal several gradations of Muslim-Christian relationships, unclear geographical, ethical, and even religious boundaries, a range of audiences, and a nuanced set of answers. For example, in the Berber *fatwā* al-Wansharīsī takes the problem of trading with the enemy so seriously that he obligates the general populace to monitor the roads and prevent anyone from entering enemy territory; yet he also makes an exception for the purchase of Arabic books and provides detailed instructions as to how these purchases should be prioritized. Although Ibn Barṭāl states that the phenomenon of Muslims living under infidel authority is so horrifying that it threatens the pillars of Islam, he also preserves the inviolability of Muslims who have signed a treaty with the infidel but who promise not to pay the required tribute, or who say they are waiting to join a *jihād* if help arrives. Ibn Barṭāl also urges local leaders to counsel the residents of subjugated areas in order to encourage them to leave and to understand the consequences of choosing to stay; this may have been what Ibn Qaṭīya had in mind when he asked al-Wansharīsī in *Asnā al-matājir* if the offending emigrants should simply be warned and counseled and then left to their own devices.

Al-Zayyātī's compilation shows that although al-Wansharīsī and his contemporaries must have been participating together in a shared discourse, the exact

legal issues under discussion, and the range of available positions to be adopted on each issue, remained varied and flexible. The central legal categories of Muslims who live under infidel authority, pay tribute to them, spy for them, trade with them, and fight for them are supplemented or replaced in some of these *fatwā*s by questions regarding ransom payments, parental permission to emigrate, Muslims fishing with non-Muslims, farmers cultivating in enemy territory, Muslims fighting against infidels or hoping to, prayer leaders and callers, wives presuming their husbands to be apostates, and students unable to emigrate but in need of quality teachers. The divorce case which prompted al-Nālī's ruling that the husband in question must be considered Muslim until proven otherwise (and not by temporary residence in '*dār al-murtaddīn*'), also shows that the court of popular opinion at this time may have been far stricter in some areas than was the law as interpreted by the jurists, including al-Wansharīsī.

The question raised by these *fatwā*s is why, if there was such a vigorous and important juristic discourse at the time concerning Muslims subject to Christian authority within Morocco, did al-Wansharīsī choose to preserve in the *Mi*^{c}*yār* elaborately crafted answers only to the two questions concerning Andalūsī emigrants? As a preliminary conjecture, two possible reasons for this decision include the relative simplicity of the Andalusī cases, and the more conclusive nature of the precedents they set. First, as opposed to the purely Moroccan *fatwā*s, in *Asnā al-matājir* and the Marbella *fatwā* al-Wansharīsī rules on only two basic issues: the obligation to emigrate, and the punishment for openly expressing a preference for Christian rule over Muslim rule. Although the jurist is also asked to treat two variations on this first issue – the obligation to emigrate despite the expectation of material loss and despite being in a

position to aid others who refuse to emigrate – these basic issues remain uncomplicated by ongoing or potential *jihād* movements, or by the additional offenses of espionage, arms trafficking, and treachery, or by ambiguously defined territory subject to Christian taxes but apparently not laws, or by the liminal status of a group which has signed a treaty but has not yet been forced to pay a tribute. The narrow scope of the questions posed to al-Wansharīsī in *Asnā al-matājir* and the Marbella *fatwā* allowed him to respond with clear, straightforward answers for which he could claim the authority of a definitive scholarly consensus. The Andalusī *fatwā*s represent an agreed-upon bottom line, that at the very least Muslims who are subject to Christian laws, who have no hope of recovering their territory for Islam, and who are capable of emigrating to Muslim territory, are obligated to do so.

Second, when al-Wansharīsī composed the Andalusī *fatwā*s, the fall of Muslim Iberia had been underway for over four centuries and was within months of completion. Even prior to the Morisco period, North African jurists most likely shared the vision of Muslim life under Iberian Christian rule which is described in *Asnā al-matājir* and the Marbella *fatwā*: a trajectory of loss and decline which begins with humiliation and an inability to correctly fulfill ritual obligations and proceeds, as Christians break the initial surrender treaties, to the complete subjugation and assimilation of the Muslim population. The fate of al-Andalus and its Muslim population would have provided a more concrete historical precedent than the still-unfolding situation in Morocco for later generations who would read the *Miʿyār*. Perhaps more importantly, elaborating upon this tragedy would also have served as a warning for al-Wansharīsī's present Moroccan audience of the consequences of

complacency in the face of unchecked Christian advances. *Asnā al-matājir* and the Marbella *fatwā* thus may be read as a powerful commentary on the foreign occupation of Morocco in al-Wansharīsī's time.

CHAPTER THREE

Al-Wansharīsī's Use of Precedent in *Asnā al-matājir*

In *fatwā*s, jurists adapt received precedents to present contexts; it has thus been necessary first to establish the nature of al-Wansharīsī's audiences and contemporary context prior to attempting to forge a better understanding of his use of authoritative precedents in *Asnā al-matājir*. As shown in the previous chapter, many scholars have considered al-Wansharīsī's Andalusī *fatwā*s (*Asnā al-matājir* and the Marbella *fatwā*) to represent a complete lack of original reasoning, a deliberately inflexible deployment of strict precedents, or both. It has already been argued above that al-Wansharīsī's rulings were not particularly strict for his time; this section will argue that al-Wansharīsī's construction of *Asnā al-matājir* also demonstrates a careful adaptation and application of prior rulings to fit not only the circumstances of the question asked but also the present social and political context of late fifteenth-century Morocco. As a number of scholars have summarized this *fatwā*, what follows will not be a comprehensive description of the entire text. Rather, this chapter will focus on those elements of *Asnā al-matājir* most indicative of the strategic choices al-Wansharīsī made in adapting existing legal precedents to the circumstances of the question to which he is responding and the broader historical context in which he was living.

Al-Wansharīsī's Use of Rabīʿ's Fatwā *on Emigration*

As Van Koningsveld and Wiegers have shown, al-Wansharīsī's work in crafting *Asnā al-matājir* consisted of selectively reproducing Ibn Rabīʿ's prior *fatwā* on the

obligation to emigrate as much as it did of composing new material. Al-Wansharīsī must have considered Ibn Rabīᶜ's lengthy ruling already to be a comprehensive presentation of the most important proof-texts, precedents, and arguments applicable to the obligation to emigrate. Many of al-Wansharīsī's minor changes to his predecessor's text are stylistic, often adding a word or two in order to transform Ibn Rabīᶜ's ordinary prose into rhyming *sajᶜ*. Al-Wansharīsī's major changes include composing original segments of the *fatwā*, re-arranging the components of Ibn Rabīᶜ's text, and omitting parts of that text. Only changes with significance to the overall meaning or function of the ruling will be treated here.

One of al-Wansharīsī's first major decisions in appropriating Ibn Rabīᶜ's *fatwā* for his own purposes must have been not to cite his source. As Van Koningsveld and Wiegers have noted, al-Wansharīsī neglects to credit Ibn Rabīᶜ specifically or to acknowledge more generally that the better part of his Andalusī *fatwā*s have been borrowed from another jurist. Presumably al-Wansharīsī made this decision in order to increase the authority of his own ruling; he must have felt that direct citation of earlier masters such as Mālik, Ibn Rushd, Ibn al-ᶜArabī, and others would be more compelling for his audience than would citation of these opinions mediated by repeated reference to a lesser-known later jurist such as Ibn Rabīᶜ. Al-Wansharīsī may also have thought it would reduce his own authority as an interpreter of these earlier opinions to admit having relied quite so heavily on an earlier jurist's research and compilation of relevant opinions within the Mālikī school.

Framing of al-Wansharīsī's Response: Ranking of Emigrants' Destinations

Al-Wansharīsī introduces and frames his response differently from that of Ibn Rabīᶜ. The latter, who was also responding to a question regarding the permissibility of remaining under Christian rule in Iberia, begins by stating that there is no scholarly disagreement as to the prohibition of residence among infidels or as to the obligation to emigrate from infidel territory to Muslim territory. In contrast, al-Wansharīsī opens his response with a substantial passage in which he cites one *ḥadīth* and the opinions of several earlier jurists, including Mālik, in support of the obligation to emigrate not just from lands of unbelief but also more generally from lands of oppression, *fitna*, injustice, and sin.[1] One of these cited opinions, taken from Ibn al-ᶜArabī's (d. 543/1148) ᶜ*Āriḍat al-aḥwadhī*, poses and responds to the objection that there may be no ideal land free from all of these vices:

> If one were to object, 'What if there was no region other than one like that?' then we would respond that one should choose the least sinful of them. For example, if there is a region in which there is unbelief, then a region in which there is injustice is better than [the former]; or [if there is] a region in which there is justice and prohibited acts, then a region in which there is injustice and permitted acts is better than [the former] for residence. Or [if there is] a region in which there are sins against the rights of God, then this is more suitable than a region in which there are sins involving the usurped rights of men . . . And ᶜUmar b. ᶜAbd al-ᶜAzīz – may God be pleased with him – has said, "So-and-so is in Medina, so-and-so is in Mecca, so-and-so is in Yemen, and so-and-so is in Syria; by God the earth is filled with injustice and oppression."[2]

Khaled Abou El Fadl has suggested that al-Wansharīsī is responding to the legal argument, advanced by some jurists, that widespread corruption renders all lands equal in status and thus makes emigration ineffective and unnecessary.[3] It is more likely that al-Wansharīsī is responding most immediately to the circumstances of the question he is asked in *Asnā al-matājir*, in which a group of lay emigrants pronounces

[1] Appendix A, 344.
[2] For notes, see Appendix A, 345.
[3] Abou El Fadl, "Islamic Law," 154.

the Maghrib to be an unworthy destination, mocks the obligation to emigrate on the basis of their comparative observations, and expresses their desire to return to Christian territory.[4] Because of these emigrants' slanderous remarks, and presumably their understandable basis in Morocco's current state of war and distress, al-Wansharīsī, unlike Ibn Rabīʿ, finds it necessary to emphasize that Muslims have an obligation to prioritize living under Muslim rule even if justice and security do not prevail there. Al-Wansharīsī would likewise have had in mind the recently-circulated questions regarding Moroccan Muslims contentedly paying tribute to, fishing with, and praising their own Christian overlords in Morocco. Even if these Muslims were more prosperous under Portuguese rule, or they found conditions more stable there, they were nonetheless obligated to emigrate to Muslim-controlled territory.

As al-Wansharīsī could have made this point with Ibn Rabīʿ's more black-and-white model emphasizing the absolute superiority of Muslim territory over infidel territory, we might still question why he chose to devote significant attention to the obligation to emigrate from more sinful or corrupt areas to less sinful ones even within Muslim territory. If we accept that he was writing for the current situation in Morocco as much as he was answering the question at hand, it is likely that al-Wansharīsī was responding to the uncertainty among the jurists and populace alike as to the legal status of particular areas of Morocco. Those areas required to pay tribute to Portugal through local leaders, but which were not subject to Portuguese laws, for example, might have been considered particularly corrupt Muslim territory rather than non-

[4] It might be objected that the question posed to al-Wansharīsī reflects a carefully crafted scenario designed to invoke these legal arguments, rather than an actual case. Yet this type of event – emigrants attempting to return to Iberia after successfully reaching North Africa or being expelled – is attested in historical sources. See for example Meyerson, *The Muslims of Valencia*, 97.

Muslim territory. Al-Wansharīsī's broader ruling acknowledges the absence of an ideal, just and sinless land but nonetheless requires emigration at the very least from infidel to unambiguously Muslim territory, and if possible, beyond that to the least corrupt land one can find.

The Qur'ān

Following this introductory section, al-Wansharīsī cites over a dozen Qur'ānic verses used to support the obligation to emigrate and the prohibition of alliances with Jews, Christians, and infidels rather than with Muslims.[5] Although the majority of this section is taken from Ibn Rabīʿ's *fatwā*, al-Wansharīsī has rearranged the citations in order to first address the issue of the ability to emigrate, as discussed in chapter one. Whereas Ibn Rabīʿ begins with the verses prohibiting alliances with infidels, al-Wansharīsī opens by stating that only a complete inability to emigrate, and not material concerns, justifies a dispensation from this obligation. He then quotes Qur'ān 4:98-99, exempting the weak from emigrating, and proceeds with Ibn Rabīʿ's explanation that those who are capable of emigrating but fail to do so are not among the weak, and their excuses are not accepted. Al-Wansharīsī's foregrounding of the issue of ability can be attributed to the prominence of this issue in the question posed to him by Ibn Qaṭīya.

[5] Appendix A, 346-51.

The Man Aslama *Precedent: Converts in* Dār al-Ḥarb *and Conquered Muslims*

While Ibn Rabīʿ follows these Qur'ānic proof-texts with *ḥadīth* reports relevant to the obligation to emigrate, al-Wansharīsī inserts between these two sections a discussion regarding earlier jurists' approaches to the legal status of *ḥarbī* converts and conquered Muslims.[6] While much of this discussion is taken from Ibn Rabīʿ, al-Wansharīsī begins with his own citation of a substantial passage from Ibn Rushd's chapter on traveling to non-Muslim territory for trade in *al-Muqaddimāt al-mumahhidāt*, his commentary on Mālik's *Mudawwana*.[7] Ibn Rushd states that emigration remains obligatory until the Day of Judgment, and that the Qur'ān, the Sunna, and the consensus of the community all obligate those who convert in non-Muslim territory to emigrate to Muslim territory. He further states that emigrants may return to their homelands if those lands revert to Islamic territory, and that is it is not permissible to enter *dār al-ḥarb* for trade or for any other reason, as it is prohibited for Muslims to be subject to infidel laws. Although al-Wansharīsī's addition of the first part of this passage strengthens his overall argument for the obligatory nature of emigration, the two secondary points appear to have been more applicable to the Maghribī than to the Iberian context at this time. First, Moroccans would indeed later recover those territories under Portuguese control, an eventuality for which there was enough hope to inspire regular *jihād* campaigns. While there was certainly hope among Mudéjars and even Moriscos that al-Andalus would be restored to Islam,[8] it must have been dimmer than in Morocco in these last months before the fall of Granada. *Hijra* out of

[6] Ibid., 352-56.
[7] Ibid., 352-53.
[8] This is evidenced in part by al-Wahrānī's advice to the Moriscos to hold fast until possible aid from the Turks could arrive, and by later Morisco revolts.

the conquered Iberian territories was oriented toward flight, not toward clearing the way or regrouping for *jihād* against those same territories.

Second, we know from the Berber *fatwā* that al-Wansharīsī was so concerned with the phenomenon of Moroccan tribes entering Christian-controlled areas in order to supply them with arms that he called for monitored roadblocks to prevent all access to those areas. Trading with the enemy was also a primary category of prohibited Muslim-Christian interaction in the other *Jawāhir al-mukhtāra fatwā*s. In the context of Iberia, the prohibition on entering *dār al-ḥarb* for trade would have functioned primarily as an *a fortiori* argument emphasizing the prohibition on residence there.

The remainder of this section of *Asnā al-matājir* is devoted to the history and validity of the analogy between the legal status of non-Muslims who convert to Islam while in *dār al-ḥarb* and that of Muslims whose territory is conquered and becomes *dār al-ḥarb*.[9] With the exception of a few editorial and stylistic changes, al-Wansharīsī's argument here is taken from Ibn Rabīʿ, who explains that the early, master jurists addressed only the case of converts simply because the case of the conquered Muslims had not yet arisen; not because the cases are dissimilar. When this second type of case first arose in Sicily and al-Andalus in the fifth/eleventh century, the jurists who were asked about the status of conquered Muslims -- Ibn Rabīʿ specifies that they were Maghribī jurists, but al-Wansharīsī leaves this out – found their legal status to be equivalent to that of the converts. Ibn Rabīʿ and al-Wansharīsī each use this passage to establish that an authoritative precedent for the legal status of conquered Muslims has already been identified; in order to bolster the authority of this analogy, they also

[9] Appendix A, 353-56.

establish that this reasoning originated with the earliest possible jurists who could have addressed the matter.

The Sunna

Al-Wansharīsī follows this section with one devoted to evidence from the *Sunna* for the prohibition of residence in non-Muslim territory.[10] In Ibn Rabīʿ's text, this is a fairly short section which is followed by the material which al-Wansharīsī allocates to the Marbella *fatwā* rather than to *Asnā al-matājir*, which consists of an exposition of all of the reasons why Muslims are unable to fulfill any of their core obligations while living under non-Muslim rule, and a list of dangers and corruptions to be feared as a result of such residence. In *Asnā al-matājir*, al-Wansharīsī expands Ibn Rabīʿ's *ḥadīth* section and then follows it with a section on the legal status of converts and conquered Muslims' property and families, which comes much later in Ibn Rabīʿ's text.

In the initial segment of his *ḥadīth* section, which is the part taken from Ibn Rabīʿ, al-Wansharīsī cites two reports: one in which Muḥammad declares himself to be free of any Muslim residing among polytheists, and one in which the Prophet told his followers not to live among or associate with polytheists, for "whoever lives among them or associates with them, is one of them."[11] The context for the first statement is given here as a battle in which a number of polytheists attempted to communicate their acceptance of Islam, but were killed by the attacking Muslim expedition who did not understand the polytheists' prostration to signal their conversion and thus inviolability. Muḥammad ordered that only half the blood-money customary for the

[10] Ibid., 356-59.
[11] For notes, Appendix A, 356.

accidental killing of Muslims should be paid in compensation for their deaths, and explained the reduction with the above statement; this indicates that converts have an obligation to clearly separate themselves from enemy polytheists. The second *ḥadīth* report closely resembles the injunction in Qur'ān 5:51, "Whoever among you allies himself with them is one of them." Ibn Rabīʿ concludes this brief section by stating that no other evidence contradicts the import of these reports, that no Muslim disagrees with what they stipulate, and that they are corroborated by evidence from the Qur'ān.

Varieties of Hijra

Al-Wansharīsī includes these concluding statements, but then cites two additional *ḥadīth* reports which appear to be mutually contradictory, along with two explanations of how the reports are to be reconciled. In the first *ḥadīth*, Muḥammad indicates that the "duty to emigrate will not cease;" in the second, he proclaims that "There is no *hijra* after the conquest, but there [remains the obligation of] *jihād* and [correct] intention. When you are summoned to battle, go forth."[12] The first explanation al-Wansharīsī provides for these two *ḥadīth*s is that of Abū Sulaymān al-Khaṭṭābī (d. 386/996 or 388/998), who states that these traditions refer to two distinct *hijra*s. The *hijra* referred to as unceasing in the first tradition is that enjoined by Qur'ān 4:100, which urges believers to emigrate in the way of God and which was revealed when polytheist Meccan persecution of the earliest Muslims had begun to intensify. While this first *hijra* was not obligatory, once Muḥammad had performed his own Hijra from Mecca to Medina, all Muslims then became obligated to follow suit; this is the *hijra*

[12] For notes, see Appendix A, 357. For an excellent analysis of these and other traditions related to hijra in early Islam, see Patricia Crone, "The First-Century Concept of Hijra." *Arabica* 41, no. 3 (1994): 352-87.

referred to in the second tradition. This second *hijra* ceased to be compulsory after Medina was conquered, but the first *hijra* remains as a recommended or desirable duty. In this passage cited by al-Wansharīsī, al-Khaṭṭābī does not specify the exact nature of the first, enduring *hijra*; he most likely has in mind the first emigration to Abyssinia and the model of fleeing religious persecution.

The second approach to reconciling the two reports is offered by al-Wansharīsī himself, who links them to a passage on emigration in Ibn al-ᶜArabī's (d. 543/1148) *ᶜĀriḍat al-aḥwadhī*, a commentary on al-Tirmidhī's compilation of *ḥadīth* reports.[13] In his commentary on the "No *hijra* after the conquest" *ḥadīth*, Ibn al-ᶜArabī states that there are six primary types of *hijra*, four of which he proceeds to describe; the full list is found in *Aḥkām al-Qur'ān*, his commentary on the legal verses of the Qur'ān.[14] Ibn al-ᶜArabī's first type is that *hijra* which is motivated by fear for oneself and one's religion, such as the Prophet's Hijra, which was obligatory for early Muslims. His second type is *hijra* to the Prophet himself. Ibn al-ᶜArabī then states that these two are the two types of *hijra* which ended with the conquest of Mecca. He goes on to explain that *hijra* from the land of unbelief, the third type here, is obligatory until the Day of Judgment.[15]

In *Asnā al-matājir*, al-Wansharīsī re-arranges and edits Ibn al-ᶜArabī's passage, without acknowledgment, such that the passage begins with "These two *hijra*s which are addressed in the traditions [reported by] Muᶜāwiya and Ibn ᶜAbbās are the two *hijra*s which ceased to be obligatory upon the conquest of Mecca . . ," followed by Ibn al-ᶜArabī's description of the two categories. The effect of this rearrangement is to make

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[13] Ibn al-ᶜArabī, *ᶜĀriḍat al-aḥwadhī*, 4:7:66.
[14] Ibn al-ᶜArabī, *Aḥkām*, 1:496-97.
[15] The fourth type in *ᶜĀriḍat al-aḥwadhī* is emigration from lands filled with prohibited acts and corruption due to oppression or *fitna*, which Ibn ᶜArabī also holds to be obligatory until the Day of Judgment. Ibn al-ᶜArabī, *ᶜĀriḍat al-aḥwadhī*, 4:7:66.

Ibn al-ᶜArabī's comments apply to both of the above-cited *ḥadīth* reports rather than only to the "No *hijra* after the conquest" tradition, and thus also to correspond to al-Khaṭṭābī's two types of *hijra*. Yet the correspondence is inconsistent, as al-Khaṭṭābī and Ibn al-ᶜArabī describe the status of these *hijra*s quite differently, and as neither of Ibn al-ᶜArabī's first two types, which he says ceased with the conquest, can correspond with the unceasing variety of *hijra*.

Al-Wansharīsī's maneuvering here is far from transparent, but appears to serve at least four purposes. First, he must have meant to assimilate Ibn al-ᶜArabī's and al-Khaṭṭābī's two sets of two *hijra*s, but in order to associate them both with the "no *hijra*" tradition, as Ibn al-ᶜArabī had done, not in order to divide the two *hijra*s between the two traditions, as al-Khaṭṭābī had done. If both sets of two *hijra*s can be made to correspond to the "no *hijra*" tradition, that reserves the unceasing *hijra* tradition for Ibn al-ᶜArabī's third type of *hijra*, which consists of leaving infidel territory for Muslim territory. Meanwhile, forcing al-Khaṭṭābī's two *hijra*s to correspond to Ibn al-ᶜArabī's first two *hijra*s (and to the "no *hijra*" tradition) has the effect of 1) contesting al-Khaṭṭābī's assertion that the enduring form of *hijra* is only recommended as opposed to obligatory, by 2) asserting that al-Khaṭṭābī's first type of *hijra*, which appears to refer to the emigration to Abyssinia, actually corresponds to Ibn al-ᶜArabī's first type of *hijra*, which was also motivated by fear for oneself and one's religion, but which took place after Muḥammad's Hijra, was obligatory at the time, and ended with the conquest of Mecca.

This first purpose of al-Wansharīsī's varieties-of-*hijra* discussion is thus to reconcile the two *ḥadīth* reports in such a manner that emigration from infidel to

Muslim territory is established as the unceasing variety of *hijra* and as obligatory. This correspondence is supported by linking the "no *hijra*" tradition with all of the motivations for emigrating to Muḥammad subsequent to his move from Mecca to Medina. In *Asnā al-matājir* al-Wansharīsī continues with two further, acknowledged passages taken from Ibn al-ᶜArabī's *Aḥkām al-Qur'ān* and his ᶜ*Āriḍat al-aḥwadhī* which reinforce this division between the obligatory and enduring *hijra* from *dār al-ḥarb* to *dār al-Islām* and the formerly-obligatory-but-now-defunct *hijra* to Medina.[16]

The second purpose this discussion appears to serve relates to al-Wansharīsī's decision to quote al-Khaṭṭābī at all, given that the Fāsī jurist then undermines al-Khaṭṭābī's assertions with a passage from Ibn al-ᶜArabī which could have stood on its own. It may be that al-Wansharīsī not only wished to include al-Khaṭṭābī's authoritative support for the reconcilability of the two seemingly contradictory *ḥadīth* reports, but also took advantage of the opportunity to assimilate the Abyssinian emigration—al-Khaṭṭābī's first and enduring type of *hijra*—to the type of emigration which came to an end following the establishment of a *dār al-Islām* and the conquest of Islam's first persecutors in Mecca. If this was indeed an implicit aim of the varieties-of-*hijra* discussion, it would pair well with al-Wansharīsī's later use of the Abyssinian case (which is not present in Ibn Rabīᶜ) as an authoritative precedent supporting his argument that emigration must be performed for religious rather than worldly interests.[17] In the introduction to his critical edition of *Asnā al-matājir*, Mu'nis finds this later citation of the Abyssinian model to be hypocritical, given that al-Wansharīsī is arguing for the obligation to emigrate from Christian territory; Abyssinia had been

[16] Ibn al-ᶜArabī, *Aḥkām*, 1:496-97; *idem*., ᶜ*Āriḍat al-aḥwadhī*, 4:7:79.
[17] Appendix A, 368.

ruled by a Christian king who offered refuge to the persecuted Meccan Muslims.[18] If my reading of al-Wansharīsī's juxtaposition of al-Khaṭṭābī and Ibn al-ᶜArabī is plausible, it would appear that al-Wansharīsī is praising Abyssinian emigrants as models to be emulated for their devotion and willingness to abandon their wealth and families, while also arguing that the circumstances of this *hijra* were unique to the period culminating in the conquest of Mecca.

If we take another step back, the final two ends served by al-Wansharīsī's varieties-of-*hijra* section relate to his decision to address the "no *hijra*" *ḥadīth*. In the question posed to Ibn Rabīᶜ in that jurist's earlier *fatwā*, this tradition is noted as one of the proof-texts offered by an unknown jurist for the permissibility of remaining under Christian rule in Iberia. Despite this, Ibn Rabīᶜ does not take up the issue of this tradition's applicability to the Spanish context in his own *fatwā*, at least in the version edited by Van Koningsveld, Wiegers, and Ryad. It would have been appropriate for Ibn Rabīᶜ to devote a portion of his answer to refuting the argument that this tradition lifted the obligation to emigrate for all Muslims after the conquest of Mecca. Thus the third reason for al-Wansharīsī's discussion of this tradition is to take up a task left unfinished by Ibn Rabīᶜ; questions regarding the legal import of this *ḥadīth* were likely still current during the later jurist's time.

Finally, al-Wansharīsī may have chosen to discuss the "no *hijra*" report not just in order to refute the continued applicability of *ḥadīth*'s first half, but in order to emphasize its second half: " . . . but there [remains the obligation of] *jihād* and [correct] intention. When you are summoned to battle, go forth." Noting that *jihād* is an

[18] Mu'nis, "Asnā al-matājir," 8.

enduring obligation in addition to *hijra* from *dār al-ḥarb* to *dār al-Islām* would only have been incidental to al-Wansharīsī's answer to Ibn Qaṭīya's question in *Asnā al-matājir*, because *jihād* was no longer possible in Spain; but it makes sense as a comment on the current situation in Morocco. The second half of this *ḥadīth* does not appear even in the question component of Ibn Rabīᶜ's *fatwā*, but this is al-Wansharīsī's second citation of the full report; the first came as part of the passage taken from Ibn al-ᶜArabī's *ᶜĀriḍat al-aḥwadhī* concerning the best region to which to emigrate.[19] Ibn Rabīᶜ mentions *jihād* only in the context of describing the duties which conquered Muslims fail to fulfill.[20] He notes that they either abandon this obligation completely, out of hopelessness, or contribute financially to the enemy's war effort, in which case they become like the enemy.

Al-Wansharīsī's added emphasis on *jihād* in comparison with Ibn Rabīᶜ's *fatwā* is further evident from the precedents he cites in a passage linking his varieties-of-*hijra* section with a substantial subsequent section devoted to the inviolability of converts' and conquered Muslims' lives, families, and property.[21] With this passage, taken from *ᶜĀriḍat al-aḥwadhī*, al-Wansharīsī returns to the *ḥadīth* noted earlier regarding Muḥammad's decision to pay only half of the usual blood money to a group of people who had prostrated in the face of a Muslim attack, attempting to indicate conversion to Islam. Ibn al-ᶜArabī comments on this incident, arguing that these prostrating polytheists received only half of the blood money in part because they were not established converts who had simply remained in *dār al-ḥarb*; their decision to save themselves by converting was spontaneous and not well-orchestrated, therefore the

[19] Appendix A, 345.
[20] Al-Wansharīsī includes this material in the Marbella *fatwā* rather than in *Asnā al-matājir*.
[21] Appendix A, 359-60.

guilt of those who slew them was reduced. A second story of accidentally killed converts follows this first one -- Ibn al-ᶜArabī cites a case in which Muḥammad ordered the full blood money paid to a group who were already known to be converts and who also failed to communicate this effectively to a Muslim expedition.

While the purpose of the comparison between these groups within Ibn al-ᶜArabī's commentary is to explain aspects of a debate regarding the inviolability of converts' lives, in *Asnā al-matājir* these reports might also serve to remind Moroccan Muslim readers (jurists and the lay communities they advised) of the consequences of remaining in *dār al-ḥarb* during a time of military conflict. Even if their lives are technically inviolable as Muslims, this would serve as a warning to those choosing to remain in territories subject to Portuguese authority; fighters are not always able to distinguish Muslim from non-Muslim in the heat of battle. As *jihād* in Iberia certainly had not become more feasible in al-Wansharīsī's time than in that of Ibn Rabīᶜ, this additional emphasis on the obligation to fight, the logistics of prosecuting a war, and the accidental killing of Muslims residing among polytheists must have been a calculated adaptation of Ibn Rabīᶜ's *fatwā* to the present context of foreign occupation in Morocco.

Inviolability of Converts and Conquered Muslims

Following this treatment of the varieties of *hijra* is a lengthy section on the inviolability of the lives, families, and property of converts and conquered Muslims in *dār al-ḥarb*.[22] As with the section on *ḥadīth* reports, al-Wansharīsī reproduces much of

[22] Appendix A, 359--67.

the material present in Ibn Rabīᶜ's *fatwā*, but adapts his predecessor's text to his present context by citing additional opinions which address the status of Muslims in *dār al-ḥarb* fighting against Muslims from *dār al-Islām*. In the part of this section taken from Ibn Rabīᶜ's *fatwā*, al-Wansharīsī presents the positions of Mālik, al-Shāfiᶜī, Abū Ḥanīfa, and a few Mālikī scholars regarding a well-known point of disagreement between schools as well as within the Mālikī school: whether it is being Muslim or being in Muslim territory which guarantees the inviolability of a Muslim's life and property. Mālik and Abū Ḥanīfa both held that Islam is the guarantor of inviolability for the Muslim's life, but that his property is not protected unless he brings it to *dār al-Islām* and establishes ownership of it there. Abū Ḥanīfa qualified this position by stating that the accidental killing of a Muslim in *dār al-ḥarb* necessitates only atonement rather than the payment of blood money. Among Mālikī jurists, Ashhab (d. 204/819), Saḥnūn (d. 240/854), and Ibn al-ᶜArabī all agreed with al-Shāfiᶜī, who held that a Muslim's life and property are both inviolable even in *dār al-ḥarb*. As noted earlier in *Asnā al-matājir*, the earliest opinions (all but Ibn al-ᶜArabī) presumed that the Muslim under discussion was a convert to Islam residing outside Muslim territory, or a Muslim who had entered *dār al-ḥarb* temporarily; and later jurists found these same rules and disagreements to apply to the case of conquered Muslims.

Ibn Rabīᶜ includes the opinion of one jurist, whom al-Wansharīsī identifies as Ibn al-Ḥājj (d. 529/1134), who distinguishes between the inviolability of converts and conquered Muslims. Ibn al-Ḥājj gives preponderance to the opinions of Ashhab and Saḥnūn – who held that Islam alone is the guarantor of inviolability for Muslims' lives and properties alike – in the case of conquered Muslims only, because unlike converts,

conquered Muslims were never characterized by unbelief and thus their property had at no prior point been licit for other Muslims. Al-Wansharīsī not only identifies Ibn al-Ḥājj, but also expands upon Ibn Rabīʿ's *fatwā* with a more sustained discussion of this former jurist's views.

According to al-Wansharīsī, Ibn al-Ḥājj offers as evidence for this distinction between conquered Muslims and converts an opinion given by Mālik's Egyptian disciple Ibn al-Qāsim (d. 191/806-7) in response to a question posed by Cordovan jurist Yaḥyā b. Yaḥyā (d. 234/848) regarding those Muslims who remained in Barcelona after it was conquered in 185/801. These Muslims failed to emigrate during the one-year grace period set by their conquerors, and they then joined the Christians in fighting other Muslims out of fear that they would be killed if the Muslims recovered the city.[23] Yaḥyā b. Yaḥyā states that these Muslims are equivalent in status to criminal or illegitimate rebels, because they remain Muslim; they are to be referred to the ruler for punishment, but their property is not licit. It is unclear whether Ibn al-Ḥājj found this precedent to be applicable to conquered Muslims in general, or reasoned that if even conquered Muslims fighting against other Muslims retain their inviolability, so too must conquered Muslims who commit no crimes beyond accepting subject status.

Al-Wansharīsī then cites Ibn Rushd's commentary on Ibn al-Ḥājj's position. While Ibn Rushd agrees that conquered Muslims who fight for the Christians are equivalent in status to criminal or illegitimate rebels, he notes that Ibn al-Qāsim's opinion regarding the status of these Muslims' property directly contravenes Mālik's own ruling on the issue. As Ibn Rushd notes, Mālik held that if an unbeliever converts

[23] This fear is further evidence that Iberian Muslims were well aware of the obligation to emigrate long before al-Wansharīsī composed *Asnā al-matājir*.

to Islam and his property is seized by Muslims prior to his relocating to *dār al-Islām*, that property is legitimately considered booty. This comment of course presupposes an agreed-upon conflation between the status of converts and that of conquered Muslims.

As noted earlier, al-Wansharīsī notes these differences of opinion without definitively adopting a position himself; rather he instructs his reader to "consider this," which is yet another indication that he was writing for an educated audience of legal professionals. Al-Wansharīsī concludes this section by describing the rulings which many skilled jurists consider to be the preponderant opinions under the following set of circumstances: 1) conquered Muslims are equivalent to *ḥarbī* converts to Islam, in accordance with the established difference of opinion as to the legal status of the latter; this means that the lives of both groups are inviolable but that the property of both groups is either violable or inviolable depending on the particular scholar's opinion regarding the convert's property; 2) if conquered Muslims fight alongside non-Muslims against Muslims, their lives become licit; 3) if they financially support non-Muslims in fighting against Muslims, their property becomes licit; and 4) the preponderant opinion regarding their children is that they should be captured and raised among Muslims, even if the conquered Muslims commit only the sin of residence among unbelievers.

Al-Wansharīsī's additions to Ibn Rabīʿ's section on inviolability are noteworthy for two reasons. First, as with his earlier inclusion of *ḥadīth* reports addressing Muslims' accidental killing of convert Muslims in *dār al-ḥarb*, the inclusion of precedents related to Muslims who fight for the enemy renders *Asnā al-matājir* more concerned with, and relevant to, a context in which Muslims are actively fighting for

the enemy territory in which other Muslims are considered to be illegitimately residing. This is true not only of the Barcelona example but also of a passage from an unidentified work of Ibn al-ᶜArabī which al-Wansharīsī cites mid-way through this section on inviolability.[24] In the cited passage, Ibn al-ᶜArabī first notes the absence of a compelling precedent within the Mālikī school for the inviolability of Muslims in *dār al-ḥarb*, then proceeds to review the rationales for the Ḥanafī and Shāfiᶜī positions. Near the end of the passage, Ibn al-ᶜArabī, who prefers al-Shāfiᶜī's view, mentions the violability of Muslim rebels' lives and property in the course of refuting one of the rationales given for the Ḥanafī position. Al-Wansharīsī does not ultimately endorse Ibn al-ᶜArabī's position, and may have included this passage as much for the example of the rebels – later compared to Muslims who fight for the enemy – as for the additional detail regarding the opinions of the other schools. Al-Wansharīsī's addition of the opinions of Ibn al-Qāsim, Ibn al-Ḥājj, Ibn Rushd, and Ibn al-ᶜArabī' as to the status of rebels and of Muslims fighting with the enemy brings *Asnā al-matājir*'s section on inviolability more in line with the categories of conquered Muslims' offenses addressed in the *Jawāhir al-mukhtāra fatwā*s. The conclusions drawn by al-Wansharīsī also accord with the basic agreement among contemporary Moroccan jurists that while living under non-Muslim rule is sinful, it is not on par with fighting for the enemy against other Muslims, for which subject Muslims may be killed.

Second, al-Wansharīsī's modifications to Ibn Rabīᶜ's section on inviolability are notable for the lack of a firm stance on the inviolability of conquered Muslims' property. By increasing the information provided in his *fatwā* concerning the different

[24] Appendix A, 363-64.

positions adopted and the rationales behind them, and by including Ibn al-ᶜArabī's statement to the effect that there is no one agreed-upon precedent which Mālikīs are bound to follow in the matter, al-Wansharīsī leaves it to his audience to determine the rule to be invoked in the case of any seized property brought before them in their own practices as *muftī*s and judges.[25] This is not the rigid opinion that many modern scholars have attributed to al-Wansharīsī; Salgado, for example, takes al-Wansharīsī's citation of Mālik's opinion to be the Fāsī jurist's own ruling, and thus characterizes *Asnā al-matājir* as allowing conquered Muslims to be stripped of all their possessions by Muslims coming from Islamic territory.[26] Salgado appears to interpret this ruling as a punishment rather than a military strategy; to my knowledge, Von Fritz Meier is the only commentator on *Asnā al-matājir* to note that strategic considerations might account for Mālikī jurists' rulings on the inviolability of subject Muslims' lives and property.[27] While al-Wansharīsī does not address an analogous case in the Berber *fatwā*, by implicitly granting non-emigrant Muslims the right to buy back any property seized from them by the Christians and subsequently bought by Muslims, he also implicitly rules for the validity of their ownership of that property at the time of seizure.

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[25] Ibn al-ᶜArabī's statement is as follows: "It was in Khurāsān that this issue was of great importance. The Mālikīs did not encounter it, nor did the Irāqī masters know of it. So how should Maghribī *muqallid*s (jurists who adhere to previously established doctrines) [deal with this issue]?" The primary purpose of this statement appears to be the justification of looking outside the Mālikī school for precedents and of failing to endorse Mālik's own recorded opinion regarding the guarantor of inviolability for Muslims' lives and properties. See Appendix A, 363, for the passage and accompanying notes.

[26] Salgado, "Del Islam," 136.

[27] Von Fritz Meier, "Über die umstrittene Pflicht des Muslims, bei nichtmuslimischer Besetzung seines Landes auszuwandern," *Der Islam* 68 (1991): 70.

Punishment of the Andalusī Emigrants

While the possible violability of conquered Muslims' property cannot accurately be described as a punishment for continued residence under non-Muslim authority, al-Wansharīsī does address the consequences of the Andalusī emigrants' actions in his next section of *Asnā al-matājir*.[28] As in the previous sections, his departures from the basic template set forth by Ibn Rabīᶜ serve to adapt *Asnā al-matājir* to the specifics of Ibn Qaṭīya's question and to the context of Portuguese occupation within Morocco. Al-Wansharīsī opens by denouncing the Andalusīs' claim that their impoverished state in the Maghrib indicates that they should have been exempt from the obligation to emigrate; it is at this point that he points to the early Meccan Muslims' emigration to Abyssinia as a model for the proper prioritization of religion over worldly interests. After citing this precedent, al-Wansharīsī emphasizes the bounty to be found in the Maghrib for would-be emigrants, making sure to point to his own (and of course his ruler's) city of Fez as a destination made especially attractive by the fertility and spaciousness of the surrounding lands. Drawing largely on language present in Ibn Rabiᶜ's *fatwā*, al-Wansharīsī then establishes that these Andalusīs were indeed obligated to emigrate, that they may not return to Castile, that Muslims must do anything necessary to leave infidel territory, and that any Muslim content to remain subject to non-Muslim rule has strayed from the religion.

This section ends with al-Wansharīsī's recommendation regarding the Andalusīs' worldly punishment for slandering *dār al-Islām* and for openly expressing a preference for non-Muslim rule:

[28] Appendix A, 368-71.

> [As for] the ugly language, the cursing of *dār al-Islām*, the desire to return to the land of polytheism and idols, and other detestable monstrosities which could only be uttered by the depraved, which you report coming from those emigrants – disgrace is required for them in this world and the next, and they must be lowered to the worst of positions. What is required of [the ruler] whom God has empowered and enables to prosper in the land is to take hold of them and make them suffer a severe penalty and an intense, exemplary punishment, through beating and imprisonment, such that they do not transgress the bounds of God. This is because their corrupting ideas (*fitna*) are more severely damaging than the trials of hunger, fear, or the plundering of people and property. This is because whoever perishes here [viz., from hunger, etc.] [elicits] the mercy of God Most High and his most generous forgiveness, while one whose religion perishes [provokes] the condemnation of God and the greatest of his anger. Fondness for **polytheist allegiance and living among Christians;** the determination to **reject the obligation to emigrate to depend upon infidels; and** contentment with **paying the *jizya* to them,[29] with the relinquishing of Islamic power, with insubordination, with the renunciation of allegiance to the sultan, and with the triumph of the Christian sultan over, and his degradation of, [Islamic power]** – [these are] serious, perilous abominations, a mortal blow [to one's faith] which is on the verge of unbelief (*kufr*) – may God protect us.[30]

Most of this language is unique to *Asnā al-matājir* and represents the *fatwā*'s central point of connection between the two legal discourses to which al-Wansharīsī is contributing: the obligation to emigrate from conquered territories in Iberia, and the status of Muslims living under Christian authority in the occupied areas of Morocco. As noted earlier, the criminal offenses of which these Andalusī emigrants are accused are very similar to those committed by one recurring category of Moroccans in the *Jawāhir al-mukhtāra* rulings: a verbally expressed preference for infidel over Muslim rule and contentment with subject status, including payment of a tax or tribute to the infidel rulers. And while al-Wansharīsī advises a severe beating for the Berbers and Andalusīs alike, he specifies that the punishment for the Andalusīs must be exemplary, and that this is because of the serious damage caused by their spreading of *fitna*.

As for al-Wansharīsī's *fatwā*s as a whole, there is thus also an intended audience for the Andalusīs' crime and punishment. Because the emigrants are present in the

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[29] Often translated as 'poll tax,' this is the term for the tax paid by *dhimmī*s, Christians and Muslims living under Muslim rule; the term also came to signify monies paid by subject Muslims to their Christian rulers.

[30] Appendix A, 371-72. As in Appendix A, bolded text indicates material taken from Ibn Rabī''s *fatwā*.

Maghrib and cursing this region in particular, the most immediate audience for their corrupting ideas certainly consists of Moroccans, not other Iberian Muslims weighing emigration against remaining in their conquered homelands. We know from the *Jawāhir al-mukhtāra fatwā*s that the proper relationship between Moroccans and the Portuguese and Spanish-controlled territories was a subject of great concern for the elite as well as of great confusion among the populace. Al-Wansharīsī's identification of *fitna* as the primary evil resulting from the Andalusīs' actions suggests a fear that the endorsement of Christian rule by these emigrants, who already had first-hand experience of life under that rule, would encourage contentment among conquered Moroccans, or weaken Maghribī resistance to further foreign encroachment, or lessen the seriousness in people's minds of associated crimes, such as trading with the enemy.

Al-Wansharīsī's intended audience for the example to be set by the Andalusīs' beating or imprisonment must likewise be those Moroccans who would have been exposed to the emigrants' corrupting ideas and who might remain in the vicinity of their trial and punishment. The immediate practical aims of *Asnā al-matājir*, if al-Wansharīsī's recommendations were implemented by the court to which Ibn Qaṭīya was attached, would thus have been to counteract the *fitna* spread by these Andalusīs by reinforcing among Moroccans the prohibition on living in Christian territory or assisting the enemy in any way, and the possible consequences of doing so.

Al-Wansharīsī might have achieved this immediate practical aim through a less elaborate *fatwā*; but again, he also submitted the ruling to a wider professional audience through the *Miʿyār*, where it would enjoy a much longer-term impact. Al-Wansharīsī most likely chose to construct elaborately and to preserve *Asnā al-matājir*, rather than

the Berber *fatwā*, in order to create a more authoritative precedent for later rulings on similar cases. While the foreign occupation of Morocco remained of relatively recent origin, limited scope, and uncertain character, the historical drama of the fall of al-Andalus was four hundred years old, decisive, well-known, and beginning to develop into a powerful symbol of a tragic loss.

Legal Probity and Mudéjar Judges

In perhaps the least understood section of *Asnā al-matājir*, al-Wansharīsī addresses the legal probity of Muslims who choose to remain in *dār al-ḥarb*.[31] Although Ibn Rabīᶜ included a corresponding section in his *fatwā*, al-Wansharīsī departs completely from his predecessor's answer, relying instead on the opinions of Ibn ᶜArafa and al-Māzarī.[32] As noted in chapter one, a number of scholars have praised al-Māzarī's approach as far more tolerant than that of al-Wansharīsī, while others have compared *Asnā al-matājir* to a ruling issued by al-ᶜAbdūsī (d. 849/1445), another Fāsī chief *muftī* who wrote a *fatwā* similar to al-Māzarī's, but concerning Mudéjars rather than Muslims in Sicily. In what follows, I will review briefly these scholars' remarks, then examine al-Wansharīsī's decision to include al-Māzarī's ruling within *Asnā al-matājir* by comparing this ruling to Ibn Rabīᶜ's answer, to a number of similar *fatwā*s which al-Wansharīsī includes elsewhere in the *Miᶜyār*, and to al-ᶜAbdūsī's ruling, which does not appear in the *Miᶜyār*. Contrary to what many scholars have argued, it will be shown that *Asnā al-matājir* cannot be said to be stricter or less sympathetic than the *fatwā*s of al-Māzarī or al-ᶜAbdūsī. Rather, al-Wansharīsī's choice of al-Māzarī as the primary authoritative

[31] Appendix A, 373-77.
[32] For a summary of this section of Ibn Rabīᶜ's *fatwā*, see Van Koningsveld and Wiegers, "Islamic Statute," 33-34.

precedent to include in *Asnā al-matājir* on this issue reflects a pragmatic approach to a legal dilemma which must have been important in Morocco at the time: the acceptance in *dār al-Islām* of documents certified by judges living in *dār al-ḥarb*.

Al-Māzarī

Before scholars turned their attention to comparisons between *Asnā al-matājir* and the 1504 *fatwā* of al-Wahrānī, a number of the earliest commentators on al-Wansharīsī's *fatwā* compared this ruling with that of al-Māzarī (d. 536/1141), whom they described as a far more tolerant jurist. In Mu'nis's seminal analysis of *Asnā al-matājir*, the historian praises al-Māzarī's sympathetic ruling and his extension of material and moral support to emigrants who were arriving in Ifrīqiyā (Tunisia) from Sicily.[33] Mu'nis charges al-Wansharīsī with failing to consider seriously al-Māzarī's opinion, which justified Sicilian Muslims' residence under Christian rule and allowed for the validity of their judges' appointments. Abdelmajid Turki, who likewise compares al-Māzarī's opinion favorably with that of al-Wansharīsī, goes a step further by arguing that al-Wansharīsī must have disapproved of al-Māzarī's liberalism and pragmatic tolerance.[34] Although he offers no explanation for al-Wansharīsī's inclusion of al-Māzarī's ruling in *Asnā al-matājir*, Turki elaborates in another article that al-Wansharīsī's lack of commentary following al-Māzarī's opinion, and his insertion of that opinion amidst others that he clearly supports and that are opposed to that of al-Māzarī, indicates the Fāsī jurist's disagreement with al-Māzarī's ruling.[35] Following a biography of the jurist and a summary of the relevant section of *Asnā al-matājir*, these

[33] Mu'nis, "Asnā al-matājir," 17-18.
[34] Turki, "Consultation juridique," 694.
[35] Turki, "Pour ou contre," 318.

assertions will be analyzed and it will argued that Mu'nis and Turki misunderstand al-Wansharīsī's strategic and sensible use of al-Māzarī's precedent.

Life and Times of al-Māzarī

Although al-Māzarī achieved renown as an accomplished and influential jurist at a relatively early age, contemporary sources reveal little about his birth and early years. His biographers report his full name as Abū ᶜAbd Allāh Muḥammad b. ᶜAlī b. ᶜUmar b. Muḥammad al-Ṭamīmī al-Māzarī.[36] The *nisba* 'al-Māzarī' refers to Mazara (Ar. Māzar), a town on Sicily's southern coast. The place and date of al-Māzarī's birth are unspecified in the sources, but biographers agree that the jurist died in al-Mahdīya (now a Tunisian port) in 536/1141 at the age of 83; he was thus born in 453/1061.[37] Al-Ṭāhir al-Maᶜmūrī, editor of the jurist's *fatwā*s, argues convincingly that al-Māzarī was likely born in Ifrīqiyā rather than in Sicily.[38] The jurist's father probably emigrated from Mazara to Ifrīqiyā sometime before the Norman conquest of Sicily, which lasted from early 453/1061 to 484/1091; Mazara was conquered in 464-5/1072.[39]

Only two of al-Māzarī's teachers are known with certainty: Abū al-Ḥasan al-Lakhmī (d. 478/1085-6),[40] with whom al-Māzarī most likely studied in Sfax, and ᶜAbd al-

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[36] Abū ᶜAbd Allāh Muḥammad b. ᶜAlī b. ᶜUmar al-Māzarī (d. 536/1141). DM, 374-75; IM, 327-29; SN, 1:186-88; ZK, 6:277.

[37] The date cited for al-Mazārī's birth in ᶜAbd al-Wahhāb's *al-Imām al-Māzarī*, 443 AH, is incorrect and has been corrected in the revised edition of ᶜAbd al-Wahhāb's *Kitāb al-ᶜUmr*, completed and published posthumously. Although al-Wahhāb's monograph on al-Māzarī is often cited, it is not an annoted scholarly work; the author reveals very few of his sources. ᶜAbd al-Wahhāb, *al-Imām al-Māzarī*, 50; al-Wahhāb, *Kitāb al-ᶜUmr fī al-muṣannafāt wa'l-mu'allifīn al-Tūnisīyīn*, ed. Muḥammad al-ᶜArūsī al-Maṭwī and Bashīr al-Bakkūsh (Beirut: Dār al-Gharb al-Islāmī, 1990), 1:696-704.

[38] Al-Māzarī, *Fatāwā al-Māzarī*, ed. al-Ṭāhir al-Maᶜmūrī (Tunis: Al-Dār al-Tūnisīya li'l-Nashr, 1994), 11-13.

[39] For the Norman conquest of Sicily, see Aziz Ahmad, *A History of Norman Sicily*, Islamic Surveys 10 (Edinburgh: Edinburgh University Press, 1975); Donald Matthew, *The Norman Kingdom of Sicily* (Cambridge: Cambridge University Press, 1992).

[40] Abū al-Ḥasan ᶜAlī b. Muḥammad al-Rabᶜī al-Lakhmī (d. 478/1085-6). DM, 298; IM, 307; SN, 1:173.

Ḥamīd b. Muḥammad al-Ṣā'igh (d. 486/1093-4),[41] with whom he studied in either Mahdīya or Sousse (Sūsa).[42] Al-Māzarī became the leading Mālikī jurist of Mahdīya, which was heir to the Qayrawāni intellectual tradition after the Banū Hilāl conquered the Zīrid's former capital in 449/1057. Known by the honorific title of Imām, or master jurist, he attracted a great number of students from the surrounding regions as well as from the Maghrib and al-Andalus.[43] Many of the jurist's foreign students travelled through Mahdīya on their way east to perform the pilgrimage or to learn from eastern masters, while others were his students only by means of written exchanges, which resulted in al-Māzarī's granting of an *ijāza*, or license to transmit his works, to the student.

Al-Māzarī authored approximately a dozen works in the fields of law, jurisprudence, *ḥadith* commentary, literature, and possibly medicine.[44] His best-known work is *al-Muᶜlim bi-fawā'id Muslim*, the first commentary on the *Ṣaḥīḥ* of Muslim.[45] His *Īḍāḥ al-Maḥṣūl min Burhān al-uṣūl*, a commentary on al-Juwaynī's (d.478/1085) work of jurisprudence *al-Burhān*, has also been published.[46] Al-Māzarī's commentary on Abū

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[41] ᶜAbd al-Ḥamīd b. Muḥammad al-Ṣā'igh (d. 486/1093-4). DM, 260; SN, 1:174; ᶜAbd al-Wahhāb, *Kitāb al-ᶜUmr*, 1:685-87; al-Qāḍī ᶜIyād, *Tartīb al-madārik wa-taqrīb al-masālik li-maᶜrifat aᶜlām madhhab Mālik*, ed. Muḥammad Sālim Hāshim (Beirut: Dār al-Kutub al-ᶜIlmīya, 1998), 2:342-43. Al-Ṣā'igh probably lived in Sousse until summoned to serve as chief *muftī* in Mahdīya. After an uprising in Sousse against Zīrid ruler Tamīm b. al-Muᶜizz (r. 454-501/1062-1108) in which the jurist or his son was implicated, he was dismissed and returned to Sousse for a period.

[42] Niether al-Māzarī nor his biographers name the cities in which he studied. Later scholars have come to differing conclusions as to where the jurist must have studied, based on his biographies, those of teachers, and political events at the time. Al-Lakhmī and Ibn Ṣā'igh had both lived in Qayrawān but left for the eastern coast of Tunisia after the Hilālī invasion. Al-Māzarī, *Fatāwā*, 25-37; EI^2, s.v. "al-Māzarī;" ᶜAbd al-Wahhāb, *Kitāb al-ᶜUmr*, 1:696-700.

[43] Al-Māzarī, *Fatāwā*, 41-61.

[44] ᶜAbd al-Wahhāb, *Kitāb al-ᶜUmr*, 1:697-704; Hady Roger Idris, *L'École Mālikite de Mahdia: L'Imām al-Māzarī (m. 536 H/1141) Études d'Orientalisme dédiées à la mémoire de Lévi-Provençal*, 2 vols. (Paris: Maisonneuve et Larose, 1962) 1:157-60.

[45] This commentary has been published in several editions, including: al-Māzarī, *al-Muᶜlim bi-fawā'id Muslim*, ed. Muḥammad al-Shādhilī al-Nayfar, 2nd ed., 3 vols. (Dār al-Gharb al-Islāmī, 1992).

[46] Al-Māzarī, *Īḍāḥ al-Maḥṣūl min Burhān al-uṣūl*, ed. ᶜAmmār al-Ṭālibī (Dār al-Gharb al-Islāmī, 2001).

Muḥammad ᶜAbd al-Wahhāb's (d. 422/1031) *Talqīn*, a work of *fiqh*, also achieved some degree of circulation and has now been partially published.[47] Al-Māzarī's *fatwā*s have been preserved in al-Burzūli's and al-Wansharīsī's compilations and been collected and edited by al-Ṭāhir al-Maᶜmūrī.

Al-Māzarī's lifetime, 453-536/1061-1141, coincided with a tumultuous period in Ifrīqiyā. The jurist was born during the last year of the reign of al-Muᶜizz b. Bādīs (r. 406-454/1016-1062), who by 440/1049 had declared the Zīrid state independent of its Faṭimid overlords in Egypt.[48] The Faṭimids responded by dispatching the Bedouin tribes of the Banū Hilāl and the Banū Sulaym to overrun the Zīrids. Qayrawān fell to the invaders in 449/1057, forcing al-Muᶜizz b. Bādīs to transfer his capital to Mahdīya, which had also served as the first capital of the Faṭimid state prior to that dynasty's move to Egypt. Sicily, which Muslims had ruled for approximately 200 years, was gradually conquered by the Normans over the first thirty years of the jurist's life, and this conquest resulted in a flow of emigrants towards the North African coast. This period also corresponded with beginning of the reign of Tamīm b. Muᶜizz (r. 454-501/1062-1108), who launched a number of maritime attacks against the Normans and Italians. In retaliation, a group of Pisans and Genoans sacked Mahdīya and nearby Zawīla in 480/1087; Tamīm was forced to pay a considerable sum and to grant commercial privileges to the invaders in exchange for their withdrawal.[49] The three subsequent Zīrid rulers continued to launch naval attacks against Sicily, Sardinia, and

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[47] Only the sections related to purity and prayer have been published: al-Māzarī, *Sharḥ al-Talqīn: Al-Juz' al-awwal; al-ṣalāt wa-muqaddimātuhā*, ed. Muḥammad al-Mukhtār al-Salāmī, 3 vols. (Beirut: Dār al-Gharb al-Islāmī, 1997).

[48] For a history of the Zīrid state, see: Idris, *La Berbérie Orientale sous les Zīrīds: X^e-XII^e siècles.*, 2 vols., (Paris: Adrien-Maisonneuve, 1962); EI^2, s.v. "Zirids," "al-Mahdiyya." The exact date for the Zīrid split from the Faṭimids is disputed; see Idris, *La Berbérie*, 1:181.

[49] Idris, *La Berbérie*, 1:286-290.

Genoa, occasionally in conjunction with the Almoravids. This state of affairs lasted through the end of al-Māzarī's life. Shortly thereafter, the Zīrid state fell to Roger II of Sicily, in 543/1148.

Asnā al-matājir's *Section on Judges' Probity*

One of the questions that Ibn Qaṭīya asks of al-Wansharīsī in *Asnā al-matājir* concerns the effect of the Andalusī emigrants' actions and intentions on their legal probity. Al-Wansharīsī accordingly opens the relevant section of his *fatwā* with a general statement that it is abundantly clear that those who remain in *dār al-ḥarb*, return there after emigrating, or desire to return, lose their legal probity; their testimony may not be accepted, they may not lead prayer, and they may not hold offices requiring probity, such as that of a judge.[50] Al-Wansharīsī then ventures beyond the purview of the question to address the status of written documents sent by Mudéjar judges to judges in other regions, attesting to the validity of notarized documents or of individuals' rights which have been verified before them and which require recognition in the recipient judge's jurisdiction.[51] The jurist states that such documents may not be accepted, and supports this judgment with Tunisian *muftī* Ibn ᶜArafa's (d. 803/1401) opinion that "a condition for accepting the document of a judge is the validity of his appointment, by someone demonstrably entitled to appoint him; this means treating

[50] Appendix A, 373.

[51] This is the definition the editor of al-Wazzānī's *al-Miᶜyār al-jadīd* gives for *khiṭāb al-qāḍi*, the expression used here and elsewhere by al-Wansharīsī. In Wiegers' translation of al-ᶜAbdūsī's *fatwā*, he translates the same term as "homologation," or a court's confirmation or ratification of a document. Al-Wansharīsī devotes a lengthy section of the *Miᶜyār* (10:60-76) to questions related to the various conventions for judges' sending of opinions and documents to one another. A section on *khiṭāb al-qāḍi* is also normally treated in works of *adab al qāḍī* (or *adab al-qaḍā'*), which treat the professional standards and practices of judging. See, for example: ᶜAlī b. ᶜAbd al-Salām al-Tusūlī (d. 1258/1842), *al-Bahja fī sharḥ al-tuḥfa*, ed. Muḥammad ᶜAbd al-Qādir Shāhīn (Beirut: Dār al-Gharb al-Islāmī, 1998), 1:118-138. This is a commentary on Granadan chief judge Abū Bakr b. ᶜĀsim's (d. 829/1425) *Tuḥfat al-Hukkām*, a widely consulted work.

the proclamations of the Mudéjar judges – such as the judges of Valencia, Tortosa, and Pantelleria – with circumspection when received by us."[52] This citation of Ibn ᶜArafa's ruling shows that al-Wansharīsī is concerned not only with the validity of the testimony brought before Mudéjar judges, but also with those judges' own probity and the validity of their appointments.

Both of these concerns are expressed in the question posed to al-Māzarī, whose *fatwā* follows Ibn ᶜArafa's statement.[53] Al-Māzarī is asked if the rulings of Muslim judges living in Norman Sicily, or the testimony of this population's witnesses, may be accepted as valid in Ifrīqiyā. The questioner adds that it is unknown whether or not these Muslims have remained in Sicily by choice or compulsion.

In his response, al-Māzarī appears to address only the validity of the judges' rulings and documents, although presumably he would rule similarly with regard to witnesses' testimony.[54] He writes that there are two compromising factors that must be considered with regard to the probity of these judges: the prohibited nature of remaining in *dār al-ḥarb*, and the appointment of these judges by an infidel ruler. As for their residence under non-Muslim rule, al-Māzarī states as a general rule that the judges should be given the benefit of the doubt; the jurist then describes the status of four different groups. First, as for those judges who have remained in *dār al-ḥarb* out of compulsion or for a valid reason, their residence does not compromise their probity. For al-Māzarī, valid reasons to stay include the hope of converting the infidels, as mentioned by theologian and jurist al-Bāqillānī (d. 403/1013), or ransoming a prisoner of war, the permissibility of which is agreed upon within the Mālikī school. Although

[52] Appendix A, 373.
[53] Appendix A, 373-74.
[54] Appendix A, 374--76.

not mentioned in *Asnā al-matājir*, al-Māzarī also lists the hope of recovering the territory for Islam as a possible reason not to emigrate in another version of this *fatwā*.[55] Second, for those who remain willfully ignorant of the prohibition of living under infidel rule and offer no legally legitimate reason for this residence, their integrity is compromised and their testimony rejected. The third group consists of those who voluntarily enter *dār al-ḥarb* for trade; al-Māzarī simply states that there is no agreement as to their probity. Fourth, jurists are to give the benefit of the doubt to Muslims who have remained under infidel rule for unknown reasons and who otherwise appear to be upright; al-Māzarī states that their testimony should be accepted.

As for a judge's appointment by an infidel ruler, al-Māzarī does not find this to compromise the judge's integrity, or that of any other similarly appointed officials. Rather, he rules that having a judge is a communal necessity, and thus the judge's probity is not compromised; "it is just as though a Muslim sultan had appointed him," and his judgments must be enforced.[56] Al-Māzarī further notes that the scholars of a locality may serve this function – of judging or of appointing a judge – where necessary, and concludes with the example of military commanders who conquer new territories. Even though the territory remains outside the control of the sultan, the commander may appoint an upright judge whose rulings must be enforced.

Following al-Māzarī's *fatwā*, al-Wansharīsī adds three further opinions to conclude his section on probity.[57] The first is al-Wansharīsī's own observation that Andalusī jurists did not accept the testimony or judgments of those loyal to ᶜUmar b.

[55] See notes in Appendix A.
[56] Appendix A, 376.
[57] Appendix A, 376-77.

Ḥafṣūn (d. 305/918), the leader of a rebellion against the Umayyad *amīr*s of Cordoba. He then cites an instance in which Mālik resolved a dispute between two scholars by indicating that judges should not accept appointments from leaders who are not upright. Finally, al-Wansharīsī closes with a second quote from Ibn ᶜArafa, this time explaining that the early Mālikīs allowed judges to accept appointments from rebel leaders lest the rule of law be suspended.

Al-Wansharīsī thus includes a variety of opinions in this section, and although they may not seem entirely mutually reconcilable, neither is there a sharp opposition between al-Māzarī's ruling, on the one hand, and those of al-Wansharīsī, Ibn ᶜArafa, and Mālik, on the other. This last cited opinion, that of Ibn ᶜArafa, even supports al-Māzarī's position on Muslim judges in Norman Sicily by explaining that other early Mālikīs likewise allowed judges to serve under unjust rulers or rebels because the appointment of judges is a necessity. In addition to closing this section with an opinion supportive of al-Māzarī, al-Wansharīsī's decision to use al-Māzarī's ruling here rather than that of Ibn Rabīᶜ, and not to explicitly refute or even to qualify the applicability of this *fatwā*, all cast serious doubt on the conclusions of Mu'nis and Turki that al-Wansharīsī must not have examined al-Māzarī's *fatwā* carefully, or that he reproduced the ruling despite his disapproval of al-Māzarī's greater leniency toward subject Muslims.

We must assume, unless there is compelling evidence to the contrary, that al-Wansharīsī includes al-Māzarī's *fatwā* because he finds it to be a valuable ruling issued by an authoritative jurist and relevant to the concerns of *Asnā al-matājir* as a whole. Even prior to examining the relevant section of Ibn Rabīᶜ's *fatwā*, this approach allows

for a preliminary explanation of al-Wansharīsī's choices in this section, including his purpose in selecting al-Māzarī's opinion as a primary precedent. In the initial segment of this section on probity, al-Wansharīsī's states in the form of a generally applicable rule his opening declaration that it is "obvious to anyone with the least grasp" of the law that Muslims lose their legal probity if they remain in *dār al-ḥarb*, return after emigrating, or desire to return. Al-Wansharīsī's repetition here of the same categories of Muslims to which he refers throughout *Asnā al-matājir* strongly suggest that he has in mind those Muslims who, like the Andalusī emigrants, are not exempt from the obligation to emigrate. Ibn ᶜArafa's first statement that Mudéjar judges' documents must be treated with circumspection when presented in Ifrīqiyā supports this general rule.

Al-Wansharīsī places al-Māzarī's *fatwā* in a position to qualify this general rule. As al-Māzarī is one of the most respected early Mālikīs, and al-Wansharīsī cites his opinions throughout *al-Miᶜyār*, we can safely infer that al-Wansharīsī holds his predecessor to have had a grasp of the law; thus, the Fāsī jurist must also consider al-Māzarī to be in agreement with the generally applicable rule cited above. Indeed, al-Māzarī opens with a statement that residence in *dār al-ḥarb* is prohibited, and rules that those who remain there out of willful ignorance of the law or without offering a legitimate reason for doing so compromise their legal probity such that their testimony may not be accepted. That al-Māzarī allows the testimony of those who are compelled to remain in non-Muslim territory is unsurprising and does not appear to contradict al-Wansharīsī, who exempts those unable to emigrate from the obligation to do so.

The three aspects of al-Māzarī's *fatwā* which have appeared most incongruous with the rest of *Asnā al-matājir* are his mention of proselytization as a legitimate reason for remaining in *dār al-ḥarb*, his recommendation that Muslims should be given the benefit of the doubt if their reasons for failing to emigrate are not known, and his confirmation of the validity of judges' appointments by Christian rulers. I argue that this first provision is inconsequential for the message of *Asnā al-matājir* as a whole, and that the second two provisions, contrary to the dominant assumption, may be interpreted as a supportive, pragmatic accommodation of emigration to *dār al-Islām* rather than as a broadening of the permissibility of continued residence under non-Muslim rule.

Without knowing what specifically al-Māzarī meant by the hope of converting non-Muslims, or what al-Wansharīsī understood this to mean for al-Māzarī's time or for his own, it is difficult to assess al-Wansharīsī's degree of approval or disapproval of this first statement. The Normans conquered Sicily during al-Māzarī's lifetime, in a fraction of the time it would take to complete the 'Reconquest' of Spain, and they adopted Arabic as a language of administration; perhaps al-Māzarī's contemporaries considered the conversion of some of Sicily's Christians a real possibility. Al-Wansharīsī could have trusted al-Māzarī's assessment of this possibility in relation to twelfth-century Sicily without endorsing conversion of the enemy as a valid hope for late fifteenth-century Andalusī or Moroccan Muslims. If al-Wansharīsī further considered it obvious that conversion was not a reasonable goal in this latter period, including this part of al-Māzarī's opinion in *Asnā al-matājir* would not have led to confusion or opened any new avenues for exemption from the obligation to emigrate in his own time.

It should also be noted that al-Māzarī was not as lenient on Muslims' residence in *dār al-ḥarb* as modern scholars have believed on the basis on this *fatwā*. As noted in chapter one, al-Māzarī also prohibited travel to Sicily for trade, even if to acquire crucial food supplies. He argued that Muslims must not be subject to Christian laws and that they must avoid contributing financially to the enemy. In this *fatwā* on probity, al-Māzarī likewise clearly upholds the obligation to emigrate; his willingness to assume that many or most Muslims who remained in Sicily at the time he was writing were legitimately exempt from this obligation does not mean that al-Māzarī did not take this duty seriously.

As for the second aspect of this *fatwā* which has appeared at odds with the rest of *Asnā al-matājir*, al-Māzarī's insistence on giving Sicilian Muslims the benefit of the doubt must be understood as a ruling in favor of the admissibility in North African courts of written documents originating in non-emigrant Muslim communities. This is a question which relates primarily to the practical administration of rights within *dār al-Islām*; significantly, al-Māzarī is not ruling on the applicability of the obligation to emigrate to any particular individual or group. Again, without knowing the exact context for al-Māzarī's ruling, we can only speculate as to the nature of the cases being brought before judges in Ifrīqiyā at the time. Were some emigrants at pains to prove the validity of a will, gift, marriage, or divorce notarized prior to their departure from Sicily? Or were some merchants all too eager to consider contracts concluded or testimony given in Sicily to be null and void? Given the number of *fatwā*s issued by al-Māzarī and his peers related to trade with Norman Sicily, it is likely that many of these

cases concerned financial contracts signed in Sicily between Tunisian and Sicilian or subsequently ex-Sicilian Muslims.

Whatever the circumstances, al-Māzarī's ruling is best thought of as allowing Tunisian judges to proceed with the verification of rights and the adjudication of disputes among parties present in *dār al-Islām*, even when this required acknowledging the validity of a document originating in Sicily. The suspension of judgment with regard to Muslims who continued to remain, or had for some time remained under non-Muslim rule is less an endorsement of those decisions regarding residence than a recognition that justice must continue to be served in Ifrīqiyā. If al-Māzarī had been asked directly whether specific Muslims were obligated to emigrate, his category of those Muslims whose reasons for remaining in Sicily are unknown would have been nonsensical; presumably these reasons would be the first thing a jurist would need to know in order to determine whether the Muslims in question were exempt from the need to emigrate or not.

The third provision of al-Māzarī's *fatwā* requiring explanation in the context of *Asnā al-matājir* is the jurist's upholding of the validity of judges' rulings even if those judges were appointed by a non-Muslim ruler. This is simply a corollary to the provision giving these Muslims the benefit of the doubt regarding their reasons for remaining under Christian rule. Al-Māzarī's confirmation that judging is a communal necessity and that these judges' appointments are valid in *dār al-ḥarb* is a prerequisite for arguing that these judges' rulings must be honored in *dār al-Islām*, according to the logic of al-Māzarī's *fatwā*. It should be remembered that al-Māzarī is responding to a question about the admissibility of Sicilian Muslims' documents in Ifrīqiyā; he chooses

to answer the question by raising and refuting two possible reasons for considering these documents invalid on account of the judges' compromised probity. By first arguing for their probity within *dār al-ḥarb* – unless the Muslims in question are proven to be in willful contravention of the prohibition on residence there – al-Māzarī presents a compelling case for accepting their documents in *dār al-Islām*.

The admissibility of judge's documents from *dār al-ḥarb* in the courts of *dār al-Islām* is the central issue which explains al-Wansharīsī's inclusion of al-Māzarī's ruling in *Asnā al-matājir*. This must have been a pressing issue in al-Wansharīsī's time, as Iberian emigrants who already may have been living as Mudéjars for some time would have brought their interpersonal affairs with them to the Maghrib; documents from judges serving in Portuguese-controlled areas of Morocco would have raised similar concerns for jurists in *dār al-Islām*.[58] By allowing emigrants' contracts and other documents to be reviewed in Moroccan courts rather than dismissed out of hand for having been attested to by a non-emigrant judge or notary, al-Wansharīsī might have intended to further any, and most likely all, of the following aims: 1) encouraging emigration from Portuguese-controlled territories (but probably not from Iberia, for the considerations regarding circulation of this *fatwā* discussed in chapter four); 2) extending to law-abiding Iberian emigrants exactly the type of support and legal recognition that Mu'nis excoriates al-Wansharīsī for not providing, in order to facilitate their integration into Moroccan society; 3) bolstering the rule of law in Morocco in general, including in Portuguese-controlled areas.

[58] Cornell notes that while Muslim judges continued to operate under Portuguese rule in Morocco, their authority was questioned and often flouted. Cornell, "Reconquista," 386-87.

The three opinions with which al-Wansharīsī concludes this section on probity are not entirely consistent with each other or with the goals posited here for al-Wansharīsī's use of al-Māzarī's *fatwā*. The first, relating the refusal of Andalusī *skaykh*s to admit witnesses' testimony and judges' pronouncements from those loyal to a rebel leader, and the second, demonstrating Mālik's disapproval of judges accepting appointments from non-upright leaders, appear at odds with al-Māzarī's ruling. Yet the final opinion, that of Ibn ʿArafa, appears to support al-Māzarī's reasoning by justifying the acceptance of such appointments in order to prevent a disintegration of the rule of law.

I suggest that this set of opinions, as well as this section of *Asnā al-matājir* as a whole, reflects two overarching tensions framing al-Wansharīsī's discussion of the probity of Muslims living under non-Muslim rule. The first tension is that between the ideal of all Muslims' being able and willing to emigrate to Muslim territory (or of not being conquered in the first place), and the reality of continued Muslim residence in *dār al-ḥarb*. Al-Wansharīsī's opening declaration in which he expresses the generally applicable obligation to emigrate, the corresponding parts of al-Māzarī's *fatwā* which also uphold this general rule, and these last opinions aimed against judges serving under even unjust Muslim leaders, all affirm that the ideal for all Muslims is residence under (just) Muslim rule.

The second tension arises from the compromise that al-Māzarī and al-Wansharīsī both appear to endorse between the general rule that voluntary residence in *dār al-ḥarb* renders subject Muslims' testimony and judgments invalid, on the one hand, and on the other, these two jurists' pragmatic willingness to honor Sicilian

Muslim and Mudéjar documents in the courts of Ifrīqiyā and the Maghrib. This compromise, while furthering the rule of law in *dār al-Islām*, particularly in times of significant emigration, as well as quite possibly encouraging that emigration by providing a type of amnesty for those given the benefit of the doubt as to their past residence, nonetheless required the judges of *dār al-Islām* to accept in their own jurisdictions what they must have considered to be the inferior standards of *dār al-ḥarb*'s jurists, reflected in documents quite possibly produced under illegitimate circumstances of voluntary subjection to infidel rule.

While al-Wansharīsī's support of this compromise is admittedly less explicit than any other part of *Asnā al-matājir*, this subtlety can be explained by these two sets of tensions. This endorsement of al-Māzarī's *fatwā* also makes sense if, again, *Asnā al-matājir* is viewed in its North African context, as a ruling written by a Moroccan jurist, for a Maghribī audience, concerning events taking place in Morocco. Scholars have treated al-Māzarī's *fatwā* as a foreign entity inexplicably inserted into al-Wansharīsī's ruling because they have focused exclusively on understanding and sympathizing with the plight of Muslims reduced to subject status in *dār al-ḥarb* and condemned from afar by a stern 'orthodoxy' in *dār al-Islām*. Viewed from this latter perspective, al-Māzarī's ruling appears soft on emigration, more lenient toward Muslims remaining in their conquered homelands, and more tolerant of Muslim-Christian relations. I am arguing that al-Māzarī's *fatwā* is not necessarily any of these things, neither in his own time, nor as used by al-Wansharīsī as an authoritative precedent within *Asnā al-matājir*. Both rulings, and especially that of al-Wansharīsī, more likely reflect a pragmatic legal compromise designed to maintain the rule of law in *dār al-Islām* in the face of

significant population movements, including but not limited to an influx of refugees from conquered territories.[59]

Ibn Rabīᶜ

A brief comparison of al-Māzarī's *fatwā* with the corresponding section of Ibn Rabīᶜ's ruling will help to further demonstrate these points. Al-Wansharīsī reproduces most of Ibn Rabīᶜ's text in either *Asnā al-matājir* or the Marbella *fatwā*, so his choice to use al-Māzarī rather than Ibn Rabīᶜ for this section on probity must have been a strategic and considered decision. Van Koningsveld and Wiegers have previously summarized Ibn Rabīᶜ's ruling. Thus, I will address only two salient points here which support the above conclusions regarding al-Wansharīsī's use of al-Māzarī: Ibn Rabīᶜ addresses only the validity of witnesses' testimony rather than the admissibility of documents *in dār al-Islām*, and he is far less lenient on the issue of non-emigrant Muslims' probity than is al-Māzarī.[60]

First, in the relevant portion of his *fatwā*, Ibn Rabīᶜ addresses the validity of Mudéjars' testimony in the abstract, as Mudéjars; that is, presumably in their normal lives at home in *dār al-ḥarb*. He does not mention Mudéjar judges' rulings, or the possibility of these Mudéjars attempting to testify in *dār al-Islām*, or their going before a judge to request a written document attesting to their rights or relationships which could be sent to *dār al-Islām*. The scope of this ruling would have been sufficient for al-Wansharīsī had he only been concerned with the legal status of Mudéjars in *dār al-ḥarb*,

[59] It might also be objected that al-Wansharīsī does not endorse this compromise in the Berber *fatwā*, where he cites Ibn ᶜArafa's statement regarding the Andalusī jurists' rejection of Mudéjar judges' documents without comment (see above, p. 48). Yet in that *fatwā*, al-Wansharīsī was asked only about tribes who had chosen to remain under enemy rule voluntarily, leaving little room for a discussion of giving such Muslims the benefit of the doubt as to their residence. *Asnā al-matājir* also likely represents a more considered, developed view on the matter.

[60] Van Koningsveld and Wiegers, "Islamic Statute," 33-34.

as this matches the scope of the question posed to him by Ibn Qaṭīya. In choosing to use al-Māzarī as his primary authoritative precedent on the subject, al-Wansharīsī chose to expand the scope of his answer to include the status of Mudéjar judges, and especially the validity of those judges' documents as introduced in Maghribī courts.

Second, like al-Māzarī, Ibn Rabīʿ divides Muslims living under non-Muslim rule into four groups, but with a slightly different configuration and for a distinct purpose. Ibn Rabīʿ's first group is aware of the obligation to emigrate and capable of doing so, but remains in *dār al-ḥarb* voluntarily; their testimony is rejected. The second group is also aware of the rule, but incapable of emigrating; for those among them who are upright, their testimony is accepted. The third group is either ignorant of the prohibited nature of their residence, or erroneously believes it to be permitted; this group's testimony is rejected by Mālik and al-Bāqillānī but permitted by al-Shāfiʿī for those among them who are otherwise upright.[61] The fourth group, a subsection of the third, consists of those with legal knowledge who have erred in their *ijtihād* by claiming that residence under non-Muslim rule is permitted, despite the abundance of mutually reinforcing proof-texts to the contrary. This prohibition is so obvious, according to Ibn Rabīʿ, that the third group is nearly non-existent; even lay Muslims with knowledge of the Qur'an and Sunna are expected to be suspicious of those in the fourth group. This fourth group is clearly feigning the result of their *ijtihād*, they are not excused for allowing this residence, and their testimony is rejected by all.[62]

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[61] Ibn Rabīʿ's *fatwā* may even be an adaptation of al-Māzarī's *fatwā* as well.

[62] Ibn Rabīʿ describes the jurists of this fourth group in such a manner that even al-Shāfiʿī, according to Ibn Rabīʿ's presentation of the master jurist's reasoning, would have had to agree that their testimony is rejected. Unlike Mālik and al-Bāqillānī, al-Shāfiʿī bases probity not on the commission of sins but on whether or not a Muslim's testimony is suspect. By implying that these jurists intentionally erred in

The content of Ibn Rabīᶜ's ruling regarding Mudéjars' probity thus would also have been sufficient for al-Wansharīsī's purposes if the Fāsī jurist only wished to further condemn those Mudéjars capable of emigrating but unwilling to do so. While Ibn Rabīᶜ's first two groups are roughly analogous to those of al-Māzarī, the two jurists part company in their assessment of those Muslims who do not fit neatly into the categories of those clearly exempt from the obligation to emigrate or of those clearly in violation of this obligation. Where al-Māzarī sees a large group (his fourth) who must be given the benefit of the doubt, Ibn Rabīᶜ sees a few jurists (his fourth group) who are held accountable not only for their own residence under non-Muslim rule, but also for misleading a small number of irresponsibly uneducated lay Muslims (his third group) by advising them that remaining is an acceptable option. While Ibn Rabīᶜ cites a difference of opinion with regard to the testimony of this last group, he also notes that the Mālikī opinion is to reject their testimony, and he is certainly not arguing that these Mudejars be extended any special consideration.

Ibn Rabīᶜ's approach to the question of probity meets the particular needs of his own *fatwā*, but al-Māzarī's ruling is a more fitting precedent for *Asnā al-matājir*. In the question posed to Ibn Rabīᶜ, a law student indicates that a Mudéjar jurist has argued that it is permissible to reside under Christian rule because Muslims are allowed to practice Islam there and because obligatory *hijra* ended with the conquest of Mecca. Ibn Rabīᶜ's primary concern in this section of *fatwā* is thus to undermine the credibility of such self-serving jurists so that any Mudéjars who remain in doubt as to their

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their *ijtihād* and misled commoners, Ibn Rabīᶜ successfully casts suspicion upon their testimony, and they already would have been regarded as sinners according to the criteria of Mālik and al-Bāqillānī.

obligations will not be misled into believing that it is permissible to remain where they are.

Al-Wansharīsī lacks this immediate adversary and is principally concerned with events in *dār al-Islām*. Al-Māzarī's *fatwā* fits the needs of *Asnā al-matājir* in both scope and judgment by favoring the admissibility of documents verified by subject Muslim judges in the courts of *dār al-Islām*, without leaving any doubt as to the ongoing prohibition of living under Christian rule.

Al-ᶜAbdūsī

A number of scholars have also contrasted *Asnā al-matājir* with what they describe as a more moderate *fatwā* issued by ᶜAbd Allāh b. Muḥammad b. Mūsā al-ᶜAbdūsī (d. 849/1446), who was chief *muftī* of Fez, *imām* of the Qarawīyīn mosque, and one of al-Waryāglī's teachers.[63] Like al-Māzarī, al-ᶜAbdūsī addresses the probity of Muslims and the appointment of Muslim judges in non-Muslim territory. Any evaluation of al-ᶜAbdūsī's ruling in relation to *Asnā al-matājir* must begin with a comparison between the former ruling and that of al-Māzarī, which is al-Wansharīsī's primary choice of authoritative precedent on this issue within *Asnā al-matājir*.

The full text of the question posed to al-ᶜAbdūsī and his response are included in *Al-Ḥadīqa al-mustaqilla al-naḍra fī al-fatāwā al-ṣādira ᶜan ᶜulamā' al-ḥaḍra*, a *fatwā* collection compiled by an anonymous editor in the 9th/15th century.[64] An abridged version consisting primarily of the jurist's answer is also included in al-Wazzānī's *al-Miᶜyār al-*

[63] SN, 1:367; NI, 1:249-50; TD, 114.
[64] Jalāl ᶜAlī al-Qadhdhāfī al-Juhānī, ed., *al-Ḥadīqa al-mustaqilla al-naḍra fī al-fatāwā al-ṣādira ᶜan ᶜulamā' al-ḥaḍra* (Beirut: Dār Ibn Ḥazm, 2003).

jadīd; Wiegers has translated the latter into English.[65] In the full version, al-ᶜAbdūsī is asked: "Concerning a document coming from the lands of the Christians, verified by the Mudéjars' notaries and requiring a judgment in the lands of the Muslims: May [a judgment be based] on it if the handwriting of the aforementioned notaries is verified, or not?" The questioner then asks if the Mudéjars lose their legal probity and ability to give testimony as a result of their residence, and if there is a difference in this regard between those able to leave and those unable to do so without harming themselves and expending all of their movable and immovable property. Finally, the questioner turns to the appointment of Mudéjar judges, asking if their rulings are valid, and if it matters in this regard whether they have been appointed by the people or by the Christian king.

Al-ᶜAbdūsī begins his answer by declaring that if these Muslims' residence in infidel territory is voluntary, this is a major sin and that the scholarly consensus is that their testimony may not be accepted. The jurist cites the *ḥadīth* in which Muḥammad declares himself free of any Muslim who resides among the polytheists, as well as Mālik's statement, also cited by al-Wansharīsī in *Asnā al-matājir*, that only the soul of a Muslim whose faith is diseased could be content to live in a land of unbelief and idol worship. Al-ᶜAbdūsī rules that if Mudéjars must relinquish all of their property in order to emigrate, then they must do so, as long as they may take with them sufficient resources to reach *dār al-Islām*. They are not required to risk their lives; if they fear for themselves or for their families, they may remain where they are and their probity is not compromised.

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[65] Al-Juhānī, *al-Ḥadīqa*, 144-45; al-Wazzānī, *al-Miᶜyār al-jadīd*, 3:35; Wiegers, *Islamic Literature*, 86-87.

Al-ᶜAbdūsī then addresses the validity of Mudéjar judges' rulings. If a judge is appointed by the Muslim community, his rulings are valid within that community, and the documents he certifies may serve as the basis for judgments in other courts, provided it is certain that the community appointed him and that the document is in his handwriting. If the Christian king appointed the judge, his rulings are invalid unless the community willingly accepts his judgeship, in which case it is as though they had appointed him. In that case, his appointment is valid, and if he appoints professional witnesses to serve as notaries, their signed testimony is admissible – presumably in other courts – according to the conditions for verifying the testimony of those not present at court.[66] In a closing sentence omitted in al-Wazzānī's version of the *fatwā*, al-ᶜAbdūsī adds that some jurists will not base judgments on documents certified by Mudejar judges, because it is the Christian ruler who appoints the judges to preside over the Muslims, and this is by compulsion, not by their choice.

This final statement is important, as it acknowledges that a given Mudéjar community's after-the-fact endorsement of a judge who was originally selected by the region's Christian rulers likely would have been a pragmatic resignation at best, not a truly voluntary choice. Jurists in *dār al-Islām* who, like al-ᶜAbdūsī, made acceptance of Mudejar judges' documents conditional upon those judges' having been appointed by their communities rather than by the Christian king could choose to maintain this legal fiction and honor the documents they received from *dār al-ḥarb*, or to reject the validity

[66] These conditions are part of what is discussed and disputed in the section of the *Miᶜyār* devoted to correspondence between judges noted above (10:60-76) and in the relevant sections of *adab al-qāḍī* manuals. It appears that while normally two witnesses would need to accompany a document in order to testify that the contents of that document had indeed been authored or signed by the parties in question (either lay Muslims or judge), in practice a judge would often operate on his own ability to recognize another judge's handwriting.

of these judges' appointments and therefore the admissibility of their documents. In the full version of the *fatwā*, al-ᶜAbdūsī thus leaves the matter to the discretion of the receiving judge and any advisors he might consult.

Either al-Wazzānī or his source, the *Nawāzil* (*fatwā* collection) of Almerian judge Ibn Ṭarkāṭ (d. after 854/1450) appears to have omitted this mention of disagreement in favor of the ruling supporting acceptance of Mudejar judges' certified documents in the courts of *dār al-Islām*.[67] The omission could very well be al-Wāzzānī's, as he makes his own position clear in a section of *al-Miᶜyār al-jadīd* devoted to the probity of judges and lay Muslims living in non-Muslim-controlled territory.[68] Directly following al-Wansharīsī's Berber *fatwā*, al-Wazzānī comments that al-Wansharīsī goes too far in that response by not accepting in an absolute sense these Muslims' testimony or the documents certified by their judges. Al-Wazzānī then reproduces al-Wansharīsī's section on probity from *Asnā al-matājir*, instructs the reader to "consider this," and cites a few short opinions endorsing the validity of judges' appointments by non-Muslims.[69] Al-Wazzānī concludes with al-ᶜAbdūsī's ruling, after which he writes:

> This is better than the preceding response by the author of the *Miᶜyār*, in which he did not allow the attestation of their notaries or the documents certified by their judges at all. This [ruling by al-ᶜAbdūsī is better] by virtue of the opinion held by some scholars that Islamic territory does not become *dār al-ḥarb* merely because of the infidel's taking control of it, but rather [it only becomes *dār al-ḥarb*] when the rites of Islam cease to be performed there. As long as the rites of Islam, or most of them, are still performed in that [territory], it does not become *dār al-ḥarb*.[70]

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[67] Abū al-Qāsim (or Abū al-Faḍl) b. Muḥammad b. Ṭarkāṭ (d. after 854/1450; see ZK, 5:182) includes many of the same jurists' *fatwā*s in his collection as does the compiler of *al-Ḥadīqa*, but Ibn Ṭarkāṭ's *Nawāzil* remain in manuscript (in Madrid and Tetouan) and thus far no studies treat all of its rulings. For a description of the *Nawāzil*, see: M. Isabel Calero Secall, "Una aproximación al studio de las fatwas granadinas: Los temas de las fatwas de Ibn Sirāŷ en los Nawāzil de Ibn Ṭarkāṭ," in *Homenaje a Prof. Darío Cabanelas Rodrígeuz, O.F.M., Con Motivo de su LXX Aniversario*, 1:189-202 (Granada: Universidad de Granada, 1987).

[68] Al-Wazzānī, *al-Miᶜyār al-jadīd*, 3:28-35.

[69] Al-Wazzānī, *al-Miᶜyār al-jadīd*, 3:34.

[70] Al-Wazzānī, *al-Miᶜyār al-jadīd*, 3:35.

Al-Wazzānī, who saw the establishment of the French Protectorate during the last decade of his life, clearly developed a very different view of, and relationship to, Christian rule than had al-Wansharīsī. Yet in addition to the strategically abridged version of al-ᶜAbdūsī's *fatwā* that he presents, al-Wazzānī's comparison between the opinions of al-ᶜAbdūsī and al-Wansharīsī is skewed by his misleading characterization of al-Wansharīsī's position. Although he does not make this entirely clear, al-Wazzānī's phrasing implies that this comparison must have been based only on the Berber *fatwā*, even though he has also just shown at this point that al-Wansharīsī included more lenient opinions, including that of al-Māzarī, in the relevant section of *Asnā al-matājir*. Nonetheless, it is not accurate to describe al-Wansharīsī's position in the Berber *fatwā* as disallowing absolutely all testimony and judges' documents from Christian-controlled areas. Rather, in that ruling al-Wansharīsī is asked about a group of Berbers who were living in non-Muslim territory despite their ability to leave; the jurist also makes it clear in his response that it concerns only those Muslim living under non-Muslim rule voluntarily. In the section of his response addressing those Muslims who commit no additional offenses beyond this residence, al-Wansharīsī cites but does not comment upon Ibn ᶜArafa's statement that the Mālikīs have refused to accept the pronouncements of the Mudéjar judges. In the section addressing those who trade with the enemy, an offense al-Wansharīsī associates in this *fatwā* with selling arms to the Christians, he further rules that Muslims entering *dār al-ḥarb* for trade lose their legal probity. Al-Wazzānī's characterization of al-Wansharīsī's position as refusing to accept these Muslims' probity or judges' rulings in the absolute thus fails to account for these two important qualifications, that the Muslims in question must be living under

non-Muslim rule voluntarily and that, for lay individuals, their loss of legal probity is tied to their providing material support to an enemy in a time of war.

Those modern scholars who have compared the rulings of al-ᶜAbdūsī and al-Wansharīsī have largely done so through the lens of al-Wazzānī's particular structuring of, and quite likely his commentary upon, these texts. Yet where al-Wazzānī compared al-ᶜAbdūsī's *fatwā* to the Berber *fatwā*, these scholars have compared the abridged version of the former to al-Wansharīsī's little-understood section on probity in *Asnā al-matājir*, with unconvincing results. Molina López, who accuses al-Wansharīsī of having applied the law rigidly, erroneously, and without sensitivity to the plight of the Mudéjars, writes that the jurist had a responsibility to rule as did his contemporaries al-Wahrānī and al-ᶜAbdūsī, whose more just and considered opinions afforded to every Muslim the 'right' to remain in Christian territory if their lives or families were in danger, and the 'right' to dissimulate.[71] This conflation of al-Wahrānī and al-ᶜAbdūsī's opinions is puzzling, and no footnote clarifies Molina López's sources or reasoning. While it is true that al-ᶜAbdūsī allows Muslims to remain in non-Muslim territory if they fear for their lives, so does al-Wansharīsī, implicitly in *Asnā al-matājir* through his repeated differentiation between those able and unable to emigrate, and explicitly in the Berber *fatwā*, as noted above.

In *Islamic Literature in Spanish and Aljamiado*, Wiegers too notes that al-ᶜAbdūsī's opinion is clearly more moderate than that of al-Wansharīsī, because the former exempts from the obligation to emigrate Mudéjars who fear for their lives and families.[72] He further suggests that al-Wansharīsī likely omitted al-ᶜAbdūsī's *fatwā* from

[71] Molina López, "Algunas consideraciones," 428.
[72] Wiegers, *Islamic Literature*, 87 n. 77.

al-Miᶜyār because he disagreed with the position adopted by his predecessor, which Wiegers characterizes as implicitly sanctioning the status quo. In Van Koningsveld and Wiegers' later typology of opinions on the status of Mudéjars, the authors place al-ᶜAbdūsī squarely in the pragmatist camp, because the jurist

> Argued, first of all, that the testimony of Muslims in Christian Spain can be accepted, on the basis of the assumption that they were not staying among the Infidels out of free choice, and because leaving them would endanger their lives and their families. Secondly, he stressed that . . . Whether or not a Muslim judge in Christian Spain must be recognized as legitimate depends . . . on the willingness of the local Muslims to accept him of their own free will, even if he was appointed by the Christian ruler and not by themselves.[73]

Again, it does not really make sense to describe al-ᶜAbdūsī's *fatwā* as more moderate or more pragmatic than *Asnā al-matājir*, for all of the reasons discussed here and in the previous chapters. First, although al-Wansharīsī does not explicitly state in *Asnā al-matājir* that Muslims who fear for their lives are exempt from the obligation to emigrate, this is the only fair conclusion to be drawn from his repeated emphasis on this obligation's applicability only to those who are able to emigrate; not only is this conclusion confirmed by al-Wansharīsī's explicit statement in the Berber *fatwā* – available in *al-Miᶜyār al-jadīd* and placed in direct conversation with al-ᶜAbdūsī's *fatwā* by al-Wazzānī – but it should also be recalled that al-Wansharīsī bore no responsibility to discuss any exemptions to this obligation at all in *Asnā al-matājir* or the Marbella *fatwā*, given that he was asked only about Muslims described as perfectly capable of emigrating, even to the point in *Asnā al-matājir* of having already emigrated and being anxious to do it again in reverse.

In contrast, al-ᶜAbdūsī is asked whether or not Mudéjars who are capable of emigration are to be distinguished in status from those incapable of doing so. The

[73] Van Koningsveld and Wiegers, "Islamic Statute," 50.

jurist thus devotes his opening paragraph to the obligation to emigrate, duly exempting those who fear for their lives but also making very clear that they must ruin themselves financially if that is what it takes to reach *dār al-Islām*; they need not have a *dirham* to spare beyond the expense of the actual journey. This forceful statement, (along with al-ᶜAbdūsī's citation of a *ḥadīth* condemning residence under non-Muslim rule and of Mālik's statement that only a Muslim of diseased faith would be content to remain in infidel territory), does not strike me as an unambiguous endorsement of the status quo.

Second, al-Māzarī's ruling, which al-Wansharīsī includes not only in the *Miᶜyār* (twice) but also in *Asnā al-matājir* itself as the centerpiece of the section on probity, is more lenient than al-ᶜAbdūsī's ruling with regard to both exemptions from the obligation to emigrate and the acceptance of non-emigrant Muslims' judges' documents in *dār al-Islām*. As noted above, al-Māzarī allowed Muslims to remain in Norman Sicily not only if they were unable to emigrate, but also if they erroneously believed it permissible to remain, or if they hoped to convert the Christians, or if they hoped to win back the territory. While al-Wansharīsī may not have agreed with all of these reasons or found them applicable to his own time, neither does he edit out or explicitly refute this portion of al-Māzarī's *fatwā*, which he ought to have done if he had omitted al-ᶜAbdūsī's ruling entirely for being too lenient. It is al-Māzarī, not al-ᶜAbdūsī, who was also willing to assume, if necessary, that Muslims had remained in Sicily out of compulsion; al-ᶜAbdūsī simply states that if Mudéjars fear for their lives their testimony is not compromised.

Furthermore, al-Māzarī is more unambiguously supportive of admitting Christian-appointed judges' documents in the courts of *dār al-Islām* than is al-ᶜAbdūsī. Again, al-Māzarī states outright that judging is a necessity and thus the nature of the judges' appointments has no bearing on the validity of their rulings; for al-Māzarī, the reasons for these judges' residence in *dār al-ḥarb* is what mattered, and he was willing to assume that their reasons for doing so, and therefore their documents, were acceptable. Al-ᶜAbdūsī, on the other hand, in the full version of his *fatwā*, tied the validity of Mudéjar judges' rulings to the voluntary acceptance of those judges' appointments by their communities, and by presenting a difference of opinion on this issue, essentially left the endorsement of this legal fiction to the discretion of any judge receiving a document certified by a Mudéjar judge.

Molénat, who characterizes al-Wansharīsī's *fatwā* as extremely severe, likewise hails al-ᶜAbdūsī has a much more moderate voice who upheld the 'right' of every Muslim to remain in Christian territory if emigration would "represent a danger" for himself or his family.[74] As in Molina López' article, this 'right' is better described as a dispensation or exemption, and al-ᶜAbdūsī's choice of words indicates that he expects this exemption to apply to the fear of mortal danger, not just of injury or light wounds. Molénat goes further than Wiegers by accusing al-Wansharīsī of intentionally omitting al-ᶜAbdūsī's *fatwā* from the *Miᶜyār*, arguing that this is a second instance of al-Wansharīsī's manipulation of his predecessors' texts in order to serve his own purposes of a stricter ruling.[75] The other example Molénat offers of this manipulation is al-Wansharīsī's alleged omission of a lenient portion of Ibn al-Qāsim's response to Yaḥyā

[74] Molénat, "Le problème," 395.
[75] Ibid., 399.

b. Yaḥyā regarding the status of Muslim who remained in Barcelona after Christians conquered the city in 185/801; but this was a logical abridgment of the text in question, and most likely was presented in abridged form already in al-Wansharīsī's source, a text by Ibn al-Ḥājj.[76] Thus, neither this earlier abridgment nor al-Wansharīsī's omission of al-ᶜAbdūsī's *fatwā*, even if this were established, can reasonably be said to represent a concerted effort on al-Wansharīsī's part to suppress opinions more lenient than his own.

Finally, Rubiera Mata argues that al-ᶜAbdūsī's ruling, because it is favorable to the Mudéjars, is another 'exceptional' opinion like that of al-Wahrānī.[77] She urges further study of al-ᶜAbdūsī's *fatwā*, especially because it concerns Mudéjars rather than Moriscos, and is thus as more fitting contrast to al-Wansharīsī's opinion than is al-Wahrānī's *fatwā*. While Rubiera Mata is certainly correct that the rulings of al-ᶜAbdūsī and al-Wansharīsī have more in common than do either with al-Wahrānī's *fatwā*, these two opinions are still of a very different scope. Al-ᶜAbdūsī's ruling is more directly comparable with that of al-Māzarī; they are each asked specifically about probity, testimony, and the validity of judges' appointments within non-emigrant Muslim communities, and in each case the questioner requests that the responses cover the cases of Muslims living under Christian rule voluntarily as well as involuntarily. Yet as demonstrated above, al-Māzarī's ruling, which al-Wansharīsī chose to place in the heart of *Asnā al-matājir*, is the more 'lenient' or 'moderate' ruling.

It should be clear that al-Wansharīsī did not exclude al-ᶜAbdūsī's *fatwā* from the *Miᶜyār* for being too exceptionally sympathetic to Mudejars. As others have pointed

[76] Appendix A, 365-66 and n. 105.
[77] Rubiera Mata, "Los Moriscos," 541.

out, al-Wansharīsī includes several of al-ᶜAbdūsī's other opinions in his compilation, so he likely knew of this ruling regarding probity as well. Yet any number of reasons might explain this exclusion, all of them more plausible than the intentional suppression of al-ᶜAbdūsī's perceived pragmatism. Al-Wansharīsī may not, in fact, have come across this particular ruling; or al-ᶜAbdūsī's *fatwā* may simply have been redundant given the numerous other rulings on similar cases which al-Wansharīsī did choose to include in the *Miᶜyār*; or it may have been less authoritative than these other incorporated rulings, especially in comparison with that of a revered master like al-Māzarī.

Related Rulings in the Miᶜyār

A final measure of perspective on al-Wansharīsī's inclusion of al-Māzarī's *fatwā* within *Asnā al-matājir* may be gained through a brief inventory of other rulings included in the *Miᶜyār* which relate to judges operating outside Muslim territory. These include:

1) A statement in which Ibn ᶜArafa – the same jurist who advises treating Mudéjar judges' documents with caution – appears to endorse nonetheless the acceptance of such a document. This statement appears in a lengthy section reviewing jurists' opinions as to Andalusī and Maghribī procedures for judges' sending of documents to one another. In the course of a discussion regarding standard formulae for greetings and the proper dating of the documents, Ibn ᶜArafa relates the example, recorded by an historian, of an improperly addressed document written by a judge. The recipient of this document initially rejected its validity, then asked where it had been written. An infidel region was named, and the handwriting was identified as that of an Ibn al-Mujāhid, at which point the document was accepted. Without comment as to the provenance of the document in this example, Ibn ᶜArafa proceeds to discuss the importance of properly dating such documents.[78] It appears that the positive

[78] Al-Wansharīsī, *al-Miᶜyār*, 10:66-67.

identification of the judge's handwriting confirmed the acceptability of the document.

2) A repetition of much of *Asnā al-matājir*'s section on probity (including al-Māzarī's full *fatwā*) which includes an additional statement against the acceptance of documents written by Mudéjars and their judges, who are content to live under Christian rule.[79]

3) A *fatwā* issued by an Ibn al-Ḍābiṭ, whom al-Wansharīsī describes elsewhere as one of Abū al-Ḥasan al-Lakhmī's (d. 478/1085-6)[80] students,[81] concerning a man who been entrusted with some property by another man who was away in Sicily. A second man in Tunisia presented to Ibn al-Ḍābiṭ a document attested to by two witnesses and a judge, which confirmed that the man in Sicily had died, and that this second man in Tunisia was one of his heirs. The first Tunisian man remained hesitant to turn the property over because of the questionable nature of the Sicilian judge's ruling, given that the judge was appointed by a Christian. Ibn al-Ḍābiṭ responds that the judge's ruling will not be considered valid until his probity can be confirmed, but it was objected that this had been done. It appears that Ibn al-Ḍābiṭ then acknowledged that this was a matter of necessity, and that making the man's heirs and creditors wait would entail hardship for them. Nonetheless, he states that the notaries of Mahdīya will be able to clear the matter up, as they will be well aware of the Sicilian judge's character.[82]

4) A *fatwā* issued by Abū al-Ḥasan al-Qābisī (d. 403/1012-13),[83] who was likewise asked about the property of a man who had died in non-Muslim territory in the Sūdān ('black' Africa). The man had not left a will or family, and another man had appropriated the key to his storehouse. When the community realized that this man was not trustworthy, they raised the issue before a Muslim who had been appointed by the king of this region to oversee the affairs of the Muslims there, and with whose oversight these Muslims were content. This overseer appointed a member of the community to sell all of the man's belongings and to bring the appropriate sum back to the overseer. An heir of the deceased then claimed that this appointed member of the community was unjust and that none of what the overseer had done was permissible. Al-Qābisī begins his response by stating that if these Muslims have inhabited this place, then they must have someone to oversee their affairs and judge between them, and that this overseer must have power over those who violate his judgments. This power must furthermore come from the territory's ruler, as it is not possible to issue judgments without the knowledge and permission of the king, especially

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[79] Ibid., 10:107-108.
[80] Abū al-Ḥasan ᶜAlī b. Muḥammad al-Rabᶜī al-Lakhmī (d. 478/1085-6). DM, 298; IM, 307; SN, 1:173.
[81] Ibid., 2:273. Ibn al-Ḍābiṭ must have been a contemporary of al-Māzarī in Ifrīqiyā.
[82] Ibid., 10:113.
[83] Abū al-Ḥasan ᶜAlī b. Muḥammad, known as Abū al-Ḥasan al-Qābisī (d. 403/1012-13) was a jurist, theologian, and prominent *ḥadīth* scholar from Qayrawān. Among his works is one treating the evaluation of witnesses. SN, 1:145.

an infidel or hostile king (presumably because he would have a close eye on the Muslim settlement). If the overseer judges among them according to Muslim laws, his judgments are upheld as long as they are correct, and they are binding upon those who choose to enter under his authority and to live under his supervision. This is something which cannot be avoided if people travel to that region. Al-Qābisī states that the man appointed to manage the deceased man's possessions cannot be approached with hostility simply for performing this function, especially if the heir has no proof against him. The decision of the overseer is carried out.[84]

5) A comment by al-Burzulī (d. 841/1438) taken from a section of *Fatāwā al-Burzulī* which al-Wansharīsī re-arranges in the *Miʿyār* such that this comment is appended to a *fatwā* issued by Ibn ʿArafa.[85] In this *fatwā*, Ibn ʿArafa is asked if the sultan may seize the property of a group of people in the Ifrīqiyān countryside if the sultan is victorious over them, and most of them are *mustaghraq al-dhimma*, that is, they owe all of their money to others. Ibn ʿArafa allows this collective seizure, based on the condition of the majority of these people, at least until such time as those among them who are law-abiding may be separated from the others. This is because they – presumably the upright among them – are disobedient by virtue of their being outnumbered by the belligerents and because they contribute to the numbers of this latter group.

Al-Burzulī comments that this is also because the group as a whole may not be afforded the inviolability of those who distinguish themselves and do not mix with the others. The above is the case if those who are upright had an alternative to (residing with) this group, (but did not take advantage of that alternative). Otherwise, if an upright man among them had had no alternative, "then he is like one who is compelled [to remain] in the land of war, if he was unable to leave their lands and feared for himself or his property, or for his family and child."[86] Al-Burzulī links this to the case of those who live under infidel rule in Qawṣara (Pantelleria): if they are conquered and have no alternative, they are like those compelled, and do not lose their probity; but if they remain by choice, they lose their probity.[87] They are like the people of al-Andalus, who are called Mudejars (*yusammūna bi'l-dajn*).[88]

6) A number of opinions related to Muslims living under non-Muslim rule, including one addressing testimony, which al-Wansharīsī places together in two slightly different paragraphs in his chapters on *jihād* and sales.[89] In the chapter

[84] Al-Wansharīsī, *al-Miʿyār*, 10:135.
[85] Al-Burzulī, *Fatāwā al-Burzulī*, 2:22-23; al-Wansharīsī, *al-Miʿyār*, 2:438-39; 6:156-57.
[86] Al-Burzulī, *Fatāwā al-Burzulī*, 2:23; al-Wansharīsī, *al-Miʿyār*, 2:438; 6:156.
[87] Burzulī, *Fatāwā al-Burzulī*, 2:23; al-Wansharīsī, *al-Miʿyār*, 2:439; 6:157. In all three editions, the first clause reads "whoever is conquered and has an alternative," but this must be an error for those who do not have an alternative.
[88] Al-Burzulī, *Fatāwā al-Burzulī*, 2:23; al-Wansharīsī, *al-Miʿyār*, 2:439; 6:157. In al-Burzulī, the editor was unable to read these last two words in the manuscripts available to him, but the text is clear in both volumes of al-Wansharīsī.
[89] Al-Wansharīsī, *al-Miʿyār*, 2:439, 6:95.

on *jihād*, this paragraph follows al-Burzulī's above comment and includes three statements endorsed by al-Wansharīsī. The first statement indicates that some contemporary jurists have committed a clear error by issuing *fatwā*s which make licit the property of Muslims who live near *dār al-ḥarb* and who have signed treaties with the people of that territory. The second statement relates an opinion that the property of Mudejars should not be purchased because they do not possess true ownership of it. The third statement is very similar to one which appears in the Berber *fatwa*: "Some later jurists held that it was not permissible to trade with them, nor to greet them; and that they are similar to those with erroneous beliefs, so their testimony is not permitted, nor is anything else, as was the practice in the issuance of *fatwā*s in al-Andalus."[90] The paragraph in the chapter on sales is slightly longer and contains the following formulation of the final sentence, with 'they' referring to the Muslims of Pantelleria, who have just been compared to Mudejars and to people of error: "What the texts stipulate is to not permit their testimony, and to refuse the documents certified by their judges, as was the practice in the issuance of *fatwā*s in al-Andalus with regard to those who were under the command of the apostate Ibn Ḥafṣūn."[91]

7) A *fatwā* by Abū al-Faḍl Qāsim al-ᶜUqbānī (d. 854/1450)[92] in which he is asked about a judge who is practicing in a land known for corruption and for non-adherence to divine law.[93] The questioner wishes to know what such a judge should do if a case occurs which requires a particular legal ruling according to the school's commonly accepted doctrine, and yet the judge knows that if the man has broken an oath, for example, and the judge rules that the man's wife is prohibited to him, the man may go complain to a friend among the Arab commanders, and the commander will tell him to take back his wife and ignore the judge's ruling. If the ruler is like this, may the judge apply a ruling other than the commonly accepted view, and return the man's wife to him in accordance with this other opinion, in order to safeguard the permissibility of this man's sexual relations with this woman and maintain adherence to the law? Al-ᶜUqbānī responds that if the man broke an oath but was excused, or if the judge allows a forgiving opinion to be applied to a one-time occurrence, this is permitted; but if the man persists in treating oaths lightly, the commonly accepted view of the school must be applied.

This last ruling, while not strictly pertaining to non-Muslim territory, nonetheless shows a tolerance for a judge's need to adjust pragmatically his rulings to a situation of

[90] Al-Wansharīsī, *al-Miᶜyār*, 2:439. Although this sentence reads "*al-ᶜamal wa'l-fatwā*," the second version, below, which reads "*al-ᶜamal fī al-fatwā*" is more likely correct.
[91] Al-Wansharīsī, *al-Miᶜyār*, 6:95.
[92] Abū al-Faḍl Qāsim al-ᶜUqbānī (d. 854/1450) was chief judge of Tlemcen and a renowned jurist considered to have reached the level of *ijtihād*. Al-Wansharīsī was among his students. NI, 2:12-14; SN, 1:367-68. It is unclear to what 'land' he is referring, but this may be a comment on political corruption in his own state (the Tlemcen-based Zayyānid dynasty).
[93] Al-Wansharīsī, *al-Miᶜyār*, 4:294.

corruption under an unjust ruler, which appears to be precisely how some jurists envisioned the status of Muslims under Christian rule in Spain, Sicily, and Pantelleria. Taken together, these rulings do not present a uniform position as to the probity of Muslims and their judges outside of Muslim territory, or as to the admissibility as evidence of these judges' documents in *dār al-Islām*. In the first and third cases cited here, Mudejar judges' documents appear to be admissible; but in the sixth case they are not, and the second case is ambiguous. It is unclear whether this opinion is stating that judges' documents are not accepted if those judges are content to remain under Christian rule, or whether the author is declaring all Mudéjars and their judges to be living there contentedly rather than by compulsion. The fourth case cited here upholds the necessity of having someone act as a judge in a given Muslim community located outside of *dār al-Islām*, and that validity of that figure's rulings, without addressing at all the permissibility of residence in that community.

While no definite conclusion may be drawn from al-Wansharīsī's inclusion of this group of opinions within *al-Miʿyār*, it should be clear that he did not intentionally exclude any and all opinions favorable to Mudéjars or to Muslims in similar situations. It should likewise be clear that al-Wansharīsī was not at a loss for opinions touching on the issue of non-emigrant Muslims' probity or the validity of their judges' rulings and certifications of documents, meaning that he was not compelled to use al-Māzarī's opinion in *Asnā al-matājir* because it was the only available authoritative precedent. Al-Wansharīsī must have made informed and calculated choices in selecting among the relevant opinions available to him for inclusion in *Asnā al-matājir* specifically and in *al-Miʿyār* more broadly. Although the jurist's criteria for selection were likely complex

and require more study, what this tentative inventory demonstrates is that any attempt to account for these criteria must consider all of these opinions and likely many more, and not simply al-Wansharīsī's inclusion of al-Māzarī's *fatwā* and presumed exclusion of that of al-ᶜAbdūsī.

Analysis

While al-Wansharīsī's section on the probity of lay Muslims and judges living in non-Muslim territories is far from straightforward, I have assumed that in constructing this section, al-Wansharīsī made rational choices supportive of his overall aims in *Asnā al-matājir* and appropriate for his historical context. This approach is distinct from the dominant approach, which has proceeded from the assumption that al-Māzarī's *fatwā* is incompatible with al-Wansharīsī's opinions and aims, that this *fatwā* therefore can and must be considered as a foreign element to be separated from and compared to the parts of *Asnā al-matājir* which are taken to represent al-Wansharīsī's real opinion, and that this *Asnā al-matājir*-minus-al-Māzarī's-*fatwā* may also then be compared to, and found to be far stricter than, al-ᶜAbdūsī's *fatwā* – even though the latter is actually far stricter than al-Māzarī's *fatwā* and thus stricter than an *Asnā al-matājir* allowed to retain all its component parts.

Again, this has been a preliminary attempt to understand al-Wansharīsī's choices, and more research is called for; an examination of the jurist's own manual for notaries, for example, is beyond the scope of this dissertation but would likely shed a great deal of light on the jurist's opinions regarding documents originating in non-Muslim territory. Drawing primarily on Ibn Rabīᶜ's *fatwā* and on the *Miᶜyār*, I have argued that al-Wansharīsī's support of al-Māzarī's opinion is indicated by his having

devoted the vast majority of his section on probity to al-Māzarī's ruling, including this latter jurist's lengthy justifications for extending to subject Muslims the benefit of the doubt, despite the availability of numerous alternative rulings less favorable to subject Muslims. Despite the presence of seemingly contradictory opinions, the purpose of which appears to be the strengthening of a general rule that Muslims voluntarily residing under non-Muslim rule forfeit their probity, al-Wansharīsī also reserves the final word in this section for an opinion supportive of al-Māzarī's ruling.

Al-Wansharīsī appears to have selected al-Māzarī's ruling because the latter jurist addresses the admissibility in the courts of *dār al-Islām* of documents originating within non-emigrant Muslim communities; this is the primary focus of al-Māzarī's *fatwā* and a factor distinguishing it from other related rulings which address only the validity of judges' rulings within their own communities, or the probity of subject Muslims in general. Al-Wansharīsī must have supported the primary thrust of al-Māzarī's *fatwā*, which is to give subject Muslim judges the benefit of the doubt and to accept the documents they certify as valid bases of judgment in *dār al-Islām*. If we consider al-Wansharīsī's historical context and the practical implications of this ruling, his support for al-Māzarī's position also makes sense; allowing the adjudication of disputes and recognition of rights and relationship based on documents that Mudejars or Moroccan Muslims brought with them from *dār al-ḥarb* to *dār al-Islām* is a pragmatic compromise that might appear sympathetic to continued residence in the former, but is ultimately more supportive of existing and future emigration to the latter. Finally, it would have strengthened al-Wansharīsī's case to base his ruling on the precedent set by an early master jurist as respected and authoritative as al-Māzarī.

Punishment in the Hereafter

The last section of *Asnā al-matājir* to be examined here is al-Wansharīsī's description of the punishment the Andalusī emigrants might expect in the hereafter.[94] While nearly this entire section is original to al-Wansharīsī's *fatwā* rather than taken from that of Ibn Rabīʿ, one paragraph in particular is worthy of closer analysis. After citing the emigrants' offensive statements mocking the idea of emigration to the Maghrib, al-Wansharīsī declares:

> Whoever commits this [offense] and is implicated in it, has hastened for his malevolent self the warranted punishment in this world and the next. Yet, in terms of disobedience, sin, injurious conduct, vileness, odiousness, distance from God, diminished [religious standing], blameworthiness, and deservingness of the greatest condemnation, he does not equal the one who abandons emigration completely, through submission to the enemy and by living among them, who are far [from God]. This is because the extent of what has issued from these two wicked men [who have made the above statements] is a firm resolve (*ʿazm*), which is planning and preparing oneself for action, while neither of them has yet undertaken that action.

In the course of answering Ibn Qaṭīya's question regarding the consequences of these particular emigrants' actions, al-Wansharīsī also rules on those who have not yet emigrated or who might still attempt a return to Christian territory: while these slanderous emigrants have committed very grave sins, the punishment awaiting those who persist in living voluntarily under non-Muslim rule will be worse yet. This adds support to the tentative conclusion reached in the analysis above of the Berber *fatwā* that al-Wansharīsī adopts a stricter stance in that earlier *fatwā* than in *Asnā al-matājir*. While those accused of similar crimes – the public expression of contentment with or a preference for infidel rule – in the Berber *fatwā* were charged with outright apostasy, in *Asnā al-matājir* they merely border on infidelity. As a contribution to the contemporary juristic discourse on Muslims living under non-Muslim rule in Morocco itself, this

[94] Appendix A, 377-82.

section of *Asnā al-matājir* would have reinforced al-Wansharīsī's position on the sins committed by those choosing to remain in Christian-controlled regions.

Conclusion

The preceding analysis of al-Wansharīsī's use of authoritative precedents has focused primarily on explaining the jurist's departures from Ibn Rabīʿ's earlier *fatwā* on the obligation to emigrate from Christian to Muslim territory, which forms the foundation for *Asnā al-matājir* and the Marbella *fatwā*. This chapter has argued that in the case of *Asnā al-matājir*, each of al-Wansharīsī's major re-arrangements of and departures from his predecessor's *fatwā* represents an adaptation to the historical context of Portuguese occupation of Moroccan ports in the late fifteenth century, to the specific parameters of the questions posed to him by Ibn Qaṭīya, or both. While al-Wansharīsī has often been accused in the literature of simply repeating past precedents in an unthinking and at times internally contradictory manner, this preliminary attempt to understand his ruling in its North African context suggests that in *Asnā al-matājir*, the jurist very skillfully selected and deployed context-appropriate precedents in order to craft his own authoritative contribution not only to two complex and overlapping discourses regarding Muslim minorities in his own time, but also to future juristic discourses on recurring iterations of this legal issue.

CHAPTER FOUR

Asnā al-matājir as Authoritative Precedent

The preceeding chapters have argued that al-Wansharīsī crafted *Asnā al-matājir* and the Marbella *fatwā* for a professional legal audience, and that he chose these particular *fatwā*s for elaboration and preservation in the *Miʿyār* because Ibn Qaṭīya's questions, unlike the more nuanced and complex issues treated by the *Jawāhir al-mukhtāra fatwā*s, provided the ideal platforms for clearly defined, well-defended responses supported by scholarly consensus and the equally irrefutable weight of the monumental historic loss of al-Andalus. The present chapter explores the success of al-Wansharīsī's *fatwā*s, particularly *Asnā al-matājir*, in becoming the authoritative precedent for later rulings related to Muslims living under non-Muslim rule.

It will be recalled that *Asnā al-matājir* and the Marbella *fatwā* often have been characterized in the existing literature as either representing the orthodox Mālikī opinion on emigration, or as the strictest rulings in a continuum of *fatwā*s related to Muslims in non-Muslim territory. This first characterization is problematic in part because it is inappropriate to call any *fatwā* – one jurist's non-binding opinion offered in response to an individual petitioner's ad-hoc request – 'orthodox.' The continuum-of-rulings approach has also been critiqued here for failing to place al-Wansharīsī's rulings first and foremost in conversation with the *fatwā*s issued by his immediate peers in response to very similar legal questions. Rather, an artificial distinction between *fatwā*s addressing Muslims living under Christian rule in Sicily or Spain, on the one hand, and Muslims living under Christian rule in Morocco, on the other, has

resulted in a number of unconvincing conclusions drawn from comparisons between *fatwā*s which address different legal issues in different time periods, but have been placed in exclusive conversation simply because they relate to Muslims living in what is now Europe. Combined with a relentlessly negative view of al-Wansharīsī's rulings and the relatively small number of *fatwā*s related to European Muslims discovered thus far, this tendency has produced such curiosities as the extraction of al-Māzarī's *fatwā* from *Asnā al-matājir* in the service of a comparison between the two which leaves the latter stricter than the sum of its parts.

In what follows, I suggest a new approach to evaluating the authoritative status of *Asnā al-matājir*, based on an assessment of later jurists' references to the text. As a additional lens through which to understand the legacy of this text, the fate of *Asnā al-matājir* will be contrasted in particular with that of al-Wahrānī's 1504 *fatwā* to the Moriscos, which has often been portrayed as occupying the extreme creative, pragmatic, and sympathetic end of the same continuum on which al-Wansharīsī is placed at the extreme of the blindly imitative, rigorist, and cruel end. I argue that al-Wansharīsī's *fatwā* became the authoritative precedent for later Mālikī jurists on the issue of Muslims' obligation to emigrate to Muslim territory, that al-Wahrānī's opinion appears to have had no appreciable impact on later Mālikī legal thought on the issue, and that we can identify specific reasons for the disparate fates of these two rulings. A brief description of al-Wahrānī's *fatwā* will be followed by an examination of selected later Mālikī *fatwā*s on the obligation to emigrate and a preliminary explanation for the success of al-Wansharīsī's opinion in shaping later legal thought on this issue.

Ibn Abī Jumᶜa al-Wahrānī and his Fatwā

As noted earlier, Aḥmad b. Abī Jumᶜa al-Wahrānī (d. 917/1511), described as the '*Muftī* of Oran' in much previous scholarship, has only recently been identified by Stewart.[1] Although he spent part of his youth in Oran, this jurist, like al-Wansharīsī, completed his education in Tlemcen and began to teach and write in that city before eventually settling in Fez. Al-Wahrānī assumed a post as professor of law in Fez, where he and his son Muḥammad Shaqrūn (d. 929/1522-23) were both considered prominent jurists. Among al-Wahrānī's works are a treatise on elementary education, probably written in Tlemcen, and his 1504 *fatwā* to the Moriscos, most likely written in Fez, where al-Wansharīsī remained active until his death in 914/1508.

Al-Wahrānī's *fatwā* was copied as late as 1609 and survives in four extant manuscripts: one in Arabic, two in *aljamiado*, or Spanish written in modified Arabic script, and one in Castilian.[2] We have only al-Wahrānī's response, and not the question, which the jurist describes as having originated among some Andalusīs. Given the early date of the *fatwā*, these Andalusīs are assumed to have been Granadan Moriscos.[3] The *muftī*'s response, though by no means as elaborate as al-Wansharīsī's, is nonetheless of some length. Al-Wahrānī does not explicitly address the legal issue of the obligation to emigrate from non-Muslim to Muslim territory; rather, he praises his questioners for their steadfast faith, encourages them to persevere, and proceeds to offer practical

[1] See Stewart, "Identity," for a thorough discussion of the available biographical sources and a reconstruction of the jurist's life. Ibn Abī Jumᶜa's birth date is unknown.
[2] For dates and descriptions of these manuscripts, see Stewart, "Identity," 265-68. The Castilian manuscript, referred to as "X" in the literature and previously thought to be a lost third *aljamiado* version, was recently located in Madrid by Maria del Mar Rosa-Rodriguez. See Rosa-Rodgriguez, "Simulation and Dissimulation: Religious Hybridity in a Morisco Fatwa," *Medieval Encounters* 16.1 (forthcoming).
[3] Muslims in Castile were the first Spanish Muslims to be subject to mass conversions to Catholicism, in 1501-1502.

advice as to how they might continue to fulfill their ritual and moral obligations as Muslims without being detected by the Spanish authorities, and despite being forced to perform such acts as praying in church or drinking wine. As long as their intentions are pure and their inward faith remains resolute, writes al-Wahrānī, they will not sin in doing what they must to avoid persecution. Harvey includes a nearly-complete English translation of the *fatwā* in his recent *Muslims in Spain.*[4]

Later Mālikī Fatwās *on the Obligation to Emigrate*

A preliminary search of printed Mālikī *fatwā* collections as well as individual *fatwā*s and treatises extant as individual manuscripts in the libraries of Morocco, Tunisia, Algeria, Egypt, and Spain reveals a considerable number of later *fatwā*s on Muslims living under non-Muslim rule. The secondary literature on the nineteenth and twentieth-century *jihād* movements in West Africa, which often included calls for emigration away from territory controlled by European colonial powers or nominally Muslim rulers, likewise suggests the existence of a considerable number of *fatwā*s on *hijra* which have not yet been placed in conversation with the North African material. The scope of the present study has required that I limit my analysis to *fatwā*s issued in response to French colonialism in Algeria and Mauritania. I have selected these two cases in particular because of the availability of full copies of *fatwā*s and letters written by Mālikī scholars both in support of and against the obligation of particular groups of Algerian and Mauritanian Muslims to emigrate. This focus has the additional benefit of geographical diversity and the opportunity to see development in legal thought over

[4] Harvey, *Muslims in Spain*, 61-63.

time; the Mauritanian *fatwā*s draw not only on al-Wansharīsī and his contemporaries, but also on the Moroccan, Algerian, and Egyptian rulings issued in response to colonialism in Algeria.

An analysis of these *fatwā*s supports the conclusion that al-Wansharīsī's *fatwā*s successfully went on to become the authoritative precedent for later Mālikī rulings on the obligation to emigrate. While many of these later jurists based their rulings on *Asnā al-matājir* as a whole or on a selection of the opinions al-Wansharīsī cites within this *fatwā*, none of them cite al-Wahrānī's *fatwā*. Following a review of the available rulings for both of these cases, I will offer a preliminary assessment of the legacy of *Asnā al-matājir*.[5]

Algeria

Historical Context

When France conquered Algiers in 1830, the ᶜAlawī sultan of Morocco, Mawlāy ᶜAbd al-Raḥmān b. Hishām (r. 1238-1276/1822-1859), began to admit a large number of Algerian refugees into the sultanate, terming them *muhājirūn* who had renounced their own lands in order to perform a *hijra* from *dār al-ḥarb* to *dār al-Islām* and avoid living under infidel rule.[6] As sovereignty over the western province of Oran became unclear, the residents of Tlemcen appealed to ᶜAbd al-Raḥmān to accept their oath of allegiance

[5] Not all of the writings discusses here are technically *fatwā*s, which respond to requests for legal advice. At least one author's claim to be responding to such a request is dubious, and in several cases these letters or treatises respond not to requests but to attacks. I have nonetheless included these texts because of their authors' presentations of legal arguments in support of particular rulings, and their responsiveness to current events. There does not appear to be any indication that the true *fatwā*s here were necessarily recieved differently from the letters and treatises solely on the basis of their format.
[6] Amira Bennison, *Jihad and Its Interpretations in Pre-colonial Morocco: State-Society Relations during the French Conquest of Algeria* (London: RoutledgeCurzon, 2002), 47-48.

and assume leadership in the region.[7] After weighing the risks of confrontation with the French and other concerns against the prospect of bolstering his authority with the successful prosecution of a *jihād*, the Moroccan sultan sent an expedition to Tlemcen in late 1830 to take control of the city. The initiative was ultimately unsuccessful, and ᶜAbd al-Raḥmān withdrew his force in 1831. An attempt to rule the province indirectly by installing an ᶜAlawī governor likewise proved unsuccessful.

In 1832, ᶜAbd al-Raḥmān then entrusted leadership of the *jihād* against French expansion to Muḥyī al-Dīn, leader of the Qādirīya sufi order and of the Mascara region's Qādirī tribes.[8] Muḥyī al-Dīn urged the local tribes to offer their allegiance to his son, ᶜAbd al-Qādir, who established a base of power at Mascara the same year. In 1834, ᶜAbd al-Raḥmān recognized ᶜAbd al-Qādir as his deputy in the region. The same year, the latter signed a treaty in which the French governor of Oran acknowledged the Algerian commander's sovereignty in the interior of the province, south of a French coastal zone.[9]

ᶜAbd al-Qādir's support among regional tribes declined as a result of this treaty, though, and some even began to seek their own political alliances with the French.[10] When the Dawā'ir and Zmāla tribes seceded from ᶜAbd al-Qādir's authority in 1835 in favor of the French, hostilities broke out between the governor of Oran and the Algerian commander. The French gained control of both Mascara and Tlemcen, further weakening ᶜAbd al-Qādir's prestige and tribal support. ᶜAbd al-Raḥmān, alarmed, supplied ᶜAbd al-Qādir with substantial military and financial assistance in 1836. In

[7] Ibid., 48-58.
[8] Ibid., 47-74.
[9] Ibid., 75-85.
[10] Ibid., 83-98.

1837, the French signed the Treaty of Tafna, again recognizing ᶜAbd al-Qādir's authority within specific geographic limits, and withdrew from Tlemcen. Yet ᶜAbd al-Qādir's struggle to maintain sufficient tribal support for his rule continued, and in 1939 the Tījānīya sufi order allied with the French.

Also in 1839, war resumed between French forces and those of ᶜAbd al-Qādir, and France began the systematic conquest of Algeria which would be completed in 1857.[11] ᶜAbd al-Qādir first sought refuge in Morocco in 1843, but a subsequent French attack on Morocco forced ᶜAbd al-Raḥmān to sign a treaty in 1844 agreeing to treat the Algerian resistance leader as an outlaw. In the years that followed, ᶜAbd al-Qādir moved between Algeria and Morocco, until finally forced to surrender to the French in 1847. He was kept in France until 1852, then settled in Damascus, where he died in 1883.

Al-Tusūlī's First Response to ᶜAbd al-Qādir

ᶜAbd al-Qādir, who had benefitted from a thorough legal education, wrote treatises on a number of religious topics and corresponded with foreign scholars during his period of rule in western Algeria.[12] In February 1837, while acting as ᶜAbd al-Raḥmān's deputy and prior to the signing of the Treaty of Tafna, ᶜAbd al-Qādir wrote to the Moroccan sultan requesting responses from the scholars of Fez on a series of legal issues related to the conduct of *jihād* against the French, including the commander's continued efforts to secure the loyalty and military and financial support of the tribes

[11] Rudolph Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History* (The Hague: Mouton Publishers, 1979), 55.
[12] Peters, *Islam and Colonialism*, 55-62.

in western Algeria.[13] ᶜAbd al-Qādir requested legal advice as to the actions he should take against tribes whose members were aiding the enemy, refusing to join the defensive *jihād*, or refusing to contribute financially to the resistance. ᶜAbd al-Raḥmān conveyed this question to the chief judge of Fez, Abū al-Ḥasan ᶜAlī b. ᶜAbd al-Salām al-Tusūlī.[14]

Life of al-Tusūlī

Al-Tusūlī was born in the Moroccan town of Tusūl but spent most of his life in Fez, where he died in 1258/1842.[15] He served as chief judge of Fez from 1247/1831 until 1250/1834-5, when he became chief judge of Tetouan for an unspecified period before returning to Fez. In his *Salwat al-Anfās*, Muḥammad b. Jaᶜfar al-Kattānī describes al-Tusūlī as the leading Mālikī jurist of his time. Al-Tusūlī's biographers note that he had a particularly deep knowledge of Mālikī *fatāwā*. He authored numerous legal works in addition to his responses to the Algerian leader ᶜAbd al-Qādir (discussed below), including: 1) *Al-Bahja fī sharḥ al-Tuḥfa*, a commentary on Ibn ᶜĀsim's *Tuḥfat al-Hukkām*; 2) *Al-Jawāhir al-nafīsa fī-mā yatakarraru min al-ḥawādith al-gharība*, a collection of the *fatāwā* of his teachers and a number of earlier jurists; 3) A *ḥāshiya* (super-commentary) on the

[13] ᶜAlī b. ᶜAbd al-Salām al-Tusūlī (d. 1258/1842), *Ajwibat al-Tusūlī ᶜan masā'il al-amīr ᶜAbd al-Qādir fī al-jihād*, ed. ᶜAbd al-Laṭīf Ṣāliḥ (Beirut: Dār al-Gharb al-Islāmī, 1996), 71-73; Bennison, *Jihad*, 91-93.
[14] The full text of the question posed by ᶜAbd al-Qādir is available in *Ajwibat al-Tusūlī* (102-104), in al-Wazzānī's *al-Miᶜyār al-jadīd* (3:61-63), and in Muḥammad b. ᶜAbd al-Qādir al-Jazā'irī's chronicle *Tuḥfat al-zā'ir* (1:316-317), with the exception in this last source of much of the initial salutation. A full, but often inaccurate, French translation is provided by Michaux-Bellaire in *Archives Marocaines* 11 (1907): 116-118. In *Islam and Colonialism* (56-57), Peters produces a much better translation of the body of the question, excluding the salutation.
[15] Al-Tusūlī, *Ajwibat al-Tusūlī*, 36-38; SN, 1:567-68; SF, 1:266; IM, 549. Al-Tusūlī lacks an entry in the *Encyclopedia of Islam* (2nd ed.), although he is mentioned in connection with his commentary *al-Baḥja fī sharḥ al-Tuḥfa* in two other articles. In these articles and a number of other sources, the jurist's name is spelled al-Tasūlī. I have favored al-Tusūlī because Ṣāliḥ renders his birthplace as 'Tusūl' with a *dumma*, but the biographical sources are unclear on this point. Al-Tusūlī's birth date is unkown.

sharḥ (commentary) of Muḥammad b. Sūda al-Tāwūdī (d. 1209/1794-5) on the *Lāmīyat al-Zaqqāq* of ᶜAli b. al-Qāsim al-Zaqqāq (d. 912/1506-7), a work on judgeship; and 4) A commentary on the *Shāmil* of Bahram b. ᶜAbd Allāh al-Damīrī (d. 805/1403), a work of *fiqh*.

Al-Tusūlī was also praised for his active encouragement of *jihād* after the French invasion of Algeria in 1830. Muḥammad al-Manūnī counts him as one of the earliest figures in a 'modern Moroccan awakening' for his writings and sermons demanding re-organization of the army, and for his call to the people to take up arms in defense of the greater Maghrib.[16] ᶜAbd al-Laṭīf Ṣāliḥ, editor of al-Tusūlī's responses to ᶜAbd al-Qādir (d. 1883), places the jurist's writings and sermons at the forefront of a contemporary movement of jihādist literature focusing on these two primary themes: the encouragement of war in general, or to save Algeria in particular; and the need for a better-organized and funded army.[17]

Al-Tusūlī's Ruling on Emigration

The chief judge wrote a lengthy, five-part treatise not only responding to ᶜAbd al-Qādir's queries, but also addressing several related subjects, including the obligation to emigrate from territory conquered by the enemy to Muslim territory.[18] The full treatise, dated Rabīᶜ al-Awwal 1253/June 1837 and titled simply *Ajwibat al-Tusūlī ᶜan masā'il al-amīr ᶜAbd al-Qādir fī al-jihād* ("Al-Tusūlī's Answers to the Amīr ᶜAbd al-Qādir's Questions on *Jihād*"), is extant in a number of manuscripts, was printed in a lithograph

[16] Muḥammad al-Manūnī, *Maẓāhir yaqẓat al-Maghrib al-ḥadīth*, 2nd ed. (Beirut: Dār al-Gharb al-Islāmī, 1985), 27-30.
[17] Al-Tusūlī, *Ajwibat al-Tusūlī*, 61-70.
[18] Al-Tusūlī, *Ajwibat al-Tusūlī*, 105-330. See also Bennison, *Jihad*, 91-93.

edition, and published in 1996. Al-Tusūlī also produced a condensed version of his answer, which appears in al-Wazzānī's *fatwā* compilation al-*Miᶜyār al-jadīd*.[19] It appears that both versions of the treatise were actively circulated as part of al-Tusūlī's efforts to encourage the *jihād* against France. Ṣāliḥ notes that the work maintains a practical focus throughout, with al-Tusūlī concluding each section with exhortations extolling the virtues of *jihād* and the importance of the resistance.

Although ᶜAbd al-Qādir's question does not specifically address emigration, al-Tusūlī devotes one section of his *fatwā* to confirming this obligation for capable Muslims.[20] The majority of this section consists of either material taken from *Asnā al-matājir*, which al-Tusūlī notes as such, or al-Tusūlī's own comments adapting al-Wansharīsī's *fatwā* to the current situation in Algeria. Many of these added comments have the effect of making the ruling stricter. For example, whereas al-Wansharīsī had not taken a definitive stance on the inviolability of non-emigrant Muslims' lives and property, but had rather offered a series of predominant opinions based on context, al-Tusūlī remarks that all who live in infidel territory clearly contribute financially to the enemy, and thus their property is licit.[21] After noting Ibn Rushd's opposition to entering *dār al-ḥarb* for trade, al-Tusūlī also mentions al-Māzarī's prohibition of the

[19] Abū ᶜIsā Muḥammad al-Mahdī al-Wazzānī, *al-Nawāzil al-jadīda al-kubrā fī-mā li-ahl Fās wa-ghayrihim min al-badw wa'l-qurā, al-musammā bi-: Al-Miᶜyār al-jadīd al-jāmiᶜal-muᶜrib ᶜan fatāwī al-muta'akhkhirīn min ᶜulamā' al-Maghrib*, ed. ᶜUmar b. ᶜAbbād ([Rabat]: Wizārat al-Awqāf wa'l-Shu'ūn al-Islāmīya, 1996-2000), 3:61-63.
[20] Al-Tusūlī, *Ajwibat al-Tusūlī*, 301-10. See also Bennison, *Jihad*, 91-93; Peters, *Islam and Colonialism*, 56-57; al-Jazā'irī, *Tuḥfat al-zā'ir*, 1:326-28. Although al-Wazzānī notes that Fāsī chief judge ᶜAbd al-Hādī also answered this question and that his answer is recorded in *al-Nawāzil al-ṣughrā*, in the text included in al-Wazzānī's smaller collection of *fatwā*s, ᶜAbd al-Hādī is actually responding to a different question posed by the Algerian leader three years later. Al-Wazzānī, *al-Miᶜyār al-jadīd*, 3:63; *al-Nawāzil al-ṣughrā*, 1:414-17 (see below).
[21] Al-Tusūlī, *Ajwibat al-Tusūlī*, 310.

same, and suggests that the implication of these rulings may be that it is impermissible to even cross infidel territory en route to the pilgrimage.[22]

Ibn Ruwayla's Letter to Ibn al-Kabābṭī

ᶜAbd al-Qādir's chief secretary Qaddūr b. Muḥammad b. Ruwayla (d. 1272/1855)[23] wrote a letter in response to accusations leveled at him by Muṣṭafā b. al-Kabābṭī (d. 1277/1860-61),[24] who held an appointment as the official Mālikī *muftī* of Algiers[25] from 1831 to 1843.[26] The letter is undated, although one scholar has suggested that it may have been written in 1834.[27] After a short introduction criticizing Ibn al-Kabābṭī and his peers for their loyalty to the French, Ibn Ruwayla refers his reader to al-

[22] Ibid., 305.
[23] Qaddūr b. Muḥammad b. Ruwayla (d. 1272/1855). Ruwayla was born and educated in Algiers, but left the city when the French captured the capital. He became ᶜAbd al-Qādir's secretary and advisor until he (Ruwayla) was taken prisoner by the French. After his release, he emigrated east. He performed the pilgrimage, rejoined ᶜAbd al-Qādir, and died the day they arrived in Beirut on the way to Damascus. For his biography, see al-Jazā'irī, *Tuḥfat*, 2:594; ᶜĀdil Nuwayhiḍ, *Muᶜjam aᶜlām al-Jazā'ir min ṣadr al-Islām hattā muntaṣaf al-qarn al-ᶜishrīn* (Beirut: Manshūrāt al-Maktab al-Tijārī li'l-Ṭibāᶜa wa'l-Nashr wa'l-Tawzīᶜ, 1971), 131-32; Abū al-Qāsim Saᶜd Allāh, *Abḥāth wa-ārā' fī tārīkh al-Jazā'ir*, 4th ed. (Beirut: Dār al-Gharb al-Islāmī, 2005), 2:20; Muṣṭafā Ibn Tuhāmī, *Sīrat al-Amīr ᶜAbd al-Qādir*, ed. Yaḥyā Buᶜazīz (Beirut: Dār al-Gharb al-Islāmī, 1995), 153.
[24] Muṣṭafā b. Muḥammad, known as Ibn al-Kabābṭī (d. 1277/1860-61) was born in Algiers, completed his legal education in 1227/1812, and taught law until his appointment as Māikī judge of Algiers in 1243/1827-28. He remained in his position during the first year of French occupation in 1830, after which he rose the position of chief Mālikī *muftī*. He held this position from 1247/1831 until 1259/1843, at which point he was involved in a dispute with the French authorities and was exiled. He settled in Alexandria until his death. For his biography and dispute with the French, see Saᶜd Allāh, *Abḥāth*, 2:11-48, esp. 14-33.
[25] Under Ottoman and then French rule, *muftī*s and judges were appointed from both the Mālikī and Ḥanafī schools. For a list of Mālikī *muftī*s of Algiers, see Nūr al-Dīn ᶜAbd al-Qādir, *Ṣafaḥāt min tārīkh madīnat al-Jazā'ir min aqdam ᶜuṣūrihā ilā intihā' al-ᶜahd al-Turkī* ([Algiers]: n.p., 1965), 183-85; Muḥammad al-Ḥafnāwī, *Taᶜrīf al-khalaf bi-rijāl al-salaf*, ed. Muḥammad Abū al-Ajfān and ᶜUthmān Baṭṭīkh (Beirut: Mu'assasat al-Risāla, 1982), 480-81.
[26] This letter is extant in two manuscript copies preserved in the Algerian National Library: Ms. 1304 (bound manuscript consisting of eight folios, Maghribī script, undated) and ms. 2083 (bound manuscript consisting of six folios, Maghribī script, undated). Ms. 2083 appears to be a copy of ms. 1304. Ibn ᶜAbd al-Karīm mentions this letter in his *Ḥukm al-hijra min khilāl thalāth rasā'il Jazā'irīya* (12) but explains that he did not edit it because most of the letter is a repetition of *Asnā al-matājir* (even though it is actually the Marbella *fatwā*).
[27] Saᶜd Allāh, *Abḥāth*, 2:20.

Wansharīsī's *Asnā al-matājir* and reproduces the entire text of the Marbella *fatwā*, which he apparently considered to be a part the longer *fatwā.*

Ibn al-Ḥaffāf's Commentary on Ibn Ruwayla's Letter

ᶜAlī b. al-Ḥaffāf (d. 1307/1890)[28] authored a commentary in the margins of Ibn Ruwayla's letter. Ibn al-Ḥaffāf explains and supports Ibn Ruwayla's introduction and relates aspects of the Marbella *fatwā* to the position of Ibn al-Kabābṭī and his peers, whom he mentions by name at various points, forcefully accusing them of each violation detailed in that *fatwā.* His comments are clearly intended for the accused, and he most likely also wrote the following note which appears on the first page of both manuscript copies: "this is what Qaddūr b. Ruwayla wrote to the non-emigrant Muslim jurists (*fuqahā' al-Muslimīn al-dhimmīyīn*) of Algiers. Read it and understand it! If you find any refutation, then respond. If not, repent, return to God Most High, and emerge from subjection! Peace [be upon you]."[29] In one of his notes, Ibn al-Ḥaffāf includes part of *Asnā al-matājir*'s section on the inviolability of Muslims' property, and cites *al-Miᶜyār* as his source. Perhaps even more than Ibn Ruwayla's simple reproduction of the Marbella *fatwā*, Ibn al-Ḥaffāf's systematic explanation of how the jurists of his time were committing each of the violations described by al-Wansharīsī demonstrates a complete confidence in, and thorough dependence on, this text as an authoritative statement of doctrine.

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[28] ᶜAlī b. ᶜAbd al-Raḥmān b. Muḥammad al-Ḥaffāf, known as Ibn al-Ḥaffāf (d. 1307/1890). For his biography, see Nuwayhiḍ, *Muᶜjam*, 115; al-Ḥafnāwī, *Taᶜrīf al-khalaf*, 269-70.

[29] Algerian National Library, mss. 1304 and 2083. Ibn al-Ḥaffāf repeatedly addresses the *muftī*s of Algiers as *dhimmī*s in his commentary.

At some later point, Ibn al-Ḥaffāf reversed his position and served first as Mālikī *muftī* of Blida (al-Bulayda)[30] and then of Algiers, from 1290/1873-74 until his death.[31] As Ibn ᶜAbd al-Karīm suggests, Ibn al-Ḥaffāf appears to have been swayed by a discussion with Tunisian jurist Muḥammad Bayram (d. 1889). Bayram's argument, that the Muslims of Algiers had few learned individuals such as himself who could teach them their religion, was very similar to that of the man from Marbella.[32] Although this is ironic, it may also be that the Marbella *fatwā* itself gave greater circulation to this type of reasoning. Bayram also conveyed to Ibn al-Ḥaffāf another jurist's sentiment that the world in the modern era had become one *dār*, and that in leaving it, one could only go toward it.[33]

Ibn al-Shāhid's Letter from Algiers

Abū ᶜAbd Allāh Muḥammad b. al-Shāhid al-Jazā'irī (d. *ca.* 1255/1839),[34] who held an appointment as Mālikī *muftī* of Algiers for much of the period between 1192/1778 and 1207/1792,[35] composed an undated letter justifying his decision not to emigrate after the French conquest.[36] Without naming his interlocutor, Ibn al-Shāhid indicates that he is responding directly to the author of a hate–filled letter in which he and his peers are slandered and accused of apostasy for remaining in Algiers under French rule.

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[30] A town south of Algiers which the French occupied in 1839.
[31] A note by an anonymous third author on the title page of the manuscripts mocks Ibn al-Ḥaffāf for taking up an official appointment under the French after writing such a severe commentary attacking the city's jurists.
[32] Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 13-14; al-Ḥafnāwī, *Taᶜrīf al-khalaf*, 269.
[33] Al-Ḥafnāwī, *Taᶜrīf al-khalaf*, 269.
[34] For his biography, see: Saᶜd Allāh, *Tārīkh al-Jazā'ir al-thaqāfī min al-qarn al-ᶜāshir ilā al-rābiᶜ ᶜāshar al-Hijrī (16-20 m.),* 2nd ed. (Algiers: Al-Mu'assasat al-Waṭanīya li'l-Kutub, 1985), 2:284-85.
[35] For Ibn al-Shāhid's terms as *muftī*, see ᶜAbd al-Qādir, *Ṣafaḥāt*, 184, 208-209; al-Ḥafnāwī, *Taᶜrīf al-khalaf*, 481.
[36] This is one of the three treatises Ibn ᶜAbd al-Karīm edits in *Ḥukm al-hijra* (105-124), based on a unique manuscript in the Algerian National Library, ms. 1305 (seven folios, copied 1282/1865).

The letter to which he is responding has not been identified, but much of the content may be gathered from Ibn al-Shāhid's frequent citations of his opponent's statements. Ibn al-Shāhid addresses his opponent as a fellow jurist who lives outside of the conquered territories, and that jurist does not appear to have emigrated from Algiers. Ibn al-Shāhid appears to have employed many of the same proof-texts and arguments that appear in *Asnā al-matājir* and the Marbella *fatwā*, but may not have reproduced these *fatwā*s verbatim as did Ibn Ruwayla, because Ibn al-Shāhid at no point mentions al-Wansharīsī or his compilation.

Ibn al-Shāhid begins by stating that his opponent has accused him of apostasy without any relevant evidence. He writes that the evidence produced "demonstrates the obligation to emigrate in the absolute. It concerns only those capable of emigrating, but who fail to do so. As for those who are incapable – like us – you establish no evidence against them with this."[37] While his opponent had cited Qur'ān 4:97-99 ("Those whom the angels take in death . . ."), Ibn al-Shāhid counters that this verse confirms his own position, which is that emigration is only obligatory for those who cannot practice their religion and are capable of emigrating. In support of this position, he cites the opinions a number of exegetes, primarily adherents of the Shafīᶜī and Ḥanafī schools, who held that emigration is only obligatory if Muslims cannot practice their religion. Ibn al-Shāhid likewise argues that the recorded opinion (presumably that of Ibn Rushd) that travel to *dār al-ḥarb* for trade is reprehensible supports his own position that residence among infidels is at most a sinful act of

[37] Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 107-108.

disobedience. If remaining under infidel rule is merely reprehensible rather than prohibited, then it certainly cannot constitute apostasy.

If his opponent would accuse the scholars of Algiers of being inclined toward the infidel based on their recurring interactions and occasional flattery of them, Ibn al-Shāhid challenges him to think instead in terms of compulsion: "For they are compelled in this, and God has made compulsion a reason to forgive those who utter words of unbelief, as long as their hearts remain secure in faith."[38] He then cites two Qur'ānic verses: 16:106, which warns of a severe punishment for those who open their hearts to unbelief after having believed, except for those who are compelled and whose hearts remain secure in faith; and 3:28, which instructs Muslims not to ally with unbelievers instead of believers, unless they fear the unbelievers greatly. These two verses are the primary Qur'ānic proof-texts for the doctrine of *taqīya*, or precautionary dissimulation in the face of danger. While al-Wahrānī also alludes to 16:106 (but not 3:28) in a section of his *fatwā* detailing the strategies Moriscos should adopt if forced to utter blasphemous statements, the connection between these two passages is not strong enough to suggest that Ibn al-Shāhid has al-Wahrānī's text in mind here. Ibn al-Shāhid's use of Qur'ān 16:106 makes sense in the context of his sustained treatment of apostasy, and 3:28 is present even in *Asnā al-matājir*.

Ibn al-Shāhid then chastises his opponent for assuming that Muslims in Algiers are incapable of fulfilling their religious obligations. His opponent had apparently taken the destruction of numerous mosques to be indicative of Muslims' inability to pray, and had claimed that their remaining in Algiers despite this inability

[38] Ibid., 113.

demonstrated their contentment with this state of affairs and with unbelief. Ibn al-Shāhid responds that mosques are not an integral part of prayer, and proposes a series of questions that his opponent ought to have asked prior to coming to any conclusions about Muslim life under French rule. These questions include the status of prayers in the remaining mosques, whether or not these Muslims feel their religion is threatened, and whether or not the French have imposed regulations for marriage, slaughter, and inheritance. The answers would indicate that the capital's Muslims are still practicing their religion.

In addition to maintaining their religious obligations, Ibn al-Shāhid indicates that the Muslims of Algiers are largely incapable of emigration. While his opponent had claimed that moving would be easy for them, this is not the case; most of the wealthy have indeed left, and those who remain are either too poor or have other reasons for staying. These include the insecurity of the routes and lack of safe places to which to emigrate; the need to resolve debts or sell off property before leaving; or the need to wait for an opportune time to relocate oneself and one's family. Ibn al-Shāhid notes that the Companions did not all emigrate together in one day, but did so as and when they were able. As for jurists, many of them remain in order to guide the commoners who might otherwise fall into unbelief; Ibn al-Shāhid notes that the scholars of al-Azhar had done the same when this same infidel (France) occupied Egypt.

Finally, Ibn al-Shāhid accuses his opponent of committing *qadhf*, the false accusation of prohibited sexual relations, for presuming that non-emigrant Muslims' women and children are "with the infidels." Ibn al-Shāhid warns that leveling such charges without any evidence is unbecoming of learned jurists such as his opponent,

and cites a number of verses describing the evidentiary requirements for proving *zinā* on the one hand, and prescribing a punishment for *qadhf* on the other. As further confirmation that he remains a Muslim and not an apostate, Ibn al-Shāhid concludes with a number of creedal statements, beginning with "I witness that there is no God but God, and Muhammad is the messenger of God."

At the end of the letter, the copyist states that Ibn al-Shāhid died in 1253/1836-37,[39] and that one of his students had received this other jurists' letter and brought it to him while he was serving as a judge; because Ibn al-Shāhid was blind, he dictated this response to the student.

Like those of al-Tusūlī, Ibn Ruwayla, and Ibn al-Ḥaffāf, Ibn al-Shāhid's text demonstrates the extent to which al-Wansharīsī's *fatwā*s dominated the discourse on emigration in colonial Algeria. Throughout the letter, Ibn al-Shāhid is forced to respond to accusations and arguments which appear to be based largely on *Asnā al-matājir* and the Marbella *fatwā*. Yet this opponent's letter or *fatwā* was clearly not based solely on these texts; Ibn al-Shāhid is responding first and foremost to the charge that he and his fellow jurists in Algiers have committed apostasy by virtue of their continued residence under French rule. His opponent's position was therefore far more extreme than that of al-Wansharīsī. This shift may in part be explained by an observation made by John Voll in his study of Muḥammad Aḥmad al-Mahdī's writings on emigration in late-nineteenth-century Sudan.[40] Voll notes that the Mahdī used the concept of *hijra* in a number of ways; when attempting to convince Muslims who were content where they were, rather than fearful or oppressed, he threatened them with

[39] This disagrees with the date given in Sa^{c}d Allāh's *Tārīkh al-Jazā'ir*; see above.
[40] John Voll, "The Mahdī's Concept and Use of "Hijrah." *Islamic Studies* 26.1 (1987): 39.

damnation rather than spoke to them of fleeing persecution. Similarly, the relative lack of religious oppression in colonial Algiers in comparison to late fifteenth-century Iberia may well have influenced a rise in inflammatory rhetoric and accusations of apostasy leveled at those content not to emigrate.

ᶜUlaysh's Response to ᶜAbd al-Qādir

Egyptian jurist Abū ᶜAbd Allāh Muḥammad b. Aḥmad ᶜUlaysh (d. 1299/1882),[41] like al-Tusūlī, issued a *fatwā* in response to a question posed by ᶜAbd al-Qādir. ᶜUlaysh was born in Cairo to a Maghribī family, was educated at al-Azhar, authored a large number of works, and held an appointment as the country's head Mālikī *muftī* from 1854 until his 1882 imprisonment for supporting the Urabi movement; he died in prison.[42] Although Rudolph Peters suggests that ᶜAbd al-Qādir wrote to Egyptian scholars in the same year in which he wrote to al-Tusūlī (1837), neither the question nor the answer is dated.[43] The question is also distinct from that posed to al-Tusūlī, and although there is ample reason to assume that it was authored by ᶜAbd al-Qādir, the text as extant does not bear his name.[44] In the question, ᶜAbd al-Qādir states that after a

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[41] SN, 1:551-52; ZK, 6:19-20; Muḥammad ᶜUlaysh, *Fatḥ al-ᶜAlī al-mālik fī al-fatwā ᶜalā madhhab al-Imām Mālik* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1958), 1:2-4; Khalid Blankinship, "Ilaysh, Muhammad," *Encyclopedia of the Modern Middle East and North Africa*, 2nd ed. (Detroit: Macmillan, 2004), 1086. A number of sources also spell the jurist's name "ᶜIlaysh," a spelling that the editor of *Fatḥ al-ᶜAlī* believes is supported by ᶜUlaysh's own writings.

[42] In addition to his *fatwā* compilation, ᶜUlaysh's published works include his commentary the *Mukhtaṣar Khalīl*: ᶜUlaysh, *Minaḥ al-Jalīl: Sharḥ ᶜalā Mukhtaṣar al-ᶜalāma Khalīl*, 9 vols. in 5 (Dār al-Kutub al-ᶜIlmīya, 2003).

[43] Peters, *Islam and Colonialism*, 57. Peters assumption may be based on ᶜAbd al-Qādir's son's comment, directly after summarizing al-Tusūlī's above answer, that he had not seen the Egyptian answer. Al-Jazā'irī, *Tuḥfat*, 1:329.

[44] For the question, see ᶜUlaysh, *Fatḥ al-ᶜAlī*, 1:375. Al-Wazzānī also includes the question (3:81-82) and part of ᶜUlaysh's response (3:82-90) in *al-Miᶜyār al-jadīd*, but does not identify the questioner and attributes the answer only to 'a later scholar.' Abū Yaᶜlā al-Bayḍāwī's unpublished 2005 edition of *Asnā al-matājir*, which is based in part on ᶜUlaysh's response in *Fatḥ al-ᶜAlī*, does not include the question (see chapter one, pp. 21-22). Both Peters and Muhammad Umar have translated the question into English.

particular region was conquered by the infidel, some of the inhabitants emigrated while others remained. Jurists within each group then issued *fatwā*s supporting their own positions. Those who emigrated have accused those who remained of strengthening the enemy, and they hold these non-emigrants' lives and property to be licit. Those who remained insist they are not obligated to emigrate, as Qur'ān 3:28 allows those who are afraid to maintain otherwise prohibited relations with unbelievers, and because the "no *hijra* after the conquest" tradition indicates that there is no obligation to emigrate.[45]

ᶜUlaysh's response consists only of reproducing the full text of *Asnā al-matājir* and the Marbella *fatwā*, with no substantial comments or modifications.[46] Although Abū Yaᶜlā al-Bayḍāwī notes numerous minor discrepancies between these texts as preserved in the printed edition of the *Miᶜyār* and as recorded by ᶜUlaysh, the most significant difference is simply that the Egyptian jurist places the response portion of *Asnā al-matājir* in front of the question. By using al-Wansharīsī's *fatwā*s to answer ᶜAbd al-Qādir's question without any adaptation to his present context, ᶜUlaysh fails to counter the argument of those Algerian jurists (such as Ibn al-Shāhid) who based their

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Peters, *Islam and Colonialism*, 58; Muhammad Umar, "Islamic Discourses on European Visitors to Sokoto Caliphate in the Nineteenth Century," *Studia Islamica* 95 (2002): 140-41. The assumption of ᶜAbd al-Qādir's authorship is supported by the content of the question, by al-Jazā'irī's indication that ᶜAbd al-Qādir sent a question to the scholars of Egypt around the time of the question to al-Tusūlī, and by the pairing of this first response by ᶜUlaysh with other responses explicitly issued at the request of ᶜAbd al-Qādir. In *Fatḥ al-ᶜAlī*, this response (1:375-87) is followed immediately by ᶜUlaysh's 1846 response (1:389-92) to another question (1:387-89) in which ᶜAbd al-Qādir is named as the *mustaftī*, and in a manuscript preserved in the Tunisian National Library, this first response by ᶜUlaysh is followed by ᶜAbd al-Qādir's own treatise on *hijra*, another response by al-Tusūlī, and a later Egyptian response to ᶜAbd al-Qādir's questions. Tunisian National Library, ms. 2418, folios 1b-17a (entire manuscript).

[45] The *mustaftī* appears to be describing *fatwā*s such as those of Ibn Ruwayla, Ibn al-Ḥaffāf, and Ibn al-Shāhid, who were all Mālikīs. Peters, who apparently had not seen these *fatwā*s, writes that those who wrote against the necessity of emigration must have been Ḥanafīs (*Islam and Colonialism*, 58), as that *madhhab* required emigration only for religious oppression and the Mālikīs were more 'radical' in this regard (182 n. 86).

[46] ᶜUlaysh, *Fatḥ al-ᶜAlī*, 1:375-87.

justification for remaining under infidel rule in part on Qur'ān 3:28. While al-Wansharīsī's response includes a refutation of the "no *hijra*" tradition's applicability to emigration from *dār al-ḥarb* to *dār al-Islām*, as well as ample clarification as to whom Qu'rān 4:97-100 does and does not exempt from this obligation as a result of weakness, Qur'ān 3:28 is cited in *Asnā al-matājir* as a proof-text prohibiting alliances between believers and non-believers without further elaboration.[47] Neither al-Wansharīsī nor Ibn Rabīᶜ, the former's source for this section of *Asnā al-matājir*, appears to have felt the need to counter or qualify the applicability of this verse's dispensation for fear to the populations addressed by their *fatwā*s. When faced with a question that did call for a discussion of this dispensation, ᶜUlaysh declined to engage the specific arguments of *muftī*s in question and instead relied solely on the authority of the *fatwā*s recorded in the *Miᶜyār*.[48] His dependence on al-Wansharīsī is thus even more complete than that of Ibn Ruwayla, who had at least composed a short introductory note in his letter reproducing the Marbella *fatwā*.

Al-Tusūlī's Second Response to ᶜAbd al-Qādir

In 1840, ᶜAbd al-Qādir sent a second *istiftā'* to Fez, this time directed to Fāsī chief judge ᶜAbd al-Hādī al-ᶜAlawī (d. 1271/1854-55)[49] and answered by both al-ᶜAlawī and al-

[47] Appendix A, 348.
[48] ᶜAbd al-Qādir sent a second *istiftā'* to Egyptian *muftī* ᶜUlaysh, most likely in 1846, accusing Mawlāy ᶜAbd al-Raḥmān of assisting the French, signing an illegitimate treaty with them, and betraying those waging *jihād* to preserve Muslim territory. Neither the question nor the response address *hijra,* nor draw on related precedents. Al-Jazā'irī, *Tuḥfat*, 1:471-80; ᶜUlaysh, *Fatḥ al-ᶜAlī*, 1:387-92. See also Peters, *Islam and Colonialism*, 60-61.
[49] Abū Muḥammad ᶜAbd al-Hādī b. ᶜAbd Allāh b. al-Tuhāmī al-Ḥusaynī al-ᶜAlawī (d. 1271/1854-55) was chief judge of Fez for twenty years. SN, 1:572.

Tusūlī.[50] In his chronicle of his father's life, of ᶜAbd al-Qādir's son explains that this question arose after a number of Algerian tribes along the coast had entered under infidel protection.[51] After trying to convince them of their grave sins and to warn them to join their brethren in the interior, ᶜAbd al-Qādir concluded that his only option was to attack them; but prior to taking this step, he decided to consult the scholars regarding the status of these tribes. In the *istiftā'*, ᶜAbd al-Qādir asks if those who have voluntarily submitted to the infidel, allied with them, and are fighting with them against Muslims, are considered apostates. He also asks if the duty to defend Muslim territory extends to residents of adjacent territories and obligates financial contributions to the war effort.

In his response, dated 1 Muḥarram 1256/5 March 1840, ᶜAbd al-Hādī al-ᶜAlawī presents conflicting opinions on the question of apostasy, but confirms that if a particular region is conquered and cannot defend itself, *jihād* becomes the individual responsibility of all those nearby, even women. If they cannot participate by fighting, then they must do so financially. ᶜAbd al-Hādī does not directly address emigration or cite the opinions of al-Wansharīsī or his contemporaries.

Al-Tusūlī's response, extant in a manuscript compilation of several *fatwā*s issued by or in response to ᶜAbd al-Qādir, complements that of ᶜAbd al-Hādī by directly

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[50] For ᶜAbd al-Qādir's full question and al-ᶜAlawī's response, see al-Jazā'irī, *Tuḥfat*, 1:384-89; al-Wazzānī, *al-Nawāzil al-ṣughrā*, 1:414-17; al-Wazzānī, *al-Miᶜyār al-jadīd*, 10:291-97. Peters (*Islam and Colonialism*, 59-60) translates part of the question into English. The full question also concerns the status of a group of Ibādī Kharijites. For the first part of the question and al-Tusūlī's answer, see Tunisian National Library ms. 2418, folios 13b-16a. Only al-ᶜAlawī's response is dated, but al-Tusūlī's was presumably issued the same year. In his *al-Miᶜyār al-jadīd*, al-Wazzānī states that al-Tusūlī answered following ᶜAbd al-Hādī and that there are long and short versions of the former's response. The compiler then places the summary version of al-Tusūlī's longer treatise directly after ᶜAbd al-Hādī's answer (10:297-304). Yet al-Tusūlī's longer treatise, and thus presumably the shorter version, were authored several years earlier (1837 rather than 1840) in response to a different question. Al-Tusūlī's response to the same question asked of ᶜAbd al-Hādī is extant in manuscript and is discussed below.

[51] Al-Jazā'irī, *Tuḥfat*, 1:384.

addressing *hijra* but not responsibility for participating in *jihād*.[52] The Fāsī *muftī* begins by stating that he has already addressed the status of those living under enemy rule in the fourth section of the treatise he had sent previously to ᶜAbd al-Qādir; this is the section of al-Tusūlī's *Ajwiba* summarized above. Although he refers his reader to this earlier work, al-Tusūlī also writes that he will further explain the rulings related to three categories of offenses committed by the non-emigrants described in ᶜAbd al-Qādir's present question: assisting the enemy by informing them of the Muslims' weaknesses, taking up arms for the enemy, and living with them under their rule. As for those committing either of these first two offenses in isolation, al-Tusūlī rules that once defeated, these offenders should be killed without an opportunity to repent.[53]

Al-Tusūlī's response to those who commit only the third offense is worth quoting at length (my emphasis):

> Concerning those who are living with the Christians, the master al-Zayyātī states in his [compilation of] *nawāzil* (*fatwā*s) titled [*al-Jawāhir*] *al-mukhtāra*: "[The ruling adopted in] the *fatwā*s our learned masters have issued concerning them, is that it is necessary to kill them and take their property as *fay'*, meaning as booty, because the land [they are in] is infidel territory and their property is under infidel control, not under their own control. This is because they can take it from them [viz., the infidels can seize the Muslims' property] whenever they wish, given that the territory is theirs and they have the authority over it [viz., over the land and everything in it]. Their women are likewise to be captured and taken from them until they reach Muslim territory. They

[52] Tunisian National Library ms. 2418 consists of the following *fatwā*s, in a single bound volume: 1) ᶜUlaysh's two responses to ᶜAbd al-Qādir, together with the questions, as they appear in *Fatḥ al-cAlī* (folios 1a-10a); 2) ᶜAbd al-Qādir's treatise *Ḥusām al-dīn* (folios 10a-13b); 3) The *fatwā* of al-Tusūlī discussed here, with ᶜAbd al-Qādir's question (folios 13b-16a). Al-Tusūlī is misidentified by the compiler as ᶜAlī al-Rusūl at the beginning of the text and as al-Rusūlī at the end; 4) A *fatwā* issued by Egyptian jurist Muṣṭafā al-Bulāqī in response to al-Tusūlī's *fatwā* (folios 16a-17a); 5) the compiler's statement that he has copied these *fatwā*s on the obligation to emigrate in 1268/1852, and a closing prayer in verse. The entire manuscript is listed in the library's catalogue as *Risāla fī wujūb al-hijra wa'l-jihād* (Treatise on the Obligatory Status of Emigration and *Jihād*) by Muḥammad ᶜUlaysh al-Azharī. I have not seen any reference to this manuscript in the existing literature. This may be the only extant copy of al-Tusūlī's second response to ᶜAbd al-Qādir and of al-Būlāqī's answer, however, Moroccan manuscript libraries and the Tunisian national library abound with copies of texts described only as al-Tusūlī's responses to ᶜAbd al-Qādir; having initially assumed that these would all be al-Tusūlī's long and short *Ajwiba*, I did not consult and identify every manuscript.

[53] Al-Tusūlī distinguishes between those fighting for the enemy, who must be killed, and those fighting against other Muslims as a group of illegitimate rebels (*muḥāribūn*), whose punishment should be determined by the ruler.

> are then judged divorced and should be prevented from [re-marrying] their spouses, then they are to be married off, and it is not permissible to have their wives remain with them." End [of the text], verbatim.
>
> [Al-Wansharīsī] states in the *Miʿyār*, [and this is] the gist of it: *Any Muslim who has continued living with them and has not emigrated to us after the tyrant's seizure of his land, or who flees from us to them*, [legally] possesses neither property nor children, because the infidels have possession [of their property and children], just as the territory is in their possession. [This rule is derived] through an analogy with [the case of] one who was originally an infidel, converted to Islam, and remained with them; for he [legally] possesses neither property nor children, by agreement of Mālik and Abū Ḥanīfa – may God Most High have mercy upon both of them.
>
> Then, [al-Wansharīsī] states: *One who is originally Muslim and remains in their land, or who flees from us to them*, is analogous to one who was originally an infidel and who remained in their territory after his conversion to Islam, until raided [by Muslims from *dār al-Islām*]; [the original Muslim] is assimilated to [the convert] with respect to all [of these] rulings. This is by agreement of the later jurists, because [the original Muslim] is their equivalent in all meaningful respects.
>
> Furthermore, [al-Wansharīsī] states: *If these Muslims who have fled from us to them, or who have continued living with them from the beginning*, fight against us, at that point the opinion that their lives are licit becomes the preponderant [opinion]. If they financially support their fighting us, the opinion that their property is licit becomes preponderant, and the opinion that their children should be captured will have become preponderant. End, in his words, summarized.[54]

This section of al-Tusūlī's response is remarkable for his citation of al-Waryāglī and for his interpretation of the precedent set by *Asnā al-matājir*. Although al-Tusūlī attributes this first paragraph only to al-Zayyātī, this is a passage from al-Waryāglī's *fatwā*, which al-Tusūlī had also included in his own *fatwā* compilation, *al-Jawāhir al-nafīsa*.[55] As argued in the previous chapter, al-Waryāglī's position regarding Muslims who reside in infidel territory and pay a tribute to them, but who do not fight or spy for the enemy, is the most unforgiving ruling issued by any of al-Wansharīsī's contemporaries; this is the only later citation of this *fatwā* I have seen.[56] Al-Tusūlī may have felt that ʿAbd al-Qādir's second request for a *fatwā* regarding those tribes loyal to France merited a more strongly worded response than he had offered in his original treatise.

[54] Tunisian National Library ms. 2418, folio 14a-b.
[55] For al-Waryāglī's *fatwā*, see Appendix C, 397-99; Appendix D, 412-14.
[56] Al-Waryāflī's *fatwā* will later be cited indirectly by a Mauritanian jurist, as seen below, but that jurist is simply citing this *fatwā* issued by al-Tusūlī.

Al-Tusūlī's use of *Asnā al-matājir* is striking for his reformulation of al-Wansharīsī's categories of offenses committed by the Andalusī emigrants. Whereas al-Wansharīsī had spoken of Muslims who failed to emigrate, who returned to their homelands after emigrating, or who desired to return, in al-Tusūlī's paraphrase these Muslims have either failed to emigrate or they "flee from us to them." In this *fatwā*, those who commit reverse emigration are no longer returning to their own homelands after successfully emigrating; rather, they are traitors who are voluntarily defecting from the Muslim camp in order to join the infidels. As al-Tusūlī's *fatwā* progresses, this group moves from second mention to first, becoming the primary category of Muslims who have failed to emigrate. Al-Tusūlī thus adapts the authoritative precedent of *Asnā al-matājir* to support his own ruling, but not by arguing for the applicability of al-Wansharīsī's *fatwā* to the Algerian context; rather, he reformulates his predecessor's categories such that al-Wansharīsī appears to have been writing directly about this new type of case.

The remainder of al-Tusūlī's *fatwā* is primarily concerned with the evidence necessary to declare a Muslim to be an apostate and with legal status of apostates' property, wives, and children. Al-Tusūlī was much more willing than ᶜAbd al-Hādī to declare ᶜAbd al-Qādir's enemies to be apostates. He considered fighting and spying for the enemy to be strong evidence of apostasy, in part because those who commit these offenses "know that if the infidel enemy takes control of the country, Islam will be extinguished there . . . thus they are fighting to elevate the word of the infidels [above that of Islam]."[57] In ᶜAbd al-Qādir's own treatise on these issues, discussed below, the

[57] Tunisian National Library, ms. 2418, folio 14b.

Algerian leader makes a similar statement regarding the inevitability of a French attempt to eradicate Islam from the areas under their control. With respect to the tribes mentioned in ᶜAbd al-Qādir's *istiftā'*, al-Tusūlī writes that if they glorify the infidel's religion, according to the criteria set forth in his *fatwā*, they are indeed apostates. In the event that it cannot be proven that a particular group has glorified unbelief or committed another act necessarily indicative of apostasy, then their status should be determined in accordance with the analogy presented in the *Miᶜyār*; that is, they are equivalent to non-Muslims who have failed to emigrate to *dār al-Islām*, and the status of their property, wives, and children will depend upon any additional offenses they commit beyond subjecting themselves to infidel authority.

Following al-Tusūlī's response in the same manuscript is a *fatwā* issued by Egyptian Mālikī jurist Muṣṭafā al-Būlāqī. After reading ᶜAbd al-Qādir's question and al-Tusūlī's response, al-Būlāqī issued a *fatwā* in which he states more forcefully than does al-Tusūlī that there is no doubt that the actions described by ᶜAbd al-Qādir constitute apostasy. Al-Būlāqī does not address emigration or subjection to non-Muslim rule.

Fatwā *of al-Sharīf al-Tilimsānī*

In al-Wazzānī's *al-Nawāzil al-ṣughrā*,[58] ᶜAbd al-Hādī al-ᶜAlawī's above response to ᶜAbd al-Qādir is followed immediately by a ruling dated one year later, on 30 Dhū al-Ḥijja 1256/22 February 1841, by Muḥammad b. Saᶜd al-Sharīf al-Tilimsānī (d. 1264/1848).[59] Al-Tilimsānī was a judge in Ottoman Tlemcen who moved to Fez, returned briefly to Tlemcen during Mawlāy ᶜAbd al-Raḥmān's attempt incorporation of

[58] Al-Wazzānī, *al-Nawāzil al-ṣughrā*, 417-20. The usual transition from one *fatwā* to the next, the phrase "wa-su'ila," 'and he was asked,' is missing here.
[59] Muḥammad b. Saᶜd b. al-Ḥājj al-Ḥasanī al-Baydarī al-Tilimsānī (d. 1247/1848). SF, 3:97-98; MA, 7:2581.

the city into the Moroccan sultanate, and then fled back to Fez when the French captured Tlemcen in 1835. Al-Tilimsānī, who had left behind all his books and money, found Fez too expensive and settled in Taza, where he was *imām* and *khaṭīb* of the city's Great Mosque until relocating to Fez for the last time in 1262/1846. He would have been in Taza when he issued this *fatwā*, which Aḥmad al-Badawī al-Sarāyrī (d. 1295/1878),[60] a jurist from Rabat, states that he copied from al-Tilimsānī's handwriting.

The *mustaftī*'s salutation indicates that the *amīr al-mu'minīn*, or 'Commander of the Faithful,' has ordered a ruling regarding the property of some groups of Bedouins from the Banū ᶜĀmir[61] who have sought protection from the French, unnecessarily entering under their control in order to reach a place of safety. As both the Moroccan sultan and ᶜAbd al-Qādir used this title, the identity of the *mustaftī* is ambiguous.[62] In response, al-Tilimsānī states that one should rely on the abundant *fatwā*s on similar issues written by Maghribī scholars in the ninth/fifteenth century and later, because these jurists are the exemplars for his own age. Al-Tilimsānī then reproduces the *fatwā*s of al-Mawāsī, Ibn Zikrī, and Ibn Barṭāl, before noting that these and other

[60] Aḥmad b. Muḥammad al-Badawī al-Sarāyrī or al-Surāyrī al-Ribāṭī (d. 1295/1878). In the *fatwā*, this jurist's name is recorded as Aḥmad b. Muḥammad, but the biographical entry reads Aḥmad b. Aḥmad. MA, 7:2659, ᶜAbd al-Salām b. ᶜAbd al-Qādir b. Sūda, *Itḥāf al-muṭāliᶜ bi-wafayāt aᶜlām al-qarn al-thālith ᶜashar wa'l-rābiᶜ*, ed. Muḥammad Ḥajjī (Beirut: Dār al-Gharb al-Islāmī, 1997), 1:263.

[61] The Banū ᶜĀmir were one of the tribes most loyal to ᶜAbd al-Qādir throughout his campaign against the French; see below.

[62] If this *fatwā* was indeed issued in 1256/1841, these sections of the Banū ᶜĀmir may have been in Algeria and ᶜAbd al-Qādir may be the more likely *mustaftī*. If the date has been substantially corrupted, the Banū ᶜĀmir may have been in Morocco and sultan Mawlāy ᶜAbd al-Raḥmān might be the more likely *mustaftī*; Bennison writes that sections of this tribe which had supported ᶜAbd al-Qādir since 1832 abandoned his camp in 1262/1846, travelling to Taza before settling between Fez and Rabat (Bennison, *Jihad*, 140). The tribe unsuccessfully petitioned the French for repatriation to Algeria in early 1847. Thinking ᶜAbd al-Qādir had negotiated their return, they attempted to meet him near Taza, but the sultan's son Sīdī Muḥammad suspected treachery. The affair ended in a bloody battle in 1263/1847 in which many from the tribe were killed and others travelled through the mountains to seek French protection (Bennison, *Jihad*, 144, 149-151). A favorable response to this question would legitimize raids on the Banū ᶜĀmir or the seizure of property they had left behind.

opinions are recorded in the *Miʿyār* and should be consulted there.[63] The author appears to have mistaken al-Zayyātī's *al-Jawāhir al-mukhtāra*, the actual source of these opinions, for al-Wansharīsī's *al-Miʿyār*, which he must have viewed as the primary compendium of authoritative Mālikī opinions.

ʿAbd al-Qādir's Treatise

Purportedly in response to an anonymous *mustaftī*'s question regarding those who rely on the infidels and have submitted to their rule, ʿAbd al-Qādir authored his own legal treatise on the subject in Dhū al-Ḥijja 1258/January 1843.[64] The treatise is of substantial length and detail despite ʿAbd al-Qādir's circumstances at the time of writing; he notes that he is fighting on the frontier and has no books or resources at his disposal.[65] In at least two manuscript copies of the text, the treatise is titled *Ḥusām al-dīn li-qaṭʿ shabah al-murtaddīn*, or "The Sword of the Religion, for Severing Resemblance to the Apostates."[66]

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[63] This is the context in which al-Wāzzānī includes these three rulings, discussed earlier, in his compilation.

[64] See al-Jazā'irī, *Tuḥfat*, 1:411-23; Ibn ʿAbd al-Karīm, *Ḥukm al-hijra*, 43-66; Peters, *Islam and Colonialism*, 58-59. Peters translates a portion of the answer. Ibn ʿAbd al-Karīm's edition is based on two manuscripts in the Moroccan National Library, without reference to the text as reproduced by ʿAbd al-Qādir's son in *Tuḥfat al-zā'ir*, which contains additional material. For the purposes of this study, no attempt will be made to determine a most 'authentic' version of this text; any circulating version of the treatise will be reflective of the range of authoritative precedents and arguments concerning emigration current in this time period. For the sake of convenience, all ideas in the different versions of this treatise will be attributed here to ʿAbd al-Qādir, though it is likely that copyists edited the text.

[65] Al-Jazā'irī, *Tuḥfat*, 1:422; Ibn ʿAbd al-Karīm, *Ḥukm al-hijra*, 66.

[66] Ibn ʿAbd al-Karīm notes that one of the two manuscripts he consulted at the Moroccan National Library bears this title, while the other one records a similar title: *Sayf al-dīn al-qāṭiʿ li-shabah al-murtaddīn* (Ibn ʿAbd al-Karīm, *Ḥukm al-hijra*, 45). In a manuscript I consulted at the Tunisian National Library, this treatise was also titled *Ḥusām al-dīn li-qaṭʿ shabah al-murtaddīn* (Tunisian National Library, ms. 2418, folio 10a-b). The text as recorded by al-Jazā'irī is untitled, although elements of the title appear in ʿAbd al-Qādir's closing paragraph (al-Jazā'irī, *Tuḥfat*, 1:411). Those who circulated the treatise may have given it a variety of titles.

ᶜAbd al-Qādir, who argues for the necessity of emigration throughout his treatise, draws on wider range of Qur'ānic verses and *aḥādith* than does al-Wansharīsī. Early in *Ḥusām al-dīn*, ᶜAbd al-Qādir divides those who rely upon infidels and live under their rule into two categories of men: those who do not believe that God will provide for them wherever they go, and those devoted to the pursuit of worldly gain, whether with Muslims or infidels. ᶜAbd al-Qādir states that God has commanded emigration, but instead of citing 4:97-99 ("Those whom the angels take in death . . .") in evidence, he cites Qur'ān 29:56 and 29:60, in which God instructs believers that the earth is spacious enough for them to worship only Him, and that He provides sustenance for animals and men who cannot bear their provisions with them.[67] Drawing on the work of unidentified exegetes, ᶜAbd al-Qādir explains that this second verse was directed toward men who had not emigrated because they feared hunger and poverty.

ᶜAbd al-Qādir then casts Algerians' decision to live under French rule or to emigrate as a divine test of faith. He first cites verse 5:41, in which God instructs Muḥammad not to worry about those who rush into unbelief, for God has intended to try them, and they will suffer a severe punishment in the hereafter.[68] Qur'ān 7:155 and 16:37 indicate that God will guide some and lead others astray, while 29:2-3, 9:16, 47:31, and 3:142 all reinforce the theme that God will test mankind in order to separate true believers from false ones and to reveal those willing to fight and persevere in the way of God, relying only on God, Muḥammad, and fellow believers. With these and other proof-texts, ᶜAbd al-Qādir not only links the concepts of *hijra* and *jihād*, but also

[67] Al-Jazā'irī, *Tuḥfat*, 1:411. This section is missing from the manuscripts Ibn ᶜAbd al-Karīm edited.
[68] Ibid., 1:412.

acknowledges that conditions under French rule would appear favorable to Muslims residing there, and thus Algerians would be tempted strongly not to emigrate.

ᶜAbd al-Qādir then describes two types of men living under infidel rule whose sins are particularly offensive to God and who commit acts indicative of unbelief.[69] Those of the first type know what is right but deliberately reject the truth. The second type consist of those who have read a few chapters of legal works and think they have attained a level of knowledge which entitles them to be called scholars;ᶜAbd al-Qādir clearly has in mind those jurists who justified remaining under French rule. He states that these 'scholars' distort the meaning of God's words, and are like the wrongdoers of Qur'ān 6:21 who invent lies against God. This alone would be indicative of unbelief, but they also permit what God has forbidden and contradict what has been agreed upon by scholarly consensus, acts which also entail unbelief.

ᶜAbd al-Qādir accuses these jurists of considering all of the Qur'ānic verses praising and commanding emigration to be abrogated, not on the basis of any other scriptural proof-texts they adduce as evidence, but on the basis of idle talk and false opinions. They believe this despite the Qur'ān being full of praise for *hijra* and of criticism for those who fail to undertake it, and despite the numerous *ḥadīth* reports which emphasize this obligation. At this point ᶜAbd al-Qādir cites many of the same Qur'ānic verses, *aḥadīth*, and early scholars' opinions as al-Wansharīsī cites in *Asnā al-matājir* in support of the obligation to emigrate and the prohibition on living among or allying with non-believers.[70] In the version of this treatise preserved by ᶜAbd al-Qādir's

[69] Al-Jazā'irī, *Tuḥfat*, 1:412-13; Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 48-50.
[70] These *aḥadīth* are Muḥammad's statements that he is free of any Muslim residing among infidels, that anyone who lives among the infidels is one of them, and that *hijra* will not cease until repentance ceases, and repentance will not cease until the sun rises from the west. The Qur'ānic verses are 4:97, 60:1, and

son, the author also quotes al-Wansharīsī directly as an authority on the obligation to emigrate and on the question of ability as addressed in Qur'an 4:97-99. On the issue of whether or not the fear of losing property is a legitimate reason not to emigrate, ᶜAbd al-Qādir even states that al-Wansharīsī 'stipulates' that this is not a valid excuse.[71] While much of this discussion is missing from two manuscript copies of this treatise preserved in the Moroccan National Library, those manuscripts include an entire paragraph taken from *Asnā al-matājir* which is not present in the version of this treatise recorded in *Tuḥfat al-zā'ir*.[72]

ᶜAbd al-Qādir also adds his own arguments to this discussion of obligation and ability, one of which is especially noteworthy because it is apparently a response to Ibn al-Shāhid's *fatwā* or to a ruling with a similar argument. While Ibn al-Shāhid had pointed to the gradual emigration of Meccan Muslims in order to justify the decision of some Algerian Muslims to delay emigration until their families were ready, ᶜAbd al-Qādir counters that this is not a legitimate concern. Muḥammad emigrated ahead of his relatives, showing that men must emigrate by themselves even if they cannot bring their families with them.[73] Interestingly, ᶜAbd al-Qādir emphasizes that women too must emigrate even without their spouses. In support of this point, he notes that many women emigrated to Abyssinia and to Medina, and he cites Qur'ān 60:10 instructing the

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4:138-39. Al-Jazā'irī, *Tuḥfat*, 1:413-15; Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 50-55 (does not include discussion of 4:97).

[71] Al-Jazā'irī, *Tuḥfat*, 1:414. ᶜAbd al-Qādir also argues that of the five necessities which must be protected – religion, life, intellect, progeny, and property – property is the least priority and its protection may not come at the expense of protecting religion, which must be one's greatest priority.

[72] Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 55. The paragraph states that all of the relevant Qur'ānic verses and the consensus of the scholars support the prohibition of alliance with infidels, and it is prohibited to violate consensus by permitting residence under infidel rule.

[73] Al-Jazā'irī, *Tuḥfat*, 1:414; Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 53.

believers in Medina to accept these latter emigrants, and not to return them to the infidels.[74]

Following his discussion of scriptural proof-texts on the obligation and ability to emigrate, ᶜAbd al-Qādir summarizes the Marbella *fatwā* in a few short sentences. He states that al-Wansharīsī has demonstrated the inability of those living under Christian rule to properly perform any of their obligations, including prayer, fasting, pilgrimage, and *jihād*.[75] While he elaborates on a few of these examples, ᶜAbd al-Qādir directs his readers to consult this text for themselves, as he has long been acquainted with it.[76]

In the *Tuḥfat al-zā'ir* version of this treatise, ᶜAbd al-Qādir then addresses probity, ruling that the testimony of witnesses and the rulings of judges who live under Christian rule are invalid. In support of this ruling, he first cites Ibn ᶜArafa's statement, which also appears in *Asnā al-matājir*, that a judge's documents may not be accepted unless his appointment is valid, and that the documents of Mudejar judges were thus treated with circumspection by the people of al-Andalus.[77] ᶜAbd al-Qādir defines Mudejars for his audience as Muslims who enter under Christian rule, and explains that Algerians call such people hypocrites. He then continues with a misleading summary of al-Māzarī's ruling on Sicilian Muslim judges, stating that al-Māzarī held these judges' probity to be compromised on two accounts, as a result of their residence under infidel rule and their appointment by an infidel ruler. While al-Māzarī had addressed these points as two possible compromising factors and had largely disregarded the second

[74] Al-Jazā'irī, *Tuḥfat*, 1:414-15; Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 54.
[75] Al-Jazā'irī, *Tuḥfat*, 1:415; Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 55.
[76] Al-Jazā'irī, *Tuḥfat*, 1:415; Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 56.
[77] Al-Jazā'irī, *Tuḥfat*, 1:415-16.

concern, ᶜAbd al-Qādir claims that his predecessor had ruled against accepting these judges' rulings.

ᶜAbd al-Qādir then identifies and responds to several arguments used by other jurists to justify continued residence under French rule, including the "no *hijra*" *ḥadīth* and Qur'ān 3:28. These are among the arguments advanced by Ibn al-Shāhid and the two that ᶜUlaysh's *mustaftī*, presumably ᶜAbd al-Qādir, indicated were being used to argue against the need to emigrate. Here, ᶜAbd al-Qādir begins with a forceful condemnation of these ignorant, would-be jurists who issue *fatwā*s without knowledge, who err and mislead others, and who are addressed by Muḥammad's statement that "A time will come for the people when their scholars have a worse stench than a donkey's corpse."[78]

In response to the "no *hijra*" tradition, ᶜAbd al-Qādir continues to use much of the same material as is present in *Asnā al-matājir*. He states that when asked about the status of *hijra* after the conquest of Mecca, Muḥammad explained that the formerly obligatory *hijra* from Mecca to Medina was no longer in effect and had been abrogated, just as had the prohibition on emigrants' returning to their homelands if they became *dār al-Islām*; as for emigration from infidel to Muslim territory, this remains an obligation until the sun rises from the west. ᶜAbd al-Qādir then cites Ibn al-ᶜArabī's divisions of *hijra*, reinforcing this distinction between the historical pre-conquest *hijra* and the obligation to emigrate from infidel territory, which "remains until the day of judgment."[79]

[78] Al-Jazā'irī, *Tuḥfat*,1: 416; Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 56. I have been unable to locate this tradition.
[79] Al-Jazā'irī, *Tuḥfat*, 1:416; Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 56-57.

Whereas ᶜUlaysh had not responded to the use of Qur'ān 3:28[80] as a justification for Algerians' remaining under French rule, ᶜAbd al-Qādir argues that this verse has been abrogated. He writes that al-Bukhārī transmits a report in which Ibn ᶜAbbās (d. 68/687), a Companion of the Prophet, states, "there is no *taqīya* today, because of the expansiveness of the lands of Islam."[81] I have been unable to locate this particular report, which ᶜAbd al-Qādir could have recorded incorrectly in the absence of his reference materials. In his *al-Jāmiᶜ li-aḥkām al-Qur'ān*, the most prominent Mālikī exegetical work, jurist and exegete al-Qurṭubī (d. 671/1273) states:

> Muᶜādh b. Jabal and Mujāhid said: "*Taqīya* [was permitted] at the beginning of Islam, before the Muslims became powerful; as for today, God has strengthened Islam above [the need for] Muslims to fear their enemies." Ibn ᶜAbbās said: "[*Taqīya*] is speaking with the tongue [things normally prohibited], while one's heart remains steadfast in faith."[82]

This may be similar to the passage ᶜAbd al-Qādir had in mind, although instead of Islam's power and strength, the Algerian wished to emphasize the Islamic world's expansive territory. Earlier in the treatise, ᶜAbd al-Qādir also cites an interpretation of Qur'ān 4:97 which holds the angels' rebuke of those oppressing themselves ("Was not God's earth spacious enough . . .") to mean that the only excuse for failing to emigrate is a lack of an appropriate destination.[83] The resistance leader clearly found it of paramount importance that the Algerians under French rule had ample destinations within Islamic territory from which to choose, no doubt including his own camp.

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[80] {Believers should not take as allies unbelievers instead of believers. Whoever does that will have no connection with God in anything, except if you fear them greatly. God warns you of Himself, and unto God is the return.}

[81] Al-Jazā'irī, *Tuḥfat*, 1:416-17; Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 57. ᶜAbd al-Qādir locates this statement in al-Bukhārī's *Kitāb al-tafsīr*, but this does not appear to be correct.

[82] Muḥammad b. Aḥmad al-Anṣārī al-Qurṭubī (d. 671/1273), *Al-Jāmiᶜ li-aḥkām al-Qur'ān*, ed. Muḥammad Ibrahīm al-Ḥafnāwī and Maḥmūd Ḥāmid ᶜUthmān (Cairo: Dār al-Ḥadīth, 2002), 3:429.

[83] Al-Jazā'irī, *Tuḥfat*, 1:414.

ᶜAbd al-Qādir then refutes his opponents' use of 16:106, which is interpreted as allowing a dispensation for those forced to utter words of unbelief as long as their hearts remained steadfast in faith; it is unclear how specifically his opponents had linked this verse to the circumstances of Algerians under French rule.[84] This dispensation, according to ᶜAbd al-Qādir, applies only to those who have been captured by the infidel, such as prisoners of war, and who fear they will be killed; but even under these circumstances, patient endurance is preferable.[85] No true Muslim would remain under infidel rule and commit prohibited acts if he were capable of fleeing.

ᶜAbd al-Qādir responds in a similar fashion to his opponents' argument that Qur'ān 12:55, in which Joseph asks the Egyptian king to appoint him guardian of the land's storehouses, is evidence of the permissibility of a Muslim's appointment by an infidel to a judicial or other office.[86] The Algerian leader counters that Joseph was a slave and had no power to change his circumstances; his example in this case applies only to those in a similar position of captivity.

ᶜAbd al-Qādir's approach to refuting his opponents' next argument is somewhat surprising, because it appears to undermine the analogy, central to earlier *fatwā*s such as *Asnā al-matājir*, between conquered Muslims and non-Muslims who had converted to Islam in *dār al-ḥarb*.[87] The argument ᶜAbd al-Qādir refutes is based on the writings of Shafiᶜī scholars Yaḥyā b. Sharaf al-Nawawī (d. 676/1277) and ᶜAbd al-Karīm al-Rāfiᶜi al-Qazwīnī (d. 624/1227), who held that emigration is recommended rather than obligatory for those protected by their clans or their high ranking; applied to Algerians,

[84] Al-Jazā'irī, *Tuḥfat*, 1:417; Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 57.
[85] For this and other interpretations of 16:106, see al-Qurṭubī, *Al-Jāmiᶜ li-aḥkām al-Qur'ān*, 5:526-35.
[86] Al-Jazā'irī, *Tuḥfat*, 1:417; Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 57.
[87] Al-Jazā'irī, *Tuḥfat*, 1:417-18; Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 58-59.

this would mean that if they felt protected by their sheer numbers of their status, they would not be obligated to emigrate. ᶜAbd al-Qādir explains that this precedent cannot be applied to the Algerian case because these two earlier jurists were referring to infidels who had converted to Islam in *dār al-ḥarb*. These newly converted Muslims did not need to emigrate to protect their religion because they had the protection of their clans or high ranking. As for those Muslims in *dār al-Islām* who are conquered by the infidel, they do not have any clan or rank to protect their religion from corruption. ᶜAbd al-Qādir challenges his readers to think of one people or tribe which has entered under infidel rule and retains the protection of a clan able to prevent their subjection to any law the infidels wish to enforce, or to block their exposure to religious corruption.

At this point ᶜAbd al-Qādir shifts his attention to the protections guaranteed by treaties. He returns to familiar territory by stating that only a feeble-minded idiot would place his trust in the infidels or their treaties, for "we do not accept their testimony [as legally valid] with regard to themselves, let alone with regard to ourselves!"[88] This appears to be a direct quote from *Asnā al-matājir*, although ᶜAbd al-Qādir does not mention al-Wansharīsī here. He then appeals to the historical precedent of al-Andalus:

> It's as though the news of al-Andalus has not reached this idiot! Especially the people of Cordóba, who, when the infidels conquered them, came to an agreement with them as to sixty-some provisions which the [Muslims] stipulated as the terms [of their surrender]. These did not last a year before they violated them, one after another. And in the end the infidel began to approach the Muslim and say to him: "Your father, or your grandfather, or your grandfather's grandfather, was an infidel, so return to unbelief and leave the religion of Islam!"[89]

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[88] Al-Jazā'irī, *Tuḥfat*, 1:418; Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 59. See Appendix B, 391.
[89] Al-Jazā'irī, *Tuḥfat*, 1:418; Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 59. The translation is based on a composite of the two slightly different versions in these two sources.

The idiot whom ᶜAbd al-Qādir berates in this passage must be a jurist who has argued for the continued security of Muslim life and practice under French rule. Yet rather than simply urging such jurists to heed the lessons of the past, ᶜAbd al-Qādir constructs a legal argument requiring them to do so.[90] He writes that if those feeble in intellect and religion protest (as does Ibn al-Shāhid) that the French have not ordered Muslims under their control to convert or abandon their religion, then such an order can be anticipated from them. ᶜAbd al-Qādir argues that numerous legal rules within the Mālikī school are based on the principle that that is expected is akin to reality; for example, the dispensation which allows prayers to be combined on account of rain may be invoked if rain is anticipated. Similarly,

> The infidels will most likely order this, because if they had not commanded this, then all trace of Islam would not have been obliterated from the [Iberian] peninsula, Sicily, and the other places seized by the infidels, such that not one Muslim remains in them. According to the principles [of Mālikī law], is the most likely [scenario] similar [in legal weight] to that which has been realized, or not? The correct opinion is that it is.[91]

For ᶜAbd al-Qādir, it is of no consequence whether or not the French have attempted to curtail Muslims' religious practices or other rights. Nor does he claim that it can be known with certainty that the French will do so; rather, the strong probability that they will begin to restrict these practices in the future constitutes a valid legal argument for the obligation to emigrate in order to avoid these restrictions.

The remainder of the treatise covers a mixture of familiar ground and new arguments, or adaptations of recurring arguments to the circumstances of Algeria. ᶜAbd al-Qādir mocks those Algerians who would claim that they have signed a 'truce' with the French when they are living in subjection to their laws, paying them taxes,

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[90] Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 60-61; this passage is missing from al-Jazā'irī's *Tuḥfat*.
[91] Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 61.

and fighting for them. Any truly valid truce would have to be authorized by the Muslim ruler or his representative. ᶜAbd al-Qādir also returns to the issue of the ability to emigrate, addressing those who claim to be too weak to relocate or who compare themselves to captives. He cites numerous opinions to the effect that any individuals who are truly so constrained may not marry, or if married, may not have sex with their spouses; this is because any child produced is liable to be seized and raised as an infidel.

A substantial passage on the status of the lives, property, and family of those living under non-Muslim rule follows.[92] ᶜAbd al-Qādir begins with the explanation, familiar from *Asnā al-matājir*, that this crisis of non-Muslims conquering Muslim territory had not been present at the beginning of Islam, but only appeared in the fifth/eleventh century. Thus none of the earliest scholars discussed it, and those who were later confronted with the issue compared this case to the case of *man aslama wa-lam yuhajir*, or those who converted to Islam while in *dār al-ḥarb* but did not emigrate. In this passage it becomes clear that ᶜAbd al-Qādir apparently finds the analogy of converts and conquered Muslims to be applicable to considerations of inviolability of person and property, while he had earlier argued that the two are not alike in terms of the reasons for which they must emigrate. ᶜAbd al-Qādir's discussion of inviolability draws heavily on arguments and precedents also cited in *Asnā al-matājir*, such as those of Ibn Rushd and Ibn al-Ḥājj. One notable addition to these opinions is ᶜAbd al-Qādir's reference to al-Maghīlī's (d. *ca.* 909/1503-1504) "*Maṣābīḥ al-falāḥ*," in which this Maghribī jurist, famous for his role in the persecution of Saharan Jews, reportedly held that any believers requesting protection from infidels, or entering under their rule, forfeit the

[92] Al-Jazā'irī, *Tuḥfat*, 1:418-20; Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 62-63.

inviolability of their property and should be killed, even if found reading the Qur'ān.[93] Not only is this statement more inflammatory than much of ᶜAbd al-Qādir's treatise, but it may be one of the only known references to this particular work of al-Maghīlī.[94]

The treatise concludes with arguments for considering those Muslims living under French rule to be apostates, and the legal consequences of this status. ᶜAbd al-Qādir cites a number of named and unnamed prior scholars who held to be apostates anyone who fights for non-Muslims against Muslims, flees from *dār al-Islām* to *dār al-ḥarb*, brings happiness to the infidels, or even wears a European hat.[95] Apparently speaking of the Algerians under French rule, ᶜAbd al-Qādir concludes that those who are supporting the Christians and who have entered under their rule are gladdened by the Christians' victories over the Muslims – and that they are indeed apostates. This declaration is followed by opinions for and against considering women to be apostates and their lives forfeit alongside the men. As with the obligation to emigrate, ᶜAbd al-Qādir appears to favor the position that women are equal to men. In closing, he states that this is a response to those who desired one, notes his location on the frontier without his books, and dates the treatise to the last day of Dhū al-Ḥijja 1258/[January 1843].

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[93] Muḥammad b. ᶜAbd al-Karīm al-Maghīlī (d. *ca.* 909/1503-1504) was born in Tlemcen, studied in Tunis, and settled in the Saharan oasis of Tuwāt, on the trans-Saharan trade route from Tlemcen to Timbuktu. In the 1480's, he was instrumental in the destruction of a synagogue in Tamanṭīṭ, the primary village in the Tuwāt oasis, and the slaughter of much of the town's Jewish population. For his life and works, see John Hunwick, *Sharīᶜa in Songhay: The Replies of al-Maghīlī to the Questions of Askia al-Ḥājj Muḥammad* (London: Oxford University Press, 1985).

[94] Hunwick states that this work, properly titled *Miṣbāḥ al-arwāḥ fī uṣūl al-falāḥ* may be lost and is known only through the comments of Ibrāhīm b. Hilāl al-Sijilmāsī (d. 903/1497-98) in his own work. A 1968 edition which purports to edit the *Miṣbāḥ* is mistitled and is in reality a short treatise by al-Maghīlī on the obligation to avoid infidels. Hunwick, *Songhay*, 36-37. It is also possible ᶜAbd al-Qādir also had a mistitled copy of al-Maghīlī's work or was quoting from al-Sijilmāsī. This passage is only in al-Jazā'irī's version of ᶜAbd al-Qādir's treatise (1:419).

[95] Al-Jazā'irī, *Tuḥfat*, 1:420-22; Ibn ᶜAbd al-Karīm, *Ḥukm al-hijra*, 63-65.

ᶜAbd al-Qādir's *Ḥusām al-dīn* appears to be the most extensive of the Algerian writings on emigration from this period, as we might expect considering the resistance leader's ongoing *jihād* against the French and his concern, which led him to request many of the other rulings examined here, to provide authoritative legal support for his condemnation of tribes which were aiding the French and of jurists who argued against the need to emigrate. While ᶜAbd al-Qādir adapts his treatise to his own circumstances in order to refute the arguments against emigration which were in circulation among Algerian jurists and in order to further strengthen the familiar precedents deployed in earlier *fatwā*s, he also depends heavily on al-Wansharīsī's *Asnā al-matājir* and the Marbella *fatwā*. He employs many of same the proof-texts and arguments as found in these texts, and although he does not always credit al-Wansharīsī as his source, ᶜAbd al-Qādir does single out his predecessors' *fatwā*s as texts that he knows well and which his readers should consult.

ᶜAbd al-Qādir does not appear to engage with al-Wahrānī's *fatwā*, either explicitly or implicitly. He is clearly responding to specific arguments made by jurists such as Ibn al-Shāhid, who relied on a number of scriptural proof-texts, authoritative precedents, and logical reasoning in order to justify remaining in French-controlled parts of Algeria. While some of these Algerian jurists claimed to be incapable of emigration, ᶜAbd al-Qādir clearly finds their reasoning to be disingenuous or hypocritical; thus his comment that the Mudejars of al-Andalus are the past equivalent of the hypocrites of Algeria, and his suggestion that if Algerians were truly captive to their fate, they would cease all sexual relations so as not to risk placing more Muslim children in Christian hands. In contrast, al-Wahrānī directs his *fatwā* toward Muslims

whom he believes to be legitimately incapable of emigrating; he thus produces no arguments against the obligation to emigrate for those capable, nor any questionable justifications for the incapacity of Moriscos to emigrate.

There is thus little in al-Wahrānī's *fatwā* which would require refutation by later scholars such as ᶜAbd al-Qādir. Had the Algerian leader been aware of this text, and found it relevant to his own disputations, there are two points in this treatise where he might have referred to it: in his discussions of *taqīya* and of the fall of al-Andalus. In the first case, ᶜAbd al-Qādir pronounces Qur'ān 3:28 to be abrogated, but al-Wahrānī had not cited this verse; he had alluded to 16:106, which ᶜAbd al-Qādir agrees is a valid proof-text for those Muslims who have been conquered and are completely unable to emigrate. Although ᶜAbd al-Qādir states that 'patience,' meaning suffering and possibly martyrdom, is preferable to taking advantage of this verse's dispensation to utter words of unbelief, as long as al-Wahrānī's audience was truly incapable of emigration, these two jurists would be in agreement as to their legal status. The other primary use ᶜAbd al-Qādir might have had for al-Wahrānī's *fatwā* would be as an additional example of the horrors Muslims may face once the French, inevitably in ᶜAbd al-Qādir's view, begin to force Algerians to perform all of the prohibited actions mentioned by al-Wahrānī, from eating pork to marrying their daughters to infidels.

Gannūn's Treatise on Living in Enemy Territory

Muḥammad b. al-Madanī b. ᶜAlī Gannūn (d. 1302/1885),[96] a Fāsī jurist and reformer, authored an undated treatise titled *al-Taḥdhīr fī al-iqāma bi'arḍ al-ᶜadūw*,

[96] Abū ᶜAbd Allāh Muḥammad b. al-Madanī b. ᶜAlī Gannūn (d. 1302/1885) was an outspoken and prolific Mālikī jurist and reformer from Fez. The hard 'g' of his name is spelled with a *jīm* or a modified or

"Warning against Residence in the Enemy's Territory." An introductory note in one manuscript copy indicates that Gannūn addressed the text to those living in Algeria.[97] Although I am unaware of any sources attesting to the treatise's receipt or circulation in Algeria, at least four manuscripts are extant in Moroccan libraries, one of which was copied in 1299/1882; a revised and expanded version of the text is also published in 1301/1884 in the margin of a lithograph edition of another of Gannūn's works.[98]

Gannūn begins the treatise by citing the *ḥadīth* "Religion is sincere advice,"[99] and explaining to his addressees that warning them against living in enemy territory is among the greatest advice they can receive. He cites the first half of Qur'ān 11:113, {Incline not toward the unjust, or the Fire will seize you} along with an exegete's list of actions constituting this prohibited inclination, including occupying oneself exclusively with the unjust, interacting with them, approving of their actions, and dressing like or resembling them. Gannūn then devotes a paragraph to the consequences of *bidᶜa*, unlawful innovation, before comparing both injustice and innovation to unbelief: "It is well-known and established that there is no greater wrong nor innovation than unbelief, and that anyone who is content with a people's actions is one of them."[100] If even approving of a group's actions implicates an

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unmodified *kāf*, depending on the source. E. Lévi-Provençal, *Les Historiens des Chorfa: Essai sur la Littérature Historique et Biographique au Maroc du XVIᵉ au XXᵉ Siècle* (Paris: Maisonneuve et Larose, 2001), 373-74; ZK, 7:94; SN, 1:610; SF, 2:412-14.

[97] Moroccan National Library ms. 2223D, p. 145.

[98] Manuscripts: Moroccan National Library, ms. 2223D.8, pp. 145-46 (incomplete); Moroccan National Library, ms. 1079D.6, folios 77b-82b (dated copy, titled *al-Naṣīḥa* and given incorrect folio numbers in the library catalogue); Qarawīyīn Library ms. 1994.5, folios 31b-33a; Mu'assasat al-Malik ᶜAbd al-ᶜAzīz Āl Saᶜūd (Casablanca) ms. 249, entire manuscript. Lithograph: Ibn al-Madanī Gannūn, *al-Taslīya wa'l-salwān li-man ibtalā bi'l-idhāya wa'l-buhtān*, Fez, 1301/1884. *Al-Taḥdhīr* is in the margins of pages 122-58, by my count; the text repeats page numbers 1-8. All references here will be to the lithograph edition.

[99] "*Al-dīn al-naṣīḥa.*" This *ḥadīth* is included in a number of collections, including: *Ṣaḥīḥ al-Bukhārī*, *Kitāb al-Īmān*, 57, and *Ṣaḥīḥ Muslim*, *Kitāb al-Īmān*, 55.

[100] Gannūn, *al-Taḥdhīr*, in the margin of *al-Taslīya*, 125.

observer, Gannūn asks his reader to imagine the consequences of living among them, seeking refuge with them, courting their favor, and supporting them.

Gannūn continues to address innovation and injustice alongside unbelief in his next section, in which he quotes primarily from a work he refers to as *al-Ibrīz*, "The Pure Gold."[101] He lists four actions which contribute to a worshiper's separation from God: fearing an oppressor more than God, ingratiating oneself to the oppressor for worldly sustenance, advising and assisting infidels, and failing to advise Muslims, including the failure to prohibit them from wrongdoing. Gannūn also warns that associating with a group engaging in prohibited acts can lead to the adoption of their behaviors.

Gannūn devotes the next section of this treatise to the obligation to emigrate.[102] Here he quotes extensively from the *Miʿyār* and acknowledges al-Wansharīsī's compilation as the source of the opinions he cites. Gannūn reproduces much of *Asnā al-matājir*'s opening sections containing proof-texts from the Qur'ān and Sunna which support the obligation to emigrate and prohibit alliance with unbelievers. The author includes part of Ibn al-ʿArabī's passage emphasizing the migration from lands of oppression to the best available alternative, the same jurist's statement that emigration from *dār al-ḥarb* to *dār al-Islām* will remain an obligation until the Day of Judgment, and Ibn Rushd's prohibition on travel to *dār al-ḥarb* even for trade. Gannūn adds to this

[101] This work is most likely *al-Ibrīz min kalām Sīdī ʿAbd al-ʿAzīz al-Dabbāgh*, by Aḥmad b. al-Mubārak al-Sijilmāsī al-Mālikī, published by Dār Usāma (Beirut, 1998) and Dār al-Kutub al-ʿIlmīya (Beirut, 1998).
[102] Gannūn, *al-Taḥdhīr*, in the margin of *al-Taslīya*, 131-37.

material additional commentary and *aḥadīth* which support emigration and are drawn primarily from a Ḥanafī work of exegesis, *Rūḥ al-bayān fī tafsīr al-Qur'ān*.[103]

Gannūn's treatment of the issue of judges' probity is perhaps the most interesting aspect of his treatise, as it sheds light on a source previously used by al-Wahrānī in his *fatwā* to the Moriscos. He addresses probity in the context of travel to *dār al-ḥarb*. After citing an opinion listing the dangers believers face in non-Muslim territory, including humiliation of their religion, subjection to infidel laws, and possible compulsion or enticement to abandon Islam, Gannūn writes:

> These are all among the [matters] prohibited by divine law, given the ability to avoid them; and [the Muslim] has in Muslims lands an alternative to being exposed to these matters. God Most High said: {Whoever emigrates in the way of God will find many refuges and abundance in the earth}.[104] Al-Fākihānī[105] said: "There is no disagreement [on this point]. Know that this is among the [acts] which invalidates the testimony of an upright person, if he has traveled voluntarily to enemy lands." Then Ibn Nājī said: "While I was the judge of Jerba,[106] it happened that [I received] the testimony of the judge of Pantelleria (Qawṣara),[107] certifying on the basis of his knowledge [the validity of] an official document [proving] a legal right. He requested of me that we validate his handwriting, but I did not facilitate the bearer in this, because they are capable of devising a strategy in order to leave [Qawṣara]. Occasionally someone who is there leaves, but returns to [the island], and thus their legal status becomes that of infidels."[108]

Following this passage, Gannūn states that al-Māzarī prohibited travel to Sicily for trade, even to buy food in times of extreme scarcity. He cites two of his predecessor's justifications for this, the need to avoid being subject to infidel laws, and the assurance

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[103] Ismā'īl Ḥaqqī b. Muṣṭafā al-Barūsawī al-Ḥanafī, *Rūḥ al-bayān fī tafsīr al-Qur'ān*, edited by ᶜAbd al-Laṭīf Ḥasan ᶜAbd al-Raḥmān, 10 vols. (Beirut: Dār al-Kutub al-ᶜIlmīya, 2003).

[104] Qur'ān 4:100.

[105] This may be ᶜUmar b. ᶜAlī al-Fākihānī al-Mālikī, author of an exegetical work (*al-Ghāya al-qaṣwā fī al-kalām ᶜalā āyāt al-taqwā*, Beirut, Mu'assasat al-Rayyān, 1995) and a commentary on forty *aḥādīth* (*al-Manhaj al-mubīn fī sharḥ al-Arba'īn*, Riadh, Dār al-Ṣumayᶜī, 2007).

[106] An island off the southwest coast of Tunisia.

[107] And island in the Mediterranean between Sicily and Tunisia, conquered by Norman Sicily in 618/1221.

[108] *Thumma qāla Ibn Nājī: Jarat, wa-anā qāḍ bi-Jurba, shahādat qāḍi Qawṣara bi-rasmi haqq, yashhadu fīhi min ᶜilmihi. Fa-ṭalaba min-nī an narfaᶜa ᶜalā khattihi, fa-lam umakkin ṣāḥibahu min dhālika li-annahum qādirūn ᶜalā al-taḥayyul lil-khurūj min-hā. Wa-rubbamā yakhruju baᶜḍ man fīhā wa-yaᶜūdu, fa-hum fī ḥukm al-kuffār*. By *fa-lam umakkin ṣāḥibahu min dhālika* Ibn Nājī appears to mean that he did not do the bearer of the document the service of attesting to the Pantellerian judge's handwriting, and therefore did not enable him to fulfill the rights verified by the document. Alternatively, al-Nājī may mean that he did not grant the judge's request to certify his handwriting.

that God will provide sustenance. Where Gannūn might have continued to reproduce the precedents available to him in *Asnā al-matājir* by citing al-Māzarī's *fatwā* on judges' probity, he thus chose to rely instead on Ibn Nājī's much stricter and more straightforward opinion on probity, and to cite an opinion of al-Māzarī's more relevant to and consistent with the treatise's overall emphasis on the obligation to emigrate.

Ibn Nājī is Abū al-Qāsim b. ᶜIsā b. Nājī al-Tanūkhī (d. 839/1435),[109] a Mālikī jurist from Qayrawān who studied with many of the most prominent jurists of his time, first in Qayrawān and then Tunis. He served as a judge, preacher, and teacher in over half a dozen cities before eventually returning to Qayrawān, where he died. Ibn Nājī authored a number of works, including long and short commentaries on an abridgment of the *Mudawwana*, a commentary on Ibn Abī Zayd's *Risāla*, and the completion of an important biographical work begun by another scholar, *Maᶜālim al-īmān fī maᶜrifat ahl al-Qayrawān*.[110]

Ibn Nājī's commentary on the *Risāla*, one of the best-known Mālikī primers, is the only legal work cited by al-Wahrānī and is likely the same work cited here by Gannūn.[111] In his *fatwā*, al-Wahrānī advises the Moriscos to perform their ablutions and prayers only by means of gestures if they are not capable of more than this. He states that this ruling is found in Ibn Nājī's commentary as an explanation of the meaning of

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[109] For his biography, see: Al-Wahhāb, *Kitāb al-ᶜUmr*, 1:777-83; DH, 423; NI, 2:12; SN, 1:352; TD, 266-67; ZK, 5:179. Al-Wahhāb notes that while many biographical sources list the jurist's death date as 837 or 838, he is relying on a source which cites Ibn Nājī's actual death certificate; al-Zirikī also reproduces an image of a document bearing this date.

[110] ᶜAbd al-Raḥmān al-Dabbāgh, Abū al-Qāsim b. Nājī, and Muḥammad al-Kinānī, *Maᶜālim al-īmān fī maᶜrifat ahl al-Qayrawān* and supplement, edited by ᶜAbd al-Majīd al-Khayālī, 5 vols. in 3 (Beirut: Dār al-Kutub al-ᶜIlmīya, 2005). Volume one also includes a biography of Ibn Nājī (19-22).

[111] Three editions of this work have been published, the first two of which combined the commentaries of Aḥmad al-Zarrūq and Ibn al-Nājī. Each has now been published separately. See Qāsim b. Nājī, *Sharḥ Ibn Nājī al-Tanūkhī ᶜalā matn al-Risāla*, ed. Aḥmad Farīd al-Mazīdī, 2 vols. (Beirut: Dār al-Kutub al-ᶜIlmīya, 2007). The work remains poorly edited and unindexed; I have not yet located either of the passages discussed here in this work.

Muḥammad's statement, "Do of it what you are able."[112] Al-Wahrānī thus cites Ibn Nājī's commentary as a source of authoritative precedents on the issue of dispensations for those unable to perform their ablutions even through *tayammum*, a method of ritually washing with sand where pure water is unavailable.

As shown in chapter one, a number of scholars have held al-Wahrānī's opinion to be an indirect refutation of al-Wansharīsī's *fatwā*s emphasizing the obligation to emigrate from *dār al-ḥarb* to *dār al-Islam*. I have argued that these rulings are perfectly compatible and not necessarily in conversation with one another at all, as they treat distinct legal issues: al-Wansharīsī is primarily concerned with the obligation to emigrate as applies to those capable of doing so, while this obligation is not of concern to al-Wahrānī because he is addressing the performance of ritual obligations by a group clearly incapable of emigrating. Al-Wahrānī's failure to include an explicit disclaimer to this effect may be explained by any number of reasons, including but not limited to: 1) the *istiftā'*, which has not survived, may have stated that the Muslims in question were incapable of escaping their predicament; 2) Al-Wahrānī may have found little to be gained from stating the obvious, which is that a group presumed incapable even of modified ablutions (*tayammum*) would be incapable of and therefore exempt from attempting the infinitely more difficult task of an overseas emigration *en masse*; 3) Given that al-Wahrānī's *fatwā* would need to be smuggled into Spain and kept secret, it would have been important to restrict the physical size of the document by omitting any unnecessary information.

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[112] "*Fa-atū min-hu mā istaṭaʿtum.*" *Ṣaḥīḥ al-Bukhārī*, *Kitāb al-Iʿtiṣām bi'l-Kitāb wa'l-Sunna*, 7288; *Ṣaḥīḥ Muslim*, *Kitāb al-Ḥajj*, 1337.

Al-Wahrānī's decision to cite only one legal authority in his *fatwā* may also be explained in part by these physical constraints as well as by the lay nature of his audience. That al-Wahrānī was writing for lay Muslims rather than for legal professionals is clear from the tone and format of his ruling, which is addressed in the second person and is more a letter of heartfelt support, encouragement, and practical advice than it is a dispassionate discussion of legal rules and their proper application to the third-person generalized subjects of those rules. His failure to cite additional authoritative precedents alone is not conclusive evidence that he was writing for a lay audience, but if al-Wahrānī meant to dissent from a particular jurist's opinion, we should expect that he would have engaged some of that jurist's specific legal arguments. Al-Wahrānī does not directly or indirectly engage any of the arguments presented in *Asnā al-matājir*; although he clearly hold his addressees to be pious and praiseworthy Muslims whose acts of worship may be accepted by God, as opposed to the blameworthy emigrants of al-Wansharīsī's *fatwā*, the difference in these valuations can, again, be attributed to the disparate statuses of these two groups. Treating Muslims deemed incapable of emigration differently from those who are capable of emigrating but fail to do so is not indicative of disagreement with the general rule obligating capable Muslims to emigrate.

Furthermore, if al-Wahrānī wished to argue against the obligation of capable Muslims to emigrate to *dār al-Islām*, and had to choose one single jurist to cite in his *fatwā*, we should expect him to have chosen a jurist who was lenient on the subject of emigration. What Gannūn's *fatwā* suggests is that a jurist who was indeed writing about the obligation to emigrate, and who wished to cite Ibn Nājī as an authority, would likely

be aware of Ibn Nājī's uncompromising position on Muslims living voluntarily under non-Muslim rule. Not only does Ibn Nājī refuse to honor documents certified by Mudejar judges,[113] but he considers those Muslims who have been returning to Pantelleria after successfully leaving to be equivalent in status to infidels, and even seems to allow this phenomenon to influence his assessment of all of that island's Muslim residents.

If al-Wahrānī was aware of, and disagreed with, Ibn Nājī's stance on emigration, he might nonetheless have overlooked the latter's more colorful opinions on the subject if the commentary he did wish to cite was crucial for the coherence and success of his *fatwā* to the Moriscos. Yet the opinion al-Wahrānī draws from Ibn Nājī's work appears to be far from essential to his *fatwā*, as it relates to a *ḥadīth* report that al-Wahrānī might have cited on its own or with another scholars' commentary. The opinion conveyed by Ibn Nājī specifically applies this report to the performance of ablutions by means of gestures, and is thus relevant to the Morisco context and enhances the credibility of al-Wahrānī's advice on this point. Yet it is not so relevant as to specifically address the circumstances of Muslims under Christian rule, nor does al-Wahrānī feel the need to provide authoritative precedents for any other section of his *fatwā*. Al-Wahrānī does not appear to cite al-Nājī's commentary because doing so is essential to the internal consistency and strength of his legal arguments; and especially not because it is so essential that he would be tempted to overlook a source's other opinions with which he strongly disagreed. Rather, this citation appears to be symbolic, a token reference to a named legal authority which might help to reassure al-

[113] As seen in *Asnā al-matājir*, Ibn ᶜArafa (d. 803/1401), with whom Ibn Nājī studied in Tunis, used the term Mudejar to refer to Muslims in Pantelleria.

Wahranī's audience that he is a learned scholar of Mālikī law whose assessment of their legal options may be trusted, acted upon, and passed on.

Following the opinions of Ibn Nājī and al-Māzarī, Gannūn continues his treatise by noting that an unnamed jurist held those who travelled *to dār al-ḥarb* for trade to be equivalent in status to spies, as they might be forced to reveal information or to surrender weapons to the enemy. The traders would then be implicated in shedding Muslim blood. Gannūn adds that the punishment for spying is death without an opportunity to repent.

After citing two more *ḥadīth* reports, Gannūn states that "all of these Qur'ānic texts, prophetic *aḥādīth*, and matters of definitive scholarly consensus, just as [stated] in the *Miʿyār*, are explicit with respect to the obligation to emigrate and the prohibition of residence in their lands."[114] The author then urges anyone with the least share in Islam to leave for *dār al-Islām* while they still can. Gannūn then returns to his review of the relevant legal opinions, noting that Mālik, Abū Ḥanīfa, and Ibn Rushd all held the property of those who converted to Islam but remained in *dār al-ḥarb* to be licit. The author also refers again to the *Miʿyār*, where it is explained that the later jurists assimilated the case of conquered Muslims to this earlier case of converts. The last opinion Gannūn cites in this first part of his treatise is Ibn Zikrī's *fatwā* – his second one as recorded in al-*Jawāhir al-mukhtāra* – declaring that if Muslims aid infidels in fighting against other Muslims, even financially, they should be fought and killed just like the infidels with whom they have allied. A 'continuation' of Gannūn's treatise[115] contains a

[114] Gannūn, *al-Taḥdhīr*, in the margin of *al-Taslīya*, 140.
[115] Ibid., 141-159.

theological discussion related to predestination and God's forgiveness for the commission of sins, and is not relevant here.

With some notable elaborations and changes, such as the addition of Ibn Nājī's opinion and the citation of an alternative opinion of al-Māzarī's, Gannūn thus relies heavily on al-Wansharīsī's *Asnā al-matājir* in the construction of this treatise. He refers to the *Miᶜyār* as an authoritative source in addition to citing the individual opinions contained therein, and his overall arguments are consistent with those of al-Wansharīsī.

Mauritania

As in the earlier case of Algeria, Mauritanian Mālikī scholars responded to French colonization in the early twentieth century with a large number of *fatwā*s and other treatises in which they argued for or against the obligation to wage a defensive *jihād* or to emigrate away from conquered territories. Yahya wuld al-Bara, Muḥammad Yaḥyā b. Ḥabīb Allāh, and al-Khalīl al-Naḥwī have each provided overviews of the various positions advocated in these texts, which range from calls for emigration in order to join an active *jihād*, to strategic boycotts of French goods, to accommodation with French authorities.[116] Unfortunately, the majority of the texts described by these

[116] Yahya wuld al-Bara, "Les théologiens mauritaniens face au colonialism français: Étude de *fatwa*-s de jurisprudence musulmane," in *Le temps des marabouts: Itinéraires et stratégies islamiques en Afrique occidentale française v. 1880-1960*, ed. David Robinson and Jean-Louis Triaud (Paris: Éditions Karthala, 1997), 85-117; Muḥammad Yaḥyā b. Ḥabīb Allāh, *al-Ḥaraka al-Iṣlāḥīya fī bilād Shanqīṭ (Mūrītānīyā) bayn al-istijāba li'l-istiᶜmār al-Faransī wa-difāᶜihi min khilāl baᶜḍ al-fatāwā wa'l-wathā'iq* (Salé: Manshūrāt Mu'assasat al-Shaykh Murabbīhi Rabbuh li-Iḥyā' al-Turāth wa'l-Tabādul al-Thaqāfī, 2006), esp. 357-403 and appendices; Al-Khalīl al-Naḥwī, *Bilād Shinqīṭ, al-mināra wa'l-Ribāṭ* (Tunis: Al-Munaẓẓama al-ᶜArabīya li'l-Tarbīya wa'l-Thaqāfa wa'l-ᶜUlūm, 1987). Lydon (Trails, 302, 420) notes that Wuld al-Bara (as Ould el-Bara) has completed a major forthcoming compilation of *fatwā*s from Mali, Mauritania, Morocco, and Senegal (*Al-*

scholars appear to be extant only in privately-held manuscripts. I will review here the relevant writings of four jurists whose work I was able to consult directly: Sidīya Bāba (d. 1924), Saᶜd Būh (d. 1917), Murabbīh Rabbuh (d. 1942), and Muḥammad ᶜAbd Allāh b. Zaydān al-Buṣādī (d. 1934). First, a brief summary of Mā' al-ᶜAynayn al-Qalqamī's (d. 1328/1910) career and arguments against the French will set the context for these other scholars' writings.

Mā' al-ᶜAynayn

Mā' al-ᶜAynayn al-Qalqamī (d. 1328/1910) was the leader of a prominent *jihād* against French expansion into Mauritania in the early twentieth century.[117] He was born in southeastern Mauritania, completed his education in Morocco, and performed the pilgrimage prior to establishing a base of operations in the northern third of the Western Sahara. Mā' al-ᶜAynayn was a powerful businessman and the influential leader of his own ᶜAynīya branch of the Qaḍirīya Sufi order. He maintained close ties with the Moroccan sultanate, to which he provided both slaves and religious guidance. The *shaykh* directed his earliest armed campaigns against Spanish settlements in Dakhla, in the southern third of the Western Sahara, in the late nineteenth century. When French administrator Xavier Coppolani's program to 'pacify' Mauritania led to the declaration of a French protectorate in that country's southwestern district in 1903, Mā' al-ᶜAynayn shifted his attention to preventing French occupation of that country's Adrar region further to the north. Followers of the *shaykh* assassinated Coppolani in 1905, after

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Majmūᶜa al-kubrā fī fatāwī wa-nawāzil ahl gharb wa-janūb gharb al-Ṣaḥrā) which will likely contain the *fatwās* he summarizes.

[117] For Mā' al-ᶜAynayn's biography and career, see: EI[2], s.v. "Ma' al-ᶜAynayn al-Ḳalḳamī;" Ibn Ḥabīb Allāh, *al-Ḥaraka al-Iṣlāḥīya*, 293-319; B.G. Martin, *Muslim Brotherhoods in Nineteenth-Century Africa* (Cambridge: Cambridge University Press, 1976), 125-51.

which Mā' al-ᶜAynayn continued to lead a number of campaigns against both the French and their Mauritanian allies. The *jihād* was carried on by the leader's sons after he returned to Morocco in an unsuccessful attempt to secure the support of Mawlāy al-Ḥafiz. Mā' al-ᶜAynayn then retired to the southern Moroccan town of Tiznit, where he died in 1910. Coppolani's successor, Henri Gouraud, meanwhile conquered the Adrar in 1909 and the remainder of the country thereafter. Mauritania remained under French control until gaining independence in 1960.

Mā' al-ᶜAynayn authored dozens of works, including *Hidaya man hāra fī amr al-Naṣārā*, "Guide for those Confused about the Matter of the Christians," a lengthy treatise setting forth his legal arguments in support of individual Muslims' obligation to wage *jihād* against foreign occupation.[118] He wrote the treatise in response to those who had criticized as illegitimate his raids against the Spanish in Dakhla, although Wuld al-Bara argues that this work is representative of the *shaykh*'s views regarding French colonialism in Mauritania as well.[119] Wuld al-Bara and Ibn Ḥabīb Allāh both classify him as one of the most notable and influential figures who called for and justified active resistance to French rule. Many of the arguments and proof-texts advanced by advocates of resistance, as they are summarized by Wuld al-Bara, are very similar to those advanced by ᶜAbd al-Qādir.[120] These include the obligation to emigrate or fight, or both; the necessity of elevating religious interests over the defense of one's property; the prohibition of alliances with non-Muslims, as evidenced by numerous Qur'ānic verses; and the certainty that even if the Christians currently allow the

[118] For discussions of this work, see Wuld al-Bara, "Les théologiens mauritaniens," 102-104 and Ibn Ḥabīb Allāh, *al-Ḥaraka al-Iṣlāḥīya*, 357-69.
[119] Wuld al-Bara, "Les théologiens mauritaniens," 103.
[120] Ibid., 104.

practice of Islam, they will inevitably suspend these rights in the future. Arguments not previously advanced in the Algerian literature include the assertion that anarchy is preferable to European rule, and that Muslims will prevail in battle if they place their faith in Islam. Wuld al-Bara also notes that many of the scholars writing against accommodation pointed to the persecution suffered by Muslims in Spain after the fall of al-Andalus as evidence of the consequences of living under non-Muslim rule.

Shaykh Sidīya Bāba's 1903 Fatwā *Encouraging Accommodation*

Sidīya b. Muḥammad Bāba (d. 1924), like Mā' al-ᶜAynayn, was both a respected Sufi leader and an erudite scholar.[121] His grandfather Sidīya al-Kabīr (d. 1868) established a formidable commercial and diplomatic network based in Boutilimit in the Trarza region of southwest Mauritania. David Robinson suggests in *Paths of Accommodation: Muslim Societies and French Colonial Authorities in Senegal and Mauritania, 1880-1920* that growing political instability in Trarza in the second half of the nineteenth century, and the consequent threat to the influence and prosperity of the Sidīya network, led Sidīya Bāba to support French rule as a means of bringing peace and stability to southwestern Mauritania.[122] Shaykh Sidīya allied with Coppolani and then with Gouraud, becoming instrumental to the planning and execution of France's expansion throughout Mauritania.

[121] David Robinson, *Paths of Accommodation: Muslim Societies and French Colonial Authorities in Senegal and Mauritania, 1880-1920* (Athens: Ohio University Press, 2000), 178-93.
[122] Ibid., 183.

In 1903, Sidīya Bāba issued a *fatwā* arguing for the benefits of accepting French rule.[123] In this text, he responds to a brief question posed by the French, asking whether or not Muslims are required to fight against the Christians in their lands. The questioner notes that the Christians support rather than oppose the practice of Islam, for example by appointing judges and organizing the judicial system, and that the Muslims of Mauritania are as powerless as those of the eastern Maghrib (Algeria and Tunisia) to wage an effective *jihād*. The first half of Sidīya Bāba's answer focuses primarily on the permissibility, and advisability given the Mauritanian context, of concluding a treaty with the French. He bases each component of his answer on an excerpt from Khalīl Ibn Isḥāq's (d. 776/1374) *Mukhtaṣar*, followed by commentaries on this text by earlier scholars and by the *shaykh*'s own explanation of how the prescribed terms and conditions for treaties apply to the Mauritanian context. At the end of this first section, Sidīya Bāba concludes that Muslims in Mauritania are exempt from the obligation to wage *jihād* because of their obvious weakness and their lack of unity, funding, and arms.

Sidīya Bāba then states that just as Mauritanian Muslims are exempt from *jihād*, so too are they excused for their inability to emigrate from their conquered territories.[124] This inability is a result of the weakness of most or all of them, as well as the lack of alternative regions with sufficient security and resources to render them suitable destinations for emigration. Sidīya Bāba cites the familiar Qur'ānic verse (4:98)

[123] Robinson, *Paths*, 90, 178-79. This text was first published in a French translation and later in Arabic. The French translation, by Edouard Michaux-Bellaire, is based on a document provided by a French administrator and appears to be the more complete version. The Arabic text is part of a longer document recorded by a Shaykh al-Bashīr b. Mubārakī (also spelled Mbarigi) detailing several exchanges between Coppolani, Saʿd Būh and Sidīya Bāba. E. Michaux-Bellaire, ed. and trans., "Une fetoua de Cheikh Sidia, Approuvé par Cheikh Saad Bouh ben Mohammed El Fadil ben Mamin, frère de Cheikh Ma El Ainin," *Archives Marocaines* 11 (1907): 129-53; Ibn Ḥabīb Allāh, *al-Ḥaraka al-Iṣlāḥīya*, 417-21.

[124] Michaux-Bellaire, "Une fetoua de Cheikh Sidia," 137-38; Ibn Ḥabīb Allāh, *al-Ḥaraka al-Iṣlāḥīya*, 419-20.

excepting those who are weak from the obligation to emigrate, followed by excerpts from the exegetical works of al-Bayḍāwī (d. 710/1310), a Shāfiʿī theologian and jurist, and al-Nasafī (d. 710/1310), a Ḥanafī scholar. Both exegetes explain that the verse exempts from emigration those without the means to travel or knowledge of the routes.

At this point Sidīya Bāba notes that in addition to this exemption from the obligation to emigrate, his *mustaftī*'s description of the Christians in question is indeed accurate. They do not oppose the practice of Islam, but have rather built mosques, organized the judiciary, and promoted the public welfare by putting an end to thievery and banditry and by fostering peace between warring tribes. The *shaykh* goes so far as to suggest God has sent them as a mercy to his servants, and cites three additional Qur'ānic verses in support of cooperation with non-Muslim rulers. The first of these, 60:8, states that God does not forbid Muslims from dealing kindly with those who neither fight against them nor turn them out of their homes, and that God loves those who are just. This verse will recur in the other Mauritanian *fatwā*s discussed below.

The second verse, Qur'ān 3:28, is the same verse used by Algerian *muftī* Ibn al-Shāhid to justify continued residence in Algiers, and the applicability of which was refuted by ʿAbd al-Qādir. Here Sidīya Bāba cites only that portion of the verse ("Unless you fear them greatly") indicating an exemption from prohibited relationships with non-Muslims on account of fear. He also notes that according to the *Tafsīr al-Jalālayn*, a popular work of exegesis by Shāfiʿī jurists Jalāl al-Dīn al-Suyūṭī (d. 910, 1505) and Jalāl al-Dīn Maḥallī (d. 864/1459), this verse applies to all areas in which Islam is not powerful.

The third verse is Qur'ān 12:55, in which Joseph asks the Egyptian pharaoh to appoint him guardian of the storehouses. Sidīya Bāba cites al-Nasafī's explanation that this verse indicates the legitimacy of accepting appointments from unjust leaders, notes that other exegetes held similar views, and concludes the *fatwā* with a date and signature. As ᶜAbd al-Qādir had also argued against the use of this verse (in addition to 3:28) to justify allegiance to a non-Muslim ruler, Sidīya Bāba's arguments may be based on pro-accommodation *fatwā*s acquired by the French, specifically Coppolani, in Algeria. While Robinson observes that the French had come to appreciate the usefulness of these rulings in Algeria and thus solicited similar texts from the Mauritanian scholarly elite, the connection may be yet more direct.[125] It is conceivable that Coppolani, raised in Algeria and fluent in Arabic, may provided Sidīya Bāba with actual copies of those *fatwā*s issued in favor of French rule in Algeria.

Sidīya Bāba's ruling is followed by a brief endorsement by Saᶜd Būh (d. 1917), one of Mā' al-ᶜAynayn's younger brothers and a long-time ally of the French in Senegal and Mauritania.[126] Saᶜd Būh indicates his support for Sidīya Bāba's *fatwā*, adding only that the Christians are amply supplied with men and resources and that they have conquered vast territories in the east and west. Neither Sidīya Bāba nor Saᶜd Būh refer directly or indirectly to the *fatwā*s of al-Wansharīsī or al-Wahrānī here.

Edouard Michaux-Bellaire, whose French translation of this text appeared in *Archives Marocaines* in 1907, appended material from an additional Mālikī commentary on the *Mukhtaṣar Khalīl* and concluded the article with his own analysis.[127] He noted

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[125] Robinson, *Paths*, 56.
[126] On Saᶜd Buh, see Robinson, *Paths*, 161-77. For the text, see Michaux-Bellaire, "Une fetoua de Cheikh Sidia," 140; Ibn Ḥabīb Allāh, *al-Ḥaraka al-Iṣlāḥīya*, 420-21.
[127] Michaux-Bellaire, "Une fetoua de Cheikh Sidia," 140-53.

that the arguments presented by Sidīya Bāba were not novel, but rather very similar to those advanced in the *fatwā*s that Léon Roches, acting on behalf of General Bugeaud in Algeria, was able to obtain from jurists in Qayrawān and Cairo in 1941; Roches also obtained approval of these texts by the *muftī* of Mecca in 1942. Michaux-Bellaire laments that as much as these texts support the peaceful acceptance of French rule, they also maintain the ultimate superiority of Islam, continue to view Christians as the enemy, and merely delay the pursuit of war until such time as the Muslims feel capable of winning.

Sidīya Bāba's 1909 Letter Discouraging Jihād

In addition to the above *fatwā*, Sidīya Bāba also wrote a number of letters urging the peaceful acceptance of French rule in Mauritania. Ibn Ḥabīb Allāh reproduces one of these letters, in which Sidīya Bāba implores the *mujāhid* Sīdī b. Ḥabatt to cease fighting and to sign a treaty with the Christians.[128] The *shaykh* employs many of the same arguments as in the above *fatwā*, but with less recourse to authoritative legal precedents. In addition to stressing the futility of *jihād*, he complains that the war effort has cost lives and damaged Mauritania. He points to the peace and prosperity of the *sūdān* ('blacks,' here the Senegalese), whom he argues have become more stable and even more Muslim under French rule.

Sidīya Bāba continues by stating that emigration is only obligatory where it is not possible to practice Islam, and directs his reader to confirm this in the

[128] Ibn Ḥabīb Allāh, *al-Ḥaraka al-Iṣlāḥīya*, 423-26. Wuld al-Bara ("Les théologiens mauritaniens," 109 n. 82) identifies the recipient as Sīdī Muḥammad wuld Aḥmad wuld Ḥabatt al-Ghallāwī. This may be the same Sīdī Muḥammad b. Ḥabatt whom al-Naḥwī identifies as having writing a treatise titled *Fī ḥukm man ghalaba ʿalā waṭanihi al-Nasārā*, which is simply an abbreviation of the title of *Asnā al-matājir*. Al-Naḥwī, Bilād Shinqīṭ, 331.

commentaries of Shāfiᶜī scholars Ibn Ḥajar al-ᶜAsqalānī (d. 852/1449) and Aḥmad b. Muḥammad al-Qastallānī (d. 923/1517) on the a*ḥādīth* contained in the *Ṣaḥīḥ al-Bukhārī.* He then makes a direct reference to al-Wansharīsī's *fatwā*s on emigration by making a distinction between the circumstances addressed in the *Miᶜyār* and those of Mauritania.[129] According to Sidīya Bāba, not only did the Spanish persecute the Muslims under their control, but emigration was easy for Iberian Muslims; they had the option of moving to a kingdom within the peninsula, with a sultan and the power to fight in the way of God.[130] The *shaykh* appears to have in mind the Naṣrid kingdom of Granada, even though it lacked power and was months away from surrender at the time al-Wansharīsī wrote *Asnā al-matājir.* Sidīya Bāba concludes by advising his reader to more fully consider the circumstances of his time and place, and by asking him to put an end to his *jihād*, which has contributed to the spilling of Muslim blood. The letter is dated mid-1327/1909, and Wuld al-Bara notes that Sidīya Bāba distributed it widely in Mauritania.[131]

Saᶜd Būh's 1909 Letter to Mā' al-ᶜAynayn

Earlier in 1909, Saᶜd Būh had also written a letter discouraging *jihād*, this one directed to his brother Mā' al-ᶜAynayn.[132] The letter responds to arguments made by

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[129] The *mīm* of *al-Miyᶜār* unfortunately is missing in Ibn Ḥabīb Allāh's text, obscuring this reference (*al-Ḥaraka al-Iṣlāḥīya*, 425). Although he refers only to the work as a whole, the context makes it clear that Sidīya Bāba must be referring specifically to al-Wansharīsī's *Asnā al-matājir* and the Marbella *fatwā.* This is made more explicit in Saᶜd Būh's letter, below, which this letter follows very closely in parts.

[130] "*Fa-amā kalām al-Miᶜyār wa tābiᶜīhi, fa-maᶜa taysīr al-hijra fī bilād al-Andalus ilā barr al-ᶜudwa, wa maᶜa wujūd ṭā'ifat lahā sulṭān . . .*" It is not entirely clear which ᶜ*udwa*, or 'bank' of the Mediterranean Saᶜd Būh has in mind, but he appears to mean Naṣrid Granada.

[131] Wuld al-Bara, "Les théologiens mauritaniens," 109.

[132] For the Arabic text, see Ibn Ḥabīb Allāh, *al-Ḥaraka al-Iṣlāḥīya*, 427-49. For a French translation, see Dedoud Ould Abdallah,, "Guerre sainte ou sédition blâmable? *Nasiha* de sheikh Sa'd Bu contre le *jihad* de

Mā' al-ᶜAynayn and his supporters, and although it was also widely circulated, it appears not to have reached Mā' al-ᶜAynayn himself.[133] Saᶜd Būh titled the letter *al-Naṣīḥa al-ᶜāmma wa'l-khāṣṣa fī al-taḥdhīr min muḥāribat al-Farāniṣa*, or "General and Specific Counsel, Cautioning against Combating the French." Saᶜd Būh focuses primarily on legal discussions pertaining to *jihād*, which are not relevant here, but his treatment of emigration mid-way through the letter is significant. In the course of denouncing the fighters' practice of seizing property belonging to Muslims living under French rule, Saᶜd Būh defends these Muslims' residence with reference to al-Wansharīsī's *fatwā*s:

> Yes, there is a response in the *Miᶜyār*, in a writing authored by the compiler which he called *Asnā al-matājir fī-man ghalaba ᶜalā waṭanihi wa-lam yuhājir*. It is a well-researched (*mabḥūth*) response containing [several] studies and distinct cases, which should be evident to anyone who has examined the *Miᶜyār*. Yet the circumstances of the people of al-Andalus are not like the circumstances of the *zawāyā* (maraboutic groups), thus [the ruling regarding] them may not be based on an analogy with [the former].[134]

What is remarkable here is that neither Saᶜd Būh nor Sidīya Bāba disputes the validity of *Asnā al-matājir*; that is, they agree that Muslims were obligated to emigrate from al-Andalus. What both authors are arguing against is the applicability of this precedent to the Mauritanian case. That four centuries after al-Wansharīsī's death these Mauritanian scholars appear to have considered *Asnā al-matājir* to be the governing precedent on emigration until and unless the *fatwā*'s inapplicability to new cases could be established attests to the success of this *fatwā* in becoming authoritative for later scholars.

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son frère sheikh Ma al-Ainin," in *Le temps des marabouts*, ed. Robinson and Triaud (Paris: Éditions Karthala, 1997), 127-53.

[133] Ould Abdallah, "Guerre sainte," 125-26. See also Robinson, *Paths*, 175.

[134] Ibn Ḥabīb Allāh, *al-Ḥaraka al-Iṣlāḥīya*, 439. This translation of *zawāyā*, or *zwaya*, is taken from Robinson, *Paths*, 47.

To establish this lack of applicability, Saᶜd Būh cites Egyptian Mālikī jurist Shihāb al-Dīn al-Qarāfī's (d. 684/1285) treatise on the issuance of court judgments and *fatwā*s.[135] One of the issues al-Qarāfī's addresses is whether *muqallid* (follower) jurists are bound to apply the rulings previously issued by *mujtahid*s (jurists capable of independently deriving new laws from the revealed sources), even when those earlier rulings were based on customs that had prevailed at the time of the original ruling but which are substantially different from the customs and practices of the *muqallid*'s time.[136] Al-Qarāfī responds:

> Applying these rulings which have been deduced on the basis of customs, even after those customs have changed, is a violation of the scholarly consensus [on this matter] and [demonstrates] an ignorance of the religion. Rather, for every legal matter which is determined according to customs, its judgment changes as the custom changes, to [the ruling which] is required by the new custom. This does not constitute a new instance of *ijtihād*, but rather this is a principle which the scholars have thoroughly examined and concerning which they have come to a consensus. Thus we are following them in this, and not appealing to a new *ijtihād*.[137]

Saᶜd Būh's use of this passage confirms his recognition of *Asnā al-matājir* as highly respectable and appropriate for its time, while asserting the necessity and legitimacy of adjusting the legal outcome for a later case in which the same general rules are applied to a different set of prevailing circumstances. He goes on to state that those who have not emigrated are unable to do so, and reiterates the overwhelming power of the Christians. In response to a call for at least the men to emigrate in order to join the *jihād* against the French, Saᶜd Būh counters that this would leave their women and children unprotected in the hands of the Christians.

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[135] Shihāb al-Dīn Aḥmad b. Idrīs al-Qarāfī (d. 684/1285) was a prominent Egyptian Mālikī scholar. DM, 128-130; SN, 1:270. Several editions of this treatise, on distinguishing between the work of the judge and the *muftī*, have been published, including: Al-Qarāfī, *Al-Iḥkām fī tamyīz al-fatāwā ᶜan al-aḥkām, wa-taṣarrufāt al-qāḍī wa'l-imām*, ed. Aḥmad Farīd al-Mazīdī (Beirut: Dār al-Kutub al-ᶜIlmīya, 2004).

[136] Al-Qarāfī, *al-Iḥkām*, 72. For a translation of the question and a discussion of this passage, see Sherman Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: Brill, 1996), 129-33.

[137] Ibn Ḥabīb Allāh, *al-Ḥaraka al-Iṣlāḥīya*, 439. For this passage in al-Qarāfī, see *al-Iḥkām*, 72.

Although he does not explicitly address French policies toward the practice of Islam in Mauritania, Saᶜd Būh then cites the opinion of Shāfiᶜī jurist al-Mawārdī (d. 450/1058), who held that if Muslims living in an infidel territory may manifest their religion, then that territory becomes part of *dār al-Islām*.[138] Al-Mawārdī even argued that residence in such a territory is preferable to migration because of the hope of winning converts to Islam. While modern commentators have seen al-Wansharīsī's *Asnā al-matājir*, and the positions adopted within the Mālikī school as a whole, in stark opposition to such a lenient ruling, Saᶜd Būh clearly finds the two to be compatible. The *shaykh* appears to be using al-Mawārdī's opinion to demonstrate the legal import of one of the primary differences between those circumstances which had prevailed in al-Andalus and those prevailing in Mauritania, which is Mauritanians' freedom to manifest Islam. The reasoning behind this connection is more clearly spelled out in the above letter by Sidīya Bāba, in which he states that the Andalusīs were unable to practice Islam while being perfectly capable of emigration.

Saᶜd Būh concludes his letter to Mā' al-ᶜAynayn by urging him to return to scholarly pursuits and to abandon his quest to expel the French, which he asserts is surely as futile as attempting to return milk to a teat. The letter is dated in early 1327/1909.

Murabbīh Rabbuh's Fatwā *on the Obligation to Emigrate*

In 1344/1925, Mā al-ᶜAynayn's son Muḥammad al-Muṣṭafā Murabbīh Rabbuh (d. 1942) authored a *fatwā* in response to a group of travelers who wished to understand

[138] Ibn Ḥabīb Allāh, *al-Ḥaraka al-Iṣlāḥīya*, 443. On al-Mawārdī's opinion, see also Khaled Abou El Fadl, "Islamic Law," 150.

the evidence for the prohibition on residing with the infidels.[139] The substantial text is titled *Ṣawlat al-kārr wa-malja' al-fārr fī taḥrīm al-iqāma maᶜa al-kuffār*, or "The Advance Assault and Base of Retreat, on the Prohibition of Residence with the Infidels."[140] Unlike in the other Mauritanian texts discussed above, *hijra* is the primary focus of this *fatwā* rather than serving as just one component of a discourse on *jihād*. The author supports the obligation to emigrate and draws heavily on the writings of al-Wansharīsī and al-Tusūlī to make his case.

Murabbīh Rabbuh begins and ends with original material, but the majority of the *fatwā* consists of excerpts from the work of these two earlier scholars. In his introduction, Murabbīh Rabbuh cites Qur'ān 9:23-24, along with Shāfiᶜī exegete Fakhr al-Dīn al-Rāzī's (d. 606/1209) commentary on these verses, in order to stress Muslims' obligation to prioritize religion over such worldly interests as commerce, property, and even close familial ties, especially as regards family members who are more committed to unbelief than to faith. He then cites the last part of Qur'ān 60:9, most likely in response to Sidīyā Bāba's citation of Qur'ān 60:8, but without an explicit comment to this effect. Qur'ān 60:8 and the first half of 60:9 state that God only forbids Muslims from dealing kindly with those who fight them in their faith and drive them from their homes, or who support others in these pursuits; the end of verse 60:9 states that those who do ally with such people are wrongdoers. Thus, while Sidīyā Bāba interprets the French to be among those who do not fight Muslims in their faith or drive them from their homes, and views this verse as supportive of the permissibility of formal relations

[139] The text is reproduced in Ibn Ḥabīb Allāh, *al-Ḥaraka al-Iṣlāḥīya*, 457-68. Murabbih Rabbuh states that the travelers posed to question to an unspecified individual, who referred the question to him.
[140] The title is a play on *al-karr wa'l-farr*, a battle technique of advance and retreat. *Ṣawlat al-kārr* is literally 'the assault of the attacker.' While '*malja' al-fārr*' could also mean 'the refugee's sanctuary,' given the context it appears to mean the place to which a military unit retreats to regroup after an advance.

with them, with this citation Murabbīh Rabbuh offers a counter-argument that the French are indeed implicated in these actions, that these verses affirm the prohibition on relations with them, and that the consequences of violating this prohibition are severe. Fakhr al-Dīn's commentary here includes an explanation of this verse given by the Companion Ibn ᶜAbbās, who states that the end of 60:9 means that such Muslims are polytheists like those with whom they have allied; this is because of their contentment with polytheism, and the fact that contentment with unbelief is unbelief.

After setting a tone very reminiscent of ᶜAbd al-Qādir's own treatise, Murabbīh Rabbuh then reproduces most of the section treating "Those living with the infidel enemy" from al-Tusūlī's *Ajwiba* to ᶜAbd al-Qādir, discussed above. He acknowledges his source, and proceeds through the text in the same order as had al-Tusūlī. As the latter had drawn much of his own material from al-Wansharīsī, most of this section of Murabbīh Rabbuh is also taken from *Asnā al-matājir*. This includes al-Wansharīsī's discussion of the ability to undertake emigration, the *ḥadīth* reports related to emigration and the question of their mutual compatibility, the concurrence of evidence from the Qur'ān, *sunna*, and scholarly consensus as to the prohibition on living in infidel territory (with a note that this is in the *Miᶜyar*), and the analogy between converts to Islam in *dār al-ḥarb* and conquered Muslims. Murabbīh Rabbuh's primary omissions from al-Tusūlī's text are those sections treating the various opinions and proof-texts related to the status of conquered Muslims' lives and property. The Mauritanian scholar ends this section with al-Tusūlī's ruling declaring the property of Muslims residing under French rule to be licit because of their payment of the *jizyā* to

their conquerors, and with Ibn Zikrī's ruling that if such Muslims fight against other Muslims, they should be fought and killed.

In the next major section of his *fatwā*, Murabbīh Rabbuh reproduces material directly from *Asnā al-matājir*, and likewise acknowledges his source, giving the full title, author's name, and date of the *fatwā*. Some of the material here is redundant for having already been cited by al-Tusūlī, although the author minimizes this repetition. Murabbīh Rabbuh includes excerpts from al-Wansharīsī's sections on the definition of 'weakness' as an exemption from the obligation to emigrate and as used in the Qur'ānic verses prohibiting alliances with non-believers, Ibn Rushd's statement that *hijra* will remain an obligation until the Day of Judgment, and on *ahādīth* supportive of this obligation. Murabbīh Rabbuh ends this section with a passage reiterating the obligation to emigrate for anyone capable of doing so, even if this entails hardship, and condemning those who are capable of emigrating but who contentedly remain living with unbelievers.

Following these excerpts, Murabbīh Rabbuh presents a number of additional arguments taken from a variety of sources. He begins with Fakhr al-Dīn al-Rāzī's commentary on Qur'ān 8:74, which designates those who fight and emigrate in the way of God to be the true believers. Fakhr al-Dīn states that if believers are living in infidel territory, and believe they might weaken the enemy by leaving, then they must do, as their case will become analogous to that of the earliest Meccan Muslims who emigrated to Medina.[141]

[141] Murabbih Rabbuh does not pursue the implications of this analogy, which restricts the extension of the Companions' obligation to emigrate to later cases by identifying the realistic potential to weaken the enemy as the *ʿilla* (effective cause) for this obligation.

Murabbīh Rabbuh then offers a succinct summary of the conditions under which a Muslim territory becomes non-Muslim territory, according to the four schools of law. He states that for Mālik, *dār al-Islām* becomes *dār al-ḥarb* when the infidels' laws are applied, and that al-Shāfiᶜī and Ibn Ḥanbal agreed with this. For Abū Ḥanīfa, the change in status occurs when all three of the following are true: the infidels' laws are in force, the territory is separated from *dār al-Islām*, and Muslims and *dhimmī*s lose their former protections.[142] Murabbīh Rabbuh does not comment, but presumably held Mauritania to have become *dār al-ḥarb*. While the early scholars disagreed as to the legal status of conquered territory, he states that they agreed that the property of Muslims living in *dār al-ḥarb* could be legitimately seized as booty.

The author then cites a treatise on the conduct of war by Muḥammad Aḥmad al-Sanūsī al-Khaṭṭābī.[143] This passage warns Muslims to beware of hypocrites (as in Qur'ān 9:8) and predicts divine punishment for those who prioritize worldly over religious interests (Qur'ān 2:16) or who die rejecting faith (Qur'ān 2:161). Apparently still quoting al-Sanūsī, Murabbih Rabbuh then states in no uncertain terms that those who aid the infidels in fighting against Muslims are undoubtedly apostates. He asks rhetorically what kind of unbelief could be greater that working for the humiliation of Islam and the glorification of unbelief, and who should be called apostates if not these very apostates.

Murabbīh Rabbuh then returns briefly to al-Tusūlī and al-Wansharīsī. From the Algerian's second response to ᶜAbd al-Qadir, he cites al-Waryāgli's opinion (but, like al-Tusūlī, attributes it to al-Zayyātī) that Muslims in *dār al-ḥarb* must be fought and that

[142] See Khalid Abou El Fadl, "Islamic Law," 161-62.
[143] *Bughyat al-musāᶜid fī aḥkām al-muhāhid*; I have not been able to identify this author or work.

their money may be taken as booty. Murabbīh Rabbuh softens al-Waryāgli's opinion here by describing the Muslims in question as those who spy and fight for the enemy, and by quoting al-Waryāglī as stating that they should be fought, rather than that they should be killed. In contrast to this softening, the Mauritanian then reduces al-Wansharīsī's nuanced discussion on property to an unequivocal statement that according to the *Miʿyar*, those who remain in *dār al-ḥarb* do not possess valid ownership of their property or children. The language used here makes clear that Murabbīh Rabbuh has summarized al-Wansharīsī's discussion as it is found in al-Tusūlī's *fatwā*.

The author concludes with commentary on a few additional Qur'ānic verses warning believers not to obey unbelievers (3:149) or to ally with those who fight against Muslims in their faith (60:9), and warning of a grievous fate for the hypocrites (4:138-39). In this second mention of Qur'ān 60:9, Murabbīh Rabbuh draws on Ismā'īl Ḥaqqī al-Bursālī (d. 1724)'s exegetical work *Rūḥ al-Bayān*, which directly links this verse to Qur'ān 4:97, the verse most often cited in support of the obligation to emigrate. Verse 60:9 states that those who ally with the prohibited class of non-believers are '*ẓālimūn*,' wrongdoers or oppressors, while in 4:97 the angels reprimand those who had been oppressing themselves (*ẓālimī anfusihim*) by not emigrating away from the source of their torment. Murabbīh Rabbuh thus ends with another counter to Sidīya Bāba's use of 60:9, which at the same time reinforces this classic proof-text for the obligation to emigrate.

Murabbīh Rabbuh's *fatwā* thus draws heavily on the fifteenth-century Moroccan-Iberian and nineteenth-century Moroccan-Algerian legal discourses on the obligation to emigrate, while also responding to elements unique to the Mauritanian

discourse. The Mauritanian context is also suggested in the author's very choice to quote extensively from al-Tusūlī's *fatwā*s, even when the latter is in turn reproducing material form *Asnā al-matājir*, and to give second billing to direct citation of al-Wansharīsī's work. While recognizing the *Miᶜyār* as a foundational source of authoritative precedents, as Mā' al-ᶜAynayn's son and political successor Murabbīh Rabbuh would also have found the *fatwā*s written and received by ᶜAbd al-Qādir to be a useful lens through which to interpret and apply those precedents.

Al-Buṣādī's Fatwā *on Property*

Mauritanian scholar Muḥammad ᶜAbd Allāh b. Zaydān al-Buṣādī (d. 1353/1934) authored an extensive treatise, in the form of a *fatwā*, refuting one of the central analogy on which al-Wansharīsī's *Asnā al-mataājir* is based. Although this is one of the most remarkable Mālikī texts from any era related to the obligation to emigrate, both author and *fatwā* have remained obscure. In two manuscript copies of the treatise extant in Morocco, the author's name is recorded as Muḥammad ᶜAbd Allāh b. Zaydān al-B(u)sātī[144] and as Muḥammad ᶜAbd Allāh b. Zaydān b. Ghāl b. al-Mukhtār Fāl al-Būṣādī al-Anṣārī.[145] In a recent article on Mauritanian scholars in the Hijaz, Ahmad Salem Ould Mohamed Baba confirms the latter spelling; this is the only published reference to this figure I have been able to locate.[146]

[144] Ḥasanīya Library (the 'Royal Library', Rabat) ms. 12438.3, folios 164a-176b. Name appears on folios 175b and 176b.
[145] Mu'assasat al-Malik ᶜAbd al-ᶜAzīz Āl Saᶜūd (the 'Saudi Library,' Casablanca) ms. 440, entire manuscript. Name appears with the title prior to the start of the text on the first folio.
[146] Ahmad Salem Ould Mohamed Baba, "Dawr al-ᶜulamā' al-Shanāqiṭa fī al-thaqāfa bi'l-Mamlaka al-ᶜArabīya al-Saᶜūdīya fī ᶜahd al-Malik Saᶜūd b. ᶜAbd al-Azīz," *Al-Dāra* 4 (2006): 317-343 (accessed online at www.aldarahmagazine.com). The authors of the manuscript catalogue for the Saudi library in Casablanca admit being unable to definitely identify the author, and incorrectly suggest he might be Ghālī b. al-Mukhtār Fāl al-Shinqīṭī al-Buṣādī (d. *ca* 1243/1827), who is actually the author's grandfather.

Ould Mohamed Baba counts Muḥammad ᶜAbd Allāh b. Zaydān b. Ghālī al-Buṣādī al-Shinqīṭī as one of the most important scholars of his age in the fields of jurisprudence and linguistics. His *nisba* probably does not refer to the town of Shinqīṭī itself (Fr. Chinguetti), but to the Adrar region of northern Mauritanian or to "the intellectual world emanating from Shinqīṭī."[147] The jurist was educated in eastern Mauritania in the schools of the Buṣādī tribe and in the home of his grandfather, Ghālī b. al-Mukhtār al-Buṣādī. Al-Buṣādī was linked for a time with Mā' al-ᶜAynayn, prior to travelling eastward; he remained in Cairo for some time on his way to Mecca, where he taught and debated for an unspecified period until his death there in 1353/1934. Ould Mohamed Baba does not indicate when al-Buṣādī left Mauritania, but this appears to have been sometime between a 600-family *hijra* to the east organized in 1326/1908 by a number of other Buṣādīs of the Ghuẓfīya (Gudfiya) sufi order, and another wave of emigration after 1353/1934, both in response colonial occupation.[148] It is also unclear whether al-Buṣādī meant his journey east to be an act of *hijra* or whether this was simply an extended *ḥājj* which led to continued residence in Mecca. Ould Mohamed Baba describes al-Buṣādī's position toward the French as reformist and similar to that of Saᶜd Būh and Sidīya Bāba, as demonstrated by al-Buṣādī's well-known *fatwā, Taḥrīm*

See al-Qādirī, et al., *Fihris al-makhṭūṭāt*, 1:324-25. Another online source, the *Muᶜjam al-Bābaṭīn li-shuᶜarā' al-ᶜArabīya fī al-qarnayn al-tāsiᶜ ᶜashar wa'l-ᶜashrīn* (www.almoajam.org), lists al-Buṣādi under "Muḥammad ᶜAbd Allāh b. Ghālī (d. 1933)" and describes him as a jurist, poet, and sufi.

[147] For this definition of *Bilād Shinqīṭ*, see Ghislaine Lydon, *On Trans-Saharan Trails: Islamic Law, Trade Networks, and Cross-Cultural Exchange in Nineteenth-Century Western Africa* (Cambridge, Cambridge University Press, 2009) 82.

[148] On this emigration, see also Wuld al-Bara, "Les théologiens mauritaniens," 102. Coppolani's assassin was a member of the Ghuẓfīya.

nahb amwāl al-muᶜāhidīn lil-Naṣārā, "Prohibition on Plundering the Property of those under Treaty with the Christians."[149]

This must be the same text which in one of the Moroccan manuscripts is titled *Jawāb ᶜan ḥukm Allāh Taᶜālā fī māl al-Muslimīn min al-Shanājiṭa al-muqīmīn fī arḍ al-ḥarbīyīn*, "Response Regarding the Legal Status of the Property Belonging to Shinqīṭī Muslims Living in non-Muslim Territory."[150] An edition of the text based on the Moroccan manuscripts appears as Appendix E. Although the *fatwā* deals primarily with the contested issue of whether or not conquered Muslims' property remains inviolable if they do not emigrate, in refuting the primary proof-text for the violability of this property, al-Buṣādī also refutes the legitimacy of al-Wansharīsī's analogy between converts to Islam in *dār al-ḥarb* and conquered Muslims, upon which the latter's obligation to emigrate is partially based. The author also addresses emigration more directly near the end of the *fatwā*.

The context for the ruling appears to be a heated debate among Mauritanian scholars and resistance leaders regarding the status of the property of those Muslims remaining under French rule. Wuld al-Bara notes that some of the scholars who were demanding that Muslims emigrate from the earliest-conquered regions of Mauritania went so far as to authorize and incite the pillaging of communities which refused to relocate.[151] The situation became such that even Mā' al-Aynayn, who had ruled that non-emigrants' property was licit in his *Hidaya*, authored a letter urging a group of

[149] Despite being 'well-known' I have not yet located any reference to this text in the literature on Mauritania.
[150] Saudi Library copy; the Royal Library version is given a similar title in the card catalogue, but the text itself is untitled. See Appendix E.
[151] Wuld al-Bara, "Les théologiens mauritaniens," 102.

mujāhidūn to fight the French, but to be careful not to seize property from those Muslims who are legitimately exempt from the obligation to emigrate.[152]

Summary of al-Buṣādī's Text

Al-Buṣādī addresses his *fatwā* directly to his *mustaftī*, reminding him that he has asked about God's judgment concerning the property of those Shinqīṭī Muslims who are living in enemy territory (438). In a show of pious modestly, he protests that perhaps he is not up to the task of pronouncing on such a difficult matter. He cites Ibn al-ᶜArabī's complaint, taken from *Asnā al-matājir*, that this was originally a Khurasānī issue, and thus a difficult one for later Mālikī *muqallid*s left without precedents to follow. Nonetheless, al-Buṣādī admits that he has an obligation to give counsel and not to remain silent while the truth is reviled. He writes that he is thus presenting his thoughts on the matter to the scholarly community in order to clarify and remedy; presumably he is referring here to elements of the prevailing legal discourse.[153] It becomes clear later that al-Buṣādī is writing to an opponent with whom he disagrees, he had probably not "asked" about status of non-emigrants' property so much as challenged al-Buṣādī to defend his own position (441).

The author's seemingly modest reference to Ibn al-ᶜArabī is quickly revealed to be the beginning of a sustained critique of the analogy between converts and conquered Muslims so prevalent in pro-emigration *fatwā*s. Al-Buṣādī states that every later jurist whose discussion of this issue he has consulted agrees that there is no opinion attributed to the earlier jurists which makes licit the property of conquered

[152] Ibid., 102-103.
[153] His term for reviling the truth, *taᶜyīr al-haqq*, an uncommon word from the same root as *Miᶜyār*, may also be an allusion to his opponent's work.

Muslims – neither in an explicit text, nor as an extrapolation of an explicit text. They also all agree that those incapable of emigration retain the inviolability of their property.

Rather, he states that the scholarly disagreement is only with regard to those whose residence in conquered territory is voluntary. On the one hand, some hold this property to be licit. They base this ruling on an analogy with the case of one who converts to Islam and has not yet established ownership of his property by bringing it to *dār al-Islām*. This property is licit according to Ibn al-Qāsim's narration of Mālik opinion, which is the commonly accepted opinion within the school. On other hand, some scholars hold this property to be inviolable. This group reasons that the conquered Muslim's property was inviolable prior to the change in status of his territory, and that residence in *dār al-ḥarb* does not remove this pre-existing inviolability. Furthermore, they hold the analogy between these two cases to be invalid because of the disparity between them. Al-Buṣādī notes that more than one scholar has chosen and relied upon latter this opinion, which is the correct one, despite not having done the analysis of it justice. He is certainly referring here to al-Wansharīsī's treatment in *Asnā al-matājir* of Ibn al-Ḥājj's distinction between these two cases,[154] but al-Buṣādī also appears to be criticizing Ibn al-Ḥājj for not having properly explored and established the implications of this distinction.

Establishing this distinction is the task to which al-Buṣādī devotes the majority of his treatise. It should be noted prior to examining the particulars of his critique that al-Wansharīsī and Ibn Rabīʿ do not actually use the term *qīyās* (analogical reasoning) to

[154] See Appendix A, 364-67.

describe their assimilation of the status of conquered Muslims to that of converts to Islam in *dār al-ḥarb*. Rather, Ibn Rabīʿ explicitly refutes the allegation that he is basing an analogy on the opinions of prior scholars, acknowledging that a proper analogy should only be based on a ruling derived from a scriptural proof-text or scholarly consensus. Although al-Wansharīsī omits the first sentence of Ibn Rabīʿ's argument, the remainder of his predecessor's defense of his reasoning appears in *Asnā al-matājir* as the section explaining that the case of the conquered Muslims is really just another manifestation of the case of the converts.[155] This assertion that the two cases are just two concrete instances of the same abstract case (Muslims in non-Muslim territory) is meant to establish that the reasoning employed does not constitute *qīyās*. Thus, in arguing below that the analogy between these two cases is not a valid one, al-Buṣādī is first implicitly asserting that this reasoning is in fact *qiyās* and can be judged by the rules for applying this method of legal reasoning. Nonetheless, rather than critique the use of earlier scholars' opinions as the source of the original ruling from which this analogy is drawn, al-Buṣādī's critique centers on the disparities between the original and new cases.

Prior to delving into the specifics of his argument, al-Buṣādī first justifies the very act of questioning an earlier scholar's interpretation (438-40). He quotes a number of jurists' statements to the effect that it is possible for later scholars to be more knowledgeable on certain points than earlier scholars, and that arguments must be evaluated on the strength of their evidence rather than simply accepted for being the opinions of particular exemplars. Al-Busādī asserts that the decision to assimilate these

[155] See Appendix A, 353-55.

two cases is one such opinion that must be thoroughly evaluated, and he is doing nothing more than expressing his own opinion on the matter, as previously stated. That al-Buṣādī feels the need to justify revisiting this analogy, while other scholars clearly felt free to critique other aspects of rulings on emigration, demonstrates the extent to which this conflation of conquered and convert Muslims had been accepted as doctrine by the time he was writing.

Al-Buṣādī then introduces his argument by stating that this analogy is invalid on two counts, because of the disparity between the new and original cases and because the rule derived from this analogy contradicts a clear text already governing the original case (440). He proposes to expand upon these two points following an explanation of the components of *qiyās*, how those components have been applied to the current analogy, and how they are applied in an alternate analogy offered by al-Buṣādī.

The standard components of *qiyās* are four: 1) the *aṣl*, or original case; 2) the *ḥukm al-aṣl*, or rule governing the original case; 3) the *farᶜ*, a 'branch' or new case in need of a ruling; and 4) the *ᶜilla*, or effective cause, which is the rationale for the ruling attached to the original case, is common also to the new case, and the presence of which then justifies extending the original case's ruling to the new case. In the existing analogy, 1) the *aṣl* is the convert's property and children prior to his bringing them to *dār al-Islām*; 2) the *ḥukm* is that they are licit; 4) the *ᶜilla* is the convert's residence in *dār al-ḥarb*, and the alliance with infidels that this entails; and 3) the *farᶜ* is the property and children of one is a Muslim originally, but who voluntarily resides in *dār al-ḥarb*.

In the counter-analogy (441), the original case and its ruling are the same as in the original analogy; that is, al-Buṣādī accepts that the property and children of a convert to Islam in *dār al-ḥarb* are licit. As for the *ʿilla*, he intends to offer textual and rational evidence demonstrating that it has been misidentified and misapplied. Al-Buṣādī states that prior to examining this evidence, he will first reproduce the argument of the 'analogists' (hereafter a synonym for his opponents), then bring forth a number of scholars' opinions which he sees as calling into question the validity of this analogy.

The 'analogists' are represented by al-Wansharīsī (441-42); the passage al-Buṣādī uses to set forth the existing analogy is the same section of *Asnā al-matājir* referred to above,[156] in which al-Wansharīsī explains that the earlier jurists did not encounter this particular case and thus spoke of Muslims in non-Muslim territory in the abstract, and that when the new case arose after the fall of Sicily and parts of al-Andalus, the later jurists found the new case of conquered Muslims to be equivalent in all respects to the previously-discussed case of the converts. Al-Buṣādī states that al-Wansharīsī also mentions a counter to this analogy, meaning the opinion of Ibn al-Ḥājj,[157] but that this opinion was not properly explored.

Al-Buṣādī then begins his discussion of the *ʿilla* in the original analogy, contending that it has been misidentified (442-43). The analogists hold that the *ʿilla* for declaring converts' property to be licit is their alliance with infidels; this position is evidenced by al-Wansharīsī's statement that the later scholars "did not see a difference between the two groups, because they are as one with respect to their alliance with the

[156] Appendix A, 353-55.
[157] Appendix A, 364-67.

enemy . . ."[158] Yet the identification of this alliance as the *ʿilla* common to the original and new cases contradicts the analogists' assertion that this alliance was nonexistent during the first several centuries of Islam and that it did not arise until after the extinction of the master *mujtahid*s.[159] Al-Buṣādī argues that alliance with the enemy cannot be the *ʿilla* for the original case if it was nonexistent when that original case was discussed by the early masters.

Al-Buṣādī anticipates the counter-argument that what the analogists might have meant is that a different type of alliance with the enemy arose after the fall of Sicily and part of al-Andalus (443). He states this is incorrect, as the two types of alliance are exactly the same. If it is asserted that in the first case, residence in enemy territory precedes the convert's being Muslim, whereas in the second case the man's being Muslim precedes his residence in enemy territory, this is a difference in what preceded the man's residence, not a difference in the nature of that residence itself. Rather, in both cases the offending residence is subsequent to the man's being Muslim; this is obvious in the new case, and is true of the original case because the man only becomes a Muslim in non-Muslim territory after he converts and the laws of Islam come to apply to him. Thus, both the original and the new cases are instances of a Muslim residing voluntarily in *dār al-ḥarb* after being Muslim.

Al-Buṣādī then highlights a second portion of the cited passage from *Asnā al-matājir*, in which al-Wansharīsī asserts that the early masters only discussed the case of the convert, that there is no doubt that they did not turn their attention to new case, and that the new case concerned Muslims as to whose legal status the early jurists were

[158] Appendix A, 355.
[159] Appendix A, 3554.

silent (443-44).[160] The author's point here is to establish that the analogists explicitly acknowledge that this analogy, and specifically the above-identified *ʿilla*, is their only evidence for declaring the property of conquered Muslims to be licit. Once this is established, according to al-Buṣādī, there can be no recourse to any other *ʿilla*, nor any appeal to additional evidence, should he successfully prove this *ʿilla* to be invalid.

After having established the position of the analogists, al-Buṣādī cites a second lengthy passage appearing in *Asnā al-matājir*, this time as an example of earlier scholars' opinions which call into question the validity of their analogy (444-45). In the selected passage, taken from his *ʿĀriḍat al-aḥwadhī*, Ibn al-ʿArabī states that there was scholarly disagreement as to the status of the convert's property. He then proceeds to review the arguments and supporting evidence of Mālik, al-Shāfiʿī, and Abū Ḥanifā, and explains that the disagreement centered on two issues: whether or not the guarantor of inviolability for a Muslim's property is his being Muslim or his being in *dār al-Islām*, and whether or not *ḥarbī*s can possess true ownership.[161]

Al-Buṣādī makes two initial notes and three arguments on the basis of this passage. First, he cautions the reader not to interpret this passage as suggesting that a property owner must remain powerful in order to maintain the inviolability of his property once he has established that inviolability in *dār al-Islām* (445-46). This is known not to be correct, as an explicit proof-text supports the continued inviolability of the property of Muslim prisoners of war. Even property seized from Muslims by *ḥarbī*s remains the rightful property of those Muslims. Rather, the correct position is that any property obtained while an infidel must be brought to *dār al-Islām* in order for

[160] Appendix A, 354-55.
[161] Appendix A, 359-60.

legal possession of that property to be established; it is the former infidel's state of unbelief at the time of acquisition which makes the property licit.

Second, even if statements such as "the guarantor of inviolability is being in Muslim territory," and "the Muslim does not have real ownership if he is among them," were taken to mean that Muslims must reside indefinitely in Muslim territory in order to maintain the inviolability of their property, this would produce another contradiction in the analogists' reasoning (446). These very statements from the master *mujtahid*s would then apply directly to the case of the conquered Muslims; yet not only has it already been established that the analogists claim no such directly applicable text, but if convert and conquered Muslims had been addressed in the same authoritative text, an analogy could not be drawn in which the converts are claimed to be an earlier precedent which could govern the later case of the conquered Muslims.

Al-Buṣādī's three arguments on the basis of this passage are fairly straightforward (446-47). The first argument, based on Mālik's statement with regard to the convert in *dār al-ḥarb* that "his property may be taken, until he establishes legal ownership of it within Muslim territory," is that the property of converts only becomes inviolable once it is brought to *dār al-Islām*. The second argument, based on Ibn al-ᶜArabī's explanation that the scholars disagreed as to whether territory or religion guarantees inviolability, is that this disagreement specifically pertains to the obtainment of inviolability for previously violable property. The author explains that this is a different question from that of what factors might cause a loss of inviolability for property which is already protected. Al-Buṣādī's third argument, based Ibn al-ᶜArabī's discussion of the scholarly disagreement regarding the *ḥarbī*'s ability to possess

valid ownership, is that this disagreement related only to property acquired while an infidel, not to property acquired while Muslim.

Al-Buṣādī then uses these three arguments to refute the validity of the *ʿilla* that his opponents have assigned first to the rule governing the convert's property, and by extension, to that governing the conquered Muslim's property (447-48). Mālik's position that a convert's property is licit prior to his establishment of ownership within *dār al-Islām* means that this property, which was already licit, remains licit until it is made inviolable. The convert's residence in *dār al-ḥarb* cannot be the *ʿilla* for the violability of this property, because for this to be true, one of two false propositions would have to be true. Either residence in *dār al-ḥarb* is the *ʿilla* for the origination of this ongoing violability, or (thinking ahead to the new case) it is the *ʿilla* which requires that inviolable property becomes violable. The first proposition is not possible because the violability of the man's property precedes his residence – according to the argument that he is not a Muslim residing in *dār al-ḥarb* until his conversion – and an effect cannot precede a cause; thus, the man's sudden residence cannot be the reason for the pre-existing and continuing violability of his property. As for the second proposition, that this residence is the *ʿilla* for making something previously inviolable violable – which would work for the new case of conquered Muslims – this is not possible for the case of the convert, because his property is not inviolable prior to his establishing valid ownership of it in *dār al-Islām*. It is thus rationally impossible for a Muslim's residence in enemy territory to be the effective cause for the ruling that his property is licit.

Nor is it possible, al-Buṣādī continues, for residence in *dār al-ḥarb* to be a legal obstacle (*mānᶜ*) preventing the convert's property from being inviolable (448). This is likewise because such an obstacle cannot block something that does not yet exist, and the convert's property has not yet become inviolable prior to his bringing it to *dār al-Islām*. Rather, this is a case of an original absence of a condition which would bring about inviolability, not the presence of a hindrance blocking that inviolability.

After some further elaboration, al-Buṣādī declares that the only possible *ᶜilla* for the violability of the Muslim's property in the original case is the man's state of unbelief which preceded his conversion and thus necessarily preceded his residence as a Muslim in *dār al-ḥarb* (449). This unbelief is an attribute present only in the original case, and thus this *ᶜilla* is restricted to the case of the convert and may not be extended to the case of the conquered Muslim, who was at no prior point an unbeliever. Furthermore, if the effective cause for a ruling is not shared between two cases, then no analogy can be made between them (450).

Once this disparity between the two cases is established, al-Buṣādī pursues his second primary critique of the analogy drawn between these two cases, which is that the *ᶜilla* identified by the analogists for the original ruling is contrary to its *ᶜilla* as expressed in a clear textual precedent (450-51). Al-Buṣādī begins by reiterating a point first made in his discussion of Ibn al-ᶜArabī's passage identifying the two points of scholarly disagreement as to the convert's property. Mālik's position was that *ḥarbī*s (such as converts prior to conversion) do not possess legally valid ownership of their property. This lack of true ownership is the reason for the lack of inviolability of any property a convert acquires prior to his conversion. This previously acquired property

can be made inviolable by establishing ownership of it in *dār al-ḥarb*. As for property acquired after conversion, as a Muslim his ownership of that property is valid and it is inviolable.

This conclusion is supported by two types of evidence. First, in his *Mukhtaṣar*, Khalīl states that if a mother is an infidel at the time of birth, her child may be enslaved (450-51).[162] By extension, property is likewise licit if obtained while the owner is an unbeliever. More importantly, at least two commentators on Mālik's declaration that the convert's property may be taken as booty agree that early Mālikī jurist Abū al-Ḥassan[163] explained that this applied only to property acquired while an infidel.

Thus, the real ᶜ*illa* for the violability of converts' previously acquired property is unbelief; as for their residence in *dār al-ḥarb*, al-Buṣādī asserts that with respect to inviolability of property, this is an inconsequential attribute with no legal effect (451). At the same time, he grants that such residence may be relevant to questions of sin and thus produce legal effects such as censure, the rejection of testimony, and disqualification from holding religious appointments.

Al-Buṣādī then addresses the implications of this change of ᶜ*illa* for the analogy between converts to Islam in *dār al-ḥarb* and non-emigrant conquered Muslims (451-52). The original case should in fact be the legal status of converts' property which was acquired after they became Muslims, and the *ḥukm* is that this property is inviolable. If this rule is applied to the new case, it is therefore evidence for the continued inviolability of conquered Muslims' property, as that property too was acquired while

[162] Al-Tusūlī's second answer to ᶜAbd al-Qādir also includes a practical discussion of this rule. Al-Tusūlī explains that even if a father converts prior to the birth of his child to a still-infidel woman, that child follows her status and may be enslaved. Only after she converts are her children born inviolable Muslims. Tunisian National Library ms. 2418, folio 15b.
[163] This may be Abū al-Ḥasan al-Qābisi (d. 404/1014), and early Tunisian Mālikī scholar.

Muslim. Thus, what the analogists have claimed is evidence in their favor is actually evidence against them.

In order to further clarify this point, al-Buṣādī states the confusion arises from the erroneous belief that the guarantor of inviolability for a Muslim's property is his being Muslim (452). Rather, it is made clear from the statements of Mālik that this property is made inviolable by establishing ownership of it within *dār al-Islām*. For Muslims who convert in *dār al-Islām*, that territory immediately provides inviolability. For Muslims who convert outside of Muslim territory, it is not the case that their property would be inviolable by virtue of their merely being Muslim were it not for the removal of that inviolability because of their loyalty to infidels. On the contrary, their property is not inviolable until they establish ownership in *dār al-Islām*.

Al-Buṣādī states that he has belabored this point in order to make clear that the analogy as it has been presented by his opponents in essence makes the property of a conquered Muslim, whose ownership of that property has been established in *dār al-Islām*, equivalent in status to the property of a *ḥarbī* (Muslim or not, as converting does not change the status of previously acquired property), merely on account of the non-emigrant Muslim's commission of the sin of living in *dār al-ḥarb* (453-54). Not only has it been demonstrated above that this is an invalid analogy, but it is also well known that the property of a Muslim cannot be made licit merely by his commission of an act of disobedience to God. Al-Buṣādī notes that this rule is discussed in legal works under monetary penalties, and that only unbelief should render a Muslim's inviolable property licit.

Al-Buṣādī then addresses the practical implications of declaring conquered Muslims' property to be licit (454). He asks if this would mean asserting that most or all such Muslims are capable of emigrating, or if it would mean considering licit the property of those Muslim who are unable to emigrate, even though it has been asserted that it is the failure to emigrate if required to do so that makes a Muslim's property licit. Or, he continues, would one attempt to distinguish between those capable of emigration as opposed to incapable? Or assume that their being mixed together is no obstacle to seizing this population's property? Al-Buṣādī's challenge here may be in part a response to the impracticalities of implementing Mā' al-ᶜAynayn's call, noted above, for the *mujāhidūn* to be careful not to pillage the property of those Muslims who are exempt from the obligation to emigrate.

The author then returns to his argument that the analogy presented by his opponents contradicts clear texts from the earliest Mālikī scholars (454-55). Al-Buṣādī reproduces the passage from the *Samāᶜ Yaḥyā*, included in *Asnā al-matājir*, which Ibn al-Ḥājj had used to support the distinction between Muslims who had previously been infidels and those who had not.[164] In this passage, Yahyā b. Yahyā (d. 234/848) asks Mālik's disciple Ibn al-Qāsim (d. 191/806-7) about those Muslims who remained in Barcelona after it was conquered by Christians in 185/801. Although these Muslims sought to protect themselves by assisting their conquerors in fighting other Muslims, Ibn al-Qāsim responds that because they are still Muslim, they are to be judged as illegitimate rebels, and their property is not licit. Al-Buṣādī states that this is an explicit and specific text from an early Mālikī authority supporting the principle that a

[164] For this passage and notes, see Appendix A, 365-66.

Muslim's property, if already established as inviolable, remains inviolable even if the Muslim owner subsequently resides in *dār al-ḥarb.*

As further textual support for his position that conquered Muslims retain the inviolability of their property, al-Buṣādī then addresses the status of Khārijites and apostates (455-56). According to the early Mālikīs, if Khārijites attacked other Muslims, they may be killed during battle, but their property was not to be taken; only the property of non-Muslim *ḥarbī*s could be taken in battle. Al-Buṣādī argues that if Khārijites, whom some do not even consider Muslim, retain the inviolability of their property even when fighting against Muslims, then surely the property of conquered Muslims likewise remains inviolable. If this were not evidence enough, Mālik, Ibn al-Qāsim, and others also supported the continued inviolability of the property of apostates. If a man committed apostasy, fled, and fought against Muslims, even for the rest of his life, these authorities held that his property remained inviolable until such time as he had been asked to repent and to return to Islam, and had refused. Al-Buṣādī stresses that if an apostate's property is not made licit, then it makes no sense to declare the property of conquered Muslims licit on account of their residence under non-Muslim rule.

In one of the two manuscript copies of the text, al-Buṣādī then states that scholars have divided loyalty to infidels into four categories: it may be indicative of unbelief, prohibited, permissible, and even recommended (457-58). He argues that verses such as Qur'ān 5:51 and 9:23, which include the statement that those who ally with unbelievers are considered to be among them, were revealed only with regard to those who approve of unbelief and who are thus apostates. As for those who do not

approve of unbelief and do not commit apostasy, but who are friendly to unbelievers and reside among them without compulsion, this group commits a prohibited act. Third, if a Muslim allies with infidels because of familial relations without weakening Islam, this could be recommended. This is evidenced by Muḥammad's having sent a Companion to the man's infidel brother in Mecca, and by Qur'ān 60:8; this is the same verse Sidīya Bāba had argued permitted residence under French rule and which Murabbīh Rabbuh used to argue the opposite (including 60:9). Finally, if Muslims are compelled, then their residence is permissible. Al-Buṣādī presents as evidence for this Qur'ān 3:28 ("unless you fear them greatly"), the same verse which has recurred throughout the emigration *fatwā*s to excuse residence under non-Muslim rule, but he does not elaborate on this point.

Al-Buṣādī then offers what appears to be a concluding statement in his argument against the validity of the convert-conquered Muslim analogy (458-59). He quotes al-Wansharīsī's statement that the later jurists' analogy was "of the utmost excellence and beauty" and counters that it was rather "of the utmost corruption and filth."[165] Rather than the two cases being "completely equivalent," al-Buṣādī holds them to be completely opposed.[166] In the original case, the object of the ruling is property for which ownership has not been established, and the ruling is that this property is licit. The reason (*ʿillā*) for this ruling is the owner's unbelief at the time of acquisition. In the new case, the object of the ruling is property for which ownership has been definitively established. The ruling is that this property is inviolable, because of the owner's having been Muslim at the time of acquisition. In the first case, the

[165] See Appendix A, 356; Appendix E, 458.
[166] Appendix A, 356.

complication arises of the owner's becoming Muslim; under the presumption of continuity (*istisḥāb*), the status of his property remains licit. In the new case, the complication arises of the owner residing in non-Muslim territory; under the same presumption, his property remains inviolable. In the first case, this property remains licit regardless of whether or not the Muslim remains in *dār al-ḥarb* willfully, while in the new case, the property of an owner who is exempt from the obligation to emigrate could not have been made licit under any circumstances.

In the next section of the *fatwā*, al-Buṣādī begins to relate his arguments more directly to the current state of affairs in Mauritania, noting the severity of internal strife and disagreement among Muslims (459-60). He states that even for the sake of argument, if one were to grant the validity of his opponents' analogy, another principle would need to be considered because of the prevailing circumstances. This principle is that every prohibited act which is an offense against God (rather than against other humans), such as the failure to emigrate, becomes permitted if the Muslim commits this offense out of fear for his life or his family and property. Al-Buṣādī states that this is found in the *Miʿyār*, in a passage taken from Ibn Abī Zayd's *al-Nawādir*.[167]

As additional evidence of this point, al-Buṣādī cites the comment made by al-Burzulī in response to Ibn ʿArafa's *fatwā* allowing the sultan to seize the property of a mixed group of belligerents and other Muslims.[168] Al-Burzulī states that the property of the non-belligerents is only licit if they have an alternative to residing among the belligerents; otherwise, they are like those compelled to remain in enemy territory, who are unable to leave and who fear for their lives, property, or families. Al-Buṣādī

[167] For this work, see Appendix A, 366 n. 104.
[168] This *fatwā* and comment are also in the *Miʿyār* and are discussed in chapter three, pp. 229-230.

then asserts that whether one agrees with this or not, no one who has any knowledge of the current conditions of the people in this country could deny their tremendous state of fear for their lives, property, and families, other than someone whose heart God has imprinted with zealotry (*taᶜaṣṣub*).

Al-Buṣādī adds that the allegation that those living under Christian rule are content with this situation is likewise false, and that the conditions under which they live are the best witness to this (461-62). Even when Muslims do manage to emigrate from under Christian rule, hoping to find support when they reach their destination, they are rather met with increasing hostility; despite themselves, many are forced to return from where they came. Al-Buṣādī also reproduces part of al-Māzarī's *fatwā* on Sicilian judges, which appears in *Asnā al-matājir*, in support of giving Muslims the benefit of the doubt as to their reasons for remaining under non-Muslim rule.[169]

Near the end of the *fatwā*, al-Buṣādī cautions that the task of jurists is grave (462-63) and should only be undertaken by truly qualified and serious scholars. He rebukes those who have grasped a convenient analogy and applied it indiscriminately and unceasingly, thereby making licit what should be prohibited, the lives and property of Muslims. Despite the warnings of God and the pious ancestors, those unqualified to derive legal rulings from *qiyās* have done so, and have corrupted the law. Al-Buṣādī cites one last passage from the *Miᶜyār* in connection with this point, taken from a substantial treatise authored by al-Wansharīsī on reprehensible and commendable innovations.[170]

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[169] See Appendix A, 374.
[170] For the entire treatise, see al-Wansharīsī, al-*Miᶜyār*, 2:461-511. For this passage, see 2:502-503.

In this passage, al-Wansharīsī states that one of the most reprehensible innovations is the issuance of *fatwā*s by those ignorant of the law, which has led to calamity and the destruction of religion and people. He cites a *ḥadīth* to the effect that when the truth has disappeared to the extent that no scholars remain, the people will take ignoramuses to be their leaders, asking them questions, and they will respond with baseless *fatwā*s, thus erring and leading others astray. Al-Wansharīsī also cites the opinion of an earlier scholar who complained that in his time people without knowledge had taken to evaluating sources of disagreement for themselves, picking from among them the opinion best suited to their interests, from any school of law. These people would take it upon themselves to determine what is prohibited and permitted, misinterpreting and abusing dispensations and deviant opinions, and sometimes even violating scholarly consensus.

Al-Buṣādī states that such sentiments are widespread in legal works (464). It does not appear that his purpose in reproducing this passage is to malign al-Wansharīsī's own use of analogy so much as to denounce the manner in which this aspect of *Asnā al-matājir* has been wielded by scholars or would-be scholars in his own time against those remaining under French control in Mauritania. Al-Buṣādī is accusing his own opponents, whether trained jurists or those claiming to have legal knowledge, of irresponsibly and inhumanely holding to this one analogy declaring Muslims' property to be licit, disregarding any other considerations related to these Muslims' residence in Christian territory and any textual evidence leading to alternate legal outcomes.

Lest anyone think that he himself has been partial to lenient opinions excusing residence under non-Muslim rule, al-Buṣādī concludes by reaffirming that it is absolutely prohibited for those capable of emigrating to remain under the control of those who deny the revelation of the Qur'ān and the prophethood of Muḥammad, and to exposed oneself to all of the worldly and religious corruptions this residence entails (464). This is followed by a prayer in which al-Buṣādī seeks divine forgiveness for any errors he has made. In one manuscript of the text, a poem summarizing the *fatwā* follows the body of the text (466-67).

Analysis

Al-Buṣādī's *fatwā* has been summarized at length for its importance as the most substantial refutation of al-Wansharīsī's *Asnā al-matājir* to be discussed thus far. While this text deserves a more thorough analysis, a preliminary assessment here will be limited to three points. First, al-Buṣādī's *fatwā* is a clear testament to the legacy of al-Wansharīsī's *fatwā*s as the authoritative precedents on emigration for later Mālikī scholars. Four centuries after the composition of *Asnā al-matājir* and a thousand miles to the south, even a scholar who disagreed with the basic logic of one of al-Wansharīsī's principal arguments was compelled to justify this disagreement in a treatise comparable in size to *Asnā al-matājir* and the Marbella *fatwā* combined. The opponents whom al-Buṣādī addresses throughout the text are clearly contemporaries of his who have continued to base their own positions largely on al-Wansharīsī's precedent.

Second, al-Buṣādī's approach differs markedly from the other jurists discussed here who have argued against their own obligation to emigrate. While Algerian Ibn al-

Shāhid and Mauritanians Sidīya Bāba and Murabbīh Rabbuh argued primarily against the applicability of *Asnā al-matājir* to their own circumstances, the parallel aspect of al-Buṣādī's text is secondary to his own primary argument, which is that al-Wansharīsī's analogy between the property of *ḥarbī* converts to Islam and non-emigrant conquered Muslims is not valid under *any* circumstances. Although al-Buṣādī limits his discussion to this question of property, his attack on a central and previously uncontested component of *Asnā al-matājir* serves to challenge the authority of this precedent as a whole and surely had greater implications than the author wished to pursue in this *fatwā*. As he notes in his conclusion, al-Buṣādī did not wish to be seen as contesting the prohibited nature of voluntary residence under enemy rule, or as in any way making light of the very grave moral consequences of such a choice.

In this sense, al-Buṣādī's position is comparable to that of al-Māzarī, whose *fatwā* on judges' probity the Mauritanian scholar cites favorably. Both jurists uphold the obligation to emigrate for those capable of doing so, but note the impracticality of attempting to differentiate from a distance exactly who is capable or incapable of emigrating, and support giving Muslims the benefit of the doubt as to their reasons for remaining under Christian rule. For al-Māzarī, this meant accepting non-emigrant judges' documents as valid. Al-Buṣādī's position on this particular point is unclear; at one point he appears to allow that the sin of choosing to remain under enemy rule disqualifies a Muslim from holding judicial office. Nonetheless, he is clear that even a proven act of disobedience toward God would not justify declaring a Muslim's property to be licit.

Third, like the other jurists discussed above, al-Buṣādī argues that fear of the enemy exempts Muslims from the obligation to emigrate, without direct or indirect reference to al-Wahrānī's *fatwā*. In identifying proof-texts for the four types of loyalty to infidels (indicative of infidelity, prohibited, permitted, and recommended), al-Buṣādī cites 3:28 ("unless you fear them greatly") in support of the dispensation to live under non-Muslim rule if one fears for one's life, property, or family. Closer to the end of the *fatwā*, he cites al-Burzūlī's comment that those who remain among a community of belligerents should not be held accountable for this if they are compelled by fear for themselves, their properties, or their families. In both instances, al-Busādī's concern appears limited to establishing a dispensation for residence under non-Muslim rule on account of fear; he does not refer to dissimulation nor justify any specific actions other than residence.

Fourth, while some scholars have argued that al-Wahrānī's *fatwā* is in part an argument against *Asnā al-matājir*, al-Buṣādī's *fatwā* helps to demonstrate what a serious refutation of al-Wansharīsī's text might look like. While al-Wahrānī's *fatwā* is written as a comforting and practical guide for lay Muslims, with one symbolic citation of an earlier jurist's opinion and a handful of allusions to scriptural proof-texts, al-Buṣādī's text is a substantial and sustained technical critique of the legal reasoning employed by al-Wansharīsī, supplemented with several related arguments grounded in revealed proof-texts and the authoritative commentary of earlier jurists, crafted in a high rhetorical style, and explicitly intended to shape the professional legal discourse. In the scholarly arena, al-Buṣādī's *fatwā* may or may be the match of *Asnā al-matājir*; al-Wahrānī's *fatwā* certainly appears outclassed.

Conclusion

If this assessment does not do justice to the importance of al-Wahrānī's *fatwā*, it may be noted that the Moriscos appear to have been no more interested in reading and copying *Asnā al-matājir* than later Mālikī scholars were in citing or debating al-Wahrānī's text. As argued in chapter one, we have no reason to believe, and ample reason to doubt, that *Asnā al-matājir* circulated in the Iberian peninsula either before or after the Morisco period. Harvey notes that al-Wahrānī's text is the only *fatwā* related to emigration known to have been in Morisco hands.[171] The foregoing review of later Mālikī *fatwā*s on emigration, if necessarily non-exhaustive, is representative enough to suggest that these texts' fates were reversed south of the Mediterranean: while al-Wansharīsī's *fatwā*s were foundational for later rulings on emigration, it appears quite plausible that al-Wahrānī's *fatwā* was never in North or West African hands, other than those of the author.

Al-Wansharīsī's and al-Wahrānī's texts cannot usefully be described as representing opposite ends of a spectrum of opinions on the obligation to emigrate. The stark contrast in the legacies of these rulings provides further confirmation for the argument, begun in chapter one, that these *fatwā*s differ from one another in almost every respect: legal question treated, form and function of the response, audience, stature of the issuing *muftī*, and reason for later importance. On the one hand, al-Wansharīsī responded to two questions directly concerning the obligation to emigrate for capable Muslims, and responded with a well-argued, two-part treatise (*Asnā al-matājir* and the Marbella *fatwā*). He wrote for two immediate audiences: the *muftī*, most

[171] Harvey, *Muslims in Spain*, 67.

likely a court advisor, who had posed the questions; and the wider professional legal audience of the *Miʿyār*, which included al-Wansharīsī's own colleagues and students as well as future generations of jurists throughout the Mālikī world (most of Muslim Africa). Although al-Wansharīsī was asked at least one other question related to emigration (in the Berber *fatwā*), I have also argued (chapter three) that he deliberately crafted a more elaborate response to Ibn Qaṭīya's questions because of the greater potential of the Andalusī material to serve as a compelling precedent for later jurists.

On the other hand, al-Wahranī's *fatwā* is not about emigration; his audience was as clearly incapable of emigrating as the Andalusīs of *Asnā al-matājir* were capable. Rather, al-Wahrānī wrote his 1504 *fatwā* as an inspirational and practical guide for a lay Morisco community in need of advice as to how to approximate adherence to Islamic law under the gravest circumstances of fear and oppression. *Asnā al-matājir*'s hierarchical enumeration of proof-texts and detailed discussions of scholarly consensus and disagreement would not only have been inappropriate for this audience, but also would have been an unnecessary hindrance to smuggling the text into Granada and transmitting it to future generations of clandestine Muslims. While al-Wahrānī provides enough legal evidence to give the Moriscos confidence in the legitimacy of his opinions, his primary thrust is to inspire them to remain steadfast, not to convince other jurists of the validity of their struggle. He likely intended no further audience beyond his questioners, and probably made no attempt to distribute the *fatwā* among his peers in Fez for the purposes of scholarly debate. As al-Wahrānī does not address emigration and did not write for a professional audience, we should not be surprised

that his text appears to have had no appreciable impact on the development of later legal thought on Muslims living under non-Muslim rule.

What al-Wansharīsī's and al-Wahrānī's *fatwā*s do have in common is that they were incredibly influential for their respective audiences. Moriscos continued to copy al-Wahrānī's text, presumably at great risk, until as late as 1609; Harvey has thus called it the "key theological document for the study of Spanish Islam" in the Morisco period.[172] Moriscos would not have judged this text primarily on the basis of al-Wahrānī's professional reputation or the quality of his legal arguments, but rather on the basis of the encouragement, validation, and guidance the *fatwā* contained. The importance of this text lies in the value attached to it by the lay Muslim audience to which it was addressed.

Al-Wansharīsī's *fatwā*s were likewise successful in becoming authoritative for the audience to which they were addressed. This chapter has demonstrated that later Mālikī jurists acknowledged *Asnā al-matājir* and the Marbella *fatwā* to be the dominant precedents on the issue of emigration from non-Muslim to Muslim territory. The writings of Ibn al-Shāhid, Sidīya Bāba, and al-Buṣādī show that even later jurists who disagreed with al-Wansharīsī's *fatwā*s or their applicability to particular contexts recognized these *fatwā*s as important precedents which had to be reinterpreted or refuted in the course of their arguments.

For those later jurists who agreed with al-Wansharīsī, the writings of ʿUlaysh and Ibn Ruwayla demonstrate that some were content simply to reproduce al-Wansharīsī's *fatwā*s wholesale. Although Nigerian *fatwā*s have fallen outside the scope

[172] Stewart, "Muftī," 2-3; Harvey, *Muslims in Spain*, 60.

of this study, it also worth noting in this regard ᶜUthman dan Fodio's (d. 1817) *Bayān wujūb al-hijra ᶜala al-ᶜibād*, or "The Exposition of the Obligation to Emigrate upon the Servants of God," the extensive treatise Dan Fodio wrote in 1806 in support of his successful *jihād* to establish the Sokoto Caliphate in what is now Nigeria.[173] In this treatise, Dan Fodio justifies the obligation to emigrate even from territory ruled by nominally Muslim rulers, if those rulers were seen to be upholding corrupt and un-Islamic practices. Although he relies primarily on scriptural proof-texts and rarely quotes directly from *Asnā al-matājir* or the Marbella *fatwā*, Dan Fodio nonetheless uses these earlier rulings to great effect, claiming in one sweeping statement that al-Wansharīsī has demonstrated a unanimous consensus among jurists as to the obligatory nature of emigration to Muslim territory.[174] He thus achieves a similar effect as do 'Ulaysh and Ibn Ruwayla, but by declaring al-Wansharīsī to have definitively established a consensus rather than by assuming his readers will become convinced of this by reading these *fatwā*s for themselves.

The success of al-Wansharīsī's *fatwā*s in becoming the authoritative precedent for later Mālikī rulings can be attributed to a number of factors. Most notable is perhaps al-Wansharīsī's monumental achievement in compiling the *Miᶜyār*, which became a standard textbook and authoritative reference manual for Mālikī legal professionals. Compiling the *Miᶜyār* not only elevated al-Wansharīsī's status among his peers and later jurists, but also guaranteed that future generations of jurists would be inclined to associate al-Wansharīsī's particular choices of worthy inclusions with the

[173] ᶜUthmān Ibn Fūdī [ᶜUthman dan Fodio], *Bayān wujūb al-hijra ᶜala al-ᶜibād*, ed. and trans. F. H. El Masri (Khartoum: Khartoum University Press, 1978). El Masri includes an analysis of the text and an overview of Dan Fodio's life (1-39).
[174] Ibn Fūdī, *Bayān*, 26, 48.

commonly accepted views of the school. When those inclusions were also his own well-argued *fatwā*s, al-Wansharīsī's ability to influence Mālikī legal thought naturally would be enhanced. The credibility of *Asnā al-matājir* even may have been subtlety promoted by virtue of al-Wansharīsī's inclusion of some of its components, such as al-Māzarī's *fatwā* on judges' probity and Ibn al-ᶜArabī's classification of types of *hijra*, elsewhere in the *Miᶜyar* as authoritative precedents of their own;[175] or by his inclusion of his own extensive writings on the proper method of issuing *fatwā*s.[176]

Al-Wansharīsī's *fatwā*s on emigration were also moderate for his time, amenable to adaptation for later contexts, and, in the eyes of later jurists, supported by historic fact, as the loss of al-Andalus would become of the most powerful and enduring symbols in Islamic history. That his *fatwā*s were moderate and relatively uncomplicated, as demonstrated in chapters two and three, meant that they could be adapted in the service of either stricter or more lenient opinions. Thus ᶜAbd al-Qādir, who accuses non-emigrants of apostasy, urges his readers to consult al-Wansharīsī's *fatwā*s and uses the fate of Muslims in al-Andalus to argue for the inevitability of a Christian attempt to eradicate Islam from Algeria. Saᶜd Būh, who argues against the need to emigrate, also held *Asnā al-matājir* to have been the correct opinion with regard to al-Andalus, but reinterprets this precedent to his own needs by arguing that whereas the Andalusīs were persecuted and capable of emigrating, Mauritians are free to practice their religion and incapable of emigrating.

Even if al-Wahrānī had permitted residence under non-Muslim rule for those capable of emigrating, the Moriscos' eventual fate would have rendered his *fatwā* a poor

[175] See Appendix A for references.
[176] In addition to the passage on *iftā'* quoted by al-Buṣādī above, al-Wansharīsī also authored a lengthy *fatwā* on *iftā'* which takes the form of a debate with his students. Al-Wansharīsī, al-*Miᶜyar*, 12:9-46.

precedent for later jurists arguing against the need to emigrate. Even Ibn al-Shāhid, who made the most explicit appeal to *taqīya* in the *fatwā*s analyzed here, stressed that Muslims in Algiers were perfectly capable of performing their religious obligations under French rule; he may have argued less forcefully against the need to emigrate had he felt Islamic practices were being suppressed. As the accommodationist Mauritanian jurists discussed here likewise maintained that they were free to manifest their religion under French rule, another Nigerian example will help to illustrate this point regarding the utility of al-Wahrānī's ruling as a precedent. In his study of Muslim responses to British colonialism in Nigeria, Muhammd Umar discusses a letter written by Muhammad Buhari, the Wazir of Sokoto who surrendered to the British in 1903.[177] In this letter, Buhari justifies his decision to surrender in Islamic terms and reviews his deliberations with his legal advisors. He had ruled out *hijra* in lieu of surrender as impossible, and had then explored the option of *taqīya*, justified on the basis of Qur'ān 3:28, as a legitimate basis for submitting to the British and feigning friendship with non-believers in the service of self-preservation. Buhari approached the British fearing that they may even demand conversion to Christianity, and was relieved to find that no dissimulation would in fact be necessary, as the British did not intend to prohibit the fundamentals of Islamic practice. One of his legal advisors, Ahmad Sa^{c}d, supported Buhari's decision to surrender and reminded him of times in Islamic history, such as the Mongol capture of Baghdad in 1258, when Muslims had had to endure major adversities prior to God's restoration of order. Thus, facing a situation he feared could be comparable to that which the Moriscos had faced, Buhari found refuge in the

[177] Muhammad S. Umar, *Islam and Colonialism: Intellectual Responses of Northern Nigeria to British Colonial Rule* (Leiden: Brill, 2006), 80-83.

Qur'anic proof-text for *taqīya* – but not al-Wahrānī's *fatwā* – and his advisor recalled examples of Muslims regaining power after periods of defeat, which would certainly have provided more hope than the story of Spanish Islam. Al-Wahrānī's advice to the Moriscos to hold on until help arrived does not appear to have been a model which inspired later emulation.

As a final note, it should be stressed that al-Wansharīsī's *fatwā*s did not go on to influence later Mālikī thought where al-Wahrānī's did not, simply because al-Wansharīsī's opinions were the 'orthodox' ones. Rather, at the time of their issue, *Asnā al-matājir* and the Marbella *fatwā* were merely well-positioned to become authoritative precedents, and they indeed realized this potential because of the *Miʿyār*'s widespread circulation, usefulness, and reputation; because Muslims in Spain were first forcibly converted to Christianity and then expelled from the Iberian peninsula, appearing to prove al-Wansharīsī 'right'; and because later jurists chose to recognize these rulings as authoritative, well-argued, and adaptable to their own historical circumstances. These later jurists were not bound to find al-Wansharīsī's opinion more 'orthodox' than that of al-Wahrānī; in fact, it would not be unreasonable to state that *fatwā*s treating issues of Muslim allegiance and identity issued in politically sensitive times are never simple repetitions of previous, already-'orthodox' rulings. If al-Wansharīsī himself might have us believe that his opinions are simply continuations of accepted past precedent, this claim should not be taken at face value; the length and detail of his ruling alone might make us suspicious that he doth protest too much. As demonstrated in chapter three, al-Wansharīsī employed carefully selected and arranged past precedents in the crafting of opinions supportive of his desired ruling and relevant to his own historical context.

The writings of Ibn al-Shāhid, Saᶜd Būh, Sidīya Bāba, and al-Buṣadī confirm that al-Wansharīsī's arguments rely on perfectly disputable proof-texts, analogies, and historical precedents; but as each of these later jurists also acknowledge, *Asnā al-matājir*'s status as an authoritative precedent is unrivaled in the Mālikī school, for the identifiable reasons outlined here.

CONCLUSION

Although Harvey praises al-Wahrānī's "acute sympathy" for the Moriscos and describes the jurist's *fatwā* as the key document for understanding Moriscos' religious beliefs and practices, he also acknowledges that this text was likely meant to be a temporary expedient rather than a new doctrinal precedent.[1] Harvey stresses that "outside the Iberian Peninsula, at least, the older unbending interpretation was still being propounded, and we can be sure that the rigorist teachings of the Middle Ages shari^{c}a requirements will not have been forgotten overnight."[2] As Harvey also considers al-Wansharīsī's rulings to represent Mālikī orthodoxy at this time, he must have the Fāsī jurist and his *fatwā*s on emigration in mind here, and he is clearly using *Middle Ages* in the pejorative sense. This statement highlights two trends prevalent in scholarly approaches not only to *Asnā al-matājir* and the Marbella *fatwā*, but to Islamic law and to the history of the Islamic West more generally: an exaggeration of the extent to which Islamic history in Iberia was unique from, or can be studied in isolation from, its North African counterpart; and the tendency to consider legal rulings which appear illiberal to modern sensibilities to be inflexible, uncreative, and unresponsive to the changing needs of society.[3]

This study has argued against both of these notions. While al-Wansharīsī's *fatwā*s have been assumed to address the status only of Muslims living under Christian

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[1] Harvey, *Muslims in Spain*, 60, 64.
[2] Ibid., 64.
[3] Amira Bennison makes a convincing case for more effectively linking the study of Maghribī and Iberian history in "Liminal States: Morocco and the Iberian Frontier between the Twelfth and Nineteenth Centuries," in *North Africa, Islam and the Mediterranean World: From the Almoravids to the Algerian War*, ed. Julia Clancy-Smith (London: Frank Cass, 2001), 11-28.

rule in Iberia, and have been placed in exclusive conversation with other rulings related to conquered Sicilian or Andalusī Muslims, chapters one and two have shown that these rulings have as much or more to do with North Africa as they do Iberia. By the time the Andalusīs of *Asnā al-matājir* arrived on the southern shores of the Mediterranean, Maghribī Muslims had been subject to Christian rule in parts of Morocco for the better part of a century, and this situation had given rise to a Fez-based juristic discouse regarding their status. Al-Wansharīsī himself contributed to this discourse, much of which is preserved in a-Zayyātī's *al-Jawāhir al-mukhtāra*, prior to composing the two *fatwā*s on emigration that he would include in the *Miʿyār*.

I have argued that al-Wansharīsī crafted *Asnā al-matājir* and the Marbella *fatwā* not to encourage Mudéjars to emigrate or to condemn those among them who could not or would not do so, but in order to serve at least two purposes, for two audiences located primarily in the Maghrib. First, in *Asnā al-matājir* al-Wansharīsī responds to another Maghribī jurist's request for advice as to the proper punishment of the unhappy Andalusī emigrants who were slandering *dār al-Islām* and the concept of *hijra*. His identification of *fitna* as their most heinous crime, and his insistence that they be given a severe, *exemplary* punishment, suggest a concern that the spread of these Andalusīs' corrupting ideas among Maghribīs could work against the *fatwā*s he and his peers had just issued emphasizing the prohibition of living under Christian rule, trading with the enemy, spying or fighting for them, and viewing favorably their dominance.

Second, al-Wansharīsī also deliberately crafted *Asnā al-matājir* and the Marbella *fatwā* to shape legal discourse – to be consulted, discussed, and studied by the legal

professionals and students who would become the audience of the *Miʿyār*. While al-Wansharīsī employs many of the same arguments in his Berber *fatwā* as in these two Andalusī *fatwā*s, and while I have argued that he did not view the latter as exceptional in terms of the legal issues they treat or the positions he adopts, I have also suggested that al-Wansharīsī did see in the Andalusī material a greater potential for the construction of authoritative precedents. The dramatic loss of al-Andalus and the straightforward nature of Christian-Muslim relations in Iberia, at least as viewed from North Africa, simply made *Asnā al-matājir* and the Marbella *fatwā* better candidates than the Berber *fatwā* to serve as sites for the elaboration and preservation of precedents which would be compelling and instructive for future generations of jurists.

Chapters three and four have challenged the second assumption noted above, that rulings which appear illiberal and conservative are indicative of a refusal or inability to adjust to changing times. As demonstrated in chapter three, al-Wansharīsī strategically selected and rearranged existing precedents, proof-texts, and new legal arguments in order to design a ruling (*Asnā al-matājir*) responsive to two present contexts (Muslims living under Christian rule in Iberia and North Africa) and adaptable to innumerable future ones. That he was able to do this with great success – as shown in chapter four – is a testament to his skill, interpretive dexterity, and even creativity.

While jurists tend to ground the authority of their rulings in claims of continuity with received tradition, this does not indicate an absence of juristic discretion or adaptation to changing circumstances. In a recent study tracing the issuance and later citation of a judicial ruling over several centuries, David Powers and

Etty Terem reach several conclusions also supported by the present dissertation.[4] They argue that while *fatwā*s derive their authority from their adherence to earlier rulings,

> It is impossible to draw upon an older text and apply it to a new case without somehow adding to, modifying, or transforming its meaning . . . the authority of a legal text is continuously constructed and reconstructed and should never be taken for granted. The *muftī* aspires to compose a text that is faithful to the past, appropriate for the present, and mindful of the future.[5]

Not only are past rulings reconstructed and changed by the simple fact of their application to new cases, but jurists like al-Wansharīsī deliberately deployed past precedents in ways supportive of new positions, as in his replacement of Ibn Rabīʿ's section on judges' probity with al-Māzarī's *fatwā* in *Asnā al-matājir*.

Saba Mahmood's recent work on the women's mosque movement in Egypt also provides a helpful theoretical framework for understanding the use of interpretive discretion in the service of 'conservative' rulings. Arguing against the tendency in feminist scholarship to locate women's agency only in their resistance to partriarchal domination or in their capacity to subvert norms, Mahmood suggests that the pious cultivation of modesty and patience are also forms of constructive action and achievement. She writes that "in this sense, agentival capacity is entailed not only in those acts that result in (progressive) change but also those that aim toward continuity, stasis, and stability."[6] Similarly, juristic discretion is found not only in departures from standard school doctrine or in innovative solutions to novel cases, but also in the creative work that often goes into the 'mere' maintenance of precedent.

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[4] David and Etty Terem, "From the *Miʿyār* of al-Wansharīsī to the New *Miʿyār* of al-Wazzānī: Continuity and Change," *Jerusalem Studies in Arabic and Islam* 33(2007): 254-56.
[5] Ibid., 254-55.
[6] Saba Mahmood, "Feminist Theory, Embodiment, and the Docile Agent: Some Reflections on the Egyptian Islamic Revival," *Cultural Anthropology* 16, no. 2 (2001): 202-36.

As jurists' reconstructions of prior rulings is often subtle enough to mask the appearance of change, we can better understand a *muftī*'s balance between the maintenance of past precedents and adaptation to his present context by studying inter-related *fatwā*s addressing the same or similar questions over time. As opposed to studying all of the *fatwā*s issued on a particular issue in a given time period, tracing the trajectory of legal arguments as they are first issued, then edited or reformulated to serve as authoritative precedents in later rulings, brings into much finer detail the types of choices and changes made by each successive jurist. It is moments of change that allow us to explore the contextual factors that most often influence legal thought; thus recognizing changes in the arrangement and types of arguments deployed in legal rulings, and not just in a jurist's final judgment, greatly broadens our field of data for exploring the development of Islamic law.

Appendix A:

Translation of *Asnā al-matājir*

Title (appears at end of text)

Asnā al-matājir fī bayān aḥkām man ghalaba ᶜalā waṭanihi al-Naṣārā wa-lam yuhājir, wa-mā yatarattabu ᶜalayhi min al-ᶜuqūbāt wa-l'zawājir

The Most Noble Commerce, an Exposition of the Rulings Governing One Whose Native Land has been Conquered by the Christians and Who Has Not Emigrated, and the Punishments and Admonishments Accruing to Him[1]

Question (introduced by al-Wansharīsī)

The honorable master jurist, the accomplished preacher, the enduring virtuous exemplar, the pure sum of excellence, the man most admired for his moral rectitude, Abū ᶜAbd Allāh b. Qaṭīya[2] -- may God perpetuate his noble achievement and reputation – sent to me the following text:

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[1] This translation is based primarily on Aḥmad Najīb's critical edition of this text: Aḥmad Najīb, ed., *Asnā al-matājir fī bayān aḥkām man ghalaba ᶜalā waṭanihi al-Naṣārā wa lam yuhājir, wa-mā yatarattabu ᶜalayhi min al-ᶜuqūbāt wa'l-zawājir*, by Aḥmad b. Yaḥyā Al-Wansharīsī (n.p: Al-Markaz al-ᶜIlāmī lil-Dirāsāt wa'l-Nashr, 2006). The following three editions have also been consulted: 1) the Rabat-Beirut printed edition: Aḥmad b. Yaḥyā al-Wansharīsī, *al-Miᶜyār al-muᶜrib wa'l-jāmiᶜ al-mughrib ᶜan fatāwī ahl Ifrīqiyā wa'l-Andalus wa'l-Maghrib*, ed. Muḥammad Ḥajjī, et al. (Rabat: Wizārat al-Awqāf wa'l-Shu'ūn al-Islāmīya and Beirut: Dār al-Gharb al-Islāmī, 1981-83), 2:119-41; 2) the Fez lithograph edition: Aḥmad b. Yaḥyā al-Wansharīsī, *al-Miᶜyār al-muᶜrib wa'l-jāmiᶜ al-mughrib ᶜan fatāwī ahl Ifrīqiyā wa'l-Andalus wa'l-Maghrib*, ed. Ibn al-ᶜAbbās al-Būᶜ Azzāwī, et al. (Fez, 1897-98), 2:90-110; and 3) Ḥusayn Mu'nis's edition: "Asnā al-matājir fī bayān aḥkām man ghalaba ᶜalā waṭanihi al-Naṣārā wa lam yuhājir, wa-mā yatarattabu ᶜalayhi min al-ᶜuqūbāt wa'l-zawājir," *Revisto del Instituto Egipcio de Estudios Islamicos en Madrid*, 5 (1957): 1-63 (also numbered 129-91). Mu'nis's edition was later reprinted as a booklet with the same title (Al-Ẓāhir [Cairo], Egypt: Maktabat al-Thaqāfa al-Dīnīya, 1996), but references will follow the pagination of the more widely consulted original edition (1-63); pagination in the book differs only slightly. In addition to these editions of *Asnā al-matājir*, I have consulted an unpublished, draft edition of a *fatwā* issued by Ibn Rabīᶜ and quoted extensively by al-Wansharīsī; this edition was prepared by Drs. Sjoerd van Koningsveld (Leiden, NL) and Gerard Wiegers (Nijmegen, NL) in cooperation with Dr. Umar Ryad (Leiden, NL), who generously agreed to share this work with me. On the basis of this *fatwā*, I have occasionally agreed with the Rabat-Beirut edition of *Asnā al-matājir* against Najīb's edition; other considerations on the basis of Ibn Rabīᶜ's *fatwā* are noted below. Text marked in bold indicates material quoted or closely paraphrased from Ibn Rabīᶜ's *fatwā*.

[2] This *muftī* has not yet been identified by scholars working on this *fatwā*, although he must have been a Maghribī and a contemporary of al-Wansharīsī.

"Praise be to God alone. Your answer [is requested], master[3] – may God be pleased with you and [may He] profit the Muslims through your life – regarding a legal case which has arisen (*nāzila*).[4] This [concerns] a group of those Andalusīs who emigrated from al-Andalus and left behind their houses, property, orchards, vineyards, and other types of immovable property; who spent in addition to this a large sum of their available money, and who escaped from under the rule of the infidel community; and who allege that they fled for the sake of God, taking with them [only] their religion, their lives, their families, their offspring, and whatever money they had left – or that some of them had left; and who – praise be to God the Exalted – settled in the land of Islam (*dār al-Islām*), under submission to God, His prophet, and Muslim rule.[5]

"After having reached the land of Islam they regretted their emigration (*hijra*). They became angry and alleged that they found their condition difficult and impoverished. They alleged that they did not find in the land of Islam – which is this land of the Maghrib, may God preserve her, guard her dwellings, and grant her ruler victory – with respect to the means for procuring any type of income at all, any kindness, ease, or support; nor did they find sufficient security with respect to their ability to move throughout the region. They made this clear with a variety of ugly language which demonstrated their weakness in religion, their lack of the correct certainty in their faith, and the fact that their emigration was not for God and His

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[3] *Sīdī*, literally "my master," is a common form of respectful address in the Maghrib, similar to the English "sir."

[4] Literally 'occurrence,' this is a technical term for a legal case which has arisen and occasions an *istiftā'*, or request for a *fatwā*. Collections of *fatwā*s are also commonly referred to as *nawāzil*.

[5] *ḥukm al-dhimma al-Muslima*. *Dhimma*, meaning custody or guardianship and most often associated with the 'protected' status of Christians and Jews under Muslim rule, is used throughout the *fatwā* as a term for both Muslim and non-Muslim rule. It may be an error in some cases for *umma*. I have translated *ḥukm al-dhimma* and *dhimma* in all cases simply as 'rule.'

messenger as alleged. Rather, it was only for worldly gain[6] that they hoped to attain immediately upon their arrival, in convenient accordance with their desires. When they found that [emigration to the Maghrib] was not amenable to their interests, they openly derided the land of Islam and its state of affairs, cursing and defaming that which had prompted their emigration. They openly praised the land of unbelief (*dār al-kufr*) and its inhabitants, and (openly expressed) regret at having left it.

"It is [even] occasionally reported that one of them, in rejecting emigration to the land of Islam – which is this land, may God protect it – has said, 'Emigrate from there to here?! Rather, it is from here to there that emigration should be required!' And that another of them has said, 'If the ruler of Castile came to these parts, we would go to him requesting that he send us back there,' meaning to the land of unbelief. And from yet others of them, that they are looking for any kind of scheme by which they may return to the land of unbelief, thereby reverting, by any means possible, to [living] under infidel rule.[7]

"What [consequent] sin, diminished religious standing, and loss of credibility (*al-jurḥa*) attaches to them in this matter? Have they, through this, committed the very act of disobedience [to God] that they were fleeing from, if they persist in this behavior without repenting of it and returning to God the Exalted? And what of those among them who, after reaching the land of Islam – may God protect us! – return to the land of unbelief? Is it obligatory to punish those among them who have been witnessed

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[6] *Li-dunyā yuṣībūnahā*. This language appears in a *ḥadīth* which is cited in several collections, often in more than one section. See *Ṣaḥiḥ al-Bukhārī*, *Kitāb al-Waḥy*, 1; *Ṣaḥiḥ Muslim*, *Kitāb al-Imāra*, 155. The *ḥadīth* states that actions are rewarded according to their intentions; those who emigrate for God and His messenger are thus rewarded, whereas a *hijra* motivated by worldly gain or marriage is assessed accordingly.

[7] Najīb chooses a variant from a single manuscript here that reads *al-milla al-kāfira*, against the other three editions (Rabat printed, Fez lithograph, and Mu'nis's edition), which all read *al-dhimma al-kāfira*.

making these or similar statements? Or rather [should they not be punished] until they have been presented with exhortations and warnings concerning this matter? And then whoever repents to God the Exalted is left alone, and it is hoped that his repentance will be accepted, whereas whoever persists in this is to be punished? Or are they to be shunned and each one left with what he has chosen? And thus for whomever of them God establishes contentedly in the land of Islam, his emigration is [considered to have been performed] with valid intention and God the Exalted will owe him his due reward? But whoever of them chooses to return to the land of unbelief and to infidel rule takes upon himself the anger of God? And whoever among them maligns the land of Islam explicitly or implicitly is to be left to his own devices?

"Explain for us, in a comprehensive, generalizable,[8] [fully] explained, and sufficient exposition, the judgment of God Most High concerning all of this. Is it a condition of [the obligation to] emigrate that no one [is required to] emigrate other than to a standard of living guaranteed to be in accordance with his desires, immediately upon arrival and in whatever region of the Islamic world he has alighted? Or is this not a condition? Rather, emigration is obligatory upon them, from the land of unbelief to the land of Islam, whether to sweetness or bitterness, abundance or poverty, hardship or ease, with respect to worldly conditions. The true purpose of emigration is the protection of religion, family, and offspring, for example, and escape from the rule of the infidel community to the rule of the Muslim community, to whatever God wills by way of sweetness or bitterness, poverty or wealth, and so on

[8] *Mujarrad*, literally 'abstract.' The *mustaftī* is requesting a ruling that will be applicable not only to this specific case, but which sets forth the legal rules generally applicable to any similar case. An answer in which the *muftī* gives only his ruling and omits a detailed presentation of his legal reasoning or proof-texts can also be referred to as *mujarrad*, but that does not appear to be what the *mustaftī* is requesting and is not what al-Wansharīsī provides.

with respect to worldly conditions. May God the Exalted reward you [for your efforts], and may a noble state of peace serve as foundation to your elevated station, and may the mercy and blessings of God Most High be upon you."

Answer

I answered him with the following text:

Praise be to God alone, and may blessings and peace be upon our master and lord Muḥammad after Him.

The response to the matter about which you asked – and it is God the Exalted who grants success by His grace – is that emigration from the land of unbelief to the land of Islam is an obligation until the Day of Judgment, as is emigration from a land of sin and falsehood resulting from oppression or discord (*fitna).*[9] The messenger of God – may God bless him and grant him peace – said, "The time will soon come when the best property of a Muslim is a herd of sheep which he drives to mountaintops and rainy areas, fleeing with his religion from *fitna*s." This is recorded by al-Bukhārī, [Mālik in] the *Muwaṭṭa*', Abū Dāwūd, and al-Nisā'ī.[10] Ashhab[11] related that Mālik[12] said, "No one should reside in a place in which other than truth and justice are operative." [Ibn al-ᶜArabī][13] said in *al-ᶜĀriḍa:*[14]

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[9] *Fitna* may refer to any of several types of communal discord, from civil war to the presence of corrupting elements in society.
[10] *Ṣaḥīḥ al-Bukhārī*, *Kitāb al-Īmān*, 19; *al-Muwaṭṭa'*, *Kitāb al-Isti'dhān*, 16; *Sunan Abū Dāwūd*, *Kitāb al-Fitan*, 4267; *Sunan al-Nisā'ī*, *Kitāb al-Īmān*, 5036.
[11] Ashhab b. ᶜAbd al-ᶜAzīz al-Qaysī (d. 204/819), an Egyptian student of Mālik. ZK, 1:333; IM, 101-102.
[12] Mālik b. Anas (d. 179/795), eponymous founder of the Mālikī school of law. EI², s.v. "Mālik b. Anas."
[13] Abū Bakr Muḥammad b. ᶜAbd Allāh b. Muḥammad, known as Ibn al-ᶜArabī (d. 543/1148), a prominent Mālikī jurist from Seville. DM 376-78; EI², s.v. "Ibn al-ᶜArabī;" SN, vol. 1, 199-201.
[14] Ibn al-ᶜArabī (d. 543/1148), *ᶜĀriḍat al-aḥwadhī bi-sharḥ Ṣaḥīḥ al-Tirmidhī*, ed. Jamāl Marᶜashlī, 13 vols. in 8 (Beirut: Dar al-Kutub al-ᶜIlmīya, 1997). The work is often referred to as '*al-ᶜĀriḍa*.' Although al-Wansharīsī introduces what follows as a quote from *ᶜĀriḍat al-aḥwadhī*, and I have set it off as such, this

If one were to object, 'What if there was no region other than one like that?' then we would respond that one should choose the least sinful of them. For example, if there is a region in which there is unbelief,[15] then a region in which there is injustice is better than [the former]; or [if there is] a region in which there is justice and prohibited acts, then a region in which there is injustice and permitted acts is better than [the former] for residence.[16] Or [if there is] a region in which there are sins against the rights of God, then this is more suitable than a region in which there are sins involving the usurped rights of men.[17] This model supports what (Abū ᶜĪsa) related (from [Muḥammad] – may God bless him and grant him peace – on the day of the conquest of Mecca: "There is no *hijra* after the conquest; but there [remains the obligation of] *jihād*, and [correct] intention; and when you are summoned to battle, then go forth").[18] And ᶜUmar b. ᶜAbd al-ᶜAzīz[19] – may God be pleased with him – has said, "So-and-so is in Medina, so-and-so is in Mecca, so-and-so is in Yemen, and so-and-so is in Syria; by God the earth is filled with injustice and oppression." (End).[20]

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whole paragraph, from "emigration from the land of unbelief . . . " is taken from that work (4:7:66). Physical volume numbers for *ᶜĀriḍat al-aḥwadhī* (4) will be followed by the original volume number (7) and pages, as each original volume is paginated separately in this edition.

[15] The Rabat printed edition of the *Miᶜyār* reads *kibr*, arrogance, here instead of *kufr*, unbelief. While *kibr* may also mean an arrogant lack of belief in God, this is a typographical error in the Rabat edition; the Fez lithograph as well as the manuscripts consulted by Mu'nis and Najīb read *kufr*.

[16] In the Fez (2:92) and Rabat (2:121) editions of this *fatwā*, which Najīb follows here (44), it is rendered unclear which land is the preferable one for residence in the first two of these three propositions: *mithla an yakūn balad fīhi kufr wa-balad fīhi jawr khayr minhu, aw balad fīhi ᶜadl wa-ḥarām wa-balad fīhi jawr wa-ḥalāl khayr minhu li'l-maqām*. In the Escorial manuscript, followed by Mu'nis ("Asnā al-matājir," 23), each pair of choices is linked by *fa-balad*, not *wa-balad*, making it clear that the second choice in each case is the one considered preferable for residence. This reading (*fa-balad*) also appears in al-Wansharīsī's later repetition of Ibn al-ᶜArabī's discussion of *hijra* (Rabat, 2:440), and in *ᶜĀriḍat al-aḥwadhī* (4:7:66). In both *Asnā al-matājir* and this later discussion of *hijra*, the context in al-Wansharīsī further makes it clear that not living among infidels is of utmost importance.

[17] In the third proposition, it is clear grammatically that the first case is preferable to the second: *aw balad fīhi maᶜāṣī fī ḥuqūq Allāh, fa-huwa awlā min balad fīhi maᶜāṣī fī maẓālim al-ᶜibād*. Although Mu'nis ("Asnā al-matājir," 23) suggests emending the text of the third proposition to read that the first region is more suitable *for emigration from it*, this seems unwarranted; many jurists consider the rights of men (man's duties toward other men) to take precedence over the rights of God (man's duties toward God). However, if this principle were applied to the first two propositions, it would seem that the lands with *jawr*, injustice as to the rights of men, should be avoided in both cases and rather the lands with *kufr* and *ḥarām* should be preferred. It may be that Ibn al-ᶜArabī considered it impractical to attempt to avoid *jawr*, as his quote from ᶜAmr b. ᶜAbd al-ᶜAzīz attests.

[18] The editions and manuscripts relied upon by Mu'nis and Najīb all read simply *wa-hādhā al-unmūdhaj dalīl ᶜalā mā rawāhu* for this sentence, and both editors suggest something is missing. This is because in *Asnā al-matājir*, al-Wansharīsī is quoting directly from the passage in *ᶜĀriḍat al-aḥwadhī* (4:7:65-66), where it would be clear that Ibn al-ᶜArabī is referring to the *ḥadīth* under discussion (*lā hijra baᶜda al-fatḥ . . .*). In his later repetition of this passage (2:440), al-Wansharīsī clarifies this by adding the text which I have translated and inserted between parentheses above. Although al-Wansharīsī names Abū ᶜĪsa as the narrator of this *ḥadīth*, in *ᶜĀriḍat al-aḥwadhī* Ibn al-ᶜArabī only records that Abū ᶜĪsa stated that this *ḥadīth* is authentic (*ḥasan ṣaḥīḥ*). For the *ḥadīth*, see *Ṣaḥiḥ al-Bukhārī*, *Kitāb al-Jihād wa'l-Siyar*, 2783; *Ṣaḥiḥ Muslim*, *Kitāb al-Ḥajj*, 1353.

[19] ᶜUmar b. ᶜAbd al-ᶜAzīz (d. 101/720) ruled as Umayyad Caliph from 99-101/717-720. See EI^2, s.v. "ᶜUmar (II) b. ᶜAbd al-ᶜAzīz."

[20] Mu'nis notes that ᶜUmar b. ᶜAbd al-ᶜAzīz was referring to the actions of the Umayyad caliphs before him.

This [obligation to] emigrate does not lapse for those whose fortresses and cities have been overtaken by the tyrant – may God curse him – except in a situation of complete inability [to emigrate] by any means.[21] [This obligation does] not [lapse out of concern for one's] homeland or wealth, for all of that is invalid in the view of the revealed law (*al-shar*ᶜ). **God Most High said: {Except for the weak among men, women, and children, who are unable to devise a plan and are not guided to a way; as for these, perhaps God will pardon them. God is Most Clement, Oft Forgiving.}[22] This weakness which characterizes those who are forgiven is not the same weakness that is offered as an excuse at the beginning and fore parts of the verse.[23] This [other type of weakness] is the statement of those who wronged themselves, "We were abased in the earth." God Most High did not accept their words as an excuse, and indicated that they were capable of emigrating by some means. He offered forgiveness for that weakness which renders one incapable of devising a plan or being guided to a way, through His words {as for these, perhaps God will pardon them}; for 'perhaps' on the part of God indicates necessity [of action, rather than mere probability]. The weak man who is punished in the fore part of the verse is the one who is capable [of emigrating] by some means, and**

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[21] Instead of *illā bi-taṣawwur al-*ᶜ*ajzi* ᶜ*anhā* (except in a situation of inability), Muḥammad ᶜInān's summary of this passage records *wa-lā yataṣawwaru al-*ᶜ*ajzu* ᶜ*anhā* (and no situation of inability can be imagined), an unexplained reading which is not noted in or supported by any of the editions, and would not make sense in the context of the text as a whole. ᶜInān was working only from the Escorial manuscript. See ᶜInān *Nihāyat al-Andalus wa-tārīkh al-*ᶜ*Arab al-mutanaṣṣirīn*, 3rd ed. (Cairo: Maṭbaᶜ Lajnat al-Ta'līf wa'l-Tarjama wa'l-Nashr, 1966), 61.

[22] Qur'ān 4:98-99. Translations from the Qur'ān are my own, influenced by multiple published translations including Yusuf Ali, Pickthal, Arberry, and Haleem.

[23] This refers to the verse immediately preceding the two just cited. Qur'ān 4:97 is as follows: {Those who the angels take in death while they are wronging themselves, the angels will say to them: 'In what circumstances were you?' They will say, 'We were abased in the earth.' The angels will say, 'Was God's earth not spacious enough for you to have migrated therein?' Hell will be the refuge for such men – a wretched end!} Throughout the above paragraph, the "fore part of the verse" refers to verse 4:97, which addresses those who oppress themselves by failing to emigrate within a spacious earth, while the "latter part of the verse" refers to verses 4:98 and 4:99, quoted above, which indicate forgiveness for those who are unable to find a way to emigrate.

the weak man who is forgiven in the latter part of the verse is the one who is incapable [of doing so] by any means.

Thus if the one who is afflicted with this residence is incapable of fleeing with his religion and unable to find a way to do so; and no scheme appears to him, nor any power to devise such a scheme by any way or means; or if he is in the condition of one who is confined or imprisoned; or if he is very sick or very weak; then it is hoped that he will be forgiven, and he comes to occupy the same [legal status] as one who is forced to utter words of unbelief. However, he must also maintain a steadfast intention that, if he had the power or ability, he would emigrate. Accompanying this intention must be a sincere resolve, that if he gains the power to emigrate at any point, he will use that [power] to do so. As for the one who is capable [of emigrating], in any way and by any possible means, he is not excused [from doing so]. He wrongs himself if he remains, according to what is indicated in the relevant Qur'ānic verses and *aḥadīth.*

God Most High said: {Oh you who believe! Take not my enemies and yours as allies, offering them friendship when they have rejected the truth that came to you, driving out the Messenger and yourselves because you believe in God, your Lord. If you have gone forth to strive in My way and to seek My pleasure, secretly loving them, yet I am most aware of what you hide and what you reveal; and whoever among you does this has strayed from the straight path.}[24] God Most High also said, {Oh you who believe! Take not as intimates those outside your ranks; they will constantly strive to corrupt you. They desire suffering for you; Hatred has been revealed from their mouths, and what their breasts conceal is greater. We have made plain to you the

[24] Qur'ān 60:1. This is the beginning and end of one verse.

signs, if you will understand.}[25] **God Most High also said, {Believers should not take as allies unbelievers instead of believers. Whoever does that will have no connection with God in anything, except if you fear them greatly.** God warns you of Himself, and unto God is the return.}[26] **God Most High also said, {Incline not toward the unjust, or the Fire will seize you; you have no protectors apart from God, and then you will not be helped.}**[27] God Most High also said, {Give to the hypocrites the grievous tidings that for them there is a painful punishment. Those who take as allies unbelievers instead of believers, do they seek glory among them? Verily all glory belongs to God. And He has already revealed to you in the Book, when you hear people denying and ridiculing God's revelation, do not sit with them unless they take up a different subject, or else you yourselves will become like them. Indeed God will gather all the hypocrites and disbelievers together in Hell. The [hypocrites] watch you, and if God grants you victory, they say: "Were we not with you?" But if the unbelievers have some success, they say [to them] "Did we not gain an advantage over you, and protect you from the believers?" God will judge between you on the Day of Resurrection, and God will not grant the unbelievers any way against the believers.}[28] God Most High also said, {Oh you who believe! Do not take for allies unbelievers instead of believers. Do you wish to give God a clear warrant against you?}[29] **God Most High also said, {Oh you who believe! Take not the Jews and Christians as allies; they are the allies of each other. Whoever among you allies himself with them is one of them. Verily God does not guide the**

[25] Qur'ān 3:118.
[26] Qur'ān 3:28.
[27] Qur'ān 11:113.
[28] Qur'ān 4:138-41.
[29] Qur'ān 4:144.

unjust.}[30] **God Most High also said, {Oh you who believe! Take not as allies those of them, who were given the scripture before you, and the unbelievers, who make of your religion a mockery and a sport; but fear God if you are indeed believers.** When you call to prayer, they make of it a mockery and sport, because they are a people who do not understand.}[31] God Most High also said, {Your true ally is God, and His messenger, and those who believe – who establish the prayers and pay the alms, and who are bowed in worship. Whoever turns to God and His messenger, and to those who believe – for the party of God, they are the victors.}[32]

God Most High also said, {Those whom the angels take in death while they are wronging themselves, the angels will say to them: 'In what circumstances were you?' They will say, "We were abased in the earth." The angels will say, "Was God's earth not spacious enough for you to have migrated therein?" Hell will be the refuge for such men – a wretched end! Except for the weak among men, women, and children, who are unable to devise a plan and are not guided to a way; as for these, perhaps God will pardon them. God is Most Clement, Oft Forgiving.}[33]

God Most High also said, {You see many of them allying with those who do not believe. Evil is what they have sent forward for themselves; God is angered against them and they will abide in torment. Had only they believed in God, in the prophet, and in what has been revealed to him, they would not have taken them as allies. But many of them are transgressors.}[34]

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[30] Qur'ān 5:51.
[31] Qur'ān 5:57-58.
[32] Qur'ān 5:55-56.
[33] Qur'ān 4:97-99.
[34] Qur'ān 5:80-81.

Those who are wronging themselves in these preceding verses are none other than those who fail to emigrate despite having the ability to do so, as is indicated by the words of God Most High, {Was God's earth not spacious enough for you to have migrated therein?},[35] for their wronging of themselves consisted of their failure to emigrate, which meant residing with the unbelievers and increasing their numbers. And in His words, {whom the angels take in death} there is a warning, that those rebuked and punished for this are those who die persisting in this residence [among unbelievers]; but as for those who repent of this, and emigrate, and whom death [then] overtakes, even if [they are still] en route, [as for them], {whom the angels take in death} does not include them. It is hoped that their repentance will be accepted, and that they will not die while wronging themselves. This is also indicated by the words of God Most High: {Whoever goes forth from his home as an emigrant in the way of God and His messenger , and whom death then overtakes, his reward from God is sure. For God is Most Forgiving, Most Merciful}.[36]

All of these Qur'ānic verses, or most of them, except His words {You see many of them allying with those who do not believe . . .} to [this verse's] end,[37] are **clear texts prohibiting alliances** with unbelievers.[38] As for the words of God Most High, {Take not the Jews and Christians as allies; they are the allies of each other. Whoever among you allies himself with them is one of them. Verily God does not guide the unjust},[39] [this verse indicates that] there remains no pending doubt as to this prohibition. These

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[35] Qur'ān 4:97.
[36] Qur'ān 4:100.
[37] Qur'ān 5:80-81; see above.
[38] Al-Wansharīsī is making a distinction between the clear command "Take not as allies . . ." of many of the other verses, and this verse, which describes the punishment accruing to a group that has already performed a prohibited action.
[39] Qur'ān 5:51.

words of God Most High are likewise: {Oh you who believe! Take not as allies those of them, who were given the scripture before you, and the unbelievers, who make of your religion a mockery and a sport; but fear God if you are indeed believers.}[40]

The repetition of verses to this effect, and their conformity to a single consistent theme, confirms the prohibition [of alliance with unbelievers] and removes any potential uncertainty[41] concerning it. For if there is a clear text to this effect, and it is confirmed through repetition, then the uncertainty has clearly been removed. Moreover, these Qur'ānic texts and the prophetic *aḥādīth* and the clear consensus of scholars are all mutually reinforcing of this interdiction, for concerning this prohibition of residence among, and of alliance with, unbelievers, you do not find any [scholar] with a divergent opinion among those who pray toward Mecca (*ahl al-qibla*), who adhere to the noble Book which [God describes as follows:] {Falsehood cannot approach it from before or behind it. It is a revelation from the Wise, the Praised One.}[42] This is a categorical, religiously-prescribed prohibition,[43] like the prohibition of [eating] carrion, blood, and pork; and of killing a person without right, and its sisters [viz., similar violations] of the five absolute needs[44] which the leaders of [all] sects and religions have agreed are inviolable. Any [scholar] who contradicts this [prohibition] now, or who desires disagreement as to those who reside with or rely upon them, by permitting this residence, by considering it a matter of little consequence, and by making light of its legal status – [any such scholar] has deviated from the religion and

[40] Qur'ān 5:57. The connection between these two verses is that both specifically include people of the book, Jews and Christians, in addition to the generic "unbelievers."
[41] *Rāfiᶜ li'l-iḥtimāl al-mutaṭarriq ilayhi*, more literally suggests the removal of any loopholes or weaknesses in the case for this prohibition, which would render it probable rather than certain, or qualified rather than absolute.
[42] Qur'ān 41:42.
[43] *Fa-huwa taḥrīm maqṭūᶜ bi-hi min al-dīn.*
[44] These basic human needs are the protection of religion, life, reason, progency, and reason.

parted from the Muslim community. **He is defeated with [evidence] that no Muslim can defend [himself] against, and he is preceded by [scholarly] consensus, which must not be contradicted** and the course of which must not be violated.

The 'Leader of the Jurists' Abū al-Walīd Ibn Rushd[45] -- may God have mercy upon him – said at the beginning of the chapter on trade in non-Muslim territory (*arḍ al-ḥarb*) in *al-Muqaddimāt*:

> The obligation to emigrate has not lapsed; rather, emigration remains obligatory until the Day of Judgment. And by consensus of the Muslims it is obligatory upon one who converts to Islam in non-Muslim territory to not reside there where he will be subject to the laws of the polytheists, but to emigrate from there and to reach Muslim territory, where he will be subject to their laws [viz., the Muslims'].[46]

The messenger of God – may God bless him and grant him peace – said, "I am innocent of any Muslim who resides with the polytheists."[47]

However, those obligated to emigrate [from non-Muslim territory] are not prohibited from returning to their homeland if it reverts to a land of belief and of Islam, as [had been the case for] the Emigrants among the Companions of the messenger of God – may God bless him and grant him peace – [who] were prohibited from returning to Mecca. God reserved this [prohibition] for them [viz., the Emigrants] because of the merit entailed in it [viz., not returning to Mecca].[48]

[Ibn Rushd] said:

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[45] Abū al-Walīd Muḥammad b. Aḥmad b. Aḥmad b. Rushd al-Jadd (d. 520/1126), a prominent Mālikī jurist from Cordóba and grandfather of the Ibn Rushd who is known as Averroes. DM 373-74; IM 315-23; SN, 1: 190.

[46] Ibn Rushd, *al-Muqaddimāt al-mumahhidāt*, 2:153.

[47] *Anā barīʾ min kulli Muslim yuqīmu bayna aẓhur al-mushrikīn*, could also be translated, "I am not responsible for any Muslim who lives among the polytheists." See full *ḥadīth* and citation below.

[48] *illa anna hādhihi al-hijra lā yuḥramu ᶜalā al-muhājir bi-hā al-rujūᶜ ilā waṭanihi, in ᶜāda dār īmān wa-Islām, ka-mā ḥurima ᶜalā al-Muhājirīn min aṣḥāb rasūl Allāh -- ṣallā Allāhu ᶜalayhi wa-sallam – al-rujūᶜ ilā Makka liʾlladhī iddakharahu Allāh la-hum min al-faḍl fī dhālika*. In *al-Muqaddimāt al-mumahhidāt*, Ibn Rushd explains that the Muhājirūn (Emigrants) had been obligated to remain with Muḥammad, who prohibited them from resettling in Mecca even after the conquest. The Emigrants enjoyed an exclusive status and God granted them the utmost merit for their actions. Ibn Rushd, *al-Muqaddimāt al-mumahhidāt*, 2:152.

> Thus, if by virtue of the Book, the Sunna, and the consensus of the community it was obligatory for those who converted to Islam in non-Muslim territory to emigrate from there and to join the territory of the Muslims; and not to settle or remain among the polytheists, in order that they [viz., the converts] not be subject to their laws; then how could it be permissible for anyone to enter their territory – where he would be subject to their laws – for trade or for any other [reason]!?
>
> Mālik – may God have mercy upon him – deemed it reprehensible for anyone to live in a land where the pious ancestors were derided, so how [could it be permissible for anyone to live] in a land where [infidels] disbelieve in the Merciful, and where idols are worshiped instead of [God]!? Only the soul of a Muslim whose faith is diseased could settle upon this. (End).[49]

If you were to say:

"What is to be understood from the discussion of the author of *al-Muqaddimāt*, and [from that of] other early jurists, is a case in which Islam [i.e., being Muslim] is newly added to [an ongoing state of] residence among polytheists. The case which is asked about [in the question] is a case in which [a state of] residence [in non-Muslim territory] is newly added to an original state of Islam [i.e., being Muslim]. There is a vast difference between these two cases, so it is not proper to use [the first case] as the evidence [by which to judge] this case for which a rule is now requested."

I would say:

The early jurists' understanding [of this issue] simply related to those who fail to emigrate in the absolute. They exemplified this [failure to emigrate] with one of its manifestations, which is [the case of] one who converts to Islam in non-Muslim territory and remains there. This [case] which is asked about is likewise a second [of this failure's] manifestations. It differs from the first [case], the one used as an

[49] Ibn Rushd, *al-Muqaddimāt al-mumahhidāt*, 2:153.

example, only as to the particular characteristic of residence [in non-Muslim territory] being newly added [to an existing state of being Muslim].

In the first case, the one used as an example by the [early jurists], [a state of] Islam [i.e., being Muslim] is newly added to residence [in non-Muslim territory]. In the second case, the one which is asked about and which is assimilated to the [first case], residence [in non-Muslim territory] is newly added to Islam [i.e., already being Muslim]. The difference as to which [status] is newly added is a superficial one, and [this difference] is not considered [as supporting evidence for] the call to limit this ruling to [the first case] and to not extend [that ruling] beyond [that first case]. Rather, the guiding masters who preceded [us] and whom [we] follow devoted their discussions to the case of one who converts to Islam and does not emigrate. This is because this submission to to polytheist rule[50] was nonexistent in the beginning and early period of Islam; [this submission] only occurred, according to what has been said,[51] after centuries had passed, and after the extinction of the master *mujtahid*s of the great cities.[52] Thus, because of this – without doubt – none of them turned their attention to the legal rules [pertaining to this second case].

Then, when submission to Christian rule appeared this time in the fifth century A.H. and afterwards, when the cursed Christians – may God destroy them – seized the island of Sicily and some regions of al-Andalus, [at that point] some of the jurists[53]

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[50] *Al-muwālāt al-shirkīya*. Variants of this phrase (*al-muwālāt al-kufrānīya, al-muwālāt al-Naṣrānīya)* are used throughout to mean submission to non-Muslim rule. *Muwālāt* (alliance), from the same root as *awlīyā'* (allies), links this submission to the Qur'ānic verses prohibiting Muslims from allying with non-Muslims, and thus also connotes a prohibited form of political alliance or the illegitimate conclusion of a treaty with non-Muslims.

[51] *ʿalā mā qīla* could also mean "in the manner described," but as this added by al-Wansharīsī it probably reflects his reliance on Ibn Rabīʿ for this point.

[52] The eponymous founders of the law schools and their earliest disciples.

[53] Ibn Rabīʿ specifies that they were Maghribī jurists.

were questioned about this. They were asked about the legal judgments pertaining to those who commit [this submission]. They answered that they [i.e., those Muslims who remain in conquered territory] are subject to the same rules as those who convert to Islam [in non-Muslim territory] and do not emigrate. [These jurists] assimilated those who are asked about [i.e., Muslims in conquered territory], and as to whose legal status [the earliest jurists were] silent, to them [i.e., those who convert to Islam in non-Muslim territory].

[These jurists] considered the two groups to be equivalent in terms of the legal rules pertaining to their property and children; they did not see a difference between the two groups as to these [two issues]. This is because the two [groups] are as one with respect to their submission to the enemy, their living among them, their interacting and associating with them, their lack of separation from them, their failure to emigrate as is obligatory for them, and [their failure] to flee from them; and [with respect to] all of the other reasons which entail these legal rules, on which [the earliest jurists] were silent as regards this case whose status is [now] asked about. Thus, [these later jurists] – may God have mercy upon them – assimilated the legal rules on which they [i.e., the earliest jurists] were silent, and which pertain to those [Muslims] about whom they were silent, to the legal rules on which they had elaborated, [and which] pertained to those [who converted in non-Muslim territory]. Thus the scope of later jurists' interpretation in this became simply the assimilation of [the status of] those left unaddressed to [the status of] a group whose [status] was addressed, and which was completely equivalent to [the unaddressed group] in substance.

[This answer] from [these later jurists] – may God have mercy upon them – represents an impartial examination [of the issue], a cautious use of interpretation, and a reliance upon adhering to [the opinions of] the guiding masters who preceded [us] and whom [we] follow. Thus [this answer] was of the utmost excellence and beauty.

As for the evidence from the *Sunna* that this residence [in non-Muslim territory] is prohibited, what al-Tirmidhī includes [in his collection] is the following:

> The Prophet – may God bless him and grant him peace – sent an expedition to Khathᶜam. Some people sought protection by prostrating, but they were quickly killed. This reached the Prophet – may God bless him and grant him peace – and he ordered that one-half of the blood money be paid to them. He said: 'I am innocent of any Muslim who lives among polytheists.' They said: 'Why, Oh Messenger of God?' He said, 'Their fires should not be visible to one another.'[54]

And in the same chapter [of al-Tirmidhī]: "The Prophet – may God bless him and grant him peace – said: 'Do not live among the polytheists or associate with them. Whoever lives among them or associates with them, is one of them.'[55]

The explicit stipulation in these two traditions (*ḥadīth*s) as to the intended meaning is such that it will be obvious to anyone with sound judgment and a correct approach to evaluating evidence. The two [traditions] have been established as being among the *ḥasan* [good] traditions in the six compilations around which the core of Islam revolves.[56]

[The later jurists] said: 'There is no evidence that contradicts them [i.e., the rulings derived from these traditions]; there is no abrogating [evidence], no [evidence] that requires specification [of their legal applicability], or any other [evidence that

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[54] *Jāmiᶜ al-Tirmidhī, Kitāb al-Siyar*, 1604; *Sunan Abū Dāwūd*, *Kitāb al-Jihād*, 2645; *Sunan al-Nisā'ī*, *Kitāb al-Qasāma*, 4780. For Ibn al-ᶜArabī's commentary on this *ḥadīth*, see *ᶜĀriḍat al-Aḥwadhī*, 4:7:78-79.
[55] *Sunan al-Tirmidhī, Kitāb al-Siyar*, 1650; *Sunan Abū Dāwūd*, *Kitāb al-Jihād*, 2787.
[56] For a description of the six collections and terminology used to rank the reliability of traditions, see: Muḥammad Zubayr Ṣiddīqī, *Ḥadīth Literature: Its Origin, Development, and Special Features*, revised ed. (Cambridge: Islamic Texts Society, 1993).

would qualify the applicability of these rulings]. No Muslim disagrees as to what these two [traditions] stipulate. This is sufficient [support] for using these two [traditions] as evidence [as to legal rules].

This is in addition to mutual corroboration between these two [traditions] and explicit texts of the Book, and [between these two traditions and] the legal maxims; and the attestation of these two [sources] to the two [traditions].

In *Sunan Abū Dāwūd*, in a tradition related from Muᶜāwiya,[57] he stated: "I heard the messenger of God – may God bless him and grant him peace – say: 'The duty to emigrate will not cease until repentance ceases; and repentance will not cease until the sun rises from the west.'"[58]

On this [same topic] is a tradition narrated by Ibn ᶜAbbās. He stated: "The messenger of God – may God bless him and grant him peace – said on the day of the conquest of Mecca: 'There is no *hijra* after the conquest; but there [remains the obligation of] *jihād*, and [correct] intention; when you are summoned to battle, then go forth.'"[59]

Abū Sulaymān al-Khaṭṭābī[60] said:

> Emigration was recommended at the beginning of Islam, not obligatory; and this is the word of God – may He be exalted – {Whoever emigrates in the way of God will find many refuges and abundance in the earth}.[61] This was revealed when the polytheists' insults against the Muslims in Mecca intensified. Then, emigration became obligatory for Muslims upon the Prophet's – may God bless him and grant him peace – departure for Medina. [The Muslims] were ordered to move to his city, in order to be with him

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[57] ᶜAbd Allāh b. Muᶜāwiya b. ᶜAbd Allāh b. Jaᶜfar b. Abī Ṭālib (d. 130/747 or 748). EI², s.v. "ᶜAbd Allāh b. Muᶜāwiya."
[58] *Sunan Abū Dāwūd*, *Kitāb al-Jihād*, 2479.
[59] *Ṣaḥiḥ al-Bukhārī*, *Kitāb al-Jihād wa'l-Siyar*, 2783; *Ṣaḥiḥ Muslim*, *Kitāb al-Ḥajj*, 1353; *Sunan al-Tirmidhī, Kitāb al-Siyar*, 1590.
[60] Ḥamd (or Aḥmad) b. Muḥammad b. Ibrāhīm b. Khaṭṭāb al-Bustī, known as Abū Sulaymān al-Khaṭṭābī (d. 386/996 or 388/998) was a well-traveled jurist and traditionist who was born and died in Bust, in modern-day Afghanistan. EI², s.v. "Al-Khaṭṭābī."
[61] Qur'ān 4:100.

> and to cooperate and band together if anything serious befell them; and to learn and study the affairs of their religion.
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> Fear of the Qurāysh, who are the people of Mecca, had become great in that time. Thus when Mecca was conquered and submitted in obedience, this meaning [of the obligation to emigrate] came to an end. The obligatory nature of emigration was lifted, and its status returned that of a recommended or desirable duty.
>
> Thus these are two *hijra*s. Of the two, the one that has ceased is the obligatory one. The one that remains is the recommended one. This is how the two traditions may be reconciled, despite the disparity that exists between [the quality of] their chains of transmission. The chain of transmission for the tradition reported by Ibn ᶜAbbās is *muttaṣil ṣaḥīḥ* (sound, with an uninterrupted chain of narrators), and the chain of transmission [for the tradition reported by] Muᶜāwiya has a point of weakness (*fīhi maqāl*). (End.)

I say:[62] These two *hijra*s which are addressed in the traditions [reported by] Muᶜāwiya and Ibn ᶜAbbās are the two *hijra*s which ceased to be obligatory upon the conquest of Mecca. The first *hijra* is that which is motivated by fear for one's religion and person, like the Hijra of the Prophet – may God bless him and grant him peace – and of his Meccan Companions. This [*hijra*] was an obligation for them,[63] without which [their] faith would not have been complete. The second [*hijra*] consisted of emigrating to the Prophet – may God bless him and grant him peace – in his abode, where he had settled. Those who went to him pledged their allegiance [to him] on the basis of their *hijra*, while others pledged their allegiance on the basis of Islam.

As for emigration from the land of unbelief, it is obligatory until the Day of Judgment. Ibn al-ᶜArabī stated in *al-Aḥkām*:[64]

> Moving about on the earth is divided into six categories:
>
> The first: Emigration, which is leaving the land of war for the land of Islam. This was an obligation in the days of the Prophet – may God bless him and grant him peace – and this *hijra* remains obligatory until the Day of Judgment. The [*hijra*] which ceased with the conquest [of Mecca] was [the one that consisted of] travelling to the Prophet – may God bless him and grant him peace – wherever he was. [It is obligatory for anyone

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[62] Despite al-Wansharīsī's "I say," this next paragraph is taken from Ibn al-ᶜArabī's *ᶜĀriḍat al-aḥwadhī*, with some re-arrangement and the addition of the reference to the two *ḥadīth* reports; Ibn al-ᶜArabī was only referring to the "no *hijra*" tradition. Ibn al-ᶜArabī, *ᶜĀriḍat al-aḥwadhī*, 4:7:66.

[63] Najīb's edition (67) reads "to him," as does the Rabat printed edition (2:126). "To them" makes more sense here and is the variant that appears in Mu'nis's edition (34) and in Ibn al-ᶜArabī.

[64] The following passage appears in Ibn al-ᶜArabī's *Aḥkām al-Qur'ān*, a work of exegesis covering 500 verses of the Qur'ān of legal import. Ibn al-ᶜArabī, *Aḥkām al-Qur'ān*, ed. Riḍā Faraj al-Hamāmī (Beirut: Al-Maktaba al-ᶜAṣrīya, 2003), 1:496.

> who converts to Islam in the land of war to depart for the land of Islam].[65] If he remains in the land of war he commits and act of disobedience to God, and there is disagreement as to his status.

See the rest of the categories of emigration in [Ibn al-ᶜArabī's *al-Aḥkām*].

Ibn al-ᶜArabī also stated in *al-ᶜĀriḍa*:[66]

> God first prohibited Muslims to reside among polytheists in Mecca, and obligated them to join the Prophet in Medina. When God granted victory over Mecca, the *hijra* lapsed, and the prohibition on residence among polytheists remained.
>
> Those who sought protection by prostrating had not converted to Islam and remained among the polytheists; their seeking protection was only [conceived] at that moment. Yes, [it is true] that it is not permissible to kill one who hastens to Islam when he sees the sword at his head, by community consensus. But they were killed for one of two reasons: Either because prostration does not provide inviolability, and inviolability is only [achieved] through faith, as evidenced by pronouncing the two testifications of faith; or, because those who killed them did not know that [prostrating] made them inviolable. This [latter possibility] is the correct [one]. For when Khālid[67] rushed to kill the Banū Jadhīma, they said: "We have converted (*ṣaba'nā*)!" and they did not know to say "We have converted to Islam (*aslamnā*)!" So he killed them. The Prophet – may God bless him and grant him peace – paid blood money to [their families] because of Khālid's offense. The offenses of the ruler (*imām*) and his commander are [payable] from the treasury [*bayt al-māl*].
>
> He also said:[68] This indicates that saying specifically "There is no God but God and Muḥammad is the messenger of God" is not a condition of [converting to] Islam . . . [Muḥammad] only paid half of the blood-money [to those who prostrated] out of concern for compromise and the common good.[69] He paid the people of Jadhīma twice that amount [i.e., full blood-money],[70] in accordance with what was required by the circumstances of each one, based on their word.[71]
>
> The scholars disagreed as to the status of one who converts to Islam and remains in non-Muslim territory (*dār al-ḥarb*).[72] Can he be killed, or his family and property captured? Mālik said: "His life is spared, but his property can be taken, until he

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[65] This sentence in brackets does not appear in al-Wansharīsī, but is necessary to understand this passage taken from Ibn al-ᶜArabī (*al-Aḥkām*, 1:496). This passage in al-Wansharīsī differs slightly from that given in Ibn al-ᶜArabī; most notably, in *al-Aḥkām* Ibn al-ᶜArabī states that there are many categories of movement on the earth, that the first type is *hijra*, and that there are six categories of *hijra* (not of movement in general).

[66] Ibn al-ᶜArabī, *ᶜĀriḍat al-aḥwadhī*, 4:7:79.

[67] Sayf al-Dīn Khālid b. al-Walīd (d. 21/642), one of the most prominent military commanders of the early conquests.

[68] *qāla*. It is unclear to whom this sentence is attributed; it may be that Ibn al-ᶜArabī has taken this entire passage from another work and this marks the beginning of a new section taken from that work.

[69] In the elided section, Ibn al-ᶜArabī states that if someone says he is Muslim, this should suffice to give him the legal status of being Muslim. He also notes that he has already made this point in another work.

[70] Ibn al-ᶜArabī reads *mithla dhālika* (the same amount), while al-Wansharīsī reads *mithlay dhālika* (twice as much). The difference in the two cases appears to be that some of people of Khathᶜam were engaged in battle, and the status of those who prostrated was ambiguous; whereas the people of Jadhīma had already converted, and they laid down their arms when Khālid arrived.

[71] After Khālid's return, Muḥammad sent ᶜAlī to speak with the people of Jadhīma and compensate them for all their lost lives and damaged property. For an account of the Jadhīma incident, see Ibn Isḥāq, *The Life of Muḥammad*, trans. A. Guillaume (Oxford: Oxford University Press, 2003), 561-65.

[72] For an overview of opinions on this issue across time and legal schools, including many of the opinions cited by al-Wansharīsī, see Abou El Fadl, "Muslim Minorities," 165-69.

> establishes [legal] ownership of it within Muslim territory (*dār al-Islām*)."[73] It was also said that he [i.e., the convert] has ownership of his property and his family; al-Shāfiᶜī supported this view.[74] The issue is examined among the [other] issues about which there is scholarly disagreement, building on the **questions of whether or not the *ḥarbī* (resident of *dār al-ḥarb*) can possess valid ownership, and whether the guarantor of inviolability (*al-ᶜāṣim*) is Islam or [being in Muslim] territory.[75]**
>
> **Those who say that he possesses valid ownership hold to [the following statement of [Muḥammad's] – may God bless him and grant him peace – : "Has ᶜAqīl left us a home? . . ."[76] [They also] hold to his statement – may God bless him and grant him peace – "I was ordered to fight people until they say, 'There is no God but God.' When they have professed this, they have protected their lives and their property from me, except by [legal] right to it."[77] [Muḥammad] thus treated lives and property equally, and linked them by a possessive construction to them [i.e., the converts]; and [this] possessive construction necessarily indicates ownership. He then stated that he among them who converts to Islam is inviolable, which necessarily indicates that no one may act against him.[78]**

Those who attribute to him his property also hold to [Muhammad's] statement – may God bless him and grant him peace – "Whoever converts to Islam and owns something, that is his [lawful property];"[79] and to his statement – may God bless him and grant him peace – "The property of any Muslim is not licit other than by his consent."[80]

As for Mālik and Abū Ḥanīfa and those who agree with them: they hold that the guarantor of inviolability is, rather, [being in Muslim] territory; so as long as a Muslim does not establish possession of his property and child within Muslim territory, whatever is taken from that [property] in the land of unbelief is booty (*fay'*) for the Muslims. It is as though they [i.e., those who agree with Mālik and Abū Ḥanīfa] do not

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[73] Ibn al-ᶜArabī notes here that Abū Ḥanīfa likewise held this position.
[74] The Rabat-Beirut edition (2:127) mistakenly reads *innahu yajūz mālahu*, while *ᶜĀriḍat al-aḥwadhī* (4:7:79) reads *yaḥūz*.
[75] This second question regarding what gives protection, and the following *ḥadīth* regarding ᶜAqīl, are not in Ibn al-ᶜArabī's text.
[76] *Ṣaḥiḥ al-Bukhārī*, *Kitāb al-Maghāzī*, 4282; *Ṣaḥiḥ Muslim*, *Kitāb al-Ḥajj*, 1351. The remainder of the statement indicates that non-believers and believers do not inherit from each other; meaning that non-believers have possession of their own property. ᶜAqīl, the son of Muḥammad's uncle Abū Ṭālib, did not convert to Islam until after he had inherited property from a number of non-Muslims in Mecca. After converting, he sold everything and emigrated to Medina. Najīb, *Asnā al-matājir*, 73, n. 1.
[77] *Ṣaḥiḥ al-Bukhārī*, *Kitāb al-Zakāt*, 20 and *Kitāb al-Jihād*, 2946; *Ṣaḥiḥ Muslim*, *Kitāb al-Īmān*, 20.
[78] In Ibn al-ᶜArabī, this passage reads: "He then stated that they [i.e. the lives and property] were protected, and this necessarily indicates that no one had a right to them." Ibn al-ᶜArabī, *ᶜĀriḍat al-aḥwadhī*, 4:7:79.
[79] *Al-Sunan al-Kubrā*, al-Bayhaqī; for reference, see Najīb, *Asnā al-matājir*, 74, n. 3.
[80] *Al-Sunan al-Kubrā*, al-Bayhaqī; for reference, see Najīb, *Asnā al-matājir*, 74, n. 4.

consider the unbelievers to have ownership [over anything]; rather, their property and children are licit to any Muslim capable of [seizing] them, as [is the case concerning] their lives.[81] Whoever among them converts to Islam, and does not establish possession of any property or child [belonging to him] within Muslim territory, it is as though he does not have any property or children; and it is as though the ownership [of these things is attributed] to the unbelievers, just as the territory belongs to them. The Muslim does not have real ownership if he is among them [i.e., the unbelievers.][82]

Ibn al-ᶜArabī also stated: "The guarantor of inviolability for the Muslim's life is Islam, and for his property, [being in Muslim] territory."[83]

Al-Shāfiᶜī said: "The guarantor of inviolability for both of them together is Islam."[84]

Abū Ḥanīfa said: "The guarantor of inviolability which is relevant to assessing [the monetary compensation] for them both is the territory, while [the guarantor of protection which is] relevant to assessing sin is Islam."[85] The explanation for this is that in the case of one who converts to Islam and does not emigrate, and is killed,

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[81] That is, the lives of non-Muslims, which are not protected.

[82] These two analogies rely on somewhat contradictory images: either the unbelievers own nothing, or they own everything in their territory. The characterization of the Mālikī and Ḥanafī positions that al-Wansharīsī is attempting to convey appears to be thus: The property, families, and lives of unbelievers outside of Muslim territory are not protected; they are licit to Muslims (subject to the rules governing warfare). When an unbeliever converts to Islam, that conversion does not change the legal status of his property and family, which remain unprotected and licit to Muslim expeditions from Muslim territory. The legal status of all property in non-Muslim territory is the same, because it is the territory that is the determining factor in the status of property and family. In order to establish valid ownership of his property, the convert must bring that property to Muslim territory.

[83] This statement does not explicitly appear in the passages of Ibn al-ᶜArabī 's *al-Aḥkām* and ᶜ*Āriḍat al-aḥwadhī* from which al-Wansharīsī has been quoting. This would be accurate as a continuation of Ibn al-ᶜArabī's characterizations of the opinions of Mālik and Abū Ḥanīfa, but is not the opinion that Ibn al-ᶜArabī himself held; as will become clear, he agreed with al-Shāfiᶜī's position. Indeed, this statement more clearly resembles a description of Mālik's position which is recorded in Ibn Rabīᶜ's text and slightly precedes a section in which the latter jurist begins to quote from Ibn al-ᶜArabī.

[84] For a more detailed discussion of al-Shāfiᶜī's position see Najīb, *Asnā al-matājir*, 75, n. 3.

[85] Ibn al-ᶜArabī discusses this position in his exegesis of Qur'ān 4:92, which addresses compensation and atonement for the accidental killing of believers, including those residing outside Muslim territory. Ibn al-ᶜArabī, *al-Aḥkām*, 1:490-91.

atonement but not blood money or retaliation is required [in compensation for his killing], according to Abū Ḥanīfa.[86] If he had emigrated, atonement and blood money paid to the [the convert's] tribe would [both] be required.

It has been said: According to this, Mālik and al-Shāfiʿī held that [the convert's] life should be spared. And Abū Ḥanīfa held that the accidental killing [of the convert] does not necessitate the payment of blood money, but rather necessitates atonement only. This [latter opinion] is the apparent meaning [of the relevant Qur'ānic verses], as explained by the exegetes. They cite as evidence for this [opinion] the words of [God] Most High: {As for those who believed but did not emigrate; You owe them no loyalty until they emigrate},[87] and the words of [God] Most High: {If he belonged to a people hostile to you, and was a believer, the freeing of a believing slave (is required of the killer)}; [God] does not mention blood money [in this latter verse].[88] [The exegetes] said: What this believer signifies [in this latter verse] is none other than the Muslim who fails to emigrate, because he is a believer among an enemy people. And so he is one of them, according to the words of [God] Most High: {Whoever among you allies himself with them is one of them}.[89] Thus he is a believer from an enemy people. Thus, when blood money is mentioned at the beginning of the verse, for [the killing of] any believer in general; and at the end of the verse, for [the killing of] a believer whose

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[86] The atonement specified in Qur'ān 4:92 is the freeing of a Muslim slave, as will be shown below. Ibn al-ʿArabī discusses possible reasons for blood money not being mentioned in this verse as obligatory in the case of Muslims living in non-Muslim territory in both *al-Aḥkām* (1:490-91) and *ʿĀriḍat al-aḥwadhī* (4:7:79). He suggests, among other possibilities, that the Muslim wrongfully killed may not have any Muslim relatives; giving money to non-Muslims in non-Muslim territory would strengthen them in war against Muslims.

[87] Qur'ān 8:72.

[88] Qur'ān 4:92. This is the verse which covers the atonement and compensation required for the accidental killing of three types of believers: believers in general, those belonging to enemy peoples, and those whose people have a treaty with the Muslims. Blood money is mentioned as due in the first and last cases, but only the freeing of a believing slave is mentioned as being required for the middle case.

[89] Qur'ān 5:51.

people are under a treaty and alliance with us – and they are the *dhimmī*s (Christians and Jews in Muslim territory) – ; and [the verse] is silent regarding [blood money] in the [case of] this believer who is among the enemies; this indicates that [blood money] is not in effect [for this case] and that atonement alone is required [for killing this type of believer]. This is the rule regarding the legal status of his life.

Ibn al-ᶜArabī said:[90]

> It was in Khurāsān[91] that this issue was of great importance. The Mālikīs did not encounter it, nor did the Irāqī masters know of it. So how should Maghribī *muqallid*s (jurists who adhere to previously established doctrines) [deal with this issue]?[92]
>
> As evidence for their opinion that the guarantor of inviolability is [being in Muslim] territory, Abū Ḥanīfa's followers state that it is fortresses and citadels which are used for guarding and preserving [lives and property] and for warding off [dangers]. And [they state] that if the infidel came to be in our territory, his life and property would be protected. Thus, [the issue] becomes like [the legal status of] property: If it has been left lying in the road, cutting off [the hand of one who takes it] is not required; but if it has been put away inside its place of safekeeping, then cutting off [the hand of any thief who steals it] would be indicated.
>
> Al-Shāfiᶜī uses as evidence the words of the Prophet – may God bless him and grant him peace – : "I was ordered to fight people until they say, 'There is no God but God.' When they have professed this, they have protected their lives and their property from me, except by [legal] right to it."[93] This [text] stipulates that the guarantor of

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[90] I have not yet been able to locate the following passage within Ibn al-ᶜArabī's works.

[91] Khurāsān, meaning "the land of sunrise" referred broadly to the lands east of western Persia, including Central Asia and Afghanistan, as well as specifically to a region of northeastern Persia. The term is analogous to the Maghrib, literally the place where the sun sets, which can refer broadly to the western lands of Islam, or to North Africa, or in modern times to Morocco. EI², s.v. "Khurāsān."

[92] *Qāla Ibn al-ᶜArabī: "Wa-hādhihi al-mas'ala Khurāsānīya ᶜiẓam, lam tablughhā al-Mālikīya wa-lā ᶜarafathā al-a'imma al-ᶜIrāqīya, fa-kayfa bi'l-muqallida al-Maghribīya*?" This could also be translated, "So how should later Maghribī jurists know how to deal with this issue?" or "So how would they have any precedent on which to rely?" It seems that Ibn al-ᶜArabī is emphasizing his peers' geographical and temporal distance from any developed legal discourse on Muslims living in non-Muslim territory; Khurāsān and the Maghrib represent opposite ends of the Islamic world. Abou El Fadl ("Muslim Minorities," 169) paraphrases Ibn al-ᶜArabī's statement as "an obstinate issue that has not been dealt with systematically by Mālikī jurists." It should be noted, however, that without being able to place this passage in the context of Ibn al-ᶜArabī's work, we cannot be certain what specific "issue" he has been discussing up to this point. Abou El Fadl quite reasonably assumes this issue is the inviolability of the lives and property of Muslims in non-Muslim territory, which is the subject of the quoted material following what we have here as Ibn al-ᶜArabī's opening statement. Paraphrasing this statement as noting the absence of a *developed* or *systematic* legal discourse on this issue thus reflects the fact that there were some existing opinions on Muslims' inviolability while in *dār al-ḥarb* within the Mālikī school, as seen in the responses to Muslims who stayed in Barcelona after its conquest in 185/801 (Abou El Fadl, "Muslim Minorities," 169; Molénat, "Le problème," 396-97; al-Wansharīsī, *al-Miᶜyār* 2:129-30; also see below). Miller ("Obligation to Emigrate," 265), who apparently takes Abou El Fadl's paraphrase to be a translation and adopts it as her own (but cites the *Miᶜyār*), makes the unwarranted assumption that Ibn al-ᶜArabī's "issue" refers to the Mudéjar predicament as a whole.

[93] See n. 77 above.

> inviolability of one's person and property consists only of professing Islam. Even if a Muslim entered *dār al-ḥarb*, his life and property would [remain] inviolable. [The legal status of the] territory is of no relevance.
>
> As for the opinion of our fellow [Mālikīs], that Islam is the guarantor of inviolability for one's person but not for children or property; and [as for] the opinion of the followers of Abū Ḥanīfa, that only citadels protect and preserve; these are idle discussions. This is because they relate to the tangible protection gained by an infidel or rebel [behind physical walls], and this is not considered in [determining] the law. [Scholarly] discussion should only concern what is legally relevant.
>
> Do you not see that Muslim rebels and infidels may protect themselves with citadels, but the lives and property of both [groups] are both licit? [With regard to their lives], one of them [i.e., the infidel] is licit in an absolute sense, and the other on condition that he persists rather than desists, continues [to engage in rebellion], and refuses [to repent]. Property, on the other hand, is only made inviolable through the owner's protection of it, by having it with him in a place of safekeeping.

I say:[94] **Ashhab and Saḥnūn[95] agreed with the opinion of al-Shāfiʿī, which is also the choice of Abū Bakr b. al-ʿArabī,** according to what is indicated by his discussion here. **Abū Ḥanīfa and Aṣbagh b. al-Faraj[96] shared the opinion of Mālik, which Ibn Rushd also chose,** and which is the commonly accepted view (*al-mashhūr*) of Mālik, may God have mercy upon him. **The source of disagreement [between these two groups] is** what has been previously set forth.[97]

The renowned jurist and judge Abū ʿAbd Allāh b. al-Ḥājj[98] and other later jurists treated the [question of] the property of this Muslim who is being asked about – the one who is a resident of *dār al-ḥarb* and does not leave [that territory] after the tyrant seizes it – as analogous to the preceding disagreement among the master jurists of the

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[94] What follows is al-Wansharīsī's commentary.

[95] ʿAbd al-Salām Saḥnūn b. Saʿīd (d. 240/854) wrote *al-Mudawwana*, one of the Mālikī school's foundational texts. DM 263-68; EI², s.v. "Saḥnūn;" IM 117-121, 147-151; SN, vol. 1, 103-105.

[96] Aṣbagh b. al-Faraj b. al-Saʿīd al-Nāfiʿ (d. 225/840), was a prominent Egyptian Mālikī student of Ibn al-Qāsim. DM, 157-58.

[97] That is, whether or not *ḥarbī*s can possess valid ownership, and whether it is being Muslim or being in Muslim territory that provides inviolability for lives and possessions.

[98] Abū ʿAbd Allāh Muḥammad b. Aḥmad, known as Ibn al-Ḥājj (d. 529/1134), was a judge of Cordóba. QA, 134; ZK, 5:317. A collection of his *fatwā*s are preserved in the Moroccan National Library in Rabat (*Nawāzil Ibn al-Ḥājj*, ms. 55J) and possibly in the Tunisian National Library in Tunis (*Fatāwā Ibn al-Ḥājj*, ms. 21086); I did not inspect the latter to confirm this as the same text and author. The Rabat manuscript is a work of *aḥkām*, covering only areas of law that would fall under a judge's jurisdiction. I was unable to locate this discussion in the manuscript.

great cities as to [the legal status of] the property of one who converts to Islam and resides in *dār al-ḥarb*. Then, **after joining together and equating these assimilated rules** [for the property of both conquered Muslims and converts], Ibn al-Ḥājj makes a distinction [between the two cases]. [He reasons] that the property of the convert was licit prior to his conversion to Islam, as opposed to the property of the **[conquered] Muslim**. This is because **[the latter's] ownership never ceased, and he had at no prior point been an infidel, [which would have made] his property and children licit to the Muslims at some point. Thus no one may rightfully act against either [the conquered Muslim's life or property].** [Ibn al-Ḥājj said]: **This is the preponderant (*rājiḥ*) opinion in this discussion; it is made clear by the supporting evidence and by reasoned examination, and, upon consideration of the previously presented source of disagreement, is so evident as to not be lost on anyone.**

[Ibn al-Ḥājj] supports this distinction with another text,[99] which is an issue addressed in the *Samāᶜ Yaḥyā*,[100] in the chapter on *jihād*. The passage is as follows:

> I asked him [i.e., Yahyā b. Yahyā asked Ibn al-Qāsim[101]] about those Muslims from Barcelona who failed to move away from them [i.e., the Christian conquerors] after the year which had been set [by the Christians as the grace period] for their departure on the day [the city] was conquered.[102] They then attacked Muslims, seeking to protect themselves, because they feared being killed if they were defeated [by Muslims retaking the city]. [Ibn al-Qāsim] said: I do not see his status as any different from that of the criminal or illegitimate rebel (*al-muḥārib*) who steals from Muslims in *dār al-Islām*; this is because he remains within the religion of Islam. If he is caught, his case is referred to the ruler, who judges his case in the same way he would judge those

[99] While this could also be translated as "This distinction is also supported by another text," what follows makes it clear that al-Wansharīsī is still quoting from Ibn al-Ḥājj here, who must cite this passage from the *Mustakhraja* (see below) as a continuation of his own argument (al-Wansharīsī, *al-Miᶜyār*, 2:129-30). Mu'nis also labels this section as Ibn al-Ḥājj's opinion, but without comment ("Asnā al-matājir," 39-40).
[100] Abū Muḥammad Yahyā b. Yahyā al-Laythī (d. 234/848), a Cordóban jurist, is credited with the introduction of Mālik's *Muwaṭṭa'* in al-Andalus. The *Samāᶜ Yaḥyā* refers to Yahyā's recension of the *Muwaṭṭa'*, which became the canonical version of this text in the Islamic West (there were several other transmissions). EI², s.v. "Yaḥyā b. Yaḥyā al-Laythī;" DM, 431-32.
[101] ᶜAbd al-Raḥmān b. al-Qāsim al-ᶜUtaqī (d. 191/806-7), known as Ibn al-Qāsim, was the most prominent Egyptian disciple of Mālik and transmitted his master's opinions, along with his own commentary, to his (Ibn al-Qāsim's) students, including Yahyā b. Yahyā. DM, 239-41.
[102] Barcelona was conquered in 185/801.

> involved in corruption and rebellion.[103] As for his property, I do not see that it is permissible for anyone to take it.[104]

The relevant part of the [passage] ends [here].[105]

Ibn Rushd [commented on this passage as follows]:[106]

> His [viz., Ibn al-Qāsim's] opinion that their [participation in] attacking Muslims is equivalent to the position of criminal or illegitimate rebels (*muḥāribīn*) is correct. There is no difference of opinion as to this, because if a Muslim fights [other Muslims], whether his rebellion be in Muslim territory or in infidel territory, the judgment regarding him is the same. As for his opinion regarding his property – that it is not permitted for anyone to take it – this [opinion] is a clear contradiction of Mālik's opinion in the *Mudawwana* regarding the case of one who converts to Islam in *dār al-ḥarb*, after which the Muslims invade that territory and take his family and property – which is that all of that is booty (*fay'*), since [Mālik] did not distinguish in this matter between the army's capturing his property and child before or after [the convert's] departure [from *dār al-ḥarb* toward *dār al-Islām*]. (End).[107]

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[103] On the comparison between Muslims in *dār al-ḥarb* and rebels, and the translation of *muḥarib* here as "criminal or illegitimate rebel," see Abou El Fadl, "Muslim Minorities," 169.

[104] This is a passage from the *Mustakhraja* or *ᶜUtbīya* of Abū ᶜAbd Allāh Muḥammad b. Aḥmad al-ᶜUtbī (d. 254-5/868-9). Al-ᶜUtbī, an Andalusī jurist originally from Cordóba, compiled this legal work after studying with Yaḥyā b. Yaḥyā, Saḥnūn, and other major transmitters of Mālikī doctrine. The *ᶜUtbīya* did not survive as an independent text, but is preserved in its entirely in Ibn Rushd's *al-Bayān wa'l-Taḥṣīl*, a commentary on the *ᶜUtbīya*. For this passage, see: Ibn Rushd (the grandfather, d. 520/1126), *Al-Bayān wa'l-taḥṣīl wa'l-sharḥ wa'l-tawjīḥ wa'l-taᶜlīl fī masā'il al-Mustakhraja*, ed. Muḥammad Ḥajjī, et al., 2nd ed. (Beirut: Dār al-Gharb al-Islāmī, 1988), 3:41-42. Ibn Abī Zayd al-Qayrawānī (d. 386/996) also drew heavily from al-ᶜUtbī's work in his *al-Nawādir wa'l-Ziyādāt*. For this passage, see: Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir wa'l-ziyādāt ᶜalā mā fī al-Mudawwana min ghayrihā min al-ummuhāt*, ed. ᶜAbd al Fattāḥ Muḥammad al-Ḥulw, et al. (Beirut: Dār al-Gharb al-Islāmī, 1999), 3:352.

[105] This passage continues as follows in the *ᶜUtbīya*, as quoted in *al-Bayān*: "[Ibn al-Qāsim] said: If he was forced and commanded to do what he did, and was unable to disobey his commander out of fear for his life, then I do not see that he is a rebel, or that he should be killed if captured; nor is he punished, if it is clear that he was commanded to do this and feared for his life." Ibn Rushd, *al-Bayān*, 3:42; Ibn Abī Zayd, *al-Nawādir*, 3:352. Molénat argues that al-Wansharīsī has intentionally omitted the end of this passage in order to remove the possibility of pardoning Muslims forced by Christians to assist military efforts against other Muslims. This is an unwarranted assumption, as it is most likely Ibn al-Ḥājj's omission, and for a different reason: Ibn al-Ḥājj, and later al-Wansharīsī, are discussing whether or not there is a legally significant distinction between the convert and the conquered Muslim with regard to inviolability of life, family, and property; the question of coercion in determining guilt for crimes is a separate legal issue, and although it may also happen to have bearing on the status of lives, property, and family, it does not have bearing on the particular legal point under discussion. See Molénat, "Le problème," 397, 399.

[106] Al-Wansharīsī uses the following commentary by Ibn Rushd on the just-quoted passage from the *ᶜUtbīya* to refute Ibn al-Ḥājj's distinction between the convert and conquered Muslim; thus al-Wansharīsī has finished citing from Ibn al-Ḥājj and is now drawing directly from *al-Bayān*. Al-Wansharīsī, *al-Miᶜyār*, 2:130; Ibn Rushd, *al-Bayān*, 3:42.

[107] The point is that the convert's property and family, if captured in *dār al-ḥarb*, may be taken as booty whether or not the convert is still with them or has left them behind and moved to *dār al-Islām*. Ibn Rushd is equating the status of Muslims who remain in *dār al-ḥarb* after it is conquered by non-Muslims, and non-Muslims who convert to Islam in *dār al-ḥarb*. Al-Wansharīsī, *al-Miᶜyār*, 2:130; Ibn Rushd, *al-Bayān*, 3:42.

I say [viz., al-Wansharīsī]:

This opinion of Ibn Rushd evidently calls for considering as the preponderant opinion [on this issue,] a different [opinion] from that which his contemporary from the same city, the judge Abū ʿAbd Allāh b. al-Ḥājj, considered to be the preponderant opinion concerning the property and children of those [Muslims] who are being asked about; so consider this.

Some of the master jurists who have examined [this issue] say that it is apparent that the judgments pertaining to them (viz., those who convert in *dār al-ḥarb*) with regard to their persons, children, and property are [also] valid for those residing with the hostile Christians [in non-Muslim territory], in accordance with the difference of opinion that has been established and the determination of the preponderant opinion which has been set forth [above].[108] Then, if they fight us along with their allies, at that point the opinion that their lives are licit [indisputably] becomes the preponderant one. If they financially support their fighting us, the opinion that their property is licit becomes preponderant. And capturing their children has been determined to be the preponderant opinion, in order to free them from their hands and to raise them among Muslims, safe from being lured from their religion (*al-fitna fī al-dīn*), and protected from the sin of not emigrating.

[108] This opinion appears to mean that it is taken as the most evident option that the status of the conquered Muslim should be considered analogous to the status of the convert to Islam in enemy territory. Once this is determined, the disagreements regarding the status of the convert's property (licit or not), based on the underlying points of dispute (do *ḥarbī*s truly own anything, does Islam or Muslim territory guarantee inviolability), apply also to the conquered Muslim. Thus, one could argue for either the inviolability of his property or for its being licit, along the same lines as the opinions presented above. Two scholars' opposing determinations of the preponderant opinion were presented, that of Ibn al-Ḥājj, favoring the inviolability of the conquered Muslims' property, and that Ibn Rushd, favoring its being licit.

[Regarding] what is mentioned in the question concerning the regret and resentment that has overtaken some of the emigrants from enemy territory to Muslim territory, as a result of their alleged poverty and lack of subsistence – this is an invalid claim and an unsound supposition in the view of the noble law.[109] Only someone of weak conviction, or rather, devoid of all sense and religion, would be deluded by this reasoning, consider it [legally consequential], and direct his attention toward it. How could one imagine that this reasoning constitutes an argument for removing the obligation to emigrate from *dār al-ḥarb*? While in the lands of Islam – may God exalt His word – is a spacious domain for the strong and the weak, and the rich and the poor.[110] **God made the[se] lands expansive so that** those afflicted with this infidel blow and Christian strike at their **religion, family, and offspring might take refuge in them.**

A large group among the most important and greatest Companions – may God be pleased with them – emigrated to Abyssinia (*arḍ al-Ḥabasha)*, fleeing with their religion from the torment of the polytheists, the people of Mecca. Among this noble delegation were Jaᶜfar b. Abī Ṭālib, Abū Salama b. ᶜAbd al-Asad, ᶜUthmān b. ᶜAffān, and Abū ᶜUbayda b. al-Jarrāḥ.[111] The case of Abyssinia is well known. **Others emigrated to other places, relinquishing their homes, property, children, and elders; and renouncing, fighting and battling them [viz., the polytheists]; holding fast to their religion and abandoning their worldly interests.**

So how [could one think of staying in or returning to non-Muslim territory] for some ephemeral worldly pursuit, the relinquishing and renouncing of which would not

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[109] This means that this is not a legally relevant or significant factor which would bring about a change in the ruling.

[110] *Al-thaqīl wa'l-khafīf,* literally "the heavy and the light." Najīb notes that exegetes gloss this as 'young and old,' or 'rich and poor,' or similar opposed pairs. Najīb, *Asnā al-matājir*, 85.

[111] For the biographies of these Companions, see Najīb, *Asnā al-matājir*, 85-86.

adversely affect making a living among Muslims or impact the bounty [available in Muslim territory] for those seeking subsistence? [This is] especially [true] in this devout Maghribī region – may God preserve it, augment its honor and glory, and protect it from changes of fortune and sorrows, from the central lands to the borders – for its soil is among the most fertile, and its lands among the most spacious in length and width, on God's earth, particularly the city of Fez and the areas under its jurisdiction, its surrounding regions in every direction, and its districts.

If indeed this delusion is clearly proven,[112] and its holder lacks – God forbid – discernment, sound reason, and understanding – then he has furnished a sign and proof of his vile and contemptible character by **giving greater weight to a despicable,** ephemeral **worldly goal than to a pious action rewarded in the hereafter**. **This weighing [of the two] and giving preponderance [to worldly pursuits] is a great wrong; whoever has preferred this and fallen into [this belief] has suffered a loss and gone astray.**

This [emigrant who was so] deceived in concluding his bargain [i.e., preferring this world and losing the hereafter] – the one who regretted his emigration from a land in which the trinity [of God] is alleged,[113] in which church bells are rung, in which Satan is worshipped and the Merciful [God] is renounced[114] – did he not realize that **man has only his religion, through which [is obtained] his eternal salvation and happiness in the hereafter, and for which he should exert his priceless soul, to say nothing of most of his wealth?**

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[112] That is, if it is clearly proven that the any of the emigrants regrets his emigration or wishes to return to Iberia because of a lack of material comfort in the Maghrib.
[113] *yuddaᶜā fīhā al-tathlīth*; this could also be *yudᶜā*, meaning the trinity is invoked or prayed to.
[114] *Yukfar bi'l-Raḥmān.*

God Most High said: {Oh you who believe! Let not your wealth nor your children divert you from the remembrance of God. Those who do this, they are the losers.}[115] [God] Most High also said: {Your wealth and your children are only a temptation; but with God is a mighty wage.}[116]

Among the greatest and most honorable benefits of wealth, among those with discernment, is spending of it in the way of God and for the purpose of His satisfaction. How could anyone, for the sake of wealth, plunge so obstinately into submission to [our] enemies, or hurtle and throw oneself, or hasten towards [such submission]? And this when God Most High had said: {You see those in whose hearts is sickness, vying with one another in hastening to them, saying "We fear lest a change of fortune befall us . . . "}[117] The change of fortune (*dā'ira*) [that he fears] in this case (*nāzila*) is losing his grip on his immovable property, so he is described with a sickness of heart and weakness of faith. Had he been strong in religion and correct in conviction, trusting in, relying, and depending upon God Most High, then he would not have neglected the principle of placing one's trust in [God] despite the high standing [conferred by adherence to this principle], its abundant gains, and its testament to [the adherent's] soundness of faith and depth of conviction.

Once this is established, there can be no dispensation for any one of those whom you mentioned to return [to Spain] or to not perform the *hijra* – not by any means; and he is not excused [from this obligation], no matter what he must do to fulfill it, through burdensome toil or delicate strategy – rather, [he must pursue] whatever he finds to be

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[115] Qur'ān 63:9.
[116] Qur'ān 64:15.
[117] Qur'ān 5:52. The verse immediately prior, warning against taking Jews and Christians as allies, makes clear that "them" in this verse refers to non-Muslims.

a means of escape from the infidel noose; and where he does not find a tribe to defend him or protectors to guard him, and he is content [nonetheless] to remain in a place detrimental to religion, where it is prohibited to manifest Muslim practices, then he has strayed from the religion and joined with the unbelievers (*mulḥidīn*).

The obligation is to flee from a land conquered by adherents of polytheism and depravity to the land of safety and faith. **For this reason they [viz., the early non-emigrants] were countered in response to [their] offering an excuse, by His words {Was God's earth not spacious enough for you to have migrated therein? Hell will be the refuge for such men – a wretched end!}.[118] This means that wherever the emigrant turns, even if he is weak, he will find a vast and uninterrupted earth. So there is no reason of any kind for the one who is capable [of emigrating], even if this involves hardship as to work or strategy,** or in making a living, or [if it results in] poverty; **except for the [truly] weak who are fundamentally incapable, who can devise no means and are not guided to a path.**

[As for] the one who hastens to flee and rushes to move away from the land of perdition to the land of the pious, that is a clear sign in the current world of what his status will become in the hereafter; because for whomever righteous work is made easy, triumph and success are hoped for him; but for whomever evil work is easy, perdition and loss are feared for him. May God make us and you among those for whom prosperity is made easy, and who benefit from remembrance [of God].

[As for] the ugly language, the cursing of *dār al-Islām*, the desire to return to the land of polytheism and idols, and other detestable monstrosities which could only be

[118] Qur'ān 4:97.

uttered by the depraved, which you report coming from those emigrants – disgrace is required for them in this world and the next, and they must be lowered to the worst of positions. What is required of [the ruler] whom God has empowered and enables to prosper in the land is to take hold of them and make them suffer a severe penalty and an intense, exemplary punishment, through beating and imprisonment, such that they do not transgress the bounds of God. This is because their corrupting ideas (*fitna*) are more severely damaging than the trials of hunger, fear, or the plundering of people and property.[119] This is because whoever perishes here [viz., from hunger, etc.] [elicits] the mercy of God Most High and his most generous forgiveness, while one whose religion perishes[120] [provokes] the condemnation of God and the greatest of his anger. Fondness for submission to **polytheists and living among Christians;** the determination to **reject the obligation to emigrate to depend upon infidels; and** contentment with **paying the *jizya* to them,[121] with the relinquishing of Islamic power, with insubordination, with the renunciation of allegiance to the sultan, and with the triumph of the Christian sultan over, and his degradation of, [Islamic power]** – [these are] serious, perilous abominations, a mortal blow [to one's faith] which is on the verge of unbelief (*kufr*) – may God protect us.

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[119] As noted above, *fitna* may refer to any of several types of communal discord, from civil war to the presence of corrupting elements in society. Here I interpret it to mean the dangerous, corrupting ideas that the emigrants are openly spreading in the Maghrib in the first part of this sentence, and as the trials or temptations brought about by hunger, fear, and loss in the second part. These trials can also lead to corrupt actions, but al-Wansharīsī is signaling that the ideas conveyed by the emigrants – preference for residence under non-Muslim rule – are far more damaging to Muslim society than any crime hunger or loss may compel one to commit. He employs the same contrast between the *fitna* of corruption and that of hunger elsewhere in the *Mi'yār*, in a passage condemning those who mislead themselves and others by presuming greater knowledge of the law than is their right (2:503).

[120] This could be either *man halaka dīnuhu*, the person whose religion perishes, or *man hallaka dīnahu*, whoever destroys or corrupts his religion; but this form is less common.

[121] Often translated as 'poll tax,' this is the term for the tax paid by *dhimmī*s, Christians and Muslims living under Muslim rule; the term also came to signify monies paid by subject Muslims to their Christian rulers.

As for the loss of legal credibility (*jurḥa*) for one who remains in [*dār al-ḥarb*], returns after emigrating, or desires to return, and as for his disqualification from holding those religious offices requiring complete integrity – judging, witnessing, and leading prayer – this is one of the things about which there is no doubt and which is obvious to anyone with the least grasp of the applied branches of the law (*al-furūᶜ al-ijtihādīya*) and of legal cases. Their testimony is not accepted, nor is the attestation (*khiṭāb*)[122] of their judges. Ibn ᶜArafa[123] – may God have mercy upon him – said: "A condition for accepting the attestation of a judge is the validity of his appointment, by someone demonstrably entitled to appoint him; this means treating the proclamations of the Mudéjar judges (*mukhāṭibat quḍāt ahl al-dajn*) – such as the judges of the Muslims of Valencia, Tortosa, and Pantelleria[124] – with circumspection when received by us [in Ifrīqiyā]. Similar situations [should likewise be treated with circumspection]. (End).[125]

Imām Abū ᶜAbd Allāh al-Māzarī[126] – may God have mercy upon him – was asked in his time if rulings coming from the judges of Sicily, or [the testimony] of their professional witnesses, may be accepted [in Ifrīqiyā], considering that this [viz., judicial

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[122] A judge may attest to the validity of a written document or legal instrument so that the document may be used in another jurisdiction or brought before another judge.

[123] Abū ᶜAbd Allāh Muḥammad b. Muḥammad b. ᶜArafa al-Warghamīya, known as Ibn ᶜArafa (d. 803/1401), was *imām*, *khaṭīb*, and *muftī* of the Great Mosque of Tunis. ZK, 7:43-44.

[124] *Qawṣara*, misprinted as Mawṣara in the Rabat-Beirut edition of *Asnā al-matājir*, is Pantelleria, an island between Sicily and Tunisia. The Muslim inhabitants acquired a Mudejar status in 618/1221 when the Almohad governor of Tunis signed a treaty giving control of the island to Emperor Frederick II of Sicily. See EI^2, s.v. "Ḳawṣara" and Henri Bresc, "Pantelleria entre l'Islam et la Chretiente," *Les Cahiers de Tunisie* 19, no. 75-76 (1971): 105-127.

[125] Al-Wansharīsī includes this same quotation from Ibn ᶜArafa in a long section on conventions in al-Andalus and the Maghrib for judges' acceptances of the written pronouncements of other judges. In that section, the passage from Ibn ᶜArafa introduces one of many possible reasons not to accept another judge's pronouncement as valid; thus I have translated his final '*wa-naḥwi dhālika*' as "similar situations should likewise be treated with circumspection." Al-Wansharīsī, *al-Mi'yār*, 10:66.

[126] Abū ᶜAbd Allāh Muḥammad b. ᶜAlī b. ᶜUmar al-Māzarī (d. 536/1141). DM, 374-75; IM, 327-29; SN, 1:186-88; ZK, 6:277. See chapter three for his biography.

authority] is a necessity[127] and that it was unknown whether their residence there under the infidels was by choice or compulsion.[128]

He answered:

> There are two aspects to what might render this [judgment or testimony] unacceptably compromised (*qādiḥ*). The first affects the judge and his documents (*bayānātihi*) from the standpoint of his integrity (ᶜ*adāla*), because remaining in *dār al-ḥarb* under infidel command is not permitted. The second [aspect] is from the standpoint of his office, as the judge is appointed by the infidels.
>
> For the first, there is a principle [which should be] relied upon in this and similar cases, which is giving the benefit of the doubt to Muslims and presuming their innocence.[129] One should not turn from this principle to false suspicions and baseless presumptions. For example, one should accept [the probity] of someone who appears to be upright, even though it is possible for that person at the same time to have committed a major sin in secret; [this is] unless evidence is furnished against a person's innocence [from error].[130] This possibility [of having committed sins in private] is rejected [from considerations of legal probity], and the judgment is based on what is evident, as this carries greater weight (*al-rājiḥ*); [this is] unless indicators appear which necessitate departing from [this presumption of] probity. At that point it would be necessary to suspend [judgment] until some [clear evidence] arises that requires withdrawing this obligation to give preponderance to [the assumption of] his legal probity; after this, the judgment (as to his probity) remains whatever is most likely.[131]
>
> A judgment is derived from specifically defined evidence, so that [evidence] is operative, whereas the evidence for probity [itself] is based on a general, unrestricted matter and so is not considered [operative here].[132] I have written some on this in *Sharḥ*

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[127] Having a judge is considered a collective duty which communities are obligated to fulfill. See Muhammad Khalid Masud, et al., "Qāḍīs and their Courts: An Historical Survey," in *Dispensing Justice in Islam: Qadis and their Judgments*, ed. Masud, et al. (Leiden: Brill, 2006), 19.

[128] Abdel-Majid Turki has produced an Arabic edition, French translation, and short study of al-Māzarī's *fatwā*, based primarily on a version of the *fatwā* found in a Tunisian legal work and recorded by H.H. ᶜAbd al-Wahhāb in his biography of al-Māzarī. See Abdel-Majid Turki, "Consultation juridique d'al-Imam al-Mazari sur le cas des musulmans vivant en Sicile sous l'autorité des Normands," *Mélanges de l'Université Saint-Joseph* 50 (1984): 691-704; *idem*., *Qaḍāyā thaqāfīya min tārīkh al-gharb al-Islāmī: nuṣūs wa-dirāsāt* (Beirut: Dār al-Gharb al-Islāmī, 1988), 61-80; Ḥasan Ḥusnī ᶜAbd al-Wahhāb, *Al-Imām al-Māzarī* (Tunis: Dār al-Kutub al-Sharqīya, 1955), 87-89. Al-Wansharīsī's citation of this *fatwā* in *Asnā al-matājir* is abridged (2:133-34), but he produces a longer version elsewhere in the *Miᶜyār* (10:107-109). This *fatwā* also appears in *Fatāwā al-Māzarī*, ed. al-Ṭāhir al-Maᶜmūrī, 365-66. Najīb's edition of *Asnā al-matājir* notes the differences between al-Wansharīsī's citation of al-Māzarī's *fatwā* within *Asnā al-matājir* and what he calls the original version of al-Māzarī's original *fatwā*, by which he means the one edited by ᶜAbd al-Wahhāb. Najīb, *Asnā al-matājir*, 93-101.

[129] *Taḥsīn al-ẓann bi'l-Muslimīn wa-mubāᶜadat al-maᶜāsī,* more literally making one's thoughts about Muslims favorable and distancing Muslims from sinful acts.

[130] *Ka-tajwīz man ẓāhiruhu al-ᶜadāla, wa-qad yajūzu fī al-khafā', wa-fī nafs al-amr, qad irtakaba kabīra, illā man qāma al-dalīl ᶜalā ᶜismatihi.* This last phrase may also be translated as "except for one whose infallibility has been proven," i.e., Muhammad, who can be assumed not to have committed any major sin in secret.

[131] *Fa-yajibu al-tawaqquf hīna'idh hattā yaẓhara mā yūjibu zawāl mūjib rājiḥīyat al-ᶜadāla.*

[132] *Wa'l-ḥukm huwa mustafād min qarā'in maḥṣūra fa-yuᶜmalu ᶜalayhā, wa-qarā'in al-ᶜadāla ma'khūdha min amr muṭlaq fa-tulghā.* Al-Māzarī appears to be saying that a decision (*ḥukm*, judgment) regarding the judge's probity (and thus the admissibility of his written statements as evidence elsewhere), must be based on the same considerations as for any judge's *ḥukm*, which is based on the apparent meaning of any applicable evidence. A direct determination of one's overall probity, however, would be a more general

al-Burhān.[133] I mentioned Abū al-Maᶜālī's approach and my own, where we discussed the disagreements and discord which had occurred among the Companions, may God be pleased with all of them.[134]

If this resident of non-Muslim territory is [there] by compulsion, there is no doubt that this [residence] does not compromise his probity.[135] This is also the case if his reason [for remaining there] is valid, such as his residing in non-Muslim territory in hopes of guiding the infidels or turning them from a manifest error.[136] Al-Bāqillānī[137] points to this, while the followers of Mālik similarly point to the permissibility of entering [non-Muslim territory] in order to free a prisoner of war.[138]

If he lives [there] voluntarily, out of willful ignorance, and gives no [legitimate] reason [for this], then this [residence] compromises his probity. [Jurists within] the school disagree as to rejecting the witness of one who voluntarily enters [non-Muslim territory] for trade, and they disagree more vehemently in interpreting the *Mudawwana* on this [point]. Thus for those of them [i.e. Muslim residents of non-Muslim territory] who appear to be upright, if the reason for their residence is uncertain, then the default position is to excuse him [for his residence]. This is because most of the preceding

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affair subject to less specific standards and therefore is trumped by the more defined, practicable standards for the validity of a *ḥukm*. Here al-Māzarī is invoking a general principle of *uṣūl al-fiqh* regarding the interpretation of absolute (*muṭlaq*) and restricted (*muqayyad*) language in the sources of the law; on this distinction, see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence,* 3rd ed. (Cambridge: Islamic Texts Society, 2003), 155-58. This passage has confounded its editors. The Rabat-Beirut edition of the *Miᶜyār* record the final word as *fa-tulghā*, as above, but they note a variant in one manuscript copy, which reads *muṭlaqā*, 'received' (2:133); Mu'nis records *salafī mutlaqā* without noting any variants or attempting an explanation (47); al-Maᶜmūrī records *muṭlaqā*, similarly without noting any variants or offering an explanation (365); Turki chooses *salafī muṭlaqā* when noting this passage in a footnote to his French translation, but does not translate the passage as it does not appear in the version of this *fatwā* on which he bases his translation ("Consultation," 702); and Najīb chooses *fa-tulghā*, notes the variants, and states that the expression is difficult (95). I find *fa-tulghā* most convincing as it must appear in the most consulted manuscript copies of the *Miᶜyār* (based on the note in the Rabat-Beirut edition), it preserves the parallelism of the sentence (one thing is restricted and operative; the other is absolute and inoperative), and is supported by a passage in another of al-Māzarī's works, mentioned below.

[133] *Īḍāḥ al-Maḥṣūl min Burhān al-uṣūl* is al-Māzarī's commentary on al-Juwaynī's (d.478/1085) *al-Burhān*, a work of jurisprudence (*uṣūl al-fiqh*).

[134] See al-Māzarī, *Īḍāḥ al-Maḥṣūl min Burhān al-uṣūl*, ed. ᶜAmmār al-Ṭālibī (Dār al-Gharb al-Islāmī, 2001), 327. In a paragraph included in a chapter treating the relationship of absolute (*muṭlaq*) and restricted (*muqayyad*) statements, al-Māzarī notes that he agrees with the position of Abū al-Maᶜālī (al-Juwaynī), who favors weighing the absolute and restricted meanings against one another and operating on the basis of the preponderant one. Al-Māzarī makes a statement similar to the one in this *fatwā* – that he has written about this elsewhere in his commentary – but I have not yet located the other passage(s), which must reference the differing opinions of the Companions.

[135] In Turki's edition, this sentence is followed by: "It is likewise if his [residence] was voluntary as a result of ignorance of the rule [that one must emigrate] or out of conviction that residence is permissible. This is because it is not obligatory upon him to know this piece of knowledge to the extent that not knowing it would compromise his integrity." Turki, "Consultation," 702.

[136] In Turki's edition, the hope of freeing the territory from infidel rule and returning it to Islamic control is added here. Turki, "Consultation," 702.

[137] Al-Bāqillānī (d. 403/1013) was a prominent Ashᶜarī theologian and Mālikī jurist. See EI², s.v. "Al-Bāḳillānī."

[138] In Turki's edition, this sentence is followed by: "This is also the case if his reason [for staying] was an error – of which there are innumerable possibilities, just as there are countless uncertain arguments among scholars of *uṣūl al-fiqh*. Often what is an error in one scholar's opinion can be correct in another's, according to the view that only one scholar is actually correct and the others are excused [for errors reached through diligent, qualified effort]. Turki, "Consultation," 703.

> possibilities [for why they remained] support excusing them. These cannot be rejected in favor of one single possibility unless the evidence supports [that one other possibility, which is that] their residence was voluntary rather than for a legitimate reason.
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> As for the second [factor which might compromise the judge's probity], which is the infidel's appointment of the judges, notaries, trustees, and others, in order to prevent them from [wronging] one another – this is obligatory, to the point that a follower of our [Mālikī] school claims this to be rationally obligatory, even if the infidel's appointment of this judge is void [according to the *sharīᶜa*].[139] As for the subjects' need of him, and his administering to them because of the need for this [office], this does not compromise his authority or the enforcement of his judgments; it is just as though a Muslim sultan had appointed him.[140]
>
> In the chapter on oaths [in the *Mudawwana*], in the section on "The case of one who swears 'Your rights will be fulfilled' and [swears upon a] fixed period [for fulfillment]," [the opinion is recorded that] the scholars of a locality take the place of the sultan in his absence, out of fear that [otherwise] an [important or urgent] issue [might go unresolved]. According to Muṭarrif and Ibn al-Mājishūn,[141] in the case of one who leaves the [territory under the control of the] ruler and conquers a land, and then appoints an upright judge, the rulings [of that judge] are enforced. (End).

I said:[142] The *shaykh*s of al-Andalus issued a *fatwā* on the status of those loyal to the rebel heretic ᶜUmar b. Ḥafṣūn,[143] ruling that their testimony was not permissible and the attestations of their judges would not be accepted.[144]

There was disagreement with regard to accepting appointment to the judgeship from a commander who is not upright.[145] In *Riyāḍ al-nufūs fī ṭabaqāt ᶜulamā' [al-*

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[139] In Turki's edition, this sentence is followed by: "In the *Mudawwana* [is found the opinion that] the scholars of a region take the place of the sultan in his absence, out of fear that an [important or urgent] issue [might go unresolved]." Turki, "Consultation," 703.

[140] In Turki's edition, this sentence reads: "Thus the infidel's appointment of this upright judge, either because of the need for that of to meet the demands of the subjects, does not compromise his authority, and his judgments are enforced, just as though a Muslim sultan had appointed him. It is God who guides to the true path." Turki, "Consultation," 703-704. Turki's edition ends here. Mu'nis notes at this point in his edition (49) that al-Wansharīsī has failed to include this important paragraph, which is included in ᶜAbd al-Wahhāb's edition (on which Turki's edition is based); but the same basic content and ruling is in fact included above.

[141] These are both early Mālikī scholars who studied with Mālik.

[142] This is al-Wansharīsī's comment on al-Māzarī's *fatwā*.

[143] ᶜUmar b. Ḥafṣūn (d. 305/918), led an unsuccessful rebellion beginning in 267/880 against the Umayyad *amīr*s of Cordova. EI², s.v. "ᶜUmar b. Ḥafsūn."

[144] Al-Wansharīsī devotes a lengthy discussion to this case in his chapter on judging, witnessing, and oaths. Al-Wansharīsī, *al-Miᶜyār*, 10:109-112.

[145] This story from *Riyāḍ al-nufūs* is also included in al-Wansharīsī's chapter on judging. Al-Wansharīsī, *al-Miᶜyār*, 10:109.

Qayrawān] wa-Ifrīqiyā (The Garden of Souls, on the Biographies of the Scholars of Qayrawān and Ifrīqiyā), by Abū Muḥammad b. ᶜAbd Allāh al-Mālikī,[146] he writes:

> Saḥnūn said: "Abū Muḥammad ᶜAbd Allāh b. Farrūkh[147] and Ibn Ghānim,[148] the judge of Ifrīqīya, who are both among those who narrate from Mālik – may God be pleased with him – disagreed. Ibn Farrūkh said: 'The judge must not assume the judgeship if an unjust commander (*amīr*) appoints him,' while Ibn Ghānim said: 'It is permissible for him to take office even if the commander is unjust.' So they wrote with this [issue] to Mālik, and Mālik said: 'Al-Fārisī is correct,' meaning Ibn al-Farrūkh, 'and the one who claims to be Arab was mistaken,' meaning Ibn Ghānim."[149] (End).[150]

Ibn ᶜArafa said: "They [viz., the early Mālikīs] did not consider [the judge's] acceptance of an appointment on the part of a transgressor attempting to overcome the [rightful] ruler to be an invalidating act [*jurḥa*] because they feared the discontinuance of judgments" (End).

[The preceding has addressed] the worldly judgments pertaining to them. **As for [the judgments concerning] the hereafter that pertain to those who spend their entire lives,** exhausting their youth and old age living among them and under their authority, **and who do not emigrate, or who emigrate and then return to the land of unbelief and who persist in committing this major act of disobedience [to God] up until their deaths** – may God protect us – **the [judgment] which accords with the *sunna* and the body of scholars is that they will be punished with severe torment, although they will not suffer eternally. [This latter consideration] is based on their [viz., these**

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[146] This work has been published: ᶜAbd al-Allāh b. Muḥammad al-Mālikī (d. ca. 360/970), *Riyād al-nufūs fī ṭabaqāt ᶜulamā' al-Qayrawān wa-Ifrīqīya wa-zuhhādihim wa-nussākihim wa-siyar min akhbārihim wa-faḍā'ilihim wa-awṣāfihim*, ed. Bashīr al-Bakkūsh and Muḥammad al-ᶜArūsī al-Maṭwī, 2nd ed., 2 vols. (Beirut: Dār al-Gharb al-Islāmī, 1994). In the text, Ifrīqiyā is initially spelled with a final *alīf* and then with a *tā' marbūṭa*.
[147] Abū Muḥammad ᶜAbd Allāh b. Farrūkh al-Fārisī (d. 176/792-3) lived in Qayrawān but traveled east to study with Mālik and others. Al-Mālikī, *Riyād al-nufūs*, 1:176-187; ZK, 4:112.
[148] Abū ᶜAbd al-Raḥmān ᶜAbd Allāh b. ᶜUmar b. Ghānim (d. 190/806), an early Mālikī jurist who studied with Mālik and served as judge of Ifrīqiyā. Al-Mālikī, *Riyād al-nufūs*, 1:215-229; ZK, 4:109.
[149] Al-Fārisī is Ibn Farrūkh's *nisba* but also used here as "the Persian" in contrast to Ibn Ghanīm, who is chided for his weaker grasp of the law despite his having the advantage of being Arab.
[150] For this passage, see al-Mālikī, *Riyād al-nufūs*, 1:178-79. Al-Wansharīsī's version is slightly abridged.

scholars] correct opinion as to the [eventual] cessation of punishment for those who have committed major sins, and [these sinners'] deliverance through the intercession of our lord, prophet, and master Muḥammad, the elect, the chosen, – may God bless him and grant him peace – according to what is recorded in the sound [*ḥadīth*] reports (*ṣiḥāḥ al-akhbār*).[151]

The evidence for this [viz., the eventual cessation of punishment] is His words, may He be exalted and glorified: {God does not forgive that a partner should be ascribed to Him; but he forgives anything else, to whom He pleases}.[152] And His words: {Say: "Oh my servants who have transgressed against themselves! Do not despair of God's mercy. Surely God forgives all sins; for He is the Forgiving, the Merciful}.[153] And His words: {Verily your Lord is the Lord of forgiveness to mankind, for all their wrong-doing}.[154]

Yet the words of God Most High: {Whoever among you allies himself with them is one of them},[155] and the statements of Muḥammad – peace be upon him – "I am innocent of any Muslim who resides with the polytheists" and "Whoever lives among them or associates with them, is one of them"[156] are extremely severe [in condemnation of] them.

The statement, "Emigrate from there to here?!" which you relate from [that emigrant] who is feeble in mind and religion, is a model of contempt and mockery. And [as for] the other fool's statement, "If the ruler of Castile came to these parts, we would

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[151] For examples of *aḥādīth* on Muḥammad's intercessory role, including for those who have committed major sins, see Najīb, "*Asnā al-matājir*," 102.
[152] Qur'ān 4:48.
[153] Qur'ān 39:53.
[154] Qur'ān 13:6.
[155] Qur'ān 5:51; see full verse quoted earlier.
[156] These two *ḥadīth* reports have been quoted above.

go to him . . .," his talk is offensive and his words repugnant. You are well aware of the ugliness of expression contained in the statements of each one of them. It is likewise obvious what fault and blame each of them bear for this, as no one would utter this, nor deem it permissible [to utter these things], except someone who had disgraced himself and lost – may God protect us – his sense; and who desires to repeal that which is authentic in both transmission and meaning [i.e., the prohibition of living under infidel rule] – and as to whose prohibition no one has disagreed in the entire Islamic world, from where the sun rises to where it sets – [he desires to repeal this] as a result of selfish interests which are illegitimate in the view of the law and which are complete nonsense.[157] These delusional interests could only proceed from a heart seized by Satan, who has made it forget the sweetness of faith and its location among the lands [i.e., that it is currently in *dār al-Islām*].

Whoever commits this [offense] and is implicated in it, has hastened for his malevolent self the warranted punishment in this world and the next. Yet, in terms of disobedience, sin, injurious conduct, vileness, odiousness, distance from God, diminished [religious standing], blameworthiness, and deservingness of the greatest condemnation, he does not equal the one who abandons emigration completely, through submission to the enemy and by living among them, who are far [from God]. This is because the extent of what has issued from these two wicked men [who have made the above statements] is a firm resolve (*ʿazm*), which is planning and preparing oneself for action, while neither of them has yet undertaken that action.[158]

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[157] *Lā raʾs lahā wa-lā dhanab*, literally, which have neither head nor tail.

[158] Two misprints in the Rabat-Beirut edition (they are identical here) can render these last two paragraphs particularly difficult to understand without recourse to Muʾnis or (far preferably) Najīb, and are indicative of the errors to be found throughout this edition: in the two examples given above of

Our Ashᶜarī masters disagreed as to the assessment of blame for this (*al-mu'ākhadha bi-hi*) [viz., the resolve to do something blameworthy]. The master Abū ᶜAbd Allāh al-Māzarī – may God have mercy upon him – transmitted from many [previous masters] that [resolve] is not assessed blame directly, because of the apparent meaning of [Muḥammad's] saying – peace by upon him: – "God has forgiven for my community for whatever thoughts occur to themselves."[159] The judge Abū Bakr al-Bāqillāni held that [thoughts] are assessed blame, and provided as evidence the *ḥadīth:* "'If two Muslims align their swords against one another, the slayer and the slain both go to hellfire.' It was said, 'Oh messenger of God! This is for the slayer, but what of the slain?' He said: 'He intended to kill his companion.'"[160] Thus his sin was on the basis of his intention. He [viz., al-Bāqillāni] was answered that coming face to face and unsheathing [their] swords are actions, and this is the intention referred to [in this case]. [Al-Qāḍī ᶜIyāḍ] stated in the *Ikmāl*:[161]

> Most of the early jurists, theologians, and *ḥadīth* scholars held the same position as al-Bāqillānī because of the large number of *aḥādīth* attesting to the assessment of blame for the actions of the heart; and they interpreted those *aḥādīth* which point to a lack of assessment as pertaining to [merely] considering something (*al-hamm*), [as opposed to a firm resolve to take action, *ᶜazm*].

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statements made by the emigrants, the Rabat-Beirut edition introduces the second statement as "*qawluhu al-safīh al-ākhar*," or "his other foolish statement," as though only one emigrant was under discussion (the correct reading is "*qawl al-safīh al-ākhar*," the statement of the other fool"). In the second paragraph, the Rabat-Beirut edition reads "*illā innahu yusāwī*," or "yet he is equal to," omitting the "*lā*" which should negate this statement; thus this edition makes the non-emigrant and the one who desires to return to non-Muslim territory equal to one another in sin. The two wicked men in the last sentence would then have to refer to these two, the non-emigrant and the would-be-return-emigrant, who somehow both would have resolved to do something but not done it. Al-Wansharīsī, *al-Miᶜyār*, 2:135.

[159] *Ṣaḥīḥ al-Bukhārī*, *Kitāb al-Ṭalāq*, 5269; *Ṣaḥīḥ Muslim*, *Kitāb al-Īmān*, 127. The *ḥadīth* continues, "as long as they are not acted upon or uttered." For al-Māzarī's commentary on this and other *aḥadīth* in *Ṣaḥīḥ Muslim*, see: Al-Māzarī, *Al-Muᶜlim bi-fawā'id Muslim*, ed. Muḥammad al-Shādhilī al-Nayfar, 2nd ed. (Dār al-Gharb al-Islāmī, 1992), 2:208-209.

[160] *Ṣaḥīḥ al-Bukhārī*, *Kitāb al-Īmān*, 31; *Ṣaḥīḥ Muslim*, *Kitāb al-Fitan*, 2888.

[161] Abū al-Faḍl ᶜIyāḍ b. Mūsā b. ᶜIyāḍ al-Yaḥṣubī, known as Qāḍī ᶜIyāḍ (d. 544/1149), an Andalusī judge, wrote *Ikmāl al-Muᶜlim bi-fawā'id Muslim*, a continuation of al-Māzarī's *al-Muᶜlim bi-fawā'id Muslim*, a commentary on the *aḥādīth* included in the *Ṣaḥīḥ Muslim*.

Al-Thawrī was asked:[162] "Might we be held accountable for an intention [*al-himma*]?" He said: "[Only] if it is a firm resolve [*ᶜazm*]."

Yet they [also] said [viz., the early scholars]: "Only the sin of the intention is assessed, because it is an act of disobedience; but the sin of the intended act is not assessed, because it has not been carried out. If it is carried out, a second sin is recorded; but if it is averted, one good act is recorded, according to the *ḥadīth*: " . . .he only desisted from it for My sake."[163]

Muḥyī al-Dīn al-Nawawī[164] said: "The texts have given an evident meaning of accountability for resolve, such as in the words of [God] Most High: {Those who love that scandal should be spread concerning those who believe . . . }[165] and {Avoid suspicion as much as possible, for suspicion in some cases is a sin}.[166] The community (*umma*) agreed by consensus on the prohibition of envy and contempt of people, and the desire to do prohibited things to them. (End).[167]

This argument is countered by the fact that the firm resolve to act about which there is disagreement (*al-ᶜazm al-mukhtalaf fīhi*) is [the type] which has an external manifestation, such as fornication and wine-drinking. As for [the type] which does not have any external manifestation, such as beliefs and such impurities of the soul as envy and the like, these [latter] types are not the source of disagreement. This is because the

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[162] Abū ᶜAbd Allāh Sufyān al-Thawrī (d. 161/778).
[163] *Ṣaḥīḥ Muslim*, *Kitāb al-Īmān*, 205. In this *ḥadīth*, the angels inform God that a man intends to commit a sin; God orders one sin recorded against him if he commits the act, and one good deed recorded if he desists, because he desists for the sake of God.
[164] Muḥyī al-Dīn Abū Zakarīyā al-Nawawī (d. 676/1277) was a prominent Shafīᶜī jurist.
[165] Qur'ān 24:19; the verse continues, { . . . they will have a grievous punishment in this world and in the hereafter; God knows, and you do not know.}
[166] Qur'ān 49:12.
[167] For this discussion in Qāḍī ᶜIyāḍ's *ḥadīth* commentary, see: ᶜIyāḍ b. Mūsā b. ᶜIyāḍ al-Yaḥṣubī, Abū al-Faḍl, known as Qāḍī ᶜIyāḍ (d. 544/1149), *Sharḥ Ṣaḥīḥ Muslim li'l-Qāḍī ᶜIyāḍ, al-musammā Ikmāl al-Muᶜlim bi-fawā'id Muslim*, ed. Yaḥyā Ismāᶜīl (Al-Manṣūra: Dār al-Wafā' li'l-Ṭibāᶜa wa'l-Nashr wa'l-Tawzīᶜ, 1998), 1:423-27.

prohibition of them concerns them [directly]; this [direct prohibition] occasioned the legal obligation [not to be envious, etc.], and thus [this obligation] does not need the consensus which has been concluded regarding it [in order to be valid].

Let this be the end of the response to take written shape in answer to the profitable question posed by the honorable jurist, the accomplished preacher, the enduring virtuous exemplar, the pure sum of excellence, the master Abū ᶜAbd Allāh b. Qaṭīya – may God perpetuate his noble achievement and reputation. It is desirable to give this response a title, and so it is called ***Asnā al-matājir fī bayān aḥkām man ghalaba ᶜalā waṭanihi al-Naṣārā wa-lam yuhājir, wa-mā yatarattabu ᶜalayhi min al-ᶜuqūbāt wa-l'zawājir*** (The Most Noble Commerce, an Exposition of the Rulings Governing One Whose Native Land has been Conquered by the Christians and Who Has Not Emigrated, and the Punishments and Admonishments Accruing to Him).

By God, I ask that it be beneficial, and that (my) reward multiply on its account. This was composed and written by the lowly worshiper and seeker of forgiveness, the insignificant servant submitted to God's will, Aḥmad b. Yaḥyā b. ᶜAlī al-Wansharīsī, may God grant him success. Its composition was completed on Sunday, the nineteenth day of the sacred month of Dhū al-Qaᶜda in the year 896 [23 September 1491], may God make His benevolence known to us.

Appendix B:

Translation of the Marbella *Fatwā*[1]

The Question (introduced by al-Wansharīsī):

The aforementioned jurist Abū ᶜAbd Allāh also wrote to me with the following text:

"Praise be to God, and may blessings and peace be upon the messenger of God. Your answer [is requested], master – may God be pleased with you and [may He] profit the Muslims through your life – regarding an occurrence. This [concerns] a man from Marbella who is known for his virtue and piety, and who, when the people from his area emigrated, stayed behind in order to search for a brother of his who had previously gone missing during a battle with the enemy in enemy territory (*dār al-ḥarb*). He has searched for any news of him up until now, but he has not found him and has lost hope. So he wanted to emigrate but another reason has arisen [for his remaining behind], which is that he is a spokesman for, and supporter of, the subject Muslims (*al-Muslimīn al-dhimmīyīn*) where he resides, as well as for those like them who live in the surrounding area in the western part of al-Andalus. When difficult situations arise for them with the [Chrisitians], he speaks with the Christian officials[2] for them, argues on their behalf, and delivers many of them from serious predicaments.

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[1] For editions relied upon, see Appendix A, first note. Harvey translates excerpts from this *fatwā* in *Islamic Spain* (56-58) and Maíllo Salgado includes a full translation in "Consideraciones" (186-91). While the latter is far more faithful to the text, both contain a number of errors. Some of these errors will be noted below.

[2] I have translated *hukkām* as officials here, rather than judges, because Ibn Qaṭīya may be referring to judges and local government officials of various types.

Most of them are incapable of taking on this [role] for them; in fact, if he emigrated they would hardly be able to find his equal in this skill. Great harm would befall them in his absence, if they were to lose him.

"Is residing with them under infidel rule permitted for him, on account of the benefit (*maṣlaḥa*) his residence entails for those unfortunate [Muslim] *dhimmī*s, even though he is capable of emigration anytime he wishes? Or is this not permitted for him, as they also have no dispensation for their residing there subject to infidel laws, especially considering that they have been granted permission to emigrate and that most of them are capable of doing so whenever they wish? And presuming that this were permitted to him, would he thus also be granted a dispensation, based on what he is capable of, to pray in his garments [as they are], seeing as they generally would not be free from major ritual impurities (*najāsa*) as a result of his frequent interactions with the Christians, his conducting his affairs among them, and his sleeping and arising in their homes in the course of serving these subject Muslims in the manner stated?

"Clarify for us the judgment of God as to all of this. [May you be] rewarded and praised, if God Most High wills, and may a state of abundant peace serve as foundation to your elevated station, and may the mercy and blessings of God Most High be upon you."

The Answer

I responded with the following text:

Praise be to God Most High alone. The answer – and it is God the Exalted who grants success by His grace – is that our One Almighty God placed the poll-tax (*al-jizya*) and abasement[3] around the necks of the cursed infidels, as chains and shackles which they must drag about across the lands and in the major cities and towns, demonstrating the power of Islam and honoring its chosen prophet. Thus any Muslim – may God protect and provide for them – who attempts to invert these chains and fetters [by placing them] on his [own] neck has contravened God and his messenger and submit himself to the anger of the Almighty, the Omnipotent; he deserves that God should throw him along with them into the Fire. {God has decreed: 'It is I and my messengers who must prevail,' for God is Strong, Almighty};[4] thus it is obligatory upon every believer who believes in God and the Last Day to strive to preserve the fundamentals of the faith (*ra's al-īmān*) through distance and flight from living among the enemies of the Merciful One's beloved [prophet]. The attempt to justify the [continued] residence of the aforementioned virtuous man on the basis of the stated purpose – interpreting between the tyrant and the disobedient Mudéjars under his authority – does not do away with the obligation to emigrate. Nor would anyone imagine that the legally

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[3] *Al-jizya wa'l-ṣaghār*. In the Rabat-Beirut (2:137) edition of the *Miʿyār* and Mu'nis's edition ("Asnā al-matājir," 56), *jizya* appears as *khizya*, although the Rabat-Beirut editors note *jizya* as a variant occurring in one of their consulted manuscripts. The word is translated by Maíllo Salgado ("Consideraciones," 187) as 'oprobio', disgrace or humiliation, while Harvey omits the word in his own loose and partial translation of the passage (*Islamic Spain*, 57), most likely because he felt it meant the same thing as *al-ṣaghār*, abasement. Najīb favors *jizya* but does not explain his choice (*Asnā al-matājir*, 113). Although paired synonyms are common in Arabic, and many copyists were apparently happy to pair *al-khizya* and *al-ṣaghār*, *jizya* is a far more compelling reading. This passage clearly refers to Qur'ān 9:29: {Fight such of those who have been given the Book who do not believe in God or in the Last Day, and who do not forbid what God and his messenger have forbidden, and who do not follow the religion of truth, until they pay the *jizya* and are abased (*hattā yuʿṭū al-jizya ʿan yad wa-hum ṣāghirūn*)}. See EI[2], s.v. "D̲Jizya."

[4] Qur'ān 58:21.

inconsequential qualities recorded in the question stand in opposition to the ruling that [*hijra*] is obligatory, except for one who would feign ignorance of or disregard the inversion of the natural order, and who has no skill in the methods of the law.[5] For living with infidels, without [their being] subject tributaries (*ahl al-dhimma*), is not permitted or allowed for even one hour of one day because of the pollutions, the filth, and the religious and worldly corruptions to which this gives rise, throughout their lives.

Among them [i.e., these corruptions]:[6] The purpose of the law is for **the Word of Islam and the testification of Truth to be established on the basis of its manifest superiority, elevated above all others, kept far removed from belittlement or being dominated by the infidel's signs and ceremonies. Living among them under humiliation and abasement requires – without doubt – that this sublime, exalted, noble Word should be lowly rather than elevated, and belittled rather than honored. It would suffice to mention only this violation of the basic principles of the law (*al-qawā'id al-sharʿīya*) and the fundamentals [of the religion], or the one who tolerates and patiently bears this all of his life without any necessity or compulsion.**

Also among them [i.e., these violations]: Complete **fulfillment of the required prayers (*al-ṣalāt*), which follow the two testifications of faith (*al-shahādatayn*) with respect to their virtue, exaltation, promulgation, and manifestation, can only occur and can only be conceived of when [these prayers are] fully manifest, elevated, and free**

[5] *Madārik al-sharʿ*, which Maíllo Salgado translates as the sources of jurisprudence, refers more properly to the various methods skilled jurists rely upon in working with those sources.
[6] From here forward, the pronoun in each initial "*wa-min-hā*" refers to violations of the law, as elaborated by Ibn Rabīʿ in the *fatwā* relied upon by al-Wansharīsī. The first instance of "*wa-min-hā*" here was added by al-Wansharīsī and has as its referent the aforementioned corruptions to be encountered under non-Muslim rule.

from belittlement and contempt. Yet living among infidels and closely associating with the depraved entails exposing [prayer] to neglect, belittlement, mockery, and sport. God Most High said: {When you call to prayer they take it in mockery and sport; That is because they are a people who do not understand}.[7] This violation should also suffice.

Also among them: The giving of alms (*ītā' al-zakāt*). It is obvious to anyone with discernment and an enlightened mind that the collection of *zakāt* on behalf of the *imām* (legitimate ruler) is one of the pillars of Islam and rites of man, and where there is no *imām*, there is no collection. [This results from] the absence of its [necessary] condition, thus there is no *zakāt* because of the lack of [a ruler] entitled to [its collection and distribution]. Thus, this is one of the pillars of Islam destroyed by this submission to infidel rule. As for its collection on behalf of one who would use it against the Muslims, the contradiction of all legitimate acts of worship that this would entail is also obvious.[8]

Also among them: Fasting during Ramaḍān. It is obvious that this is an individual obligation,[9] as well as payment of the charity due by the conclusion of the month (*zakāt al-abdān*).[10] This is conditional upon the sighting of the crescent moon for

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[7] Qur'ān 5:58.

[8] *Wa-amā ikhrājuhā li-man yastaᶜīnu bi-hā ᶜalā al-Muslimīn, fa-lā yukhfā ayḍan mā fī-hi min al-munāqiḍa lil-mutaᶜabbadāt al-sharᶜīya kullahā.* Harvey misinterprets this to refer to someone other than the *imām* who would collect the alms on behalf of Muslims, and greatly simplifies the second half the sentence accordingly: "As for payment of alms to someone appointed to distribute help to needy Muslims, that is not allowable [as a substitute]." Harvey, *Islamic Spain*, 58.

[9] Individual obligations must be fulfilled by every Muslim who meets the relevant criteria (such as being old enough), as opposed to collective obligations, which must simply be met by some party within the community (such as appointing a judge).

[10] *Wa-min-hā ṣiyām Ramaḍān, wa-lā yukhfā innahu farḍ ᶜalā al-aᶜyān , wa-zakāt al-abdān. Zakāt al-abdān*, more often referred to as *zakāt al-fitr* or *ṣadaqat al-fitr* is the name for the obligatory alms Muslims must contribute to the poor prior to the beginning of the ᶜĪd prayer the morning after the last day of fasting (the first day of ᶜĪd al-Fitr marking the end of Ramaḍan). It is included here because, like the fasting itself, it is a time-specific obligation whose validity depends upon correct knowledge of the beginning and ending of the month. Maíllo Salgado translates *zakāt al-abdān* quite literally as "el azaque de los cuerpos" without explanation, while Harvey's translation is more creative and also unexplained: "Then

its beginning and ending, in most cases [this sighting of] the crescent moon can only be confirmed through the testimony of a witness, and testimony can only be given before the *imām*s or their deputies. Where there is no *imām*, there is no deputy, and therefore no witness' testimony.[11] **Thus the month is at that point uncertain in its beginning and end, in terms of legitimate practice.**

Also among them: The pilgrimage to the House [of God]. The pilgrimage [is one of these violations], even if [this obligation] has lapsed because of a lack of ability, as they are [nonetheless] commissioned with its performance.[12]

And then ***jihād* (fighting)** to raise the Word of Truth and eliminate unbelief **is among the fundamental Islamic practices. It becomes a collective obligation whenever the need arises, especially at the sites of this residence [under non-Muslim rule] which is asked about, and in the surrounding area. Thus, they either [fail to perform this**

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there is the fast of Ramadan, the poor man's alms, as it has been called." Maíllo Salgado, "Consideraciones," 188; Harvey, *Islamic Spain*, 58.

[11] The Rabat-Beirut editors, Mu'nis, and Najīb all note a gap in the text here between "*shahādat*" and "*al-shahr*." The edition of Ibn Rabīʿ's *fatwā* by Van Koningsveld et al. reveals that the missing word is "*yakūnu*:" "*. . . fa-lā shahādat, fa-yakūnu al-shahr idh dhāka mashkūk . . .*"

[12] In Rabīʿ's *fatwā*, the entry for pilgrimage simply reads: "*wa-khāmisuhā: hajj al-bayt; wa'l-hajj - wa-in kāna sāqit ʿanhum li-ʿadmi al-istiṭāʿa.*" Al-Wansharīsī adds "*li-annahā mawkūla ilayhim*." Ibn Rabīʿ thus lists the pilgrimage among the basic religious obligations the Mudejars fail to fulfill by living under non-Muslim rule, even though he also notes that this obligation has lapsed for them because of their lack of the required ability to undertake the journey. Al-Wansharīsī's addition clarifies that they are still in a general sense commissioned with the obligation to perform the pilgrimage, even if that obligation is not currently in effect for them; for if they acquired the ability, they would again be obligated. What both jurists seem to imply is that even if the obligation to perform the pilgrimage simply lapses when one cannot perform it, unlike the other pillars just discussed – and thus not performing the pilgrimage cannot be said to be a direct violation of that obligation for them – the Mudéjars are nonetheless to be held responsible for placing themselves in that position of inability. The point is not pressed, most likely because contemporaries of both jurists were issuing *fatwā*s exempting Maghribī and Andalusī Muslims in *dār al-Islām* itself from the obligation to perform the pilgrimage, on the basis of a general lack of ability to do so. This passage in *Asnā al-matājir* has proven confusing for some, partially because of the grammar and perhaps partially because of an expectation that this obligation would receive a fuller exposition. Mu'nis ("Asnā al-matājir," 58-59) assumed that something was missing here in the text; he notes that the copyist must have forgotten to write out the end of this paragraph and the beginning of the next one (on *jihād*). Maíllo Salgado ("Consideraciones," 188) likewise notes a gap in the text, and completely misinterprets the rest of the passage: "Entre otras [contradicciones]: la peregrinación a la Casa, pues la peregrinación aunque tenga lugar separándose de ellos (de los infieles), por la ausencia total de capacidad [de actuación de los musulmanes], puesto que [la organización de] ella está encomendada a ellos (a los infieles)."

obligation, in the absence of] any necessary constraints which would completely prevent them from [fulfilling] it, [and in so doing are] equivalent to those who resolve [to neglect *jihād*], without this being necessary; and those who so resolve [in turn] are equivalent to those who purposely abandon [their obligation];[13] or, they boldly embark on the very opposite [of *jihād*], by supporting their [infidel] allies against the Muslims, either physically or financially, and thus they become at that point hostile combatants (*ḥarbīyīn*) along with the polytheists. This [violation of a fundamental principle of Islam] should also suffice, as a contradiction [of what is right] and a clear error.

This account has made plain the deficiency of their prayers, their fast, their payment of alms, and their *jihād*; their failure to elevate the word of God and the testification of Truth; and their disregard for honoring, glorifying, and raising [the word of God] high above the belittlement of the infidels and the mockery of the depraved. So how could any jurist have any hesitation as to, or any pious person doubt, the prohibition of this residence [under non-Muslim rule], with its accompanying violation of all these honorable and noble Islamic fundamentals, and with all this entails; and with the associated worldly inferiority, and the suffering of disgrace and humiliation, which are generally inseparable from this state of living [with them] in subjection? [This status][14] moreover violates the established honor of the Muslims and their elevated standing, and invites contempt for and oppression of the religion.

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[13] Al-Wansharīsī's text here omits too much of Ibn Rabīʿ's *fatwā* to convey intelligibly the intended meaning. I concur with Van Koningsveld, et al.'s suggested minimum emendation of al-Wansharīsī's text, as follows: "*thumma, hum immā [tārikūhu min ghayr] ḍarūra māniʿa minhu ʿalā al-iṭlāq, [fa-hum] ka'l-ʿāzim ʿalā tarkihi min ghayr ḍarūra . . .*" The actual passage in Ibn Rabīʿ is more elaborate; for a summary, see Van Koningsveld and Wiegers, "Islamic Statute," 26-27.

[14] Although the pronoun (*huwa*) here in al-Wansharīsī is ambiguous and could refer to the aforementioned jurist, in Ibn Rabīʿ's *fatwā* it more clearly refers to the situation of Muslims living under non-Muslim rule.

[As for what else this residence entails,] they also are matters which make one's ears ring. Among them are degradation, contempt, and humiliation; [despite Muḥammad's] having said – may peace be upon him: "A Muslim must not degrade himself,"[15] and "The upper hand is better than the lower hand."[16] Among them also are belittlement and ridicule, neither of which anyone with any remaining manhood would tolerate unnecessarily. Among them also are insults and injury to his honor and often to his person and property; and it is clear what this entails with regard to the *sunna* and manhood. Among them also are one's being immersed in witnessing objectionable acts, exposure to [repeated] contact with impurities, and eating forbidden and doubtful [foods].

Among them also are situations that are to be expected fearfully during this residence, and these are also [numerous]. These include violation of the treaty on the part of the king, and [Christians' increased] control over persons, families, children, and property.

It was related that ᶜUmar b. ᶜAbd al-ᶜAzīz[17] prohibited settlement in the Andalusī peninsula even though it was at that time a frontier (*ribāṭ*), the virtue of whose [defense] was well-known. Despite the strength and dominance of the Muslims, and the abundant numbers and supplies at their disposal, the reigning caliph, whose virtue, piety, righteousness, and guidance of his subjects were generally acknowledged, forbade this [settlement] for fear of endangerment. So what of someone who casts

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[15] *Sunan al-Tirmidhī*, *Kitāb al-Fitan*, 2204; *Sunan Ibn Māja*, *Kitāb al-Fitan*, 4066.
[16] *Ṣaḥiḥ al-Bukhārī*, *Kitāb al-Zakāt*, 1427; *Ṣaḥiḥ Muslim*, *Kitāb al-Zakāt*, 1033. Some narrations of this *ḥadīth* specifiy that the upper hand is that of the giver to charity and the lower hand is that of the beggar or receiver.
[17] Umayyad caliph who reigned from 99/717 to 101/720.

himself, his family, and his children by their own hands [into harm's way][18] at a time of their [i.e., the Christians'] strength, dominance, greatness of numbers, and abundance of supplies, relying on their fidelity to the treaty concluded in accordance with their laws? We do not accept their testimony [as legally valid] with regard to themselves, let alone with regard to ourselves! So how could we rely upon their alleged fidelity, considering the expected [violations] which have [already] occurred and the incidents which are observed by anyone who studies and examines the reports from throughout the inhabited regions?[19]

Among these [fears] also is the fear for one's person, family, children, and property on account of their evildoers, fools, and murderers; this is even if one assumes the fidelity of their lords and kings. This too is attested by [current] practice and confirmed by [existing] realities.

Among these fears also is that of religious corruption (*al-fitna fī al-dīn*). Even supposing that the important and intelligent could protect [themselves] against this, who is going to protect the humble, the mentally incompetent, and the weak among women if the enemy's lords and devils approach them?

Among these fears also is that of corrupt sexual relations and marriages [between Muslim women and Christian men].[20] How often will a man [be able to] protect his pure wife, daughter, or female relative from [every] lowlife among the

[18] This refers to Qur'ān 2:195, which instructs believers not to cast themselves by their own hands into destruction.
[19] For a discussion of the historical events likely referred to here, see Van Koningsveld and Wiegers, "Islamic Statute," 35-38.
[20] *al-fitna ʿalā al-abḍāʿ wa'l-furūj*; both terms may refer more literally to genitals, while *al-abḍāʿ* may also refer to marriages.

enemy dogs and infidel pigs[21] **who might acquaint himself with her, then entice her and mislead her as to her religion, overpowering her so that she submits to him, and so that apostasy and religious corruption come between her and her guardian,** as happened to the daughter-in-law of al-Muᶜtamad b. ᶜAbbād[22] and whatever children she bore – may God protect us from misfortune and the malicious joy of our enemies.

Among these fears also is the spread of their practices, language, clothes, and reprehensible customs to those residing among them through the years, as happened to the people of Ávila[23] and others, who lost the Arabic language completely. And when the Arabic language is lost completely, its [related] acts of worship are also lost. Let it suffice for you to mention the neglect of all the spoken acts of worship, in all their number and abundant virtue.

Among these fears also is [their] taking control of property through the institution of heavy assessments and unjust fines leading to a complete claim on [the Mudejars'] property, and by ensnaring their wealth in infidel taxes (*al-ḍarā'ib al-kufrīya*), **either all at once in the guise of some temporary necessity,** or at different times. **Or this may be based on a combination of excuses and interpretations[24] as to which no appeal or dispute is possible with them, even if [these excuses] are extremely weak, and**

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[21] *Kilāb al-aᶜdā' wa-khanāzīr al-buᶜadā'. Al-buᶜadā'* means distant or far removed from God; al-Wansharīsī used this term for stylistic reasons, but it does not work well here in English so I have replaced it with infidel, which is equivalent to the intended meaning.

[22] Abū al-Qāsim Muḥammad b. ᶜAbbad b. Muḥammad, al-Muᶜtamad ᶜalā Allāh (r. 461-484/1069-1091), ruled the Kingdom (*ṭā'ifa*) of Seville when Toledo fell to Alfonso VI, King of Castile and León in 478/1085. The 'Mora Zayda' converted to Christianity, married Alfonso VI, and bore him one son, Sancho. See EI², s.v. "ᶜAbbādids;" Wiegers, *Islamic Literature*, 6.

[23] This place name is spelled *Ābulla* in the text. Mu'nis identified this town as Ávila, first conquered by Muslims in 145/762. The town changed hands more than once before being lost permanently to Christian hands in 481/1088. Van Koningsveld and Wiegers suggest the name could also refer to a number of small villages called Ayelo in Valencia. Mu'nis, "Asnā al-matājir," 62; Van Koningsveld and Wiegers, "Islamic Statute," 28-29 n. 44.

[24] As Van Koningsveld and Wiegers point out, this most likely refers to unfavorable interpretations of the treaties governing Mudejar communities in various places. Van Koningsveld and Wiegers, "Islamic Statute," 29.

the flimsiness and corruption [of this] is extremely clear. They do not protest this for fear that this would stir up forces of hatred [against them] and become a reason for the treaty to be broken and for the appropriation of their persons, families, and children. The reality attests to this, for anyone who studies it; this even has occurred quite often in the place referred to in the question [as it has] in other places, on more than one occasion.

These ongoing and expected corruptions **have confirmed the prohibition of this residence and the forbiddance of this** living together which deviates from all that is right, **through various, mutually reinforcing considerations which all convey a single concept. The master jurists transferred this original ruling [viz., the prohibition of residing in non-Muslim territory] to other [cases] because of its strength and the clarity of its prohibition. The master jurist of Medina (*dār al-hijra*), Abū 'Abd Allāh Mālik b. Anas – may God be pleased with him – said: "The [Qur'ānic] verses on *hijra* set forth that every Muslim must depart from regions in which traditions are altered and the truth is not operative," to say nothing of departing and escaping from infidel territory** and lands of the depraved. God forbid that a virtuous community upholding His unity should rely upon those who believe in the Trinity, and be content to reside among the impure and filthy, despite exalting and glorifying Him.

Thus there is no room for the aforementioned virtuous man to reside in the place mentioned for the stated motive. Nor can there be any dispensation for him or for his companions as to the impurities and filth which beset their garments and bodies, as forgiveness for this is conditional upon its being very difficult to guard and

protect oneself from [these impurities]; but there is no such difficulty [which can be claimed] considering their voluntary choice of residence and deviant course of action.

God – may He be exalted – knows best, and is the grantor of success. With greetings to whoever examines this among those who testify "there is no God but God," this was composed by the lowly worshiper and seeker of forgiveness, the miserable desirer of the blessing of those who consider and make use of this; the insignificant servant of God, Aḥmad b. Yaḥyā b. Muḥammad b. ʿAlī al-Wansharīsī, may God grant him success.

Appendix C:

Translation of *Fatwā*s on Muslims Living Under Non-Muslim Rule from *Al-Jawāhir al-mukhtāra fī-mā waqaftu ᶜalayhi min al-nawāzil bi-Jibāl Ghumāra*[1] (Selected Jewels: Legal Cases I Encountered in the Ghumāra Mountains)

by

ᶜAbd al-ᶜAzīz b. al-Ḥasan al-Zayyātī (d. 1055/1645)[2]

First Fatwā *of Ibn Barṭāl*

The jurist Abū al-Ḥasan ᶜAlī b. ᶜAbd Allāh, who I believe is the one known as Ibn Barṭāl [3]– may God have mercy upon him – was asked about some people who have made an agreement with the Christians to the effect that they would pay them tribute [viz., the Muslims are paying the Christians], and they would leave them be, residing in their lands [viz., the Christians would allow the Muslims to remain]. [The Muslims] fall into categories with regard to their [relations] with them. Among them are those who spy on the Muslims and convey information about them to them [viz., to the Christians]. There are also those who go trade among them. And there are those who have started fighting against them [viz., against Muslims], and who go forth into battle alongside the Christian soldiers, and who prevent the Muslims from reaching their enemy. Among them also are those who only pay the tribute, but who do not do any of the other things mentioned here. There is also among them a group whom the enemy does not oblige to pay the tribute, such as the prayer leaders and callers.[4] What is the judgment of God

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[1] For the manuscripts consulted, Appendix D, n. 1.

[2] ᶜAbd al-ᶜAzīz b. al-Ḥasan al-Zayyātī (d. 1055/1645). For this jurist's biography, see chapter two.

[3] Abū al-Ḥasan ᶜAlī b. ᶜAbd Allāh b. ᶜAlī al-Aghṣāwī, known as Ibn Barṭāl (*ca.* late fifteenth-early sixteenth cent. Morocco). Ibn Barṭāl's name is given most fully in the third of his *fatwā*s, below. For his biography, see chapter two.

[4] *Ṭalaba*, 'students,' also refers to prayer leaders in Moroccan usage.

concerning their lives, property, ability to lead prayer, and ability to testify? What [status] applies to each of these groups? [Provide us with] a comprehensive answer.

He answered: The group of people who have concluded this pact with the Christians – may God Most High destroy them – to the effect that they pay a tribute to them are a depraved people, disobedient to God and in violation of the *sunna* (exemplary behavior) of His prophet.

As for those who keep to their houses, and who do not frequent them for trade or for any other [purpose], but who pay them the tribute: they are disobedient to God on account of their payments to them and their remaining under submission. Thus their testimony is not permissible, nor is their leading of prayer. Nonetheless, their situation is less serious than the situation of those who go to them and make themselves useful for their interests. The status of this category is that their property is not licit to anyone, nor are their lives violable.

As for those who spy on the Muslims, the commonly accepted view is that the life of a spy is licit, that he should be killed, and that his killer should be rewarded.

As for those who sell weapons to the Christians, and join in their army, this category has deviated from the religion and their status is that of the Christians with regard to both lives and property.

As for those who have begun trading among them, they are depraved and they sin more gravely than those who keep themselves at home.

As for the prayer leaders and callers who are content to remain subjects of the Christians (*taḥt dhimmat al-Naṣāra*) – may God destroy them – they are evil prayer

leaders and callers, whose testimony is not accepted and whose leading of prayer is not permissible. They are greater in sin than the others because they are [exemplars] whose guidance [others] follow. Thus, repentance is obligatory for them after their relocation from those lands which the infidels have conquered. God is the grantor of success. (End [of the text] from a certain notebook).

Fatwā *of al-Waryāglī*

The jurist Abū Muḥammad ᶜAbd Allāh al-Waryāglī,[5] who I believe is among the jurists of Tangier – may God have mercy upon him – was asked: "What do the masters of right guidance say about our Muslim brothers who are settled in their [own] lands where the laws of the infidels apply to them, [and who live] on land adjacent to Muslims but have not moved from their [own] lands to other lands in Islamic territory, where they would not be subject to the customs and laws of the infidels? Is it permissible for Muslims – may God increase your honor – to shed their blood, capture their women, and take their property? Are their prayers, giving of alms, and fasting during Ramaḍān valid or not?

He answered: What you mentioned of this vile, contemptible group, whose perceptive faculties God has obscured after [having granted them] vision, and whom He has led astray through the spread of unbelief into their hearts after [having given them] insight, and who are content to live under the impure infidels who do not believe in [God] the Compassionate and who insult our prophet and lord Muḥammad – may the

[5] Abū Muḥammad ᶜAbd Allāh al-Waryāglī (d. 894/1488-89). For his biography, see chapter two.

best blessings and purest peace be upon him – upon my life, the likes of this could only arise from someone weak in faith, whom God has previously led into error and from whom He has withdrawn. This is in addition to their glorifying the infidels and exposing [the testification] "There is no God but God" to the scorn of those who worship idols; and all of this is by their choice, without compulsion. [The ruling] that our masters have chosen with regard to these people, and [which is adopted in] the *fatwa*s our learned masters have issued concerning them, is that it is necessary to kill them and take their property as booty (*fay'*), because the land [they are in] is infidel territory and their property is under infidel control, not under their own control. This is because they can take it from them [viz., the infidels can seize the Muslims' property] whenever they wish, given that the territory is theirs and they have the authority over it [viz., over the land and everything in it].

Their women are likewise to be captured and taken from them until they reach Muslim territory. They are then judged divorced and should be prevented from [re-marrying] their spouses. They should be married off, and it is not permissible to have their wives remain with them.

Oh questioner, you have committed a serious error by calling them "our Muslim brothers." Rather, they are our enemies and the enemies of the religion – may God frustrate their efforts and block their good fortune. They are the brothers and supporters of the infidels – may God strengthen the Muslims against them and enable their swords to [strike] their necks and the necks of the infidels – whose group they have joined and to whose side they have gone. Peace be upon you, Oh questioner, but not upon them.

We must answer with a ruling supported by the texts of the early jurists. The *fatwā*s of the later masters will follow this response, God willing; but in this [ruling] is a [full] explanation and comprehensive [response]. May God deliver us and you from deviance and error, and allow us to die loving the religion of the Prophet whose teachings are true. (End of [the text] from the aforementioned notebook).

Fatwā *of al-Māwāsī*

The *shaykh* and jurist Abū Mahdī ᶜIsā al-Māwāsī[6] – may God have mercy upon him – was asked about some people who are living in their homelands as subjects of the infidel enemy – may God destroy and divide them – even though it would be easy for them to move from those lands, and they have a means of leaving them. Is their remaining under subjection to the infidel enemy permissible or not?

There are categories with respect to their relations with them: one category pays to them a tribute but does not frequent them. Another category frequents them for trade but not for any other [purpose]. Another category frequents them and informs them of the Muslims' affairs. Another category goes out [in boats] with them to fish and says to them, "may God prolong this period and this hour" – may God not accept their supplications.

Provide us with a comprehensive explanation of the rule for [each of] these categories.

He answered: As for Muslims' remaining under infidel rule, this is prohibited. Whoever frequents their homes has lost his religion and his [standing in the] world,

[6] Abū Mahdī ᶜIsā b. Aḥmad al-Māwāsī (d. 896/1491). For his biography, see chapter two. The manuscripts record his name as al-Māwsī or al-Māsawī; for the textual variants, see Appendix D, n. 19.

and is in violation of what his master [viz., Muḥammad] has commanded of him; for it is not permissible for a Muslim to conclude a treaty with the infidel to the effect that he will pay him tribute. This is agreed upon within the Mālikī school, so for whoever does that [viz., lives under infidel rule], his testimony is not accepted, nor is his leading of prayer. This is the rule for the first category; for Islam should be elevated, and [no other religion] should be elevated above it.

As for the judgment concerning the second category, which consists of those who frequent their places for trade, they are worse than the first category and their situation is more repugnant.

As for the third category, which consists of those who frequent their places for trade and inform them of the Muslims' affairs, this is the most repugnant of the three groups and the closest in status to that of a spy who points out the Muslims' weaknesses. His informing [the Christians] as to the Muslims' disadvantages is similar [in status] to banditry, the perpetrators of which must be killed in order to prevent the harm and corruption [he causes]. This is the considered view of those who say that the spy must be killed. [Others say] that he should not be killed, but that the ruler (*al-imām*) should determine his punishment and admonishment, or [that] a distinction ought to be made between one who acted in this manner [during] a single lapse [in judgment, as opposed to repeatedly]; this is a well-known point of scholarly disagreement. Also, should his repentance be accepted or not? [As to this question, his case] resembles the religion of the heretic with regard to the concealment of his action – this is [regarding] the one who frequently visits them, who shows the most affection toward them, and informs them of the routes leading to the Muslims' settlements; for

this is the most malicious and repugnant group. [This group] is closer to the infidels than to the believers, because love for the infidel and praying for his strength and power over the Muslims are among the signs of unbelief. May God protect us from apostasy and a change of conviction. (End, also from the aforementioned notebook).

Second Fatwā *of Ibn Barṭāl*

The jurist Abū al-Ḥasan ᶜAlī b. ᶜAbd Allāh b. Barṭāl – may God have mercy upon him – was asked about the judgment concerning some people who are residing in their homelands, while the Christians live in their immediate vicinity. They are of three categories: One category engages in strife and war with the infidels, like the people of Jabal (Mount) Ḥabīb.[7] Another category, when the treaty was concluded with the Christians, [the Christians] gave them a fixed time period [during which the Muslims could remain]. Their intention is not to pay them any monetary tribute, and that if they are asked for it, they will flee to the lands of Islam. What is the judgment concerning their residing in their lands with this intention? There is also a category whose intention is to reside in their lands and to pay tribute to the Christians for as long as the world remains. Clarify for us the judgment concerning these categories.

He answered: The answer to the horrifying first affair, which has threatened the pillars of Islam and blotted out the very days and nights, is that the first third consists of those Muslims whose intercession is accepted by [the strength of] their Islam, and from the dust of whose footsteps we must seek a blessing; for they are engaged in a

[7] A mountain in northwestern Morocco; see ch. 2, n. 63 and 71. This may be an error for Mount Zabīb.

powerful act of devotion to God. I only wish I were with them, so that I could attain a great victory.

As for the second third, who have agreed amongst themselves that if they are forced to pay a tribute they will flee with their lives, has committed a reprehensible act by residing in a territory in which the infidel has established his control and supremacy. Nonetheless, this third, if they fulfill what they have pledged through their intentions, will be among the saved, God willing; for they will have deceived [the enemy] and escaped.

As for the third third, they have lost their religion and their [standing in this] world, and have violated what their master [viz., Muḥammad] has commanded of them; thus they deserve a severe punishment. There is disagreement as to their punishment, [divided] among five opinions. The commonly accepted one is that which was held by Ibn al-Qāsim and Saḥnūn, which is that he should killed without being asked to repent – may God protect us from this calamity. While the Muslim's life is inviolable, through this [viz., intending to reside permanently among infidels] he makes his [own] life licit.

Likewise, it is not permissible for a Muslim to buy and sell [goods] with the Christians, as through this they [viz., the Christians] are made stronger against the Muslims. The people in these lands should have patiently endured their affliction [rather than engaging in trade with Christians] until God provided an effective end to [the situation]. (End, from the aforementioned notebook).

Excerpts from al-Burzulī and Ibn Rabīʿ

I also found in the aforementioned writing the following text:

In the chapter on *jihād* written by the master *shaykh* Abū al-Qāsim[8] – may God have mercy upon him – is the following text: And related to this is the calamity which struck the Muslims, that they live among polytheists and under their rule. [As to] the status of their property [viz., of the Muslims under non-Muslim rule], they applied the same ruling to this [case] as to the case of the *ḥarbī*[9] who has converted to Islam but has not emigrated, while he is in non-Muslim territory with his family, property, and children. In the chapter on *jihād* in the *Mudawwana*, concerning the *ḥarbī* who has converted to Islam but has not emigrated, [it is stated] that his property and children [may be seized as] booty (*fayʾ*) for the Muslims. Ibn al-Qāsim viewed the status of the territory as predominant over his [status as a Muslim], and Aṣbagh, among the followers of Mālik, ruled that his property was licit and that its possessor had no valid right of ownership over it, but rather that it was the infidels who had ownership [of the property in their territory]. Ibn Rushd held a similar opinion, because of his [viz., the subject Muslim's] contentment with residence among polytheists and with paying to them the *jizya*;[10] for he and his property are under their authority despite the scholarly consensus that emigration is obligatory upon him if he finds a means to do so. Ibn ʿArafa stated: "I said: 'The commonly accepted opinion is that the property of the *ḥarbī* can be taken as booty for the Muslims if he has not left [that territory for Muslim territory after converting]."'

[8] Al-Zayyātī is referring to Abū al-Qāsim al-Burzulī (d. 841/1438), compiler of the substantial *fatwā* collection which served as one of the primary sources for al-Wansharīsī's *Miʿyār*.
[9] A non-Muslim living in hostile territory.
[10] The name for the tax paid by Jews and Christians under Muslim rule (*dhimmīs*) to the Muslim state.

The jurist Abū al-Ḥasan Muḥammad b. Yaḥyā b. Rabīʿa[11] -- may God have mercy upon him – was asked about residence with the Christians in a region where their laws are in force, and [in which] the Muslims remained with them under subjection and humiliation because of their property and their [own] choice, paying to them the *jizya* assessed [on their properties], being abased, and giving to the polytheists the alms [owed for their possessions].

He answered – May God have mercy upon him: The jurists of the great cities said: This submission to polytheist [rule] was nonexistent in the land of Islam, and first arose after centuries had passed, and after the extinction of the master *mujtahid*s of the great cities.[12] Because of this, none of them turned their attention to the legal rules [pertaining to subject Muslims]; rather, they devoted their discussion to the legal rules pertaining to the opposite [case], which is that of those among them who submit to us, or those who enter under our protection and our treaty, in humiliation and subjection, glorifying our religion and without opposing [our authority and prayers].[13]

Then, when this submission to Christians appeared in the fifth century A.H., when the Christians seized the island of Sicily and some regions of al-Andalus, [at that point] some of the jurists in the Maghrib were questioned about this. They were asked about the legal judgments pertaining to those who commit this [prohibited act of submission]. They answered that they [i.e., those Muslims who remain in conquered territory] are subject to the same rules as those who convert to Islam [in non-Muslim territory] but do not emigrate. Thus [these jurists], because of the similarities between

[11] While this name is spelled Ibn Rabīʿa in all three manuscript copies, Van Koningsveld and Wiegers note that this is a misspelling of Ibn Rabīʿ. Van Koningsveld and Wiegers, "Islamic Statute," 20.
[12] The eponymous founders of the law schools and their earliest disciples.
[13] The end of this sentence has been added for clarity.

the two groups, assimilated them as to the legal rules pertaining to their property and their children; they did not see a difference between the two groups as to these [two issues]. This is because the two [groups] are as one with respect to their submission to the enemy, their living among them, their interacting with them, their failure to emigrate and to carry out the obligatory flight from their countries; and [with respect to] all of the other reasons which entail these legal rules.

Know that the guarantor of inviolability of the Muslim's life, property, and children is Islam and the territory [of Islam], [each] according to one of Malik's two opinions [on the subject]. Al-Shāfiʿī held that the guarantor of inviolability for both his life and property is Islam. Abū Ḥanīfa agreed that the guarantor of inviolability for his life and child is [both] the territory and Islam, because of the words of [God] Most High: {As for those who believed but did not emigrate; You owe them no loyalty until they emigrate},[14] and the words of [God] Most High: {If he belonged to a people hostile to you, and was a believer, the freeing of a believing slave (is required of the killer)}; [God] does not mention blood money [in this latter verse].[15] What is meant by this is the believer who has failed to emigrate, because he is a believer among an enemy people, and so he is one of them, because of the words of [God] Most High: {Whoever among you allies himself with them is one of them}.[16] Thus he is a believer but belons to an enemy people.

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[14] Qur'ān 8:72.
[15] Qur'ān 4:92. This is the verse which covers the atonement and compensation required for the accidental killing of three types of believers: believers in general, those belonging to enemy peoples, and those whose people have a treaty with the Muslims. Blood money is mentioned as due in the first and last cases, but only the freeing of a believing slave is mentioned as being required for the middle case.
[16] Qur'ān 5:51.

As for his property and small children: According to the narration of Ibn al-Qāsim in the *Mudawwana*, Mālik held that his property and children are legitimate booty; Abū Ḥanīfa held this position also. This difference of opinion [as to the Muslim's property and children] is relevant as long as he does not fight; but if he fights alongside his [non-Muslim] allies, there is only [one opinion, which is] that his life is licit. If they aid them [viz., if Muslims aid non-Muslims] financially in fighting against us, there is only [one opinion, which is] that their property is licit and their children may be captured in order to remove them from enemy hands. Likewise, their women [may be taken] in slavery.

(End, corrected.) (End of what I found in the aforementioned notebook, verbatim.)

Third Fatwā *of Ibn Barṭāl*

The jurist Abū al-Ḥasan ᶜAlī b. ᶜAbd Allāh b. ᶜAlī al-Aghṣāwī, who I believe is known as Ibn Barṭāl – may God have mercy upon him – was asked about some people whose lands are close to the Christians. There are categories [with respect to] their residence in [these lands]: One group lives in a state of discord with the Christians and cultivates [the land] at the edges of those regions under treaty; [their cultivation is] a form of theft, as the enemy does not know the borders of the territory or the location of their cultivation.

Another category signed a treaty, but their intention is that they will not pay any tribute. [This is] because the Christians postponed their payment until the month of October, at which point they must pay them [the tribute]; so they have resolved to themselves that they will reside in their lands until that time. Then if the Muslims aid

them, they will be the first in [waging] *jihād*; or if they do not aid them, [in that case] they will relocate to [join] them [i.e., they will move to Muslim territory]. What is the judgment of God concerning those who are in this category?

Another category signed a treaty, and their intention is to reside [there] permanently and to pay the tribute as well. What is the judgment of God concerning [those who live] in the manner described?

Another issue: A man from Asilah – may God Most High return her to Islam – came to owe a debt to a man, and then the enemy captured him [viz., the debtor], while he has property here; so may the creditor retrieve his debt from this property, or should the man be ransomed first? Clarify this for us.

He answered: The answer to this horrifying affair which has threatened the pillars of Islam and blotted out the very days and nights, is that the third who remain in a state of war with the enemy and of preparation for *jihād* against them, and who are in waiting to attack them – they are the Muslims whose intercession is accepted by [the strength of] their Islam, and from the dust of whose footsteps we must seek a blessing; for they are engaged in the greatest act of devotion to God. I only wish I were with them, so that I could attain a great victory.

As for the second third, who reside with the intention that if the enemy pressures them to pay the tribute, they will flee; they have committed a reprehensible act by residing in a territory in which the infidel has established his control, supremacy, and dominance over [the Muslims'] families and property. Nonetheless, this third, if they fulfill what they have pledged through their intentions, they will be

among the saved, if God Most High wills; [this is] if they refuse to pay them the tribute the first instance [it is imposed], for they will have deceived [the enemy] and escaped.

As for the third third, they are a truly vile third, because they have lost their religion and their [standing in this] world, and have violated what their master [viz., Muḥammad] has commanded of them; for it is not permissible for a Muslim to conclude a treaty with the infidels which stipulates that he pay them a tribute; [this is] by agreement within the school of Mālik. Thus anyone who does this has been disobedient to God Most High and gone against His messenger – may God bless him and grant him salvation. What is obligatory upon you and upon our masters[17] who reside there is to inform this third of their error and to rebuke, as much as they can, those among this third who have power and authority. Then if they disobey, they should be renounced; and it will not be permissible for you to act as their guardians or executors, nor for you to witness for them, nor to pray the funeral prayer for their dead, nor to attend to their (legal) affairs, unless they turn back from their sinful action and their contemptible depravity.

You had informed us in your question before this that the third category contains groups who convey news of the Muslims to the Christians, and inform them as to their weaknesses, and work with them in matters damaging to the Muslims; this group deserves a severe punishment. There is disagreement as to their punishment, [divided] among five opinions. The commonly accepted one is that which was held by Ibn al-Qāsim and Saḥnūn, which is that the punishment for whoever does this is death, without his being asked to repent – may God protect us from this great calamity. While

[17] *sādātinā*, literally "our masters" or "gentlemen" is most likely used here as a plural of *sīdī*, a standard Moroccan form of address indicating respect.

the Muslim's life is inviolable, through this [viz., informing against Muslims] he makes his [own] life licit.

You also had informed us that they pay tribute to the Christians, they trade with them, and they bring to them things from which they can benefit. We answered you, saying that it is not permissible for a Muslim to bring to the Christians anything that strengthens them against the Muslims, nor is it permissible for him to sell to them, or to buy from them, in a place where he is humiliated by them, such as in your lands, because Islam should be elevated, and [no other religion] should be elevated above it. The people in these lands should have been patient in their religion until they had completely despaired of any hoped-for assistance. This is because [their land] is adjacent to Muslim territory, and especially as ᶜUthmān al-Marīnī is still active, his victory is anticipated, he is strongly intent on freeing his lands, he is courageous and determined, but is pained by this [humiliating loss of territory and grievous subjection of Muslims to Christian rule].[18] God is asked to release his bonds, to eliminate the harmful consequences of his deeds, to repair his condition, and to make fortunate his era. We also ask Him to reconcile his servants and to restore those of His lands which have fallen.

We answered you prior to this, immediately upon the arrival of your question, and sent it [viz., the response] to you, but its arrival was not immediate.

The answer to the last issue is that the creditor should establish before the judge the debt owed to him. In the absence of a judge, then [he should do this] before a group of the area's notaries. Once he has established this, he should retrieve his due,

[18] This entire sentence is difficult to understand in all of the manuscripts and will need further review; see notes in the edition.

and he should be paid for this from the prisoner's money. The judge, or group of notaries in his absence, should assume responsibility for this. The payment of the debt should not be delayed in order to pay ransom. Indeed, if the prisoner had set aside for himself a specified amount of money [from which to ransom himself], that money is part of the rest of his debts. If his money can cover all of his debts, they should all be paid; if not, specific parties should be paid according to the amount of the debts.
(End, from the aforementioned notebook, which states that it was transmitted from the handwriting of the person who transmitted it from the hand [of the author].

Appendix D:

Edition of *Fatwā*s on Muslims Living Under Non-Muslim Rule from *Al-Jawāhir al-mukhtāra fī-mā waqaftu ᶜalayhi min al-nawāzil bi-Jibāl Ghumāra* (Selected Jewels: Legal Cases I Encountered in the Ghumāra Mountains)

by

ᶜAbd al-ᶜAzīz b. al-Ḥasan al-Zayyātī (d. 1055/1645)[1]

First Fatwā *of Ibn Barṭāl*[2]

[2:40][3] **وسئل[4] الفقيه أبو الحسن علي بن عبد[5] الله، وأظنه المعروف بابن برطال** – رحمه الله – عن أناس اصطلحوا مع النصارى على أن يغرموا لهم مالاً وتركوهم ببلادهم مقيمين. وصاروا معهم على فرق. فمنهم من يتجسس على المسلمين وينقل إليهم أخبارهم. ومنهم من يتسوق عندهم. ومنهم من صار يقاتل عليهم ويخرج للقتال مع عساكر النصارى، ويمنع المسلمين من الوصول إلى عدوهم. ومنهم من يؤدى المغرم فقط ولا يفعل شيئاً مما ذكر. ومنهم طائفة أسقط العدو عنهم الخراج كالطلبة والمؤذنون. ما حكم الله في دمائهم وأموالهم وإمامتهم وشهادتهم؟ وما يخص كل فريق من هؤلاء الفرق؟ جواباً شافياً.

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[1] This collection has not yet been published, although a number of these *fatwā*s appear in abridged form in al-Wazzānī's two *fatwā* collections (*al-Mi'yār al-jadīd* and *al-Nawāzil al-ṣughrā*). This is an edition of part of al-Zayyātī's chapter on *jihād*, based primarily on the following three manuscripts: Moroccan National Library, Rabat, ms. 1698, vol. 2, pp. 1-74 (BNRM); Ḥasanīya Library, Rabat, ms. 5862, pp. 225-267 (Ḥ); General Library and Archives, Tetouan, ms. 178, pp. 239-281 (T). These are the page ranges for the entire chapter on *jihād*; the locations of each *fatwā* will be given below. All three manuscripts are numbered by pages rather than folios. Only the Tetouan manuscript is dated; it was copied in 1102/1691. All three manuscripts have been drawn upon equally, but page transitions will be marked in the text for BNRM only; this is the copy most often referred to in the few published works which draw upon this collection. Where noted, I have emended the text based on versions of these *fatwā*s which appear in the following sources: Van Koningsveld, Wiegers, and Ryad's edition of Ibn Rabīᶜ's *fatwā*; al-Wazzānī's aforementioned *fatwā* collections; and al-Tusūlī's *fatwā* compilation, *Al-Jawāhir al-nafīsa fī-mā yatakarraru min al-ḥawādith al-gharība* ("Precious Jewels, Concerning Difficult and Recurring Cases"). The latter is unpublished; I have consulted two manuscript copies: Ms. 12575, Ḥasanīya Library, Rabat; Ms. 5354, Tunisian National Library, Tunis.

[2] BNRM, 2:40-41; Ḥ, 247; T, 262. Al-Wazzānī incorporates a part of this *fatwā*, along with the two other *fatwā*s by the same jurist found here, into one composite ruling in *al-Nawāzil al-ṣughrā*, 1:419.

[3] This *fatwā* begins on line 27 of 33.

[4] I have standardized the spelling of words such as this, which are written without a *hamza* in the original.

[5] I have emended this from عبيد in BNRM and T, based on the spelling of this jurist's name in the other two *fatwā*s attributed to him in this section. This word is illegible in Ḥ.

فأجاب: القوم الذين عقدوا الصلح مع النصارى [2:41] – دمرهم الله تعالى – على أن يغرموا لهم قوم فساق عصاة لله تعالى ومخالفون لسنة رسوله. فأما من التزم داره فلم يتردد[6] عليهم لتجارة ولا لغيرها، إلا أنه يغرم لهم، فهو عاص لله بغرامته وقعوده تحت الذلة. فلا تجوز شهادته ولا تصح إمامته، غير أن حالته أخف من حال من هو يأتي إليهم ويستعمل نفسه في مصالحهم. وحكم هذا القسم أنه لا يحل ماله لأحد ولا يباح دمه. وأما الذين يتجسسون على المسلمين فالمشهور أن دم الجاسوس مباح وأنه يقتل ويكون قاتله مأجوراً. وأما من اشترى الصلاح مع النصارى ويأتي في عسكرهم، فهذا القسم قد مرق[7] من الدين فحكمه حكم النصارى في دمه وماله. وأما من صار يتسوق عندهم، فهو فاسق وهو في الإثم أقوى ممن ألزم نفسه داره. وأما الطلبة والمؤذنون الذين رضوا بالقعود تحت ذمة النصارى – دمرهم الله – فهم طلبة سوء ومؤذنو سوء، لا تقبل شهادتهم ولا تجوز إمامتهم، وهم أعظم وزراً من غيرهم لأنهم يقتدى بهم، فتجب عليهم التوبة بعد رحيلهم من تلك البلاد التي غلب عليها الكفرة. وبالله التوفيق (اهـ من بعض التقاييد).

Fatwā *of al-Waryāglī*[8]

وسئل الفقيه أبو محمد عبد الله الورياجلي، وأظنه من فقهاء طنجة – رحمه الله – ما تقول أئمة الهدى في أخواننا المسلمين المستوطنين ببلادهم، حيث تنالهم أحكام أهل الكفر، في بر متصل بأهل الإسلام، ولم ينتقلوا من بلادهم إلى غيرها من بلاد الإسلام، حيث لا تجري عليهم من الكفار عوائد ولا أحكام؟ فهل يحل للمسلمين – أعزكم الله – سفك دمائهم وسبي نسائهم وأخذ[9] أموالهم؟ وهل تصح منهم إقامة الصلاة وإيتاء الزكاة وصوم رمضان أم لا؟

فأجاب: ما ذكرتموه من هذه الطائفة الرديئة الخسيسة، التي طمس الله بصائرها بعد الإبصار، وأضلها بسريان الكفر إلى قلوبها بعد الاستبصار، ورضوا بالاستيطان تحت الكفار الأنجاس الذين يكفرون بالرحمن، ويسبون نبينا ومولانا محمد – عليه أفضل الصلاة وأزكى السلام – ولعمري، فمثل هذا لا يصدر إلا من ضعيف الإيمان، ومن سبق

[6] In all three manuscripts: يقوم. This word is emended based on the text in the other *fatwā*s.
[7] In all three manuscripts: فرق. This word is emended based on context.
[8] BNRM, 2:41; Ḥ, 247-48; T, 262-63.
[9] In all three manuscripts: أخذ. This word is emended based on context.

له من الله الغواية والحرمان. هذا مع تعظيمهم للكفار وتعريضهم "لا اله إلى الله" لازدراء عباد الأصنام وكل هذا باختيارهم من غير إكراه. فالمختار في حق هؤلاء لائمتنا، والفتاوى الصادرة فيهم[10] عن شيوخنا، انه يجب قتلهم وأخذ مالهم على حكم الفيء لأن الدار دار الكفر، ومالهم إنما هو تحت أيدي الكفار، لا تحت أيديهم، لأنهم ينتزعونه منهم متى[11] أحبوا، والدار دارهم والإيالة لهم عليه.

وكذالك تسبى نساءهم وتنزع من أيديهم حتى يصلوا إلى بلاد المسلمين فيحكم بطلاقهم، ويحال بينهم وبين أزواجهم، ويزوجون، ولا يجوز إبقاء نسائهم معهم.[12]

وقد أخطأت أيها السائل خطأ عظيماً في تسميتك لهم بإخواننا المسلمين. بل، هم أعداؤنا وأعداء الدين – خيب الله سعيهم وحبس[13] سعدهم. بل هم إخوان[14] وأنصار للكافرين – أعز الله المسلمين عنهم ومكن سيوفهم من رقابهم ورقاب الكافرين – الذين انحازوا إلى فئتهم ورجعوا إلى جهتهم. والسلام عليك أيها السائل، ولا[15] عليهم.

ولا بد لنا من جواب فتيا معضوداً[16] بنصوص المتقدمين، وفتاوى الأئمة المتأخرين بعد هذا الجواب، إن شاء الله. وفيه[17] يكون الشرح والإيعاب. خلصنا الله وإياكم من الزيغ والضلال، وأماتنا على محبة دين النبي الصادق في المقال.

اهـ من التقييد المذكور.

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[10] In BNRM and Ḥ: فيه

[11] In T: متى ما; In Ḥ: حتى ما

[12] This is an emendation based on the text in al-Tusūlī's *fatwā* compilation. All three manuscripts of al-Zayyātī read omit لا يجوز. Al-Tusūlī, *al-Jawāhir al-nafīsa*, Ḥasanīya Library ms. 12575, 2:233 (numbered by pages); Tunisian National Library ms. 5354, folio 240b.

[13] Emended on the basis of the text in al-Tusūlī, both manuscripts (Ḥasanīya ms. 12575, 2:233; Tunisian National Library ms. 5354, folio 240b). All three manuscripts of al-Zayyātī read حبش

[14] In Ḥ: أعوان; unclear in T.

[15] In Ḥ: بل لا; in BNRM: لا.

[16] In BNRM: ولا بد لنا من جواب من جواب معضود. In T and Ḥ: ولا بد لنا من جواب الفتيا معضود, with a blank space between من جواب and الفتيا. I have emended the latter version by removing the definite article from *futyā*.

[17] In Ḥ: وفيه كفاية يكون.

Fatwā *of al-Māwāsī*[18]

وسئل الشيخ الفقيه أبو مهدي عيسى الماواسى[19] – رحمه الله – عن أناس سكنوا بأوطانهم [2:42] على ذمة العدو الكافر – دمره الله وبدد شمله – مع أنهم يتأتي لهم الانتقال من تلك الأوطان ويجدون للرحيل منها سبيلاً. هل تجوز إقامتهم تحت ذمة العدو الكافر أم لا؟ وحالهم معهم على أقسام: قسم يغرم لهم ولا يتردد إليهم، وقسم يتردد إليهم للتجارة لا لغيرها، وقسم يتردد إليهم ويعلمهم بأخبار المسلمين،[20] وقسم يركب معهم للاصطياد ويقول لهم "أطال الله هذه المدة وهذه الساعة[21]– لا قبل الله دعاءهم. بينوا[22] لنا حكم هذه الأقسام بياناً شافياً.

فأجاب: أما مقام المسلمين اختياراً تحت إيالة الكفار، فحرام.[23] وإن من تردد إلى منازلهم خسر[24] دينه ودنياه وخالف ما أمره مولاه، إذ لا يحل للمسلم أن يعقد الصلح مع الكافر على أن يغرم له، باتفاق في مذهب مالك. فمن يفعل ذلك، لا تجوز شهادته ولا إمامته. هذا حكم القسم الأول، والإسلام يعلو ولا يعلى عليه.

وأما[25] حكم القسم الثاني، وهو من[26] يتردد إلى منازلهم للتجر، فهو أسوأ حالاً من القسم الأول وأقبح منزلاً.

وأما حكم القسم الثالث، وهو الذي يتردد إلى منازلهم للتجر[27] ويعرفهم بأخبار المسلمين، فهذا أقبح الفرق الثلاثة وأشبه حالاً بالجاسوس الدال على عورات المسلمين. وهذا[28] يكون خبره[29] على مضرة[30] المسلمين كالحرابة، التي

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[18] BNRM, 2:41-42; Ḥ, 248; Tetouan, 263. A version of this *fatwā* is also recorded in al-Wazzānī, *al-Nawāzil al-ṣughrā*, 1:418.

[19] In Ḥ: الماسوي. Although both manuscript copies of *al-Jawāhir al-nafīsa* also read الماوسي, this jurist's name is spelled الماواسي in the biographical sources. See p. 140.

[20] In Ḥ: قسم يغرم لهم ولا يتردد إليهم، وقسم لا يتردد إليهم للتجارة لا لغيرها، وقسم يتردد إليهم ويعلمهم بأخبار المسلمين.
In T: قسم يغرم لهم ولا يتردد إليهم للتجارة لا لغيرها، وقسم يتردد إليهم ويعلمهم بأخبار المسلمين. BNRM and Ḥ list four categories, whose descriptions do not entirely match each other, while T lists three categories. None of them correspond perfectly with the answer, but BNRM appears to make the most sense.

[21] In Ḥ and T: هذه المدة وهذه في الدنيا. In BNRM, a mark above الساعة may indicate a mistake, but there is similarly a mark under الدنيا in Ḥ.

[22] In BNRM: فبينوا

[23] In Ḥ and T: فحرام محرم.

[24] Emended; all three manscripts read خسير

[25] In Ḥ: وما

[26] Ḥ and T omit من.

[27] All three manuscripts appear follow T's assimilation of the first two categories, omitting the following: . . . فهو أسوأ حالاً من القسم الأول وأقبح منزلاً. وأما حكم القسم الثالث، وهو الذي يتردد إلى منازلهم للتجر . . .
Emended based on al-Tusūlī (Ḥasanīya ms. 12575, 2:234; Tunisian National Library ms. 5354, folio 240b).

[28] Emended; all three manscripts read هل

[29] In BNRM: وهل يكون به. In T, the end of خبرته appears crossed out, such that it may read خبر or خبره.
In Ḥ: خبرته.

توجب لمن قامت به القتل، درءاً لمضرته ومفسدته؟[31] وهو نظر من قال بقتل الجاسوس. أم[32] لا يقتل ويجتهد الإمام في عقوبته وزجره. أو يفرق بين من اتخذ ذلك فلتة واحدة، خلاف معروف. وهل تقبل توبته أم لا؟ يشابه إلى دين[33] الزنديق في كتمان فعله. وهو المتردد لهم الأود إليهم ويعرفهم بالطرق الموصلة إلى أوطان[34] المسلمين، فهو[35] أخبث[36] الفرق[37] وأقبح، وهو أقرب للكافرين من المؤمنين،[38] لان الحب للكافر والداعي بالعزة له والاستطالة[39] على المسلمين من علامات[40] الكفر. ونعوذ بالله من الارتداد وتبدل الاعتقاد.[41]

اهـ من التقييد المذكور أيضاً.

Second Fatwā *of Ibn Barṭāl*[42]

وسئل الفقيه أبو الحسن علي بن عبد الله بن برطال – رحمه الله – عن حكم أناس سكنوا بأوطانهم والنصارى يجاورونهم، وهم على ثلاثة أقسام: قسم أهل فتنة وحرب مع الكفار كأهل جبل حبيب،[43] وقسم، لما انعقد الصلح مع النصارى، ضربوا لهم أجلاً، ونيتهم أنهم لا يغرمون[44] لهم مالاً، فإن هم طولبوا به، فروا إلى بلاد الإسلام. ما حكم

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[30] In all three manuscripts: نصرانية. Emended based on al-Tusūlī.
[31] This sentence contains a number of grammatical inconsistencies and unclear phrases; my translation is based on reading the passage roughly as follows:
وهل يكون إخباره النصارى بمضرات المسلمين كالحرابة، التي توجب لمن قام بها القتل؟
[32] In BNRM: أو
[33] In BNRM: فشابه دين
[34] Emended based on context. In Ḥ: إيعاد. In BNRM and T: إجبار. In both manuscripts of al-Tusūlī: إستتار. In al-Wazzānī: إستيلاء
[35] In BNRM and Ḥ: فهي
[36] In Ḥ: أبيس (أبأس). Illegible in T.
[37] In Ḥ and T: الفريق
[38] In Ḥ and T: من الايمان
[39] In T: الاستيطالة
[40] In all three manuscripts: علامة. Emended based on context.
[41] In Ḥ and T: الاشفاء
[42] BNRM, 2:42; Ḥ 248; T, 263. Al-Wazzānī combines Ibn Barṭāl's three *fatwā*s into one composite ruling in *al-Nawāzil al-ṣughrā*, 1:419.
[43] Although all three manuscripts read Ḥabīb, this may be an error for Mount Zabīb in the Ghūmara mountain range, rather than Ḥabīb. See chapter two, notes 63 and 71.
[44] In T: لا يتركون يغرمون

سكناهم في بلادهم مع هذه النية؟ وقسم نيتهم أن يسكنوا بلادهم ويغرموا للنصارى ما بقيت الدنيا. بينوا[45] لنا حكم هذه الأقسام.

فأجاب: الجواب عن المسألة الأولى الهائلة، التي هوّل بها أركان[46] الإسلام وطمست بها عيون الليالي والأيام، أن الثلث الأول هم المسلمون المشفعون بإسلامهم الذين يجب علينا التبرك بغبار أقدامهم، فأنهم في عبادة عظيمة. فيا ليتني كنت معهم فأفوز فوزاً عظيماً.

وأما الثلث الثاني: الذي عقد بينهم أنهم، إن اضطروا على الغرامة، يفر بنفسه،[47] فقد فعل فعلاً مكروهاً[48] في استيطانه ببلد يمكن الكافر فيه قهره وغلبته، غير أن هذا الثلث، إن وفي ما عاهدت[49] عليه نيته،[50] فانه من الناجين إن شاء الله أنه[51] غرّ وسلم.

وأما الثلث الثالث، فأنه خسر[52] دينه ودنياه، وخالف ما أمر به مولاه، فهؤلاء يستحقون العقوبة العظيمة. واختلف في عقوبتهم على خمسة أقوال: المشهور منها ما ذهب إليه ابن القاسم وسحنون، أنه يقتل من غير استتابة – عافانا الله من هذه المصيبة. فبينما[53] المسلم حرام الدم وإذا به يصيّر نفسه حلال الدم.

وكذلك لا يحل لمسلم أن يبيع ويشتري من النصارى فيتقوون بذلك على المسلمين. وكان يجب على أهل الأوطان الصبر على ما أصابهم حتى يقضى الله أمراً كان مفعولاً.

اهـ من التقييد المذكور أيضاً.

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[45] In BNRM: فبينوا

[46] In Ḥ and T: التي هو بها أو كانت; in T an attempt has apparently been made to correct أو كانت to أركان.

[47] In Ḥ and T: لما عقد بنية أنهم، إن اضطر على الغرامة، يفر بنفسه

[48] In BNRM: فقد فعل مكروهاً

[49] Emended from عاهد

[50] In BNRM: نيتهم

[51] In BNRM: لأنه

[52] In Ḥ and T: وأما الثلث الثالث فبأس الثلث لأنه خسر

[53] In Ḥ and T, this word may be مبنيها or بينها, but is difficult to read; it is more clearly فبينما where the passage recurs below.

Excerpts from Abū al-Qāsim al-Burzulī and Ibn Rabīʿ[54]

وجدت في التقييد المذكور أيضاً ما نصه:

وقع في كتاب الجهاد من تأليف الشيخ الأمام أبي القاسم – رحمه الله – ما نصه:

وفيه ما أصابه [2:43] المسلمون من غاشية المسلمين الساكنين تحت أحكام المشركين وبين أظهرهم، وحكم أموالهم، فأجروها على مسألة الحربي الذي يسلم ولم يهاجر، وهو ببلد الحرب بأهله وماله وولده. وفي كتاب الجهاد من *المدونة*، في الحربي[55] الذي يسلم ولم يهاجر، أن ماله وولده فيء للمسلمين. فغلب ابن القاسم عليه حكم الدار، وكان أصبغ، من أصحاب مالك، يفتي بحلية ماله، وأنه لا يد لصاحبه عليه، وإنما اليد للكفار. وبمثله قال ابن رشد لكونه رضي بالإقامة بين المشركين وضرب الجزية عليه، فهو وماله تحت إيالتهم، مع الإجماع على وجوب الهجرة عليه إن وجد سبيلاً إلى ذلك. قال ابن عرفة: "قلت: والمشهور أن مال الحربي للمسلمين فيء إذا لم يخرج."

قال الفقيه أبو الحسن محمد بن يحيى بن ربيعة – رحمه الله – وقد سؤل عن الإقامة مع الروم في البلد[56] الذي تعلوا عليه أحكامهم وبقى المسلمون معهم تحت الذمة والإذلال بسبب أموالهم واختيارهم،[57] يعطون الجزية عليها، وهم صاغرون ويؤدون الزكاة منها للمشركين.

فأجاب – رضي الله عنه: أن فقهاء الأمصار [قالوا] إنه لما كانت هذه الموالاة الشركية[58] مفقودة في دار الإسلام، ولم تحدث إلا بعد مضى مئين من السنين، وبعد انقراض أئمة الأمصار المجتهدين، لم يتعرض أحد منهم لأحكامها الفقهية، وإنما تفقهوا[59] في أحكام نقيضها، وهو من والانا[60] منهم أو من دخل ذليلاً صاغراً في ذمتنا وعهدنا معظماً لديننا وغير متعرض.[61]

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[54] BNRM, 2:42-43; Ḥ, 248-49; T, 263-64. For the first part, see also al-Burzulī, *Fatāwā al-Burzulī*, 2:22-23.
[55] In Ḥ: الحرب
[56] In Ḥ and T: في بلد
[57] BNRM omits إختيارهم
[58] In T: المشركية
[59] In Ḥ: ولم يتفقوا. In BNRM: وإنما يتفقوا
[60] In Ḥ: ولانا
[61] In Van Koningsveld, Wiegers, and Ryad's edition, this continues: وغير متعرض لكلمتنا وصلاتنا. This sentence does not appear in al-Wansharīsī's *fatwā*s.

ثم لما نبغت هذه الموالاة النصرانية في المائة الخامسة من تاريخ الهجرة، وقت استيلاء الروم على جزيرة صقلية وبعض كور الأندلس، سيل عنها فقهاء المغرب واستفتوا[62] بالأحكام الفقهية المتعلقة مرتكبها،[63] فأجابوا بأن أحكامهم[64] جارية على أحكام من أسلم من الحربيين ولم يهاجر، فألحقوا[65] هؤلاء، بأسوأ الطائفتين،[66] في الأحكام الفقهية المتعلقة بأموالهم وأولادهم، ولم يروا فيها فرقاً بين الفريقين، وذلك لأنهما[67] في موالاة الأعداء ومساكنتهم ومداخلتهم وترك الهجرة والفرار الواجب من بلادهم[68] وسائر الأسباب الموجبة لهذه الأحكام بمثابة واحدة.

واعلم أن العاصم لدم المسلم وماله وولده هو الإسلام والدار في أحد قولي مالك. وذهب الشافعي إلى أن العاصم[69] لدمه وماله جميعاً الإسلام،[70] واتفق أبو حنيفة أن العاصم لدمه وولده الدار والإسلام، لقوله تعالى: {والذين آمنوا ولم يهاجروا ما لكم من ولايتهم من شيء حتى يهاجروا}[71] ولقوله تعالى: {فإن كان من قوم عدو لكم وهو مؤمن فتحرير رقبة مؤمنة}[72] ولم يذكر ديته. فالمراد بهذا المؤمن الذي لم يهاجر، لأنه مؤمن في قوم أعداء، فهو منهم، لقوله تعالى: {و من يتولهم منكم فإنه منهم}،[73] فإنه مؤمن من قوم عدو.

وأما ماله وولده الصغار فذهب مالك، في رواية ابن القاسم عنه في *المدونة* إلى أن ماله وولده فيء. وبه قال أبو حنيفة. وسبب هذا الخلاف ما لم يحاربوا، فإن حاربوا مع أوليائهم، فليس إلا استباحة دمهم. وإن أعانوهم بالمال على

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[62] Emended. In all three manuscripts: استفتوها

[63] All three manuscripts read بارتكابها. Emended on the basis of the text in Ibn Rabīʿ: واستفهموا عن الأحكام الفقهية المتعلقة بمرتكبها

[64] All three manuscripts of al-Zayyātī read فأجابوا بأن قالوا أحكامهم; this is emended based on the text of Ibn Rabīʿ, which omits قالوا.

[65] In T: فألحقوها

[66] All three manuscripts read أسوا. In Ibn Rabīʿ: لم يهاجروا، فألحقوا هؤلاء بهم، وسووا الطائفتين

[67] All three manuscripts of al-Zayyātī read وذلك لأنهما بمساواتهما; this is emended based on the text of Ibn Rabīʿ, which omits بمساواتهما

[68] All three manuscripts of al-Zayyātī read وترك الهجرة والفرار الواجب من بلادهم منهم; this is emended based on the text of Ibn Rabīʿ, which omits وترك الهجرة والفرار الواجب من بلادهم. This longer phrase makes منهم redundant.

[69] In Ḥ: إلى العاصم

[70] This sentence regarding al-Shāfiʿī's opinion is the only part of these last two paragraphs which matches the text in Ibn Rabīʿ.

[71] Qur'ān 8:72.

[72] Qur'ān 4:92.

[73] Qur'ān 5:51

قتالنا فليس إلا استباحة أموالهم وسبي ذراريهم للاستخلاص من يد الكفار وإنشاءهم[74] بين أظهر المسلمين، آمنين من الفتنة. وكذلك نساؤهم للاسترقاق.[75] اهـ صحح.[76]

اهـ ما وجدته في التقييد المذكور بلفظه.

Third Fatwā *of Ibn Barṭāl*[77]

وسئل الفقيه أبو الحسن علي بن عبد الله بن علي الأغصاوي، وأظنه المعروف بابن برطال – رحمه الله – عن أناس بلادهم قريبة من النصارى وحالهم في السكنى فيها على أقسام: قسم سكنوا على الفتنة مع النصارى ويحرثون في أطراف بلاد الصلح على وجه السرقة، إذ العدو لا يعرف حدود البلاد ولا أين حرثهم.

وقسم صالحوا ولكن نيتهم أنهم لا يؤدون مغرماً لأن النصارى كانوا أخروهم بالغرم إلى شهر أكتوبر وحينئذ يؤدونه [2:44] لهم فأظهروا في أنفسم أنهم يسكنون في بلادهم إلى ذلك الأجل، فإما أن يغيثهم المسلمون، فيكونون هم الأولون في الجهاد، وأما إن لا يغيثوهم،[78] فيرحلون إليهم. فما حكم الله في أصحاب هذا القسم؟

وقسم صالحوا ونيتهم السكنى على وجه التأبيد وتأدية المغرم كذلك. فما حكم الله على هذا الوجه المذكور؟

ومسألة أخرى: رجل من أهل أصيلا – أعادها الله تعالى للإسلام – ترتب عليه دين لرجل، ثم أسره العدو وله هنا مال فهل يقتضي رب الدين من هذا المال دينه أم يفدي الأسير أولاً؟ بينوا لنا ذلك.

فأجاب: الجواب عن المسألة الهائلة التي هول[79] بها أركان الإسلام وطمست بها أعين[80] الليالي والأيام، أن الثلث الساكن على مجاهدة العدو والتأهب لجهادهم وانتظار غاراتهم هم المسلمون المشفعون بإسلامهم الذين يجب علينا التبرك بغبار أقدامهم فأنهم في عبادة ما أعظمها عبادةً. فيا ليتني كنت معهم فأفوز فوزاً عظيماً.

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[74] This is emended based on the text in Ibn Rabīʿ; all three manuscripts read:
بالاستخلاص من يد الكفار، وأن نساءهم

[75] In BNRM: نساءهم لا يسترقون; but a mark above this word appears to indicate a mistake of some kind.

[76] BNRM omits اهـ صحح

[77] BNRM, 2:43-45; Ḥ, 249; T, 264. Al-Wazzānī combines Ibn Barṭāl's three *fatwā*s into one composite ruling in *al-Nawāzil al-ṣughrā*, 1:419.

[78] In Ḥ: لا يغيثهم

وأما الثلث الثاني الساكن بنية أنه إن أضغطه العدو[81] على الغرامة يفر، فقد فعل[82] مكروهاً في استيطانه ببلد يمكن[83] العدو فيها قهره وغلبته واستيطال الأهل والأموال. غير أن هذا الثلث إن وفى بما عقد عليه بنيته، فأنه من الناجين إن شاء الله تعالى، إذا قطع الغروم عليهم رأساً، لأنه غرّ وسلم.

وأما الثلث الثالث، فبئس الثلث لأنه خسر دينه ودنياه، وخالف ما أمر به مولاه، أنه لا يحل لمسلم أن يعقد الصلح مع الكفار على أن يغرم لهم، باتفاق في مذهب مالك. فمن فعل ذلك كان عاصياً لله تعالى ومخالفاً لرسوله – صلى الله عليه وسلم. والواجب عليكم وعلى ساداتنا المستوطنين هنالكم أن يعرّفوا هذا الثلث بخطئه، وأن يزجروا أهل الحل والعقد من ذلك الثلث[84] جهدهم. فان خالفوا، فاهجروهم، ولا يحل لكم أن تولوا[85] بهم ولا أن تشهدوا لهم ولا تصلوا على جنائزهم ولا تتعرضوا لمسائلهم إلا أن يرجعوا عن فعلهم المذموم وعن[86] رذالتهم الخسيسة.

وكنتم عرفتمونا في سؤالكم قبل هذا أن القسم الثالث منهم أقوام ينقلون خبر المسلمين للنصارى ويخبرونهم بعوراتهم[87] ويسعون معهم فيما يضر المسلمين فهؤلاء القوم يستحقون العقوبة العظيمة. واختلف في عقوبتهم على خمسة أقوال. المشهور منها ما ذهب إليه ابن القاسم وسحنون أن عقوبة من فعل ذلك القتل من غير استتابة – عفانا الله من هذه المصيبة العظيمة. فبينما المسلم حرام الدم وإذا به[88] يصير نفسه حلال الدم.[89]

وكذلك كنتم عرفتمونا أنهم يغرمون على النصارى يتبايعون معهم ويحملون لهم ما ينتفعون به. وجاوبناكم أنه لا يحل لمسلم أن يحمل للنصارى ما يتقوون به على المسلمين، ولا يسوغ له[90] أن يبيع لهم ولا أن يشتري منهم بموضع تناله فيه الذلة منهم، كبلادكم، لأن الإسلام يعلوا ولا يعلى عليه. وكان من حق أهل تلك الأوطان الصبر لدينهم حتى يقع الإياس من نصرة ترجى لأن بلاد المسلمين متصلة، لا سيما وعثمان[91] المريني قائم العين مرجو الانتصار، شديد

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[79] This word has been emended based on the earlier version of this *fatwā*. Here, all three manuscripts read ثلث

[80] In Ḥ and T: عين

[81] T and Ḥ omit العدو

[82] In Ḥ: فعلى

[83] Illegible in Ḥ.

[84] In BNRM: عن ذلك

[85] Emended based on the text in al-Tusūlī; all three manuscripts of al-Zayyātī read تركوا

[86] In Ḥ and T: عن

[87] In T: ويخبرونهم عن عوراتهم. In Ḥ: ويخبرونهم عوراتهم

[88] In BNRM: ذا به

[89] T omits الدم

[90] In Ḥ and T: لهم

[91] Emended based on context; all three manuscripts of al-Zayyātī and the Tunisian National Library manuscript of al-Tusūlī read عماد; the Ḥasanīya manuscript of Tusūlī has a blank here.

الحرص على استخلاص بلاده، مملؤ الأحشاء، أسفاً مضموراً لقريحة ألماً.[92] فالله المسؤول أن يطلق عقاله وأن يزيل وباله وأن يصلح أمره وأن يسعد عصره كما نسأله أن يوفق بين عباده وأن يتدارك ما هوى[93] من بلاده.

وقد جاوبناكم قبل هذا بفور بلوغ سؤالكم، وبعثناه لكم، فلم يفر[94] وصوله.

والجواب عن المسألة الأخيرة أن رب الدين يثبت دينه عند القاضي، فإن عدم القاضي، فعند جماعة عدول البلد. فإذا أثبته، يتخلص من دينه، وقضى له به من مال الأسير، ويتولى ذلك القاضي أو جماعة عدول عند عدمه. ولا يؤخر [2:45] قضاء الدين لاستيفاء الفدية. نعم، إن كان الأسير قد قاطع على نفسه بمال محدود، فان ذلك المال من سائر ديونه. إن حمل ماله الجميع، قضى الجميع. وإن لم يحمله،[95] وقعت الخاصة على قدر الديون.

اهـ من التقييد المذكور، قائلاً إنه[96] نقل من خط من نقل من خطه.

Fatwā *of al-Wansharīsī (the 'Berber* Fatwā')[97]

وسئل الأمام حافظ زمانه أبو العباس أحمد بن يحيى الونشريسي – رحمه الله ورضي عنه – عن قوم من البرابر أقاموا بأوطانهم تحت طاعة العدو الكافر، وهم يجدون سبيلاً إلى الخروج من تلك الأوطان. هل تجوز إقامتهم هنالك أم لا؟

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[92] This sentence is difficult to understand and has been emended in several places based on the text as recorded by al-Tusūlī (Ḥasanīya Library ms. 12575, 2:238 and Tunisian National Library ms. 5354, p. 247-48). In al-Zayyātī, the subject appears to alternate between al-Marīnī and the inhabitants of the occupied region under discussion, as follows:
In BNRM: وعماد المريني قائم العين، مرجوا الانتظار، شديد الحرص على استخلاص بلاده، حملوا الأحشاء، أسفاً مضموراً القريحة ألماً.
Variant in Ḥ: مرجوا لانتظاره
Variant in T: الانتظار may be corrected to الانتصار, and حملوا may be corrected to مملوا.
Variant in the Ḥasanīya Library manuscript of al-Tusūlī: the passage ends with القريحة.

[93] In Ḥ: هدى

[94] Emended; all three manuscripts read يفور

[95] In Ḥ and T: إن حمل ماله الجميع، وإن لم يحمله

[96] In Ḥ: لأنه

[97] BNRM, 2:45-47; Ḥ, 249-51; T, 264-66. An abbreviated version of this *fatwā* is included in al-Wazzānī's *al-Mi'yār al-jadīd*, 3:28-31.

وهم مع[98] العدو على أقسام: منهم من يقيم بوطنه ولا يذهب إليهم،لا للتجارة ولا لغيرها. ومنهم من يذهب إليهم لقصد التجارة لا لغيرها. ومنهم من يذهب إليهم لقصد التجارة وتعريفهم بأخبار المسلمين. ومنهم من يصطاد[99] معهم ويبصرهم بأوطان المسلمين، ويتحاكم إليهم ويقول لهم "الله يطيل[100] مدتكم."

وما الحكم سيدي فيما استولى عليه العدو الكافر من أموال المسلمين؟ هل يجوز شراءه منهم أم لا؟ فان بعض الطلبة يذهب إليهم لاستخلاص الكتب من أيديهم بالشراء. بينوا لنا ذلك، ولكم الأجر، والسلام عليكم.[101]

فأجاب: حاصل السؤال بما اشتمل عليه من الأنواع يرجع إلى أسئلة: الأول المقام بأرض الحرب والدخول تحت إيالة الكفر. والثاني الدخول إليهم للمتاجرة والإخبار بعورة المسلمين. والثالث الاصطياد معهم والتحاكم إليهم والدعاء لهم بالبقاء. وهذان السؤالان كالنوعين تحت السؤال الأول، والأول[102] كالجنس لهما. فالرابع في حكم ما استخلص من أموال المسلمين.

فأما الأول، فجوابه – والله سبحانه الموفق للصواب بفضله – أن الدخول تحت طاعة الكفر والمقام بدار الحرب مع التمكن من النقلة عنها والبعد منها حرام، لا يجوز طرفة عين ولا ساعة من نهار. والواجب المتحتم اللازم أن تهجر بقاع الكفر ينتقل عنها إلى دار الإسلام بحيث لا تجري أحكامهم. والدليل على ذلك الكتاب[103] والسنة الإجماع.

أما الكتاب،[104] بقوله تعالى: {أن الذين توفيهم الملائكة ظالمي[105] أنفسهم قالوا: "فيما كنتم؟" قالوا: "كنا مستضعفين في الأرض." قالوا: "ألم تكن أرض الله واسعة فتهاجروا فيها؟" فأولئك مأواهم جهنم وساءت مصيراً، إلا المستضعفين من الرجال والنساء والولدان، لا يستطيعون حيلة ولا يهتدون سبيلاً. فأولئك عسى الله أن يعفوا عنهم، وكان الله عفواً غفوراً}[106] أن الذين لا يهتدون سبيلاً يتوجهون إليه، لو خرجوا هلكوا، فأولئك عسى الله أن يعفو عنهم. يعني في إقامتهم لأنهم[107] بين ظهور المشركين.

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[98] Ḥ omits مع. In T: مع has been corrected from من. In BNRM: مع
[99] In BNRM: من يذهب يصطاد
[100] In Ḥ: يصيل
[101] In Ḥ: ولكم الأجر والسلام
[102] Ḥ and T omit والأول
[103] In Ḥ and T: الكتب
[104] In Ḥ: الكتب
[105] T repeats ظالمي
[106] Qur'ān 4:97-99.
[107] In Ḥ: في أرد لأنهم. In BNRM, there is a blank space with a line through it between في and ظهورهم.

وأما السنة، فقوله – صلى الله عليه وسلم: "أنا بريء من كل مسلم يقيم مع المشركين."[108]

وأجمع الأئمة على ذلك.

فإذا وجب، بالكتاب[109] والسنة وإجماع الأئمة، على من[110] أسلم بدار الحرب أن يهجرها ويلحق بدار الإسلام، ولا يثوي[111] أو يقيم بين أظهرهم لئلا تجري عليه أحكامهم، فلآن يجب في حق المسلم الأصلي أحرى وأولى. وقد ذكره مالك – رضي الله عنه – السكنى ببلد يسب فيه السلف، فكيف ببلد يكون فيه تحت طاعة الشيطان، وسخط الرحمن وحيث يدعى التثليث وتعبد الأوثان؟ لا تسكن على هذه المرام إلا نفس خبيثة العقيدة مريضة الإيمان.

ونص الأئمة على أنه، لو لم يجد السبيل إلى التخلص من حبال الكفرة إلا ببذل ما له من المال، أوجبناه عليه وجوباً مضيفاً. فان لم يفعل، لم تكمل حرمته، ولم تقبل شهادته، ولم يكن له حق في الفيء والخمس. ولهذا[112] اختلف المذهب في أموال الدجن،[113] هل يحكم لها[114] بحكم الدار، فهي كأموال العدو، أو لم تزل على ملكهم؟ وعن بعضهم، لا تجوز معاملتهم، ولا السلام[115] عليهم، كأهل الأهواء. ونص القاضي أبو الوليد الباجي – رحمه الله – على أن المسلم، إذا أقام بدار الحرب مع القدرة على الخروج، وقتل خطأ، أنه لا دية[116] له. ونص أهل المذهب أيضاً على امتناع قبول مخاطبة[117] أهل الدجن، كقضاة دجن بلنسية [2:46] وطرطوشة[118] وقوصرة[119] وميورقة.[120] وعللوا بان شرط قبول[121] القاضي صحة ولايته ممن تصح توليته بوجه.

وأما الداخل إليهم[122] للتجر وطلب الدنيا وجمع[123] حطامها، وهو النوع الأول من نوعي السؤال الثاني من تخليصنا، وهو مجموع السؤال الثاني من الأصل، وأحد نوعي الثالث منه. فنص – رحمه الله – أنه جرحة فيه،

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[108] *Jāmiʿ al-Tirmidhī, Kitāb al-Siyar*, 1604; *Sunan Abū Dāwūd*, *Kitāb al-Jihād*, 2645; *Sunan al-Nisā'ī*, *Kitāb al-Qasāma*, 4780.

[109] In Ḥ and T: الكتب

[110] T omits من

[111] In T: ببلد. In BNRM and Ḥ: بيار. I have emended this word based on the text of Ibn Rushd's *al-Muqaddimāt al-mumahhidāt* (2:153), upon which this paragraph draws heavily.

[112] In T: وهذا

[113] Emended based on context. In Ḥ and T: دين. In BNRM, there is a blank space with a line through it between أموال and هل. The same term appears below, so this usage is not anachronistic.

[114] T omits لها

[115] In Ḥ: وللا سلام. In T: وللا لسلام

[116] Ḥ repeats لا دية

[117] In BNRM: المخاطبة

[118] In Ḥ: طرطوشية

[119] T omits قوصرة

[120] In BNRM: ميروثم

[121] T omits قبول

[122] In T: إليهم بوجه, although بوجه appears crossed out.

تسقط بها إمامته وشهادتة إذ لا يجوز لأحد دخول أرض الشرك، إلا لمفاداة أسارى المسلمين. والواجب على أئمة المسلمين وجماعتهم – وفقهم[124] الله وأعانهم – أن يمنعوا من الدخول إلى أرض الحرب للمتجارة ويضعوا لهم المراصد في الطريق لذلك حتى لا يجد أحد السبيل إلى ذلك، لا سيما إن خشي أن يحمل[125] إليهم ما لا يحل بيعه منهم، مما هو قوة على أهل الإسلام، لاستعانتهم[126] به في حروبهم.[127]

قال في *المدونة*: وشدد مالك الكراهية في التجارة إلى أرض الحرب. قال: يجري حكم المشركين عليهم، ولا تباع من الحربيين آلة الحرب من كراع أو سلاح وسروج وغيرها، مما يتقوون به في الحرب، من نحاس وخرثى وغيره.

وفي *الواضحة* عن مطرف وابن الماجشون: اذا كانت الهدنة بيننا وبين المشركين، فلا بأس أن يباع منهم الطعام. ويكره أن يباع لهم الكراع والسلاح والحديد والنحاس والخرثى والجلود، وكل ما يستعان به في الحرب. وأما في غير الهدنة، فلا يحل أن يباع منهم الطعام ولا غيره، من كل ما هو قوت لهم في دار حربهم.

وفي *المقدمات*، لا يجوز أن يباعوا[128] شيئاً مما يستعينون به في حروبهم من كراع أو سلاح أو حديد، ولا شيئاً مما يرهبون به على الإسلام في قتالهم، مثل الرايات،[129] وما يلبسون في حروبهم من الثياب، فيباهون بها على الإسلام. وكذالك النحاس، لأنهم يعملون منه الطبول، فيرهبون به على المسلمين. وكذلك لا يجوز أن يباع منهم العبد النصراني، لأنه يكون دليلاً على المسلمين، وعورة عليهم. وإنما يجوز أن يباع منهم من العروض ما لا يتقوون بها[130] في الحرب ولا يرهب به في القتال، ومن الكسوة ما يقي الحر والبرد، لا أكثر، ومن الطعام، ما لا[131] يتقوت به، مثل الملح والزيت، وما أشبه ذلك.

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[123] In Ḥ: جميع.
[124] Emended; all three manuscripts read وفرهم
[125] In BNRM and Ḥ: يجعله. In T, this word has been corrected but appears to be يحمل, which is supported by the text in Ibn Rushd's *al-Muqaddimāt al-mumahhidāt* (2:154).
[126] In T: لاستغاثهم.
[127] In all three manuscripts: فرضوا بهم. I have emended the text based *al-Muqaddimāt al-mumahhidāt* (2:154).
[128] In BNRM: يبتاعوا
[129] In BNRM: الريات
[130] In *al-Muqaddimāt al-mumahhidāt* (2:155): ما يتقوى به
[131] Emended; manuscripts omit لا

وأما النوع الثاني من نوعي السؤال الثاني، وهو الذي يدخل[132] إليهم للدلالة على المسلمين والإخبار بعوراتهم، فالواجب على من ثبت ذلك عليه[133] من ضعفة المسلمين واخسائهم ببينة مرضية لا مدفع فيها[134] القتل في قول ابن القاسم وسحنون، ولا تقبل له توبة. قال سحنون: ولا دية لورثته، كالمحارب. وقيل: يجلد نكالاً ويطال سجنه وينفى لما بعد من دار الحرب.[135] نقله سحنون عن بعض أصحابنا. وقيل: يقتل إلا أن يتوب. قاله[136] ابن وهب.[137] وقيل: إن كانت منه فلتة، وظن جهله،[138] وعدم عوده، وليس من أهل الضر على الإسلام، نكل وضرب. وإن كان معتاداً، قتل. قاله ابن الماجشون. وقيل: يقتل إلا أن يعذر بجهله. وقيل: يجتهد فيه الإمام، وهي رواية العتبي واللخمي، بتفصيل[139] في المسألة يطول بنا جلبه.[140]

وأما النوعان الأولان من أنواع السؤال الثالث من تخليصنا،[141] وهي الاصطياد معهم والتحاكم إليهم، وهو القسم الرابع من تقسيم المسائل، فحكمها الجرحة وعظيم الكراهة. ولا يبعد التحريم، لما في ذلك من إذلال عزة الإسلام وأهله. والإسلام يزيد ولا ينقص، ويعلوا ولا يعلى عليه.

وأما الثالث من السؤال الثالث، وهو الدعاء للملاعين الكفار[142] – أبعدهم الله – بالبقاء وطول المدى، فالظاهر أن ذلك علامة[143] على ردة الداعي وإلحاده في فساد سريرته[144] واعتقاده،[145] لما تضمنه من الرضي بالكفر، والرضى بالكفر كفر. وقد الحق الشيخ[146] أبو الحسن الاشعري – رضي الله عنه – إرادة الكفر بالكفر، كبناء الكنائس ليكفر فيها، أو قتل نبي[147] مع اعتقاد صحة رسالته، ليميت[148] شريعته.[149] ومنه عند القرافي تأخير من أتى[150] يسلم على يديك، [2:45][151] فتشير عليه بتأخير الإسلام، لان إرادة إبقاء الكفر، يريد إرادة بقائه، كفر.[152]

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[132] Emended; manuscripts read الداخل
[133] T omits عليه
[134] In Ḥ: بها
[135] In Ḥ: لدار الحربي
[136] In T: قال
[137] In BNRM: ابن زرب
[138] In Ḥ: فعله
[139] In T: تفصيل. In Ḥ: فتصيل
[140] In Ḥ: حليه
[141] In Ḥ and T: تخليصها
[142] In Ḥ and BNRM: الكفرة
[143] Emended; manuscripts read علم
[144] In Ḥ and T: سرائرته
[145] In Ḥ: إشهاده
[146] In BNRM: شيخ
[147] In Ḥ and T: قتل بنبي. In BNRM: بشيء; word is unclear.
[148] In Ḥ: للميت
[149] Emended; manuscripts read شريعة

من هذا المعنى مسألة وقعت في أيام شهاب الدين القرافي – رحمه الله – وهي[153] أن رجلاً قال لأخر[154] "أماته الله كافراً،"[155] فأفتى الشيخ شرف الدين الكرخي[156] بكفره، لما تضمنه من إرادة الكفر. وهي في مسألتكم أوضح وأبين. وأدنى حال هؤلاء الفسقة أن يبالغ في ضربهم ويمعن في تأديبهم[157] حتى يتوبوا، كما فعل عمر – رضي الله عنه – بصبيغ المتهم في اعتقاده، من ضربه أياه، حتى قال: "يا أمير المؤمنين، إن كنت تريد دوائي، فقد بلغت مني موضع الدآء، وإن كنت تريد قتلي، فأجهز عليّ،" فخلى سبيله.

وأما السؤال الرابع، وهو ابتياع ما في أيديهم من أموال المسلمين، ما حكمه؟ جوابه: قال في *المدونه*، ومثله في *العتبية* من سماع ابن القاسم، واللفظ *للمدونة*: وإذا دخلت دار الحرب بأمان، فابتعت عبد المسلم من حربي أسره أو أبق[158] إليه، أو وهبه الحربي لك، فكافأته[159] عليه، فلسيده أخذه بعد أن يدفع إليك ما أديته[160] من ثمن أو عرض. وإن لم تثب واهبك، أخذه ربه بغير شيء. (اهـ).

وإلى اختصار حكم المسألة أشار الشيخ أبو عمر وابن الحاجب[161] بقوله: ومن عاوض في دار الحرب على مال مسلماً أو ذمياً، فلمالك أخذه بثمنه اتفاقاً، فإن كان بغير شيء، أخذه بغير شيء، ولو باعه[162] المعاوض مضى، ولمالكه[163] الزائد إن كان. وخرج اللخمي تمكينه على الغنيمة، وخرجه غيره[164] على الموهوب يباع. وفيه قولان: المشهور كالمعاوض، وقيل: يأخذه بالثمن ويرجع على الموهوب له بجميع الثمن، لا غير. وحيث قلنا يأخذه ربه بالثمن، فإن المشتري يصدق فيه ما لم يتبين كذبه، فيأخذه ربه بقيمته يوم إشترائه حيث إشتراه. وإن جهلت به،

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[150] In Ḥ: أن. In BNRM: يريد أن
[151] In BNRM, this page should be numbered 2:47, but pp. 45-46 have been repeated.
[152] BNRM omits يريد إرادة بقائه
[153] Ḥ and T omit وهي
[154] In BNRM: بالأخر
[155] In Ḥ and T: أماته الله البعيد كافراً
[156] In Ḥ: الكراخي
[157] In T: يمكن في. BNRM omits ويمعن في
[158] In Ḥ: أم وفق
[159] I have emended this based on context; all three manuscripts read: فكافية or فكافيه.
[160] I have emended this based on context; all three manuscripts read: وديته.
[161] Emended based on the text in al-Tusūlī. All three manuscripts read الشيخ خليل أبو عمر وابن الحاجب, although BNRM has a line above خليل indicating a mistake.
[162] In BNRM: باعاعه
[163] In Ḥ and T: ولمالك
[164] Ḥ omits غيره

فلأقرب محل له. وإن ادعاه، صدق المبتاع مع يمينه إن أشبه، وإلا، فربه إن أشبه،[165] وإلا، بقيمته. وإن نكل صدق عليه الأخر، وإن لم يشبه.

وحكم الدخول لاستخلاص الكتب[166] والمتاع[167] في هذا المعنى واحد، فلا معنى لإفراد الكلام. ويتأكد على الطالب الداخل لهذا الغرض الخاص أن[168] يبدأ في استخلاص ما يمكنه[169] من الكتب، بالأهم[170] فالأهم. فأهمها في الاستنقاذ كتاب[171] الله، ولو لم يكن مستنقذه[172] على طهارة.[173] ثم حديث رسول الله[174] – صلى الله عليه وسلم. ثم الفقه، ثم الأصلان،[175] ثم العربية واللغة والطب وكتب التفسير من الطراز الأول، لا سيما تفسير[176] إبن عطية، وكذلك كتب القراءات.

أهـ، من التقييد المذكور. والغالب على ما قيدت من التقييد المذكور من هذه الأجوبة التصحيف،[177] فمن وجد نسخة من ذلك، فليصلح ما فسد هنا. وأجره على الله.

Fatwā *of Ḥamdūn*[178]

وسئل الفقيه الأجل أبو العباس أحمد بن محمد الأبار الفاسي المدعو[179] بحمدون[180] – حفظه الله – بما نصه:

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[165] T omits وإلا، فربه إن أشبه

[166] In T: ما يمكنه من الكتب

[167] In T: المبتاع, buyer; al-Tusūlī and al-Wazzānī, على الطلبة is added to the end of this sentence. Together, these two edits change the meaning from equating the buying of books with the buying of other objects, to equating students with other buyers.

[168] In Ḥ: وأن

[169] In BNRM: ما عليه

[170] In Ḥ: بالأعلم

[171] In Ḥ and T: كتب

[172] In Ḥ and T: مستقذه

[173] In Ḥ: طاهرة. Unclear in T.

[174] T omits الله

[175] In BNRM: الأصول

[176] In T: في تفسير

[177] In T: التضيف. In BNRM: التضييف

[178] BNRM, 2:47-48; Ḥ, 251-52; T, 266-67. This *fatwā* is included in al-Wazzānī's *al-Mi'yār al-jadīd*, 3:36-38, with only slight differences.

[179] In Ḥ: المدعوا

[180] Abū al-ᶜAbbās Aḥmad b. Muḥammad al-Abbār al-Fāsī, known as Ḥamdūn (d. 1071/1660-61).

سيدي – حفظ الله مقامكم وأعانكم على ما فيه مصلحة أقامكم. جوابكم – أدام[181] الله رعايتكم – في رجل مقيم ببلاد مشتلمة على مداشر عديدة، وأهل البلاد المذكورة على قسمين: قسم أهل سنة يتذهبون بمذهب مالك في الفروع، وقسم يتذهبون بمذهب آخر خارج عن المذاهب الأربعة المعروفة في هذا الزمان. وأتفق لهذا[182] الرجل المسؤول عن حاله أن كانت سكناه مع أهل القسم الثاني، وهو رجل سني، مالكي المذهب، كأهل القسم الأول، إلا أن سكناه حيث ذكر فقط. فما تقول سيادتكم في سكناه مع هؤلاء القوم المذكورين؟ هل هي ممنوعة أو جائزة؟[183] والفرض[184] أنهم لا يأمرونه بشيء من مذهبهم، ولا يجبرونه بشيء عليه، ولا يدعونه إلى ذلك، بل هم على مذهبهم وهو كذلك، وله بالمدشر المذكور الذي هو ساكن به أصول وأملاك، إن رحل منها، فسدت واندثرت.[185] وإن أقام عليها، أقام مع هؤلاء القوم المذكورين. [2:46][186] فهل تجب عليه الهجرة وبيع أملاكه وجميع ماله هنالك وينتقل بالسكنى إلى مداشر أهل السنة، أم لا يجب عليه ذلك؟

ومن بدعة هؤلاء القوم أنهم يرون ترك[187] السورة في صلاة الظهر والعصر، وأنها لا تقرأ في شيء من ركعاتها وأن الجمعة لا تجب اليوم في بلد من سائر البلدان، زاعمين أنها لا تصلى إلا مع إمام عادل أو في طاعة إمام عادل، ولا عادل في أئمة الوقت، بل كلهم أهل ظلم وجرم، وأن النبي – صلى الله عليه وسلم – لم يقع له إسراء إلى السماء، وأن من دخل النار من عصاة هذه الأمة، فهو مخلد فيها، لا يخرج منها أبداً. هذا ما أخبر به الرجل السائل عن حال إقامته بالبلاد المذكورة. فتأمل ذلك سيدي وأجبنا بما يشفي الغليل إن شاء الله. ولكم الأجر والسلام.

فأجاب بما نصه:

الحمد لله.[188] الجواب – والله سبحانه وتعالى ولي التسديد والهداية إلى الصواب – أن الذي تدل[189] عليه نصوص العلماء في النازلة وأشباهها أن الواجب على من حل ببلد شاعت بها المناكر والبدع، ولم يقدر[190] على تغييرها لوجود مانع واختلال شرطه، فلينظر، فإن وجد بلداً يتحقق أنه سالم من هذه المناكر وهذه البدع وأمثالها،

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[181] In Ḥ and T: أدم
[182] In Ḥ and T: هذا
[183] In Ḥ and T: أجازة
[184] In Ḥ and BNRM: الفرق
[185] Emended on the basis of al-Tusūlī; all three manuscripts read وانتشرت
[186] In BNRM, this page should be numbered 2:48, but pp. 45-46 have been repeated.
[187] In Ḥ: تلك
[188] Ḥ and T omit الحمد لله
[189] In Ḥ and T: أنزل
[190] In Ḥ: يعرد

وأمكنه الانتقال إليه من غير مشقة فادحة، تلحقه لا مطلق المشقة، فلينتقل إليه. وأما إن لم يتحقق السلامة بالموضع الذي يريد أن ينتقل إليه لشيوع[191] المناكر والبدع في هذا الزمان بكل مكان،[192] فالأفضل له أن يقيم ببلده. ثم ليكن حلس بيته.

وبهذا المعنى وفق بعض العلماء[193] – رضي الله عنهم – بين الحديثين الواردين عنه – صلى الله عليه وسلم – في الفرار والإقامة. فحديث الفرار قوله – صلى الله عليه وسلم: "سيأتي على الناس[194] زمان لا يسلم لذي دين دينه إلى أن يفر من شاهق إلى شاهق كطائر يفر[195] بأفراخه وكثعلب بأشباله."[196] أو كما قال – صلى الله عليه وسلم. فحمله[197] على ما إذا وجد موضعاً سالماً من البدع، فر إليه.[198] وحديث الإقامة قوله – صلى الله عليه وسلم – للذي سأله لما ذكر الفتن، وقال: "ما تأمرني به، يا رسول الله، إن أدركني ذلك؟" فقال له – عليه[199] أفضل الصلاة وأزكى السلام – "كن حلساً من احلاس بيتك،"[200] يعني أنه يتخذ بيته كالثوب الذي يستر به عورته في الملازمة. فحمله هذا الموفق على ما إذا عمت المناكر ولم يجد مهاجراً. والذي أختاره ابن الحاج في *المدخل* ورجحه، عدم الانتقال في هذا الزمان، وأن الإنسان يعوض منه[201] دوام صمته وملازمة بيته، ويترك الخوض فيما هم فيه، فيحصل له بذلك بركة امتثال قوله – صلى الله عليه وسلم – "نعم الصوامع[202] بيوت أمتي،"[203] كما يحصل له السلامة من تبديد شمله وحاله، ومن تشويش خاطره وترك الدؤوب على عبادة ربه. ويصير كالغائب عنهم، ولم يضره – بعون الله وبركة نبيه – صلى الله عليه وسلم – ما هم فيه.

وهذا كله إذا كان هؤلاء القوم المذكورون في النازلة يخفون مذهبهم، ولا يظهرونه بحيث يأمن المقيم معهم من فتنته وفتنة عياله، وإذا لم يترام بهم ألسنتهم لما يوجب كفرهم. وإلا، فأن حكم بكفرهم، فلا خلاف في تحريم الإقامة معهم حيث لم يقدر على قتالهم، لتعاضد الآي القرآنية والأحاديث النبوية على منع موالاتهم. ولا يعذر إذ ذاك بضياع

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[191] In Ḥ: لشويع
[192] In Ḥ: ما كان. Illegible in T.
[193] This paragraph summarizes a lengthier discussion in Ibn al-Ḥājj (d. 737/1336), *al-Madkhal*, 1:216-18.
[194] In Ḥ: للناس
[195] In Ḥ: فر. In T and BNRM: فر منه
[196] See Muttaqī's *Kanz al-ᶜummāl fī sunan al-aqwāl wa'l-afᶜāl*, *Bāb al-Fitan fī al-ikmāl*, 31008.
[197] T omits citation of the *ḥadīth* from سيأتي to وسلم.
[198] In Ḥ and T: فما فر منه
[199] Ḥ and T omit عليه
[200] See Muttaqī's *Kanz al-ᶜummāl fī sunan al-aqwāl wa'l-afᶜāl*, *Faṣl fī al-waṣīya fī al-fitan*, 31274.
[201] Ḥ omits منه
[202] In Ḥ and BNRM: الصوام
[203] See Ibn al-Ḥājj, *al-Madkhal*, 1:218; I have been unable to locate this is any *ḥadīth* collections.

ماله وأصوله، بل[204] حتى يكون عذره واضحاً، بمثابة[205] المريض والمقعد. وهذا ما أمكن تسطيره في النازلة، والله سبحانه وتعالى أعلم بالصواب. أهـ من خطه.

Excerpt on the Categories of Hijra[206]

ووجدت في تقييد لبعض الفقهاء ما نصه:

الفصل التاسع في الهجرة إلى الله تعالى والعزلة عن الخلق. أعلم – وفقك الله وأيانا – أن الهجرة على أقسام: هجرة من دار الكفر إلى دار الإسلام، وهجرة من أرض كثرت فيها البدع والعصيان، وهجرة عن الخلق إلى الملك الديان.

أما الأولى والثانية، فواجب[207] حكمهما،[208] يتعين[209] أمرها.[210] قال الله تعالى: {أن الذين توفيهم الملائكة ظالمي أنفسهم [2:47][211] قالوا: "فيما كنتم؟" قالوا: "كنا مستضعفين في الأرض." قالوا: "ألم تكن أرض الله واسعة فتهاجروا فيها؟"}.[212] الثعالبي: "ظالمي أنفسهم" بترك الهجرة، وقول هؤلاء "كنا مستضعفين في الأرض" اعتذاراً غير صحيح، إذ كانوا يستطيعون الحيل ويهتدون السبيل. وقوله: {يجد في الأرض مراغماً}[213] أي متسعاً ومتحولاً. وقال في قوله تعالى: {فمن يتولهم منكم، فأنه منهم}.[214] نهى الله سبحانه[215] المؤمنين بهذه الآية عن اتخاذ اليهود والنصارى أولياءً في النصرة والخلطة المؤدية إلى الامتزاج والمعاضدة. وحكم هذه الآية يلم كل من[216] أكثر

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[204] T omits بل
[205] In Ḥ and T: بمنافة
[206] BNRM, 2:48-49; Ḥ, 252; T, 267. This excerpt is included in al-Wazzānī's *al-Mi'yār al-jadīd*, 3:38-39, with only slight differences.
[207] In Ḥ: فجواب
[208] In Ḥ and T: حكمها
[209] In Ḥ: يتعين. In BNRM: تتعين
[210] In Ḥ: أحدها
[211] In BNRM, this page should be numbered 2:49.
[212] Qur'ān 4:97
[213] Qur'ān 4:100
[214] Qur'ān 5:51
[215] T omits سبحانه
[216] In Ḥ and T: بلف وكل من

مخالطة هذين الصنفين، فله حظه من هذا العناء الذي تضمنه قوله تعالى "فإنه منهم." وقال رسول الله – صلى الله عليه وسلم – "أنا بريء من كل مسلم إقام بين المشركين."[217] أهـ

ولا يعارض هذا الحكم بقوله – صلى الله عليه وسلم – "لا هجرة بعد الفتح، لكن جهاد ونية."[218] وأين الجهاد؟ وأيضاً يحتمل ذلك حيث لا تجري عليهم أحكام الكفار. فأما من جرت عليه أحكام الكفار، ودخل تحت قهرهم، فلا ينبغي أن يختلف في وجوب الهجرة في حقه، إلا من عذره القرآن من {المستضعفين من الرجال والنساء والولدان،[219] لا يستطيعون حيلة ولا يهتدون سبيلاً}.[220]

وقال ابن عباس: "أنا وأمي من المستضعفين."[221] قال مالك – رحمه الله – "لا أحل لأحد المقام بأرض يسب فيها السلف وتغير فيها السنن ويعمل فيها بغير الحق." وإذا تعين الفرار من بلاد الظلم، فبلاد الكفر أحرى. أهـ

وأما الهجرة من بلاد الظلم والذلّ والبدع،[222] فواجبة كما تقدم، وإن كانت الأولى آكد، ولا سيما في حق أهل العلم. فلا يحل لهم أن يذلوا أنفسهم، والله تعالى قد أعزهم وشرفهم بالعلم والقرآن. ولتكن إقامته بالله وخروجه إلى الله. قال الله[223] تعالى: {ومن يخرج من بيته مهاجراً إلى الله ورسوله ثم يدركه الموت، فقد وقع أجره على الله}.[224]

Fatwā *of al-Bijā'ī*[225]

وأريد[226] أن أثبت سؤالاً وجواباً لبعض العلماء، لموافقته لمعنى[227] ما تقدم. **كتب[228] الفقيه الزاهد سيدي أحمد البجائي[229]** – رحمه الله ورضي عنه – **للفقيه العالم العلامة سيدي أحمد بن الحاج البيدوي[230]** – رحمه الله[231] – سؤالاً، هذا نصه:

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[217] See citation above.
[218] *Ṣaḥiḥ al-Bukhārī*, *Kitāb al-Jihād*, 2631, 2670; *Ṣaḥiḥ Muslim,* 1864.
[219] In Ḥ and BNRM: من المستضعفين والنساء والولدان
[220] Qur'ān 4:98.
[221] *Ṣaḥiḥ al-Bukhārī*, *Kitāb al-Janā'iz*, 1291; *Kitāb Tafsīr al-Qur'ān*, 4311 and 4312.
[222] In BNRM: من بلاد الذل الظلم
[223] BNRM omits الله
[224] Qur'ān 4:100
[225] BNRM, 2:49-50; Ḥ, 252; T, 267. A version of this *fatwā* is included in al-Wazzānī's *al-Mi'yār al-jadīd*, 3:39-41, and the answer is included in DN, 114-15.
[226] In Ḥ: وأزيد

الحمد لله سيدي، رضي الله عنكم وأدام بمنه عافيتكم ومتع المسلمين ببقائكم. جوابكم في موضع كثر فيه الظلام[232] والأشرار وانتشر فيه الباطل والمكس كل الانتشار، وذل[233] به المسلمون وعز به الكفار، وارتفع فيه أهل الجور والظلم واتضع فيه أهل المعرفة العلم، وتمكس جل المبيعات فيه على المسلمين وأشكل الأمر على المسترشدين.[234] ولم يظهر من فضلائه[235] ناكر لمنكر، فلا أدري أخوفاً على أنفسهم أو استهزاءاً بالأثر. ثم أن إنساناً اضطر إلى أخذ العلم من علماء الموضع المذكور وخشي على نفسه مما هو قبل مسطور. فهل – أعزكم الله – يسوغ له المكث[236] بذلك الموضع، مع عدم قدرته على تغيير المنكر إلا قليلاً؟ ويكون بذلك لأمر ربه ممتثلاً؟ وهل يسوغ له الشراء من بعض المبيعات الممكسات[237] إن[238] أضطر إلى ذلك، ويكون آمناً من الوقوع في المهالك؟ أم يجب عليه أن ينتقل من ذلك الموضع لغيره، لأن الراتع حول الحمى يوشك أن يقع فيه؟ بينوا لنا[239] الأمر لمن اضطر إليه واحتاج إليه في خاصة نفسه. ولكم الأجر.

ونص الجواب:

الحمد لله. الواجب على المؤمن المحقق، الناظر لنفسه نظر مشفق، أن يفر بدينه من الفتن، ولا يقيم إلا في موضع تقام فيه السنن. ولا يأخذ من علم دينه ما يحتاج إليه،[240] إلا ممن[241] تظهر[242] آثار الخشية والخضوع عليه،

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[227] In T: معنى

[228] In T: من كتب. In al-Tusūlī: كتبه. It appears that it is al-Bijā'ī who wrote this response, although the introduction makes it sound as though he wrote the question. See his biography in DN, 114-15, where the answer is reproduced.

[229] In Ḥ: اللجائي. Abū al-ᶜAbbās Aḥmad b. Muḥammad al-Ḥājj al-Bijā'ī (d. *ca.* 901/1495).

[230] I have not yet located this jurist in any biographical sources. The name may also be البيدري or a similar variant. In al-Tusūlī, his first name is given as Muḥammad.

[231] T omits رحمه الله

[232] In Ḥ and possibly BNRM (which is unclear): الكلام

[233] In Ḥ: دل

[234] In Ḥ: المترشدين

[235] Emended from فضائله in all three manuscripts.

[236] In Ḥ and BNRM: الكتب

[237] In T: المماكسات

[238] In Ḥ and T: إلى أن

[239] Ḥ and BNRM omit لنا

[240] All three copies read إلا ما يحتاج إليه. I have emended the text based on context and the text in al-Tusūlī and Ibn ᶜAskar.

[241] In BNRM: ولا يأخذ إلا ممن

[242] In Ḥ and T: تظهره

ويطلب ذلك في أقطار الأرض ونواحيها[243] بدليل {ألم تكن أرض الله واسعة فتهاجروا فيها؟}. هذا مع الإمكان ووجود بغيته[244] في غير ذلك [2:48] المكان.

فإن تعذر عليه ذلك، واشتدت عليه المسالك، ولم يجد موضعاً صالحاً مرضياً، ولا معلماً ناصحاً مهدياً، فليقم هنالك صابراً صبراً جميلاً، ويكون من {المستضعفين من الرجال والنساء والولدان، لا يستطيعون حيلة ولا يهتدون سبيلاً.} وليقل كما قالوا إذ لم[245] يجدوا معيناً على الدين، ولا ظهيراً: {ربنا أخرجنا من هذه القرية الظالم أهلها، وأجعل لنا من لدنك ولياً، وأجعل لنا من لدنك نصيراً}،[246] ويأخذ من العلم ما يضطر إليه من كل متصدر للأخذ عنه، فرب حامل علم إلى من هو أعلم منه،[247] وقد يتعالج المريض بدواء الطبيب الكافر، وقد يؤيد الله الدين بالرجل الفاجر.[248] ويشتري من المبيعات ما يضطر[249] إليه لبساً وطعاماً ولكن لا[250] يغشم المعيشة غشماً، وليعط الورع حقه ويستعمل في ذلك اجتهاده، ورفقه،[251] ويجتنب شراء الجزء المأخوذ من المكس من غاصبه، ويشتري مما بقي على ملك صاحبه، على[252] مراعاة قواعد الشريعة المقررة و مسائل الفقه المسطرة، والوقوف على حد الضرورة وعدم استرسال في الشهوات المباحات، فضلاً عن المحظورات.[253] فان اقتصر على ضروریاته،[254] لم يخف على دينه اختلالا إذ لو كانت الدنيا جيفة، لكان[255] قوت المؤمن منها حلالاً. اهـ محل الحاجة من التقييد المذكور.

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[243] In Ḥ: نواحها
[244] This word is replaced by a line in BNRM.
[245] In T: ألم, although a mark may indicate a correction.
[246] Qur'ān 4:75
[247] See Muttaqī's *Kanz al-ᶜummāl fī sunan al-aqwāl wa'l-afᶜāl*, *Kitāb al-ᶜilm*, *qism al-afᶜāl*, 29375.
[248] *Ṣaḥīḥ Muslim*, *Kitāb al-Īmān*, 111.
[249] In Ḥ: ما يظهر
[250] BNRM omits لا
[251] In T: رفقته
[252] In Ḥ: هذا. Unclear in T.
[253] In Ḥ and T: المحضورة. In BNRM: المحضورات. I have emended the text based on context.
[254] In BNRM: ضروراته
[255] In T: لكانت

First Fatwā *of al-Zawāwī*[256]

وسئل الفقيه العلم أبو الحسن على بن عثمان الزروالي،[257] أحد فقهاء بجاية – رحمه الله تعالى ورضي عنه – عمن سكن في أرض النصارى. هل يجب عليه الهجرة منها[258] أم لا؟

فأجاب: قال القاضي أبو الوليد بن رشد – رحمه الله: أجمع المسلمون[259] أنه لا يحل لمسلم أن يبقى في بلاد الكفر اختياراً حيثما تناله أحكامهم، فيجب على من قدر على الفرار أن يفر، ولا يقيم بها. (اهـ من بعض التقاييد).

Second Fatwā *of al-Zawāwī*[260]

وسئل أيضاً عمن كان ساكناً في أرض النصارى وأراد الهجرة منها إلى بلاد الإسلام، وأبواه أو واحدهما يمنعانه من ذلك. هل يجوز له الخروج بغير إذنهما ورضاهما، أم يفرق في ذلك بين خوف الضياع عليهما أم لا؟ أو[261] بين كونهما، لهما غيره من الأولاد ذكوراً أو إناثاً أم لا؟

فأجاب: لا يتوقف خروجه عن إذنهما، إذ لا طاعة لهما في معصية الله تعالى، ولم أر فيما ذكرتم من خوف الضيعة عليهما نصاً. ولا شك أنه قد تعارض واجبان، والقاعدة في مثل ذلك تقديم أقواهما. وأما إذا كان لهما غيره، فالحكم ما تقدم من وجوب الفرار وعدم الاستئذان. (اهـ من التقييد المذكور).

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[256] BNRM, 2:50; Ḥ, 252; T, 267. A version of this *fatwā* is included in al-Wazzānī's *al-Mi'yār al-jadīd*, 3:41.
[257] Although all three manuscripts read الزروالي, both manuscripts of al-Tusūlī record the name as الزواوي. I was also able to locate a biographical notice for the latter but not the former.
[258] Ḥ omits منها
[259] In Ḥ: المسلمين
[260] BNRM, 2:50; Ḥ, 252-53; T, 267. A version of this *fatwā* is included in al-Wazzānī's *al-Mi'yār al-jadīd*, 3:41-42.
[261] In BNRM: و

Third Fatwā *of al-Zawāwī*[262]

وسؤل أيضاً عن معنى الهجرة وفضلها.

فأجاب: الهجرة المعلومة أن يخرج عن وطنه إلى موضع النبي – صلى الله عليه وسلم – للأغراض التي ذكرها[263] العلماء، وهي واجبة[264] على كل من أسلم قبل فتح مكة.[265] وأما بعد فتح مكة، فقد قال – عله الصلاة والسلام: "لا هجرة بعد الفتح، ولكن[266] جهاد ونية."[267] ويبقى وجوب الفرار من الموضع الذي[268] يخاف على دينه عدم السلامة في موضعه، أو كان في موضع ليس فيه من يعلمه دينه. ويتأكد الفرار من بلاد الكفار لما يجري على من كان بها من استيلاء الكفر على الايمان، وإجراء أحكام الكفر عليه. اهـ من التقييد المذكور.

First Fatwā *of Ibn Zikrī*[269]

وسئل الإمام أبو العباس أحمد بن محمد بن زكري – رحمه الله – بما نصه:

سيدي – رضي الله عنكم وأعانكم على ما به أولاكم – ما ترون في هذا الرجل الشريف القائم بأمر الجهاد الآن في المغرب الأقصى من حوز سبتة وإخواتها؟ هل فعله اليوم جائز شرعاً لكون سلطان تلك [الأوطان] صالح[270] المشركين، والموضع الذي هو فيه الشريف داخل في عمالة السلطان المذكور؟ والفرض أن هذا الصلح لم يقع إلا بعد اطلاع العدو على [2:49] عورات المسلمين إطلاعاً كلياً، وأخذوا البلاد[271] المذكورة في غاية قوة الجند والسلاح،

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[262] BNRM, 2:48; Ḥ, 253; T, 267-68. A version of this *fatwā* is included in al-Wazzānī's *al-Mi'yār al-jadīd*, 3:42.
[263] In Ḥ: ذكر
[264] Ḥ repeats واجبة
[265] In Ḥ and T: بعد الفتح، فتح مكة
[266] In Ḥ and T: وإنما هو
[267] *Ṣaḥiḥ al-Bukhārī*, *Kitāb al-Jihād wa'l-Siyar*, 2783; *Ṣaḥiḥ Muslim*, *Kitāb al-Ḥajj*, 1353.
[268] In Ḥ and T: التي
[269] BNRM, 2:48-49; Ḥ, 253; T, 268. A version of this *fatwā* is included in al-Wazzānī's *al-Mi'yār al-jadīd*, 3:42-43.
[270] Emended. In BRNM: لكون السلطان صلح. In Ḥ and T: لكون السلكان تلك صالح
[271] In T: البلد

وبيت[272] المال على خير. هل فعل هذا الشريف مباح لأجل هذا المعنى، أم لا؟ والفرض أن الصلح المذكور[273] له مدة تنيف على العشرين سنة. هل يسوغ ذلك، أم لا؟

فأجاب: إن كان الرجل القائم بالجهاد آمناً في حزبه ونفسه آمناً من غائلة من يمنعه من جهاد العدو، جاز له قتال الكفار بحيث يؤمن العدو أن يقاتل[274] المسلمين في غير موضع الشريف المذكور. وأما الصلح الواقع، فغير ماض[275] لما فيه من تقوي العدو وضعف المسلمين في تلك المدة، وغاية ما يقع الصلح بين المسلمين وعدوهم السنتان والثلاثة – والله الموفق للصواب بمنه وفضله. اهـ من بعض التقاييد.

Second Fatwā *of Ibn Zikrī*[276]

وسئل أيضاً: ما تقولون في قبائل من المغرب الأقصى، تلي سبتة وطنجة وأصيلا والقصر، امتزجت أمورهم مع النصارى، وصارت بينهم محبة حتى أن المسلمين، إذا أرادوا الغزو، أخبروا هؤلاء القبائل من المغرب النصارى، فلا يجدهم المسلمون إلا متحذرين مهيئين، والفرض أن المسلمين لا يتوصلون إلى الجهاد في هؤلاء النصارى إلا من بلاد هؤلاء القبائل، وربما قاتلوا المسلمين مع النصارى. ما حكم الله في دمائهم وأموالهم ونسائهم وأولادهم؟ وهل ينفون من تلك البلاد أم لا؟ وكيف إن أبوا من النفي إلا بالقتال، فهل يقاتلون أم لا؟

فأجاب: ما وصف به القوم المذكورون يوجب قتالهم وقتلهم كالكفار الذين يتولونهم. ومن يتولى الكفار فهو منهم. والله أعلم. اهـ من التقييد المذكور.

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[272] In Ḥ: وبقيت
[273] In Ḥ and T: المذكورة
[274] In Ḥ: يقتال
[275] In Ḥ: قاض
[276] BNRM, 2:49; Ḥ, 253; T, 268. A version of this *fatwā* which does not include the city names is included in al-Wazzānī's *al-Nawāzil al-ṣughrā*, 1:419.

Appendix E

Edition of al-Buṣādī's
Jawāb ᶜan ḥukm Allāh Taᶜālā fī māl al-Muslimīn min al-Shanājiṭa al-muqīmīn fī arḍ al-ḥarbīyīn
(Response Regarding the Legal Status of the Property Belonging to Shinqīṭī Muslims Living in non-Muslim Territory)

by

Muḥammad ᶜAbd Allāh b. Zaydān b. Ghāl b. al-Mukhtār Fāl
al-Būṣādī al-Anṣārī (d. 1353/1934)[1]

[جواب عن حكم الله تعالى في مال المسلمين من الشناجطة المقيمين في أرض الحربيين
لمحمد عبد الله بن زيدان بن غال بن المختار فال البوصادي الأنصاري][2]

[165و/1و] بسم الله الرحمن الرحيم، وصلى الله على سيدنا محمد وعلى آله وصحبه وسلم.[3] هذه النقلة للفقيه العلامة الأديب محمد عبد الله بن زيدان بن غال بن المختار فال البوصادي الأنصاري جزاه الله بخير.[4]

بسم الله والحمد لله والسلامات على رسول الله والآل والصحب العظام الجاه والتابعين بلا تناه.[5] أما قبل ومع وبعد – ولله الأمر من قبل ومن بعد – فالسعيد من تبصر فأبصر، والموفق من نبه فتفكر،[6] والمحروم من وقف وتحير،[7] والشقي من بدل في الدين وغير.

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[1] This edition is based on the two extant manuscripts of this *fatwā* that I have been able to locate: Ḥasanīya Library (Rabat) ms. 12438.3, folios 164a-176b (12 folios); Mu'assasat al-Malik ᶜAbd al-ᶜAzīz Āl Saᶜūd (Casablanca) ms. 440, entire manuscript (11 folios). The manuscripts will be referred to as 'Ḥ' for Ḥasanīya and 'S' for 'Saudi Library,' and page transitions will be marked for both; it will be evident which manuscript corresponds to the page number. The manuscripts are undated and written in clear Maghribī script. Only the Saudi manuscript gives the name of a copyist, Muḥammad Sidīya b. Aḥmad b. Bāba (name appears on folios 175b and 176b). While the first two thirds of the text is substantially parallel between the two manuscripts, the final third is not. This part of the Ḥasanīya manuscript not only contains significant additions, but also appears to be a re-arrangement of the material in the Saudi manuscript. I have chosen followed the order of the Ḥasanīya text and to note departures from the order of the Saudi text. I have standardized the orthography for words such as سؤل, which appears as سئل in the text, and have used a * symbol in place of the three dots used in the Ḥasanīya manuscript to separate units of verse.

[2] This is the title as it appears at the beginning of the Saudi manuscript. The Ḥasanīya manuscript is untitled, but the card catalogue describes the text as *Ajwiba fī ḥukm māl al-Muslimīn al-muqīmīn al-'ān fī arḍ al-ḥarbīyīn*.

[3] In Ḥ: وصلى الله على سيدنا محمد وآله وصحبه

[4] This sentence appears only in S. In Ḥ, the author's name later appears as Muḥammad ᶜAbd Allāh b. Zaydān al-B(u)sātī (البساتي), on folios 175b and 176b. For his biography, see chapter four, pp. 302-304.

[5] In Ḥ: الحمد لله والسلامات على رسول الله والآل الصحب العظيم . . .

[6] In S: فتذكر

[7] In Ḥ: وفق فتحير

هذا وقد كنت سألتني عن حكم الله تعالى[8] في مال المسلمين من الشناجطة[9] المقيمين الآن[10] في أرض الحربيين. وقد – والله – استسمنت ذا ورم ونفخت في غير ضرم، فاني لستُ من رجال الإفتاء ولا من صبيانه. ومعاذ الله أن يجتنى يانع الثمار من غير أغصانه، سيما والمسألة هذه عزيزة المنال قليلة المثال، كما قال حذامي القول فيها. ومميط نقابها عن فيها أبو بكر بن العربي، ما نصه:[11] "وهذه المسألة خراسانية عظماً، لم تبلغها المالكية ولا عرفتها الأئمة العراقية، فضلاً عن المقلدة المغربية." ولكن الدين النصيحة والسكوت عن تعيير[12] الحق فضيحة وسوق الحق عرضة النفاق والرباح والباطل يذهب أدراج الرياح. وها[13] أنا أنبس بما سنح بخاطري فتعرضه على أهل العلم كي يوضح أو يرفع، والحق أحق أن يتبع.

فأقول – والله تعالى الموفق للصواب – أنه أتفق كلام كل من وقفتُ على كلامه من المتأخرين في المسألة، أنهم لم يجدوا قولاً للأقدمين بإباحة هذا المال،[14] لا منصوصاً ولا مخرجاً. واتفقوا على أن العاجز عن الهجرة لا يستباح ماله بوجه، ثم اختلفوا[15] فيمن أقام اختياراً، فمن مبيح له قياساً[16] على مال الحربي يسلم قبل حوزه له بدار الإسلام، على القول بعدم العصمة[17] بمجرد إسلامه، الذي هو قول ابن القاسم وروايته [1ظ] عن مالك في *المدونة*، وهو المشهور. ومن مانع له قياماً مع عصمته المحققة السابقة على هذه الإقامة، قائلاً إن الإقامة به بدار الحرب لا ترفع عصمته، وإن هذا الإجراء لا يستقيم لوجود الفارق. واختار هذا الرأي ورجحه وصححه واعتمده[18] غير واحد، وهو عين الحق والتحقيق، غير أنهم لم يحرروه حق التحرير.

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[8] S omits: تعالى
[9] Ḥ omits: الشناجطةمن
[10] In S: المسلمين الآن من الشناجطة المقيمين في أرض الحربيين
[11] Ḥ omits: ما نصه
[12] In Ḥ, تعيير is written in the margin with a symbol indicating the word belongs here. In S: عند تعير
[13] In S: فها
[14] In Ḥ: قولاً بإباحة هذا المال للأقدمين
[15] In Ḥ: واختلفوا
[16] In S: تخريجاً
[17] In S: عصمة
[18] In S: واعنمده وصححه

وهذا – لا محالة – يحتاج إلى بسط قيل، وتأصيل أصل، وإظهار دليل، لان ضبط [165ظ] العلم بقواعده مهم، كما للشيخ زروق في *تأسيس القواعد*، قائلاً إنها[19] تضبط مسائله وتفهم معانيه وتدرك مبانيه وتنفي الغلط من دعواه وتميز المتبصر فيه وتعين المتذكر عليه وتقيم حجة المناظر وتوضح المحجة للناظر وتعين الحق لأهله والباطل في محله. وقال:

> إذا حُقق أصل العلم، وعرفت مواده، وجرت فروعه، ولاحت أصوله، كان الفهم فيه مبذولاً بين أهله. فليس المتقدم فيه بأولى من المتأخر، وإن كان له فضيلة[20] السبق، فالعلم حاكم، ونظر المتأخر أتم لأنه زائد على المتقدم، والفتح من الله مأمول لكل احد. ولله در ابن مالك حيث يقول: "إذا كانت العلوم منحاً إلهية ومواهب اختصاصية، فغير مستبعد أن يدخر لبعض المتأخرين ما صعب على كثير من المتقدمين – نعوذ بالله من حسد يسد باب الأنصاف أو يصد عن جميل الأوصاف (هـ)." وهو عجيب (هـ).

وقال في أخرى: "المتكلم في فن من فنون العلم، إذا لم يُلحق فرعه بأصله ويُحقق أصله من فرعه، ويصل معقوله بمنقوله، وينسب منقوله لمعادنه، ويعرض ما فهم منه على ما عُلم من استنباط أهله، فسكوته عنه أولى من كلامه فيه، إذ خطؤه[21] اقرب من أصابته، وضلاله أسرع من هدايته،" إلخ.

وقال في أخرى: "العلماء مصدقون فيما نقلوا، مبحوث معهم فيما قالوا، لأن النقل موكل إلى أماناتهم، والقول نتيجة عقولهم، والعصمة غير ثابتة، فلا ثقة به إلا بعد إفهام دليله [2و] والثقة بدين قائله،" الخ. أي، ومن ثم، أمر الأئمة بالنظر[22] في آرائهم، نصحاً للأمة ومحافظة على الشريعة، ومخافة من إتباعهم على الخطأ الجائز عليهم. قالوا:[23] "اذ لا يرفع الباطل علم قائله، ولا يضع الحق جهل مناوله، بل، إنما[24] يعرف الحق بالدلائل لا بقول الاماثل،" حتى قال: "باب مدينة العلم لا يعرف[25] الحق بالرجال فمن عرف الحق بالرجال أصبح في غاية الضلال." ولبعضهم في المعنى: "الحق لا يُعرف بالأماثل، فانظر لذات القول لا للقائل، فلا يُقفي عالم في باطل، والحق مقبول ولو من جاهل." وبعد ما رأيت اخا الانصاف، [166و] فلا تستبعد أن يخص أخيراً من بين الأوائل

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[19] In S: لأنها
[20] In Ḥ: فضلية
[21] In S: خطاه
[22] Ḥ omits بالنظر
[23] Ḥ omits قالوا
[24] Ḥ omits إنما
[25] In S: تعرف

بعظام الأياد، من خصص عروق القيصوم وغض القيصيم بما لم ينله العبهر والجاد،[26] إذ قد يوجد في النهر ما لم يوجد في البحر وربما جاحت السحوق واثمرت الفسيلة وأعيت الحكيم الحكومة وفرجتها سخيله.

ولما كان هذا الإجراء رأياً صرفاً، كما ستقف على جزم مجريه بعدم وجود النص فيه[27] من الأقدمين، وكان الخطأ فيه صعب المرام لعظم ما يترتب على استباحة رقاب المسلمين وأموالهم، وتغيير أحكام الله تعالى من عظم[28] الآثام. وكان غاية القول مني فيه[29] إبداء ما عندي وعرضه على أهله كما قدمت.

قلت – وعلى الله توكلت واليه أنبت – إن هذا القياس[30] – والله تعالى أعلم – فاسد الوضع، لإلحاق الفرع فيه بغير أصله، وفاسد الاعتبار لمخالفة النص في محله. وذلك لان القائسين زعموا أن علة إباحة الأصل المقيس عليه هي الإقامة بدار الحرب وما يلزم عليها من شتات[31] أنواع موالاة الكفار. فتكون هي علتها في الفرع المقيس، كما يعلم ذلك بالوقوف عليه في كلامهم. وليس كما زعموا، كما يعلم ذلك بالوقوف عليه في كلام الأئمة. وليكن الكلام منا في بيان الفاسدين الوضعي والاعتباري في بابين، ولنقدم أمام المقصود مقدمة في حقيقة القياس من حيث [2ظ] هو، ثم في تصويره هنا في هذه المسألة، ثم في تصوير اعتراض المعترض،[32] لان ذلك أثلج على الفؤاد وادعي لفهم المراد، لان[33] الحكم على الماهية فرع تصورها.

فنقول إن حقيقة القياس من حيث هو: هي حمل معلوم على معلوم.[34] أي، تشبيه معلوم بمعلوم لمساواته له في علة[35] الحكم عند الحامل. وأركانه أربعة: الأصل المقيس عليه، الذي هو عند الفقهاء محل الحكم المقيس عليه،

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[26] In both manuscripts, الأياد and الجاد appear to end in a small *yā'*.
[27] In S: في محله
[28] In S: عظيم
[29] In Ḥ: فيه مني
[30] In S: الإجراء
[31] Ḥ omits شتات
[32] Ḥ includes an incomplete version of this word alongside the whole.
[33] In S: إذ
[34] Ḥ omits على معلوم
[35] In Ḥ: علة في

والركن الثاني هو حكم الأصل المقيس عليه، والثالث هو الفرع المقيس، الذي هو محل الحكم المقيس، والرابع المعنى الجامع بينهما، وهو علة الحكم الناشئ عنها.[36]

وتصويره في هذه المسألة: إن تقول الأصل المقيس عليه هنا، هو ولد ومال من أسلم، قبل حوزه [166ظ] لهما بدار الإسلام، وحكمهما الإباحة، وعلتها الإقامة بهما بدار الحرب وما يتبعها[37] من موالاة الكفار، والفرع المقيس، وهو هنا ولد ومال أصلي الإسلام، المقام بهما بدار الحرب اختياراً، فهذا تصويره في هذه المسألة على زعم القائسين.

وصورة اعتراض المعترض أن يقول: أما ما ذكرتم من إباحة الأصل المذكور قبل الحوز، على المشهور،[38] فمسلم. وأما كون علتها، هي الإقامة المذكورة، فقد وافق الصحيح مريض وحال دون القريض جريض. أي، فنحن لا نسلم ذلك،[39] إلا بشهادة شاهد عدل من مسالك العلة. وإلا، فالدعاء ما لم تقم[40] عليها بينات أبناؤها أدعياء. قال من *القوادح*، كما في النقل: "منع وجود علة الأصل، ومنع علية ما يعلل به،" ألخ.[41] ولكن ها نحن[42] نتبرع عليكم بقبول انقلاب الدعوى في القضية، فنكون نحن الملزومين[43] بإثبات ما أدعينا من بطلان[44] علية ما زعمتموه علة، بإقامة شهادة الدليلي العقلي والنقلي. ثم، لا بد من نقل كلام القائسين أولاً. ثم، من كلام الأئمة،[45] ما يدفعه، ليلا يظن ظان[46] أنا حرفنا كلام أحد الفريقين من موضوعه، أو ألحقنا تابعه بغير متبوعه، فيكون [3و] ما أوردنا[47] على ما تكلموا عليه غير[48] وارد، ويذهب ضرباً في حديد بارد.

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[36] In Ḥ:
الأصل المقيس عليه، الذي هو عند الفقهاء محل الحكم، وحكمه الفرع المقيس، الذي هو عند الفقهاء محل الحكم المقيس، والمعنى الجامع بينهما، وهو علة الحكم الناشئ عنها.

[37] In Ḥ: وما يلزم عليهما

[38] In Ḥ: الأصل وعدم على المشهور قبل الحوز المذكور

[39] In S:
. . . الإقامة المذكورة. فدون ذلك عكاس ومكاش اثار من معترض القيس العماش. أي، فالمعترض لا يسلم ذلك إلا بشهادة . . .

[40] In S: تقيم

[41] Ḥ omits the entire preceding sentence.

[42] Ḥ omits نحن

[43] In Ḥ: الملزمين

[44] In Ḥ: إبطال

[45] Ḥ includes a second القائسين here, crossed out.

[46] Ḥ omits ظان

[47] In Ḥ: كلامنا

[48] Ḥ omits غير

ونص المراد من كلامهم، حسبما ذكره أبو العباس الونشريسي في *معياره*[49] من جواب الإمام[50] ابن قطية الطويل في المسألة:[51]

> وإنما خص من تقدم من أئمة الهدى المقتدى بهم الكلام بصورة من أسلم ولم يهاجر، لأن هذه الموالاة الشركية كانت مفقودة في صدر الإسلام وغرته، ولم تحدث على ما قيل إلا بعد مضي مئين[52] من السنين، وبعد انقراض أئمة الأمصار المجتهدين. فلذلك لا شك لم يتعرض لأحكامها الفقهية أحد منهم. ثم، لما نبغت[53] هذه[54] الموالاة النصرانية في المائة الخامسة وما بعدها من تاريخ الهجرة وقت الاستيلاء ملاعين النصارى – دمرهم الله[55] – على جزيرة[56] صقلية وبعض كور الأندلس، سؤل عنها بعض الفقهاء واستفهموا عن الأحكام الفقهية المتعلقة بمرتكبها. فأجاب بأن[57] أحكامهم جارية على أحكام من أسلم ولم يهاجر. والحقوا هؤلاء المسئول عنهم والمسكوت عن حكمهم بهم، وسووا بين الطائفتين في الأحكام الفقهية المتعلقة بأموالهم [167و] وأولادهم، ولم يروا[58] فرقاً بين الفريقين. وذلك لأنهما في موالاة الأعداء ومساكنتهم[59] ومداخلتهم وملابستهم وعدم[60] الهجرة الواجبة عليهم[61] والفرار منهم وسائر الأسباب الموجبة لهذه الأحكام المسكوت عنها في الصورة المسئول عن فرضها بمثابة واحدة، فألحقوا – رضي الله عنهم – الأحكام المسكوت عنها في هؤلاء المسكوت عنهم بالأحكام المتفقهة[62] فيها في أولئك. فصار اجتهاد المتأخرين في هذا مجرد إلحاق المسكوت عنه بمنطوق به مساو له في المعنى من كل وجه، و هو منهم – رضي الله عنهم – عدل من النظر واحتياط في الاجتهاد وركون إلى الوقوف مع من تقدم من أئمة الهدى المقتدى بهم، فكان غاية في[63] الحسن والزين (هـ).[64] المراد منه بلفظه.

ثم أعقبه هذا الرأي[65] بالترجيح من[66] بعض المحققين، ثم ذكر نقيضه بعد، ورجحه وصححه واعتمده،[67] لكن لم يحرره [3ظ] حق التحرير، كما قدمته.

فانظر إلى قوله عنهم:[68] "ولم يروا فرقاً بين الفريقين وذلك لأنهم في موالاة الأعداء ومساكنتهم" إلخ.، يظهر لك ما قدمناه من جعلهم علة الإباحة في الأصل المقيس عليه، إنما هي موالاة الأعداء. وليس[69] كما زعموا، ولو لم يرد في

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[49] In S: حسبما ذكر في المعيار
[50] Ḥ omits الإمام
[51] In Ḥ: المسألة عنهم
[52] In the *Miʿyār*: مئات
[53] In Ḥ: بغتت
[54] In the *Miʿyār*: هذه المرة
[55] In S: الله تعالى
[56] In Ḥ, this word has been corrected but an extra ز remains.
[57] In Ḥ: أن
[58] In the *Miʿyār*: لم يروا فيها
[59] In S, a partial beginning of this word appears at the end of one line and is not crossed out, then the full word appears at the start of the next line.
[60] In the *Miʿyār*: عدم مباينتهم وترك الهجرة
[61] Ḥ omits عليهم
[62] In both manuscripts and the printed edition of the *Miʿyār*, this word appears as المتفقة.
[63] In Ḥ: فكا في غاية الحسن والزين
[64] For this passage in the *Miʿyār,* see: Al-Wansharīsī, *al-Miʿyār*, 2:125. For my translation, see Appendix A, 354-55.
[65] Ḥ omits هذا الرأي
[66] In Ḥ: عن
[67] In S: ورجحه واعتمده وصححه

الرد عليهم إلا ما أوردوه من المناقضة فيما أسلفوه من كلامهم ورقموه بأقلامهم، لكفى. وذلك لأنهم جزموا أولاً بعدم وجود الموالاة للكفار إلا بعد مضى مئين من السنين، وبعد انقراض أئمة الأمصار المجتهدين، كما في قولهم: "وإنما خص من أئمة الهدى المقتدى بهم الكلام بصورة من أسلم ولم يهاجر،[70] لأن هذه الموالاة الشركية كانت مفقودة في صدر الإسلام، ولم تحدث على ما قيل إلا بعد مضي مئين من السنين، وبعد انقراض أئمة الأمصار المجتهدين" الخ.، ثم تقحموا آخر إلى إثبات ما جزموا بعدم وجوده، كما في قولهم: "ولم يروا فرقاً بين الفريقين، وذلك لأنهم في موالاة الأعداء . . ." الخ. فأثبتوا أعظم الموالاة لمن نفوها عنه، وجعلوها علة إباحة مال من برءوه منها عند من أثبتوا عدم وقوعها إلا بعد انقراض عصور بعد عصره، فسبحان من ألف بين النفي[71] والإثبات، وجمع بين الضدين بعد الشتات.

ولا تظن أنهم أثبتوا في الأصل من الموالاة نوعاً لم يوجد في الفرع، لان ما[72] أثبتوا في الأصل هو عين ما أثبتوه في الفرع من غير زائد. ومن فرق بينهما بكون الإقامة في الأصل سابقة على الإسلام، وفي الفرع لاحقة بعده، فقد فرق بينهما بتغاير[73] ما قبل الإقامتين، لا بتغاير الإقامتين نفسيهما. بل من أمعن النظر علم أن الإقامتين لاحقتين بعد الإسلام، اذ لا إقامة أصلاً [167ظ] في الفرع، ولا معتبرة في الأصل إلا بعد الإسلام لمانع الكفر من اعتبار الأحكام الفرعية. وحينئذ تكون نفس الموالاة في الأصل المقيس، لان كلا منهما هي إقامة مسلم بدار الحرب اختياراً بعد إسلامه. ولكن سوف أنقل من كلام الأئمة ما يدفع ما زعموه من علية ما زعموه علة للإباحة، إن شاء الله تعالى.

ثم، انظر[74] إلى قوله: "وإنما خص من تقدم[75] من أئمة الهدى المقتدى بهم الكلام بصورة من أسلم ولم يهاجر،" الخ.، ثم إلى قوله: "فلذلك، لا شك، لم يتعرض لأحكامها الفقهية أحد منهم،" ثم إلى قوله: "فالحقوا – رضي الله عنهم

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[68] Ḥ omits عنهم
[69] S omits this entire paragraph, from وليس to إن شاء الله تعالى.
[70] Ḥ omits the remainder of the quotation and replaces it with
[71] This is emended from: الفي
[72] These two words are written together in the text: لانما
[73] This is emended from: يتغاير
[74] S omits انظر
[75] Ḥ omits من تقدم

– الأحكام المسكوت عنها في هؤلاء المسكوت عنهم،" إلخ.،[76] يتضح لك ما قدمناه[77] من جزمهم من عدم[78] وجود النص من الأقدمين[79] في الفرع المقيس، ليلا يزعموا عند إبطال علية ما زعموه علة، أن ثم علة أخرى، فينتشر الكلام، أو يزعموا بعد[80] إبطال هذا القياس أن لهم مستند غيره.[81] أي، فهم معترفون بأن لا مستند لهم غير هذا القياس،[82] وأن لا علة للإباحة فيه في الأصل المقيس عليه إلا الموالاة المذكورة.

وبعد، فالشروع في انجاز ما وعدنا به من نقل ما ينادي على زعمهم بالإبطال من كلام الأئمة. ولنختر منه أثبته تقريراً وأحسنه تحريراً، الذي هو أبو بكر بن العربي حسبما نقله عنه صاحب *المعيار*،[83] اذ بنقل وفهم كلام صاحب[84] *العارضة*، لم يبق[85] محل للنزاع ولا للمعارضة. فلعمري لقد وجد هذه المسألة ميتة، فأحياها، فعرف موضوعها وحقق مبناها وفرع فروعها، فأوضح معناها. وإن كان سيف المذهب وسفينة بحاره، المذلل لصعابه والمسهل لأوعاره، أبو الموّدة،[86] لم يترك من أحكام أصلها المقيس عليه شاذة،[87] لكن فيه تقديم وتأخير وتصريح وتلويح كما نبه على ذلك شروحه.[88] إي،[89] فهو، وإن استوفى أحكامها، فاته تحقيق مبناها.

ونص المراد منه:

> وقد اختلف الناس فيمن اسلم وبقى بدار الحرب فقتل أو سبي أهله[90] وماله. فقال مالك: "حقن دمه، وماله لمن أخذه، حتى يحوزه بدار الإسلام." وقيل عنه انه يحوز ماله وأهله، وبه قال الشافعي. والمسألة محققة في مسائل الخلاف، مبنية على أن الحربي، هل يملك [4و] ملكاً صحيحاً أم لا، وعلى أن العاصم، هل هو الإسلام أو الدار؟[91] فمن ذهب إلى انه يملك ملكاً صحيحاً تمسك بقوله – صلى الله عليه وسلم[92] –"وهل ترك لنا عقيل من دار؟" وبقوله – صلى الله عليه وسلم –"أمرت أن أقاتل الناس حتى يقولوا 'لا اله إلا الله.' فإذا [168و] قالوها عصموا[93] مني دماءهم وأموالهم

[76] Ḥ omits إلخ
[77] In Ḥ: ما قلناه
[78] In Ḥ: من جزمهم بعد
[79] In Ḥ: المتقدمين
[80] S omits the section after the first إبطال, from علية to بعد.
[81] S adds فينتشر الكلام here.
[82] In S: لا مستند لهم في إستباحة الفرع المقيس إلا هذا القياس
[83] In S: حسبما نقله في المعيار
[84] Ḥ omits صاحب
[85] I have emended this word from يبقى
[86] S omits أبو المودة
[87] In Ḥ: يزد من أحكامها شاذ ولا فاذة
[88] In Ḥ: شرحه
[89] Ḥ omits أي
[90] In S, أهله is written in the margin with an indication that it should be inserted here.
[91] In S: الدار أو الإسلام
[92] In S: عليه الصلاة والسلام
[93] In Ḥ: عصمو

إلا بحقها." فسوى بين الدماء والأموال وأضافها إليهم، والإضافة تقتضي التمليك. ثم أخبر عمن أسلم منهم أنه معصوم، وذلك يقتضي أن لا يكون لأحد عليه سبيل. وتمسك أيضاً من أتبعه ماله بقوله – صلى الله عليه وسلم – "لا يحل مال امرئ مسلم إلا عن طيب نفسه منه."

وأما مالك وأبو حنيفة ومن قال بقولهما، فعندهم أن العاصم إنما هو الدار، فما لم يحز المسلم ماله وولده بدار الإسلام، و إلا، فما أصيب من ذلك في دار الكفر،[94] فهو فيء للمسلمين. وكأن الكفار عندهم لا يملكون، بل أموالهم وأولادهم حلال لمن يقدر عليها من المسلمين كدمائهم. فمن أسلم منهم ولم يحز مالاً ولا ولداً بدار الإسلام، فكأنه لا مال له[95] ولا ولد، وكأن اليد للكفار، كما أن الدار لهم، وليست يد صاحبه الإسلامي يداً[96] إذا كان بين أظهرهم (هـ). بلفظه.[97]

تنبيهان – الأول:[98] ربما يتوهم، قبل إمعان النظر،[99] من قوله "أن العاصم إنما هو الدار" ومن قوله "وكان اليد للكفار، كما أن الدار لهم، وليست يد صاحبه الإسلامي يداً[100] إذا كان بين أظهرهم" اشتراط قوة اليد لاستمرار العصمة بعد تقررها، بكون المالك لا بد أن يكون في دار الإسلام أبداً بعد[101] تقرر[102] ملكه وعصمته، وإلا ارتفعت عصمة ماله. وليس كذلك، إذ لا أحد أضعف يداً من أسير في الأسر تحت أيديهم بالقهر، والنص صريح باستمرار عصمة ماله، بل الاستمرار موجود وان لم يكن تحت يد أصلاً، إذ تسور الحربي على مال المسلم لا يبطل ملكه بالمرة، وإنما تكون[103] للحربي به شبهة الملك، إلى أن يفوت على ربه بمفوت من مفوتاته المشهورة على تفاصيلها المذكورة.

كما قال الزقاني عند قول خليل "ولأسير وطء زوجة وأمة سلمتا،" ما نصه: "أي، [4ظ][104] من وطء السابي، لأن سبيهم لنا لا يهدم نكاحنا ولا يبطل ملكنا (هـ)." بل، إنما تراعى قوة اليد بكون ذي اليد[105] بدار الإسلام، لتقرر الملك بعد أن لم يكن، وذلك فيما[106] إذا[107] كان الاكتساب في الكفر، لأنه الموجب لعدم صحة الملك الموجبة لافتقار

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[94] Ḥ omits و إلا، فما أصيب من ذلك في دار الكفر
[95] Ḥ omits له
[96] In Ḥ: يد
[97] See this passage in al-Wansharīsī, *al-Miʿyār*, 2:127-28; Appendix A, 20-21. For *ḥadīth* citations, see my translation.
[98] S omits الأول and gives تنبيه in the singular. In Ḥ, الأول is written in the left margin following this line., with a mark indicating the word should be inserted here.
[99] Ḥ omits قبل إمعان النظر
[100] I have emended this word from يد
[101] In S: بدار الإسلام بعد
[102] Ḥ omits تقرر
[103] In Ḥ: يكون
[104] S repeats أي at the beginning of the following page.
[105] Ḥ omits بكون ذي اليد
[106] S repeats فيما at the end of one line and the beginning of another.
[107] In Ḥ: إذ

العصمة لقوة اليد، بكون[108] ذي اليد بدار الإسلام، كما هو الشأن في كل ضعيف سبب الملك لفساد أو خروج على غير عوض،[109] كما ستقف على ذلك إن شاء الله تعالى.

ثانيهما:[110] أنا، لو سلمنا شمول دلالة عموم[111] هذا، على أن استمرار[112] العصمة بعد وقوعها[113] مشروط بكون[114] المعصوم بدار الإسلام أبداً،[115] لكانت المسألة المقيسة منصوصاً عليها [168ظ] من الأقدمين، وقد جزمنا بعدم ذلك،[116] ولما تأتي القياس حينئذ لا طباقهم، على أن دلالة دليل الأصل المقيس عليه على الفرع المقيس مانعة من القياس عليه، لعدم أولويته بالأصالة من الفرع. حينئذ قال: "وحيثما يندرج الحكمان في النص، الأمران قل سيان."

وبعد هذا، أيها القائسون، هلموا آذاناً واعية وقلوباً مصغية فتعلموا أولاً من قوله "وماله لمن أخذه حتى يحوزه بدار الإسلام،" ثم من قوله "فأما مالك ومن قال بقوله فعنده أن العاصم إنما هو الدار،" أن لا عصمة لمال[117] هذا الأصل بمجرد الإسلام قبل الحوز المذكور. ثم تعلموا ثانياً من قوله "وهل العاصم الإسلام أو الدار،" أن اختلاف الأئمة إنما هو فيما يوجب العصمة بعد أن لم تكن، لا فيما يرفعها بعد أن كانت. فلم يتكلموا فيه هنا[118] ببنت شفة ، عكس الفرع المقيس، فأن الاختلاف فيه إنما هو فيما يرفع العصمة بعد أن كانت، لا فيما يوجبها بعد أن لم تكن. فنحن وأياهم كلانا في واد. ثم تعلموا ثالثاً من قوله "هل يملك الحربي ملكاً صحيحاً،" ومن استدلالهم بقوله – صلى

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[108] In Ḥ: يكون
[109] Ḥ omits كما هو الشأن في كل ضعيف سبب الملك لفساد أو خروج على غير عوض
[110] S reads على instead of ثانيهما
[111] Ḥ omits شمول and عموم
[112] S reads دوام instead of استمرار
[113] S omits بعد وقوعها
[114] In S: كونية
[115] Ḥ omits أبداً
[116] The remainder of this sentence in S reads:
لكان حكم الفرع المقيس منصوصاً عليه للأقدمين، وقد جزمنا بعدمه، ولامتنع قياس الفرع حينئذ على أصله بعدم أولويته بالأصالة، إذ الاندراج حكم الفرع في دلالة دليل الأصل معه. قال: "وحيثما يندرج الحكمان في النص، فالأمران قل سيان."
[117] In S: بمال
[118] Ḥ omits هنا

الله عليه وسلم – "من أسلم على شيء فهو له،"[119] إلى غير ذلك، أن موضع[120] اختلافهم إنما هو فيما كان مكتسباً في الكفر، لا فيما كان مكتسباً في الإسلام، كما ستقف على ذلك إن شاء الله تعالى.

فصل في تحقيق مناط حكم الأصل المقيس عليه.

أيها النظار،[121] رأينا صريحاً أن لا العصمة عند مالك لمال من أسلم [5و] قبل الحوز المذكور. فنعلم أن قوله بإباحته حينئذ لم يكن رفعاً منه لعصمته، بل إنما ترك ما كان مباحاً قبل الإسلام على إباحته،[122] وحينئذ نعلم[123] يقيناً بطلان ما زعمنا من أن علة الإباحة حينئذ عنده، إنما هي الإقامة بدار الحرب وما يتبعها من موالاة الكفار،[124] لامتناع ذلك إذ ذاك[125] عقلاً فيمتنع نقلاً. وذلك لأنا إما أن نزعم أن هذه[126] الإقامة علة لوجود ابتداء هذه الإباحة المستصحبة[127] هنا، أو نزعم أنها [علة ل] إباحته بعد عصمته.[128] وكلا الزعمين مستحيل.[129] أما أولاً، فلأن الإباحة هنا، التي هي المعلول، سابقة على[130] وجود العلة، التي هي الإقامة، على زعمنا. والمعلول فرع العلة والفرع لا يتقدم على أصله، لاستحالة وجود التأثير قبل وجود المؤثر[131] وتقدم الفعل على فاعله.[132] وأما أخيراً،[133] والحالة هذه من كون الإقامة قبل الحوز المذكور، فلامتناع رفع غير واقع، لان[134] العصمة ساعتئذ [169و] لم تقع أصلاً عند مالك حتى تُرفع، لا بإقامة ولا بغيرها. وتحصيل القول في ذلك أن لا عصمة إلا بحوز، ولا حوز فلا عصمة. ولا رفع إلا لمرفوع، ولا مرفوع فلا رفع.[135] وكل ما أمتنع عقلاً أمتنع نقلاً، وذا أمر عليه مجتمع.

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[119] See Appendix A, 360.
[120] In S: موضوع
[121] In Ḥ: الناظر
[122] In S: لم يكن منه عن رفع لعصمته، بل إنما لم يعصم ما كان مباحاً قبل الإسلام بمجرد الإسلام قبل الحوز
[123] In Ḥ: نعم
[124] In Ḥ: وما لم يلزم عليها من أنواع موالاة الكفار
[125] Ḥ omits إذ ذاك
[126] Ḥ omits هذه
[127] Ḥ omits هذه and المستصحبة
[128] In S: أنها رافعة لعصمة تقررت. The last word has been corrected and is difficult to read.
[129] In S: ممتنع
[130] Ḥ omits على
[131] In Ḥ: المأثر
[132] In Ḥ: الفاعلي
[133] In S: أخراً
[134] In S: وما ذلك إلا لما علم من العصمة ساعتئذ
[135] In S: ولا رافع إلا لمرفوع، ولا مرفوع فلا رافع

ومن ثم، قال في *نشر البنود* عند قوله "والعلم والوسع[136] على المعروف" الخ.، ما نص المراد منه: "واعلم أن الشأن عند أهل الأصول أن يتكلموا أولاً في المسألة على الجواز العقلي. فإن أمتنع الشيء عقلاً، عُلم ضرورة إمتناع[137] وقوعه، وإن جاز عقلاً، نظروا بعد ذلك، هل وقع في الشرع أم لا" (هـ).

تنبيه – وكما أمتنع عقلاً أن تكون هذه الإقامة هنا علة للإباحة، يمتنع شرعاً أن تكون[138] هنا مانعة من وجود ابتداء[139] العصمة قبل وجود الحوز الذي هو هنا[140] موجب العصمة. وذلك لأنه لا تأثير للمانع في نفي ممنوعه، ولا لانتفاء الشرط في نفي[141] مشروطه، إلا بعد وجود موجب الممنوع أو المشروط. وإلا، كان النفي حينئذ لانتفاء الموجب، لا لوجود المانع، ولا لانتفاء[142] الشرط على مذهب الجمهور، خلافاً [5ظ] للفخر الرازي من الشافعية، بل مال إليه إبن الحاجب منا. قالوا: إذ لا يحسن عادة أن يقال 'لم يبصر الأعمى زيداً لحيلولة الجدار بينه وبينه،' بل لعدم البصر الموجب للإبصار. كما لا يحسن شرعاً أن يقال 'لم يرث زيد خالد[143] الأجنبي لكفره،' بل لعدم قرابته التي هي موجب الإرث.

قال: "مقتضى[144] الحكم وجوده وجباً * متى يكن وجود مانع سبباً * كذلك[145] انتفاء شرط كانا * وفخرهم خلاف ذا أبانا." على أنا، لو فرعنا على مذهب الأقل المرجوح غاية المرجوحية، لما أجرى[146] هنا نفعاً البتة. وذلك لأن الإقامة المذكورة[147] حينئذ تكون في الأصل مانعة من ابتداء العصمة والمرقب وجوده في الفرع أن تكون مانعة لانتهائها وهما لا تلازم بينهما.[148] فالمستدل بمنع الابتداء على منع الانتهاء يرد عليه من جهة المعترض القول

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[136] In Ḥ: لوسع
[137] In S: عدم
[138] In S: تعد
[139] Ḥ omits ابتداء
[140] Ḥ omits هنا
[141] In Ḥ: إنتفاء
[142] In S: ولا نتفاء
[143] In Ḥ: خالديرثلم
[144] In S: ومقتضى
[145] In S: كذا إذ
[146] In Ḥ: جرى
[147] In Ḥ: لأنها
[148] In S: تكون في الأصل مانع ابتداء، والمترقب وجوده في الفرع أن تكون مانع انتهاء. ومانع الابتداء ومانع الانتهاء لا تلازم بينهما

بالموجب[149] من *القوادح*. قال: "والقول بالموجب قدحه جلا * وهو تسليم الدليل مسجلا * من مانع أن الدليل استلزما * لما من الصور فيه اختصما." وستكون لنا عودة إلى زيادة[150] إيضاح لهذا المعنى في الكلام على فساد الاعتبار، وبما رأيت من تعذر وجود رافع العصمة [169ظ] في الأصل المقيس عليه، لعدم المرفوع، بتعذر وجود المعنى الجامع بين الأصل والفرع.[151] وما ذلك إلا لما علم من أنه لا مطمع في إباحة الفرع المقيس بعد تقرر عصمته إلا برافع يرفع العصمة، كما علم أن اشتغال محل الحكم بأحد النقيضين يمنع المحل[152] [من] قبول نقيضه قبل رفعه،[153] والإباحة والعصمة نقيضان. وقد اشتغل المحل هنا بالعصمة منهما، ولا مطمع في وجود إلا قبل رفعها، ولا في رفعها بغير رافع، لامتناع وجود الترجيح من غير مرجح. ولا مطمع في وجود رافع في الأصل المقيس عليه لعدم المرفوع، كما تقدم بيانه بما لا مزيد عليه.[154]

وحينئذ[155] أنكر أبو[156] هذا[157] الإجراء نجله، ومد حنفي النزاع رجله، وقام خطيب الاعتراض على منابر الانتقاض، ونادي بملء رأسه غير حاش[158] ولا محاش، أن لا علة لإباحة هذا الأصل المقيس [6و] عليه إلا الكفر السابق على الإقامة،[159] وهو هنا وصف لازم للأصل، لا يتعداه للفرع المقيس[160] لما علم من استحالة وجود الكفر من أصلي الإسلام الذي لم يتقدم إسلامه كفر.[161] والوصف اللازم علة قاصرة. قال: "في تعداد العلة، القاصرة * منها محل الحكم أو جزء وزد * وصفاً اذا كل لزومياً يرد." ومعلول[162] العلة القاصرة ليس أصلاً يقاس عليه إجماعاً.

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[149] In Ḥ: الموجب
[150] Ḥ omits إلى زيادة
[151] In S: عدم وجود عصمته ترفع علمت تعذر وجود معنى جامع هنا بين الأصل والفرع
[152] In Ḥ: بأحد التقضين يمنع لمحل
[153] S adds: ولا مطمع في رفعه بلا رافع، لاستحالة الترجيح من غير مرجح
[154] In S: فلا مطمع في الأباحة بلا رافع للعصمة، ولا مطمع في رافعها في الأصل المقيس عليه لعدم المرفوع، كما تقدم . . .
[155] In S: وها هنا
[156] In S: أبوا
[157] In Ḥ: هذ
[158] In S, this word may be غاش, but is unclear.
[159] S omits على الأقامة
[160] S omits المقيس
[161] In Ḥ: على كفر
[162] In Ḥ: معلوم

قال: "وليس حكم الأصل بالأساس * متى يجد عن سنى القياس * لكونه معناه ليس يعقل * أو التعدي فيه ليس يحصل."[163] بل أعظم فوائد ذكر[164] العلة القاصرة معرفة امتناع القياس على معلولها.[165] قال: "وعللوا بما[166] خلت من تعديه * ليعلم امتناعه والتقويه." وما ذلك إلا لأنه[167] بإنعدام التعدية انعدام المعنى الجامع، وهو أحد أركان القياس الذاتية، وبإنعدامها، إنعدام الماهية. وليكن هذا آخر ما أردنا من بيان فساد الوضع اكتفاء بالبعض عن البعض واقتداء بسيد الخلق يوم العرض، فيما أخبر عنه تعالى بقوله: {عرف بعضه وأعرض عن بعض}.[168] وإلا، لما أردنا[169] تسليط قادح لعلة التسلط[170] فرقاً وكسراً وقلباً ونقضاً وانتقاظاً وقولاً بموجب[171] علة وعدم[172] انعكاس كما رأيت. وسترى ملزومات كل إن شاء الله تعالى.

باب في بيان فساد الاعتبار.

هذا، [170و] وليكن في علم كل ذي علم أن افتقار عصمة مال وولد من أسلم للحوز المذكور عند مالك إنما هو فيما كان مكتسباً في الكفر، لا فيما كان مكتسباً في الإسلام. وذلك لأن موجب افتقار العصمة للحوز إنما هو عدم صحة ملك الحربي، كما تقدم التنبيه عليه في قول *العارضة*:[173] "والمسألة محققة في مسائل الخلاف مبنية على أن الحربي، هل يملك ملكاً صحيحاً أم لا؟" ومن ثم، لما زال الوصف، الذي هو الكفر الموجب لعدم صحة الملك، الموجبة لافتقار العصمة للحوز، بصيرورة المالك[174] مسلماً صحيح الملك، زال افتقار العصمة للحوز المبنى[175] عليها، كما هو شأن كل بناء بزوال مبناه. فصارا معصومين بمجرد إكتسابهما مع الإقامة بهما بدار الحرب، كما نص على ذلك خليل، أي بالمفهوم الشرطي الواقع في كلامه موقع النص الصريح في الولد بقوله:[176] [6ظ] "ورق

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[163] In Ḥ: "وليس حكم الأساس * متى يحد عن القياس * لكونه معناه ليس يعقل * أو التعدي فيه ليس يصل"
[164] Ḥ omits ذكر
[165] Ḥ omits معلولها
[166] Ḥ omits بما
[167] In Ḥ: أنه
[168] Qur'ān 66:3
[169] In Ḥ: ردنا
[170] In Ḥ: بسلط
[171] In Ḥ: بلا موجب
[172] Ḥ omits وعدم
[173] In S: في قوله
[174] In S: الممتلك
[175] Ḥ omits المبنى
[176] In Ḥ: خليل في الولد صريحاً بقوله

أن حملت به بكفر" وفي المال الذي هو شقيقه وتؤمه في الحكم تخريجاً، لأنه، كما قيل، إذا[177] لم تكنه أو يكنها، فأنه أخوها غذته أمها بلبانها. أي، فتقييد فيئية المال بما إذا لم يكن اكتسابه بعد الإسلام[178] يكون قوله المخرج على حد قوله، إن لم يكن لنحو مالك ألف "قول بذي وفي نظيرها عرف." فذلك قوله بها المخرج ولكن الله – والحمد لله[179] – أغنى عن التخريج بالتنصيص. فقد صرح به الرهوني قيداً في قول خليل "وماله فيء،" وذكره عن أبي الحسن قيداً في مسألة *المدونة* هذه، التي هي متبوع خليل، وتابعه على ذلك النقاد واقروه ونص المراد منه عند قوله "وماله فيء": "يريد الذي اكتسبه قبل الإسلام لا بعده. قال ابن عاشر ما نصه أبو الحسن: 'وكذا ما اكتسبه بعد الإسلام يكون له لا فيئاً (هـ)،' منه بلفظه. ونقله الجسوسي وأقره وهو ظاهر (هـ)." منه بلفظه.

وبه تعلم أن الإقامة بدار الحرب، بالنسبة لغير التأثيم وما ينبغي عليه من تعزير ورد شهادة وعزل من قضاء إلى غير ذلك من المناصب الشرعية،[180] لا تأثير لها فيه، أي، لا تأثير لها في منع العصمة ابتداء، ولا في رفعها بعد الوقوع، فهي[181] بالنسبة لدفع العصمة أو رفعها وصف طردي. بل، حيث امتنعت العصمة، فالمنع حينئذ إنما هو لفقد موجب العصمة الذي هو الحوز، وذلك فيما إذا كان الاكتساب في الكفر. وحيث [170ظ] لم تفتقر العصمة للحوز، فالعصمة[182] حينئذ حاصلة ابتداء ودواماً مع الإقامة به بدار الحرب. وهو فيما إذا كان الاكتساب في الإسلام، كما رأيت. وحينئذ يتسلط من جهة المعترض الانتقاض والقلب من *القوادح* إذ بعدم تأثير الوصف المعلل به، يرد قادح الانتقاض. قال: "والوصف إن يعدم له تأثير * فذاك لانتقاضه[183] يصير،" إلى أن قال: "يجيء في الطردي حيث عللاً * به" ألخ. وبصيرورة دليل المستدل دليلاً عليه، يتسلط قادح القلب كما هنا. وذلك لان القياس على ما كان مكتسباً من مال وولد من أسلم، بعد إسلامه يصير حكم الفرع المقيس دوام [7و] العصمة واستمرارها الذي يأبوه، كما رأت،[184] لأنه حكم الأصل حينئذ. فقد صار ما زعموه دليلاً لهم دليلاً عليهم. ولا جرم فهذه عادة لله

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[177] In Ḥ: إذ
[178] In S: الاكتساب في الأسلام
[179] In S: ولله الحمد
[180] In Ḥ: الشريعة
[181] In S: بل هي
[182] In Ḥ, several words are crossed out here (الذي هو الحوز وذلك فيما).
[183] In Ḥ: الانتقاضه
[184] Ḥ omits كما رأت

في كل من نظم لله[185] للباطل نثيراً. {ولو كان من عند غير الله لوجدوا فيه اختلافاً كثيراً}،[186] وهذا بمجرده[187] كاف في فساد الاعتبار.

ولكن سوف أزيدك في المسألة إيضاحاً حتى تعلم هل ما زعموه[188] من استباحة مال المسلم بموالاة الكفار – عياذاً بالله تعالى – صواباً أو خطأ صراحاً. هذا وليكن[189] في علم كل ذا علم[190] أن سبب الغلط في هذا الإجراء هو ظنهم[191] أن مال من أسلم تقرر ملكه وعصمته بمجرد إسلامه. وليس كما ظنوا، كما تقدم التصريح به في كلام صاحب[192] *العارضة*، و في[193] أيما ديوان،[194] مثل ما ذكره البناني عند قول خليل "وملك الحربي[195] بإسلامه غير الحر المسلم،" ونص المراد منه: "قول الزرقاني 'قدم بأمان أم لا،' إلخ.، يعني، أم لم يقدم بأمان في حال كفره، لكن بعد إسلامه. وأما إذا أقام ببلده، فسيأتي آخر الباب في قول المؤلف: 'وماله وولده فيء،' إلخ. (هـ)." منه بلفظه.

فأنظر إلى تصريحه بعدم وجود الملك بمجرد الإسلام قبل الحوز بدار الإسلام.[196] وجعله له مدلول قول خليل "وماله فيء" جاعلاً معنى الفيئية فيه عدم وجود تقرر[197] الملك أصلاً، مقيداً لكلامه بكلامه يتضح ما قلناه من عدم وجود الملك قبل الحوز كما تقدم في كلام *العارضة*، وكما هو صريح من كلام أبي عبد الله السرقسطي في أثناء كلام له في توهين هذا القياس.[198]

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[185] Ḥ omits لله
[186] Qur'ān 4:82
[187] In S: بمجرد
[188] In S: تعلم ما توهموه
[189] In Ḥ: واليكن
[190] In S: في علمك
[191] In S: إنما هو ظن
[192] Ḥ omits صاحب
[193] In S: وكما هو في
[194] In both manuscripts: أي ما
[195] S omits الحربي
[196] In S: بمجرد الإسلام دون قدومه به إلى دار الإسلام
[197] Ḥ omits تقرر
[198] In S: هدا الإجراء

ونص المراد منه: [171و] "وفي هذا الإجراء نظر من حيث أن الحربي مباح الدم والمال والرقبة. فإذا أسلم، أحرز[199] دمه ورقبته باتفاق، وبقى الخلاف في ماله ما دام بدار الحرب (هـ). منه بلفظه، على نقل *المعيار*.[200] فأنظر إلى تصريحه بعدم إنعصام المال ما دام بدار الحرب عند القائل به. وقد علمت أن القائل بعدم العصمة دون الحوز بدار الإسلام[201] إنما هو مالك وموافقوه. بل، ادعاء وجود العصمة عند مالك بمجرد الإسلام كالمتعذر لما يلزم عليه من كون المسألة وفاقية بعد [7ظ] أن كانت محققة في مسائل الخلاف. ولأجل انعدام انعصامه[202] أصلاً قبل الحوز، وبقائه على حكمه قبل الإسلام، فسر الزرقاني[203] الفيئية في قول خليل "فيء بالغنيمة" بقوله[204] "غنيمة للجيش الذي دخل بلاده ولو عبر بغنيمة كان أولى (هـ)." فلفظه وهي نكتة عجيبة إذ لا غنيمة تخمس ويختص بها الغانمون إلا ما أوجف عليه من أموال وأولاد[205] الحربيين حتى لو قوتلت أمة من أهل الردة أو مستغرق[206] الذمة وأخذت أموالهم لكانت فيئاً لسائر المسلمين[207] لا تخمس ولا يختص الآخذون منها بشيء.

وإنما أطلت الكلام بتحقيق هذه المسألة لأنه بتحقق عدم عصمة مال من أسلم قبل الحوز، وبقائه على حكمه في الكفر قبل الإسلام، على الرواية المقيسة عليها، يتحقق[208] أنا لم نزد في قياسنا على أن سوينا في الحكم بين مال مسلم تقررت عصمته جزماً وبين مال حربي حكماً[209] بارتكاب المسلم بإقامته بدار الحرب حوباً وأثماً ، وناهيك بهذا فساداً ومنافرة للأصول ومخالفة للفصول. أما الفساد، فقد تقدم بيانه،[210] وأما منافرته للأصول، فلما تقرر عندنا من أنه لا يستباح مال المسلم بصدور المعصية منه كما[211] حققوه في مبحث العقوبة المالية، حتى قال ابن الفخار ما

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[199] In Ḥ: حرز
[200] Ḥ omits المعيار
[201] In S: القائل به
[202] In S: عدم الإنعصام
[203] In S: الشروح
[204] In S: قال الزرقاني في قوله "فيء،" أي
[205] S omits وأولاد
[206] In Ḥ: امستغرق. In S: أو مغتر
[207] In S: لكانت أموالهم فيئاً لسائر المسلمين
[208] In Ḥ: بتحقق عدم وجود العصمة وتقرر الملك في مال من أسلم بمجرد الإسلام قبل الجوز بتحقق
[209] In S: بين مال الحربي ومال مسلم تقررت عصمته جزماً
[210] In S: تقدم من بيانه ما أغنى عن إعادته
[211] In S: مسلم بصدور معصية منه حسب

نص، المراد منه:[212] "لا يعلم ذنب يوجب استباحة المال إلا الكفر وحده (هـ)." منه بلفظه. واستباحة المال بالإقامة بدار الحرب استباحة له بذنب غير الكفر.

وهب، فنحن، إن استبحناه[213] بالإقامة في قياد أهل الكفر اختياراً، أيسعنا أن ندعي قدرة جميع المقيمين أو أكثرهم على الهجرة؟[214] أم نستبيح مال العاجز عن الهجرة ومن في معناه كالصبي والمرأة،[215] وقد بنينا الاستباحة على ترك الهجرة الواجبة؟ أم نحن نميز بين مال العاجز، فنتركه، وبين مال غيره، فنأخذه؟ أم لم يكن التباس هذا بهذا مانعاً؟[216] أخذ هذا على الأصل الإجماعي المؤسس على قوله تعالى: {لو لا رجال مؤمنون ونساء مؤمنات، لم تعلموهم أن تطئوهم فتصيبكم منهم معرة بغير علم ليدخل الله في رحمته من يشاء لو تزيلوا لعذبنا الذين كفروا منهم عذاباً أليماً}[217] المشار إليه بقول العلوي تبعاً لإجماعهم[218] "فما به ترك المحرم يرى * وجوب تركه جميع من درى * وسوين بين جهل لحقاً * بعد [8و] تعين وما[219] قد سبقاً،" مع ما يلزم على ذلك من انتهاك [171ظ] الحرمات وإثارة الفتن التي لا يسد لها باب إلى الأبد[220] التي تمنع المظلوم أخذ عين شيئه من ظالمه، كما في قوله: "من قدر على شيئه، فله أخذه إن يكن غير عقوبة وأمن فتنة ورذيلة،"[221] فضلاً عن غيره.

وأما مخالفته للفصول فحسبك ما قدمنا في كلامي أبوي المودة والحسن ومتابعتهم[222] في عين النازلة وما في آخر مسألة من *سماع يحيى* من كتاب الجهاد. ونصه:

> وسألته عمن تخلف[223] من أهل برشلونة من المسلمين عن الارتحال[224] عنهم بعد السنة التي أجلت لهم يوم فتحت[225] في ارتحالهم، فأغار على المسلمين تعوذاً بالله[226] مما يخاف من القتل إن ظفر به. فقال: "ما أراه إلا بمنزلة المحارب الذي يتلصص بدار الإسلام، فأنه مقيم على دين الإسلام. فإن أصيب فأمره إلى

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[212] S omits المراد منه
[213] In Ḥ: إستبحنا
[214] Ḥ omits على الهجرة
[215] In S: مال العاجز ومن لالصبي والمرأة
[216] In Ḥ: مانع
[217] Qur'ān 48:25. Ḥ omits from المؤسس to the end of this verse.
[218] In Ḥ: بقوله
[219] Ḥ omits ما
[220] Ḥ omits التي لا يسد لها باب إلى الأبد
[221] S omits from كما to end of quotation. Ḥ is emended from: إن يكون غير عقوبة وأمن فتنة أوريلة
[222] In S: ومتابعيهم
[223] In Ḥ: تخالف
[224] In Ḥ: الاتحال
[225] S omits يوم فتحت
[226] S omits بالله

الإمام يحكم فيه بمثل ما يحكم في أهل الفساد والحرابة. وأما في ماله فلا أراه يحل لأحد أصابه (هـ)."
المراد منه بلفظه.

فأنظر – رحمك الله[227] – إلى هذا النص الصريح *بالسماع* الصحيح الوارد عن أرجح الأصحاب الذي هو[228] رأس من قال بعدم عصمة مال من أسلم قبل حوزه[229] بدار الإسلام. ورواه عن الإمام كيف يصدع بدوام عصمة مال هذا المسلم المقيم بدار الحرب مع محاربته للمسلمين وإغارته عليهم. أني يسع أحداً بعد هذا أن يقول برفع العصمة بمساكنة الحربيين قياساً على رأيه ومرويه، ويلزمه القول بذلك. فيا عجبا نحن لو فرضنا هذا التخريج صحيحاً وفي دواوين الأقدمين، والمخرج أبن القاسم نفسه ووجدنا قوله المنصوص بنقيضه، أفليس يلزمنا طرح قوله المخرج والأخذ بقوله المنصوص على أصلنا،[230] فضلاً عن أن يكون التخريج فاسداً وفي غير دواوين الأقدمين، والمخرج من غير الأقدمين،[231] فضلاً عن خصوص ابن القاسم وصريح نص ابن القاسم بنقيضه؟ ومع ذلك نطرح نص ابن القاسم ونأخذ بهذا التخريج: "بعنا لعمري[232] الشمش بالنبراس * أن السماع مانع القياس،" أي،[233] الصحيح الوضع فضلاً عن فساده هذا.

وفي أول مسألة من جهاد *المعيار*، من جواب للإمام ابن مرزوق في تحقيق الفرق بين مسألتي قول الإمام: "من قتل قتيلاً فله سلبه، فان القاتل يستحق فيها [8ظ] أسلاب جميع قتلاه إن تعددت،" وقوله "إن قتلت قتيلاً فلك سلبه، فأنه لا يستحق إلا سلب قتيله الأول إن تعددت قتلاه" ما نصه. فإن قلت ما ادعيتموه من العموم في قتيلا المذكور مع من ينتقض بما حكي أبو محمد في بعض أبواب هذا الفصل من *النوادر* عن كتاب ابن سحنون، ونصه: "وإذا قاتلنا الخوارج مع قوم من أهل الحرب [172و] استعانوا بهم علينا، فقال الإمام 'من قتل قتيلاً، فله سلبه، فأن من قتل خارجياً فليس له سلبه وله سلب الحربي (هـ)،' فهذا ينافي العموم. قلت: إنما يعم اللفظ ما يصح أن لا يراد به باعتبار المقامات. والذي يراد بالقتيل في هذا المقام الذي يحل دمه وماله، وهم الكفار الحربيون والخارجي. وإن حل قتله حال القتال لم يحل ماله (هـ)." المراد منه بلفظه.

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[227] S omits رحمك الله
[228] Ḥ omits هو
[229] In S: الحوز
[230] Ḥ omits على أصلنا
[231] In S: من غيرهم
[232] In S: لعمر
[233] Ḥ omits أي

فيا أيها المدعي إباحة مال المسلم بموالاة وإعانة[234] الحربيين، انظر إلى هذا التصريح من حفاظ المذهب نقلاً عن دواوين الأقدمين بدوام عصمة مال هذا الخارجي[235] المحارب للمسلمين مع أوليائه الحربيين، مع ظهور القول بتكفيره بمجرد خارجيته فقهاً مسلماً. كيف ندعي بعد هذا إباحة مال مسلم بموالاة الكفار، أو نطلب بعد موالياً للحربيين ابعد من أهل الإسلام من الخارجي؟ أم تنتظر موالاة لأهل الكفر[236] أعظم ضرراً على أهل الإسلام[237] من طعن القنا وضرب المشرفي، بل أعظم منها عند الله[238] في مقتها وأوضح في الدلالة على المقصود من أختها. ما ثبت عن مالك وابن القاسم وغيرهما في *المدونة* وغيرها من دوم عصمة[239] مال من ارتد وهرب لدار الحرب وحارب المسلمين – عياذ بالله تعالى[240] – ولو مكث على ذلك طول عمره،[241] قياماً مع عصمته السابقة[242] على ردته، قبل موجب رفعها من[243] إبايته التوبة بعد نيل أحكامنا له، وتقدمنا له بالاستتابة،[244] لا يرفعها عندهم غير ذلك، وسواء كان المال باقياً بأيدينا بدار الإسلام، كمالهم عند قوله: "ووقفت أم ولده كمناه إن فر لدار الحرب أو كان تحت أيد المرتدين" كما في قوله: "وإن ارتدت جماعة فحاربوا فكالمرتدين."

فيا أيها المستبيح لمال المسلم بموالاته للكفار،[245] هذه الردة هنا حمار أو حجر ملغى إليهم،[246] أي، فنحن، إذا لم نستبيح[247] مال المرتد[248] بمجرد ردته، على المقابل [9و] الضعيف في كل مرتد، فما لنا لا نستبيح هذا المرتد ونصيروه حربياً أو موالياً لأهل الحرب، وقد جعلنا موالاة الحربيين علة لإباحة مال الموالي، ودليلاً عليه؟[249] هل دلالة بلا مدلول؟ أوعلة قامت بلا معلول؟[250] هذا لعمري مهيع عليل، تحجه السليمة العقول. أم ننتظر[251] بعد

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[234] S omits وإعانة
[235] This is an emendation from: الخاجي
[236] In S: للكفار
[237] S omits على أهل الإسلام
[238] Ḥ omits عند الله
[239] In S: عدم إستباحة
[240] In S: وفر لدار الحرب – عياذاً بالله تعالى – وحارب المسلمين
[241] In S: عمره حتى يموت أو يأت بالتعمير إن خيفت حياته
[242] In S: عصمة ماله السابقة
[243] In S: ردتة، لا يرفعها عندهم غير
[244] In S: وقتله على ذلك. S omits the remainder of the paragraph.
[245] In S: فيا أيها المدعي استباحة مال المسلم بموالاة الكفار والحربيين
[246] In S: في أليم
[247] In Ḥ: تسبتيح
[248] In S: هرا المرتد
[249] In Ḥ: فما لنا لا نستبيح مال بهذه الموالاة التي ما بعدها من موالاة. وقد جعلناها علة لإباحته ودليلاً عليه أم لا؟
[250] In Ḥ: أعلة بلا معلول؟
[251] In S: تترقب

موالاة أعظم من موافقتهم في الاعتقاد ومشاركتهم في الإلحاد ومظاهرتهم على حرب حزب الله[252] والسعي في إطفاء نور الله[253] فضلاً عن مساكنتهم في الديار – أعوذ بالله ثم أعوذ ثم أعوذ ثم أعوذ ثم أعوذ – من خالد جميعاً.[254]

ومن لم يكتف بهذه النصوص [172ظ] المذهبية التفصيلية الثابتة عن الأئمة المجتهدين ويتواري بغمد العمومات الاجماعية الأصلية المخصصة المبينة، كقوله تعالى: {ومن يتولهم منكم}،[255] فتعداد الجزئيات[256] في حقه محصل[257] عناء وشغب وتعب في غير متعب.[258]

هذا، وقد قسم العلماء موالاة الكفار إلى كفر ومعصية وجائز ومستحب. ومن تغلغل في أسباب النزول وماجريات الصحابة كاد ذلك أن يكون له علماً بديهياً وذلك أن الموالي إما أن يرتضي دين الكفار، فذلك كفر وعليه يتنزل قوله تعالى: {ومن يتولهم منكم فإنه منهم}[259] فأنها نزلت في قصة عبد الله بن أُبي ونفاقه، مع إشارة الآيات المذكورة هنا لكفره لوصفها له بمرض القلب والارتداد نحو قوله: {فترى الذين في قلوبهم مرض}[260] وقوله: {من يرتدد منكم عن دينه}[261] كاف في إيضاح ذلك. وإما أن يكون الموالي غير مرتض لدين الكفار، ولكن على سبيل الموّدة، والموالي غير مضطر، فموالاته حينئذ محرمة كقصة حاطب وأبي لبابة والأنصاريين المباطنين اليهود إلى غير ذلك.

وأما أن تكون الموالاة لهم على جهة صلة الرحم ولا وهن على الإسلام فيها، كقصة قتيبة وبعث عمر بالحلة إلى أخيه المشرك بمكة بأمر النبي – صلى الله عليه وسلم – و فعل النبي وقوله في أيما موضع فهي حينئذ مستحبة.

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[252] Ḥ omits ومظاهرتهم على حرب حزب الله
[253] Ḥ adds ومحاربة حزب الله
[254] In Ḥ: مساكنتهم من أسلم في ديار المتنازع في كونها على الاختيار والاضطرار
[255] Qur'ān 5:51 and 9:23
[256] In S, this paragraph begins: ومن لم يحتذ بهذا، فتعداد الجزئيات
[257] In S: محض
[258] This is where the two manuscript copies begin to diverge as to the order of the text. At this point, S skips to the paragraph beginning وبعد هذا أيها المؤمنون أتطوع لنا أنفسنا on page 462. The following three paragraphs appear only in Ḥ.
[259] Qur'ān 5:51
[260] Qur'ān 5:52
[261] Qur'ān 2:217

وأما أن تكون على سبيل الاضطرار ولم تكن على اضطرار مسلم وكانت بالكفر وسبه – صلى الله عليه وسلم – في الظاهر فباللسان فجائزة.

ونزلوا الآيات القرآنية على هذا التقسيم. فنزلو على المستحبة قوله تعالى: {لا ينهاكم الله عن الذين لم يقاتلونكم في الدين، ولم يخرجوكم من دياركم، أن تبروهم وتقسطوا إليهم إن الله يحب المقسطين}،[262] والأحاديث الواردة في ذلك. وعلى الجائز قوله: {إلا أن تتقوا منهم تقاة ويحذركم الله نفسه وإلى الله المصير}،[263] وغير هذا من الأحاديث الواردة أيضاً. وعلى الكفرية قوله: {ومن يتولهم منكم فإنه منهم إن الله لا يهدي القوم الظالمين}[264] كما قدمنا. ولكن بقى إجمال تحت تلك المنية فأتهم إنما مثلوهم في بعض الأحكام، الذي هو الحكم بالكفر وما يوجبه من الخلود في النار – عياذاً بالله تعالى – أو حرمة المناكحة أو منع الإرث أو غير ذلك [173و] لا في جواز أقرارهم على الكفر ولا استباحة أموالهم قبل الاستباحة والاباحة منها كما قدمنا. ونزلوا على موالاة المحرمة غير ذلك من الآيات والأحاديث. أنظر كتب التفاسير في أيما محل كابن جزي واللباب وغير ذلك. ولولا[265] الإطالة لجلبنا نصوصهم بجواهر حروفها.

ولنصرف عنان القول إلى ما كنا بصدده، فنقول[266] إن من أحاط علماً بما تقدم علم أن قول القائسين إن هذا القياس في "غاية الحسن والزين" مقابل عند المعترض بأنه في غاية الفساد والرين. بل إن تعجب فعجب قولهم "إلحاق المسكوت عنه بمنطوق به مساو له في المعنى من كل وجه." بل، لو قيل مخالف له في المعنى من كل وجه لكان أليق، لأنك كلما حاولت حصرهما بضابط تشتتا * أو جمعهما برابط تفلتا * لأن محل حكم الأصل مال لم تتقرر فيه عصمة ولا ملك لصاحبه. ومحل حكم الفرع مال تقررت عصمته وملكه قطعاً.[267] وحكم الأصل قبل الرفع الإباحة، وحكم الفرع قبله العصمة. وسبب حكم الأصل الكفر، وسبب حكم الفرع الإسلام.[268] والمترقب في الأصل

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[262] Qur'ān 60:8
[263] Qur'ān 3:28
[264] Qur'ān 5:51
[265] This is emended from: ولو
[266] At this point the text unique to Ḥ ends, but the following two paragraphs appear later in S than they do in Ḥ. In S, this section begins at folio 10a, line 9 and ends at folio 10b, line 2. The introductory phrase is إلا من أحاط rather than إن من أحاط.
[267] In S: ومحل حكم الفرع تقررت عصمتة قطعاً
[268] In S: وعلة حكم الأصل الكفر، وحكم الفرع الإسلام

بعد ذلك العصمة والمترقب في الفرع الإباحة.[269] أي،[270] فإن نحن استصحبنا حكم الأصل، دامت الإباحة، وإن إستصحبنا حكم الفرع، دامت عصمته. والخطاب في وجود سبب عصمة الأصل المترقبة[271] وضعي من حيث أنه سواء ترك الحوز اختياراً أو اضطراراً لا ينعصم بدونه والخطاب في وجود سبب الأباحة المترقبة في الفرع تكليفي صرف، أي فلا استباحة لمال عاجز عن الهجرة أصلاً.

فالمسألتان ضرتان كلما ملت إلى هذه نفرت هذه. فلا تلتقيان في واد ولا تجتمعان في ناد، بل لا أجد لهما مثلا إلا أم عمرو وعميدها حيث يقول:[272] "أليس الليل[273] يجمع أم عمرو وايانا فذلك لنا تداني * نعم وترى[274] الهلال كما أراه ويعلوها النهار كما علاني."

على أنا،[275] أيها المنكح الثريا سهيلاً، المبتاع بنهار[276] التحقق في المسألة ليلاً، لو سلمنا صحة هذا القياس تسليماً جدلياً رفضاً للمنصوص، ومكابرة للمحسوس، وتحريفاً للكلم عن مواضعه، ونقضاً للمذهب[277] المتبوع على هوى[278] تابعه، واستقبلنا من الأمر ما استدبرنا لاستصغرنا ما استكبرنا، وذلك لانا لم نطلق عنان القول بمطلق الإقامة، وراعينا خصوص هذه [173ظ][279] الإقامة كما هو اللازم رعيا، لما تلون به الزمان من الفتن السحم والحوادث الدهم.[280] وما عليه أهل تلك البلاد من شدة اختلاف الكلمة[281] والشتات وتجاذب الآراء وسوء الطويات

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[269] S omits ذكل and the second المترقب.

[270] Ḥ omits أي

[271] In S: والخطاب في وجود سبب العصمة المترقبة في الأصل

[272] In S:
فيا لهما من ضرتان، كلما ملت إلى أحداهما نفرت أخراهما، فلا لهما تلقيان في واد ولا تجتمعان في ناد. فما هما أي المنكح الثريا سهيلاً المبتاع [10ظ] بنهار التحقيق في المسألة ليلاً، إلا كما قال عميد أم عمرو "أليس . . .علاني."
This is the end of one continuous section in S. In S, what follows this section is the material on pp. 464-65 here.

[273] This is emended; both manuscripts read اليل

[274] In Ḥ: تر

[275] The section in S which corresponds with the next three paragraphs begins at folio 9a, line 16, and extends to folio 10a, line 8. It begins: على أنا، لو سلمنا . . .

[276] In Ḥ: بتهار

[277] In S: لمذهب

[278] This is emended; both texts read مهوى

[279] A second هذا repeated at the beginning of this folio, with a mark above it, has been omitted.

[280] In S:
. . . على هوى تابعه، ولم نطلق عنان القول بمطلق الإقامة، كما هو اللازم، ورعينا خصوص هذه الإقامة المسؤل عنها لخظاً، لما تلون به الزمان من الفتن السحم والحوادث الدهم.

[281] In S: من شدة اللجاج والفساد واختلاف

وحلول الوجل وانقطاع السبل ونهب النياق وضرب الأعناق. ولما[282] ألزمنا أكثر المقيمين بلزوم الهجرة[283] [9ظ] اللازم على تركها[284] استباحة ماله، على زعمنا جرياً على ما أصلوه بل على ما فصلوه،[285] حسبما ذكر أبو العباس الونشريسي في *معياره* عن ابن أبي زيد في *نوادره* من أن كل تحريم بين العبد وربه خاف العبد بعدم ارتكابه ظلماً على نفسه أو أهله وماله فله ارتكابه. ونص المراد منه: قال أبو بكر محمد بن عبد الله الابهري: "وكل تحريم فيما بين العبد والله سبحانه، إذا أجبر عليه الإنسان، فلا شيء عليه. وله أن يفعله[286] من خاف على نفسه من قتل أو ضرب أو ظلم يخاف على نفسه أو أهله[287] وماله واشباه ذلك (هـ)." منه بلفظه.

بل، صرح به البرزلي في خصوص الفرع هذا، كما في نوازل الجهاد وغيرها من *المعيار* أيضاً.[288] ونص المراد من:[289] "وسؤل ابن عرفة عن السلطان، إذا ظفر بقرية من بوادي افريقية وجلهم مستغرقون الذمة. فأجاب بإباحة أموالهم عملاً بالأغلب حتى يتحقق أهل الحلال منهم. وذلك لأنهم عصاة بمكاثرة الحربيين وتكثير سوادهم." قال البرزلي: "فلم يجعل لهم حرمة من بان[290] بنفسه ولم يخالطهم، وهذا إذا وجد مندوحة عنهم. وإن لم يجد، فهو كالمكره في بلاد الحرب إذا لم يستطع الخروج وخاف على نفسه أو ماله وأهله وولده (هـ)." المراد[291] منه بلفظه. ولا أظن مخالفاً ولا موالفاً ممن له علم بحال أهل تلك البلاد[292] اليوم ينكر عموم الخوف البالغ النهاية على النفس والمال والأهل[293] إلا من طبع الله على قلبه بالتعصب.[294] بل، أكثر المقيمين هنالك ينشد لسان حاله اليوم: "كيف الوصول إلى سعاد[295] ودونها * قنى الجبال ودونها حتوف * الرجل حافية وما لي مركب * والكف صفر والطريق مخوف؟"

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[282] In S: لما
[283] In Ḥ: ولما الزمنا أكثر المنا اليوم بجوب الهجرة
[284] In S: تركه
[285] In Ḥ:
ما فعلوه، من أن كل تحريم بين العبد وبين الله تعالى خاف العبد بعدم ارتكابه ظلماً على نفسه أو ماله وأهله جاز له ارتكابه كما نص على ذلك في *النوادر* عن الابهري كما في جهاد *المعيار*. ونص المراد منه. . .
[286] In Ḥ: يفعه
[287] Ḥ omits أو هلمه
[288] In Ḥ: كما في المعيار أيضا من نوازل الجهاد وغيرها
[289] Ḥ omits ونص المراد من
[290] In Ḥ: يأمن
[291] S omits المراد
[292] Ḥ omits ممن له علم بحال أهل تلك البلاد
[293] S omits على النفس والمال والأهل
[294] In Ḥ: بالتعصب، مع العلم بما عليه أهل هذه البلاد من خبث مساعيها واستحكا عقاربها بأفاعيها.
[295] In Ḥ: بل، أكثر المقيمين اليوم يسند لسان حاله كيف إلى السعاد

وأما ما عسى يزعمه منهمكون في أمهات الفجور من تتكون ببنات الزور ذوو[296] تمرد وضلالة لا يتبينون أن يصيبوا قوماً بجهالة لا يبالون بفساد آخرة ولا دنيا، يقولون لمن ألقى[297] إليهم السلم لست مؤمناً يبتغون[298] عرض [174و] الحياة الدنيا من أن المقيمين راضون بالمقام تحت إيالة النصارى فزعم فاسد.[299]

وشهادة قرائن الأحوال للمقيمين بالاضطرار أصدق شاهد. وما ذلك إلا لما علم من سرعة مقاطعة من كان تحت إيالة النصارى للنصارى على مجرد رؤية خرقة على عود يتجاذ بها متصوف صحبته مريد وشيخ شاسع الدار شريد، فجلوا على ذلك عقودهم ونبذوا عهودهم وقطعوا حبالهم ووصلوا أقتالهم. ولما لم يتم لهم أمر، أسرع إخفاؤهم إلى الفرار هرباً، واظهر من لم يستطع حراكاً عن القوم طرباً. فبينما القوم على ذلك إذا رفت الآزفة التي ليس بها من دون الله كاشفة ووقع القوم في سلى جمل ورمت بهم عقيمات الأقدار في مخلولون لك، فصار هذا يقتل هذا، وهذا يأخذ مال هذا، ولا يدري هذا فيماذا ولا هذا لماذا.

ولما حصل المهاجرون في دار هجرتهم ووصلوا أولياءهم وأهل نصرتهم ومج المكان ريقه في شدقه وضن عن القوم بميسور رزقه حتى اشترى العقد بالفريد بالمد، وحتى يبعث العتاق بالبعير والجلد وشارك الصديق في عداوتهم المعادى. وصار المهاجر إليهم معهم كالصخرة في فم الوادي لا هي نفعت الزرع فيما حر ما يذويه، ولا هي تنحت فتركت الوادي يسقيه، وصار القوم يطلبون من يزيح ضرهم أو يرفع حرجهم وجعلوا يندبون أوسهم وخزرجهم فنظروا والله إليهم بأعين محمرة واقبلوا عليهم بوجوه مكفهرة. وعند ذلك، أيقن القوم بحلول الذمة والدمار، وأنهم استجاروا من الرمضاء بالنار وصاروا – والعياذ بالله تعالى – يرجعون القهقر على رغم النفس لأماريد النصارى وقد قتلوا بطارقتهم بالأمس. ومع ذلك فقد انتدب ولاة الأمر من كل أناس يطبون النحدة من السلطان نصره الله بفاس فشددوا حيازم الشياظم وشمروا عن سواعد الجد والعزائم وأذابوا في هبوات [174ظ] الغيظ سير كل قلوص لصوصي يقاسون أيما مخربة وأيما لصوص.

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[296] In Ḥ: وأما ما عسى يزعمه منغمسون في أمهات متمشدقون ببنات الزور ذو

[297] In S: الغى

[298] In Ḥ: تبتعون

[299] From this point, S continues with al-Māzarī's *fatwā* (below); the next two paragraphs are unique to Ḥ.

فيا لها من همة بإعلاء الإسلام ما أعلاها وبعدم موالاة أهل الكفر ما أولاها،[300] على من تثبت عدالته وشك في وجه إقامته، هل على الاختيار أو الاضطرار، فلا يسوغ التوقف في شأنه، ما لم يرتفع ظاهر عدالته،[301] فإن ارتفعت فحينئذ يتوقف وتسلط القرائن، فلأي وجه صرفته صرفناه،[302] كما حفقه[303] أبو عبد الله المازري في جواب في أحكام وشهادة حكام أهل الدجن في النازلة الصقلية.[304] ونص المراد منه، حسب ما ذكره في *المعيار*:

> فأجاب: "القادح في هذا وجهان. الأول يشتمل على القاضي وبيناته[305] من ناحية العدالة، فلا يباح المقام في دار الحرب[306] في قياد أهل الكفر. والثاني من ناحية الولاية، إذ القاضي مولى من قبل أهل الكفر. والأول له قاعدة يعتمد[307] عليها في هذه المسألة وشبهها، وهي تحسين الظن بالمسلمين ومباعدة المعاصي عنهم، فلا يعدل عنها[308] لظنون كاذبة وتوهمات واهية،[309] كتجويز[310] من ظاهره العدالة. وقد يجوز في الخفاء، وفي نفس الأمر أن يكون ارتكب كبيرة إلا من قام الدليل على عصمته. وهذا التجويز مطرح."

وبعد هذا، أيها المؤمنون،[311] أتطوع لنا أنفسنا أن نعمد هذا التحريم القطعي بالكتاب[312] والسنة والإجماع الذي[313] عظم الشارع أمره في أعظم الأيام وأشرف البقاع، وقام به خطيباً في حجة وداعه، وقرع به إسماع أتباعه، حرصاً على إتباعه. وضربوا[314] به عرض الحائط على مجرد هذا الإجراء المجتث الأساس، المقطوع الذنب عن الرأس،[315] الذي لم يفرغ[316] من إجرائه رأس من أجراه، حتى يتبرأ[317] منه خشية أن يتبعه عليه من رواه[318] فنستبيح

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[300] This is the end of the section unique to Ḥ. In S, this section begins:
وشهادة الحال لأكثر المقيمين بالاضطرار أصدق شاهد على أن من ثبتت [10و] عدالته وشك في وجه إقامته، هل على الاضطرار أو الاختيار . . .

[301] In Ḥ: فلا يسوغ التوقف في حال ما لم ترفع ظاهر عدالته،

[302] S omits فإن ارتفعت فحينئذ يتوقف وتسلط القرائن، فلأي وجه صرفته صرفناه،

[303] In Ḥ: جفظه

[304] In S: في جوابه في النازلة الصقلية، أي في شهادة وأحكام شهودها وقضاتها

[305] In Ḥ: بيانات

[306] S omits في دار الحرب

[307] In Ḥ: يعتد

[308] Ḥ omits عنها

[309] S omits the remainder of the passage and simply records أخره فانظرهإلى

[310] In Ḥ: بتجويز

[311] This next paragraph is located in S on folio 9a, lines 8-16, and is introduced as follows:
وبعد ما رأيت أخا الانصاف، أتطوع لنا . . .

[312] In S: وبعد ما رأت أخا الإنصاف أتطوع لنا أنفسنا بعد إلى أن تعمد إلى هذا التحريم الكلي القطعي بالكتاب

[313] This is an emendation from: الذ

[314] This is emended from نرموا in S and قرصوا in Ḥ.

[315] S omits المجتث الأساس المقطوع الذنب عن الرأس

[316] In Ḥ: يفرق

[317] In Ḥ: يترأ. In S: تبرأ

[318] In S, this may be وراه

به محظور[319] رقاب المسلمين وأموالهم على السواء ونرفع به شرعاً ثابتاً ووحياً من السماء ويطار بويلتها عنا كل المطار على توالي السنين في سائر الأقطار. فما كان إذا أسلس قيادنا[320] للوهم وما كان أقل تثبيتنا للفهم.[321]

هذا،[322] وفي علمنا ما ورد عن الشارع والسلف من شدة التنفير من العمل بالقياس والتحذير. وإن كان محمولاً على فاسده عند أكثر العلماء فالشيء يرجع إلى أصله بأدنى سبب، سيما وفي علمنا ما عمت به البلوى من الاغترار [175و] بكل ناعق وتوهم الغيث في كل بارق وفساد الدين من أصله. فتولى الأمر غير أهله.

هذا، وفي نوازل البدع المحدثات من *المعيار* ما نص المراد منه:

> ومنها المناكر العظيمة القاصمة للظهور، المورثة للقبور، المنجرة بتعاطي الجهال العلم وانتصابهم للفتوى والالقاء والطلب، فهذا أمر فاش قد كثرت البلوى به وعمت المصيبة به وهلكت بسببه الأديان والأبدان. وذلك لما ضاع العلم وقل القائم به والمناضل عنه وذهب أهل التمييز والتحقيق، فانهمك الناس وتعاطي العلم جهالهم وأفضوا إلى ما حذر منه – صلى الله عليه وسلم – "في نزع الحق حتى إذا لم يبق عالماً، اتخذ الناس رؤوساء جهالاً ، فسئلوا فأفتوا بغير علم، فضلوا وأضلوا."[323] أعاذنا الله أن أكون منهم ووقانا التباعات.
>
> قال الشيخ أبو عبد الله ابن المناصف – رحمه الله تعالى – "وقد إنتهى الحال اليوم إلى أن ينظر أحد العوام في أوراق من الفقه أو الكلام، ويقدم على الخوض فيما يهلكه والمستمع منه. أو يقف على مسائل من الخلاف فيختار منها ما يوافقه من شتات المذاهب. ويفيده سوء نظره الكاذب، ثم يتصدر للقول ويطلب الفتوى، فيقول فيما ليس له به علم، هذا حلال وهذا حرام. يفترى على الله الكذب." إلى أن "و[أخبرني] عن آخرين يفتون في عظيم النوازل على حسب أغراضهم بما قد سمعوه فلم يفهموه، أو قاسوه فحرفوه من رخصة قائل أو علة ناظر في مذهب من المذاهب الشاذة الأقوال الفاذة. وربما مر بنظره الفاسد أشباه هذه الأقوال إلى استنباط أشياء لا رأس لها ولا ذنب يخرق في بعضها الإجماع (هـ)."[324]

والنقل عنهم في هذا المعنى كثير جداً،[325] وإياي إياي إياي أن يستروح مستروح[326] أو يظن ظان من ما أوردت في هذه المسألة[327] جنوحاً أو ميلاً إلى بعض الأقوال[328] بالترخيص أو المسامحة في ترك الهجرة من بلاد

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[319] S omits محظور

[320] In Ḥ: قياد قيادنا

[321] In Ḥ: للوهم. S continues with على أنا، لو سلمنا تسليماً جدلياً, and leads into the paragraph located earlier in Ḥ.

[322] This paragraph and the passage from the *Miʿyār* are only in Ḥ.

[323] *Ṣaḥīḥ al-Bukhārī*, *Kitāb al-ʿIlm*, 100; *Ṣaḥīḥ al-Bukhārī*, *Kitāb al-ʿIlm*, 2673.

[324] Al-Wansharīsī, *al-Miʿyār*, 2:502-503. This is taken from one segment (2:502-505) of a long *fatwā* on commendable and reprehensible innovations (2:461-511) authored by al-Wansharīsī himself. Numerous mistakes in the manuscripts have been emended on the basis of the *Miʿyār*, without notation.

[325] Following these first words, the rest of this paragraph is located in S on folio 10b, with the following introduction:

ولعمري لقد حان الرواح والمنقلب إلى الله الملك الحق وآن للذين آمنوا أن تخشع قلوبهم لذكر الله وما برك من الحق، وأياي . . .

[326] In Ḥ: أيستروح ما أسترح

[327] In S: من كلامي هذا

[328] In S: القول

الفجرة لمن قدر عليها يوماً ما بوجهاً ما، فهيهات هيهات[329] أن ترك نفس مؤمن سليم الفطرة إلى المقام تحت إيالة من ينكر قرآنية القرآن ونبوءته – صلى الله عليه وسلم – ويزعم أن الله ثالث ثلاثة، بل أن الله هو المسيح بن مريم بعد علمه بتغليظ [175ظ] تحريمها وشدة الوعيد الوارد فيها مع ما ينشأ عنها من المفاسد الدينية والدنيوية. بل لا أظن معصية بعد الكفر بالله تعالى أو قتل[330] النفس تربو عليها – واستغفر ولله ربي لذنبي من[331] ظعنان لساني وجموح قلبي وما أدخلت[332] نفسي فيه مما لا مدخل لي فيه. والتمس من كل من خاف مقام ربه ونهى النفس عن الهوى من علماء المسلمين المرجوع إليهم في الحكم والفتوى أن يبادر إلى إصلاح ما رأى من فساده أو يفصح إن رءاه حقاً بما ظهر له من سداده.[333] ويرحم[334] الله من إذا اعرض، اعرض عن حلم، وإذا اعترض، اعترض بعلم ، ولم يكن ممن يجادل في الله بغير علم.[335] فيجلب بيد[336] التنقيح والتدقيق محض ألباب التحقيق[337] خالصة[338] من دم الأشكال وفرث الاحتمال، فأني على وجل من أني في كل[339] ما حاولت تحقيقه مخطأ ومائن، ولكن نفد الكتاب وجرى القلم بما هو كائن، وكتب من أوجب له[340] قصر باعه وقلة إطلاعه وعدم الإصغاء للحق والقبول بمعية[341] نفسه ودفنها في أرض الخمول لما عسى يخفى ذلك من عجره ويستر من مكنون بجره،[342] مستعيذاً بديان السموات والأرض من جاهل متعصب يتحامل، وعالم يعرف الحق ويتجاهل. وأحمد الله سبحانة[343] تعالى حمد الشاكرين وأصلي، وأسلم على سيدنا[344] محمد سيد الأولين والآخرين، وعلى[345] آله المصطفين الطاهرين، وأصحابه البررة القائمين بكلمة الحق والراعين إليها،[346] والتابعين لهم بإحسان إلى أن يرث الله الأرض ومن عليها.[347]

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[329] In Ḥ: هيهات هيهات
[330] In S: وقتل
[331] Ḥ omits من
[332] In Ḥ: دخلت
[333] In Ḥ: فسادة
[334] In Ḥ: رحم
[335] Ḥ omits ولم يكن ممن يجادل في الله بغير علم
[336] This is an emendation from: يايد
[337] In S: فيجلب محض ألباب التحقيق بيد التنقيح والتدقيق
[338] In Ḥ: الخالصة
[339] In Ḥ: لا آمن أني في كل
[340] Ḥ omits له
[341] In S: تعمية
[342] S omits لما عسى يخفى ذلك من عجره ويستر من مكنون بجره
[343] Ḥ omits سبحانة
[344] In Ḥ: سيد المرسلين
[345] S omits على
[346] In Ḥ: ورضي الله تعالى عن ساداتنا أصحابه البررة
[347] End of S; everything below here appears only in Ḥ.

انتهى ما ألفه محمد عبد الله بن زيدان البساتي على يد محمد سيديّ بن أحمد ابن بابَ لأخيه في الله وحبيبه محمد المصطفى، رحم الله من دعا لنا بخير وصلى الله على من لا نبي بعده ولا نبي قبله.

[176و]

* قال محمد عبد الله بن زيدان لفرسان هذا الميدان *

سقى الرباب يبابا حله خيم حتى إذا لاح من آرامها أرم

طلبقت دمعزت جعفلت الكرام عسى يرى[348] ما ندمن أحكامنا حكم

قاسي قواسي عويصات القياس متى طاشت سهام حلوم القوم (ينعصم)[349]

مسبار غور خبايا الوهم إذ خبأت ثواقب الفهم من صرادها صرم

لعل يكسرها من معدني حكم أكسر فهم وإفهام الهوى ظلم

إصغاء ليت وانصافا متئدا وحسن سمت وإلزاماً بما التزم

ويقذ والله من كفيه دامغة من مجفئظ يمامي الوهم تنتقم

أيام الفصل ويوم الله أيومها وعند هذا وعند الله تختصم

ويركس الله اظلم واظلمهم ولا عليّ إذا لم يستقم قزم

لا والذي نزل الفرقان ما خذلت منا يد الله مخذولا فيحترم

أولي النهايات أرباب الدرايات طراد الخطأ وهداة الخلق حيث عم

مخدرات بنات الفهم تند به وأثار شيبة شيخي طل منه دم

بزت بزات غزات الوهم عزته ولآت حين مناص فالحمات حم

يأيها الحكماء الحاكمون بما كانوا أنبياء الله قد حكم

أيذهب الحق أدراج الرياح سدى ولا نصير بحبل الله يعتصم

خلق الفضول فجند الهم حاقتني تقالت من دياجي ليله أمم

على براكاء ضوضاة اللقى فعسى ليل الوغى بصباح الفتح ينهزم

فيستقين نفوس عزما جمحت ويستريح أناس طال ما ظلم

يا ريحى النهى (وصلا)[350] لما قطعت أيدي العوادي ولم تثبت به قدم

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[348] This is an emendation from: ير

[349] The word in paranthesis is written in the left-hand margin.

جرى هوا هي قياس طالما خرست بها الطروس ولم ينطق بها قلم

عمى الخليقة من قلب الحقيقة في عين الشريعة ملزوم وملتزم

[176ظ] يا حوذي حذامي القول فيصله حامي الحقيقة مهما سيمة الحرم

قيس بلا جامع عن علة زعمت من غير ما مسلك من قاسه عدم

لأن علة حكم الأصل قاصرة فالفرع من أصله اذ ذاك ينصرم

اذ استباحة حكم الأصل علتها الكفر القديم وذا في الفرع منعدم

هذا وما زعموا في أصل قيسهم من رفع عصمته لا ينبغي لهم

إذ لا يرى قبل حوز الأصل عصمته فيما روى العتقي الفضيل الحكم

ورفع عصمته من قبل عصمته من المحال الذي لا يدعي قدم

وحيث أعجزهم وجد أن رافعها جراء فقد أنها فيه فقد علم

إلا استباحة في الفرع المقيس به بدون رافعها من بعد ما عصم

والكفر وهو مبيح الأصل أعوزهم وجوده في المقيس الفرع ذا فهم

اذ ذاك ما جمعوا في القيس بينهما بجامع هناك الركن ينهدم

فالقول من مالك في أصل قيسهم استصحاب ما قبل أسلام به حكم

والفرع فيه اذا ما استصحبوا عصم أو يرفعوا رفعوا ما لم يرى العلم

في الأصل والأصل متبوع الفروع فرع والعود أحمد والمبدوء مختتم

انتهى ما نظمه البساتي كما نثره على يد من كتب النثر والنظم، محمد سيدي بن أحمد بن باب تيب على الجميع يا ناظرين كتابي تلعبون به ما كل حي حسين الخط نساخ.

[350] The word in parentheses is written in the right-hand margin, with a mark indicating it should be inserted here.

Abbreviations of Biographical Sources

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