[Al-Bukhari remains in Fez taking back his wife after the three (repudiations), interpreting *khulʿ* as an annulment]

The case of the jurist, al-Bukhari, Musa b. Yamwimin al-Masmudi al-Haskuri, with regard to which there was a disagreement between the two virtuous Shaykhs, Sidi Abu al- Hasan al-Sughayyir and Sidi Ibrahim al-Mu'afiri al-Sarifi—may the Exalted God have mercy on them, be content with them, and grant them satisfaction.

Sidi Abu al- Hasan ‘Ali b. Muhammad b. ‘Abd al- Haqq Zarwili [al-Sughayyir]—may the Exalted God have mercy on him—said:

"Praise be to God, Master of the Worlds—may God fortify you with obedience to Him and may He assist you in adhering to it by means of His assistance. I examined the dower contract (*rasm al-sadaq*) in which a marriage was concluded between Musa b. Yamwimin al-Haskuri, who is known as al-Bukhari, and ‘A’isha, the daughter of ‘Umar b. ‘Abd al-Salam al-Yafrini, which is dated the third of Rabi’ the First of the year seven hundred and twelve [9 July 1312]. I have also noted three repudiations (*tatliqat*) between its lines: the first one is *khulʿ-iyya*,4 dated the eleventh of the glorious Ramadan of the aforementioned year [viz., 712, i.e., 10 January 1313]; the second is *mumallika*,5 dated the tenth of Rabi’ the First of the year [seven hundred and]

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1One of the leading scholars of Fez, who committed to memory Sibawayhi’s *Kitab* and al-Bukhari’s *Sahih*. Ahmad Ibn al-Qadi, *Durrat al- Hijal*. The index to the Miʿyar contains a reference to a Abu ‘Abdallah b. Shu‘ayb al-Haskuri, a fatwa by whom can be found at 9:310, 318.


4*A khulʿ* divorce is one in which the wife agrees to compensate her husband for the securing of her release. See Schacht, Introduction, p. 164; Toledano, *Judicial Practice*, index, s.v. *khulʿ*.

5*A tamlik*-divorce is one in which a husband confers upon his wife the right to repudiate herself in the event of his committing a specific act, such as marrying another woman or taking a concubine. See Toledano,
thirteen [5 July 1313]; and the third is *khulʿiyya*, dated the thirteenth of Safar of the year [seven hundred and] fourteen [29 June 1314]. In the document [containing the repudiations] I found— at the end of the third [repudiation, the statement,] "She henceforth is not permissible to him until she marries a husband other than him."6 I also noted two separate remarriages (*rajʿas*) [inserted] between some of its lines, each one of which contained [the statement,] "He took back ‘Aʿisha after such-and-such a divorce." Likewise, I examined a document in which the aforementioned Musa acknowledged that he had imposed upon his wife, ‘Aʿisha, who is mentioned together with him in [the document,] a single, revocable divorce, ten days prior to (*mutaqaddima min*) the date of the aforementioned document, which is dated the twenty-second of Rabīʿ the Second, also of the [4:494] year [seven hundred and] fourteen [6 July 1314]. Likewise, I was informed that when the aforementioned Musa was asked the reason (*sabab*) for his undertaking to take back his divorced wife, the aforementioned ‘Aʿisha, after having already imposed the three divorce utterances upon her, he replied, "I have adopted in this matter the doctrine (*madhhab*) of those who say that *khulʿ*-divorce constitutes an annulment, that is, the doctrine of Ibn ‘Abbas—may God be pleased with him."7 This is the end of what I have read and of what was reported to me. Therefore, I say—and God is the one who guides to the truth:

[As for] the single divorce (*talqa*) that the aforementioned Musa acknowledged (*iʿtaraʿfa*) having imposed upon his aforementioned wife, ‘Aʿisha, ten days prior to the date of the aforementioned document: [1] If it was his intention that it [would constitute] a fourth [divorce utterance,] because the three divorces were irrevocable (*bawaʿin*), then he imposed it without possessing the marital power to do so.8 It is irrelevant whether he took her back following the third repudiation or remained with her without taking her back. His taking her back (*iʿtijaʿuḥu*) is null and void because, according to this assumption [viz., his considering it a fourth divorce utterance,] no marriage guardian (*wali*) was involved—indeed, after three separate repudiations. [2] Alternatively, if it was his intention that it [viz., the single revocable divorce] constituted the middle [viz., the second divorce utterance,] by virtue of the fact that the third and the first were [merely] annulments, according to his contention, then he is a liar, for two reasons:

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7Text: *faskh*. Early scholars disagreed as to whether a *khulʿ*-divorce results in the dissolution of a marriage by annulment (*faskh*) or by divorce (*talqa*). An annulment does not count as one of the three divorces a couple are allowed before they are irrevocably divorced and cannot remarry unless the wife experiences an intervening marriage. Ibn Hanbal and Ibn Rahwayh were both agreed that *khulʿ* results in dissolution of the marriage by annulment, an opinion attributed to Ibn ‘Abbas, on the basis of the latter’s interpretation of Q. 2:229: Ibn ‘Abbas said, “God mentioned divorce in the beginning, ransoming in the middle, and divorce after that.” Ibn ‘Abbas reportedly held that *khulʿ* is not divorce but rather ransoming. See *Chapters on Marriage and Divorce: Responses of Ibn Hanbal and Ibn Rahwayh*, trans. with Introduction and Notes by Susan A. Spectorsky (Austin: University of Texas Press, 1993), pp. 50-5, 108 (AA57). See also EI1, s.v., “Talaq” (J. Schacht).
First, his describing it [viz., the single revocable divorce] as being revocable (raj’iiyya) when the middle [utterance] is irrevocable (ba’ina). Second, his statement that he had imposed it on her ten days prior to the date of the aforementioned document, when [in fact] considerably more time had passed between [the date of the single revocable divorce] and the date of the middle [divorce]. This is an incoherent and senseless claim. In sum, the [legal] separation of the two of them is obligatory and entails no ambiguity. As for the bodily punishment that he deserves, painful stripes and life-imprisonment--but he should not be stoned.

[1] As for the painful stripes, this is because he openly acknowledges (muqirrun) in the formulation of the second talqa-document and the formulation of the two "returns" (muraja’as) [in the first document] that he had intercourse with her after three separate repudiations, that is, if he acknowledges (i’tarafa) having had intercourse with her after them.

[2] As for his not being stoned, this is a result of the uncertainty (shubha) that he claims, that is, his adopting the doctrine of those who hold that khul’-divorce constitutes an annulment. [In this case,] he resembles someone who acknowledged an [act of] fornication, because of the plain meaning of his preceding acknowledgement, but subsequently revoked [the acknowledgement] on the basis of his claim of uncertainty to which he resorted, because the Divine Law is magnanimous with regard to the hudud-punishments in the matter of fornication: It averts the hadd-punishment from someone who acknowledges [committing an act] of fornication [but] subsequently denies having made the acknowledgment. It also averts [the hadd-punishment] from someone who repudiated his wife three times while on a journey by means of a testimonial declaration (bayyina), [but] subsequently arrived prior to the bayyina, and he [then] acknowledges sexual intercourse [and] denies the repudiation; subsequently [4:495] the bayyina arrives and [the witnesses] attest to his repudiation--the two of them should be [legally] separated but he should not be given the hadd-punishment. All of this is stated in the Mudawwana and other [legal treatises]. This [conclusion] is derived from [the Prophet's] statement--may [God] bless him and grant him peace: "Avert the hudud-punishments in cases of uncertainty" (idra’u ‘l-hudud bi’l-shubuhat). This [statement] applies to the case of someone who repudiated [his wife] three times while on a journey, in accordance with the interpretation of al-Mazari11--may God be pleased with him--that he is like someone who acknowledges [committing] fornication but subsequently retracts [his acknowledgement]--for (idh) the learned jurists (Shaykhs)--may God be pleased with them--have [different] interpretations of it.

Therefore, the aforementioned Musa [viz., al-Haskuri] is either like the person who acknowledges and then retracts or like the person who acknowledges and then denies. In either case, that necessitates avert the stoning-penalty from him, because the hudud-punishments are not applied in cases of doubt, and blood is not shed in cases of doubt. But if the stoning-penalty is averted from him on account of this uncertainty, he

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9Text: al-thalitha. Read al-thaniya, as below, 496, l. 12.
10Text: in. See below, below, 496, l. 12, where the text is aw.

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[nevertheless] should be given painful stripes, as explained above, for it does not follow as a necessary result from averting executing him on account of the uncertainty that punishment should be averted, because execution may be averted on account of uncertainty, while punishment remains. This happens frequently, indeed, in countless cases.

[Ibn Rushd issued a fatwa holding for the application of the hadd-punishment of someone who contracted a mut’a-marriage]¹²

[As for the fatwa] that Ibn Rushd issued in his responsa (ajwiba) with regard to the application of the hudud-punishments to someone who concluded a mut’a-marriage, that case¹³ is not similar to this one, because the man in that case, according to what [the mustafti] said, married without a legal guardian (wali) and for one-half of a dirham, and the two of them contracted [the marriage] on the basis of the testimony of persons whose integrity had not been certified by a qadi (ghayr al-’udul). And for this reason, he [viz., Ibn Rushd] issued a fatwa calling for the hadd-punishment. The mut’a marriage that the remainder of those who, exceptionally, declare it to be permissible, is a marriage for a [specified] period of time that is accompanied by all of the stipulations of a [regular] marriage. [That person,] according to the Mudawwana, deserves only the discretionary punishment (‘uquba) for mut’a, according to this interpretation.

[3] As for his life-imprisonment, this is for a different cause (ma’na), namely, that it is widely known about him that he has been corrupting the religion of the masses with his fatwas; as a result, it is obligatory to eliminate this defect by means of his imprisonment for life until he dies--or [until] he demonstrates that he has reformed [himself] and will abstain [from issuing fatwas]. He should be advised in advance that whenever he issues a fatwa or discusses ifta--¹⁴ in prison, he will be severely beaten; in this manner, he will abstain from causing such damage. [Such cases] are found frequently in the law (al-masa’il al-fiqhiyya).

In God [is found] guidance [to the truth]--He has no partner.” End of his statement--may God be pleased with him.

[Ibrahim al-Sarifi refuted the fatwa of Abu al- Hasan al-Sughayyir in the case of al-Bukhari]¹²

The jurist, my virtuous Lord, professor, and mufti Abu Ishaq Ibrahim b. ‘Ali b. Ibrahim al-Sarifi--may the Exalted God have mercy on him and be pleased with him, by His grace and benevolence--said with regard to [this case]:

¹³See Fatawa Ibn Rushd, 3:000-000.
¹⁴Text: iqra’.
Consider (pl.)--may God lead you [to the truth]--that which the response to this case contains from beginning to end, and what he adduced in the way of analogical cases (nazir) and of forthcoming or forth going information\(^{15}\)--or what one of the recognized Imams has said with regard to it. I do not know what induced this mufti--may God guide him [to the truth]--to do what he did, namely, his collecting these legal issues (masa’il) and analogizing those that are different and differentiating among those that are similar; and his overlooking the true locus of the case and the doctrines of his Imam [viz., Malik] and of the majority of his companions and followers--may God be pleased with them--who best know that (ahlu dhalika). [He apparently did this] on account of the desire to expedite the matter of which I was informed, or on account of some anxiety that afflicted him (asw-li-shughl bal ‘arada fi’il-hal). In either case, he sullied [his honor]--God knows best.

[Al-Sughayyir's] statement, "As for the bodily punishment that he deserves, painful stripes and life-imprisonment." This [in fact] is the statement of Ibn Rushd--may God have mercy on him, [with regard to] a person who contracts a mut’a-marriage, if he is a virgin. He said, "He should be beaten severely after the hadd-punishment has been applied, and he should be imprisoned for a long time, because of his distaining religion and deceiving the Muslims." I will return subsequently to the remainder of this subject in its [proper] place--if God wills.

[Al-Sughayyir's] statement regarding the legal cause underlying this judgment, "He openly acknowledges in the formulation of the third\(^{16}\) talqa-document and the formulation of the two 'returns' (al-muraja’atayn) that he had intercourse with her after three separate repudiations, or he acknowledges having had intercourse with her after them"--he treated him like a person who acknowledges a clear instance of fornication, as he explains subsequently. And he may resort to something in which there is no uncertainty (shubha), according to the widespread opinion (al-mashhur) of the school.\(^{17}\) This is plain negligence and a repugnant error, the import of which will be explained subsequently--if God wills.

[Respect for disagreement is the weakest principle of the school]

[Al-Sughayyir's] statement, "He should not be stoned." Consider [his] audacity to go against [authoritative] texts. Indeed, Malik--may God have mercy on him--said in the Mudawwana, in this very case, "He should be stoned." He said, with regard to a man who married five [women]; or [with regard to] a woman repudiated by her husband three times, irrevocably (al-batta), [and remarried her] without an [intervening] husband, intentionally, being aware that this was forbidden: He should be given the hadd-punishment, and the child should not be affiliated to him. This very case was discussed by the learned jurists, and I do not know any of the learned jurists who adopted [the position] adopted by this mufti [viz., Ibn al-Sughayyir]--may God guide [him]--in the case, and took his side (la ‘arid bihi). Also, there will follow subsequently an explanation of what he

\(^{15}\)Text: akhbara. Read khabar.

\(^{16}\)Text: al-thaniya. Read al-thalitha, as above, 494, l. 17.

\(^{17}\)Cp. below, 4, 501, ll. 12-13: fa-la shakk anna hadha yarji’u ila shubha ‘ala al-mashhur kama qala.
cited (mimma jalaba); indeed, with regard to some of it, the sense has been reversed; indeed, the learned jurists--may God be pleased with them--concurred with the apparent meaning of Malik's opinion (zahir qawl Malik) in treating as equivalent three [divorces uttered] simultaneously or on [three] separate occasions (ka'll-musawa hayna al-thalath fi kalima aw muftaraqt). They argued that the apparent meaning [of Malik's opinion] is also that even if a judge (hakim) were to issue a judgment on the matter--I mean, a judgment permitting [three divorces] uttered simultaneously and his execution of it [viz. the judgment]--verily, [the judgment] is nullified and he should be given the hadd-punishment, and should be left at that, for respect for disagreement is the weakest [4:497] of all principles in the school doctrine. If this is the case with disagreement, then what [is the status of] anomalous opinions? However, it is necessary to adopt (al-waqf) the same opinions that [the learned jurists] adopted. And for this reason, 'Abd al- Haqq held, "Its abandonment [viz., the opinion supporting mut'a?] here is on account of its being anomalous, or on account of the consensus of the Companions--may God be pleased with them--to abandon it." This is despite Asbagh's having held, regarding a man who [re]married his wife [who had been divorced] irrevocably (imra'tuhu al-mabtuta before an [intervening] husband, "The hadd-punishment is not applied to him, irrespective of whether he was knowledgeable [of the law] or ignorant, in contradistinction to a man who divorced her three times." The learned jurists interpreted the word "al-mabtuta" here as meaning, "He divorced her using the term "al-batta", not using the term "al-thalath". This manner of interpreting it is the plain meaning of the Mudawwana, following the interpretation of Sahnun in the case of someone who wanted to divorce his wife one time, but his tongue slipped [by using] the term "al-batta": Verily, she is divorced by him three times, and [no consideration is given] to his intention. Sahnun said, "[As for] the man who said "al-batta", the word stands against him as testimonial evidence." And for this reason, Malik--may God be pleased with him--did not consider his intention (lam yunawwih). This is based on the disagreement regarding [the word] "al-batta"--is it divisible into parts or not? The clarification of that is [found] in its [proper] place. And Asbagh's opinion [viz., no hadd in the mabtuta case] is opposed to the case of a man who divorced [his wife] three times. The learned jurists said, "Its meaning [viz., the meaning of al-batta] is [three] different times (muftariqat), since there is no disagreement regarding the fact that she is not permissible to him except after an [intervening] marriage, and there is absolutely (al-batta) no excuse for that, together with knowledge. However, Asbagh held, "He may be excused if ignorant, for considerations of judicial equity (istihsanan). They said, "The ignorant person here is like the foreigner (a'jami)." But the foreigner is not like the perpetrator in our case, because of his claim to exercise independent reasoning (ijtihad) in matters of legal knowledge ('ilm) and to be qualified to issue fatwas (min ahl al-futya)--when in fact he is a liar and a deceiver. However, he issued the judgment (hakama) in the

18The expression zahir qawl Malik is a technical term intended to classify or assess the type of opinion being attributed to Malik. This is an unsolved problem, to the time of our author, because a distinction (not yet analyzed) is being implied: zahir vs. mashhur. I owe this explanation to Wael Hallaq.

19Text: kayfa kana . . . fa-kayfa.

20Text: wa-la yunawwih.
case on the basis of his legal knowledge; and on the basis of that which the perjurer perpetrated, he issued his fatwas. And this regarding a law that is known (?).

[Al-Sughayyir's] statement, "As for his not being stoned, this is a result of the uncertainty (shubha) that he [viz., al-Haskuri] claims, that is, his adopting the doctrine of those who hold that khul'-divorce constitutes an annulment"--this too is a delusion, without a doubt, for this sower of confusion did not fulfill the stipulation of that school [viz., the Maliki school], since the doctrine of Ibn ‘Abbas--may God be pleased with him--and it is also one of the two opinions of al-Shafi‘i--may God have mercy on him--[is:] "there is no doubt that khul' constitutes an annulment"--and this is a more serious matter [viz., with respect to punishment] for the forsaken one (al-makhdhul), because [if] someone claims that [khul'] constitutes an annulment, the wife reverts to being a stranger [sic!] with respect to him, and that becomes like a revocation (al-iqala) in the [law of] sales, and she returns to him bearing the status of one whom he may divorce three times (wa-tarji'u 'indahu 'ala al-talaq kullih). If that is the case, then there is no escape from [the stipulated requirement] of a marital guardian (wali), dower (sadaq), and two upright witnesses, according to juristic consensus. [In our case,] however, the troublemaker did not do any of that, but rather, he sowed the utmost amount of confusion and deception, and he summoned as witnesses against himself [men] who manifested (al-mubrizin) their obligation [to follow] the doctrine of Malik, who did not testify about him except in accordance with that; [whereas] he obligated himself, secretly, to the doctrine of Ibn ‘Abbas--according to that which the troublemaker did. And he cannot perpetrate anything more evil than what he has done, since he cannot find an upright witness (mubriz) or anyone else who will give testimony regarding the marriage contract in this case according to the doctrine of Ibn ‘Abbas. [Thus,] the mut'a-marriage perpetrator has a greater excuse than this sower of confusion because he did what he did while understanding that mut'a-marriage is prohibited.21 And he adduced [4:498] excuses whose explanation will follow at the appropriate time--if God wills. Further, the poor fellow (miskin) [viz., the mut'a-marriage perpetrator] expended on dower [an amount] that a group of jurists regards as [proper] dower, and the external meanings of the reports support him. And he adduced many arguments as an excuse for the witnesses not being upright witnesses ('udul), because he is characterized in the question as possessing knowledge and sound intelligence (ma'rifa), but he did not utilize any of that22 when he failed to fulfill the stipulation of mut'a-marriage, which is well-known among scholars, even if it [viz., mut'a-marriage] is forbidden according to all of them, except for an anomalous view held by one whose disagreement (bi-khilafihi) is not considered in this case. However, the followers of the school doctrine averted the hadd-punishment [viz., stoning?] in that [case] and made obligatory only bodily punishment (al-'uquba). And what is the status [viz. of the mut'a-perpetrator] compared to this forsaken one who did not spend anything in the dower document, did not summon anyone as

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21 See Fatawa Ibn Rushd, 3:1536: "la unkiru tahrim nikah al-mut'a."
22 Allusion to prophetic hadith: It is related, on the authority of Abu Hurayra, may God be pleased with him: The Messenger of God said, "The person who receives the most painful punishment on the Day of Resurrection will be the scholar whose knowledge did not benefit him." See al-Tabarani, al-Saghir; and al-Bayhaqi; al-Mundhiri, al-Targhib wa'l-Tarhib, 1:27 (?).
witnesses, and with whom no marriage guardian contracted [the marriage]? And then this mufti [viz., al-Sughayyir] asserts, "That [case] is not like ours." It is indeed as he says, "That [case] is not --by God!--like ours" (see above). Verily, this is more frightening on his part with regard to God, and less confusing than the arguments that he manifested. Nevertheless, he [viz., the mut'a-perpetrator] contends, "I fled from al-zina in the hope that that might serve as an excuse for me in the eyes of the Exalted God." Further, the poor fellow claimed to have fallen in love with her (al-'uluq biha) and, as a result, he employed deception in what he did thinking that that would benefit him.

In sum: The status of the mut'a-perpetrator is better than that of the perpetrator in this case, even if they coincide regarding the fact that each one of them invoked a school doctrine whose stipulation he did not fulfill. However ('ula anna), the perpetrator in our case intended nothing but mockery and making a game of religion, according to his custom, both privately (literally: secretly) and publicly. And he who is familiar with what he does in private [should] declare with certainty the evil [that he does] in public, even if he manifests goodness [in public]. Further, this question is the clearest testimony against him, for he married this woman four times, and he said on the fourth occasion that he married her according to the doctrine of Ibn 'Abbas. In truth, however, he did not marry her nor did he render her licit (istabahaha) according to the doctrine of either one of the two scholars [viz., Ibn 'Abbas and Malik]. And he is a fornicator, according to consensus, on the basis of what he did, if he acknowledged intercourse, or [if] testimonial evidence--or its equivalent--was brought against him, as will follow, if God wills. For verily he entered the state of marriage, and in that fashion he rendered licit that which he rendered licit from among the sacred things of the Exalted God, and this is a more serious matter for him, in consideration of that which is appropriate subsequently, if God wills. And no mind will judge this [person] favorably in this case and attribute credence to him, on account of the mockery that he manifested in it--except a simpleton who is devoid of the ability to distinguish right from wrong (al-fitra),23 or a dissimulator who is indifferent to religion--may God save us from that!

[**Averting the hudud-punishments in cases of uncertainty**]

[Al-Sughayyir's] statement, "He is like someone who acknowledges [committing] fornication."24 The apparent meaning of his acknowledgement will be discussed below, if [4:499] God wills. Now, consider his statement, "Because the Sacred Law is magnanimous in the matter of hudud-punishments for fornication, for it averts [the hadd-punishment] in cases of doubt".25 How ugly [is this statement] if he does not intend [or: retract] the examples (muthul) that he cited; but perhaps he did intend them, or their like. In a word: Alarm! Because the Sacred Law does not taken into consideration every uncertainty. Indeed, among [uncertainties] are those that it does not take into consideration whatsoever. And fornication is not different from other

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[transgressions, in this regard]. Indeed, [the Prophet] said, "Avert the hudud-punishments in cases of uncertainty (fi'l-shubuhat); thus, he referred to the hudud-punishments and the uncertainties in a general manner. If that is the case, then some uncertainties are strong and others are weak, and to distinguish that is the function of the mujtahid, not of the muqallid. There is no doubt whatsoever that his statement—peace be upon him—"Avert the hudud-punishments in cases of uncertainty," is an indicator [used by] the mujtahid, for he would inform him of his knowledge which is to be followed, lest he swerve from the straight path (wa-illa hawa). Indeed, Malik—may God have mercy on him—did not apply (ya'mal) this indicator [viz., shubha] in this case, nor did any of his companions [apply it], in my estimation. Rather, he said, "He should be stoned," and he did not pay any attention to the anomalies in it, in the case in which the divorce was a single utterance (fi kalima), and a judgment was issued by a judge certifying it; yet disagreement (khilaf) constitutes uncertainty (shubha), without a doubt, especially if a judge issued a judgment in the matter. How much the more so when there are three separate [divorce utterances], with regard to which there is no disagreement among the scholars regarding the fact that it is forbidden [viz., for him to remarry his wife without intervening marriage]. For verily, she is forbidden [to him] by virtue of an explicit text of the Qur'an, indeed, a text that is not susceptible to interpretation. And if it were the case that it was agreed that this sower of confusion fulfilled [the stipulation of] the doctrine of Ibn ‘Abbas in it, verily, Malik—may God have mercy on him—would not excuse him [for that], for he [viz., al-Haskuri] obligated himself to the doctrine of Malik in the presence of the witnesses; and verily a khal‘ divorce is an irrevocable divorce; and he did what he did for his own [sake]. And [only] when he was exposed [did] he say, "In this [matter], I adopted the doctrine of Ibn ‘Abbas." The enemy of God lied, for verily, he previously took refuge in someone other than [Ibn ‘Abbas], as I have been informed by a trustworthy person, to wit, when the qadi—may God guide him—asked him about the cause (mawjub) of his finding himself in the predicament into which he had fallen, he replied to him, "[My] wife disappeared from me for a period of time, and [upon her return] she claimed that she married [another man], and I believed her." But when the witnesses came, and the qadi—may God grant him success—wanted to verify it [viz., the statement] under [the conditions of] formal testimony (taht al-ishhad), the forsaken one retracted the claim in which he [previously] had taken refuge. And perhaps he would have had a place of refuge (mukhlas) had he stood by [his earlier assertion] and said what he said. And this is sowing confusion after his exposure (al-zuhur ‘alayhi). And it necessitates designating him as a liar, without a doubt.

The scholars have disagreed regarding the person who gives false testimony who subsequently repents. The widespread opinion is that he should be disciplined. Now the sin [of a person who gives false testimony] who subsequently repents.28 The scholars have disagreed regarding the person who gives false testimony who subsequently repents.28 The widespread opinion is that he should be disciplined. Now the sin [of a person who gives false testimony] who subsequently repents.28 The widespread opinion is that he should be disciplined. Now the sin [of a person who gives false testimony] who subsequently repents.28 The widespread opinion is that he should be disciplined.


27 Text: hakim. See above.

28 The editor of the printed text explains: In the margin of the lithograph, "Praise be to God. From his words, 'The scholars have disagreed regarding, etc.' to his words on wajh 8, 'and from that which the jurist Abu Ishaq wrote'—i.e., approximately four pages—is found only in one of many [extant] copies. And this
testimony] is smaller and of lesser import than the sin of the perpetrator in the present case. And the closer one is in the eyes of God an enormity (aziman) (sic). [4:500] Thus, he lied when he was exposed (zuhira 'alayhi) and the discrepancy [in his assertions] became manifest. Thus, he who holds that the report [about the person who gives false testimony and subsequently repents] applies to this sower of confusion has strayed entirely [from the mark]. Indeed, Malik--may God have mercy on him--did not take into consideration uncertainty in the case of the fornicator who claimed ignorance, for he [viz., Malik] said, "He is not excused for that." He said this in the case of someone who had intercourse with a Muslim concubine (amat al-Islam), and he [viz., Malik] did not adopt the hadith which the modern [jurists] cite, according to my knowledge, regarding the ignorance of the foreigner (see above). And that which is to be taken into consideration in the case is the [views] of the [founding] Imams.

Thus, where [is there grounds for] taking uncertainty into consideration here? Further, he [viz., Malik] said regarding witnesses who disagree about the value of an object that has been stolen: If two witnesses who are endowed with eyesight agree on a value of three dirhams, [his hand] should be amputated (quti'a). And there is no doubt that the disagreement [here] constitutes an uncertainty (shubha). But he did not take [the uncertainty] into consideration, according to the widespread opinion, although someone other than [Malik] took it into consideration in a source other than the Mudawwana--and perhaps [that person] is closer to goodness. The same holds in the case of a thief who climbs over [the wall] of a house [in a clandestine manner] and takes away some household goods. Then he says, "I stole household goods that belong to me (sariqtu mata'i)." And the owner of the house [subsequently] substantiates his [claim]. Verily, [his hand] should be amputated, because [the owner] did not substantiate him at the moment of his [climbing over] the forbidden wall, despite the possibility of substantiating him [at that time], and no credence is attributed to the owner of the house [after the fact], according to the preponderant judicial assumption (al-ghalib) in this, in its entirety. For verily, the preponderant view regarding everyone who behaves in this manner [viz., breaks into a house secretly] is that he is a thief, and the hadd-punishment is obligatory according to the outward manifestation of his condition [and not according to] la murr bina'an [sic] mere possibility. Likewise, he [viz., Malik] did not take uncertainty into consideration in the case of a man who had intercourse with a concubine and said, "I purchased her from her master," although the master denied that. He [viz., Malik] said, "The hadd-punishment [should be applied]." Even more serious than that is the suspicion relating to the womb [of a woman] who [married and divorced and then married again four years and eight months subsequent to the divorce]. Then, five months [after the second marriage] she gave birth to a child: Verily, she receives the hadd-punishment, and the child is not affiliated to either of the two husbands--notwithstanding al-Qabisi's having adopted the position that he adopted in this case. And [in] all of these cases that are in the Mudawwana, Malik and Ibn al-Qasim did not take uncertainty into

copy contains many mistakes and errors. Thus, we have written it as it is in [the copy], because it is the final part of the preceding response. For that reason, we have established it as we found it, and [we] edited it -- but true knowledge in its entirety is with God . . ."

29Text: 'inda al-hizar 'alayhi.
consideration. And there are many cases [like this] which can scarcely be counted at all (aslan). Thus, how does this compare to his statement, "Because the sacred law is magnanimous with regard to hudud-punishments in the case of fornication, for it averts them in cases of uncertainty"! Now the examples that he adduced in it are sound, but they do not apply in any way whatsoever to our case. As for the person who acknowledges an act of fornication and then retracts [his acknowledgement,] we will discuss this later. As for the case of the person who divorces [his wife] while on a journey, etc., the legal ruling is the opposite [of what he said], without a doubt. And that which he brought together in it between the muftariq, namely, that the person who divorces while on a journey by means of the written contents of testimonial evidence, [but he subsequently] denies the divorce and acknowledges having had intercourse [with his wife], is treated according to the interpretation of al-Mazari--may God have mercy on him: He who acknowledges an act of fornication is treated according to the contents of testimonial evidence [gap] . . . 'anhu, according to the content of his denying the divorce. Thus, he averted the hadd-punishment from him on account of the uncertainty, according to the widespread opinion. But other scholars interpreted the case differently, and in this case of ours, [holding for] divorce [and no punishment?]. If we posit that he denies having had intercourse, the opposite [result] is established. And if we posit that he acknowledges [having had intercourse], then there is also no ambiguity (ishkal).

[Al-Sughayyir's] statement to the aforementioned Musa [b. Yamwiman al-Haskuri al-Bukhari], "He is either like the acknowledger who retracts or like the acknowledger who denies" and whichever one [4:501] he is, that necessitates avert the stoning-penalty from him." This too is an outright delusion and a mistake. Rather, whichever one he is, that necessitates the infliction of stoning on him. And it is necessary according to the utterance (itlaq) of that mufti--may God grant him success--that were that woman [which one?] to give birth to a child and to confirm his acknowledgement (aqamat 'ala iqrarihi), that he should be given the hadd-punishment, and the child should be affiliated to him [for the purpose of the legal sanction]. This is because, if he retracts his acknowledgement regarding her, according to what he said, then the hadd-punishment is nullified with respect to him, because every hadd-punishment that is confirmed by an acknowledgement and nullified by a retraction, one combines in it the hadd-punishment and the attribution of paternity [for the purpose of the sanction]. This is the definition (dabit) of the chapter and it is not limited to five. Likewise, every hadd-punishment that is not nullified by a retraction, one does not combine in it the hadd-punishment and the attribution of paternity--and this is the [situation] in our case. Verily Malik--may God have mercy on him--said with regard to it, "He should be given the hadd-punishment, but the child should not be affiliated to him." However, that mufti did not specify the mention of pregnancy in the case at all (aslan), although [this condition] is present in [the case] according to the information that has been given to me. And I do not know what induced him to do that, and I am loathe to speculate (wa-qad daqa al-sadr 'ala al-ta'wil), together with [gap] examination of it (al-khawd 'alayhi). And the plain meaning of what he [viz. al-Sughayyir] has done is that he assimilated the acknowledgement of the perpetrator in the case to that acknowledgement [that was retracted]. Verily, the perpetrator in this case is like one who acknowledges an unequivocal act of fornication which is not known from anyone [other than] himself. And there is no doubt that that one resorts to (yarji'u ila) uncertainty according to the widespread opinion, as he
stated, if the acknowledgement of the perpetrator in this case is this type of acknowledgement. Verily, the perpetrator in this case is like someone who confirms his testimonial evidence that was given with regard to him. And this is the custom ('urf) in our case. Because he entered the state of marriage, without a doubt, and in that manner he rendered licit one of the sacred things of God--may He be Exalted and Magnified--especially in light of the length of time [that he spent with her]. And he adopted, together with his denial, someone whose standards are lower than his. [Further], he is not believed regarding the denial of intercourse. ‘Abd al-Malik said in Kitab Muhammad, in the case of someone who was discovered [in the act of] fornicating and [witnesses gave] testimonial evidence against him, after he had lived for a long time with his wife. He claimed, "I have not had intercourse with her since I married her": Verily, his claim is not accepted, and stoning is carried out, even if [in fact!] he spent only one night with her. Muhammad held [this view] and so did our masters, and so did Ibn al-Qasim. And one finds this in the Mudawwana, in the case of a woman who was caught fornicating after having remained with her husband for twenty years [without submitting a complaint regarding the absence of sexual relations]. She said, "[My] husband did not have intercourse with me": Verily, she is not believed, the hadd-punishment is carried out; and his denial does not remove it, because [her aim] is to deflect a hadd-punishment that is obligatory with respect to her, and previous to that she had made no claim [regarding the absence of sexual relations]. Al-Lakhmi said, "This belongs to the chapter of adjudication on the basis of an indicator." He held [the same], subsequently, in his Kitab, in the case of someone who kidnapped a woman in the presence of eyewitnesses, spent a night with her, and denied having had intercourse with her: Verily, he should be given the hadd-punishment according to the statement of [the witnesses] in that matter, because the entire [subject] belongs to the chapter of adjudication on the basis of an indicator, as mentioned above. And the twenty years [that the woman in the above case spent with her husband] are not taken into consideration (maqsuda) in the opinion of the authoritative jurists (muhaqqiqun) of the shaykhs. And we have already mentioned from the opinion of the majority: Were it the case that he had spent only one night with her [4:502] [he should receive the hadd-punishment]. Al-Lakhmi, on the other hand, regarded [the hadd-punishment] as appropriate (istahsanahu) [in the case of a person who was caught fornicating after having been married] a long time, despite the fact that nothing was heard [viz., about a physical disability or impediment to intercourse]. He who thinks that he should be treated on the basis of his having obtained [the desired enjoyment of his wife] ('ala al-isaba), apart from [viz., less than] one night, because of the possibility that there might befall her that which would prevent him from


33 Perhaps the Mawwaziyya of Muhammad b. Ibrahim, known as Ibn al-Mawwaz (d. 281/894 or 269/882), an Alexandrian jurist who reportedly studied with Ibn al-Majashun and Ibn ‘Abd al-Hakam. See Ibn Farhun, Dibaj, 232; Makhluf, Shajara, 68, no. 72; Toledano, Judicial Practice, 64, note 51.

34 Cf. Mudawwana, 16:50-1.

35 Text: qala ghuyru li-ra'ifha haddan wa'aba. Read: li-annaha innama tadfī'a haddan wa'aba 'alayha, following Sahnun, Mudawwana, 0, 208. Cp. Sahnun, Mudawwana, 4, 405, l. 15: wa-la yara Malik an yusfī' hadd qad wa'aba.
having intercourse [with her]. And this is opposed to what is found in the Chapter on Stoning (Kitab al-Rajm), to wit: to deem the husband credible, if he denies [intercourse] by swearing an oath. And this is the preceding case. However, they said: "The cause of the disagreement regarding the initial claim (asl)--the presumption of continuity regarding virginity (istishab al-bakara),\(^{36}\) or to treat [it] according to the preponderant judicial assumption (al-ghalib), because the preponderant judicial assumption (al-ghalib), subsequent to entry (al-dukhul), is intercourse. And the apparent meaning of their words regarding a virgin and virginity is, no doubt, a sensory matter [that can be perceived only by physical examination] (amrun hissi), and he may desist from deflowering her for a long time, and in this matter there are unlikely and rare [occurrences], especially together with [her] silence. For this reason, the majority treat it according to the preponderant judicial assumption. And the cause of the disagreement in our case [is as follows]: Among them are those who say, the initial claim (al-asl) is non-intercourse and the preponderant judicial assumption (al-ghalib) is its existence. However, the preponderant judicial assumption here is [found] in a ruling (hukm) whose precedence is agreed upon,\(^{37}\) apodictically (qat'an), because this woman was penetrated by that poor fellow previously, several times, both in a legal manner and illegally ('ala wujuh haram). For this reason, he is treated with regard to the last "return" (muraja'a) according to the definitive legal assessment (?) (al-maqtu' bihi), if he remains in the status that he had previously—health and soundness [of mind and body]—and no disability has been heard of, on account of an obstacle (i'tirad) or anything else. And no one would treat him on [the presumption of] non-intercourse in our case except one whose mind contains weakness and disorder [and] who is ignorant of that which is required by unblemished natures and sound temperaments, especially in light of the confusion that he sowed and the discrepancy [in his assertions] in the presence of the qadi, as mentioned previously—who treated him according to the legal ruling of one who acknowledges [fornication], together with his love of women and desires for them, in accordance with his claim.

**[The preponderant judicial assumption is given precedence over the initial claim]**

And this preponderant judicial assumption (al-ghalib) here, [mentioned] a little while ago, is given precedence over the initial claim (al-asl) according to the judicial consensus, without any doubt. This is similar to what they held regarding the testimony of upright witnesses (shahadat al-bayyina), namely, that it is given precedence over [the claim of] original freedom from liability (bara'at al-dhimma),\(^{38}\) which is the initial claim.

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\(^{36}\)Literally, *istishab* means "escorting" or "companionship". Technically, *istishab* denotes a rational proof which may be employed in the absence of other indications; specifically, those facts, or rules of law and reason, whose existence or non-existence had been proven in the past, and which are presumed to remain so for lack of evidence to establish any change. The technical meaning of *istishab* relates to its literal meaning in the sense that the past conditions "accompany" the present without any interruption or change (Kamali, *Principles*, 297). See further Ignaz Goldziher, "Das Prinzip des Istishab in der Muhammedanischen Gesetzwissenschaft," *Vienna Oriental Journal*, 1 (1887), 228-36; Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Usul al-Fiqh* (Cambridge: Cambridge University Press, 1997), 113-15.

\(^{37}\)Text: fi hukm al-mutaffaq 'ala taqdimihi.

\(^{38}\)On this term, see Kamali, *Principles*, 205.
because the preponderant judicial assumption is the trustworthiness of the witnesses, and no attention is given here to the initial claim, by common agreement; and no one who possesses intelligence will doubt that the initial claim in our case is weaker than the initial claim [in that case], on account of that which preceded. And Malik--may God have mercy on him--in the Mudawwana, gave precedence to the testimony of custom ('urf) over [an initial claim] that was twice as strong as this initial claim. He said with regard to a virgin whose husband denies having had intercourse [with her], after she had contested him, summoned him [to court], and female [witnesses] testified that she was a virgin: Their (f.) word is not accepted. Thus he [viz. Malik] gave precedence here [to the testimony of custom] over eyewitness testimony [which is the initial claim]. What is that [case] compared to our case? If someone objects that custom constitutes a witness here, one replies: To act (al-amr) on the basis of opinions is weaker. And perhaps punishment was spared (ustuhiyat) on account of the uncertainty, in contradistinction to the hudud-punishments, because they are averted on account of uncertainty. This is because Malik--may God have mercy on him--cited in the case an indicator of a case [4:503] [in which] four witnesses gave testimony against [a woman, accusing her] of fornication, and female [witnesses] examined her and they gave credence to her [assertion of virginity]. Malik--may God have mercy on him--said, "No consideration should be given to their (f.) word, and the hadd-punishment should be applied." And when someone cited the preceding case, Malik--may God have mercy on him--treated them equally, and he did not give any consideration to that which we mentioned previously. However, al-Lakhmi, in the case, [held] an opinion that no one else held, in my estimation, [but] this is not the place to mention it. This entire [discussion] is based on [the assumption] that was mentioned above, namely, that the initial claim is non-intercourse. If, however, we hold that the initial claim is the existence [of intercourse]--and this is the truth (haqq) in which there is no doubt--then the initial claim and the preponderant judicial assumption coincide, because this woman was sexually penetrated by this poor fellow previously, many times, and it is absolutely impossible for him to deny having had intercourse with her. If this is the case, then there is a presumption of continuity regarding the existence of intercourse (f-e-wujud al-wat' mustashab) until one hears about some obstacle [to intercourse], and nothing has been heard that would necessitate denying credence to him in the matter. Consider that which was mentioned previously in connection with the learned jurists in the case of the person against whom testimony of fornication was given, and he denied having had intercourse with her in a sound marriage: The opinion of the learned jurists regarding the cause of the disagreement in the [case], namely, the initial claim (asl) is the presumption of continuity (istishab) regarding virginity and the preponderant judicial assumption is the existence of intercourse subsequent to entry (al-dukhul). It is clear that he did not previously have intercourse with her prior to that marriage. And had he previously had intercourse with her in a manner similar to that--and the likes of it, as is known is the existence of intercourse--no two [jurists] would disagree regarding his being treated in accordance with it [viz., intercourse]. However, one whose status is as mentioned previously, namely, sowing

40Cf. Mudawwana, 16:50-1, or 4, 405.
41Text: wa-shibhuhu.
confusion and treating as licit that which is not permissible with respect to himself and with respect to others, 

_min annahu_ does that and issues a fatwa with respect to him now, thereby increases with respect to certainty and 

stupidity (thaljan) [sic], he and his companions, [and] there is no need with regard to him/it of anything that we 

have mentioned above. And his status is that of one to whom mendacity is attributed with regard to everything 

that he claimed in that matter, apodictically, in the opinion of every successful [person] whose nature is 

unblemished. Were it the case that it had been agreed that he may come renouncing that which is known with 

regard to his evil, then how much the more so with respect to him who prevailed over him; 42 or [if it was 

agreed] that he may repent, despite his being known as a sower of confusion; or someone whose status was 

hidden, if he comes denying? However, the denial of this deceive (mulabbis) has been fully reported to me, and 

perhaps he acknowledged ignorance at the time that the people accused him of lying (rama [sic] _al-qawm ʿalayhi 
wafaʿatan_), and he became notorious, for he retracted that entirely when he was given the power to exercise 

(malaka) his choice, and he began to console his companions regarding that which befell him [by reflecting on 

the example of] the virtuous from among the forefathers of this religious community, such as Saʿīd b. al-

Musayyab43 and Malik b. Anas44—may God have mercy on the two of them. And that made him grow, in the 

eyes of his good companions, with respect to magnification and nobility and hastening to imitate his word and 

his deed. And this is the greatest calamity that has occurred in the religion. [With regard] to all this, as with the 

legal assessment of his likes, how could it be permissible for him to retract his acknowledgement despite that (ʿala 

ma) which that mufti [viz., al-Sughayyir] said—may God grant him success. And he [viz., al-Sughayyir] treated 

him like one who acknowledges clear fornication, [that is] one whose fornication is not known from anyone but 

[the perpetrator] himself. This is negligence. And they held in the case of someone who was caught fornicating 

and acknowledged having had intercourse with his wife before she had become his wife, and she 

acknowledged the same: Verily the two of them should be stoned because the two of them acknowledge [4:504] 
having fornicated, subsequent to their having had intercourse in a valid marriage (baʿda al-ihsan). There is no 
doubt. They held: Were it the case that each one of the two attributed credence to the other, but he then 


42 Text: _zahara ᾀlayhi_. Perhaps: "exposed him". See above.

43Saʿīd b. al-Musayyab al-Makhzumi (d. ca. 94/712-13), one of the "seven jurists of Medina," was 

renowned for his piety and knowledge in the fields of hadith, _fiqh_, and _tafsir_. Ibn al-Musayyab's desire for 

independence from the political authorities resulted in two floggings: sixty strokes following his refusal to 

recognize Ibn al-Zubayr; and additional strokes as a result of his refusal to pay allegiance to the sons of Abd 

al-Malik, al-Walid and Sulayman. See _EI2_, supplement, s.v. Fukaha' al-Madina al-Sab' a, and the sources 
cited there.

44In 145/762, an 'Alid pretender to supreme power, Muhammad b. 'Abdallah, staged a coup and made 
himself master of Medina. While not playing an active role in the rebellion, Malik b. Anas did lend it 
support by issuing a fatwa in which he declared that homage paid to the 'Abbasid caliph al-Mansur had 
been given under compulsion and therefore was not binding. When the rebellion failed in 147/763, Malik 
was flogged by the governor of Medina, Ja' far b. Sulayman, and suffered a dislocated shoulder. As a result 
of the punishment, Malik's prestige is reported to have increased in the eyes of his followers. See Ibn 'Abd 
al-Barr al-Qurtubi (d. 463/1070-71), _al-Intiq’a fi fad’i’il al-thalatha al-a’imma al-fuqaha’_ (Cairo: Maktabat al- 
Qudsi, 1350), 43-44; _EI2_, s.v. Malik b. Anas, and the sources cited in the bibliography.

45Text: _isaba_. See above.
retracted his acknowledgement, his retraction would not be accepted in any way whatsoever. And he should receive the hadd-punishment for a virgin or be stoned [as a muhsan], and no consideration should be given to his retraction. The opposite is the case if [only] one of the two of them acknowledges [fornication], and the other denies, [in which case the word] of the one who retracts [his or her acknowledgement] is accepted. They held: This is because, if the husband is the one who acknowledges [fornication]--he said, "I acknowledge"--then he is sovereign with regard to his retraction (la-amlaka al-ruj'a). And if the woman is the one who said, "I acknowledge [fornication]," then the dower is regarded as being complete. But for which retraction by this forsaken one can an excuse be given? And had it been as that jurist--may God guide him--said, then verily there would be no difference between their [dual] agreeing and their [dual] disagreeing, and each one of them would enjoy the right to retract in order to lift from him the greater of the two hadd-punishments, that is, stoning, together with his denial. This is not accepted.

[Hadd-punishments are not applied when there exists doubt (shakk)]

That jurist's [viz., al-Sughayyir's] knowledge ('ahd) of that chapter [of the law] is weak. Indeed, he is like one who has not studied [law] at all.\textsuperscript{46} Consider his statement, "Because the hadd-punishments are not applied when there exists doubt (bi'l-shakk)." This is a sound statement which may be invoked when there is a reason to do so, without a doubt. But what "doubt" exists in our case in the eyes of the jurists? Malik--may God be satisfied with him--and other jurists explicitly call for stoning him. And the text of his statement in the case itself has already been cited (see above). However, this mufti\textsuperscript{47} has overlooked what [Malik] said at the outset, and the excuse has already been mentioned--there is no power and no strength except in God. [Consider the following assertion made by al-Sughayyir]:

And you see the fatwa issued by Ibn Rushd--may God have mercy on him--in his responsa, namely, the application of the hadd-punishment to someone who engages in a mut'a-marriage.\textsuperscript{48} But our case is not like that one. Because that man (al-rajul), according to what he said, married without a wali, and for one-half of a dirham, and the contract [was witnessed by men] whose integrity had not been confirmed by a qadi. And for this reason, he [viz., Ibn Rushd] issued a fatwa calling for the hadd-punishment. And the mut'a-marriage which is permitted, exceptionally, by those who permit it, is specifically a marriage for a specified time period, in which all of the stipulations of marriage are fully present.

Consider the negligence that is contained in these words. And this [case], in which he differentiated [issues] that are similar, there is no doubt that, had there not been any explicit textual indicator in the case whatsoever (aslan), then the fatwa that the shaykh [viz., Ibn Rushd?--may God have mercy on him--issued

\textsuperscript{46} Text: sara fi hukm man lam yuqayyid shay'an aslant.
\textsuperscript{47} Text: al-ma'na. Read: al-mufti (my conjecture-dsp).
\textsuperscript{48} See note 00, above.
regarding the mut'a-perpetrator would have been stronger as testimony for it. Indeed, it belongs to the category of resemblance (tashbih), without a doubt, because the mut'a-perpetrator spent that which is considered to be a [proper] dower by a group of jurists, and the external meanings of the reports support it. And he cited as a proof for having done so, "the person who holds for the permissibility of mut'a-marriage does not apply hadd-punishment for the smallest dower." Further, he cited as proof for the permissibility of his [marrying] without a wali the fact that this is the nature (sifa) of mut'a-marriage, because it\textsuperscript{49} does not require anything more than the permission of the woman, because she may lease her body in the same manner as she may lease her goods. And a wali is required only [4:505] in a circumstance (mawdi') in which ownership of her vulva (bud'iha) becomes permanent by virtue of a [true] marriage. Finally, he invoked as an excuse for the fact that the integrity of the witnesses had not been confirmed by a qadi and that he was unable to uncover anyone other than them [as follows:] He said, "I thought that I might do that without fornicating. Perhaps God will accept this excuse from me." But despite all of this, he believed that mut'a is forbidden. However, he is the one whose mendacity is deemed preponderant with regard to the two of them (al-marjih 'ala kadhbihima). Further, he mentioned that he was unable to marry her in a sound manner because she was not equal to him in status,\textsuperscript{50} "and I thought that adherence to the aforementioned disagreement was preferable to fornication." But nothing adduced by the poor fellow benefits him. And he was described in the question as being one of the people of knowledge and intelligence (min ahl al-'ilm wa'l-ma'rifa)--and that only adds to his shame. The shaykh [viz., Ibn Rushd]--may God have mercy on him--said, "His knowledge and his education (talabuhu) are a proof against him which necessitate his shame in this world and the next, and which cause him to descend to the worst of all levels [of Hell]. He [viz. Ibn Rushd] said:

This is because he knew what is right but opposed it; and what is correct but contradicted it; and what is forbidden but he rushed into it, in order to slander the Exalted God, distain his commandments (hudud), and mock his religion.

And the poor fellow did not derive any benefit from anything in which he sought an escape and from that which he explained that he was following, namely, the things stated by the jurists, such as summoning witnesses whose integrity has been authorized,\textsuperscript{51} in particular --according to my knowledge--and other things (wa-ma siwahu) stated by the jurists [with regard to nikah al-mut'a], even if it is an anomaly, and its being permitted on the basis of a weakness is even more anomalous--even if it was the opinion [gap] of one who slanders. However, he [viz., Ibn Rushd] made him distant in this case the distance of (bu'd) his support for him [sic]. And he is similar to fornication, apodictically. And he [viz. Ibn Rushd] compared his actions to that which the

\textsuperscript{49}Text: wa-annahu. Read: li-annahu (dsp)

\textsuperscript{50}Read: saliha /li/-mithlihu. Cf. Fatawa Ibn Rushd, "la kanat tuslihu li-mithli." This must refer to a social consideration, not a legal one.

\textsuperscript{51}See al-Sayyid Sanif, \textit{Fiqh al-sunna} (Place: publisher, date), vol. 2, 57-58 (ishtirat al'adala fi'l-shurut).
prostitutes used to do during the *jahiliyya*. And for this reason no consideration is given to [the claim of *shubha*]. And the *hadd*-punishment is applied for every state of his activity. And no consideration is given to a similar [claim], by general agreement. Now, if this is the case with respect to him, then what is the status of the villain of this case who did not spend anything in a dower document, did not summon [witnesses], and was not attended by a *wali* at all (aslan)—as required by the doctrine of the one whose doctrine he claimed to have adopted? Furthermore, his legal status is that of one whose mendacity has been apodictically established (*maqtuʾ*), because of the discrepancy in his statement in the presence of the qadi—may God grant him success—as mentioned above. He is manipulating (*ḥib fi*) religion, without a doubt. Indeed, in accordance with this choice [of perspective], the case of the *mutʿa*-perpetrator belongs to the category of resemblance (*tashbih*), without a doubt—because the two [men] coincide in that each one of them sought as an object a doctrine whose stipulation he did not fulfill (*lam yufi*). However, the *mutʿa*-perpetrator spent a proper dower, summoned [witnesses], and invoked as an excuse for [not bringing] a wali that which he invoked in accordance with his school doctrine. What is his status, then, compared to one who intended pure mockery, and who attributes mendacity to the righteous man of the *umma* [viz., Ibn ‘Abbas] and claims that he is only following his doctrine.

As for his [viz., al-Sughayyir's] statement, "This [case] is not like that one," it has already been mentioned, without a doubt, that "this [case] is not like that." Verily, the *mutʿa*-perpetrator has a better status and is more fearful of the Exalted God than the perpetrator of this case—even if there is a correspondence on those [points] on which they are in correspondence.

As for [al-Sughayyir's] statement, "For this reason he [viz., Ibn Rushd] issued a fatwa [calling for] the *hadd*-punishment." Indeed, he only issued a fatwa calling for his *hadd*-punishment on account of his acknowledgement [of intercourse]. And its plain meaning [is, the punishment is applied] even if he were to revoke [it] and he cited [what he cited] from the statements of the Imams [gap] [4:506] and regarding the revocation and the denial of one who entered the state of marriage *biʿl-mumkin*. And there is nothing to be gained from repeating it.

Consider [finally] his [viz., al-Sughayyir's] statement, "[. . . ] that is fully accompanied by the rest of the stipulations." [But] they added, "Except inheritance."

In a word: We have traced the proper place (*mawdiʾ*) of the case back to Malik and his Companions—may God have mercy on them—and it is the proper place to examine it (*al-khawd*). And the examination of something other than it constitutes stubbornness and the wasting of time.

God is the Master of success and guidance, and the Champion of his Messengers and of those who believe in the life of this world and in the day on which the testimony will be given. May God pray for our master Muhammad, his family, and his Companions, and grant them peace.

[Al-Wansharisi said: This is the] end of that which the jurist, shaykh, *al-imam al-ʿalim al-ʿalam al-salih al-baraka*, Abu Ishaq Ibrahim b. ‘Ali al-Sarifi—may God have mercy on him—wrote down regarding the response of

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52 Perhaps correct the text to: *al-mutʿa?* (dsp)
the shaykh al-hafiz al-shahir al-kabir, my Master, Abu al-Hasan—may God have mercy on him and be satisfied with him.
[A letter of Ibrahim al-Sarifi to the Sultan, Abu Sa'id al-Marini, in the matter of al-Bukhari, the mufti who mocks]

Included in [the document] written by the jurist, the aforementioned Abu Ishaq [Ibrahim al-Ma'afiri al-Sarifi], to the Imam, Abu Sa'id 'Uthman b. Ya'qub b. 'Abd al-Haqq al-Marini, 53 with regard to the aforementioned case [is the following letter]:

May God grant success to the Commander of the Believers wa-saddadahu wa-nasarahu bi-'aqlihi wa-a'azza nasrahu wa-arshadahu wa-habbaba lahu al-khayr hubabahu lahu yawm yura thawabahu wa-baghghada lahu al-sharr bughdahu lahu yawm yura 'aqabahu.

The case of al-Bukhari the deceiver (al-mudillu) in which a forbidden activity which he treated as permissible for himself (al-mustabih li-wajhihi) 54 has been exposed--and for which he was punished in your presence, that which was executed in accordance with his condition, which he was deserving of prior to the exposure of this grave offense of his--because of his audacity with regard to legal knowledge ('ilm), experts in legal knowledge ('ulama'), and the hadith of the Messenger of God--may God bless him and grant him peace--and his claim to exercise independent reasoning (ijtihad) in matters concerning God's religion. Sometimes he attributed negligence to people other than himself, namely, earlier great leaders whose model is emulated, and the gullible and the scoundrels believed him with regard to that. Indeed, they accorded him [a status] greater than what he claimed, so that he began to manipulate (ya'bath fi) God's religion as he wished, having no concern for what he perpetrated. This was assured by his association with (mukhalata) the authorities, judges and magistrates of rank (jah) and power (sultan); and he deceived the masses too. To that he added aggression against them, so that the masses began to fear him, and on becoming aware of that [viz., their fear,] he began to harm them in their [legal] transactions, which is a fatal blow in matters of religion and this world and it is a great cause of corruption. It is not permitted to anyone who has extended his hand over the earth [viz., the sultan] to allow this situation to continue forever, after [the matter] has been investigated and (hatta) become a matter of [certain] knowledge. Had it not been for these enormous corruptions, no one would have paid any attention whatsoever to him [4:507]. Indeed, every intelligent person knows that an insane asylum (maristan) is more appropriate for him than a prison on account of his feigned stupidity, stupidity, and disobedience ('uquq).

However, his disease is [the disease] that was mentioned and it has defied all remedies. 55 These [were] some of the characteristics of the man before this sin became manifest with regard to him in the ugliest manner possible. It undoubtedly necessitates the hadd-punishment [viz., stoning] for him, 56 by common agreement of the

53Identify.
54Alternatively, "which scandalized him" (literally, "his face").
55Text: lakinna #illatahu ma dhukira wa-qad a#yat waa #dalat.
56Text: imma. I disregard this word in the translation.
scholars despite that to which the poor fellow (miskin) took refuge. It is necessary to specify with regard to him according to the school doctrine (madhhab), and there is common agreement on his hadd-punishment in one set of circumstances, namely, if he acknowledges intercourse, if a foetus appears, or if [four witnesses] are heard in a [court] procedure (sumi’a ijra’). If, however, he denies [viz., intercourse,] then the most widespread and the soundest [opinion] according to the learned jurists who are strictest [in the application of the law] (muhaqqiqu al-askyakhi) is that he should receive the hadd-punishment, and no consideration should be given to his claim of ignorance, because of what has been mentioned already, namely, his claim to possess legal knowledge, and because he is one of those whom one would not suppose to be ignorant of that--in addition to what is known of his audacity (jur’a). His revocation should not be accepted after his acknowledgement, and whoever holds this [viz., the acceptance of his revocation] in our case is remote from mindfulness of the law or has not studied (lam yuqayyad) any [law] whatsoever. How is it possible to accept his revocation when he was accused (ukhidha) together with his denial [of intercourse]? This [case] does not resemble an ordinary (sarih) instance of fornication, for several reasons which it is not appropriate to mention here. The objective is to provide information regarding the status (hal) of the man and the legal assessment of [that status] (wa-hukmuha) in general (‘ala al-jumla), because it is known [and] not hidden. There is no intercession on behalf of someone bearing this status before [the matter] reaches the Imam. How much the more so after it reaches him! Would that the matter--if it has reached this point--were limited to him [viz., just one individual], because he is evil wherever he is. Indeed, he has begun to beguile his followers (yata’assa li-atba‘ihi) with [mention of] the best of those who have passed away, such as the Imam of Dar al-Hijra, Malik b. Anas--may God be pleased with him, and Sa’id b. al-Musayyab, the Lord of the Followers (see above). The villain sowed confusion and equated the angels to jailors (fa-shabbaha al-mala‘ika bi’l-haddadin); the fool considers only the blow to the exclusion of its cause, namely, his distain of the religion and his mockery [of it]. As a result, [his] followers and other fools have begun to think nothing of what he has done; indeed, all of them, in my view, consider him to be acting in accordance with the law. Further, their exaltation of the shaykh [prevents them from thinking that he] transgresses the law and they consider him to be obedient (wa-yarawnahu masudan) [to it]; [and they think that] the ancients--how much the more so the moderns--have not reached his level of understanding of the Exalted God! Their delight [in him] was increased (wa-zadahum thalajan) by his emergence [from prison?] by virtue of the intercession of that poor fellow (miskin) who was ignorant of what he owed God, until he put himself in the situation that he put himself in, namely, daring to scorn and curse God, since God is cursed in the words of His Prophet--may God bless him and grant him peace--by the person whose intercession prevents the execution of one of God's hadd-punishments--if it was expected. The minimum, [in this case,] is that he should complete the lesser [punishment] that was decreed for him (ma iqtasara ‘alayhi, namely, harsh treatment during life-imprisonment, for he (‘ala annahu) is an impetus to evil wherever he is, as mentioned above. As a result, the tongues of those gullible people sought guidance [from him], and they caused tyranny to prevail over legal knowledge and

57Text: iqra'ahi. Read: iqrarihi.
experts in legal knowledge. But if they deceive, the Party of God will be victorious and will prosper. God has written that He will be victorious, together with His Messengers. The Exalted one said, "I shall assuredly be the victor, I and My Messengers."\[4:508\] Whoever tries to defeat the Exalted God will be utterly vanquished.

This corrupt belief on the part of the laymen in that man—he believed the miserable troublemaker so that he exposed himself to destruction by spreading forbidden things and innovations in a manner that is not perceived. That which is obligatory upon him, when he appropriated in the manner of one who appropriates for himself—namely, the causes of punishments, his being warned of that, the advise that he was given, and the protection that he was given (?)—since this is what is obligatory upon everyone who is capable of that, just as God warned those who worshipped him at the time of the disagreement with regard to that. The Exalted one said, "Do the people of the cities feel secure--Our might shall not come upon them at night while they are sleeping? Do the people of the cities feel secure--our might shall not come upon them in daylight while they are playing?" etc.\[59\]

Because of this [verse] and similar ones, [the Prophet]—may God bless him and grant him peace—used to seek refuge in God from the passing of his blessings, the suddenness of his vengeance, and the transformation of his forgiveness, despite his inviolability—may God bless him and grant him peace—and his being the Lord of Adam's children; indeed, [despite his being] the best of the entire Creation, who will be dispatched on the Day of Resurrection to the praiseworthy spot. However, informing his community of that which will save them from the punishment of their Master. Indeed (illa fa-huwa), he is the trustworthy one (al-ma'mun) who is safeguarded from the causes (mujibat) of all the punishments. For this reason, ‘Ali—may God be pleased with him—who was the Lord (mawla) of the Muslims and his [viz., Muhammad's] successor (khalifa) used to seek refuge with God from the sins that necessitate retribution, eliminate blessing, and give the upper hand (tudilu) to the enemies, that is, give dominion (dawla) to the enemies over him.

In sum, the removal of this defect is obligatory upon everyone to whom God has given authority in the earth, and who has been designated as a khalifa in it, so that he may consider how he acts. It might be that God, in His grace, will designate him by his means, and he will not take power by himself, so that he will fear, in that, the generality of his punishments—may God protect us from that. That will not come about—may God grant you success—except by virtue of your designating those who are considered to be from among the Imams of the ancients (al-salaf) and their distinguished authorities—between you and between the Exalted God. Because they are your proof (hujja) in His eyes, witnesses for and against you. In adherence to them there is deliverance and redemption—but abandoning Him has the necessary result of detracting from religion complete repentance on the Day of Resurrection. As God the Exalted said with regard to someone who committed evil, [and who,] on that difficult day, was biting his hands and saying, "Alas, would that I had not taken So-and-so for a friend!"—may God protect you from the question of that day and [may He] delight you with the means of deliverance.

\[58\]Qur’an 58:21.
\[59\]Qur’an 7:96-97.
\[60\]Qur’an 25:28 ("Upon the day the evildoer shall bite his hands, saying, 'Would that I had taken a way along with the Messenger! Alas, would that I had not taken So-and-So for a friend! . . .")
from it. Behold ‘Umar b. al-Khattab--may God be pleased with him--may God have mercy on you--[and consider] his position next to the Exalted God, the magnitude of his honor (jah), and the testimony on his behalf in the Garden: The paths (madhahib) were too narrow for him when he died, no permanent abode was established for him, and his soul was not at ease, to the point that those who were present feared him on account of the honesty (‘adl) and the observance of the truth that he represented. Therefore, he said--may God be pleased [4:509] with him--to the rest of them, "When the Day of Resurrection arrives and God causes me to stand in His presence, and he asks you about me, will you be witnesses to what that one said?"--and [he meant] Ibn ‘Abbas--may God be pleased with him. They replied, "Yes." Then his soul was at ease, and he said, "God is great," and he died--may God have mercy on him. Further, consider [gap] whose soul was put at ease by the testimony of someone who was below him in virtue (fadl), but he--may God be pleased with him--acted in accordance with the statement of the Prophet--may God bless him and grant him peace--"You are God's witnesses on His earth."61 All of this--even if it is difficult (ta’adhdhara) and its causes have been difficult for a long time, we implore the Exalted God that it will be a small thing on His part, sufficient in the presence of the Exalted God, for [even] a small measure of goodness, if one acts in accordance with it in order to magnify God, causes one to enter the Garden; just as a small measure of evil, if one acts in accordance with it in order to mock God's justice (haqq), causes one to enter the Fire. No one, however, will be destroyed by God but one who destroys [others].

This is the advice that I offer you. The objective is the delivery of information (al-tabligh) and the removal of the contractual obligation (al-‘uhda) to which you are entitled, when it did not reach me that anyone had denounced that in your presence or deemed great that which God magnified. The Exalted God is the one from whom we seek assistance and in Him lies success.

Signed by the one who desires your benefit: Ibrahim b. ‘Ali Sarifi. Farewell--and may the mercy of the Exalted God and His blessings be upon you.

End of that which was found of this letter.

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61Identify.