

# ETHICS, GENDER, AND THE ISLAMIC LEGAL PROJECT

*Marion Holmes Katz*

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*Marion Holmes Katz is Professor of Middle Eastern and Islamic Studies at New York University. These remarks were delivered on October 20, 2015 as part of the Abdallah S. Kamel Lectures on Islamic Law and Civilization. The views expressed in this lecture are solely those of Professor Katz. © 2016 Marion Holmes Katz.*

Over the last decade, Islamic studies in Western academe have taken an “ethical turn” bringing to the forefront the role of projects of ethical self-formation in the lives of pious Muslims. This literature depicts the pre-modern period as one in which Islamic law and ethics were in harmony – a harmony that was disturbed, if not completely upended, by the emergence of the modern state and its project of codification. Talal Asad defines Shari‘a in the “traditional” model as the means “whereby individuals are educated and educate themselves as moral subjects.”<sup>1</sup> Hussein Agrama similarly argues that prior to the modern period “Shari‘a was characterized by interconnected techniques of moral inquiry and criticism that aimed to secure virtues fundamental to it” rather than being framed in terms of public order.<sup>2</sup> Even Wael Hallaq, otherwise a very differently trained scholar, adopts a similar model that underscores the

1 Talal Asad, “Reconfigurations of Law and Ethics in Colonial Egypt,” in *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003), 240.

2 Hussein Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (Chicago: University of Chicago Press, 2012), 64.

intimate relationship between law and ethics in pre-modern Islamic societies.<sup>3</sup>

In this lecture, I want to present a challenge to this identification of pre-modern Islamic law with a project of ethical self-care by examining pre-modern sources from the genres of *fiqh* (law) and *akhlaq* (ethics). The legal sources examined here are drawn specifically from *furu' al-fiqh* (literally, the “branches of *fiqh*”) or substantive law. They are extensive compilations of concrete rules covering a wide variety of subjects, including some that fall within the modern Western category of “law” (e.g., marriage and divorce, contracts, criminal penalties) and others that do not (e.g., the rules for the valid performance of various religious rituals). These rules were in principle elaborated by Muslim scholars on the basis of the revealed sources of the Qur'an and the sayings of the Prophet Muhammad (*hadith*) – although historical study suggests that other factors such as existing administrative practice also contributed to their development – and were understood as the human interpretive manifestation of God's law, the Shari'a. The authority of *fiqh* thus rested centrally on its claim to unfold the implications of revealed texts; it was a scholars' law whose legitimacy was in theory unrelated to its enactment or enforcement by the

3 Wael Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York: Columbia University Press, 2012).

political authorities. Notwithstanding, many legal scholars in fact served as judges and the question of enforceability was not necessarily far from their minds. The relationship between classical *fiqh* on the one hand and “law” in the modern Western sense on the other hand is therefore a highly complex and variable one. The second genre of pre-modern sources that I will interrogate in this lecture is the genre of *akhlaq* – quantitatively a far more minor genre of Islamic literature – focusing on ethical analysis and advice and often explicitly rooted in the Greek philosophical tradition.

#### THE GAP BETWEEN LAW AND ETHICS

The *furu’ al-fiqh* texts I will discuss today are major legal manuals representing two of the four major schools of classical Sunni law: the Hanafi and the Shafi’i. The samples I have chosen come from the two texts’ voluminous sections on marriage and divorce (in particular, from material I collected for a larger project focusing on the theme of domestic labor). The first work is *al-Hawi al-Kabir fi Fiqh Madhhab al-Imam al-Shafi’i* (*The Great Comprehensive Manual in the Jurisprudence of the Shafi’i School*) (hereinafter, *al-Hawi al-Kabir*) by the Shafi’i jurist Abu’l-Hasan al-Mawardi. Al-Mawardi (d. 1058), spent much of his life in the imperial capital of Baghdad and devoted much of his career to official service both as a judge and as a diplomatic emissary for two of the ‘Abbasid Caliphs. To get a sense of the relationship

between al-Mawardi's legal and ethical approaches to the marital relationship, let us start with his overall interpretation of the legal implications of the marriage contract.

As Kecia Ali has demonstrated in *Marriage and Slavery in Early Islam*, formative-period Muslim jurists conceived of the marriage contract as the husband's figurative purchase of access to the wife's sexual capacities, synecdochally expressed as "ownership of the vulva."<sup>4</sup> Al-Mawardi's analysis of the law of marriage focuses less on the husband's initial acquisition of the vulva (and thus of legitimate sexual access to the wife) than on the ongoing obligations and entitlements of an existing marriage. The concept of *manfa'a* (benefit) is central to his account of the marital relationship. It is the word used to designate the usufruct of an item that can be subject to a contract of rent; it also designates the labor capacity of a human being subject to a contract of hire (or of a slave whose work can be exploited by his owner). Al-Mawardi implicitly assumes that a male, whether a slave or a freeman, possesses one basic kind of "benefit" (*manfa'a*), which is his labor capacity. In contrast, he states repeatedly that a slave woman (or indeed, as we shall see, any woman) has two "benefits" (*manfa'atan*): her use for labor (*istikhdam*) and her use for sexual enjoyment (*istimta'*).<sup>5</sup> The implicit reason

4 Kecia Ali, *Marriage and Slavery in Early Islam* (Cambridge: Harvard University Press, 2010).

5 Abu'l-Hasan al-Mawardi, *al-Hawi al-Kabir fi Fiqh Madhhab al-Imam al-Shafi'i* (*The Great Comprehensive Manual in the*

for this distinction between the single “benefit” of a male and the twin “benefits” of a woman is that the sexual capacities of a man are never the object of a legitimate economic transaction.

The two “benefits” of labor and sexual availability are central to the ways in which al-Mawardi constructs marriage simultaneously as similar to and different from slavery. Al-Mawardi certainly acknowledges that both relationships involve rights of sexual access and that some female slaves are in fact used as concubines. Overall, however, he understands slave ownership (even of female slaves) as fundamentally concerned with the exploitation of labor, whereas he understands the marriage contract as dealing overwhelmingly with rights of sexual access and enjoyment. This contrast constructs sexual access as the marital relationship’s defining feature. The dichotomy between labor as the slave woman’s essential obligation and sexual availability as the wife’s essential obligation is particularly clear in the scenario of a slave woman who is also married (i.e., to a man other than her owner because a slave cannot legally be married to her owner). According to the Shafi‘i school of law to which al-Mawardi belongs, the slave woman’s owner is entitled to her labor and thus may claim her during the daytime, which

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*Jurisprudence of the Shafi‘i School*), ed. ‘Ali Muhammad al-Mu‘awwad and ‘Adil Ahmad ‘Abd al-Mawjud (Beirut: Dar al-Kutub al-‘Ilmiya, 1999), 6:214; 7:160; 9:67; 9-109.

is the prime time for work. The husband, on the other hand, is entitled to her during the nighttime, which is the prime time for sex. Al-Mawardi explicitly concedes that a husband has no right to his (free) wife's labor, although he also explicitly – if unconvincingly – repudiates the obvious inference that she herself retains the right to dispose of her labor capacity and of the daytime hours during which that capacity would customarily be exercised.<sup>6</sup>

Al-Mawardi holds that the husband's entitlements and duties are fundamentally structured around the right to sexual enjoyment (*istimta'*). He defines the husband's obligatory maintenance of his wife as direct compensation for sexual access and consistently uses the husband's sexual prerogatives as a criterion throughout his lengthy analysis of the quantity and nature of the maintenance provided. Al-Mawardi's systematic focus on the husband's entitlement to sexual enjoyment extends to his analysis of the wife's entitlement to food and clothing. He argues, for instance, that a wife is permitted to sell or exchange part of the food ration she receives from her husband, but not of her allotment of clothing. This is because her adornment with clothing is directly related to the husband's right to sexual enjoyment, while her food is not. Al-Mawardi further claims that she is forbidden to sell her food only if extreme hunger renders her too sick or weak for sex. Indeed, in al-Mawardi's account

6 Ibid., 11:445; 11:446.



of the marriage contract, the husband is neither entitled to nor responsible for the maintenance of his wife's health except insofar as it affects his right to sexual enjoyment. The husband, however, is responsible for the cost of beautifying cosmetics, which al-Mawardi sees as directly related to sex. He writes:

*If it were to be objected that she is in greater need of medicine than of oil [to beautify her hair], so it would be more just for [the medicine's] cost to be borne by the husband, the answer would be: Medicine is used to preserve the body, so its cost is borne by her, and [hair] oil is used for adornment, so its cost is borne by him because [her] adornment is for his sake and the preservation of her body is for her own sake. The wife is equivalent to a landlord who is obligated to rebuild what has collapsed of the rented house rather than the renter.<sup>7</sup>*

The wife is here seen as the proprietor of her own body, which she is obligated to maintain. The husband is merely hiring out one function of her body: that of sexual enjoyment.

Based on al-Mawardi's consistent and pervasive emphasis on the husband's right to sexual enjoyment of his wife as the lynchpin of the system of marital rights and duties (of which many more examples could be cited), one might assume that this is his underlying view of marriage and, in particular, of virtuous wifedom. It would be easy to read

7 Ibid., 11:428 (author's translation).

al-Mawardi's account of the law of marriage as value-laden and prescriptive. In this reading, marriage appears as a system of sexual subordination and a good wife appears to be one who is sexually available, physically attractive, and becomingly adorned. In this particular case, however, it is possible to juxtapose the jurist's extensive account of the law of marriage with another treatment of the marital relationship written in a very different mode.

In *Adab al-Dunya wa'l-Din* (*Good Conduct in Worldly Life and in Religion*), al-Mawardi offers a discussion of marriage embedded in his analysis of the concept of friendship (*ulfa*). *Adab al-Dunya wa'l-Din* can be characterized as a work of ethics in two distinct albeit related senses: the work deals with moral virtues and the means of their acquisition and its framework and content strongly reflect the influence of the Greek works of ethics that were so central to the Arabo-Islamic genre of *akhlaq*. Given that sexual enjoyment (*istimta'*) is the single most decisive factor in al-Mawardi's argumentation on the rights and duties of marriage in *al-Hawi al-Kabir*, it is striking to discover that he condemns it as the most morally blameworthy motivation for the contracting of a marriage in *Adab al-Dunya wa'l-Din*.

To seek a wife for the production of offspring is praiseworthy, he argues in his work on ethics, and to acquire one for the sake of household management is morally neutral.

*The third case is for the objective to be sexual enjoyment (istimta‘); this is the most blameworthy of the three cases and the one that most diminishes the manly virtues (muruwwa) because [a man who pursues this objective] is being led by his animalistic characteristics and pursuing his blameworthy lust (shahwa).*<sup>8</sup>

The only event in which al-Mawardi countenances the pursuit of marriage for sexual satisfaction is when it is used to tame and moderate one's lust, thus preserving oneself from sexual misbehavior. Al-Mawardi concedes that such a measure may be praiseworthy, although it is preferable to resort to a slave woman in this case rather than to degrade a free one. From the wife's point of view, sexual satisfaction is the most perilous motivation for marriage because passion wanes and physical desire can easily degenerate into loathing.

Despite the stark contrast between the pride of place accorded to *istimta‘* in the arguments of *al-Hawi al-Kabir* and the disdain for it in *Adab al-Dunya wa'l-Din*, I argue that the attitudes expressed in the two texts are in fact perfectly compatible. On the one hand, *al-Hawi al-Kabir* focuses on the concrete and enforceable entitlements that result from the marriage contract and consequently explores the concrete implications of the husband's central entitlement to

8 Abu'l-Hasan al-Mawardi, *Kitab Adab al-Dunya wa'l-Din (Good Conduct in Worldly Life and in Religion)*, ed. Muhammad Jasim al-Hadithi (Baghdad: Manshurat al-Majma' al-'Ilmi, 1429/2008), 1:329 (author's translation).

the sexual enjoyment of his wife in exacting (and sometimes disturbing) detail. On the other hand, the question in al-Mawardi's ethical work is not who is entitled to claim what from whom – al-Mawardi tacitly assumes that the husband is entitled to sexual enjoyment of his wife. Rather, the question is how the pursuit of sexual pleasure in marriage contributes to or detracts from the cultivation of moral virtues such as fidelity and self-control. The sharp contrast between the two suggests how little this ethical concern contributes to al-Mawardi's account of the law of marriage.

Another example of the sharp distinction between al-Mawardi's legal approach in *al-Hawi al-Kabir* and his ethical concerns in *Adab al-Dunya wa'l-Din* involves his attitude towards social hierarchies. Like all members of the Shafi'i school, he affirms that a husband must bear the costs of a servant for his wife "if she is of a status to be served (*idha kana mithluha makhduman*)."<sup>9</sup> In al-Mawardi's extensive analysis, being served by others distinguishes nobles from commoners, the wealthy from the poor, and urbanites from rustics. Al-Mawardi's deference to social conventions of rank and status is also apparent in his analysis of *kafa'a* – the requirement that a woman be married to a social peer. Here, he regards the relative status of farmers, merchants, craftsmen, and soldiers as purely subject to time- and place-bound custom and convention. As for wealth – a disputed condition

9 Al-Mawardi, *al-Hawi al-Kabir*, 9:105-106 (author's translation).

of marriage equality – he writes that it should be taken into consideration if the families of the prospective spouses are “from among the people of the cities who boast to each other and vie with each other in terms of their wealth.”<sup>10</sup> This does not apply to tribal people who, al-Mawardi notes, boast and vie on the basis of their genealogies. He strikingly supports the relevance of wealth by citing Qur’an 100:8, which states “Indeed, [the human being] is intense in his love of wealth.” Unsurprisingly, this Qur’anic statement is universally understood as a condemnation rather than an endorsement of the human preoccupation with material gain. In this context, however, al-Mawardi is interested not in what people should pursue, but in what they do in fact pursue. For his legal purposes, neither the religious legitimacy of the grounds on which people boast and vie nor the inherent ethical valence of boasting and vying are subject to significant critique. In the framework of *al-Hawi al-Kabir*, social rank – evaluated according to whatever criteria prevail in the relevant social circles – is an asset subject to legal protection, whereas the moral praiseworthiness of the social values in question is a very muted concern.

In *Adab al-Dunya wa’l-Din*, al-Mawardi evaluates the different sources of livelihood in terms of a normative distinction between occupations based on thought, which partake in the primacy of the intellect (a central axiom of the work),

10 Ibid., (author’s translation).

and those that are limited to physical exertion.<sup>11</sup> Here, he derives an absolute hierarchy of occupations directly from the hierarchy of moral capacities that underlies his ethical framework. A person intent on the cultivation of a virtuous self will not pursue work that develops only his physical and animalistic (*bahimi*) capacities any more than he will pursue a marriage that indulges the animalistic quality of lust. As for wealth, it should be pursued only to the point of fulfilling one's basic needs. This approach perhaps complements, but is nonetheless completely distinct from, al-Mawardi's legal framework, which treats social and occupational status as a matter of convention and offers individuals practical means to protect the social capital accruing from it.

This comparison between the works of al-Mawardi suggests that the legal project in *al-Hawi al-Kabir* is quite distinct from the ethical project of *Adab al-Dunya wa'l-Din*. While al-Mawardi does not perceive any provision of the Shari'a to be immoral, his approach to *fiqh* suggests that *furu' al-fiqh* is not about offering a guide to the refinement of one's moral character. Rather, the genre of *furu' al-fiqh* informs one of the obligations to which one is liable and the rights that one may claim.

11 Al-Mawardi, *Adab al-Dunya wa'l-Din*, 1:448-450.

## THE DISTINCTION BETWEEN LEGAL AND RELIGIOUS OBLIGATIONS

The relationship between law and ethics typified by al-Mawardi does not characterize pre-modern Islamic legal literature as a whole. A quite different resolution of the potential tension between legal entitlement and moral striving is reflected in the work of the Central Asian Hanafi jurist Shams al-A'imma al-Sarakhsi who died at the end of the eleventh century CE. Unlike al-Mawardi, al-Sarakhsi is known to us almost exclusively through his own works. He is not known to have served as a judge or to have been involved in government. The fact that his great legal compendium *Kitab al-Mabsut* (*The Extensive Book*) (hereinafter, *al-Mabsut*) was dictated from prison, as stated several times in the text, perhaps suggests that al-Sarakhsi got close enough to the authorities to annoy them.

I will once again focus on al-Sarakhsi's views regarding the rights and duties of marriage, particularly as they relate to domestic labor. Al-Sarakhsi's most comprehensive statement on the subject of a wife's obligation to provide service to her husband (or lack thereof) occurs in his discussion of breastfeeding. He argues that as long as the marriage remains intact,

*[the wife] is entitled to no wage for breastfeeding, but if she refuses to breastfeed she is not compelled to do that because what is incumbent upon her by virtue of the marriage [contract] is*

for her to make herself available (taslim al-nafs) to the husband for sexual enjoyment (istimta'); she is directed (tu'mar) to do all other tasks — such as sweeping the house, washing clothes, cooking and baking, and similarly breastfeeding — as a matter of religion (tadayyunan) and is not forced to perform them as a legal verdict (hukman).<sup>12</sup>

The distinction al-Sarakhsi makes between “religious” obligations and “legal” ones recurs elsewhere in *al-Mabsut*, with the “religious” designating that which is morally right in contrast to that which is judicially enforceable. In the aforementioned passage, al-Sarakhsi is introducing the ethical in one of the two senses applicable to al-Mawardi's *Adab al-Dunya wa'l-Din*. Al-Sarakhsi invokes standards of moral goodness rooted in the Qur'an and *hadith* without referencing a separate disciplinary tradition of Islamic ethical writing (although there is reason to believe that he was familiar with at least one such work from the Greek tradition).<sup>13</sup> For instance, he states that a property owner is entitled to the free use of his or her own property even in cases where this may harm a neighbor. Although the neighbor has no legal recourse against such harm, however, “refraining from ill treatment of one's neighbor is obligatory as a

12 Shams al-Din al-Sarakhsi, *Kitab al-Mabsut* (Beirut: Dar al-Ma'rifa, n.d.), 5:209 (author's translation).

13 See Michael Bonner, “*The Kitab al-Kasb* Attributed to al-Shaybani: Poverty, Surplus, and the Circulation of Wealth,” *Journal of the American Oriental Society* 121 (2001), 421.



matter of religion.”<sup>14</sup> Similarly, if a Muslim misappropriates the wealth of a non-believer in hostile non-Muslim territory, al-Sarakhsi holds that the non-believer has no legal recourse if they then both subsequently enter Muslim jurisdiction. However, he writes that the Muslim is commanded to return the goods as a matter of religion (*dinan*) because the Prophet Muhammad forbade treachery.<sup>15</sup> In these cases, a gap opens up between conduct that is legally permissible and conduct that is morally admirable, but both find a place in al-Sarakhsi’s broadly-conceived legal project.

Parallel to the distinction between “religious” and “legal” obligation, al-Sarakhsi draws a contrast between what the wife is asked to do via an advisory opinion (*fatwa*) and what she is forced to do as a matter of compulsion (*tujbar ‘alayhi kurhan*). This contrast may be surprising in light of al-Sarakhsi’s clear declaration elsewhere in *al-Mabsut* that “adjudication (*qada’*) is in reality the issuing of legal advice (*fatwa*) except that it is binding (*mulzim*).”<sup>16</sup> The incongruity disappears, however, if one understands the *fatwa* and the verdict to communicate the same information in two different performative situations. The *mufti*, whose role is to provide non-binding information about one’s obligations, might truthfully tell a wife either “You ought to do housework” or (more accurately and informatively) “You have a

14 Al-Sarakhsi, *al-Mabsut*, 15:21 (author’s translation).

15 Ibid., 10:96-97.

16 Ibid., 16:86 (author’s translation).

non-enforceable religious obligation to do housework.” The *qadi*, whose role is to reach binding legal verdicts, would simply decline to enforce a demand that she do housework. Despite the apparent contrast, each of them would be communicating a different side of the same doctrinal coin.

Although the contrast between “religious” and “legal” obligations is potentially applicable to a range of legal issues (and is thus distributed broadly, if sparsely, through *al-Mabsut*), it is most often elicited by concerns about the legitimacy of payment for specific kinds of activity. This is because Hanafi doctrine disallows contracts of hire for activities that are already morally or customarily incumbent on the prospective employee. For instance, as a Hanafi, al-Sarakhsi would find invalid contracts of hire to teach the Qur’an on the grounds that every Muslim is already subject to a divine command to share his or her scriptural knowledge. Nevertheless, no one can obtain a court verdict compelling a randomly selected fellow Muslim to provide instruction in the Qur’an. The religious obligation to teach scripture is sanctionable only in an otherworldly forum, but it has implications for law in the narrower sense (here, for the validity of a contract).

The most important arena where al-Sarakhsi envisions ethico-religious obligations of this kind is the family. For instance, he writes that a son cannot validly contract to receive wages for serving his father or mother in the home

because he is religiously obligated to do so; al-Sarakhsi carefully examines how this principle might apply to a wide range of family relationships. Such examples are based on the assumption that family relationships are governed by the broad moral teachings of the Qur'an and *hadith*, which (among other things) counsel reverence to parents. These ideals are located in a domain of virtuous personhood that is ordinarily outside of the ambit of legal enforcement, but they nevertheless have concrete legal consequences: it is because a son is religiously (*dinan*) obligated to serve his father and mother and a wife is religiously obligated to serve her husband that they cannot, according to al-Sarakhsi, legally contract to receive a wage for doing so.

This intersection between moral obligation and legal entitlement is not merely an artifact of the Hanafi doctrine that one cannot be hired for activities that one is already morally obligated to perform. Al-Sarakhsi's conviction that spouses have marital obligations beyond the enforceable provisions of the marriage contract reflects a broader Hanafi model of marriage. According to al-Sarakhsi, al-Shafi'i (the eponymous founder of the school of law to which al-Mawardi belonged) maintains that the amputation penalty for theft applies to spouses who steal each other's property based on his principle that "beyond the rights and obligations (*huquq*) of the marriage contract (*nikah*), the two [spouses] are like strangers (*ka'l-ajanib*).” In contrast, the Hanafis hold that

neither spouse can be subject to amputation for theft of the other's property and that neither's testimony can be accepted on behalf of the other. This, according to al-Sarakhsi, is because the Hanafis understand the marital relationship to entail not merely the limited rights and duties comprised in the marriage contract, but a form of unification (*ittihad*) between the spouses. Expanding on this point, he writes:

*The marriage contract was legislated [by God] for the sake of this, which is that each of them have affection for the other, favor him or her, and prefer him or her to [all] other people; God alluded to this in His statement, "He created for you mates from yourselves that you may take comfort in them, and He ordained affection and mercy between you" (Q 30:21). [Marriage] was legislated for the sake of unification in taking care of the needs of [their shared] livelihood.... It should not be said that this unification between them is [limited] specifically to the rights and obligations (huquq) of the marriage contract because the element of unification in the rights and obligations of the marriage contract is incumbent [upon the spouses] as a matter of law (shar'an), while what is beyond that is established by custom. It is manifest that each [spouse's] partiality for the other and preference for him or her over other people is the same as that between parents and children, or rather even more manifest; a person may come into conflict with his parents to satisfy his wife, and a woman may take her father's money and give it to her husband. The proof of*

*this is that each of [the spouses] considers the other's interests to be his own...*<sup>17</sup>

In this passage, al-Sarakhsi invokes the same virtuous sentiment that al-Mawardi places at the center of his analysis of marriage in his work on ethics: *ulfa*, which translates as friendship, affection, or intimacy. He cites the same Qur'anic verse that al-Mawardi uses to introduce his ethical analysis of marriage — a verse that is fundamental to any Qur'anic ethics of marriage, but does not play a central role in most concrete legal discussions of the marriage contract. Once again, al-Sarakhsi gives an ethical ideal (in this case, the affection and mercy that should prevail between spouses) a role in his substantive legal argumentation. However, it is notable that again — as in his arguments about domestic labor — al-Sarakhsi does not represent the relevant ethical disposition as itself arising from adherence to the provisions of the law. Indeed, although al-Sarakhsi makes far more vigorous and overt efforts than al-Mawardi to draw connections between Islamic law and ethics, in their *furu' al-fiqh* works both of them are ultimately interested overwhelmingly in issues such as the validity of contracts and the enforceability of claims — that is, in issues that are manifestly legal in the narrower sense. The issues of ethical self-cultivation that loom so large in recent scholarship are not evident here.

<sup>17</sup> Ibid., 16:123 (author's translation).

## HOW CAN VIRTUE BE CULTIVATED?

Do al-Mawardi and al-Sarakhsi ever focus on the actual means by which virtuous dispositions are acquired? Focusing on our textual sample of material relating to marriage and divorce (itself quite extensive albeit representing only a fraction of each of these voluminous compilations), the most obvious example occurs in the context of custody and childrearing. Al-Sarakhsi notes that, in the case of parental separation, a pre-pubescent girl should stay with her mother not only to be trained in housewifery, but because only association with women will ensure her modesty (*haya*) “and modesty is an adornment for a woman.”<sup>18</sup> In contrast, al-Sarakhsi notes, excessive association with women would lead to effeminacy in a boy (elsewhere, he states more directly that excessive modesty in a young man would itself constitute effeminacy).

Al-Mawardi also notes that it is preferable for an unmarried girl who has reached majority to live with her mother “because women know the customs of women better than men.... and also because of their common nature and the similarity in their moral characteristics (*tashabuh al-akh-laq*).”<sup>19</sup> These fleeting comments imply that virtues are acquired mimetically through personal association. The rarity and minimalism of these allusions to moral formation within the family reinforces the impression that al-Mawardi

18 Ibid., 5:6; 5:195 (author’s translation).

19 Al-Mawardi, *al-Hawi al-Kabir*, 11:511 (author’s translation).

and al-Sarakhsi envision this process going on, so to speak, offstage from the central drama of their own legal projects.

The practical implications of the assumption that women ought properly to be characterized by modesty (*haya'*) are certainly relevant to their legal works. Like other classical jurists, for instance, they both unravel the legal implications of the assumption that virgin girls will be too bashful to express their preferences regarding marriage aloud. How young women get that way (and how young men avoid getting that way) is something only briefly alluded to in their discussions of custody and child rearing.

#### THE TRANSITION TO THE MODERN PERIOD

What, then, of the transition to the modern period? How does the relationship – indeed, the gap – between law and ethics change from the pre-modern period? Al-Mawardi and al-Sarakhsi are but two examples suggesting the diversity in approaches to the relationship between law and ethics among classical Muslim jurists. One could readily add further examples demonstrating that these two scholars represent only two points on a rather broad spectrum. Efforts at a complete synthesis or fusion of the two discourses were, however, both relatively rare and explicitly framed as critiques of existing disciplinary and institutional divisions. Abu Hamid al-Ghazali (d. 1111) famously achieves an extensive synthesis between legal rules and the project of ethical self-cultivation in his *Ihya' 'Ulum al-Din* (*Revival of*

*the Religious Sciences*) framing the discussion of marriage in terms of its conduciveness to moral self-improvement.<sup>20</sup> He thus suggests that marriage is useful for the management of one's sexual urges, that a wife's provision of housework frees up the male aspirant for ethico-religious striving, and that cheerful endurance of her ill-temper usefully chastens his spirit.<sup>21</sup> However, al-Ghazali's project was explicitly reformative and polemical; it does not simply synthesize existing school and disciplinary structures, but challenges them.<sup>22</sup> Al-Ghazali's introduction to *Ihya' 'Ulum al-Din* disparagingly frames the existing institutionalized discipline of *fiqh* as a worldly endeavor aimed at protecting people from each other's depredations at the level of temporal governance.<sup>23</sup> Al-Ghazali would most likely have included the *fiqh* works of al-Mawardi and al-Sarakhsi within this critique. But my contention in this lecture is that the distinction between legal and ethical obligations in the works of al-Mawardi and al-Sarakhsi was much more typical of mainstream pre-modern scholarly practice than al-Ghazali's synthesis of law and ethics.

20 Abu Hamid al-Ghazali, *Ihya' 'Ulum al-Din (Revival of the Religious Sciences)* (Beirut: Dar al-Fikr, 1414/1994), 2:30-36.

21 Ibid., 2:30-36.

22 See Kenneth Garden, *The First Islamic Reviver: Abu Hamid Al-Ghazali and His Revival of the Religious Sciences* (Oxford: Oxford University Press 2014).

23 Al-Ghazali, *Ihya'*, 1:28-29.



This different understanding of the relationship between Islamic law and ethics in the pre-modern period raises important questions about the transition to the modern period and the relationship between Islamic law and ethics today. It is impossible to make valid generalizations about the relationship between modern Islamic law and ethics simply because modern Islamic legal discourses disperse into so many different venues and forms – although, given the number of different genres and venues in which Shari’a norms were disseminated in the pre-modern period (including multifarious forms of preaching and teaching as well as various forms of state enforcement), it might be more accurate to say that Shari’a discourses in the modern period were re-distributed from one complex configuration into another. The personal status codes of many Muslim-majority nation states, the religious guidance purveyed by official and self-appointed muftis, and the quasi-therapeutic advice often dispensed by online *fatwa* services are among the many transformations of Islamic legal discourses in the modern world. Nonetheless, I would argue that one discernible and little-noticed phenomenon is that in some cases ethical themes have taken on a distinctly more prominent role in legal argumentation since the beginning of the twentieth century. The example of *haya*’ – translatable in this specific

context as modesty—is a case in point.<sup>24</sup> As we have seen, al-Mawardi and al-Sarakhsi reference *haya'* as a gendered virtue that may develop in the parental home and acknowledge it in their legal argumentation as a factor that must be taken into account in certain contexts (e.g., the consent to marriage of a presumptively bashful virgin girl). As far as I have been able to determine, however, al-Mawardi and al-Sarakhsi do not have a significant interest in the ways that specific provisions of the Shari'a might serve to cultivate this virtue beyond a largely implicit assumption that it is promoted by gender segregation.

In contrast, the cultivation of *haya'* becomes a central trope of legal discussions of veiling in the modern period. While I would not venture a guess as to the origins of this motif, it has certainly been in circulation since the turn of the twentieth century. For instance, at the dawn of the twentieth century, the Egyptian judge 'Abd Allah Jamal al-Din Afendi frames his rebuttal of Qasim Amin's famous argument against veiling in terms of the ethical formation of the child in the Egyptian Muslim household. Jamal al-Din Afendi argues that the child's ethical formation depends on the moral character of the mother and the stability of the parents' marriage, both of which can be assured only through

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24 I have discussed the broader range of meanings covered by this term in Marion Holmes Katz, "*Haya'* (Shame) as an Affective Disposition in Islamic Legal Thought," *Journal of Law, Religion and State* 3 (2014), 139-169.

female modesty, which in turn is fostered by the veil.<sup>25</sup> In this case, nationalist concerns about the production of virtuous citizens motivate a new interest in the connection between a previously uncontroversial legal norm and the cultivation of proper ethical dispositions.

Closer to our own time, the prominent Saudi jurist Muhammad ibn Salih al-‘Uthaymin (d. 2001) opens a short essay on the legal status of veiling with a preamble establishing that God sent the Prophet Muhammad for the ethical improvement of the believers, including the cultivation of female modesty. Al-‘Uthaymin’s framing of the issue in terms of the cultivation of the ethical virtue of *haya*’ is integral to his legal argumentation. Two of the four arguments he presents under the rubric of *qiyas* (analogical reasoning) revolve around the contention that the exposure of women’s faces to unrelated men will erode their modesty. Significantly, he also links the virtue of modesty with what he sees as the morally exemplary status of Saudi practice, which is being eroded.<sup>26</sup>

25 See al-Sayyid ‘Abd Allah Jamal al-Din Afandi, *Hijab al-Mar’a: al-‘Ifa wa’l-Amana wa’l-Haya*’ (*The Woman’s Veil: Chastity, Dignity, and Modesty*) (Cairo: Maktabat al-Turath al-Islami, 1984). I thank Peri Bearman for making this text available to me. For its context within the controversy over the works of Qasim Amin, see Muhammad Ahmad Isma’il al-Muqaddam, *‘Awdat al-Hijab (The Return of the Veil)*, (Riyadh: Dar Tayba li’l-Nashr wa’l-Tawzi’, 2006), 1:69.

26 Muhammad ibn Salih al-‘Uthaymin, “Risalat al-Hijab” (“The Message of the Veil”), in *al-Mar’a al-Muslima: Ahkam Fiqhiya*

What factors might have moved the cultivation of virtue into the center of some modern discussions of the legal status of veiling? On the one hand, these examples suggest how invocation of the ethical value of Shari'a norms serves the needs of modern Muslim jurists who felt a new need to vindicate the value and goodness of the Shari'a rather than simply to explicate its content. In the particular case of modesty, a virtue with a very specific religious and cultural valence — seen in early twentieth-century Egypt as a shibboleth with respect to Western culture and in late twentieth-century Saudi Arabia as a mark of distinction from more liberal areas of the Muslim world — displays Islamic law not only as ethically good, but as constitutive of a distinctive ethical identity. Despite the fact that al-'Uthaymin wrote in a context where veiling can be subject to public enforcement and uncoded *fiqh* plays a uniquely prominent role in the legal order, there is also a sense in which these modern examples re-imagine Shari'a discourse as overwhelmingly addressed to the conscience of the individual believer. The readerships of both of these widely disseminated (and broadly accessible) opinions are very different from the specialist audiences addressed by al-Mawardi and al-Sarakhsi.

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*hawla al-Hijab wa'l-Dima' al-Tabi'iya wa-Zakat al-Huli (The Muslim Woman: Jurisprudential Rules regarding the Veil, Natural Bleeds, and Jewelry-Related Alms-Giving)* (Riyadh: Dar Tayba, 1986), 7-36.

The point here is not to argue that it is modern, and not classical, Islamic discourses that are uniformly characterized by an intimate relationship between law and ethics. Rather, it is to complicate the received narrative about Islamic law and ethics and draw attention to the wide range of relationships between these two fields before and after the advent of modernity. Only after acknowledging and analyzing this diversity can we begin to understand the pre-modern past of Islamic legal thought not simply as a contrasting foil for modernity, but as a rich body of examples of continuity as well as change.

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