Māwardī's Legal Thinking

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Abstract

Abū al-Ḥasan ʿAlī ibn Muḥammad ibn Ḥabīb al-Māwardī was a Muslim polymath, born in Basra, 364/974, died in Baghdad, 30 Rabīʿ I 450/27 May 1058. He is most famous today for al-Aḥkām al-sulṭānīyah*, a review of the law as it affects or requires the action of the caliph. His extensive handbook of Shāfiʿi law,* al-Ḥāwī al-kabīr *(of which* al-Aḥkām al-sulṭānīyah *is effectively an abstract), was much quoted in succeeding centuries. He also wrote a major Qur'an commentary and various shorter works, some in the Perso-Hellenistic wisdom tradition. Most of this study is devoted to three sample passages from the* Ḥāwī *in translation with commentary: on the ritual law, particularly the salutation at the close of the ritual prayer; on the law of* waqf *(pious foundations), particularly whether a* waqf *property is subject to division among heirs; and, finally, on penal law, particularly whether the stoning and flogging penalties for adultery are to be combined. They are sometimes opportunistic, seizing on any argument at hand, whether or not it is foreseen in the literature of jurisprudence (*uṣūl al-fiqh*). They are sometimes indeterminate, leaving questions of what to do unanswered. They sometimes refute obsolete positions, sometimes seem to expect to convert no one. They suggest that Māwardī's purpose in writing was not mainly practical, to persuade people to execute the rules of the Shāfiʿi school. Equally important, they suggest, were Māwardī's religious vision of a faithful community (distinguished more by its theory and ritual practice than, say, particular patterns of property transfer) and the ludic pleasure of argument within the learned élite for whom he was writing.*

Abū al-Ḥasan ʿAlī ibn Muḥammad ibn Ḥabīb al-Māwardī was a Muslim polymath, born in Basra, 364/974, and died in Baghdad, 30 Rabīʿ I 450/27 May 1058.[1] His extensive handbook of Shāfiʿi law, *al-Ḥāwī al-kabīr*, was much quoted in

1. For pre-modern biographies, *v.* al-Dhahabī, *Tārīkh al-islām*, ed. ʿUmar ʿAbd al-Salām Tadmurī, 52 vols (Beirut: Dār al-Kitāb al-ʿArabī, 1407-21/1987-2000), 30 (441-460 H.): 253-6 with further references. Among modern biographies in Arabic, I have been able to consult Muḥammad Sulaymān Dāwūd and Fuʾād ʿAbd al-Munʿim Aḥmad, *al-Imām Abū al-Ḥasan al-Māwardī* (Alexandria: Muʾassasat Shabāb al-Jāmiʿah, 1978), which collects many useful facts but is not always reliable in detail. For example, it confuses Māwardī's title *aqḍā al-quḍāh* with the post of *qāḍī al-quḍāh* (17). For surveys of Māwardī's oeuvre, *v.* also Fuʾād ʿAbd al-Munʿim Aḥmad, introduction to Māwardī, *K. Durar al-sulūk fī siyāsat al-mulūk* (Riyadh: Dār al-Waṭan, 1417/1997), and Khālik ʿAbd al-Raḥmān al-ʿAkk, introduction to Māwardī, *Aʿlām al-nubūwah* (Beirut: Dār al-Nafāʾis, 1414/1994). In European languages, *v.* above all Carl Brockelmann, *Geschichte der arabischen Litteratur*, 2nd edn, 2 vols (Leiden: E. J. Brill, 1943-89), 1:483 (386); Supplementband, 3 vols (Leiden: E. J. Brill, 1937-41), 1:668; George Makdisi, *Ibn ʿAqīl et la résurgence de l'Islam traditionaliste au XIe siécle (Ve siécle de l'Hégire)* (Damascus: Institut Français de Damas, 1963), 221-3; and Henri Laoust, "La pensée et l'action politiques d'al-Māwardī," *Revue des études islamiques* 36 (1968): 11-92.

succeeding centuries, and most of this article is devoted to three sample passages from it in translation with commentary. I have elsewhere reviewed his training in Shāfiʿi law and his position within the school.[2] In modern times, Māwardī has become most famous for *al-Aḥkām al-sulṭānīyah*.[3] The ʿAbbāsid caliphs of his own time were politically weak, although slowly regaining power as part of the Sunni Revival.[4] Almost their only means of influencing politics were (1) refusing to confirm appointments made and titles claimed by the warlords and (2) threatening to call in other warlords from further afield, such as the Ghaznavids. Accordingly, Māwardī stresses that all authority flows by delegation from the caliph. He appoints military commanders to maintain order, qadis to maintain justice.

There is a close verbal parallel to Māwardī's *Aḥkām* under the same title by the Ḥanbali qadi Abū Yaʿlá ibn al-Farrā' (d. Baghdad, 458/1065)—so close that either one must be a rewriting of the other or each must be a rewriting of some unknown original.[5] Most scholars who have discussed the two have refused to offer any opinion as to which was the original, which a rewriting: Muḥammad Ḥāmid al-Fiqī, the first editor of Abū Yaʿlá's version; Henri Laoust, chronicler of Māwardī's political career; Donald Little, who made the first systematic comparison; and Nimrod Hurvitz, notable especially for correctly observing that these are principally works of Islamic law, not political theory.[6] On the other hand, Muḥammad ʿAbd al-Qādir Abū Fāris published a book-length study of Abū Yaʿlá's version

2. Christopher Melchert, "Māwardī, Abū Yaʿlā, and the Sunni revival," *Prosperity and stagnation: some cultural and social aspects of the Abbasid period (750-1258)*, ed. Krzystof Kościelniak, Orientalia Christiana Cracoviensia, Monographiae 1 (Cracow: UNUM, 2010), 37-61, esp. 41-3.

3. Available in numerous editions—my references in what follows are to Māwardī, *al-Aḥkām al-sulṭānīyah*, ed. ʿIṣām Fāris al-Ḥarastānī and Muḥammad Ibrāhīm al-Zughlī (Beirut: al-Maktab al-Islāmī, 1416/1996). I have examined two English translations, both of which seem adequate: *The laws of Islamic governance*, trans. Asadullah Yate (London: Ta-Ha Publishers, 1996), and *The ordinances of government*, trans. Wafaa H. Wahba (Reading, UK: Garnet, 1996). The classic exposé is H. A. R. Gibb, "Al-Mawardi's theory of the caliphate," *Studies on the civilization of Islam*, ed. Stanford J. Shaw and William R. Polk (Princeton: Univ. Press, 1962), 151-65 (originally in *Islamic culture* [Hyderabad] 11 [1937]: 291-302). *V*. also Mohammed Arkoun, "L'éthique musulmane d'après Māwardī," *Revue des études islamiques* 31 (1963): 1-31; Donald Little, "A new look at al-Aḥkām al-sulṭāniyya," *Muslim world* 64 (1974): 1-18; Hanna Mikhail, *Politics and revelation: Māwardī and after* (Edinburgh: University Press, 1995); Eltigani Abdulqadir Hamid, "Al-Mawardi's theory of state: some ignored dimensions," *American journal of Islamic social sciences* 18/4 (2001): 1-18; Eric J. Hanne, "Abbasid politics and the classical theory of the caliphate," *Writers and rulers*, ed. Beatrice Gruendler and Louise Marlow, Literaturen im Kontext: Arabisch-Persisch-Türkisch 16 (Wiesbaden: Reichert, 2004), 49-71; and Nimrod Hurvitz, *Competing texts: the relationship between al-Mawardi's and Abu Yaʿla's* al-Ahkam al-sultaniyya, Islamic Legal Studies Program, Harvard Law School, Occasional publications 8 (October 2007) (Cambridge, Mass.: Islamic Legal Studies Program, Harvard Law School, 2007). For surveys of Māwardī's oeuvre, see Dāwūd and Aḥmad, *al-Imām* (cited above, n. 1), also these: Fuʾād ʿAbd al-Munʿim Aḥmad, introduction to Māwardī, *K. Durar al-sulūk fī siyāsat al-mulūk* (Riyadh: Dār al-Waṭan, 1417/1997); Khālik ʿAbd al-Raḥmān al-ʿAkk, introduction to Māwardī, *Aʿlām al-nubūwah* (Beirut: Dār al-Nafāʾis, 1414/1994).

4. *V*. Makdisi, *Ibn ʿAqīl*, chaps. 2, 4; idem, "The Sunnī Revival," *Islamic civilization 950-1150*, ed. D. S. Richards, Papers on Islamic History 3 (Oxford: Cassirer, 1973), 155-68; Glassen, *Der mittlere Weg*, chap. 2.

5. Abū Yaʿlā ibn al-Farrāʾ, *al-Aḥkām al-sulṭānīyah*, ed. Muḥammad Ḥāmid al-Fiqī (Cairo: Maktabat Muṣṭafá al-Bābī al-Ḥalabī, n.d.; 2nd edn., 1966; 2nd edn. repr. Beirut: Dār al-Kutub al-ʿIlmīyah, 1403/1983).

6. Fiqī, introduction to Abū Yaʿlá, *Aḥkām*, 18; Laoust, "Pensée," 15; Little, "New Look"; Hurvitz, *Competing texts*.

that includes an extended argument for the priority of Māwardī's version.[7] I myself, to the contrary, have argued that Abū Yaʿlá's Ḥanbali version is the earlier, so that Māwardī's version describing Ḥanafi, Māliki, and Shāfiʿi positions must have been written as a supplement to it.[8] I will not rehearse the argument here. Besides their reviewing the rules of different schools, the outstanding difference between the two seems to be what Donald Little stressed, namely that Māwardī seems less reluctant than Abū Yaʿlá to countenance the removal of a wicked caliph.[9] With some other details, the difference suggests that Māwardī stood a little further back from the caliph.

Before the 19th century, Māwardī was equally famous for *al-Ḥāwī al-kabīr*, of which only recently has a full text been published.[10] Formally a commentary on the *Mukhtaṣar* of al-Muzanī (d. Old Cairo, 264/877?), it rehearses and defends the rules of Shāfiʿi law at great length. It once refers to the hypothetical case of someone who has resolved to fast the year 440 (1048-9), suggesting that Māwardī was composing it around then; that is, after his retirement from politics in 437/1045-6.[11] In al-Nawawī's highly detailed survey of Shāfiʿī law, *al-Majmūʿ*, Māwardī is the fourth most often cited authority, behind Imām al-Ḥaramayn (d. Bushtaniqān, 478/1085) but ahead of al-Ghazālī (d. Tus, 505/1111).[12] There seems to have been also a smaller version, *al-Ḥāwī al-ṣaghīr*, for it was the subject of a commentary by Kamāl al-Dīn Aḥmad ibn ʿUmar (d. Cairo, 758/1357).[13]

Also now in print is Māwardī's commentary on the Qur'an, *al-Nukat wa-al-ʿuyūn*.[14] It treats the entire Qur'an in order, quoting a few verses at a time, then short glosses mainly from exegetes of the eighth century C.E., occasionally also textual variants and examples of usage from poetry. In line with the Sunni tradition of Qur'an commentary, it normally presents a range of possible interpretations without asserting that any one is the best.[15] It also was influential in the later tradition; for example, the famous commentator al-Qurṭubī

7. Muḥammad ʿAbd al-Qādir Abū Fāris, *al-Qāḍī Abū Yaʿlá al-Farrāʾ wa-kitābuhu* al-Aḥkām al-sulṭānīyah (Beirut: Muʾassasat al-Risālah, 1403/1983), 516-47.

8. Melchert, "Māwardī," 53-9.

9. Little, "New Look," 13-14.

10. Al-Māwardī, *al-Ḥāwī al-kabīr*, ed. Maḥmūd Maṭrajī, et al., 24 vols (Beirut: Dār al-Fikr, 1414/1994); also ed. ʿAlī Muḥammad Muʿawwaḍ and ʿĀdil Aḥmad ʿAbd al-Mawjūd, 20 vols (Beirut: Dār al-Kutub al-ʿIlmīyah, 1414/1994). Henceforth, references to the latter edition will be in *italics*. Neither edition is particularly good.

11. Māwardī, *Ḥāwī* 20:36 *15:491*.

12. Al-Nawawī, *al-Majmūʿ*, 18 vols., ed. Zakarīyāʾ ʿAlī Yūsuf (Cairo: Maṭbaʿat al-ʿĀṣimah or Maṭbaʿat al-Imām, 1966-9). Vols. 1-9 are by al-Nawawī, the rest by various continuators. On the most-cited names in the Shāfiʿi tradition, *v.* Christopher Melchert, "Abū Isḥāq al-Šīrāzī and Ibn al-Ṣabbāġ and the advantages of teaching at a *madrasa*," *Annales Islamologiques*, no 45 (2011), 141-66, at 155-6.

13. Subkī, *Ṭabaqāt* 9:19. Kamāl al-Dīn also apparently abridged *al-Ḥāwī al-kabīr* and combined it with his abridgement of another Shāfiʿi handbook.

14. Al-Māwardī, *K. al-Nukat wa-al-ʿuyūn*, ed. al-Sayyid ibn ʿAbd al-Maqṣūd ibn ʿAbd al-Raḥīm, 6 vols (Beirut: Dār al-Kutub al-ʿIlmīyah and Muʾassasat al-Kutub al-Thaqāfīyah, n.d.). I have not seen the earlier edition of Khiḍr Muḥammad Khiḍr, 4 vols (Kuwait: Wizārat al-Awqāf, 1982).

15. On the tradition, *v.* Norman Calder, "*Tafsīr* from Ṭabarī to Ibn Kathīr," *Approaches to the Qurʾān*, ed. G. R. Hawting and Abdul-Kader A. Shareef, Routledge/SOAS Series on contemporary politics and culture in the Middle East (London: Routledge, 1993), 101-40.

(d. 671/1273?) cites Māwardī more often than any other earlier commentator except al-Ṭabarī (d. 310/923).[16] Concerning the Qur'an, Māwardī also wrote an *Amthāl al-Qur'ān*, of which a manuscript is extant in Turkey, and a lost *Mukhtaṣar ʿulūm al-Qur'ān* mentioned in the introduction to the *Amthāl*.[17] *Al-Nukat* is where pre-modern Muslim critics complained of Māwardī's advocating Muʿtazili theological views, such as rejection of predestination.[18] However, pre-modern critics exculpated Māwardī of advocating Muʿtazilī views systematically. I know of no Muʿtazili biographical dictionary that lays claim to Māwardī, although the chief of the Baghdadi Shāfiʿi school in his time, Abū al-Ṭayyib al-Ṭabarī (d. 450/1058), may appear in one.[19]

Finally, there are also in print several shorter works on law, religion, politics, and *adab*. To begin with law, *al-Iqnāʿ* was written for the caliph al-Qādir (*r.* 381-422/991-1031), who requested exposés of the ordinances of each of the four Sunni schools of law. The famous *Mukhtaṣar* of al-Qudūrī (d. Baghdad, 428/1037) is its Ḥanafī counterpart, while ʿAbd al-Wahhāb al-Thaʿlabī (d. Cairo, 422/1031) prepared an epitome of Māliki law, probably *al-Talqīn*.[20] *Aʿlām al-nubūwah* deals with the signs of prophecy.[21] In part, this entails *kalām* questions such as the differences between prophetic miracles and magic and how to tell false prophets from true. Among the signs that Islam is the best religion is its moderation between the severity of the Christians and the laxity of the Jews; between Christian rejection of the world and Jewish embrace of it—not an original idea with Māwardī but apparently typical of his inclination toward the middle.[22]

Qawānīn al-wizārah is another work on government.[23] Māwardī describes it at the beginning as a response to someone's request, addressing an unnamed vizier in the

16. According to al-Qurṭubī, *al-Jāmiʿ li-aḥkām al-Qurʾān*, ed. Muḥammad Ibrāhīm al-Ḥifnāwī & Maḥmūd Ḥāmid ʿUthmān, 22 vols (Cairo: Dār al-Ḥadīth, 1414/1994), indexes by Sayyid Ibrāhīm Ṣādiq & Muḥammad ʿAlī ʿAbd al-Qādir, al-Ṭabarī is cited 179 times, al-Māwardī 154, Abū Naṣr al-Qushayrī (d. 514/1120) 148, al-Thaʿlabī (d. 427/1035) 80.

17. Fuʾād ʿAbd al-Munʿim Aḥmad, introduction to al-Māwardī, *K. Durar al-sulūk fī siyāsat al-mulūk* (Riyadh: Dār al-Waṭan, 1417/1997), 37.

18. E.g., Ibn al-Ṣalāḥ, *Ṭabaqāt al-fuqahāʾ al-shāfiʿiyah*, ed. al-Nawawī, al-Mizzī, and Muḥyī al-Dīn ʿAlī Najīb, 2 vols (Beirut: Dār al-Bashāʾir al-Islāmīyah, 1413/1992), 2:638-40, 642, followed by Subkī, *Ṭabaqāt* 5:270.

19. On Māwardī's Muʿtazilism, *v.* further Melchert, "Māwardī," 46-7, but the question deserves a fuller study. On Abū al-Ṭayyib al-Ṭabarī, *v.* Bayhaqī (al-Ḥākim al-Jushamī or Jishumī), *Sharḥ ʿuyūn al-masāʾil*, in Fuʾād Sayyid, ed., *Faḍl al-iʿtizāl wa-ṭabaqāt al-muʿtazilah* (Tunis: al-Dār al-Tūnisīyah lil-Nashr, 1393/1974), 385.

20. Al-Māwardī, *al-Iqnāʿ fī al-fiqh al-shāfiʿī*, ed. Khiḍr Muḥammad Khiḍr (Kuwait: Maktabat Dār al-ʿUrūbah, 1402/1982). For the story of the commissioning, *v.* Yāqūt, ed. Margoliouth, 5:408 = ed. ʿAbbās, 5:1956. Yāqūt states that he does not know who wrote an epitome of Ḥanbali law on this occasion, but my guess is that it was Abū Yaʿlá, probably *al-Mujarrad*.

21. Al-Māwardī, *Aʿlām al-nubūwah*, several editions, of which the one with the most helpful notes is that of Khālik ʿAbd al-Raḥmān al-ʿAkk (Beirut: Dār al-Nafāʾis, 1414/1994).

22. Māwardī, *Aʿlām*, ed. ʿAkk, 331-2.

23. Māwardī, *Adab al-wazīr*, al-Rasāʾil al-nādirah 5 (Cairo: Maktabat al-Khānjī, 1348/1929); *al-Wizārah (adab al-wazīr)*, ed. Muḥammad Sulaymān Dāwud and Fuʾād ʿAbd al-Munʿim Aḥmad (Alexandria: Dār al-Jāmiʿāt al-Miṣrīyah, 1396/1976); *Qawānīn al-wizārah wa-siyāsat al-mulk*, ed. Riḍwān al-Sayyid (Beirut: Dār al-Ṭalīʿah, 1979).

second person.[24] The vizier in question is told of claims on him from both *sulṭān* and *malik*, likewise of claims he has on them, presumably indicating the caliph and the leading Buwayhid warlord, respectively.[25] It does not always agree exactly with *al-Aḥkām al-sulṭānīyah*. For example, a controversial point in the *Aḥkām* is Māwardī's assertion that *wazīr al-tanfīdh*, the government minister who carries out orders without ever originating any himself, may be a *dhimmī* (tribute-paying non-Muslim). *Al-Wizārah* mentions *wazīr al-tanfīdh* but says nothing of his religion.[26] One might infer from such differences the evolution of Māwardī's thinking, on the assumption that *al-Wizārah* is an early work and *al-Aḥkām* a late; however, it would be difficult to distinguish between differences occasioned by the evolution of his thought and others occasioned by genre and limits on length, and I attempt no systematic comparison here.

Māwardī is also associated with several other texts in the tradition of 'mirrors for princes': (1) *al-Tuḥfah al-mulūkīyah fī al-ādāb al-siyāsīyah*[27]; (2) *Naṣīḥat al-mulūk*[28]; (3) *Tashīl al-naẓar wa-taʿjīl al-ẓafar*[29]; and (4) *Durar al-sulūk fī siyāsat al-mulūk*.[30] The first two are not mentioned by pre-modern biographers, and their attribution to Māwardī has now been discredited.[31] The third is attributed to Māwardī by Yāqūt under a slightly different title (*Taʿjīl al-naṣr wa-tashīl al-ẓafar*). It draws heavily on the Persian and Hellenistic traditions as well as on the Arabo-Islamic.[32] The fourth seems to be one of his earliest works, from about 393/1002-3.[33] Dedicated to the Buwayhid prince Bahā' al-Dawlah, it too draws for its quotations on both the Persian and Islamic imperial traditions (Anūshirvān and Ardashīr on the Persian side, various Umayyad and ʿAbbāsid caliphs and their governors on the Islamic), besides various unnamed *ḥukamā'*, some evidently in the Hellenistic tradition.[34] An unpublished manuscript in the Escorial titled *al-Faḍā'il*

24. Māwardī, *Wizārah*, 47.

25. Māwardī, *Wizārah*, 101-5 (*sulṭān*), 139-42 (*malik*).

26. Māwardī, *Wizārah*, 126-7; idem, *Aḥkām*, 46-7. For indignation on the part of later Shāfiʿi jurisprudents, *v*. Dāwūd and ʿAbd al-Munʿim, *Imām*, 109-11. Abū Yaʿlá attributes the opinion that *wazīr al-tanfīdh* may be a *dhimmī* to the Ḥanbali al-Khiraqī (d. Damascus, 334/945-6), *Aḥkām*, 32.

27. For the edition of Fuʾād ʿAbd al-Munʿim, *v*. n. 17.

28. I have consulted *Naṣīḥat al-mulūk*, ed. Muḥammad Jāsim al-Ḥabashī (Baghdad: Dār al-Shuʾūn al-Thaqāfīyah al-ʿĀmmah, n.d.). I have heard of but not seen editions by Khiḍr Muḥammad Khiḍr (Kuwait, 1983) and Fuʾād ʿAbd al-Munʿim Aḥmad (Alexandria, 1988).

29. Al-Māwardī, *Tashīl al-naẓar wa-taʿjīl al-ẓafar*, ed. Muḥyī Hilāl al-Sarḥān, sup. Ḥasan al-Sāʿātī (Beirut: Dār al-Nahḍah al-ʿArabīyah, 1401/1981; ed. Riḍwān al-Sayyid, Silsilat nuṣūṣ al-fikr al-siyāsī al-ʿarabī al-Islāmī 1 (Beirut: Dār al-ʿUlūm al-ʿArabīyah & al-Markaz al-Islāmī lil-Buḥūth, 1987).

30. For Aḥmad's edition, *v*. n. 1.

31. Fuʾād ʿAbd al-Munʿim, introduction to Māwardī (attrib.), *Tuḥfah*, 38; idem, introduction to his edition of the *Naṣīḥah*; *v*. most recently Louise Marlow, "Difference and encyclopaedism in tenth-century Eastern Iran," *Jerusalem studies in Arabic and Islam*, no 40 (2013), 195-244, esp. 197-9 on the authorship of *Naṣīḥat al-mulūk*.

32. *V*. n. 34 for one Hellenistic example.

33. On the date, *v*. Aḥmad, introduction, 36-40.

34. E.g., *Durar*, 112, attributed by Māwardī to *manthūr al-ḥikam*, elsewhere to Hermes Trismegistus.

and attributed to Māwardī is suspected of being a section of either *Durar al-sulūk* or *Adab al-dunyā wa-al-dīn*.[35] Likewise uncertain is the attribution to Māwardī of two books concerning the *ḥisbah* (enforcement of public morals), of which manuscripts are found in Cairo and Jerusalem.[36] Kātib Çelebī attributes to him a *musnad* collecting hadith related by Abū Ḥanīfah, incorporated into a synthesis of fifteen such *masānīd* by Muḥammad ibn Maḥmūd al-Khwārizmī (d. 665/1266-7?).[37] However, I suspect this is a mistake, for al-Khwārizmī himself apparently identifies the *musnad* in question as the work of someone else entirely.[38]

As for *adab*, *Adab al-dunyā wa-al-dīn* comprises three sections: *adab al-dīn*, on Islamic law, *adab al-dunyā*, on the wisdom tradition, and *adab al-nafs* on the cultivation of personal virtues such as not to be loquacious or envious. The introduction is notable for its argument that reason and revelation (*ʿaql* and *sharʿ*) are complementary.[39] The section on Islamic law supplies rational justifications for the rules; for example, it is the earliest work known to me that presents the Ramaḍān fast as training in sympathy and forbearance toward the poor, who are hungry most of the time.[40] The same attention to balancing reason and revelation that shows up in *Adab al-dunyā wa-al-dīn* is also evident in *al-Ḥāwī al-kabīr*.[41]

Al-Amthāl wa-al-ḥikam, a smaller work, comprises ten sections.[42] Each starts with advice from the Prophet. Then come proverbs and poetry. Most of the proverbs are the sayings of "wise men (*ḥukamāʾ*)," here meaning eighth-century renunciants (*zuhhād*, *nussāk*). However, some are from the Persian tradition, like much of the middle section of *Adab al-dunyā wa-al-dīn*, among other works. A substantial work on Arabic grammar is apparently lost.[43] I am inclined to suppose that Māwardī put away the Persian and Hellenistic traditions as the Sunni revival progressed and he transferred his principal loyalties from the Buwayhids to the caliph. In this way, the development of his oeuvre

35. Aḥmad, introduction to *Durar al-sulūk*, 30.

36. Dāwūd and ʿAbd al-Munʿim, *Imām*, 114.

37. Kātib Çelebī, *Kashf al-ẓunūn*, ed. Şerefettin Yaltkaya and Rifat Bilge, 2 vols (Istanbul: Maarif Matbaası, 1941, 1943), 2:1681.

38. Al-Khwārizmī, *Jāmiʿ masānīd al-imām al-aʿẓam*, 2 vols (Hyderabad: Majlis Dāʾirat al-Maʿārif al-Niẓāmīyah, 1332), 1:5. The fifteenth work on this list is attributed to an Abū al-Qāsim ʿAbd Allāh ibn Muḥammad ibn Abī al-ʿAwwām al-Sughdī, so far untraced by me.

39. Al-Māwardī, *Adab al-dunyā wa-al-dīn*, ed. Muḥammad Karīm Rājiḥ (Beirut: Dār Iqraʾ, 1401/1981), 7. I have heard of but not seen a translation into English: *The discipline of religious and worldly matters*, trans. Thoreya Mahdi Allam, rev. Magdi Wahba and Abderrafi Benhallam ([Morocco]: ISESCO, 1995).

40. Māwardī, *Adab al-dunyā*, 102.

41. For a longer discussion of *Adab al-dunyā wa-al-dīn*, *v.* Jean-Claude Vadet, *Les idées morales dans l'Islam*, Islamiques (Paris: Presses Universitaires de France, 1995), 48-54. Vadet likewise stresses reason and revelation, finding in Māwardī a subtle synthesis of the Islamic and Persian traditions. *V.* also Arkoun, "L'éthique musulmane," finally stressing Māwardī's synthesis of worldly wisdom and religious.

42. I have examined two editions, both by Fuʾād ʿAbd al-Munʿim Aḥmad: Doha: Dār al-Ḥaramayn, 1403/1983 and Riyadh: Dār al-Waṭan, 1420/1999. The former is expressly based on only two MSS. The latter describes three additional MSS but offers no further corrections based on them.

43. Listed by Yāqūt, *Irshād*, ed. Margoliouth, 5:408 = ed. ʿAbbās, 5:1956.

illustrates the waning of what has been called the Renaissance of Islam and the waxing of the new, thoroughgoing re-emphasis on Arabic and Islam associated especially with the Saljuqs to come.[44]

Legal Thought

The section on qadis in *al-Ḥāwī* includes one of the earliest extant expositions of *uṣūl al-fiqh*, Islamic jurisprudence strictly speaking.[45] (It apparently appears in this unusual place because, as a Shāfiʿi, Māwardī thought the qadi ought to be familiar with *uṣūl al-fiqh* as well as *furūʿ*, the practical rules.[46] However, Devin Stewart has made out that some of the earliest expositions of *uṣūl al-fiqh* were in books about judgeship, so the *Ḥāwī* may represent the end of the primitive tradition on this point.[47]) Hitherto, students of Islamic legal thought have more often approached it through *uṣūl al-fiqh* than collections of rules, and it is certainly to be hoped that one of them soon brings Māwardī's exposition into the discussion.[48] What follows are translations with comments of three passages from the *Ḥāwī* concerning practical rules. Like other extensive presentations of the law (*mabsūṭāt*, sometimes *muṭawwalāt*), the *Ḥāwī* offers detailed justifications of the rules of one school (for Māwardī of course the Shāfiʿi), implying a great deal of legal theory.

Example 1: whether the salutation is necessary at the end of the prayer

Here is Māwardī's discussion of the conclusion of the ritual prayer. All schools agree that the prayer ends when one kneels and recites the *tashahhud*, then salutes to left and right (*taslīm*). They disagree over which steps are required, which merely recommended (Māwardī, *Ḥāwī* 2:187-9 *2:143-4*).[49]

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44. For the Sunni revival, *v*. Makdisi, *Ibn ʿAqīl*, chaps. 2, 4; idem, "The Sunnī revival," *Islamic civilization 950-1150*, ed. D. S. Richards, Papers on Islamic history 3 (Oxford: Cassirer, 1973), 155-68; Glassen, *Der mittlere Weg*, chap. 2.

45. Māwardī, *al-Ḥāwī* 20:106-216 *16:55-152*.

46. *V*. Māwardī, *Ḥāwī* 20:105-6, 224-6 *16:54-5*, *159-61*.

47. Devin J. Stewart, "Muḥammad b. Jarīr al-Ṭabarī's *al-Bayān ʿan uṣūl al-fiqh* and the genre of *uṣūl al-fiqh* in ninth century Baghdad," *ʿAbbasid studies*, ed. James E. Montgomery, Orientalia Lovaniensia analecta 135 (Leuven: Peeters, 2004), 321-49, citing Abū ʿUbayd, *Adab al-qāḍī*, and al-Jāḥiẓ, *K. Uṣūl al-futyā wa-al-aḥkām*, at 344.

48. Two important translations with studies of *uṣūl al-fiqh* in the eleventh century are al-Baṣrī, *L'accord unanime de la communauté comme fondement des statuts légaux de l'Islam*, trans. Marie Bernand, Études musulmanes 11 (Paris: J. Vrin, 1970), and Abū Isḥāq al-Shīrāzī, *Kitāb al-Lumaʿ fī uṣūl al-fiqh*, trans. Eric Chaumont, Studies in comparative legal history (Berkeley: Robbins Collection, 1999). Neither makes comparisons with Māwardī. I think of no comparable discussions on the side of *furūʿ*.

49. *V*. also Yasin Dutton, "'An innovation from the time of the Banī Hāshim': some reflections on the *taslīm* at the end of the prayer," *Journal of Islamic studies* 16 (2005): 147-76, and Christopher Melchert, "The concluding salutation in Islamic ritual prayer," *Le muséon* 114 (2001): 389-406.

Al-Muzanī said that al-Shāfiʿī (God have mercy on him) said, "Then he salutes to his right, *al-salāmu ʿalaykum wa-raḥmatu 'llāh*, then to his left, *al-salāmu ʿalaykum wa-raḥmatu 'llāh*, until his cheeks are seen."[50]

Al-Māwardī said this: as for going out of the ritual prayer, it is obligatory: it does not end save by this. However, they have disagreed concerning exactly how. Al-Shāfiʿī taught that it was specified as the salutation. Going out of [the prayer] is not sound save by it. This is the majority view. Abū Ḥanīfah said that going out of the prayer is not specified as the salutation. One may go out of it by farting or speaking. As evidence, he cites the hadith report of Ibn Masʿūd, that the Prophet . . . , when he taught him the *tashahhud*, [said,] "When you finish this, your prayer is complete. If you wish, leave; if you wish, remain seated." He also cites what ʿAbd Allāh ibn ʿAmr ibn al-ʿĀṣ related, that the Messenger of God . . . said, "When a man raises his head from the last prostration and sits, then farts before saluting, his prayer is over." This is an express declaration (*naṣṣ*). They also say that the salutation is for whoever is present. This implies that it is not obligatory in the ritual prayer, like the second salutation.[51] They additionally say that it [viz., the salutation] is talk that contradicts the prayer, so it must not be specified as obligatory in the prayer, like addressing humans. This is on account of what Muḥammad ibn ʿAlī ibn al-Ḥanafīyah related of his father, that the Messenger of God . . . said, "The key to the ritual prayer is ritual purity, its sacralization is saying *Allāhu akbar*, and its desacralization is the salutation."

Misʿar ibn Kidām related of Ibn al-Qibṭīyah of Jābir ibn Samurah that he said, "We were with the Messenger of God. When he saluted, one of us said, by his hand, to his right and his left, *al-salāmu ʿalaykum*, *al-salāmu ʿalaykum*, and pointed by his hand to his right and to his left. The Prophet . . . said, 'What is this? Do you see with your hands, as if they were restless horses' tails? It suffices for one of you that he put his hand on his thigh, then salute to his right and to his left, *al-salāmu ʿalaykum wa-raḥmatu 'llāh*, *al-salāmu ʿalaykum wa-raḥmatu 'llāh*.'"[52] Thus he made the sufficient minimum to be achieved by the salutation, which implies that the sufficient minimum is not achieved by anything else.

Also, it is one of the two ends of the ritual prayer, which implies that a condition of it is something said, like the first end. Moreover, going out of the ritual prayer is an essential part of the prayer, so it should be specifically required, like the inclination and prostration. It is the completion of the worship, and cannot be achieved by what is contradictory of it, similarly to sexual intercourse in the pilgrimage. The ritual prayer is a form of worship

50. Muzanī, *Mukhtaṣar*, margin of Shāfiʿī, *Kitāb al-Umm*, 7 vols. in 4 (Cairo: al-Maṭbaʿah al-Kubrā al-Amīrīyah, 1321-5; repr. Cairo: Kitāb al-Shaʿb, 1388/1968), 1:77.

51. The Shāfiʿi school held that only the first salutation was obligatory, the second being highly recommended; e.g., Māwardī, *Ḥāwī* 2:300 *2:233*; Abū Isḥāq al-Shīrāzī, *al-Tanbīh*, *bāb furūḍ al-ṣalāh wa-sunanihā* = (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1370/1951), 25; idem, *al-Muhadhdhab*, *ṣifat al-ṣalāh*, *al-farḍ* = 2 vols. (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, n.d.; 3rd printing, 1396/1976), 1:116-17.

52. Likewise quoted by Shāfiʿī, *Umm* 1:106, ll. 10-5 = ed. Rifʿat Fawzī ʿAbd al-Muṭṭalib, 11 vols (al-Manṣūrah: Dār al-Wafāʾ, 1422/2001; 2nd printing 1425/2004), 1:278. References to the latter edition henceforth in *italic*. The expression *adhnāb khayl shums* and this very hadith report are explained in *Lisān al-ʿarab*, s.v. *sh m s*. Thanks to Professor Geert Jan van Gelder for directing me to it.

that is nullified by farting in the middle of it, so it must be nullified by farting at the end of it, like the ritual ablution. It is not sound that one should go out of the ritual prayer by what contradicts it, like the ending of the period of wiping. The ritual prayer is a form of worship, so it is not sound that it be completed by what is not a part of worship, as the other forms of worship [cannot be so completed].

As for the answer to the hadith report of Ibn Masʿūd, it has two aspects. One of them is that his saying . . . "Your prayer is complete" meant "coming near to completing it." His saying, "If you wish, arise; if you wish, remain seated," is the talk of Ibn Masʿūd [not the Prophet]. The second is that the apparent meaning of this hadith report is to be abandoned, for going out of the prayer remains an obligation [for the one praying]. Our disagreement concerns only the means of going out of it. As for the hadith report of ʿAbd Allāh ibn ʿAmr ibn al-ʿĀṣ, it is unsound. If it were sound, it could be interpreted as concerning what is after the first salutation but before the second. As for their analogy by the second salutation, the second salutation is not obligatory, whereas the first salutation is. As for their analogy by addressing humans, that it contradicts the prayer, it is an unsafe interpretation (*waṣf ghayr musallam*). Besides, the meaning of addressing humans is that if he omits it and what is equivalent to it, his ritual prayer is not spoilt (*lam tafsud*). But if he omits the salutation and its equivalent, in their opinion, then his ritual prayer is nullified (*baṭalat*).

* * * *

Typical here is the order in which Māwardī treats the problem: a brief statement of the Shāfiʿi rule; alternative rules from other schools (here just the Ḥanafī); how the other schools argue; how the Shāfiʿi school argues; finally, what is wrong with the other schools's arguments. Systematic debate with other schools in this fashion is distinctive of writing in the Shāfiʿi tradition, imitated by writers of the Māliki and Ḥanbali.[53] Ḥanafi and Shiʿi writing stands somewhat apart.[54] Earlier examples of it than the *Ḥāwī* cannot be found, but this is unsurprising inasmuch as nothing survives of the works of Ibn Surayj, Ibn Abī Hurayrah, Abū Ḥāmid al-Isfarāyinī, and Māwardī's other Baghdadi predecessors except in quotation. It must have developed out of the training by debate (*munāẓarah*) and the recording of debating points in the graduate student's *taʿlīqah* that were the hallmarks of

53. A good example of an early Māliki work in this style is al-Bājī, *al-Muntaqā*, ed. Muḥammad ibn al-ʿAbbās ibn Shaqrūn, 7 vols. in 4 (Cairo: Maṭbaʿat al-Saʿādah, 1331-32). Bājī (d. Almeria, 474/1081?) studied in Baghdad under Abū al-Ṭayyib al-Ṭabarī and Abū Isḥāq al-Shīrāzī, among others. An outstanding Ḥanbali example is Ibn Qudāmah, *al-Mughnī*, ed. ʿAbd Allāh ibn ʿAbd al-Muḥsin al-Turkī and ʿAbd al-Fattāḥ Muḥammad al-Ḥulw, 15 vols. (Cairo: Hajr, 1406-11/1986-90). Ibn Qudāmah (d. Damascus, 620/1223) likewise studied in Iraq, and although he is not reported to have formally trained under Shāfiʿi teachers, his works include massive borrowing from earlier Shāfiʿi literature, especially from Abū Isḥāq al-Shīrāzī and Ghazālī.

54. At the level of rules, Patricia Crone has identified the Māliki, Shāfiʿi, and Ḥanbali schools as constituting a Medinese bloc, Ḥanafi and Shīʿi a Kufan: *Roman, provincial, and Islamic law* (Cambridge: University Press, 1987), 23. I expect research to show increasingly that these blocs were originally Basran and Kufan, respectively. At the level of *uṣūl al-fiqh*, the distinctiveness of the Shāfiʿi and Ḥanafi traditions has been noted fairly often although so far little developed systematically; e.g., Éric Chaumont, Introduction, *Kitāb al-Lumaʿ* by Abū Isḥāq al-Shīrāzī, 12-15.

the classical school of law.[55]

As elsewhere, close investigation shows that Māwardī's account of his opponents' position is simplistic. In this passage, he once alludes and once expressly refers to the obligatory character of the first salutation, arguing that the Ḥanafi position would make it merely recommended. Actually, it seems, the Ḥanafīyah were divided, only some of them considering that the salutation at the end was merely recommended (*sunnah*) but not absolutely required (*farḍ*).[56] Whether Māwardī simplified from ignorance of Ḥanafi discussions or for polemical convenience is impossible for us to say.

Also typical is the *ad hoc* character of some of Māwardī's arguments. For example, this appeal to aesthetics, that a series of ritual acts should be symmetrical, as by one's beginning the prayer by speech (*Allāhu akbar*) and therefore also ending it by speech (*al-salāmu ʿalaykum wa-raḥmatu 'llāh*), surely has no basis in *uṣūl al-fiqh*. This is one of many passages that once provoked my question to John Makdisi, dean of a law school as well as student of Islamic law: why does Māwardī continually go beyond the hadith-based arguments one expects of a Shāfiʿi to further arguments it seems he could not have believed in? Makdisi assured me this was the way lawyers always argue: they offer one reason after another to accept their case, not particularly caring if half of them seem feeble, just so one of them persuades the reader.

Māwardī's dismissal of the hadith report of ʿAbd Allāh ibn ʿAmr ibn al-ʿĀṣ seems strikingly casual. He first attacks it as unsound without further explanation. It comes up in standard collections, including those of Abū Dāwūd and al-Tirmidhī.[57] But Tirmidhī doubted it, asserting that it was *muḍṭarib*, meaning supported by contradictory *asānīd*, and that one of its transmitters, ʿAbd al-Raḥmān ibn Ziyād ibn ʿĀṣim, had been aspersed by earlier critics. Perhaps his critique was sufficiently well known for Māwardī to feel no need of repeating it.

At the end, Māwardī proposes to deal with the hadith report of ʿAbd Allāh ibn ʿAmr ibn al-ʿĀṣ by harmonization (literally *istiʿmāl*, meaning practical application) rather than rejection. This does not necessarily indicate bad faith. The Qur'an enjoyed *tawātur*, meaning that it was transmitted to later generations by so many different paths as to preclude any suppression or distortion; hence it afforded certain knowledge. Hadith, by

55. *V.* George Makdisi, *The rise of colleges: institutions of learning in Islam and the West* (Edinburgh: University Press, 1981), 116-22.

56. E.g., ʿAlāʾ al-Dīn al-Samarqandī, *Tuḥfat al-fuqahāʾ*, *al-ṣalāh*, *iftitāḥ al-ṣalāh* = 3 vols. (Beirut: Dār al-Kutub al-ʿIlmīyah, n.d.), 1:138-9. Similarly, al-Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-sharāʾiʿ*, 7 vols. (Cairo: Maṭbaʿat Sharikat al-Maṭbūʿāt al-ʿIlmīyah, 1327-8; repr. Beirut: Dār al-Kutub al-ʿIlmīyah, 1406/1986), 1:194, noting three characterizations within the school: *farḍ*, *wājib*, and *sunnah*. The first two indicate requirements but of different degrees of certainty, the last the highest degree of being recommended, for which *v.* A. Kevin Reinhart, "'Like the difference between Heaven and Earth:' Ḥanafī and Shāfiʿī discussions of *wājib* and *farḍ*," *Studies in Islamic legal theory*, ed. Bernard G. Weiss, Studies in Islamic law and society 15 (Leiden: Brill, 2002), 205-34.

57. Abū Dāwūd, *al-Sunan*, *k. al-ṣalāh* 73, *al-imām yuḥdithu baʿda mā yarfaʿu raʾsahu min ākhir al-rakʿah*, no 617; al-Tirmidhī, *al-Jāmiʿ al-ṣaḥīḥ*, *ṣalāh* 184, *mā jāʾa fī al-rajul yuḥdithu fī al-tashahhud*, no 408.

contrast, was widely recognized by Sunni writers as affording only probable knowledge.[58] Hadith reports were authenticated or not by comparison of *asānīd*, the paths of their transmission. As we see from continual disagreement among *rijāl* critics, however, pre-modern Muslim critics worked as intuitively as modern students of hadith.[59] Māwardī could see as well as we how evaluations of particular hadith reports were necessarily tentative, hence his proposing to harmonize a contrary hadith report even after aspersing its authenticity.

Example 2: heirs and waqf property

Here is Māwardī on a question of *waqf*, the setting aside of a part of one's property and the assignment of its yield in perpetuity to whomever one wishes. Normally, the property can never again be bought or sold or divided normally among heirs (Māwardī, *Ḥāwī* 9:390-1 *7:527*).[60]

* * * *

If someone establishes a *waqf* for the benefit of his son, then his son's heirs, then [if they should die out] the poor and destitute, then the son dies, with the establisher of the *waqf* one of his heirs, does he receive his normal share of the heritage or not? There are two views. One of them is that he does receive [his normal share]. This is the position of Ibn Surayj and al-Zubayrī.[61] The second view is that he does not receive it, nor any of the [son's] other heirs. This is because the heirs take only their heritage from him [the deceased son] and not anyone else's heritage. It is rendered to the poor.

Next, one investigates the heirs of his son he [the establisher of the *waqf*] made beneficiaries. There are just three possibilities. One of them is that he made them beneficiaries in proportion to their normal inheritance shares, in which case it is [divided] among them so. The second is that he made them beneficiaries equally, in which case it is [divided among them] so, the male, female, wife, and child all inheriting equal shares. The third is that he made an absolute pronouncement [that the son's normal heirs would

58. See Bernard Weiss, *The spirit of Islamic law*, The spirit of the laws (Athens: Univ. of Georgia Press, 1998), chap. 5, esp. 89-90; Wael B. Hallaq, "The authenticity of prophetic *ḥadīth*: a pseudo-problem," *Studia Islamica*, no 89 (1999), 73-90.

59. *V*. above all Eerik Nael Dickinson, *The development of early Sunnite* ḥadīth *criticism*, Islamic history and civilization, studies and texts, 38 (Leiden: Brill, 2001), chap. 6, for a description of hadith criticism in the ninth and tenth centuries C.E., and Herbert Berg, *The development of exegesis in early Islam*, Curzon studies in the Qurʾan (Richmond: Curzon, 2000), chap. 2, for a review of the modern controversy, stressing how much the findings of different scholars have depended on their initial assumptions. Cf. Harald Motzki, *The origins of Islamic jurisprudence*, trans. Marion H. Katz, Islamic history and civilization, studies and texts 41 (Leiden: Brill, 2002), chap. 1, another good review of the modern controversy with acute comments on method. I disagree with Motzki that his own method is less speculative than the methods of earlier scholars.

60. For the law of *waqf* and references to earlier studies, *v*. *EI*^{2}, s.v. "waḳf," § 1, by Doris Behrens-Abouseif, and Peter C. Hennigan, *The birth of a legal institution: the formation of the waqf in third-century A.H. Ḥanafī legal discourse*, Studies in Islamic law and society 18 (Leiden: Brill, 2004).

61. Abū ʿAbd Allāh al-Zubayrī (d. 318/930-1), a Basran Shāfiʿi of unknown formation, for whom *v*. Subkī, *Ṭabaqāt* 3:295-9.

benefit from the *waqf* on his decease, without further detail]. In this case, it is [divided among them] equally, for the presumption (*al-aṣl*) is equality when it comes to gifts and no preference has been specified for some over others.

Thus, if he has established a *waqf* for the benefit of Zayd's heirs, with Zayd alive, none of them has any claim on it, for claims are inherited. The members of his family are called 'heirs' only figuratively, not actually. If that were so, then the *waqf* would have been established concerning something perishable, as discussed above. With Zayd dead, it remains a sound *waqf* for the benefit of Zayd's heirs. Then it falls under one of the three possibilities as to equality or preferring some over others.

* * * *

As Māwardī has explained earlier, only something that will not be used up can be subject to *waqf* (according to the Shāfiʿi school); hence, for example, real estate may be made into *waqf* but a chest of money may not. If a *waqf* property were divided up amongst heirs, it would cease to exist, at least as a unit. Only its yield (such as the fruit of an orchard, the rental of a building) may be divided up and distributed. Notably, in default of an express stipulation to the contrary, Māwardī calls for the yield of a *waqf* property to be divided equally among the named beneficiaries, not by the Qur'anic rules of dividing estates, whereby a widow receives a quarter if her husband had no children, otherwise an eighth, a widower half if his wife had no children, otherwise a quarter, a daughter half the share of a son, and so forth.

The law of property transfers (sales, pledges, fraud, &c.), not obviously religious concerns to the Christian (as ritual and adultery seem obviously religious concerns), is an important section of the law, occupying about a quarter of the *Ḥāwī*. Māwardī's reasoning in the section on *waqf*, likewise property transfers generally, is in some respects typical of his reasoning throughout the *Ḥāwī*; for example, this exhaustive listing of the possibilities. In other respects, however, it contrasts sharply with other sections of the *Ḥāwī*, exemplified by the foregoing discussion of the ritual prayer (likewise by the discussion of the penalty for adultery to come).

First, although Māwardī continues to acknowledge contrary positions, he seldom here identifies them expressly with other schools. Hence, as we move from ritual law to property transfers, we suddenly have many fewer refutations of Ḥanafi doctrine, among others. Secondly, Māwardī here quotes much less hadith, and most of that little without *asānīd*. Hadith usually appears in connection with controversy, and *isnād* criticism is one way of refuting an opponent's case. Where there is less controversy with other schools, there is also, then, less hadith. It may also be that, on the whole, the law of ritual was fixed substantially earlier than the law of property transfers. Consequently, as the generation of hadith slowed in the ninth century, the still-developing law of property had to forgo rich documentation by hadith.[62]

62. Peter Hennigan argues especially from the diversity of terminology that the law of *waqf* was still highly fluid in the later eighth century and did not crystallize until the ninth: *Birth*, esp. chap. 3.

Thirdly, Māwardī is often inconclusive. In this passage concerning *waqf*, we have to guess that he prefers the position of Ibn Surayj and Zubayrī. In some nearby passages, he seems even less conclusive; for example, over who can be said to own a *waqf* property and whether, if someone establishes a *waqf* for the benefit of himself, then the poor and destitute, the poor and destitute begin to benefit immediately (since a valid *waqf* cannot be established in one's own favor) or only on his death.[63] Two centuries before Māwardī, traditionalist jurisprudents such as ʿAbd al-Razzāq (d. Yemen, 211/827), Abū Bakr ibn Abī Shaybah (d. Kufa, 235/849), and Aḥmad ibn Ḥanbal (d. Baghdad, 241/855) might exhibit inconclusiveness by their habit of letting hadith speak for itself, presenting contradictory hadith reports in succession and leaving it to their reader or questioner to chose for himself which to follow. Two centuries after Māwardī, a jurisprudent such as al-Nawawī might exhibit inconclusiveness by his habit of laying out contradictory positions from within the Shāfiʿī school without identifying any one as correct. But neither of these habits seems to fit Māwardī's loss of interest in pointing out the most likely rule when it comes to property transfers as opposed to ritual (although Māwardī anticipates Nawawī's reluctance to overrule disagreement within the school more than he retains ʿAbd al-Razzāq's and the others' simple veneration of hadith).

Why should the law of property transfers seem systematically different from the law of ritual and family relations? It used to be a commonplace that Islamic law regulated ritual and family life (especially marriage and divorce) closely, commerce in rough outline, international relations and the suppression of crime hardly at all.[64] This is presumably an inference partly from just the relative abstractness of the law of property transfers as one sees in the *Ḥāwī*. Yet the law of *waqf* should, by this reasoning, stand out from the rest of the law of property transfers just because *waqf* properties were commonly regulated by qadis, not private persons or secretaries (*kuttāb*). That is, unlike sales or criminal justice, they were directly regulated by trained jurisprudents. Hence, if closeness of supervision were the issue, the law of *waqf* would be quite as detailed as that of the ritual prayer.

Some modern scholars have distinguished between strictly legal concerns in Islamic law and non-legal, moral concerns.[65] Following them, one might suppose that Māwardī argues differently about prayer because there his concerns are religious, whereas here he is free to discourse about *waqf* as a real jurisprudent. But surely the law of property transfers is where one most needs a law that is clear and predictable; where one urgently needs to know, for example, on the death of the original beneficiary of a *waqf*, whether the next beneficiaries will be his natural heirs or the poor and destitute.

I propose that Māwardī's discussion of *waqf* seems cursory and abstract by compar-

63. Māwardī, *Ḥāwī* 9:372-4, 388-9 *7:515-16, 526*.

64. "Its hold was strongest on the law of family (marriage, divorce, maintenance, &c.), of inheritance, and of pious foundations (*waḳf*); it was weakest, and in some respects even non-existent, on penal law, taxation, constitutional law, and the law of war; and the law of contracts and obligations stands in the middle": Joseph Schacht, *An introduction to Islamic law* (Oxford: Clarendon Press, 1964), 76.

65. The most sophisticated attempt to distinguish between legal and non-legal concerns in Islamic law has been Baber Johansen, *Contingency in a sacred law*, Studies in Islamic law and society 7 (Leiden: Brill, 1998). Cf. review by Wilferd Madelung, *Islamic law and society* 7 (2000): 104-9.

ison with his discussion of the ritual prayer (and of ritual and family relations in general) mainly because the *Ḥāwī* is dominated by a religious vision; because the *Ḥāwī* is first a work of devotion, only secondarily of directions for its readers how to order their lives. *Waqf* was a widespread, everyday economic institution, so every man of substance, such as Māwardī undoubtedly was, must have had extensive personal acquaintance with *waqf* property. Moreover, as it was among the qadi's chief duties to oversee *waqf* properties, so Māwardī should have had more extensive personal experience even than most jurisprudents. Perhaps when he sat in his mosque teaching students orally, he indeed brought up cases from his personal experience and explained how a working qadi dealt with worldly disputes. But he wrote the *Ḥāwī* to elaborate God's law. Bringing in hard cases from his personal experience as a qadi, involving imperfect information, gain for some and loss for others, and probably extrajudicial pressures, would just have sullied what Māwardī preferred to contemplate as transcendently pristine.

Example 3: the penalty for adultery

Here is Māwardī in *al-Ḥāwī* on the problem of whether to flog as well as stone the *muḥṣan* adulterer; i.e. a sane, free Muslim who has consummated a marriage with another free person (Māwardī, *Ḥāwī* 17:15-8 *13:191-3*).[66]

* * * *

Granted what we have described of the penalty for adultery, that it is stoning the non-virgin (*thayyib*) and flogging the virgin (*bikr*), the adulterer's state must fall into one of two categories: either he is a virgin or a non-virgin, as we shall describe the states of the virgin and non-virgin. If he is a non-virgin, the non-virgin being called a *muḥṣan*, his penalty is stoning without flogging.

The Khawārij teach that he is to be given a hundred lashes without stoning, treating virgin and non-virgin alike. They argue by the apparent meaning of the Qur'an, for stoning is among *akhbār al-āḥād* ['reports of individuals', hence uncorroborated], and they are not an argument for them when it comes to ordinances. Dāwūd ibn ʿAlī, among the Ẓāhirīyah, says that he is to be flogged a hundred lashes and stoned, combining the two punishments.[67] They argue by the statement of the Prophet, "Take it from me. God has made a way for them: for the virgin with the virgin, a hundred lashes and banishment for a year; for the non-virgin with the non-virgin, a hundred lashes and stoning." [They argue] also by what Qatādah related of al-Shaʿbī: that Shurāḥah al-Hamdānīyah came to ʿAlī and

66. Also *Kitāb al-ḥudūd min* al-Ḥāwī al-kabīr, ed. Ibrāhīm ibn ʿAlī al-Ṣanduqjī, 2 vols. (n.p.: n.p., 1415/1995), 1:128-37. Because it raises problems of conflict between Qurʾan and *sunnah*, the penalty for adultery has attracted an unusual number of studies. *V*. esp. John Burton, *The sources of Islamic law: Islamic theories of abrogation* (Edinburgh: Univ. Press, 1990), chap. 7, and *EI*[2], s.v. "zinā," by R. Peters, with further references.

67. Dāwūd al-Ẓāhirī (d. Baghdad, 270/884), on whom *v*. Dhahabī, *Siyar* 13:97-108, with further references. On the basis of his teaching developed the Ẓāhiri school of law, for which *v*. provisionally Melchert, *Formation*, 178-90.

said, "I have committed adultery." He said to her, "Perhaps you are jealous. Perhaps you dreamt it." She said, "No." So he flogged her on Thursday and stoned her on Friday, saying, "I flogged her according to the Book of God and stoned her according to the *sunnah* of the Messenger of God . . . ." [They say also] that the penalty for adultery must combine two punishments, the way flogging and exile are combined for the virgin.

Al-Shāfiʿī, Abū Ḥanīfah, Mālik, and the overwhelming majority of jurisprudents teach that stoning is necessary without flogging. The evidence for the necessity of stoning, contrary to what the Khawārij teach, is what we have cited earlier by way of reports of the Messenger of God . . . , both word and deed, and of the Companions, both transmission [from the Prophet] and deed; also people's widespread agreement and the crystallizing of consensus concerning it, such that this ordinance has become *mutawātir* [so widespread as to leave no doubt of its being true], even though the instances of being stoned are known by *akhbār al-āḥād*, which forbids the rise of disagreement afterwards.

The evidence that there is no more flogging in association with stoning the non-virgin is what Shāfiʿī related of Mālik of Nāfiʿ of Ibn ʿUmar, that the Messenger of God . . . stoned two Jews who had committed adultery.[68] Had he flogged them, that would have been transmitted just as it was that they were stoned. ʿIkrimah related of Ibn ʿAbbās that the Messenger of God . . . said to Māʿiz ibn Mālik when he came to him and confessed to adultery, "Perhaps you kissed or had a peek or looked?" He said, "No." He asked, "Did you do such-and-such?" without indirection.[69] He said, "Yes." At that, he ordered him stoned. Abū al-Muhallab related of ʿImrān ibn al-Ḥuṣayn that a woman of Juhaynah came to the Prophet . . . and confessed to adultery. She said, "I am pregnant." So the Prophet . . . summoned her guardian and said, "Treat her well, and when she is delivered, bring her to me." So he did this, and when she was delivered, he brought her. Then the Prophet . . . said, "Go and nurse him." She did that, then came. So the Prophet . . . gave orders concerning her. Her clothing was wrapped tightly about her, then he ordered her to be stoned and [afterwards] prayed over her. ʿUmar said to him, "O Messenger of God, you stone her then pray over her?" He said, "She repented such that if it were divided among seventy persons of Medina, it would suffice for them. Have you found anything better than what she did for herself?" He said in what we have described already of the hadith report of Abū Hurayrah, "Go, Unays, to this one's wife: if she confesses, stone her."[70] These reports indicate that he restricted himself to stoning without flogging and that what the hadith report of ʿUbādah ibn al-Ṣāmit entails, by way of his saying "for the non-virgin with the non-virgin, a hundred lashes and stoning," is abrogated. It came before what we have related, for it was the original exposition of stoning. Also, what requires execution does not require flogging, as with apostasy.

68. Cited by Shāfiʿī, *Umm* 6:143, ll. 7-8 *7:390*, but without comment on flogging.

69. *A-niktahā* (as blunt as "Did you fuck her?") in Bukhārī, *ḥudūd* 28, no 6824. It was probably not Māwardī himself but some later copyist who refused to quote exactly.

70. This is the hadith report quoted by Shāfiʿī himself as showing that flogging had been abrogated as concerned non-virgins whereas stoning stood: *al-Risālah*, ed. Aḥmad Muḥammad Shākir (Cairo: Maṭbaʿat Muṣṭafā al-Ḥalabī wa-Awlādih, 1358/1940; repr. Beirut: n.p., n.d.), ¶ 382; *Umm* 6:119, 7:251marg. *7:336*, *10:205-6*.

As for the hadith report of ʿAlī concerning the flogging and stoning of Shurāḥah, there are three answers to it. One is that there is a gap in its chain of transmitters, since the one who relates it of him is al-Shaʿbī, who never met him. The second is that he flogged her thinking her a virgin, then learnt that she was not a virgin and so stoned her. Consider that he flogged her on Thursday and stoned her on Friday: otherwise, he would have combined them on a single day. The third is that she committed adultery as a virgin, so he flogged her, then she committed adultery as a non-virgin, so he stoned her. It is conceivable that he stoned her on a Friday not immediately following the Thursday as well as that it did follow immediately.

As for analogy, even if it is not an indication of preponderance for the Ẓāhiri school, its significance for stoning is that it is general, subsuming in itself what is lesser, whereas flogging is particular and may be paired with banishment, which is not subsumed in it.[71]

* * * *

Here we are back to the familiar order: a brief statement of the Shāfiʿi rule; alternative rules from other schools; how the other schools argue; how the Shāfiʿi school argues; finally, what is wrong with how the other schools argue. Note also how, typically, Māwardī treats in order Qur'an, *sunnah*, consensus, and analogy. The identification of precisely these four sources is a major characteristic of the Shāfiʿi school (even if the list does not go quite back to Shāfiʿī himself).[72] Also familiar and typical is the way he successively deals with a contrary hadith report first by *isnād* criticism, then by harmonization with other hadith reports supporting the Shāfiʿi position.

Some of his terminological ambiguity is also, alas, typical. In this example, Māwardī continually contrasts *bikr* and *thayyib*. Students reading such texts under me have continually objected that someone who has committed adultery is by definition no longer a virgin, while Māwardī himself brings up the more precise term *muḥṣan* but then goes back to using *thayyib* throughout. One can say only that many jurisprudents before Māwardī used the same shifting terminology and that it does not actually confuse the discussion.

There is something artificial about refuting Khāriji and Ẓāhiri positions. Did Māwardī expect any of his readers to take them seriously? It is not known that there were ever important Khārijī jurisprudents in Baghdad.[73] The Ẓāhiri school had died out in Baghdad by

71. 'Analogy' here is the conventional translation of *qiyās*, but *qiyās* was actually somewhat wider than 'analogy', sometimes practically embracing 'reason' (*ijtihād*, in Shāfiʿī's formulation). *V.* Wael B. Hallaq, "Non-analogical arguments in Sunnī juridical *qiyās*," *Arabica* 36 (1989): 286-306. For the equation of *ijtihād* with *qiyās*, *v.* Shāfiʿī, *Risālah*, §§ 1323-5. Māwardī argues against Ibn Abī Hurayrah that Shāfiʿī did not mean to identify them completely: *Ḥāwī*, 20:178 *16:118*. "An indication of preponderance" translates *murajjiḥ*. Given two conceivable rules, the capable Muslim jurisprudent will normally identify one as weighing more; that is, more probably representing God's intention than the other. Thanks to Dr. Joseph Lowry for help at translating this paragraph.

72. Joseph E. Lowry, "Does Shāfiʿī have a theory of 'four sources' of law?" *Studies*, ed. Weiss, 23-50.

73. Fuat Sezgin mentions Basran, Khurasani, and Algerian Khāriji jurisprudents but no Baghdadis: *Geschichte des arabischen Schrifttums*, 11 vols. to date (Leiden: E. J. Brill, 1967-2000), 1:586. Ibn al-Nadīm mentions five Khāriji jurisprudents, one of whom he saw himself in 340/951-2, possibly in Baghdad, but he

the time Māwardī wrote the *Ḥāwī*.[74] He might better have argued against the Ḥanābilah of his own time, many of whom (including Abū Yaʿlá ibn al-Farrā') did call for both flogging and stoning.[75] I see two reasons why Māwardī should have ignored actual disagreement in favour of refuting what was merely hypothetical. First, it was not his purpose, here or elsewhere, to sketch the history of the law. He shows no strong interest even in the history of Shāfiʿi doctrine; for example, although the *Ḥāwī* is formally a commentary on the *Mukhtaṣar* of Muzanī, it normally omits to quote Muzanī's own comments, including alternative versions of what Shāfiʿī said.[76] Rather, Māwardī is maintaining a long tradition of refuting certain arguments. (Ibn Surayj regularly debated with Abū Bakr al-Ẓāhirī: perhaps Māwardī is simply rehearsing some of what they said about the penalty for adultery.[77])

Secondly, coming from a learned culture of continual debate, Māwardī did not rehearse juridical controversy in the *Ḥāwī* in order to cause Shāfiʿi rules to be enforced rather than others. (It seems likely that eleventh-century Baghdadis had their own informal means of dealing with adultery not resembling the doctrine of any school. The police were unwilling to suppress prostitution without special compensation, presumably to replace a share they were used to taking directly from the prostitutes or their owners.[78]) Rather, his point was to show off his own prowess in debate. (Compare how many scholars in our day, too, routinely set up straw men and knock them down.) Lack of interest in historical stages and arguing to show off, not to change the world, are two features that make it difficult to infer social history from handbooks of Islamic law, even those as detailed as the *Ḥāwī*. Argument for the sake of demonstrating one's prowess in debate is also a reason why present-day Salafīyah are impatient with Islamic scholasticism and like to go back directly to Qur'an and hadith to construct an enforceable code—not what Māwardī presents in the *Ḥāwī*.

professed to be a Muʿtazili: *Fihrist*, *fann* 7, *maqālah* 6. On Khāriji jurisprudence, *v*. provisionally Michael Cook, "ʿAnan and Islam: the origins of Karaite scripturalism," *Jerusalem studies in Arabic and Islam*, no. 9 (1987), 161-82, and G. R. Hawting, "The significance of the slogan *lā ḥukmᵃ illā lillāh* and the references to the *ḥudūd* in the traditions about the fitna and the murder of ʿUthmān," *Bulletin of the School of Oriental and African Studies* 41 (1978): 453-63.

74. The last Ẓāhiri jurisprudent of Baghdad mentioned by Abū Isḥāq al-Shīrāzī (d. Baghdad, 476/1083) is Ibn al-Akhḍar (d. 429/1038): *Ṭabaqāt al-fuqahāʾ*, ed. Iḥsān ʿAbbās (Beirut: Dār al-Rāʾid al-ʿArabī, 1970), 178-9. Shīrāzī states expressly that the Ẓāhiri school has died out in Baghdad, although adherents remain in Shiraz.

75. Al-Mardāwī, *al-Inṣāf fī maʾrifat al-rājiḥ min al-khilāf ʿalā madhhab al-imām Aḥmad ibn Ḥanbal*, ed. Muḥammad Ḥāmid al-Fiqī, 12 vols. (Cairo: Maṭbaʿat al-Sunnah al-Muḥammadīyah, 1955-58, repr. Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 1419/1998), 10:129. In two short works of his that are extant, Ibn al-Farrāʾ merely observes that there is disagreement over whether to flog and stone or stone alone: *Aḥkām*, 264, and *al-Jāmiʿ al-ṣaghīr*, ed. Nāṣir ibn Saʿūd ibn ʿAbd Allāh al-Salāmah (Riyadh: Dār Aṭlas, 1421/2000), 307.

76. On the ambiguous relation of the *Mukhtaṣar* of Muzanī to the doctrine of Shāfiʿī himself, *v*. provisionally Norman Calder, *Studies in early Muslim jurisprudence* (New York: Clarendon Press, 1993), chap. 5, and Christopher Melchert, "The meaning of *qāla 'l-Shāfiʿī* in ninth-century sources," *ʿAbbasid studies*, ed. James Montgomery (Leuven: Peeters, 2004), 277-301.

77. Ibn al-Nadīm, *Fihrist*, *fann* 3, *maqālah* 6; Shīrāzī, *Ṭabaqāt*, 100.

78. Makdisi, *Ibn ʿAqīl*, 152.

Conclusion

Māwardī's style of argumentation continually suggests less than absolute certainty. For example, there is the way he continually attacks hadith supporting another school's rule as unsound, then reinterprets it in support of the Shāfiʿi rule, implicitly acknowledging that their hadith may be sound after all (and implicitly asking that the hadith he cites be treated with equal charity). It thus marks the transition from a tradition of legal writing that aims to establish the correctness of its school's doctrine to one that aims to establish only its plausibility; to recognition that there will always be multiple schools. Implicitly, the different schools of the eleventh century had become somewhat like modern Protestant denominations. Presbyterians, for example, may like to think that theirs is the best church but will never declare that other Protestant churches are inadequate or seriously try to persuade Methodists (for example) to renounce their doctrines in favour of Presbyterian. In the same fashion, Māwardī may have thought that the Shāfiʿi school was the best, but by no means did he think adherence to the Ḥanafi school (among others) indicated unbelief, or even that there was any serious hope of refuting Ḥanafi doctrine and converting everyone to Shāfiʿism.

In some measure, the Shāfiʿi school stood from the start for agreeing to disagree in this fashion, at least among Sunni jurisprudents on questions of law. The legitimacy of *ikhtilāf*, disagreement among qualified jurisprudents, is one main point of the *Risālah*.[79] The new agreement to disagree marked the transformation of *ahl al-sunnah wa-al-jamāʿah* from one party among others (as represented above all by Aḥmad ibn Ḥanbal [d. 241/855]) to the default category for all Muslims except Shiʿi and Khāriji sectarians.[80] Similarly in his Qur'an commentary, continually pointing out multiple legitimate interpretations, and in his political and ethical writing, synthesizing Islamic and Persian traditions, Māwardī seems a strong example of the catholic tendency of classical Sunni Islam. To some extent, the new agreement to disagree marked the influence of *uṣūl al-fiqh*, the literature of jurisprudence strictly speaking, on *furūʿ*, the discipline of making out actual rules, from about 1000 C.E.[81]

Finally, the style of *al-Ḥāwī* marks the transformation of Islamic jurisprudence into a form of aristocratic play.[82] "Aristocratic" is to be insisted on because, with the advent

79. Norman Calder, "Ikhtilâf and Ijmâʿ in Shâfiʿi's Risâla," *Studia Islamica*, no 58 (1983), 39-47.

80. *V.* John B. Henderson, *The construction of orthodoxy and heresy: Neo-Confucian, Islamic, Jewish, and early Christian patterns* (Albany: State Univ. of New York Press, 1998), esp. 41 (comparison with church history, where likewise later orthodoxy was earlier one minority position among many), 53 (chronology of Sunnism). Henderson draws heavily on W. Montgomery Watt, *The formative period of Islamic thought* (Edinburgh: Univ. Press, 1973).

81. Yaʿakov Meron, *L'obligation alimentaire entre époux en droit musulman hanéfite*, Bibliothèque de droi privé 114 (Paris: R. Pichon and R. Durand-Auzias, 1971), 323-9. Cf. Chaumont's remark that *uṣūl al-fiqh* substituted argument for proof: introduction to *al-Lumaʿ*, 7.

82. For traditional Islamic legal writing as play, *v.* esp. Norman Calder, "The law," *History of Islamic philosophy*, ed. Seyyed Hossein Nasr and Oliver Leaman, Routledge History of World Philosophies 1, 2 vols. (London: Routledge, 1996), 979-98. Opportunism and capriciousness are observed in High Medieval Ḥanafi writing by Behnam Sadeghi, *The logic of law making in Islam: women and prayer in the legal tradition,* Cambridge studies in Islamic civilization (Cambridge: Univ. Press, 2013) but with stress on parallels to

of the Saljuqs, Islamic politics was permanently militarized (at least to the end of the Middle Ages). The triumphant *iqṭāʿ* system made large landowners finally disappear and the civilian élite came to comprise scholars such as Māwardī almost alone. Their claim to aristocratic privilege was their mastery of an intricate technical discipline, expounding Islamic law, that was emphatically international and non-local. "Play" is what aristocracies normally take up to distinguish themselves from the vulgar who have to work. In Europe, aristocrats hunted and fought. In the Middle East, that was the preserve of Turcophone soldiers, so the ulema elaborated an impractical law.

Māwardī's style of argument is notably uneven, continually piling up flimsy evidences and reasonings on top of apparently sound ones. Vestiges of Māwardī's involvement in *adab* (*belles lettres*) are evident in, among other things, the collections of "fun facts" that introduce major sections; for example, his exposition of the non-technical meaning of *ṣiyām* as "ceasing," including lines of poetry about horses that have ceased to move, to introduce the book of fasting in *al-Ḥāwī*.[83] In purely legal discussions, Māwardī confirmed and exploited his membership in the élite by showing off his supple powers of argument in support of the traditional rules. A principal reason for spending time with Māwardī is simply the ludic pleasure of scholarship in general.

European legal history.

83. Māwardī, *Ḥāwī* 3:239 *3:394*.