

INTENT IN ISLAMIC LAW: MOTIVE AND MEANING IN MEDIEVAL SUNNI FIQH.
By Paul R. Powers. Brill, Studies in Islamic Law and Society 2005. Pp.
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Paul Power's new book, *Intent in Islamic Law*, is a challenging and welcome addition to contemporary scholarship on Islamic law and comparative law. Powers examines the way in which the classical Islamic jurists thought about motive, how they thought motive could be identified, and how they thought an actor's "intent" affected the "legality" of his actions.¹ To accomplish his task, Powers compares the work of several classical jurists from different times, places and different "schools" of Sunni legal thinking. He looks for subtle similarities and differences between the ways in which these different jurists think about motive and in so doing, suggests that it would be very difficult to identify a core set of common concepts and principles that make up a uniform Sunni Islamic theory of intent. This type of comparative study is more commonly found in French or Arabic than in English.² It is welcome to see such a sophisticated example of this type

1. I should clarify what I mean by "legality." Islamic jurists worked with a five-part typology of actions: required, prohibited, recommended, reprehensible or neutral. For those interested in this idea, see generally any history of Islamic legal systems, such as the discussion in Wael Hallaq, *A History of Islamic Legal Theories* 40 (Cambridge U. Press 1997). Which category an act fits into affects the moral status of an action and determines whether an actor will be punished or rewarded in the afterlife for performing this action. For an example of a classical text discussing the ramifications of an acts classification, see Muwaffaq al-Dīn Ibn Qudāma, *Rawḍat al Nāzīr wa Junnat al Munāzīr* 16-24 (Maṭba'a al-Salafīyya 1385). In state legal systems that were rooted in classical Islamic law, the legal categorization of an action might also influence—though sometimes only indirectly—the answer to the question of whether a person would be subject to civil sanction for engaging in this action. For the complex relationship between the jurists' determination of the moral status of a law and the positive law in an Islamic state, see generally Clark Lombardi, *State Law as Islamic Law in Modern Egypt* 47-54 (Brill Academic Publishers 2006). In areas like contract law or personal status law, jurists engaged in a separate analysis to determine whether a particular action had legal effect—as, for example, whether a contract was "valid" and enforceable or "invalid" and unenforceable. For the sake of space, I will refer to both a jurist's decision about the moral category into which an action should be placed and the attempt to determine its legal efficacy inquiries into its "legality."

2. Its most famous practitioners were French-trained Muslim comparativists such as 'Abd al-Razzāq al-Sanhūrī, Chafīk Cheheta and a line of students and admirers in both Europe and the Arab world. For examples of their work, see A. Sanhūrī, *Maṣādir al-haqq fi 'l fiqh al-Islāmī* (Beirut ed. n.d.); Chafīk Chehata, *Théorie générale de l'obligation en droit musulman Hanéfite* (Sirey 1969). For a discussion of their influence, see Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* 57-59, 112-120 (Brill 1998) (discussing Sanhūrī at length at 112-120, although he sometimes disagrees with his conclusions). One might have wished that he had paid similar attention to Cheheta. But this is a quibble. I am not aware of

of scholarship appear in English.

THE COMPLEXITY OF POWERS'S TASK

Powers grapples with the complexities of his study in a manner that is impressive both for its ambition and, paradoxically, for its modesty. Let me first point out the ambitiousness of Powers's study. This type of study is more daunting than it might at first appear. As Powers notes in the introduction (19-20) and stresses regularly thereafter (100, 170, 201-202), no Islamic jurists seem to have focused on intent as an abstract legal concept. They did not always discuss motive explicitly—even though there are hints that legal conclusions about an action depend upon whether the actor consciously desired to complete an action (or achieve its results) before she or he engaged in it. Furthermore, when they *do* discuss explicitly the role of intent in determining the legality of a particular type of action, jurists generally do not refer to discussions of intent in other areas of the law. (100) Piecing together the explicit and implicit treatments of motive, Powers makes a convincing case that a classical Islamic jurist would often conceptualize the role of intent differently in different areas of law.³ The classical Sunni Islamic legal tradition recognized four schools of law as orthodox. These schools differed on points of theory, interpretive methodology and substantive law.⁴ Naturally, then, if you compare the writings of jurists from different schools, each dealing with a particular area of law, you will find that different schools conceptualize the role of motive in different ways. To do the type of study Powers proposes, one must separate out different areas of law and study the different ways that jurists

any study in English that uses this approach for a subject as broad and elusive as the role of "intent" in shaping views about the legality of an action.

3. Jurists in different schools of law sometimes use different words to deal with something that we might recognize as "intention." More confusingly, when discussing motive and the way in which an actor's motive will be relevant to the determination of the legal status of that actor's actions, a single jurist might not always conceptualize motive in the same way or even use the same word for "motive." For example, when discussing the intention to perform a ritual action—an intention that is necessary for the action to even qualify as "ritual" as opposed to mere accident—a jurist may use one word. When discussing the intention behind an action that results in a person's death—a factor that determines the punishment to which the killer is subject—the same jurist may use a different word.

4. Each school's interpretive approach was considered a legitimate method of looking for God's rulings. And each accepted the orthodoxy of any interpretation of *sharī'a* so long as it was derived (a) by a qualified jurist and (b) through a legitimate method of interpretation. As a practical matter, this meant that an interpretation of *sharī'a* was orthodox if it was developed by a scholar trained (and licensed) by one of the four schools of law. Intriguing (and arguably admirable) as the doctrine of mutual orthodoxy was, the pluralism to which it inevitably gives rise makes for an unwieldy tradition in which to look for a single understanding of concept such as "intent."

conceptualized the role of motive in these areas. Or, conversely, one must separate out the four schools and talk about the different role that motive plays in their elaborations of law in different areas.

THE BOOK'S FINDINGS

What are the results of his study? Powers takes the first of the approaches outlined above. He divides his book into chapters. In each, Powers focuses on one area of law (ritual law, contract law, personal status law—roughly comparable to “family” law in the modern West—and penal law) and he discusses how in each of these areas Islamic jurists from different schools sought to determine the motives of an actor and to consider motive as a factor in determining the legality of an action.

Powers's discussion of intent in ritual law takes up two chapters and, indeed, the better part of the first half of his book.⁵ (25-88) Aside from scholars of Islamic religious and legal thought, this analysis will be of interest primarily to legal theorists, and those interested in the philosophy of language or ethics. Powers discusses the paradoxes created by commands to engage in ritual actions—pedestrian actions which become significant when they are performed in a religious context. Drawing upon a theoretical paradigm created by John Searle,⁶ Powers points out that Islamic jurists implicitly understood that intent should be a crucial component of a ritual action. (A ritual act done accidentally would not, to their mind, count as a ritual and would not redound to the moral credit of the actor.) They thus developed a sophisticated analysis of ritual intent in order to determine which acts would satisfy God's ritual requirements.

Moving to areas of civil law, Powers starts with a discussion of “intent” in Islamic contract law. This chapter shows how Islamic jurists dealt with such issues as linguistic ambiguity in the interpretation of contracts and the advantage of “objective” or “subjective” theories of contract formation—issues of concern to lawyers, judges and scholars working in both the common and the civil law systems. Because there has already been considerable work on Islamic contract law, Powers is

5. The focus on ritual law surely reflects the fact that Powers took his doctorate in the history of religions. Religion departments in the U.S. have recently focused a great deal on the role and regulation of ritual. His two chapters are thus directed toward internal discussions within the field of religious studies as much as they are to discussions within the field of Islamic law.

6. Searle's theory is discussed in the Introduction 14-19, and some of the implications for the study of Islamic laws of ritual are discussed there. After that, Powers re-engages regularly with Searle in his chapter on ritual law. See 47-48, 50-51, 56-60, 85-88. See also 98-99 (for the purpose of contrasting ritual and contract law).

able to summarize some existing hypotheses about the role of intent in Islamic law and then to test each. He begins by cogently summarizing the diverse conclusions of modern Arab and European scholars such as Osama Arabi, Baber Johansen, Brinkley Messick, Sanhuri, Joseph Schacht, and Jeanette Wakin. (101-120) This is itself an achievement. Checking the competing theories against his own reading of the primary texts, Powers concludes, in line with Sanhuri and Arabi, that Islamic jurists were deeply divided about the degree to which a jurist should consider the intent of a contracting party and about the method that a jurist should use to determine that intent. After summarizing the views of jurists in different schools, he asks whether the texts suggest a reason for the multiplicity of views. Suggesting that Schacht's and Johansen's sociological explanation for the nature of Islamic law must be qualified, he asserts that his research supports the conclusions of Sanhuri, Arabi and, more recently, Messick, who suggest that the jurists' varied treatment of intent in the area of contracts resulted from very different views about (a) the nature of Islamic law and (b) the problems faced by a human agent entrusted with the task of interpreting and applying that law. (120-121)

In classical Islamic law, personal status law (overlapping with what we would call "family law") is an area of civil law. In an interesting, but ultimately inconclusive, discussion of intent in personal status law, Powers finds that there is disagreement even within a single school over the role that intent plays in creating legal relationships in areas such as marriage. Or rather, he finds intent plays a different role in the formation of marriage than it does in its dissolution.⁷ Furthermore, he argues that jurists, no matter their school, often assigned to "intent" very different roles in contract law and personal status law. He argues that scholars to date have failed to account for this.⁸ I think he may be underestimating the explanatory power of some theories—particularly those of Baber Johansen and Brinkley Messick. That said, his critiques are worth considering.

The discussion of intent in penal law begins with a discussion of the role of intent in assessing the punishment/compensation for injurious actions. The essay is notable in part for its extremely lucid discussion of homicide in Islamic law. (171-186) It concludes with a provocative discussion about the way in which juristic discussions about the role of intent bring out latent tensions between *fiqh* as a body of moral law that

7. Compare 130 and 144, and see discussion at 160-161.

8. See generally 158-167, and particularly the discussion at 166-167.

can only be enforced by God and *fiqh* as a body of earthly law that plays a central role in keeping the peace on earth. (186-189) The discussion of intent in the context of the so-called *hadd* crimes is short, and ultimately one wishes it could have been expanded. Following the lead of Schacht, Powers concludes that jurists were particularly concerned about intent in determining whether a *hadd* crime had been committed and this was, in large part, because they wished to apply these crimes as rarely as possible. (194-195) It is a plausible and intriguing suggestion, but it deserves more space than Powers has to give it. In the conclusion to this section on intent in criminal law, Powers asks whether there is some way to conceptualize the role of intent that will make sense of its seemingly different roles in civil and penal laws. He looks at two models and finds each wanting. Powers had earlier criticized Rosen's view of intent as a description of juristic views of motive in civil law. (164-166) He argues that it may be more apt in penal law. (198-199) However, in a survey of numerous juristic discussions, Powers finds some places where some jurists seem instead to agree with Messick's quite different understanding of Islamic intent. As in his discussion of personal status law, he finds himself forced to conclude in inconclusive fashion: "perhaps we see a range of views that stretches to include both Rosen's near-behaviorism and Messick's foundationalism, rather than simply one or the other." (198-199)

As frustrating as this type of ending might seem, it speaks to the integrity of the author, his precision and, ultimately, I think, to one of the great strengths of the book.

POWERS'S CONTRIBUTION TO CURRENT SCHOLARSHIP

Buyer beware. Although the title of this book might seem to suggest that Powers will describe a single Islamic concept of "intent," Powers's book does not do this. Instead, it methodically demonstrates that there may not be any single core understanding of "intent" implicit in the writings of Islamic jurists. He finds that jurists regularly discuss things that we might think of as "intent." However, these "intents" are described differently by jurists in different schools and even within a single school, the discussions of intent in different areas of law might differ from each other in important particulars. At the end, Powers does not feel the need to propose an overarching theory of "intent" in Islamic law. Indeed, he suggests that it would be quixotic at this stage to look for one. Readers who seek a quick summary of Islamic intent might be frustrated by Powers's unwillingness or inability to come up with an overarching theory of "intent" in Islamic law. But it seems to me that by

embracing the complexity and ambiguities of his subject, Powers has done the legal academy and community of practitioners a real service.

First, in an age when reductive discussions about Islamic law are common, it is heartening to see a book that demands that readers confront the fact that classical Sunni Islamic legal writings are complex, multifaceted and diverse.

Second, Powers's book provides useful information that may help resolve some questions in the scholarly literature about the role of intent in various areas of Islamic law. Powers has read widely in the secondary literature and has taken time to understand the conclusions that historians and anthropologists of law have reached with respect to "intent" in Islamic law. Noting that their conclusions are often based on limited samples, he has done considerable work in the primary sources in order to check them. He has recorded his findings in language that is, considering the complexity of the material, remarkably easy to follow. He proposes cautiously, but I think convincingly, that the conclusions found in some influential current works of Islamic legal history should be taken with caution. Without discounting the erudition of the scholars who proposed these conclusions, or the value of their work, Powers shows that their conclusions are sometimes overbroad. Based on studies within one school of Islamic legal thought, they make generalizations that do not bear close scrutiny and must be qualified. (199) One might ask whether Powers's own work is too limited in scope and subject to revision. Jurists within a single school of Islamic thought might disagree with each other, and one wonders whether there may be even more divergence of opinion than he recognizes.⁹ This is not, however, a conclusion from which he would shy.

9. Research is continually revealing how much internal disagreement there was among scholars within a single school and revealing that schools adopted modes of reasoning that encouraged intra-madhab disputation. For some shorter works, see for example Sherman Jackson, Taqlid, *Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory: Mutlaq and 'Amm in the Jurisprudence of Shihâb al-Dîn al-Qarâfi*, 3 *Islamic L. & Socy.* 165 (1996). See also some of the contributions to the *The Islamic School of Law: Evolution, Devolution and Progress* (Peri Bearman et al. eds., Islamic Leg. Stud. Program, Harv. L. Sch. 2006), such as Eyyup Said Kaya, *Continuity and Change in Islamic Law: the Concept of Madhhab and the Dimensions of Legal Disagreement in Hanafi Scholarship of the Tenth Century*, in Bearman at 26-40; Maribel Fierro, *Proto Malikis, malikis and Reformed Malikis in al-Andalus*, in Bearman at 57-76; Daniella Talmon-Heller, *Fidelity, Cohesion and Conformity Within Madhhabs in Szngid and Ayyubid Syria*, in Bearman at 94-116. For monographs discussing the institutional and theoretical structures that promoted such disputes, there have been a number of works looking at the subject, including Wael Hallaq, *Authority Continuity and Change in Islamic Law* (Cambridge U. Press 2001); Brannon Wheeler *Applying the Canon in Islam: The Authorization and Maintenance of Interpretive Reasoning in Hanafi Scholarship* (SUNY Press 1996).

This brings us to a third merit of his book. Powers has provided an interesting challenge for other scholars. At each stage of his argument, he has willingly acknowledged the contingency of his findings, the questions that they raise and the need for research. His book provides a guide for future research that could be used to test his findings and to supplement them.

Finally, some people study comparative law because it gives them new ways to think about commonplace ideas. For such people, the book is an embarrassment of riches. Because Powers discusses separately the role of intent in different areas of law, his studies give such readers a variety of different examples of ways in which a person's intent might reasonably change the way that we think about that action and the ethico/legal characterizations that we feel should apply to it.

CONCLUSION

Paul Powers's book is not an introductory work. Nor is it one that should be entered into lightly. It takes a subject that is more complex than one might at first expect and addresses it with the subtlety it deserves. Powers is precise in his reading of complex texts and is unfazed by ambiguities or apparent disagreement in the texts. Indeed, very much in the spirit of the scholars that he studies, Powers seems to celebrate diversity and disagreement. As a book that avoids reductive summaries of Islamic law, this is a very welcome contribution to the field both of Islamic legal studies and comparative legal studies. One hopes that Powers will continue his own work in this area and that others will accept his challenge and follow some of the signposts he has placed for further research.

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