Introduction

A Global Challenge

The phenomenon of minor marriage is by no means limited to the Muslim world. The United Nations Children's Fund has described minor marriage as a global challenge requiring multiple fronts of action to protect the rights of children. Both boys and girls married prior to maturity are by definition victims of gross violations of their human rights. The right to free and full consent to a marriage is recognized in the Universal Declaration of Human Rights (1948) with the recognition that consent cannot be 'free and full' when any of the parties involved is not sufficiently mature to make an informed decision about a life partner.[1] In nations across the world activists struggle to implement the recommendations of both the Universal Declaration of Human Rights (1948) and the Convention on the Elimination of all Forms of Discrimination against Women (1979); one such recommendation is that there be a minimum marriage age of eighteen. Child brides are more often prey to domestic violence and sexual violence, and are exposed to premature pregnancy and a vast range of sexually-transmitted diseases.[2] A 2014 United Nations Population Fund report declares that within the next decade some 140 million girls will marry prior to the age of eighteen.[3]

Each year, fourteen million adolescents give birth, an age group that suffers twice the mortality rate in childbirth as women in their twenties.[4] UNICEF calls on governments to educate their people on human rights and health issues and to enforce minimum ages of marriage as well as the registration of marriages and births. To achieve this, however, cultural attitudes and

1 http://www.unicef.org/policyanalysis/files/Child_Marriage_and_the_Law(1).pdf, last accessed on 7/19/16.

2 http://www.unicef.org/policyanalysis/files/Child_Marriage_and_the_Law(1).pdf, last accessed on 7/19/16. See also: http://www.data.unicef.org/corecode/uploads/document6/uploaded_pdfs/corecode/Child-Marriage-Brochure-HR_164.pdf. Last accessed on 7/19/16.

3 http://www.equalitynow.org/sites/default/files/Protecting_the_Girl_Child.pdf, last accessed 7/19/16.

4 Ibid. Note one Yemeni Shaykh's furious refutation of what he refers to as the conspiracies of "Organizations" such as UNICEF. These, he claims, portend to fear for the reproductive health of children while being behind the parliament's "worthless decision" (*qarār lā wazn lahu walā qīma*) to raise the Yemeni marriage age to seventeen. http://www.ahlalhdeeth.com/vb/showthread.php?t=228599, last accessed on 7/21/16.

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traditions that foster acceptance of prepubescent and child marriage must be approached through dialogue and open discourse.

Minor marriage knows few borders; it is most prevalent in Sub-Saharan Africa and South Asia. A recent study has detailed the pervasiveness of the phenomenon in countries of Central and Eastern Europe as well as those of the Former Soviet Union.[5] In the United States, it occurs among certain Christian denominations, most famously the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDC), or United Effort Plan (UEP). This denomination also tenaciously insists on preserving the practice of polygyny.[6] Its president/prophet, Warren Jeffs, spent time on the Federal Bureau of Investigation's "most wanted" list for his role in forced minor marriages and was prosecuted for statutory rape of his twelve-year-old wife.[7]

Nor has minor marriage escaped the notice of the United States Congress, which passed in 2013 the Violence against Women Reauthorization Act. Not only does the Act affirm the commitment of the United States to fighting the issue of child marriage domestically, but it also gives a mandate to the Secretary of State to compel each embassy to give an accounting of human rights violations. Investigation into forced marriage and minor marriage has become an essential component of such reporting.[8]

While widespread globally, marriages of minors are also pervasive in certain regions of the world that claim an Islamic religious identity. Although some countries such as Jordan and Syria have enshrined eighteen as the legal age at which to marry, and Libya institutionalized a marriage age of twenty-one, Egypt's minimum age remains only sixteen and Sudan's is only eleven.[9] Of the Sub-Saharan African countries where Muslim populations exceed one million, seven have determined no minimum age, while three have a minimum age of

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5 http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20_Cheryl%20Thomas%20revised_.pdf, last accessed on 7/16/2016.

6 See John Krakauer, *Under the Banner of Heaven* (New York: Anchor Books, 2004). Note the stories of Mary Ann Kingston, pp. 18–20 and Linda Kunz Green, pp. 20–24. See Carolyn Jessop, *Escape* (New York: Broadway Books, 2007) and Elissa Wall, *Stolen Innocence* (New York: William Morrow, 2008), both focused on the abuses of women and children within the FLDS sect.

7 Ben Winslow, "Jeffs seen in Arizona?" *Deseret News*, June 13, 2006.

8 http://www.girlsnotbrides.org/new-law-makes-ending-child-marriage-a-us-government-priority/, last accessed 7/15/2016.

9 Ibrahim, Barbara and Abdalla, Alyce, "Child Marriage: Arab States," in Encyclopedia of Women and Islamic Cultures, General Editor Suad Joseph. Consulted online on 16 July 2016, http://proxy.library.upenn.edu:2146/10.1163/1872–5309_ewic_EWICCOM_0162a.

fifteen for girls (eighteen for boys) and one, Chad, allows girls aged fourteen to marry. Saudi Arabia has not set a minimum age.[10]

Even where minimum marriage ages are legislated, enforcement remains difficult, particularly in rural areas where state authority is lacking and in areas where there is a cultural assumption that early marriage is a religiously-sanctioned institution. In Egypt, for example, the Law on Marriage Age (no. 56/1923) set the minimum age of marriage and stipulated that legal claims cannot be heard by married parties under that age. No punishments or legal consequences are stipulated for the early marriages. Thus it remains a common practice in rural areas of Egypt to marry off girls at the age of thirteen and delay registration of the marriage until age sixteen, creating serious legitimacy issues for any offspring born in the interim.[11] In Syrian refugee camps in Jordan, Iraq, Egypt, Lebanon and Turkey, where there is no recourse to any sort of state authority, there have been dramatic increases in child marriage since 2011.[12]

In Islamic law, marriage is a contractual relationship. As with any contract, it requires the consent of the involved parties. As a contractual relationship, marriage imposes on the parties mutual rights and obligations.[13] The act of marriage causes husband and wife to inherit from each other and affirms any paternity claims. Wives receive the full range of financial maintenance in exchange for providing sex. Accordingly, husbands may restrict the movements of their wives in order to fully benefit from their sexual availability.[14] While

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10 Although the *Encyclopedia of Women and Islamic Cultures* asserts that the marriage age in Yemen is 14 (art. "Child Marriage: Arab States"), elsewhere Yemen has been grouped with Saudi Arabia as not yet having determined a minimum age for marriage. A report from Human Rights Watch details that some 14% of Yemeni girls are married before the age of fifteen, while 52% are married prior to the age of eighteen. http://america.aljazeera.com/articles/2014/1/19/rights-group-lawfailingtoprotectchildbrides.html.

11 See *Women Living Under Muslim Laws: Women, Family, Laws and Customs in the Muslim World*, International Solidarity Network (New Delhi: Zubaan, 2006), 129. See also the important study of Shaham, Ron, "Custom, Islamic Law, and Statutory Legislation: Marriage Registration and Minimum Age of Marriage in the Egyptian Sharīʿah Courts," in *Islamic Law and Society*, Vol 2, no. 3, *Marriage, Divorce and Succession in the Muslim Family* (1995), pp. 258–281. See also *Expert Witness*, 122–123.

12 http://www.savethechildren.org/atf/cf/%7B9def2ebe-10ae-432c-9bd0-df91d2eba74a%7D/TOO_YOUNG_TO_WED_REPORT_0714.PDF, last accessed 7/25/2016.

13 Kecia Ali, "Marriage in Classical Islamic Jurisprudence," in Asifa Quraishi and Frank Vogel, eds., *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (Cambridge: Harvard University Press, 2008), 12.

14 For more on marriage laws of Egypt, and how Egyptian women can circumvent the husband's legal ability to prevent them from studying or working outside the home via

procreation is typically deemed an added benefit, the main purpose of marriage is to create a framework in which sex can take place licitly.[15]

The debate over setting a minimum marriage age in Saudi Arabia is an area where early Islamic legal thought is often invoked.[16] Saudi Arabia has famously abstained from adopting the Universal Declaration of Human Rights, citing Article Sixteen's description of marriage rights[17] as one of the principle reasons

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clauses in the marriage contract, see Zulficar, Mona, "The Islamic Marriage Contract in Egypt," in *The Islamic Marriage Contract,* 231–265.

15 For an extensive discussion of the benefits of marriage with regard to taming the passions see (the Shāfiʿī) al-Ghazālī (d. 1111), *Iḥyāʾ ʿulūm al-dīn*, Chapter on the Ethics of Marriage (*Adāb al-nikāḥ*), 2:32–77. Although the gist of the chapter is generally that marriage is for those who cannot otherwise control their passions, particularly given that marriage involves intensive preoccupation with worldly affairs such as earning a living, all of which distract from God, he spends some time on the issues of women's sexuality, particularly the benefits of foreplay and simultaneous orgasm (74–75), admonishing the man through a Prophetic hadith (deemed false, see fn. 6) not to "satisfy his need for her before she has satisfied her need for him" (74). Unsatisfied passion in the woman is considered "harmful for her" (75). Further, he should increase, if necessary, the every-four-night rule with regard to her sexual needs, "according to her need for being rendered chaste" (*bi-ḥasb ḥājatihā fī al-taḥṣīn*) (75). See additionally, pps. 43–44 for insights into the concept of exhausting one's (i.e., the man's) physical passions in order to empty the heart to better focus on God. While espousing a typically Sufi perspective, al-Ghazālī still includes culturally-enlightening reports, some encouraging sex in order to enhance focus, some encouraging abstinence for the same reasons. The reports are of varying authenticity, regarding such companions as Ibn ʿUmar who would reportedly break his fast by having sex before the sundown prayer, or the report of Ibn ʿAbbās that "the best among you is the one with the most women." Conversely, a telling maxim illustrating the perspective of disdain regarding marriage reads, "Whoever has gotten used to the thighs of women achieves nothing!" (51).

16 It is expedient, although perhaps unfair, to focus sole attention on Saudi Arabia. This issue is of major importance in Sub-Saharan Africa, as mentioned, where marriage age debates are taking place on the tribal and regional level, as seen in Kenya. Personal correspondence with John Kunyuk, magistrate who used my article, "An Evolution in Early Juristic Thought on Prepubescent Marriage," *Comparative Islamic Studies*, vol. 5.1 (2009) 33–92, to press the case for marriage age with resistant local leaders.

17 Article 16 reads: (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Universal Declaration of Human Rights, http://iipdigital.usembassy.gov/st/english/pamphlet/2012/06/20120602670 2.html#axzz4EVXdSZK9, last accessed 7/15/2016.

for dissent.[18] In a recent case of compelled minor marriage in Saudi Arabia, the legal arguments used appeared more traditional than text-based,[19] and their resolution was purely the result of prudential calculations on the part of the Saudi government. After international outcry, a member of the Saudi royal family paid the husband to renounce his right to his bride.[20] It had been, in the final analysis, a marriage arranged to settle the debt of the bride's father, a scenario which is historically familiar,[21] but which nonetheless obviates the inherent right of the bride alone to her bridal gift. Although both the Ministry of Justice and the Shūrā Council have proposed measures to set one, the concept of a minimum age for marriage, particularly one that aligns with internationally-accepted norms, has remained a highly contentious issue.[22]

The Early Legal Tradition's Relevance

What exactly is at stake? For many Saudi Arabian jurists, the issue of minor marriage is inextricably tied to consensus (*ijmāʿ*), one of the four sources of Sharīʿa law.[23] Consensus is deemed to be binding; disagreeing with a perceived consensus is posited as disagreeing with Islam itself and a sin. Thus consensus has acquired a mystique of unassailability. However, when pressed, modern Muslim scholars struggle to explain consensus. Does the term refer to the

18 http://ccnmtl.columbia.edu/projects/mmt/udhr/article_16.html, last accessed on 7/15/2016.

19 A Saudi judge in 2008 refused to annul the marriage of an eight year-old girl to a fifty-eight year-old man. See Black, Ian, "Marriage of Saudi Arabian girl, 8 annulled," *The Guardian*, Friday, 1 May, 2009 http://www.theguardian.com/world/2009/may/01/saudi-arabian-child-marriage-annulled, last accessed 1/26/15. See also Black, Ian, "Saudi girl, 8, married off to 58-year-old is denied divorce," *The Guardian*, Tuesday, 23 December 2008 http://www.theguardian.com/world/2008/dec/23/saudi-arabia-human-rights last accessed 1/26/15. The same case appears in other news outlets as being between an eight-year-old girl and a 47-year-old-man. http://www.cnn.com/2009/WORLD/meast/01/17/saudi.child.marriage/, last accessed, 1/26/15.

20 http://www.theguardian.com/world/2009/may/01/saudi-arabian-child-marriage-annulled, last accessed, 1/26/15.

21 Ottoman sources detail many such marriages, as we shall see in Chapter 8.

22 http://america.aljazeera.com/articles/2014/1/19/rights-group-lawfailingtoprotectchildbrides.html, last accessed, 7/19/16.

23 The Qur'ān, the Sunna (the "way"/"practice" of the prophet, or prophetic tradition), consensus and analogy all provide the building blocks of Islamic law. They are considered the *uṣūl*, literally the sources or roots. Positive law derived from these sources is known as the branches, the *furūʿ*.

consensus of the community at large? The Companions of the Prophet? All of the qualified early scholars? If so, of which generation exactly? How were their opinions assessed? What if one scholar disagreed? What if one only tacitly agreed? What if one agreed and then changed his mind? How many voices of disagreement could nullify a consensus? When pressed further, many are able to articulate that the consensus existed to ascribe certainty to a particular prophetic tradition. But what if there is consensus about a tradition's content but not about its interpretation? What if there is consensus about its interpretation but not about its content? Such debates have swirled on since very early in Islamic legal history.

How does consensus factor into modern legal debates? First and foremost it is an invocation of early authority. Early authority matters for Muslims, particularly that of the earliest scholars of Islam who attempted to distill the divine will into righteous practice. Often this sort of authority matters far more than current international norms.

But authority is not vested only in those earliest jurists, or the earliest community, but stretches along a vast continuum of pious men engaged with the law and its texts.[24] That it has been a largely male enterprise is evidenced by the fact that "women's basic rights are often sacrificed when dominant modes of argument press claims into their extreme form."[25] The sources of law, when dealt with selectively, can submit easily to an "authoritarian hermeneutic"[26] that preserves male power when it comes to the realms of divorce, sexual access, the right of a father to contract marriage for his daughters, and many other issues.

What, then, is the process undertaken to cull guidance from the sources of law? In formulating responsa to modern issues, Saudi jurists often look to a multi-volume work of positive law called *al-Mughnī.* Composed by the thirteenth-century Ḥanbalī jurist Muwaffaq al-Dīn Ibn Qudāma al-Maqdisī (d. 620/1223),[27] *al-Mughnī* is one of the six jurisprudential works around which

24 This is not to suggest that no women undertook this task. *Al-Muhaddithat*, Mohammad Akram Nadwi (Interface Publications, 2013), is but the preface to a forty volume biographical dictionary detailing the lives of women scholars of Islam.

25 Kecia Ali, "Just Say Yes: Law, Consent, and Feminist Epistemologies," in *Jihad for Justice* (48Hrs), 133.

26 Khaled Abou el Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford:Oneworld, 2001), 5.

27 Ibn Qudāma was born outside of Jerusalem in 541/1147 and left with his family for Damascus after persecution by the Franks. He studied in Baghdad with the great Ḥanbalī scholar ʿAbd al-Qādir al-Jīlī but eventually returned to Damascus where he remained except for the period in which he took part with Saladin in the conquest of Jerusalem in 583/1187.

the Saudi legal system is shaped. Not only is it a useful legal history, but it incorporates many now-lost Ḥanbalī legal sources alongside a commentary on an important fiqh work of Abū al-Qāsim al-Khiraqī (d. 334/945).[28]

On the topic of minor marriage, the claim of consensus features prominently in Ibn Qudāma's position on the subject of compulsion in minor marriage. Most fascinating about his approach is that Ibn Qudāma invokes an early consensus claim *first* in his arguments regarding minor marriage, prior even to any invocation of the Qur'ān or the Sunna.[29] The latter two sources are accorded a higher status than consensus, because they are understood to emanate from the divine, while a perceived consensus only takes on a stamp of divine approval retroactively. In contrast to Ibn Qudāma's position, it is worth noting that a modern Saudi mufti, Ṣāliḥ al-Fawzān (b. 1935),[30] reverses the order as he argues his case for prepubescent marriage. He looks to Quranic evidence (65:4[31]), then to the model of the prophet's marriage to ʿĀ'isha,[32] at age six with the marriage consummated at age nine,[33] and then to the consensus of the scholars.

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28 Susan Spectorsky, *Chapters on Marriage and Divorce: Responses of Ibn Ḥanbal and Ibn Rāhwayh* (Austin: University of Texas Press, 1993), xi.

29 http://www.ahlalhdeeth.com/vb/showthread.php?t=254364, last accessed 7/21/16.

30 See also al-Fawzān's media presence via his website, http://www.alfawzan.af.org.sa, or a popular television show, https://youtu.be/qoIi9trRFwg. Of additional interest is his position teaching judges in al-Maʿhad al-ʿĀlī lil-Qaḍāʾ.

31 "Now as for your women as are beyond the age of monthly courses, as well as for such as do not have any courses, their waiting-period—if you have any doubt [about it]—shall be three [calendar] months; and as for those who are with child, the end of their waiting term shall come when they deliver their burden. And for everyone who is conscious of God, He makes it easy to obey His commandment." Muhammad Asad, *The Message of the Qur'ān* (Gibraltar: Dar al-Andalus, 1993), 873.

32 ʿĀ'isha bint Abī Bakr was renowned as a relater of hadith, and has some three hundred traditions in the canonical hadith collections. She died in 58/678, and her birth date is debated. Watt gives it as ca. 614; further, he says she could not have been more than ten at the time she was transferred into the prophet's house. Watt, W. Montgomery, "'Ā'isha Bint Abī Bakr", in: *Encyclopaedia of Islam, Second Edition*, Edited by: P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs. Consulted online on 04 August 2016 <http://proxy.library.upenn.edu:2146/10.1163/1573–3912_islam_SIM_0440>. (Designated hereafter as EI2.)

33 The *Encyclopedia of Women and Islamic Cultures* suggests, without citing a source, that her age was twelve. Ibrahim, Barbara and Abdalla, Alyce, "Child Marriage: Arab States," in Encyclopedia of Women and Islamic Cultures, General Editor Suad Joseph. Consulted online on 16 July 2016, http://proxy.library.upenn.edu:2146/10.1163/1872–5309_ewic_EWICCOM_0162a .

Al-Fawzān practices the art of the jurisconsult in a post-colonial world where, for all intents and purposes, there is no Islamic legal system. Lacking the processes, institutions, and instructional methodologies of the past, Islamic law exists in the "present age as a set of *aḥkām* (rules) and not as a process of *fiqh*."[34] Even the self-proclaimed model of the Muslim state, Saudi Arabia, has resorted to codification which is, at its heart, anathema to the epistemologies and methodologies of *fiqh*. For al-Fawzān, relying on the "sources" of Islamic law is tantamount to safeguarding the Muslim community. The Sharīʿa does not define a girl's marriage age, he writes, and it is not up to those who want to impose one to legislate anything for which God did not grant permission. Doing so, he warns, will lead to communal destruction (*halāk*) and untold suffering (*ʿadhāb*). In his 2011 internet *fatwa*, he defends the lack of an established marriage age by adducing no less than four claims of Ijmāʿ about the licit nature of marrying off prepubescents. He also extracts the entirety of Ibn Qudāma's opinion from the *Mughnī*.

What, then, was Ibn Qudāma's opinion?

It is possible to parse the statements made by Ibn Qudāma in such a way that his words open pathways into each discrete topic of this study. His arguments may be outlined here as follows:[35]

1. A father may contract marriage for his mature or prepubescent virgin daughter against her will, as long as he has made for her a suitable match.[36]
2. There is no difference of opinion over the father's ability to compel the prepubescent virgin. Ibn Qudāma then cites the consensus claim of Ibn al-Mundhir (d. 318/930).[37] Accompanying this claim is the caveat that the match must be one that is "suitable."[38]

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34 Khaled Abou El Fadl, *Speaking in God's Name*, 171. Abou el Fadl defines fiqh as "lit., the understanding. Islamic law: the process of jurisprudence by which the rules of Islamic law are derived. The word is also used to refer generally to law" (300).

35 See *al-Mughnī*, 9:200–202.

36 *Idhā zawwaja al-rajul ibnatahu al-bikr fa-waḍaʿhā fī kifāyah fa-l-nikāḥ thābit wa-in karahat kabīra kānat aw ṣaghīra.*

37 Abū Bakr Muḥammad ibn Ibrāhīm ibn al-Mundhir al-Nīsābūrī. For more information on Ibn al-Mundhir see the introduction to Ibn al-Qaṭṭān al-Fāsī, *al-Iqnāʿ fī masāʾil al-ijmāʿ* ed, Fārūq Ḥammāda, (Damascus: Dār al-Qalam, 2003), pp. 64–70 See also *Kitāb al-Awsaṭ*, ed. Abū Ḥammād Ṣaghīr Aḥmad, 11–18 and 47–51; the latter is also the preeminent source on Ibn al-Mundhir's works and their abridgments, see especially 19–46.

38 *Ammā al-bikr al-ṣaghīra fa-lā khilāf fīhā. Qāla Ibn al-Mundhir: ajmaʿa kull mān nahfaẓ ʿanhu min ahl al-ʿilm anna nikāḥ al-ab ibnatahu al-bikr al-ṣaghīra jāʾiz idhā zawwajahā min kufūʾ wa yajūz lahu tazwījuhā maʿa karāhiyatihā wa-imtināʿihā.*

3. Prepubescent marriage is licit because of Q65:4.[39] The waiting period (*ʿidda*) does not become mandatory unless an actual divorce from a consummated marriage has taken place; Ibn Qudāma states unequivocally that this verse proves that the prepubescent female can be married and divorced/repudiated without consideration of her opinion.[40]
4. He then cites the report of ʿĀ'isha's early marriage, noting that it is "agreed upon," and that ʿĀ'isha at the time of her marriage, being six (at the time of the contract) and then nine (at the time of consummation), had no opinion to give.[41]
5. Next, he cites as precedent the early marriages of Qudāma ibn Maẓʿūn and Umm Kulthūm bint ʿAlī ibn Abī Ṭālib.
6. Finally, he discusses the difference of opinion over the licit nature of marrying off virgins in their majority without their permission.

From the outset, it is necessary to point out that Aḥmad ibn Ḥanbal (d. 241/855) himself, eponymous founder of the school to which Ibn Qudāma belonged, left a rather equivocal legacy. In one mention of this issue he states clearly that a virgin should not be given in marriage without her express permission, and then refused to speak about whether or not her marriage would stand if she did not consent. In another rescension of his opinions, he was asked if a man could marry off his virgin daughter without consulting her; he conceded that it was possible, but that he preferred she be consulted.[42] This lack of clarity from the eponym could partially explain why Ibn Qudāma resorted quickly to the authority of Ibn al-Mundhir.

Three major issues present themselves within Ibn Qudāma's first assertion. He is convinced of the valid role of the *walī mujbir*, the *walī* (marriage guardian) who has the ability to compel[43] his virgin daughter. This first point

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39 *Wa-allāʾī yaʾisna min al-maḥīḍ min nisāʾikum in artabtum fa-ʿiddatuhunna thalāthatu ashhur wa-allāʾī lam yaḥiḍna….*

40 *Wa-qad dalla ʿalā jawāz tazwīj al-ṣaghīra qawl Allāh taʿālā "wa-allāʾī yaʾisna min al-maḥīḍ wa-allāʾī artabtum fa-ʿiddatuhunna thalāthatu ashhur wa-allāʾī lam yaḥiḍna" fa-jaʿala lillāʾī lam yaḥiḍna ʿiddata thalāthata ashhur wa-lā takūn al-ʿidda thālāthatu ashhur illā min al-ṭalāq fī nikāḥ aw faskh fa-dalla dhālik ʿalā annahā tuzawwaj wa-tuṭallaq wa-lā idhn lahā yuʿtabar.*

41 *Wa qālat ʿĀ'isha raḍī Allāh ʿan-hā tazawwajanī al-nabī ṣallā Allāh ʿalayhi wa sallam wa-anā ibnatu sitt wa banā bī wa-anā ibnatu tisaʿ. Muttafaq ʿalayh. Wa-maʿlūm annahā lam takun fī tilka al-ḥāl mimman yuʿtabaru idhnuhā.*

42 Susan Spectorsky, *Chapters on Marriage and Divorce*, 63 and 143.

43 In the case of the minor (prepubescent), Kecia Ali points out that *ijbār* (compulsion) "gives a false impression of constraint; though occasionally the jurists discussed the

has major implications with regard to the marriage contract and the concept of consent which validates it. Second, through his use of terms such as "*bikr*" (virgin)[44] and "*kabīra/ṣaghīra*" (mature/prepubescent), we see that he predicates legal capacity upon lack of virginity, while indicating that he recognizes on some level a point at which females mature physically. This invites the question of when childhood ends and when maturity begins. Third, the concept of suitability (*kafā'a*) is factored into Ibn Qudāma's justification of a father's right to compel: *the father's ability to compel is limited to his ability to place his daughter in a socially and legally appropriate match*.

In his second assertion, we encounter the consensus statement that will be explored throughout Part Two of the present study. This consensus is the *first* legal support that Ibn Qudāma adduces to bolster his position, before any recourse to what he considers to be Qur'ānic or Sunnaic evidence. Its invocation prior to the Qur'ān or Sunna is the essence of the statement's importance for this project.

Within his third assertion we find Ibn Qudāma's position that prepubescent virgin females can be married and divorced without taking their opinions into consideration. Of major importance here is Ibn Qudāma's insistence that divorce can only occur after consummation, which clearly reveals that he believes that prepubescents can engage in sexual intercourse (or, as we will see that the language of juristic discourse indicates, "have it performed upon them"[45]). In other words, these are not marriages that exist merely on paper

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permissibility of contracting such a marriage over a son or daughter's objections, for the most part minors were presumed too young to have any opinion," Kecia Ali, *Marriage and Slavery in Early Islam*. (Cambridge, Mass: Harvard University Press, 2010), 31.

44 It is important to note that the word "*bikr*" and the concept of virginity could easily enjoy comprehensive treatment in a monograph. For the purposes of this study we will use the word "virgin" to mean *bikr*, with some reference throughout to the fact that its semantics have varied with context, and jurists themselves could recognize the need to qualify the term in certain circumstances, particularly where they required it to mean "never married" as opposed to "never having experienced intercourse". See also Mohammad Fadel, "Reinterpreting the Guardian's Role in the Islamic Contract of Marriage: The Case of the Mālikī School," *The Journal of Islamic Law*, 3:1, Spring/Summer, 1998, esp. note 9, pp. 5–6.

45 Almost invariably, as jurists consider the legal parameters of sex with prepubescents, ("at what point is the minor female able to tolerate the sexual act upon her"/*matā tuṣliḥ lil-waṭ'*) the word used when describing sexual relations with a prepubescent female is *waṭ'*. This is a word that I have chosen to translate as "to perform the sexual act upon her." This translation, although unwieldy, seems to convey the lack of mutuality in the sexual act that this word suggests (unlike, for example, the word *jimā'*). It is worth noting that the semantic range of the word includes "to tread/step on;" indeed this is given as the primary meaning of the word. See Ibn Manẓūr, *Lisān al-'Arab* (Beirut: Dār Ṣādir, 1955), 2:195–197.

until such a time as the female matures sexually. The issue of when a prepubescent female becomes sexually viable and when the maintenance payments her sexual availability requires become due are topics of serious legal discussion. Finally, with regard to divorce, it is noted here that Ibn Qudāma implies that a female can be divorced against her will, just as she can be married against her will. He makes no mention here of the minor male, or the doctrine of the right of rescission (*khiyār al-bulūgh*, the "choice of [annulling a marriage upon reaching] puberty").[46]

By invoking the report of ʿĀʾisha, and noting that it is "agreed upon," Ibn Qudāma has in many ways appealed to consensus again. In this case, the consensus claim effectively functions as a shortcut. There is no accompanying chain of transmission (*isnād*), and consensus here is used to "elevate" a presumptive source to the level of certainty.[47] There would have been, during Ibn Qudāma's era, little doubt that those considered to have agreed on the veracity of the hadith would have been the famed hadith compilers al-Bukhārī and Muslim.[48] Even so, it is al-Shāfiʿī's[49] introduction of the report into these discussions which is of most interest and perhaps of most enduring influence, as will be discussed extensively. Ibn Qudāma's use of this report, and the fact that he delays reference to the other major text[50] on the subject until his discussion

46 He does reference this later in the chapter, 9:204–5, but he believes the proper context for the discussion to revolve in the main around the rights of orphans.

47 Aron Zysow, *The Economy of Certainty* (Atlanta: Lockwood Press, 2013), 114–115.

48 For more information, see Jonathan Brown, *The Canonization of al-Bukhāri and Muslim, the Formation of the Sunni Hadith Canon* (Leiden: Brill, 2007).

49 For further information on the life of Muḥammad ibn Idrīs al-Shāfiʿī see Kecia Ali, *Imam Shafiʿi, Scholar and Saint* (Oxford: OneWorld, 2011). See El Shamsy, *Canonization*, and also the editor's introduction to *Kitāb al-Umm*, ed. Dr. Rifʿat Fawzī ʿAbd al-Muṭṭalib, (al-Manṣūrah: Dār al-Wafāʾ, 2008). See also Lowry, Joseph E., "Muḥammad ibn Idrīs al-Shāfiʿī," in M. Cooperson and S. Toorawa, eds. *Arabic Literary Culture, 500–925* (Detroit: Thomson Gale, 2005), pp. 309–317. See also E Chaumont, "Al-Shāfiʿī" in *EI2*, IX, 181–5 and Schacht, Joseph, "Shāfiʿī's Life and Personality," *Studia Orientalia Ioanni Pedersen* (Copenhagen: Einar Munksgaard, 1953), 318–326. Finally, there is a brief discussion in the introduction to Lowry, Joseph E., *Early Islamic Legal Theory, The Risāla of Muḥammad ibn Idrīs al-Shāfiʿī* (Leiden: Brill, 2007), pp. 6–7. For the primary sources on the subject, consult Sezgin, Fuat, GAS, volume I, 485.

50 The *ayyim/bikr* hadith is found most famously in Mālik's (179/795) *Muwaṭṭaʾ*. The hadith occurs (somewhat earlier) in al-Awzāʿī with the wording *thayyib/bikr: Lā tunkaḥ al-thayyib ḥattā tustaʾmar wa lā tunkaḥ al-bikr ḥattā tustaʾdhan wa idhnuhā al-ṣumūt.*("The non-virgin is not married until she is consulted, and the virgin is not married until her permission is sought, and her permission is silence.").

of the virgin in her majority, indicate the preeminence that the ʿĀ'isha report had acquired by this time in Islamic legal thought.

Ibn Qudāma pointedly refrains from referring to any of the many early anecdotes regarding the compelled marriages of prepubescent males. He instead advances his argument for compelling a female prepubescent by relying on two anecdotes that discuss only females.

In his sixth assertion, he proceeds into the argument that the physically-mature level-headed virgin (*al-bikr al-bāligha al-ʿāqila*) can also be compelled to marry. This is a reprise of point one, for we have already encountered his position that virgins both prepubescent and pubescent can be compelled. He adds to this discussion, however, by invoking texts that will appear throughout the early discourse on this subject, as we shall see.

As a whole, this section of the *Mughnī* is cited repeatedly in modern discourse on the subject of minor marriage.[51] As such, those reading his fatwa are confronted with Ijmāʿ as a powerful rhetorical device for mustering authority on a given topic. Scholarly consensus is clear that prepubescent girls may be married off. Not only this, but they can be married off against their will. Therefore, no minimum marriage age for little girls can be determined. All calls for one, says al-Fawzān, have been instigated by "media interference."

Is the consensus to which he refers the same as that to which Ibn Qudāma refers? Whose consensus, after all, could be so potent as to become a legal end-point after which silence must reign? Modern scholars cite Ibn Qudāma. Ibn Qudāma, in turn, cites Ibn al-Mundhir. Ibn al-Mundhir is adduced in ways very similar to the way that the Qur'ān and the Sunna are adduced; there is no doubt that Ibn Qudāma regards Ibn al-Mundhir's opinions on consensus as a source of binding legal authority (*ḥujja*).[52]

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51 In addition to al-Fawzān's fatwa cited above, see the following lengthy Yemeni opinion on the marrying off of minor girls. When adducing Ijmāʿ 'Alī al-Ḥudhayfī, who possesses an internet following but no solid credentials, resorts to Ibn al-Mundhir and then Ibn Qudāma, clearly using Ibn Qudāma's quotation from Ibn al-Mundhir without looking to Ibn al-Mundhir's actual works or reviewing any contexts used by him in his extensive discussions. http://www.ahlalhdeeth.com/vb/showthread.php?t=228599, last accessed 7/21/16.

52 Ibn Qudāma is not alone. Ibn Ḥajar al-ʿAsqalānī quotes Ibn al-Mundhir some 590 times in *Fatḥ al-Bārī*, while Ibn Humām said of him that Ibn al-Mundhir "was among those whose transmission (*naql*) and conclusions (*taḥrīr*) are relied upon," (Citing *Fatḥ al-Qadīr*, 5:260 in Abū Ḥammād Ṣaghīr Aḥmad, ed., *K. Al-Awsaṭ,* (Riyāḍ: Dār Ṭayba, 1993) 1:18. Ibn al-Mundhir seems often to be treated as a *muḥaddith* (ḥadīth relater), hence his inclusion in a book like al-Dhahhabī's *Tadhkirat al-ḥuffāẓ*. In this latter, he is referred to as Shaykh al-Ḥaram and "an independent scholar who imitated no one (*mujtahid lā*

The following investigations of Ibn al-Mundhir and other jurists who wrote on consensus in the early tenth through mid-eleventh centuries show that they also cited earlier scholars. Investigations of *those* early scholars prove that the consensus on a father's ability to compel his prepubescent virgin daughter is but "the lowest common denominator"[53] of agreement on a tangled and multi-faceted legal issue. The consensus is, in other words, a surface scholarly agreement masking multiple layers of disagreement and dissent. This project highlights certain lacunae in the legal arguments related to the marriages of prepubescents that suggest that jurists encountered many challenges in attempting to reconcile an underlying cultural practice with what came to be understood in the early formative period as basic precepts of the Islamic legal system. Moreover, writing on prepubescent marriage was originally concerned with both genders and evolved into an almost exclusive concern with females. The culture of dissent that characterized early efforts to articulate a legal structure from the loose framework of Sharīʿa was eventually to lose ground to trends toward consolidation, uniformity, and abridgment. Such a journey has made it possible for scholars like al-Fawzān to rely on claims of Ijmāʿ that affirm the power of the father to marry off his minor daughter. Such claims never mention the minor son or the myriad issues related to prepubescent marriage about which there was simply no consensus at all.[54]

When opinions like that of al-Fawzān refer to consensus, it is put forward in a way that would suggest that because the early scholars (those charged with making sure the human and divine could meet in the realm of language[55]) agreed on a rule, its authoritativeness is therefore unquestionable. Consensus, however, "cannot be identified with the simple fact of agreement."[56] It requires a basis. Ibn Qudāma's second invocation of consensus is closer to the way that consensus functioned for jurists like Ibn al-Mundhir. But the jurists in general did not use the same texts to reach their conclusions about the basis for the

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yuqallidu aḥadan)." Al-Dhahabī, *Tadhkirat al-Ḥuffāẓ* (Hyderabad: Majlis Dāʾira al-Maʿārif al-Niẓāmīya, 1915), 3:45. Still, Ibn al-Mundhir's juridical opinions, far more than his hadith, are what seem to have been most commonly passed down.

53 I have taken this term from Joseph E. Lowry. See *Early Islamic Legal Theory*, Brill: Leiden, 2007, Chapter 7, "*Ijmāʿ* in the *Risāla*."

54 http://www.ahlalhdeeth.com/vb/showthread.php?t=254364, as well as http://www.ahlalhdeeth.com/vb/showthread.php?t=228599 last accessed 7/21/2016.

55 Paul R. Powers, "Finding God and Humanity in Language: Islamic Legal Assessments as the Meeting Point of the Divine and Human," in *Islamic Law in Theory* (Brill: Leiden, 2014), 223.

56 Zysow, *Economy*, 156.

rule in question. This study will expose the different approaches and proof texts and widely varying vocabulary that early Muslim jurists used.

Methodology and Sources

Part One

I have organized this book into two parts. Part One is organized in two ways. First, it presents the thought of the earliest scholars of Islam in the earliest legal manuals. Second, each chapter is organized conceptually around the several topics implicit in the words "minor marriage," inspired in part by Ibn Qudāma's above-mentioned discussion points. How did other late antique cultures conceptualize maturity, and how did it come to be discussed in an Islamic historical-legal context?[57] If marriage is entered into via contract, then who may contract it for one who does not yet have legal capacity? Can a party to such a contract be compelled, and if so, what does this do to the validity of the contract? What, after all, is marriage, and what are the rights and duties of spouses—and can they be fulfilled by children? What happens when one whose marriage was contracted prior to attaining legal capacity then attains that state—what makes it possible to rescind some contracts of marriage while others can only be sundered through repudiation?[58] If a groom's "suitability" (*kafā'a*) is the only possible check on a father's power to compel his minor daughter, then what renders someone "suitable"? Lineage? Class? Race? Profession? Piety?

Each of the above issues has within it many layers which challenge the notion that the permissibility of marrying off minor girls was a firmly-rooted

57 Hodgson, Hallaq and, following them, Azam argue for strong levels of cultural interaction and interreligious literacy forged by trade between Arabia and the surrounding societies. See Marshall S.G. Hodgson, *The Venture of Islam: Conscience and History in a World Civilization*, 3 vols,(Chicago: University of Chicago Press, 1974), 1:103–104, and Hallaq, *Sharia*, esp. 27–34, and Hina Azam, *Sexual Violation in Islamic Law: Substance, Evidence, and Procedure* (Cambridge: Cambridge University Press, 2015), esp. 22–23. See also Fisher, Greg, ed. *Arabs and Empires before the Sixth Century*, Oxford: Oxford University Press, 2015, pp. 66–67. See also the chapter on "Arabs and Christianity and the Christianization of Arabs," pp. 276–372, and pages 370–371 for similarities between pre-Islamic Arabs, called Ishmaelites or Saracens, and their Jewish neighbors.

58 I have, for the most part, chosen to emphasize the unilateral nature of *ṭalāq* by translating it as "repudiation" instead of divorce. A clearer translation would be "unilateral male repudiation of the wife." However, it is sometimes more awkward than it is worth to attempt this, and I have, in a few places, resorted to the word "divorce."

doctrine of Islamic law guaranteed by consensus instead of a topic fraught with contingencies and competing viewpoints. My approach to the legal manuals and compendia discussed below[59] has been historical, doctrinal, and philological. Language, and the legal theoretical issues it presents, is key.[60] For although the jurists' task is to explore the sources for legal indicants and then to generate rules,[61] inherent in this task is discovering and communicating a stable lexicon able that can encompass discussions of the divine will for the community. The jurists must "discern, to de-code as it were, the meanings of divine speech and to minimize (and otherwise come to terms with) the problems of completeness and certainty."[62] This study attempts to expose some of the instability of the lexicon used by jurists to discuss minor marriage. Words matter: Marriage, which is at the heart of this investigation, is a contractual agreement requiring binding verbal pronouncements. Consent is expressed through verbal pronouncements. Yet crucial texts declare that silence, for certain categories of females, can express consent or that certain females, due to age or inexperience, have no actual consent to give and can be compelled.[63]

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59 This is not without an awareness of the instability of the texts themselves, both from the standpoint of paleographical issues and editorial misinterpretations and from the standpoint of the textual fluidity of an oral culture transforming itself to a writerly culture. For questions about the authenticity and polyvocality of early legal texts see Schacht, Joseph, *Origins* (306–310) and *Introduction to Islamic Law* (45) Calder, Norman, *Studies in Early Muslim Jurisprudence* (Oxford, Clarendon Press, 1993) and Mubārak, Zakī, *Kitāb al-Umm lam yu'allifhu al-Shāfi'ī innammā allafahu al-Buwayṭī wa taṣarrafa fīhi al-Rabī' ibn Sulaymān* (Cairo: Maktabat Miṣr, 1991) . For additional thoughts on polyvocality of early texts, see J. Lowry, review of Muranyi, Miklos, "*Die Rechtsbucher des Qairawāners Saḥnūn b. Sa'īd: Entstehungeschichte und Werkuberlieferung*," Journal of the American Oriental Society, Vol. 123, No. 2 (April–June, 2003), pp. 438–440, and also J. Lowry, review of Berg, Herbert, ed. *Method and Theory in the Study of Islamic Origins* (Islamic History and Civilization. Studies and Texts. No. 49.) in *Journal of the Royal Asiatic Society of Great Britain & Ireland* (*Third Series*), 2005 15, pp. 104–107.

For an intriguing study of the shift from the oral to the writerly culture see Toorawa, Shawkat, *Ibn Abī Ṭāhir Ṭayfūr and the Arabic Writerly Culture* (London: Routledge Curzon, 2005).

60 For al-Shāfi'ī's discussion of language and its role see El-Shamsy, *Canonization*, esp. 72–75.

61 Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 131.

62 Powers, "Finding God and Humanity," 206–207. Note that for al-Shāfi'ī, "certainty is not a prerequisite for religiously sanctioned judicial decisions." El Shamsy, *Canonization*, p. 58.

63 For extensive discussions of silence and consent in Islamic Law, see: 'Abd al-Raḥīm, Muḥammad, *Aḥkām idhn al-insān fī al-fiqh al-Islāmī*, Damascus: Dār al-Bashā'ir, 1996, and 'Abd al-Qādir Muḥammad Qaḥṭān, *al-Sukūt al-mu'abbir 'an al-irādah wa atharuhu fī*

Given these many considerations, this study should yield information that is of general interest. First, it provides a historical survey of Islamic legal doctrine on minor marriage and several related areas of the law pertaining to capacity, guardianship, maintenance, suitability, and termination of marriage through rescission or repudiation or divorce. Second, it provides an example of an investigation of the practical implications of consensus claims on positive law. Although subordinated to the larger inquiry concerning minor marriage, this inquiry into the contours of a particular consensus offers new and substantive methodological implications for the field of Islamic law that should resonate beyond the current study.

Chapter One, "Contextualizing Minor Marriage," attempts to locate the ensuing legal discussions of minor marriage in their Near Eastern contexts as well as in the early history of the Islamic community as it transitioned away from a purely Arabian identity. Such an approach prevents the temptation to suggest that certain practices show either "Islamic exceptionalism" or can lead to "Islamic ghettoization."[64] It is in this chapter as well that the importance of the lexicon comes to light: how were majority and minority, pubescence and prepubescence, and adulthood and childhood discussed by early writers, with what vocabulary and what possible shades of meaning? How are we to interpret the deep and abiding ambiguities in these discussions? As God's speech the Qur'ān must provide these "stable signifiers and their assigned signifieds,"[65] and so an exploration of exegesis shines some light on the concept of maturity and its various implications. What then of the Sunna, that "auxiliary" of divine communication?[66]

Most of the juridical methodologies included in this study revolve around Sunnaic indicators and attempts to determine their meaning and applicability. Chapters Two through Five present the vast ranges of differing opinions held by Muslim scholars of the eighth and ninth centuries.[67] Chapter Two is devot-

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al-taṣarrufāt, Cairo: Dār al-Nahḍah al-ʿArabiyyah, 1991. For a comparative look at consent in other legal systems, see Qarah Dāghī, ʿAlī Muḥyī al-Dīn ʿAlī, *Mabda' al-riḍā fī al-ʿuqūd: dirāsah muqāranah fī al-fiqh al-Islāmī wa al-qanūn al-madanī: al-Rūmānī wa al-Faransī wa al-Injlīzī wa al-Miṣrī wa al-ʿIrāqī*, Beirut: Dār al-Bashā'ir, 1985 .

64 Azam, *Sexual Violation*, 240.

65 Powers, *Finding God*, 204–205.

66 El Shamsy, *Canonization*, 5.

67 With Hallaq, I am comfortable designating this period the "formative period" of Islamic law, the period which saw the birth and development of a complete judiciary, fully-elaborated positive law doctrine, interpretive methodologies and doctrinal schools. Schacht's notion that this period of formation ended in the mid-ninth century does not account for these four "essential attributes." Most periodizations refer to formative, founding, or

ed to mining the compilations of Abū ʿAmr ʿAbd al-Raḥmān ibn ʿAmr al-Awzāʿī (d. 158/774), ʿAbd al-Razzāq ibn Hammām ibn Nāfiʿ al-Ṣanʿānī, al-Yamanī al-Ḥimyārī (d. 211/826), and Abū Bakr ʿAbd Allāh ibn Muḥammad ibn Ibrāhīm Ibn Abī Shayba (d. 235/849). It then proceeds to the early and oft-invoked foundational-era luminaries. These include the major representative of the early Ḥanafī school, Muḥammad ibn al-Ḥasan al-Shaybānī (d. 189/805), in Chapter Three. Chapter Four presents the thought of Mālik ibn Anas (d. 179/795), eponymous founder of the Mālikī school. His work is expounded and elaborated upon by Saḥnūn ibn Saʿd al-Tanūkhī (d. 240/854). Chapter Five presents the thought of Muḥammad ibn Idrīs al-Shāfiʿī (d. 204/820), eponym of the Shāfiʿī school and jurisprudential revolutionary.

Each of these chapters attempts to locate for each scholar or set of scholars the opinions that pertain to the issues inherent in minor marriage, using as a launching pad the famous opinion of Ibn Qudāma because of its modern relevance.

It was not, of course, possible to explore the juristic thought of every early scholar of Islamic law. This study has readily-acknowledged limitations which should serve to inspire future studies on, for example, early Shiʿī scholarship in this area, or a wider exploration of the Ḥanafī school, or a deeper plunge into exegesis. Ḥanbalī ideas are more coherently explained in the book's final chapter, which deals with later scholars and whether or not consensus held for them much impact. It would have been ideal to work from manuscripts instead of editions in which misprints abound. Even more ideal would have been reliance upon court records across regions and periods, as the Ottoman specialists in these pages have done, to attempt to construct the real-life ramifications of the juridical opinions herein. Alas, these for the most part do not exist for the formative era.

Still, the early formative-era scholars whose work is here considered represent a vigorous sampling of the oft-quoted crew whose names still spill off the tongues of muftis, shaykhs, specialists, students, and laypeople. Importantly, when consensus claims hinge on the collective opinion of "the scholars," where no names are given at all and the implicit meaning is the founding intellectuals

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classical periods. I will mostly refer to early formative (for the eighth and ninth centuries) and late formative for the late ninth through early eleventh centuries. (I have included Ibn ʿAbd al-Barr among the late formative-era scholars because of the role he played as "foundational" for jurists like al-Subkī) (see Chapter Six, below). Thereafter, I will refer to the post-formative eras. See Hallaq, *Origins*, 2–3, which contains his refutation of Joseph Schacht's periodization schema. For a different view, see Intisar Rabb's discussion of this in *Doubt in Islamic Law* (Cambridge: Cambridge University Press, 2015), 8 and fn. 15.

rather than the Companions of the prophet, then it is entirely logical to turn to these, as we shall see in Part Two of this work.

Not every scholar discussed in Part One will deal with each of the issues at hand or discuss the issue in a way that allows it to be disentangled from an umbrella topic. For example, there is no clear passage on suitability in Mālik's *Muwaṭṭa'*; meanwhile, his thoughts on rescission are best inserted into the larger topic of the legal capacity of slaves, although the entire topic is best treated by exploring the way al-Shāfiʿī approached and refuted Mālikī positions (in Chapter Five). Some scholars will add new nuance to the discussions (for example, investigations of the legal capacity of slaves in comparative discussions on the legal capacity of minors). But as we will see, some common concerns appear throughout these very different texts.

Al-Shāfiʿī's approach to prepubescent marriage differs from earlier scholars. However, much that is unique to his approach begins to appear in the writings of jurists who follow him, and most particularly in the writings of the scholars discussed in Part Two—those explicitly concerned with matters of consensus.

Part Two

Given the extensive debates on so many issues tied to minor marriage, this study suggests that the practice is in many ways incompatible with the structures of legal marriage as articulated by jurists in the early formative period. As with Jewish law,[68] the basic tasks of sexual intercourse and procreation, viewed as cornerstones of a valid marriage, cannot be accomplished when the participants in the marriage are children. Thus there is much to suggest that minor marriage was an underlying cultural practice that became enshrined, however shakily, as law.[69]

The "purely juristic tool"[70] of consensus served the tenth century's attempts at streamlining, delineating, and consolidating the juridical enterprise well.

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68 For this reason, interpreters of Jewish *halakhah* rejected the talmudic statement "commending a parent who gives his children in marriage when they are close to the age of puberty (*samukh lefirkan*) and [instead interpreted it as meaning that] *samukh le-firko* meant just after his reaching the full age of 13." The *mitzvah* (good deed) of marriage (with its implicit goal of procreation) only becomes applicable at the age of 18. (Schereschewsky, "Child Marriage," 616; for more on this topic see also Satlow, 105).

69 Shaham, "Custom, Islamic Law and Statutory Legislation," 261. Shaham also notes that juristic opinion did not hold with the Qur'anic (4:6) recommendation "that the desired age at marriage is the age of maturity of mind (*rushd*)." The verse to which he refers reads: *Ḥattā idhā balaghū al-nikāḥ fa-in anastum minhum rushdan* ... This verse concerns when an orphan should take control over any assets in his or her name.

70 Hallaq, *Origins*, 129.

Much has been written about the doctrine of Ijmāʿ, its modalities, and its theoretical underpinnings.[71] This project focuses on the practical implications of writings on consensus, particularly those from a crucial period in development of Islamic legal thought, the late formative era.

Where the understanding of consensus was such that it constituted a determination of the implications of a hadith, it could not, in the early period, be distinguished from Sunnaic practice.[72] For all intents and purposes, that practice emerged from the consensus of the Companions. And yet the deeply inconsistent Sunnaic practices were what "hadith protagonists" such as al-Shāfiʿī sought to replace with a carefully delineated textual corpus of hadith.[73]

Where—much later—the understanding of consensus was such that it was the unanimous agreement of the scholars of a given age, the sheer impossibility of assessing their opinions loomed as the ultimate hurdle. In order to have weight, the consensus had to be transmitted as a textual source that could be, like the Qurʾān and Sunna, referred to and studied. To this end, the nonexistence of works disseminating those issues upon which there was an established consensus was a lacuna in the juridical enterprise.[74]

Some scholars did, however, attempt to compile issues of consensus, and Part Two of this study intends to bring some of them to light. In pointing out the vast differences between "early" (early tenth through mid-eleventh century) and "late" (thirteenth-century to modern) presentations of consensus, this work insists there has been a change. The polyvocality and pluralism of legal thought and reasoning strategies around compelling the minor female to marry have gone missing, allowing for more simplistic discussions.

Thus Part Two of this work focuses on consensus itself, with the ultimate goal being: if minor marriage is a test case for juristic claims of consensus, and the consensus in this case proves quite rickety, how sturdy is any given consensus claim? In Chapter Six, I will explore some of the legal-theoretical issues

71 For the theoretical background of consensus, see Hallaq, Wael, "On the Authoritativeness of Sunni Consensus," *International Journal of Middle East Studies*, Vol. 18, No. 4, (Nov. 1986), (Cambridge University Press), pp. 427–454; Weiss, Bernard, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidī*, (Salt Lake City: University of Utah Press, 1992), Chapter Five, "The Ijmāʿ"; and Lowry, Joseph E., *Early Islamic Legal Theory*, (Leiden: Brill, 2007), Chapter 7, "*Ijmāʿ* in the *Risāla*.". See also Aron Zysow, *The Economy of Certainty*, 198–262.

72 Hallaq, *Sharīʿa*, 48.

73 Ibid. See also Ahmed El Shamsy, *The Canonization of Islamic Law: A Social and Intellectual History*. (New York: Cambridge University Press), 2013, esp. pp. 5–6, 12.

74 Bernard Weiss, *The Spirit of Islamic Law* (Athens: The University of Georgia Press, 2006), pp. 122–123.

regarding consensus, and the beginnings of what can loosely be called "consensus writing" (some writers, after all, titled their books with the vocabulary of "disagreement writing").[75] Who were the consensus writers and how did they understand consensus? In the 13th century, Ibn al-Qaṭṭān al-Fāsī (d. 628/1230) took the trouble to compile a consensus manual. It is not always accurate, and it is almost entirely devoid of any contextualizing discussions. But it contains the consensus statements of these very writers.

Chapter Seven then presents the writings of each of these major early consensus writers. It asks what they gleaned from the oft-cited jurists whose discussions comprise Part One. What did these tenth- and eleventh-century discussions of minor marriage look like and how did they differ from those that preceded them in the eighth and ninth centuries? How did the consensus writers cope with the instability of the early lexicon of minor marriage and how did they attempt to provide certainty for a community requiring rules?

Finally, Chapter Eight considers how the works of these early consensus writers were used or even ignored by other jurists. Ibn Qudāma, ever on the minds of modern muftīs, is featured prominently as this chapter looks to the thought of post-formative and Ottoman-era scholars. It investigates their stances and sources, with the question being, Did discussions of minor marriage change substantially because of a claimed consensus on the matter? Was anything resolved, or did disagreement and debate continue?

This work's concluding chapter asks, Does consensus matter? What value are consensus manuals and consensus claims today? Consensus is seen by some as the primary tool for resurrecting and codifying Islamic law in Muslim majority countries?[76] Is this a workable solution moving forward, or is consensus nothing more than a rhetorical device projecting authority onto a particular legal position?

The ensuing discussions of minor marriage and its intertwined legal issues are complex. The many differences of opinion coupled with the great variety of early proof texts show that there is a profound lack of resolution on the topic. Could the lack of resolution on this issue of claimed consensus have implications for other topics within Islamic law? Such a conclusion may well bring into question how many complex and tangled issues in Islamic legal history have come to acquire a veneer of resolution through the engine of consensus.

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75 It should be noted that these writers were also often deemed writers of "*Ikhtilāf*". Indeed Ibn al-Mundhir, perhaps the most enduringly famous of consensus writers, is classified in Sezgin as one who wrote on *ikhtilāf*. GAS, 1:495–496. Also Tāj al-Dīn al-Subkī in *al-Ṭabaqāt al-Shāfiʿīya* (citing al-Dhahabī)(Maṭbaʿat ʿĪsā al-Bābī al-Ḥalabī, 1964), 3:102, entry 117.

76 See Zysow, *Economy*, 157.

What is clear is that for the prepubescent virgin female, whose opinion is considered to be no opinion, and whose voice is quite literally considered to be no voice, the full weight of fourteen hundred years of patriarchal authority can still be brought to bear by simply saying, "They have agreed …" For, as the introduction to one consensus manual states, anyone deciding an issue contrary to a prior consensus ("of the Companions and the scholars of the garrison cities") is a deviant sinner (*fāsiq*).[77]

77 *Kitāb al-Iqnāʿ*, 6–7, citing Abū Isḥāq al-Shīrāzī's *Lumaʿ*, 347–348.