The Guardians of the Islamic Marriage Contract and the Search for Agency in Twelver Shi'a Jurisprudence

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Abstract

The legal nature of the Islamic marriage contract and its guardians (*'awliyā' al-'aqd*) has been a source of discourse among both classical and contemporary Imami jurists.[1] Although *'awliyā al-'aqd* literally means "guardians of the contract," it is indicative of one or more individuals who have the authority to supervise the contractual matters of any non-*walī* subject.[2] This paper will attempt to examine the juristic debate over whether the mature virgin of sound mind (*al-bikr al-bālighah al-rashīdah*) is required to have the permission of her *walī* in order to get married.[3]

Introduction

Shi'i jurists of various generations have offered different opinions and rulings resulting from the differences that are attached to different streams of hadith and supported by an absence of any direct Qur'anic reference.[4] That being said, the focus of this study is largely limited to modern-contemporary discourse (nineteenth to twenty-fist century CE/fourteenth to fifteenth century AH). This undertaking is potentially substantial as it intends to demonstrate the inner-workings and performative function of the contemporary Imami *mujtahid*, as he attempts to grapple with intra-Imami *ikhtilāf*, all the while rendering a ruling on a matter of crucial social-religious importance.[5]

The primary texts of interest are works of demonstrative jurisprudence (*al-fiqh al-istidlāl*) in which jurists evaluate the textual sources (Qur'an and Hadith) through the matrix of *uṣūl al-fiqh* (principles of jurisprudence) in an effort to deduce a ruling on any *shar'ī* (legal) matter.[6] These works are often written in the form of commentaries upon earlier legal works such as *Sharā'i al-Islām*

(eighth/thirteenth century), or *al-'Urwat al-Wuthqā'* (fourteenth/early-twentieth century), which then serve as traditional indicators of *ijtihād* and discourse among Imami jurists.[7] Although the jurists covered in this essay are primarily products of nineteenth to the twenty-first-century seminaries of Najaf and Qum, it becomes clear upon perusal of their work that these jurists make no mistake of recognizing and mentioning the Imami juristic tradition of the past millennia. However, as a part of these works they include the legal opinions of past scholars while being cognizant of the fact that in their role as *mujtahid*s they are not legally bound by the exegesis of those who preceded them.

The implications of this understanding is that, upon examiningf the juridical tradition, the *mujtahid* may break with the predominant opinion or choose to reify it. In the event that the jurist parts with the predominant opinion and/or generates a new ruling all together, new legal possibilities and alternative avenues of a conservative or liberal resonance are created for those Shi'is who adhere to the system of imitating the jurist (*taqlīd*). Furthermore, the creation of alternative avenues or rejection of the predominant contemporary outlook has the potential to create instability within the Shi'i legal hierarchy, where the jurist's credentials and credibility may come into question, in addition to stirring conflict within certain community settings where believers follow different jurists with diametrically opposing rulings.[8]

Contemporary jurists are of two opinions. The first group requires the consent of the *walī* (in most cases the father or grandfather), and the second group, the minority, does not require the consent of the *walī*. In the texts of demonstrative jurisprudence the conclusion of the first group is *tashrīk* (shared agency between father and daughter), and the position of the second group is *istiqlāl al-bint* (agency of the daughter).[9] All the texts consulted in this study set out to discover and define *istiqlālīyah*. The question arises: Why is there not a similar contention and discourse concerning the betrothal of a minor who is, in fact, legally bound by the marriage contract, with no choice in the matter, upon reaching the age of maturity? The lack of contention on this seemingly iniquitous situation is due to the conformity one finds in the corresponding hadith traditions, thus leaving the mujtahid with virtually no legally acceptable avenue of protest.[10]

By conducting a close textual analysis of Ayatullah al-Sayyid Abul Qasim al- Khu'i's (d. 1993) *Mabānī al-'Urwat al-Wuthqā'* (representing the first group) and Ayatullah al-Sayyid Sadiq al-Ruhani's (b. 1926) *Fiqh al-Ṣādiq* (representing the second group), I intend to explore some of the intricacies involved in *ijtihād*, which includes but is not limited to the hermeneutics of *uṣūl al-fiqh* and hadith sciences, while showing how these hermeneutical de-

vices affect the eventual fatwa. Second, I will briefly explore the opinions of the four imams of the Sunni school and compare them to the various Shi'i positions. I do this for two reasons: (1) the Shi'i legal tradition employs the principle of *mukhālafat al-'āmmah* (opposition to the Sunnis) as a means of resolving contradictory reports[11] and (2) since the four schools are divided among themselves, how effective is *mukhālafah li al-'āmmah* as a tool for resolving bifurcation?[12]

An overarching concern throughout this essay is the dilemma surrounding *hujjīyah* (evidentiary or probative value), namely, which traditions and methodological devices constitute a sufficient degree of *hujjīyah*. As will be demonstrated, the answer to this question is tortuous and equivocal. Lastly, I will attempt to explore the social function of compatibility (*kafā'ah*) and *al-'aḍl* (prohibition from prevention of marriage) and its potential effects on power dynamics in the Islamic family structure.[13] While I do explore some notions of gender and social conditioning, this paper is chiefly concerned with describing and examining how Imami jurists approach the traditional sources of law (Qur'an, Sunnah, and reason), all the while making use of the elaborate mechanisms and potential of current scholarly exegesis through the live issue of contested notions of agency *a propos* the marriage contract.

The Hadith Tradition and Juristic Discourse

The Imami *akhbār* collection is replete with reports advocating three kinds of agency (*istiqlālīyah*): independence of the father, independence of the daughter, and joint agency.[14] I intend to show how the copious number of conflicting reports has generated extensive discussions, drawing upon the hermeneutics of *uṣūl al-fiqh* (principles of jurisprudence) and *dirayat al-ḥadīth* (the contextual study of hadith) to establish otherwise missing contextual evidences (*qarā'in*), reconcile seemingly disparate traditions (*al-jama'*), and/or prefer one or more textual or rational evidences over the other (*al-tarjīḥ*).[15]

There are nearly twenty-three *istiqlāl al-ab* traditions found in the four principal Imami hadith compendiums, which unequivocally assert the father's absolute authority.[16] Due to their copious number I shall cite two acclaimed reports:

(1) Ibn Abi Ya'fur - Imam Ja'far al-Sadiq: "Do not marry virgin daughters except with their fathers' permission."[17]
(2) Muhammad b. Muslim - Imam al-Baqir or al-Sadiq: "Do not seek the counsel (*lā tasta'maru*) of the *jārīyah* (spinster) when she has two fathers

> (biological father or paternal grandfather), she has no authority in the presence of her father, and he said: Everyone must seek her counsel (permission) except the father."[18]

Both of these traditions emphasize the father's privileged position within the family structure and enforce normative patriarchy in which only the father will do best for his daughter and no authority shall intervene in this process. Furthermore, hadith compilers such as al-Kulyani (d. 329 AH), al-Saduq (d. 381 AH), and even al-Tusi (d. 460 AH) often arranged and listed the *akhbār* in such a way to enunciate their own legal position. As Robert Gleave has aptly demonstrated, al-Saduq and al-Kulyani used the traditions as a means of asserting their legal opinions, and I see no predicament in extending and applying Gleave's analysis to this case.[19] Furthermore, Ibn Abi Ya'fur's tradition is listed first in both *furū' al-kāfī* and *man lā yaḥduruhu al-faqīh*, which is indicative of their repute and importance. Also, both al-Khu'i and al-Ruhani deem them to be *ṣarīḥ* (clear) and *ṣaḥīḥ* (authentic).[20] In fact, I do not hesitate to assert that nearly all Imami scholars consider them, in addition to six or seven others of similar genus, acceptable according to the standards of traditional hadith sciences, not only due to complete *isnād*s (chains of transmission) but also because their reporters include the likes of Muhammad b. Muslim, Zurara b. Ayan, Fudayl b. Yassar, and Ibn Abi Ya'fur, to name but a few.

From a *rijāl* perspective, reports carrying the names of these second-century Shi'i's are of significant value.[21] Also, Muhammad b. Muslim's tradition prohibits *ijbār* (compulsion) for all guardians except the father, indicating that everyone else is required to seek her permission (*yasta'maruhā kullu aḥadin mā 'adā al-ab*) prior to contracting a marriage on her behalf. The apparent signification of this would imply two things: (1) the father reserves the right to compel his teenage or young daughter (*al-jārīyah*) into a marriage of his choice, and (2) that he has a select position within the nuclear and extended familial network.[22] To further emphasize paternal agency, al-Khu'i cites a supporting tradition: "None can annul the marriage except the father."[23]

For al-Khu'i, this tradition is a clear indication that the marriage contract should be a joint venture and a process of consultation between the *walī* and his subject. But the question remains: Is the father above this call to *ishtirāk* (joint agency)? The answer to this question is no, because the *istiqlāl al-ab* traditions did not prevail for either al-Khu'i or al-Ruhani due to the presence of opposing (*mu'āriḍ*) traditions. It is at this juncture that the hermeneutics of jurisprudence and hadith become especially pertinent. The following are four examples of *mu'ārid* reports:

(3) Safwan b. Yahya sought the advice of Musa b. Ja'far (Imam Musa al-Kazim) regarding the marriage of his daughter to his nephew. The Imam said: "Go ahead with it, with her satisfaction for surely she has a propensity towards it within herself…"[24]
(4) Al-Fudala' - Imam Ja'far al-Sadiq: "The woman who controls-owns herself and is not feeble minded and has no guardian over her, she may marry without the permission of her guardian (*walī*)".[25]
(5) Zurara b. Ay'an - Imam Ja'far al-Sadiq: "If a woman controls her own affairs, [that is] she sells [goods], purchases, she is free, she acts as a witness, and she gives forth from her wealth as she wishes. Then surely her affair is acceptable, she may marry if she so wishes without the permission of her *walī*. If this is not the case, her marriage is not permissible except with the permission of her *walī*."[26]
(6) Sa'dan b. Muslim - Imam al-Baqir: "There is no harm in the marriage of a virgin if she is content (with the proposal) without the permission of her father."[27]

Both al-Khu'i and al-Ruhani accepted the third hadith as *ṣarīḥ* and *saḥīḥ*.That being said, al-Khu'i combined it with the contents of the previous two reports. This combination or harmonization between reports is described by al-Khu'i as *al-jam'ah* (reconciliation).[28] Consequently, by combining and reconciling them he arrived at the conclusion of *al-tashrīk* (joint agency) in which the father cannot compel his daughter into a marriage without her consent, and she cannot marry without his consent. Also, in harmonizing these traditions he is not required to reject one group over the other, but to consolidate the two positions; *istiqlāl al-ab* and *istiqlāl al-bint*, thus resulting in *ishtirāk*. Put another way, since both the aforementioned positions stem from "authentic" reports, al-Khu'i essentially harmonizes their content by allowing them to speak to each other by stating that the father does have a position of authority (*istiqlāl al-ab*) to authorize or reject a marriage contract for his virgin daughter, but at the same time the correctness of the *'aqd* (contract) relies upon her willful consent, thereby creating a position of *tashrīk*[29] This shared agency does not prevent her from contracting her own marriage, except that its validity relies upon the father's consent.[30] As far as al-Khu'i is concerned, he could only consolidate and rely upon traditions that he regarded as both *saḥīḥ* and *ṣarīḥ,* as per his exegetical estimation. Furthermore, for al-Khu'i, the position of joint agency is congruent with the Qur'an, the Sunnah, and stands in opposition to the predominant position of the Sunnis (*al-'āmmah*). Therefore, with these supporting factors he reconciles the traditions and adopt the joint agency position.[31]

Keeping in mind the nuanced technicalities, joint agency essentially views marriage as a family matter requiring mutual respect between the father-grandfather and the daughter.[32] In keeping with patriarchal norms, the mother and brother have no legitimate claims to agency in this matter. Furthermore, al-Khu'i's intermediate position affirms the prevailing opinions of *akhbārī* and *uṣūlī* Imami jurists, among them al-Hurr al-'Amili (d. 1120 AH), Yusuf al-Bahrani (d. 1186 AH), Sayyid Muhsin Hakim, Muhammad Ali Araki, and Sayyid Sistani – al-Khu'i's own successor and most prominent legal authority in Najaf.[33] It should also be noted that al-Khu'i's eventual ruling, akin to that of Sistani, was that the mature virgin of sound mind must seek her father's permission to get married according to obligatory precaution (*ihtiyāt wujūban*). The validity of the marriage contract relies upon both father's and daughter's consent.[34] *Obligatory precaution* means that due to a lack of absolute certainty and the presence of clear *ikhtilāf*, al-Khu'i still considers *idhn* (consent) to be compulsory; however, in this case his followers are permitted to refer to another mujtahid if they so wish.[35]

Lastly, germane to the matter of *tashrīk* are the circumstances surrounding the marriage of Ali and Fatimah, of which Shaykh al-Tusi has provided an interesting rendition in his *Kitāb al-'Āmālī*. It is alleged that upon Ali's request for Fatimah's hand, the Prophet told Ali that other men had asked for her hand, but that each time he saw an expression of displeasure on her face (*ra'ytu al-kirāhah fī wajhihā*). Despite this, the Prophet explained to her the religious merits and divine approval of Ali's proposal. Then, noticing no displeasure (in her facial expressions) he said: "God is great, her silence is her acceptance."[36] This report expresses two notable factors: (1) the Prophet sought her permission and by doing so set a precedent for Muslims and (2) by emphasizing Ali's spiritual attributes he asserted that there was no other suitable or equal (*kafū'*) partner for her. Accordingly, this report delineates the importance of *kafā'ah* and its faith-based characteristics.[37] Furthermore, if this event is read through the developed notion of Prophetic authority (*walāyah*) in this instance, the Prophet would have had a dual *walāyah* over his daughter both in his capacity as her father and the Prophet. But despite this, he allegedly sought her consent.[38]

Reports four through six are the primary source of *ikhtilāf* and site of juristic discourse. What is intended by discourse here is that jurists approach these reports aware that their evidentiary value and authenticity have been debated in the past. Keeping this in mind, both Khu'i and Ruhani carry out their own evaluation of the material at hand. As will be demonstrated, at this point the *ijtihād* of the student (al-Ruhani) and that of the teacher (al-Khu'i) part

ways.[39] There are two reasons for this, so to speak; *tashrīk* would not be viable in light of these two reports, and the *istiqlāl al-bint* position would arguably not exist without them.

Report four is deemed to have a complete chain of narrators, and thus is *ṣaḥīḥ* by *rijāl* standards. That being said, al-Khu'i and al-Ruhani disagree over its evidentiary value (*hujjīyah*). Put another way, it is the content (*matn*), at issue, not the *sanad*, thus emphasizing the importance of both content and chain in the process of demonstrative jurisprudence. Two problematic points arise upon analysis of its content: First, jurists are unsure of the implied meaning (*murād*) of *malakat nafasahā* and *lā mawlā 'alayhā*.[40] Similar complications concerning *hujjīyah* arise upon analysis of other *mālikah* reports, namely, *aḥādīth* that allow the *mālikah* woman to marry without the consent of her *walī*.[41] On this accord, al-Khu'i questioned its judicial value by stating that *mālikah*, as expressed in this report, could be rendered or interpreted as *al-jāriyah* (free or slave) virgin or non-virgin, hence leaving its application in doubt. Likewise, he is unsure as to what *lā mawlā 'alayhā* implies: Does it mean she does not have a father, or rather, that there is no guardian in general?

Therefore, by variegating the hadith's intended meaning he renders it *ṣaḥīḥ* but *ghayri ṣarīh* (unclear), and *muṭlaqah* (having a general and unrestricted meaning).[42] The primary reason al-Khu'i rejected the *hujjīyah* of these reports is because, in his view, the *istiqlāl al-ab* and *tashrīk* reports are *ṣ arīḥ* and *ṣaḥīḥ* and numerous, as opposed to the mālikah reports which are sparse in number and lack linguistic clarity. Likewise, al-Ruhani admits that the report is open to the same questions posed by al-Khu'i, but nevertheless insists that it is possible to interpret it as applying to the virgin (who controls her own affairs) and, second, *lā mawlā 'alayhā* could include her father thus rendering *mawlā* in a generic fashion.

But the question remains: How do we interpret malakat *nafsahā*? Put differently, does her right to enter into a marriage contract without her guardian's (father or grandfather) consent may only take effect in the absence of her *walī*? Or conversely, does her authority over the marriage contract remains even in the presence of her guardian, thus not obliging her to seek consent to ensure the marriage's validity (*ṣiḥa*)?[43] In the view of al-Ruhani the answer is the latter, since he cites report five in an effort to shed further light upon the contested *murād* of *mālikīyah al-'amr*.[44] The transmission from Zurara in the fifth report refers to the woman who controls her own affairs, engages in commerce, is a free woman (*hurrah*), and is financially independent. The three aforementioned functions serve to clarify the contested notion of a woman's *mālkīyah*.

Further, this tradition is of paramount importance in not only qualifying the virgin's agency in concrete terms, but also allowing her to demonstrate her independence by partaking in the mentioned activities (e.g., buying, selling, and witnessing) that constitute *mālikīyat al-'amr*. Therefore, in the view of such scholars as al-Ruhani this report acts as a *takhṣīṣ* (specification) of the previous *khabar*. Put another way, it has the potential to further clarify and define a contested *murād*, albeit the empowered woman in this report could be equally a virgin or non-virgin. Regardless, it sheds light on the function of *mālikīyah*.

Aside from the report being *ghayri ṣarīḥ*, al-Khu'i considers the chain of narrators to be *ḍa'īf* (weak).[45] In the *Mabānī al-'Urwa*, he rejects this report on two grounds: (1) he claims that he is unaware by which chain al-Tusi has transmitted from Ali b. Isma'il, although it is probable that he used the same *sanad* as Saduq, and (2) the reporter in question, Ali b. Isma'il, has not been authenticated.[46] *'Adam tawthīq* (absence of authentication) means that he is not known to have been among the principle sources or *mashāyakh* listed in the hadith books that have been authenticated, despite the fact that he is described as one of the earliest Imami-Badran theologians of the mid-second century *hijrī*.[47] Instances such as this demonstrate how al-Khu'i implements the enterprise of hadith-*rijāl* analysis and hermeneutics as way to reject the *sanad* of a report that has otherwise been accepted as authentic by the majority of his predecessors and contemporaries.[48]

The sixth report is the most *ṣarīḥ* of all the *mu'āriḍ* reports, as it clearly delineates that the virgin may marry whom she wills, provided that she is content (*raḍīyat*). However, despite its apparent clarity, its chain of transmission has been scrutinized by Imami *fuqahā'*.[49] Several of al-Khu'i's contemporaries consider the principal transmitter, Sa'dan b. Muslim to be unauthenticated and *majhūl* (unknown) and, as result, the report is by and large deemed be *ḍa'īf*.[50] Al-Khu'i, being cognizant of this, nevertheless stipulates that his reason for rejecting this *khabar* is not due to Sa'dan. In fact, al-Khu'i authenticates him by employing general authentication (*tawthiqāt al-'āmmah*) because Sa'dan is listed in the *isnād*s used by Ali b. Ibrahim al-Qummi (d. 310 AH) in his *tafsīr* and Ja'far b. Muhammad b. Qawlawayh (d. 369 AH) in his *Kāmil al-Ziyārāt*.[51] That being said, it should be noted that al-Khu'i altered his position toward the end of his life, when he only authenticated the *mashāyikh* (teachers) of Ibn Qawlawayh and Ali b. Ibrahim al-Qummi.[52]

However, in addition to Sa'dan being unauthenticated, Khu'i rejects the report by claiming that Sa'dan never transmitted any traditions to Abbas b. Ma'ruf, the second reporter in the chain hadith. On this note, al-Ruhani vehe-

mently disagrees with his colleagues and claims that the charge of *'adam al-tawthīq* (absence of authentication) with regards to Sa'dan is without merit and the remaining part of the chain is in order.[53] Furthermore, the biographical works allege that Abbas b. Ma'ruf was a companion of the Eighth Imam (Ali b. Musa al-Rida'), thus leaving the period of the Seventh Imam remaining in between and leaving open the possibility that Abbas b. Ma'ruf may very well have transmitted from Sa'dan. This tradition serves as the axis upon which the discourse of *istiqlāl al-bint* revolves, due to it being the only clearly worded and "authentic" report of its kind.[54] Consequently it is of unquestionable importance for al-Ruhani to authenticate its text and chain, and by doing so he lends it a credible degree of *hujjīyah*.

The evaluation of the aforementioned hadith traditions reveal the nuances and performative nature of *dirāyat al-ḥādīth*. Put another way, hadith analysis and its usage as a means of *istinbāt* depends largely upon the individual *mujtahid*'s hermeneutical and rational assumptions. Moreover, the act of *istinbāṭ al-aḥkām* is the performance of careful and judicious *ijtihād* in which the *mujtahid* uses the necessary hermeneutical tools to validate his eventual conclusions. This validation is especially important for al-Ruhani, as his exegesis of the hadith and eventual conclusions represent a dissent from the predominant view of his colleagues.

Lastly, the complex and conflicting methods of hadith analysis are reflective of a highly advanced discourse with similar but not entirely parallel hermeneutical concerns in the pre-modern juristic tradition, as reflected in the works of al-Sayyid al-Murtada (d. 436 AH), Muhaqqiq (d. 672 AH), Allamah al-Hilli (d. 648 AH), and Shahid al-Thani (d. 966 AH). One example of divergence can be seen in the approach to the hadith tradition. Whereas previous scholars such as al-Tusi and al-Murtada considered the question of authenticity, contemporary *dirāyat al-ḥādīth* raises a greater number of concerns regarding both these reports' content and transmitters. In other words, as the discipline of hadith has evolved, the criticism and analysis has become sharper and more detailed.[55] On the same note, it has been shown that this development prompted jurists such as al-Khu'i to implement creative hermeneutics of authentication (*tawthīq*) and de-authentication of certain *rijāl* over others. Another example is that contemporary Imami jurists discuss the hermeneutics surrounding juristic preference and combination of reports as a way to resolve the *ikhtilāf* on this legal issue, whereas medieval Imami jurists such as Allama al-Hilli did not raise the same concerns while attempting to contend with the *ikhtilāf* concerning the *al-bikr al-bālighah al-rashīdah*.[56]

Juristic Preference (*al-Tarjīh*) and Opposition to the Sunnis (*Mukhālafah li al-'Āmmah*)

Juristic preference is the process of selecting one or a group of traditions with similar or identical content over all others.[57] Unlike Sayyid al-Khu'i and most others, al-Ruhani stipulates that upon realizing the impossibility of reconciling (*'adam imkān al-jama'*) the *istiqlāl al-ab* with *istiqlāl al-bint* reports he decided to prefer the *istiqlāl al-bint* reports above all others.[58] Thus in this case there are essentially three important factors to keep in mind; ideally the preference must be in accordance with the Qur'an and Sunnah, and be in opposition to the Sunnis.[59] To assert his *tarjīh*, Ruhani uses two hermeneutical devices in addition to the Qur'an: *al-shuhra al-fatwā'īyah* (the prevailing or most familiar legal judgment), and *qā'ādat tasalut al-nās 'alā anfusihim* (principle of governance over oneself).[60] As will be demonstrated, neither principle is traditionally among the *murajjihāt* (the established criteria for the preponderance of one tradition over another).[61]

In the case of *shuhra*, Ruhani asserts that the prevailing juristic opinions of past scholars have been *istiqlāl al-bint*, namely, the mentally mature virgin does not require her *walī*'s permission to get married. He also cites Sayyid al-Murtada's claim that there is a consensus (*ijmā'*) on this matter. Consequently, by implementing *shuḥra*, he is vesting the legal opinions of the past with a considerable degree of *ḥujjīyah* and implementing it as a part of his *ijtihād*.[62] Although a comprehensive examination of the opinions of al-Murtada and his Imami colleagues is beyond the scope of this study, al-Ruhani is not farfetched in claiming that *istiqlāl al-bint* position was a predominant one among major thinkers such as al-Murtada and Allamah al-Hilli.[63] That being said, one would be hard pressed to characterize it as constituting the overwhelming position of both the *qudamā'* (early scholars) and the *muta'akhkhirūn* (later scholars).[64] Put differently, upon careful assessment of the Imami legal tradition from al-Saduq onward it would be hard to assert that this position is the most prominent one.[65] Furthermore, how are we to understand Sayyid al-Murtada's claim that the Imami jurists have an *ijmā' al-ṭāifa* (group consensus) regarding *istiqlāl al-bikr* to begin with?

Perhaps Murtada' used the term *ijmā'* to indicate the collective opinion of himself and those present within his scholarly circle. However, even in this case it cannot be known for certain whether his own esteemed instructor Shaykh al-Mufid (d. 413 AH) and the most senior student, Shaykh al-Tusi (d. 459 AH) would be included in this claim to consensus since they are alleged to have both held the position of *istiqlāl al-ab*. Furthermore, both al-Mufid and

al-Tusi are said to have preferred the compromise position of *tashrīk* even if the daughter can show the ability to care for her own affairs.[66] This puzzlement arises from the fact that between the *Nihāya*, *Mabsūṭ*, and the *Tibyān*, al-Tusi is said to have held the *istiqlāl al-ab*, *tashrīk* and the *istiqlāl al-bint* positions, although Ibn Idris al-Hilli claims that al-Tusi retracted his initial ruling of *istiqlāl al-ab* as stated in the *Nihāya*, only to give complete agency to the *bikr*, as cited in the *Tibyān*, which Ibn Idris alleges was his final work and reflective of his final opinion. However this claim is also somewhat dubious.[67]

In the case of al-Mufid we encounter a similar uncertainty because according to his most infamous work on substantive jurisprudence, the *Muqnī'a*, he states clearly that not only does the daughter require her father's permission prior to marriage, but the validity of the marriage contract hinges upon his consent alone. Conversely in a treatise attributed to him, *Aḥkām al-Nisā'*, al-Mufid states that if the daughter were to marry without her father's permission, such a marriage would be in violation of the established practice (*al-sunnah*) of the Infallibles but nonetheless valid (*māḍiyan*).[68] Once again there is no compelling textual evidence to give absolute preference to one of these opinions over the other.[69]

Nevertheless, al-Ruhani contradicts himself at the very beginning of his discussion where he claims that *istiqlāl al-ab wa al-jadd* to also be the prevailing position among the earlier scholars.[70] Furthermore, al-Khu'i was explicit in his rejection of *al-shuhra l-fatwā'īyah*: "Aside from the most prevalent authentic and unauthentic traditions on a given subject, there is no other type of *shuḥra* when attempting to implement juristic preference."[71] In other words, the only kind of prevailing position or *shuhra* a jurist can hold fast to is that which is based on the consensus of the Imams' companions. But even in this case, it must be grounded upon a confirmed chain of narrators.[72] This is reflective of al-Khu'i's general concern and emphasis on discovering textual evidence, rather than predominant legal rulings of past jurists that, for him, do not constitute substantial enough evidence for *tarjīḥ*. This is also indicative of al-Khu'i's belief that the opinions of previous scholars, including any claims to *ijmā'*, should be considered but do not have significant probative value unless they unveil the opinion of an Infallible (*kāshif 'an ra'ī al-ma'ṣūm*). In the absence of this, these claims are to be considered to be *al-naẓar* (speculation).[73]

Interestingly enough, al-Ruhani expresses a similar theoretical sentiment with regards to both *al-shuhra* and *al-ijmā'*. In fact he states that *al-shuhra al-fatawāiyya* is the weakest form of *shuhra*, for it is one in which the jurist is not aware of the basis of the prevailing ruling. Furthermore in the case of its implementation as a means of juristic preference, the fatwa must, with perceptible

certainty (*ḥass*), be grounded upon a transmission from an infallible and not arbitrary opinion (*rāy'ī*).[74] Despite the seeming theoretical congruity, the significant practical cleavage between these two Imami *mujtahid*s indicates the subjective nature of elements of *uṣūl al-fiqh*, especially when it comes to the importance given to applying precedence to resolve a bifurcation in the tradition. For al-Ruhani, his perception of an overwhelming precedence of *istiqlāl al-bint fatāwā'* issued from such prominent authorities such as Sayyid al-Murtada' and Allamah al-Hilli is enough to vest the position with a weighty probative value, especially due to their close proximity to the period of the Imams and their companions in comparison to himself. For al-Khu'i and others, such as Muhammad Rida Muzaffar, a *mujtahid*'s reliance (*ta'wīl*) upon another jurist's rulings defeats the purpose of *ijtihād*, because according to their logic a *mujtahid* is a scholar who can perform *istinbāṭ* (extracting rulings from their sources), thus negating the purpose of imitating earlier scholars.[75] Consequently, one can say that the question of *walāyah* over the pubescent virgin is a question of competing earlier visions bringing forth the contested role that legal precedent plays in Imami demonstrative jurisprudence.

Al-Ruhani uses the second device, *qā'adat tasaluṭ al-nās 'alā anfusihim*, as a form of *sunnah* and thus claims that based on this principle *istiqlāl al-bikr* is in complete conformity with the *sunnah*. It should be mentioned that according to the texts of *qawā'id fiqhīyah* (legal maxims) there is no direct *nass* (explicit textual rulings) to support this principle.[76] Being fully aware of this, he cites *ijmā'* in order to establish it as an absolute *sunnah* (*al-sunnah al-qaṭ'īyah*), a matter of established practice beyond doubt supported, in principle, by the Qur'an and/or the Fourteen Infallibles.[77] Upon further examination, due to the absence of a direct *nass*, the contiguous juristic principles would be "the freedom to spend one's wealth as he or she wishes" and "no harm or injury" (*lā ḍarar wa lā ḍirār*). In other words, the jurist may extend the implications of these principles to serve as support for *tasalaṭ al-nās* due to absence of a direct *naṣṣ*.[78] Although there may be no direct textual indicator, jurists describe *tasaluṭ al-nās 'alā anfusihim* as an overarching *'aqlī* (rational) and *fiṭrī* (instinctual) concept that posits that humans and some animals have the freedom over their own bodies and hence have the right to act in their best interest.[79] Furthermore, he claims this *sulṭanah* over one's person is complete (*tāmma*) and absolute (*muṭlaqah*).[80]

As liberal and contemporary as this statement may seem, it is ripe with incongruity and essentialism for the simple reason that Islamic law gives much greater preference to responsibilities than to rights. In the Imami legal and doctrinal view, the rights of God, the Prophet, and the Imams outweigh the

rights of the individual. Furthermore, his scenario has the potential to raise some foundational questions: If a virgin woman is free to marry whom she wills without her father's consent, then by the same token of *tasaluṭ al-nās ʻalā anfusihim* should she not have the freedom to divorce as she wishes or donate her organs? But the reality is that Ruhani is inconsistent and does not implement this principle as a way to allow either freedom.[81] That being said, al-Khu'i would certainly have rejected the principle of *sulṭanah ʻalā al-nafs* (governance over the self) because, according to his understanding, an *ʻaqlī ijmāʻ* of this type is not among the *murajjiḥāt*.[82] Furthermore, al-Iraqi noted that a principle such as the freedom over one's person is a general overarching concept (*ʻumūm*) that cannot be included in the form of a condition (*sharṭ*) as a part of a marriage or financial contract. Hence, it has no applicability in this context.[83]

The debate and discourse over the applicability of such a principle in the context of marriage demonstrates the ever-present tension between *al-ʻaql* and *al-naql*: Just how far can a *mujtahid* extend and apply rational-philosophical concepts in the absence of a *muḥkam* (authoritative) hadith report? The answer is beyond the scope of this study and by no means straightforward, as it depends upon the individual *mujtahid*'s hermeneutical, epistemological, and social outlook. Nevertheless, the above analysis reveals the variegated nature of contemporary Imami *uṣūl al-fiqh* and the lengths to which jurists implement hermeneutical devices in order to resolve *ikhtilāf*.

The second element of an ideal *tarjīḥ* should ideally be *muwāfaq bi al-kitāb* (that which is congruent with the Qur'an).[84] In this case, the Qur'an does not mention the guardian and the virgin; however, the *iṭlāqāt* (general dispensation) of the verses forbid the guardian to prevent the divorced woman from marrying whom she wills or return to her husband after her waiting period ends.[85] Ruhani does not explore the verses in detail at all, but instead lists them as supporting evidence keeping in mind that they can be understood as general guidelines and not as having any specific and particular (*muqayyid*) evidentiary value. Although he does not explore these verses in detail, Muhammad Jawad Mughniyyah has done so in his *Tafsīr al-Kāshif* under the exegetical rubric of Q. 2:232: "And when you have divorced the women and they have ended their term (of waiting) then do not prevent them from marrying their husbands when they agree among themselves in a lawful manner…"[86] Although this verse concerns divorced women, Mughniyyah attempts to build a case for the virgin by stating that if she behaves in a way that demonstrates her maturity and ability to distinguish right from wrong, then she should have the right to decide what is best for her without outside interference. He con-

tends that the guardianship surrounding marriage should be similar to other matters, that is, if she is independent (*mustaqillah*) in her other life affairs (e.g. education and wealth), then likewise she should be free to choose her own husband. This line of argumentation essentially draws upon rational-ethical ideals to extract *ḥujjīyah* from an otherwise muṭlaq verse.[87]

The final element of juristic preference is *mukhālafah li al 'āmmah* (opposition to Sunnis), in which the Imami jurist resolves an apparent contradiction by choosing the position that does not conform to the view(s) of Sunnis. Implementing this principle serves two purposes: (1) it affirms Imami sectarian identity as a legal school (*madhhab*) and devalues the views of the "other" and (2) enables Imami jurists to conveniently resolve contradictions within their own tradition by claiming that since the Infallibles (*ma'ṣumūn*) cannot contradict themselves or each other, those apparent contradictions must be as a result of dissimulation.[88] Thus in the event of contradictory reports, those reports which resemble the position of non-Shi'a must have been verbalized under duress by the Imam to protect himself and his followers by not attracting any undue attention from those who would wish them harm.[89] Keeping this in mind, both al-Khu'i and al-Ruhani claim their positions oppose the majority (*mashhūr*) Sunni position. In the case of al-Khu'i, the *tashrīk* position would be mukhālaf to al-Shafi'i and Malik, who state that a father is not required to seek the permission of his virgin intellectually sound (*al-'āqilah*) daughter, but that it would be preferable if he did so.[90]

As straightforward as this may seem, this *mas'alah* (case) is also a point of tension for al-Shafi'i and Malik. Al-Shafi'i is confronted with the traditions stressing the father's authority on one hand and Prophetic practice of seeking the virgin's *idhn* on the other. As a result, he recommends that the father seek her consent and take care not to select a partner displeasing to her.[91] Malik preferred the predominant Madinan custom, where al-Qasim b. Muhammad and Salim b. Abd Allah would give their virgin daughters in marriage without seeking their consent.[92] Muhammad Fadel argues that although this position has been ascribed to Malik, the father's role and function is not clear cut and, in reality, the virgin can circumvent *jabr* and even contract a marriage without the guardian's consent. As ideal as this may seem, one should keep in mind that this is a "reinterpretation" of Maliki law and not the predominant view.[93]

While al-Khu'i's conclusion is in line with the majority of his colleagues, it is also *mukhālaf* to the opinions of al-Saduq, Ibn Abi 'Aqil, and al-Tusi who, like Malik and al-Shafi'i, allow the father to compel his virgin daughter to marry.[94] Furthermore, Ibn Rushd also states that the Sunni jurists disagree as to whether the guardian's *idhn* is a condition for a valid marriage.[95] Aside from

the Hanafis, Sunni jurists extend guardianship to the eldest brother, paternal uncle, and, in the event of their absence, the state.[96] This demonstrates that the opinions of Malik and al-Shafi'i were by no means monolithic and that the Sunni positions are also wrought with *ilkhtilāf* and debate over *hujjīyat al-akhbār* and the practice of the Tabi'un.

Among the four Sunni imams it is alleged that only Abu Hanifah did not require the pubertal virgin woman to seek her father's permission, although he deemed it would be preferable (*mustaḥabb*) for her to do so.[97] He supports this ruling by using the Qur'anic verses previously mentioned, supported by logical reasoning, that essentially states that if a woman is intellectually sound (*al-'āqilah*) and her behavior (*taṣarruf*) demonstrates her independence, then she should be given the agency to contract her own marriage.[98] Furthermore, an often overlooked similarity between the Imami *ikhtilāf* and that of their Sunni counterparts is the conflict over the inferred *'illa* (*ratio legis*). As it were, by means of speculative reasoning (*al-'aql*) and *ijtihād*, Abu Hanifah held that it is the minority (lack of *bulūgh*) that is the *ratio legis* behind allowing the father to compel his minor daughter or son to marry. On the other hand, al-Malik and al-Shafi'i held that the inferred *'illa* was not her minority but her virginity; so long as she is a virgin the guardians have *walayah al-ijbār* (coercive guardianship).[99] *Ijbār* can be described as a form of coercive force in which the father may marry off (*al-inkāḥ*) his virgin daughter (pubescent or otherwise).[100]

The Imami *madhhab* continues to disagree over the inferred *'illa* as well. In fact, this is why Sayyid al-Murtada' clearly points out that Abu Hanifah's position is *muwāfaq* with what he perceived to be the Imami consensus (*ijmā'*) or collective understanding, that is i*stiqlāl al-bikr*.[101] Furthermore, a similar rationale led Muhaqqiq al-Hilli and al-Allama al-Hilli to assert the very same position as al-Murtada', contrary to the alleged *tashrīk* positions of al-Tusi and al-Mufid, in addition to later medieval jurists such as Zayn al-Din al-'Amili (al-Shahid al-Thani).[102] Correspondingly, while such contemporary Imami jurists as al-Khu'i, Sistani, and others do not permit *walāyat al-ijbār* upon the *bikr bālighah rashīdah*, they also do not allow her to marry without her father's permission due to her virginity, even if she is *rashīdah* (mentally sound and mature), because that is the governing *'illa* for the ruling. The essential distinction to be made here is that the father is not in a position to coerce his virgin daughter into marriage, hence *ijbār* is not permitted. In contrast, al-Ruhani, Mughniyyah, and Fadlallah do not require her to seek her guardian's permission because the operative *'illa* for their ruling is *bulūgh* (majority) and lack of *safah* (immaturity of mind).[103] Allama al-Hilli

sums up the prevailing position of legal-philosophical divergence in a concise and pointed manner:

> If the free woman is of physical and mental maturity (*bāligha rashīdah*) she becomes empowered by means of her pubescence and mental maturity (*rushdihā*) in all aspects of her behavior (*jamī' al-taṣarrufāt*) with regards to contracts (entering into contracts) and other than that – (this is a matter) of consensus (*ijmā'*) among scholars collectively except for the act of marriage (*al-nikāh*).[104]

The *ikhtilāf* among the Imamis at least since the period of al-Mufid and al-Murtada', rests on analogy, whether the jurists can create a direct link between her ability to maturely and correctly enter into contracts of a financial nature or otherwise, and that of marriage. Can they legally and philosophically group them together? For those who do not discriminate between the various *tasārrufāt*, the question of disallowing parental coercive authority is not an issue because the virginal but pubescent girl is not legally required to seek her father's permission, let alone being subject to coercive authority, for she has demonstrated that she is mentally mature and able to independently conduct her affairs without recourse to any parental authority or otherwise.

Turing back to the jurisprudential process of *tarjīḥ* (preference) or *jam'ah* (reconciliation), as useful as *mukhālafah li al-'āmmah* may seem in its function as a hermeneutical tool, its functional application in this context is secondary at least due to the divergence of opinions both among Imamis and Sunnites. In the context of this *mas'alah* Shaykh al-Araki states that "in light of the contradictory *aqwāl* (statements and rulings) of the Sunnis it is not possible for us to carry out *tarjīḥ* from this point of view."[105] Furthermore, an often overlooked line of reasoning among traditional Imami *mujtahid*s here is that the *ikhtilāf* within the Imami *akhbār* could be a result of extra-Imami influences. Put another way, in the midst of sectarian disputes and dialogue both in Kufa and Madinah, it is inevitable that some Imamis would have transmitted and presented their own legal opinion while claiming to have heard it directly from the Imam. There is no conclusive evidence to support this, but Maria Dakake has aptly demonstrated that many Imami theological positions of the second Islamic century were evidently influenced by Hanafi-Murji'i doctrine of *ijrā'* (postponement of judgment).[106] Hence, in the process of debate and dialogue it is certainly possible, if not a foregone conclusion, that Muslims in fact influenced one another.[107]

This is not to say that the Ḥanafi position was the only influencing factor behind the proliferation of *istiqlāl al-bint* traditions, such as the one reported

from Ja'far al-Sadiq through Sa'dan b. Muslim or the *mālikah* traditions transmitted by Zurara. Further yet, it could be asserted that Abu Hanifah and other Sunnis drew upon the traditions, either directly from the Fifth or Sixth Shi'i Imam, or indirectly through a transmitter. This scenario is not entirely implausible, for the Imami hadith creates analogies between a woman's ability to carry out various financial transactions and to contract a marriage on her own. If a woman possesses these characteristics and abilities, she should be given the freedom to marry without her guardian's consent. Consequently, the Imami oral tradition asserting the daughter's agency would have been seemingly more alluring to Abu Hanifah as opposed to the nearly exclusive *istiqlāl al-ab* traditions circulating among non-Imamis during this period.

It should be noted, however, that all of these hypotheses hinge upon the notion that a portion of the *istiqlāl al-bint* traditions can be ascribed to Imams al-Baqir or al-Sadiq and their accurate transmission from disciples such as Zurara b. 'Ayan, only to be included in the Imami hadith collection some 150 years later. Nevertheless, traditional scholars should not overlook the correlation between the jurisprudential dialectics of the formative period (second-third century AH) coinciding with the origin (*ṣuḍūr*) of the conflicting *akhbār* attributed to the Fifth and Sixth Shi'i Imams, especially in the case of this *mas'alah*.[108]

That being said, *mujtahid*s contemporary to al-Khu'i, such as Ayatullah Muhammad Ali Araki (d. 1994), are not sure as to when the conflicting Sunni position took shape. The reason for this concern is that ideally, in order for *mukhālafah li al-'āmmah* to be useful, it must be *mukhālaf* at the time of transmission and not retroactively. Therefore, the principle of opposing the Sunnis is not as simple as it may seem. There are complications and nuances involved that are often not mentioned at all by jurists due to their lack of cognizance or their far-reaching ideological commitment to their *uṣūlī* principles. Be that as it may, the probability of cross-pollination should not be ignored.

Kafā'at al-'Aḍl, and Power Dynamics in the Islamic Family Structure

Wael Hallaq describes the guardian's role as seeking the best interest of the family and its daughters. He adds: "Marriage was not an individualistic venture but a family matter."[109] His characterization is accurate and is equally compatible with the outlook of Imami law. This is why all of the Imami legal texts consulted in this study emphasize two things – respect owed to the biological father and the need for mutual consultation, despite the *mujtahid*'s eventual

legal position. Even if he confirms the *walāyah* over the virgin, there is an emphasis upon mutual respect between father and daughter.[110] Therefore al-Ruhani deemed it *mustaḥabb* (preferable) that the daughter seek her father's permission before getting married.[111] Keeping this in mind, jurists have included two variable factors to be considered during the marriage proceedings: *kafā'ah*, and *al-'aḍl*. *Kafā'ah* (compatibility or suitability) is a prerequisite for the validity of the marriage contract. If a father attempts to compel his virgin daughter to marry, even though if it can be proven that the prospective spouse is not suitable for or compatible with her, she can opt out of the marriage. Likewise, if the father prevents her from marrying a man who satisfies the requirement of *kafā'ah*, his agency is terminated and the woman may marry without his consent.[112] Such stipulations indicate a cognizance on the part of jurists that paternal men do not always live up to their role in looking out for their female charges' best interest.[113] This is the overwhelming opinion of Imami jurists, including such past jurists as al-Tusi and Muhaqqiq al-Hilli.[114]

That being said, these caveats raise two important questions: What are the parameters of suitability, and how does one identify a case of *al-'aḍl*? Upon browsing the *aḥādīth*, one gets the impression that the equal partner should be righteous, not drink alcohol, be sound of mind, and have an affinity toward the family of the Prophet or preferably be Shi'i.[115] These are generally considered to be *shar'ī* descriptions of equality or compatibility. *'Urf* (common view) definitions of *kafā'ah* would be open to even greater interpretation but can include: genealogy (*naṣab*), socioeconomic class, and physical attraction. It immediately becomes apparent that suitability, equality, and compatibility in a partner can rest in the eye of the beholder, that is, provided the general legal guidelines are met, a father would find it hard to prevent his virgin daughter's marriage.[116] Once again, as the legal literature stresses, it is the woman who will be spending the rest of her life with that man; hence in her view he should be compatible.[117] Thus both past and present Imami jurists have used strong language when it comes to *al-'adl* (prevention of marriage). One such example is Muhaqqiq al-Hilli's statement:

> If the guardian prevents her (his daughter) from marrying and is not marrying her to someone of equitable status according to her wish, in that case it is permissible for her to marry even if he dislikes her (doing so). This is a matter of consensus.[118]

By doing so, they are attempting to communicate that agency is not some form of blind power but an intelligent authority. Within this dynamic, both the daughter and the father have certain responsibilities: the father must take care

to not hastily accept or reject a marriage proposal, and the daughter should take into account the protective nature of her father's authority and the emphasis placed upon cordial and respectful conduct. The legal literature is complex and replete with nuanced language known primarily to those acquainted with this literature. However, within this process the jurists have expressed pastoral concerns of family unity and cordial relations between family members. Pastoral concerns such family unity and normative patriarchy reflect the influential social factors present in juristic literature. These social factors, although highlighted in the hadith tradition, can also be a product of common view (*'urf*) taken into account by the *mujtahid* when rendering his ruling.[119]

When scholars such as al-Ruhani and Mughniyyah dissent from the normative outlook, they lend a potential socially destabilizing agency to the *bikr*. because they challenge the normative patriarchal power structure in which the father reigns supreme. Furthermore, the purpose of including these two caveats is to remind all those involved that they have certain rights and responsibilities, so they should be foremost concerned with preventing any undue hardship upon the *bikr*.[120] Once again, terms such as *undue hardship* (*ḥaraj*) yield an array of interpretations relying upon one's evaluation of their individual situation.

To sum up, the pastoral concerns expressed by various scholars indicate their concern for emphasizing what they view to be the spirit of the law, which leans toward an Islamically conditioned individualism that entails a sincere young religious woman deserving of a sincere religious man. The role of patriarchal communalism should ideally be reserved for ensuring that, above and beyond any other concern, the daughter's religio-spiritual wellbeing must come first. A strict reading of the rulings independently do not always communicate these underlying concerns of those who wield authority in the Imami tradition, and it is for this reason that compatibility and other social-ethical imperatives are emphasized in addition to the literal wording of the fatwa or legal recommendation.

Conclusion

In this paper I investigated the process of deducing legal rulings from their sources using the live issue of guardianship and the marriage contract. I analyzed the relevant *aḥādīth* and their variant interpretations, interpretations that involved a nuanced, if not an abstruse, line of arguments, chiefly semantic, aimed at either accepting or rejecting the evidentiary value of a hadith report. These reports' rejection or acceptance determined the eventual rulings of both

Ayatullah Sayyid Abul Qasim al-Khu'i and Ayatullah Sayyid Muhammad Sadiq al-Ruhani in which they selected and sifted and, in the case of al-Khu'i, combined *aḥādīth*. Naturally, this raises questions concerning the epistemological position of the *mujtahid*s in their approach to the text: Did they interpret the reports in a way designed to reach the desired predetermined conclusion? An affirmative answer would essentially entail that the *mujtahid* manipulates the texts by means of exegesis for his own aims.[121] While this would be an unfair and sweeping characterization, it is not farfetched to assume that a *mujtahid*'s hermeneutical disposition and conviction certainly affects the outcome of his *ijtihād*. Even before he approaches a *mas'alah,* he has already decided how to authenticate or deauthenticate a certain *sanad*, or which *uṣūlī* principles he may prefer over others while interpreting the *matn*.[122] This predetermined hermeneutical disposition influences how he approaches the question of *ḥujjiyah*, for that which one *faqīh* may consider to have probative value may not be viewed in the same light by another. The divergent hermeneutical dispositions of al-Khu'i and al-Ruhani allowed them to both carry out *ijtihād* but arrive are different conclusions.

Since al-Ruhani could not combine or harmonize the traditions, he chose to prefer one set over the other (*tarjīḥ*). In doing so, he relied upon what he perceived to be the predominant position of both early and later Imami jurists. He also invoked *sulṭanat al-nās 'alā anfusihim* (human authority over one's self). In this context, neither of these principles is widely accepted by Imami jurists when used to support a juristic preference; however, the latter is cautiously included as one of the jurisprudential maxims (*qawā'id al-fiqhīyah*). Al-Ruhani's usage of a theoretical principle of this nature challenges the dominion of traditional hermeneutics, and by invoking such concepts as human freedom within this context he opens the door to multiple foundational questions, such as: How does one limit and/or apply such a principle, and who determines how and when it is used? Or as Makarem al-Shirazi states, the principle of human freedom to govern themselves must be limited by the Shari'ah. Otherwise, it would not make any sense.[123] However, in light of intra-Imami *ikhtilāf* on the matter of the virgin and her agency, al-Ruhani and others, such as Mughniyyah, are free to break loose from their contemporaries' conservative patterns and invoke the principle of human freedom to justify their dissent from the norm of *tashrīk*. This clearly demonstrates the variegated and nuanced nature of the principles of jurisprudence and *istinbāt al-aḥkām* (deduction of rulings from their sources).

In addition to this, both groups of scholars attempted to juxtapose their positions in opposition to those of the Sunnis (*mukhālfat al-'āmmah*) to further

support their respective rulings. The operative value of this hermeneutical device is multifarious, at least in light of intra-Imami *ikhtilāf* and the ambivalent positions among the four Sunni imams. To sum up, there are two contemporary Imami positions: (1) *tashrīk*, held by al-Khu'i and the majority of contemporary Imami jurists, which states that by obligatory precaution the virgin daughter of mature mind must seek her father's permission or, in his absence, that of the paternal grandfather before getting married. Furthermore, the validity of the marriage contract relies upon both the father's and the daughter's consent and (2) *istiqlāl al-bint*, held by al- Ruhani and Mughniyyah, which states that the virgin mature daughter is not required to seek her father's permission to get married, although it is recommended that she do so, and the validity of the marriage contract does not rely upon her father's consent. The analysis of the hadith traditions and the methodological tools of *uṣūl al-fiqh* show that, at least within this context, jurists confront a dilemma of *hujjīyah* and have gone to great lengths to establish the viability of their respective conclusions via hadith, legal precedent, and, at times, broad-spectrum philosophical principles.

Lastly, I examined the two caveats of *al-kafā'ah* (equality or compatibility) and *al-'aḍl* (prevention of marriage by the guardian). Both of these forewarnings have been inserted into the rulings governing the virgin's marriage to express pastoral concerns dealing with family unity, the father's socio-religious precedence, and the need to prevent any undue harm or injury to the virgin girl or woman. In light of modern realities and the perceptible financially and intellectually independent Muslim woman in both the Muslim world and the "West," Muslim jurists will be forced to better explain and justify the laws governing agency and the marriage contract.

Endnotes

1. For the purposes of this paper, *jurist*, *Imami*, and *Shi'i* refer to Twelver Shi'i unless otherwise stated.
2. Within the context of this analysis, I define the *non-walī subject* as any individual who does not have the authority to contract a marriage without his/her guardian's consent.
3. In this paper, *virgin* implies an adolescent woman who has never had sexual intercourse but is of sound mind, able to discern right from wrong (*al-rashīdah*, *al-'āqilah* or *ghayri al-safīhah*). For those who have lost their virginity through fornication, the vast majority of contemporary jurists have ruled that although physically not virgins, they are classified as such insofar as they would not be afforded the agency offered to a divorced or widowed woman (*thayyib*). This includes the validity of a marriage contract executed without her *walī*'s permission.

4. In his *Kitāb al-Khilāf*, Shaykh al-Tusi (d. 460 AH) states *ikhtalafū aṣḥābanā* (our companions/Shi'a disagree) on this matter, that is to say from as early as early fifth century Twelver Shi'i scholars disagreed as to whether the *walī*'s *idhn* (permission) was required. He goes on to mention the disagreement between the Shafi'is and the Hanafis on the same matter. See Abi Ja'far Muhammad ibn al-Hassan al-Tusi, *Kitāb al-Khilāf* (Qum: Sharka Dar al-Ma'arif al-Islamiyyah, 1958), 2:358-59.
5. I use "he" because the vast majority (if not all) *mujtahid*s continue to be men. There may be female *mujtahid*s, but I have not come across any published work to indicate otherwise. This is perhaps further indicative that a great impediment to female authority within this tradition is the production of authoritative written texts, especially as regards positive and substantive Islamic law, logic, Qur'anic exegesis, and hadith studies. In Imami law, a *mujtahid* derives rulings from various sources, namely, the Qur'an, Sunnah, and reason. This process is known as *itjihād* (the exertion of effort).
6. This is commonly known as *iṣṭinbāt* (deduction of rulings from the appropriate sources).
7. These are normally substantial technical works often carried out once a jurist begins teaching advanced studies (*baḥth al-khārij*) covering the semantics and hermeneutics of demonstrative jurisprudence and principles of jurisprudence within which Qur'anic exegesis and ḥadith studies are included. *Sharā'i' al-Islām* is an early-mid seventh century work that outlines the fatwas of Muhaqiq al-Hilli who, along with his nephew al-Allama al-Hilli, were instrumental in developing a notion of *ijtihād* acceptable to Imami jurists that did not entail juristic opinion; rather, it provided a process of extracting the rulings from the Qur'an, Sunnah, and *al-'aql* (reason). They also laid the groundwork for the future epistemology of hadith analysis and shed further light on the acceptable use of solitary reports (*akhbār al-aḥād*) in deriving Islamic law. Numerous scholars have commented upon Muhaqiq al-Hilli's *Sharā'i' al-Islām,* and prior to the *'Urwah* it was a rite of passage for a *mujtahid* to either append his own notes to it or to compile a substantial commentary, such as Muhammad b. Ḥassan al-Najafi's forty-three volume *Jawāhar al-Kalām fi Sharḥ Sharā'i' al-Islām* (Dar Ihya' al-Turath al-'Arabi: 1984). On the other hand, the prominent early twentieth-century Imami *mujtahid* Sayyid Kazim al-Yazdi authored *Al-'Urwat al-Wuthqā*; his *aḥkām* work became a popular subject of commentaries and *ḥāshiyāt* by his students and later scholars. For a detailed overview of development of Imami *ijtihād* and hermeneutics, see Ahmed Kazemi Mousavi, *Religious Authority in Shi'ite Islam* (Kuala Lampur: ISTAC, 1996), 75-105. Also see Norman Calder, "Doubt and Prerogative: The Emergence of an Imami Theory of *Ijtihād*," *Studia Islamica* 70 (1989), 55-78.
8. Two examples come to mind: Ayatullah Khamene'i, following the groundbreaking ruling of his predecessor (Ayatullah Khomeini), allows the playing of chess (*al-shaṭranj*) providing no one gambles; on the other hand Sistani and the vast

majority of Shi'i jurists consider chess to be absolutely *ḥarām* (impermissible) and sinful. This is a significant cleavage between these two jurists, who have a significant number of *muqallidūn* (followers) in the Middle East (Iran, Iraq, Lebanon, and Bahrain) and India, Pakistan, Europe, and North America. Situations continue to arise where Khamene'i followers want to play chess and Sistani followers vehemently object. Both groups attend the same mosque. The imam of the center is usually called upon for an answer, only to insist that both groups show respect for one another's sources of emulation and learn to co-exist! This is a prime example of intra-Shi'i conflict. For rulings regarding chess, see al-Sayyid Abul Qasim al-Khu'i, *Ṣirāṭ al-Najāt with the notes of Mirza Jawad al-Ṭabrizi* (Qum: Maktab Nashr al-Muntakhab, 1995), 1:376, http://www.sistani.org/local.php?modules=nav&nid=5&cid=427&hl=chess, last assessed February 13, 2011 and http://www.leader.ir/tree/index.php?catid=23, last accessed February 13, 2011).

9. Throughout this paper, *father* includes the paternal biological father as well as the paternal biological grandfather, paternal great-grandfather, and so on.
10. See: Jawad Maghniyya, *Fiqh al-Imām Ja'far al-Ṣādiq* (Qum: Mu'assasah Sibtayn al-'Alamiyyah, 2002), 5:233-34. He states that the only way to interpret or discover *ikhtilāf* among the traditions is to invoke the principle of "no undue harm or injury" or a similar ethical basis for rejecting the traditions. The problem in calling upon such principles is that they are very general and can seldom, if ever, outstrip a series of confirmed and authenticated traditions (according to traditional Imami standards) of their legal and probative value. In such cases, these jurists may invoke certain ethical norms (e.g., family harmony or the need to ensure a healthy and religiously prosperous future for one's children), but such ethical precepts have little or no bearing on the eventual fatwa.
11. One method of resolving an apparent contradiction between two hadiths, both of which are believed to have been said by the Imam, is to reject the tradition that accords with or is closest to the Sunni position on the grounds that it must have been said in a state of dissimulation (*al-taqiyyah*). For a concise and complete discussion, see Sayyid Muhammad Taqi al-Hakim, *Uṣūl al-'Āmmah li al-Fiqh al-Muqāran*, 3d ed. (Qum: Majma' al-'Alimi li al-Ahlu l-Bayt, 1997), 355-56.
12. The principle disagreement between some Sunni jurists centers on the inferred *'illa* (*ratio legis*) of agency being virginity or physical and mental maturity (*al-bulūgh wa al-rushd*). See note 78 for more details.
13. Suitability (*kafā'ah*) indicates that the potential husband must be of a comparable socio-economic status and/or *tadayyun* (observes Islamic law and is not a drunkard, for example). The prevention of marriage (*al-'aḍl*) means the guardian attempts to prohibit his subject (*mawlā*) from accepting a marriage proposal.
14. Jurists describe these three positions as *istiqlāl al-ab*, *istiqlāl al-bint*, and *tashrīk* or *ishtirāk*. A fourth position, *tafsīl*, essentially distinguishes between permanent and temporary marriage: In some cases she would have agency to perform temporary marriage but not permanent marriage, and vice versa. I will not be dis-

cussing this because the vast majority of contemporary jurists do not differentiate between the two when issuing fatwas. For an extensive discussion concerning all the stated positions, see Muhammad Hassan al- Najafi (d. 1266 AH), *Jawāhir al-Kalām fī Sharḥ Sharā'i' al-Islām* (Beirut: Dar al-Ihya' Turath al-Arabi, 1981-84), 29: 174-83. For a brief overview, see Ja'far ibn al Hassan Muhaqqiq al-Hilli, *Mukhtṣar al-Nāfi'* (Qum: Mu'assasah Matbu'at Dini, 1997), 183.

15. Conflicting traditions or contradictory reports are known as *al-akhbar al-mut'āriḍah*. Textual evidences are described as *nuṣūṣ*.
16. These four compendiums are *Kitāb al-Kāfī*, *Man lā Yaḥḍuruhu al-Faqīh*, *Tahdhīb al-Aḥkām*, and *Al-Istibṣār fī mā Ikhtalafa al-Akhbār*. There exists minimal scholarly analysis of these four texts, as the field of Imami hadith studies remains in its infancy. For a general overview regarding these texts, see Jonathan Brown, *Hadith: Muhammad's Legacy in the Medieval and Modern World* (Oxford: Oneworld, 2009), 123-50.
17. Abu Ja'far Muhammad ibn al-Hassan al-Tusi, *Al-Istibṣār fī mā Ikhtalafa al-Akhbār* (Tehran: Dar al-Kutub al-Islamiyyah,1970), 3:235; 1. Also see Ibn Babawayh al-Qummi (a.k.a. Shaykh al-Saduq), *Man lā Yaḥḍuruhu al-Faqīh* (Beirut: Mu'asasah al-'Alimi al-Matbu'at,1986), 3:259, hadith no. 439; and Muhammad b. Ya'qub al-Kulyani, *Al-Furū' min al-Kāfī* (Beirut: Dar al-Ta'aruf, 1981), 5:393 hadith no. 1. Also, Shaykh al-Mufid cites this tradition verbatim in the form of a legal ruling without explicitly indicating that it is a hadith report. See Shaykh al-Mufid, *Al-Muqnī'a* (Beirut: Dār al-Mufid, 1993), 510-11.
18. Muhammad b. al-Ḥassan al-Hurr al-'Amili, *Wasā'il al-Shī'ah* (Qum: Dhu al-Qurba' 2007), 7:359, hadith no. 3. Also see Kulyani, *Al-Furū',* 393, hadith no. 2, and Tusi, *Al-Istibṣār*, 235, hadith no. 5.
19. Robert Gleave, "Between Hadith and Fiqh: The Canonical Imami Collections of Akhbar," *Islamic Law and Society* 8 (2001): 358-364. Gleave draws attention to the arrangement, listing, and heading under which the *aḥādīth* are placed. Although this may vary from scholar to scholar, it is nevertheless important to take note of this, especially as regards Kulyani and Saduq.
20. Abu al-Qasim al-Khu'i, *Mabānī al-'Urwa al-Wuthqā' Kitāb al-Nikkāḥ,* vol. 2, and Sayyid Muhammad Sadiq Ruhani, *Fiqh al-Ṣādiq*, vol. 21 (Qum: Dar al-Kitab, 1992), http://www.imamrohani.com/arabic/kotob/fokh/21/02.HTM#fehrest18, last accessed April 2, 20011). The hardcopy of this work was not available to me during the writing of this paper; however, Imam Ruhani's office has uploaded the complete version of the cited edition online, including the footnotes from the original text.
21. See Liyakat Takim, "Offering Complete or Shortened Prayers? The Traveler's Salat at the Holy Places," *Muslim World* 96 (2006): 409-413. Takim provides an extensive discussion concerning the connection between jurisprudence and *'ilm al-rijāl* (science of the narrators of hadith). All three of the stated transmitters were among the most prominent students and companions of the Fifth, sixth, and Seventh Imams. All of these reporters, aside from Ibn Abi Ya'fur, are de-

scribed as belonging to the *aṣḥāb al-'ijmā'* (those companions known as jurists [*fuqahā' min al-aṣḥāb*] whose repute is beyond reproach). See Muhammad b. Umar al-Kashshi, *Rijāl al-Kashshi* (Karbala: Mu'assasat al-'Alimi, n.d.), 206 as cited in Ja'far al-Subhani, *Kullīyat fī 'Ilm al-Rijāl* (Qum: Imam al-Sadiq Foundation, 2006), 173-80. The idealization of these transmitters is in no way monolithic in the Imami tradition, for such later scholars as Mamaqani, Khu'i, and others engaged in a hermeneutics of idealization and rehabilitation of the *rijāl*. For a thorough discussion, see Liyakat Takim, *Heirs of The Prophet: Charisma and Religious Authority in Shi'ite Islam* (Albany: State of New York University Press 2006), 158-63.

22. *Al-jārīyah* has several meanings, one of them being a young woman or youthful woman, as well as a slave or free woman. The lexicons indicate the general usage of "unmarried" or "young woman," as opposed to *'ajūz* (older woman), and a virgin or non-virgin. Al-Khu'i and others tend to interpret this tradition and similar ones as applying to non-virgins because there are numerous and straightforward traditions that emphasize the *thayyib*'s (non-virgin) agency. See E. W. Lane, *Arabic-English Lexicon* (Cambridge: Islamic Texts Society, 2003), 1:416. Also see Fakhr al-Din b. Muhammad al-Turayhi, *Majma' al-Baḥrayn* (Najaf: Dār al-Thaqāfa, 1961), 1:82.
23. Khu'i, *Mabānī*, 266. Also see Kulyani, *Al-Furū',* 392, hadith no. 8.
24. Hurr al-'Amili, 7:364, hadith no. 2 and Shaykh al-Tusi, *Tahdhīb al-Aḥkām* (Tehran: Dar al-Kutub al-Islamiyyah, 1988), 7:379, hadith no. 10. Al-Tusi lists numerous traditions stressing the need for seeking the virgin's permission and satisfaction before marrying her to future husband.
25. Kulayni, *Furū' al-Kāfī*, 7:391, hadith no. 1, as well as Saduq, *Man lā Yaḥḍuruhu,* 259 hadith no. 4397. It reads as follows: *Al-mar'ah alatī qad malakat nafsahā wa ghayri al-safīhah wa la mawlā 'alayhā, tazwīj bi-ghayri walī jā'iz*.
26. Hurr al-'Amili, 7:365, hadith no. 6. Shaykh Tusi, *Al-Istibṣār fī ma Ikhtalafa al-Akhbār* (Tehran: Dar al-Kutub al-Islamiyyah, 1969), 3:234, hadith no. 6. The tradition reads as follows: *Idhā kānat al-ma'rah malikah 'amruhā tabī'u wa tashtarī wa tu'taqu wa tushadu wa tu'ṭī min māliha ma shā'at fa-inna 'amrahā jā'iz tuzzauwiju 'in shā't bighayri idhni walīuhā, wa 'in lam takun kadhalika fa-lā yajūzu tazwījuhā 'illa bi-'amri walīuhā*. For traditions of a similar purport, see ibid, and Kulayni, *Furū' al-Kāfī* 7:391, hadith no. 1, as well as Saduq, *Man lā Yaḥḍuruhu,* 259 hadith no. 4397.
27. Shaykh al-Tusi, *Al-Istibṣār*, 3, 236, hadith no. 6 and Hurr al-'Amili, 7:365, hadith no. 4.
28. Al-Khu'i, *Mabānī*, 257.
29. As I mentioned earlier, al-Khu'i is by no means the first to construct this position based on reconciliation between these opposing traditions. But in his capacity as a *mujtahid*, he must go through the motions of once again surveying all of the traditions in order to delineate how he arrives at the position of joint agency also known as *tashrīk baynahumā*.

30. If her potential spouse is deemed to be suitable and equitable (*kafū'*), then his *idhn* is not an absolute must. I will return to the question of suitability in the paper's final section.
31. Ibid., 258. For al-Khu'i, the Sunnah constitutes the authenticated traditions of the Fourteen Infallibles. Also I should note that for al-Khu'i, the Qur'an only supports his position in a very general sense insofar as there is no objection to the *tashrīk* position. As a result, he places little or no emphasis on Qur'anic support for his ruling.
32. I will return to the family unit and social realities when discussing the function of *kafā'ah* and *al-'aḍl*. In the work of al- Khu'i, *father* implies both biological father and paternal grandfather (*al-ab wa al-jadd*). That being said, the *aḥādīth* appear ambivalent on the matter and the majority of jurists tend to the give the father priority in the case of a conflict. For example, after much debate the famous jurisprudent of Iraq, Kashif al-Ghita left the door open to *istiqlāl al-bint,* provided that she does not bring shame (*hatak*) upon her guardian. See Ja'far al-Subhani, *Niẓām al-Nikkāh* (Qum: Imam al-Sadiq Foundation, 1995), 192.
33. The joint agency position is famous among scholars from the tenth Islamic century onward. In one of the earliest commentaries on Muhaqiq al-Hilli's *Sharā'i' al-Islām,* under the section on marriage and agency, the author concluded the following: "*al-jama' bayna idhnihā wa idhn al-ab ṭarīq al-iḥtiyāṭ*…", the joining of her consent and that of the father is the way of precaution, and God knows best with regards to the realities of rulings." See Muhammad b. Ali al-'Amili, *Nihāya al-Marām fī Sharḥ Mukhtaṣar Sharā'i al-Islām,* vol. 1. (Qum: Jami'at al-Mudarrisin, n.d.); Sayyid Muhsin al-Tabatba'i al-Hakim, *Mutamasak al-'Urwat al-Wuthqā* (Qum: Manshurat Maktabat Ayatullah al-'Uzma al-Mar'ashi al-Najafi, 1983), 14:445-48; and al-Najafī, *Jawāhar al-Kalām,* 29:183-84, and Sayyid Ali al-Husayni al-Sistani, *Islamic Laws* (Stanmore: The World Federation of KS.I. Muslim Communities, 1994), 439. Sayyid Sistānī is considered to be the most popular source of emulation in Iraq if not the entire Shi'i world, in that he commands the largest number of *muqallidīn* (emulators).
34. Khu'i, *Manānī*, 270. Also see Sayyid Muhsin Hakim, *Minhāj al-Sāliḥīn*, ed. and comp. Sayyid Muhammad Baqir al-Sadr (Beirut: Dar al-Ta'aruf, 1980), 276.
35. A discussion surrounding the development and use of *ihtiyāt wujūban* in Imami jurisprudence is beyond the scope of this paper. It is restrictive but not absolute, because it allows a *muqallid* to refer to another jurist, provided that the jurist has a clear fatwa. Aside from Sayyid Muhammad Husyan Fadlallah and Sayyid Ruhani, the vast majority of jurists have made the same ruling as al-Khu'i. An example of this use of precaution can be seen in al-Khu'i's insistence that the hijab include face veiling. He considers this an obligatory precaution, thus allowing his followers to refer to "the next most learned jurist" with an alternative opinion.
36. Shaykh Tusi, *Kitāb al-'Āmālī* (Tehran: Dar al-Kutub al-Islamiyyah, 2001), 71-72, majlis 2, hadith no.13. There is also an interesting report, albeit without a

chain of narrators, in which Fatimah objects to marrying Ali, after which the Prophet explains the latter's spiritual merits in this world and the next, all of which were brought to his attention during his heavenly ascent, therefore leaving no other person *kafū'* (suitable) for her. She then agreed to the proposal. See Ali b. Ibrahim al-Qummi, *Tafsīr al-Qummī* (Qum: Dar al-Kitab, 1984), 2:336-37.

37. Both Muhammad b. Hassan al-Najafi and Sayyid Muhsin Hakim, who relate this incident, cite this same report in support of shared agency and thereby have infused it with legal value. That being said, neither of them mentioned Fatimah's *kirāha* to previous proposals. See Muhsin Hakim, 14:446, and Muhammad b. Hassan al-Najafi, 29:183.
38. "The Prophet has greater precedence over the believers than they have over themselves…" See Q. 33:6. For a mainstream Imami exegesis of this verse, see Abu al-Fadl al-Ḥassan al-Tabrasi, *Majma' al-Bayān fī Tafsīr al-Qur'ān* (Tehran: Nasr Khusraw Publication, 1993), 8:530.
39. Sayyid Muhammad Sadiq Ruhani was among the late Sayyid Abul Qasim al-Khu'i's most prominent students. This is quite a remarkable claim within contemporary Imami clerical circles. For a biography of Ruhani, see http://www.imamrohani.com/arabic/sira/01.htm, May 1, 2010.
40. Almost every work of demonstrative jurisprudence has cited this as central detracting factor in this report's *hujjīyah*. See Khu'i, *Mabānī*, 2:259. For other discussions, see Muhammad Ali al-Araki, *Kitāb al-Nikāh* (Qum: Nur Nagar, 1998), 46-47. For a concise overview, see Baqir Irwani, *Al-Fiqh al-Istidlāl* (Beirut: Dar al-Amirah, 2008), 2:299-203.
41. *Mālikah* can be rendered as "an empowered woman" or "a woman who governs herself."
42. For a discussion concerning the legal usage of *muṭlaq*, see Mahmud Abd al-Rahman, *Mu'jam al-Muṣtalaḥāt wa al-Alfāẓ al-Fiqhīyah* (Cairo: Dar al-Fadliyyah, n.d.), 3:308.
43. The implications of this question are enormous for those who assent to this system of law because if she marries despite her guardian's objections and assuming that the marriage was consummated, it may constitute fornication according to some interpretations.
44. Sayyid al-Ruhani describes this tradition as *tafsīr malikīyyah al-'amr* (a commentary of what it means to have control over one's life affairs). That being said, its exegetical function is debated and has been discussed at length by both past and present scholars. See Yusuf al-Bahrani, *Ḥadā'iq al-Nāḍirah fi Aḥkām al-'Itra al-Ṭāhirah* (Qum: Jami'at al-Mudarrisin, 1984), 23:222-23.
45. I have not come across a critique of this chain of transmission prior to al-Khu'i.
46. Khu'i, *Mabānī*, 260. Al-Khu'i is concerned with the transmitters who lie between Tusi and Ali b. Isma'il. This chain, which is often not disclosed, is what is meant by *bi isnādihi* when it is affixed at the chain's beginning.
47. The *rāwī* (reporter) in question has been widely described as one of the first *muttakalim*s (theologians) among the Imamis. Al-Najashi describes him as being

min aṣḥābinā kallama min al-Ḥudhayl wa al-Niẓām. Among other texts, he apparently also composed a treatise on marriage. See Ahmad b. Ali al-Najashi, *Rijāl al-Najashī* (Beirut: Dar al-Adwa', 1988), 2:72. Al-Khu'i corroborates much of what is found in Najashi, but does not mention the lack of his authentication in his *rijāl* compendium. See Sayyid Abul Qasim al-Khu'i, *Mu'jam al-Rijāl al-Ḥadīth* (Qum: Markaz al-Athar al-Shi'ah, 1990), 11:275-76.

48. Liyakat Takim provides an in-depth analysis of al-Khu'is methods of general and specific authentication of hadith transmitters. General authentication (*al-tawthīqāt al-'āmmah*) entails authenticating an entire chain based on the established *thiqah* of the text's compiler. For example, al-Khu'i believed that since Ibn Qulawah, who compiled *Kāmil al-Ziyārāt*, is trustworthy, this should imply that all of the transmission chains of which he is the final transmitter must be deemed authentic. An authentication of this type essentially deems the entire text to be *ṣaḥīḥ*. On the other hand, *al-tawthīqāt al-khāssah* implies that only Ibn Qawlawayh's principal sources of information (*mashāykh*; those of his teachers who transmitted directly to him) would be deemed authentic and trustworthy, thus leaving the remainder of the *isnad* open to critique. See Liyakat Takim, "The Origins and Evaluation of Hadith Transmitters in Shi'i Biographical Literature," *American Journal of Islamic Social Sciences* 24, no. 4 (2007): 35-37.
49. Ruhani points out that the last phrase, *bi ghayri idhn abīhā*, as recorded in the manuscripts and printed editions of al- Tusi's *Tahdhīb* and *Istibṣār* has also been rendered as *bi-gharyi idhn walīhā*. This alternative can be found in al-Khū'is *Mabānī* as well in Shahid al-Thani's *Masālik al-Ifhām*. This is most likely to due scribal error. See Ruhan, http:// www.imamrohani.com/arabic/kotob/fokh/21/02.HTM#fehrest18; Khu'i, *Mabānī*, 260; and Zayn al-Din b. Ahmad b. Ali al-'Amili, *Masālik al-Ifhām illā Tanqīh Sharā'i' al-Islām* (Qum: Mu'assasat al-Ma'arif al-Islamiyyah, 1992), 7:125. Also, the verb *raḍīya* (*r-ḍ-a*) implies an opposition to *al-sakhaṭ* (anger) and a high quality of consent or being well pleased. See Lane, *Arabic-English Lexicon,* 1:1099.
50. See Araki, *Kitāb al-Nikāh,* 46.
51. Ibn Qulawayh was said to have been one of Shaykh al-Mufid's teachers, and Ali b. Ibrahim al-Qummi was one of al-Kulyani's principal hadith instructors. See Muhammad b. Sulayman al-Tanakabuni, *Qiṣaṣ al-'Ulamā'* (Beirut: Dar al-Mahhajah al-Bayda', 1992), 454-55. The introduction to *Tafsīr al-Qummī* mentions some important biographical information. See al-Qummi, *Tafsīr al-Qummī,* 5-6.
52. See Takim, *Tafsir al-Qummi*, 43. Apparently it was brought to al-Khu'i's attention that by carrying out mass authentication he was, in turn, authenticating otherwise unknown and untrustworthy transmitters. Thus he changed his position from *tawthīqāt al-'āmmah* to *tawthīqāt al-khaṣṣah*. For al-Khū'is position on the authentication of *Tafsīr al-Qummī*, see Muslim al-Dawari, *Uṣūl 'Ilm al-Rijāl* (Qum: Mu'assasat al-Muhibin, 2005), 1:273-75.
53. The biographical texts allege that Abbas b. Ma'ruf was a trustworthy (*thiqah*) companion of the Eighth Imam, Ali b. Musa al-Rida. See Najashi, *Rijāl,* 5:120.

54. I use the term *authentic* in a relative fashion, as authenticity is interpretive and used in the context of Imami-Usuli hadith studies.
55. One may posit several hypotheses for this increase in complexity and intense critique: (1) the exigencies present due to the modern condition and society, which increasingly demand newer and more practical solutions to such socio-domestic matters as marriage and (2) the field's advancement is partly evolutionary insofar as Imami scholars, in addition to growing in number, are attempting to build upon the past's vast legal commentaries and not settle for its mere reproduction whether it be in the field of hadith studies, linguistics, history, or law. They may not always differ with past rulings; however, the justifications they provide for their rulings are often far more substantial and precise. This is especially true in the case of marital law, which continues to serve as a nexus point of competing social, legal, and cultural concerns for Muslim communities.
56. See al-Hassan b. Mutahar al-Hilli, *Mukhtalaf al-Shī'ah fī Aḥkām al-Shar'īyah* (Qum: Jami'at al-Mudarrisin, 1999), 7:114-15. What is meant here is that medieval jurists such as al-Hilli did not engage in the same discourse concerning juristic preference or harmonization of traditions in the context of this *mas'alah*.
57. Some jurists also describe this as *al-takhīr*, which entails the act of choosing one position over all others when confronted with opposing traditions.
58. The only prominent contemporary work of demonstrative jurisprudence, aside from that of al-Ruhani, that supports the virgin's agency is that of Jawad Maghniyya. See Jawad Maghniyya, *Fiqh Imām al-Ṣādiq*, 5:231-32.
59. See Taqi al-Hakim, *Uṣūl al-'Āmmah,* 354-56 and Muhammad Ishaq al-Fayad, *Muḥāḍarāt fī Uṣūl al-Fiqh: Taqrīran li Abḥāth Ayātullah Khū'ī* (Qum: Mu'assasah Ihya Athar al-Imam al-Khu'i, 2002), 3:221-23. *Sunnah* may imply any belief or position supported or practiced by an Infallible or accepted practice among Shi'i scholars, although the latter is not agreed upon. Imami jurists derive these three elements of juristic preference from following tradition: " When you are confronted with two conflicting traditions, compare them with the Qur'an. Take that which agrees with the book of God, and leave that which opposes it. If you do not find it (the answer) in the book of God, then compare them (the two traditions) to the reports of the *'āmmah* (non-Shi'as). Leave that which agrees with their reports and statements, and take that which opposes their reports." See al-Hurr al-'Amili, *Waṣā'il al-Shī'ah*. 10 vols. (Qum: Dhu al-Qurba', 2007), 27:118. Also see Saduq, *Man lā Yaḥḍuruhu,* 2:171.
60. I will address the contention over the evidentiary value of the Qur'an within the confines of this subject below.
61. This definition has been supplied by Liyakat Takim. See Takim, "Shortened Prayers," 406.
62. The entire process of *al-ta'ādal wa al-tarjīh* (comparison between traditions and juristic preference) is designed to produce a proof or *al-ḥujjah* (*taḥṣīl al-hujjah*) for a given legal ruling in the event that the traditional evidences oppose one

another (*'inda al-ta'āraḍ bayna al-'adillah*). See Muhammad Rida Muzaffar, *Uṣūl al-Fiqh* (Beirut: Mu'assasat al-'Alami al-Matbu'at, 1970), 181.

63. Maghniyya also uses *shahra* as a means of *tarjīḥ*. See Maghniyya, *Fiqh al-Imām Ja'far al-Ṣādiq*, 5:232. For al-Murtada, the virgin's agency hinges upon her being able to control her own affairs (*tammalaka amrāhā*) and of sound mind (*'aqlalat*) and complete (*kamalat*). I would assume that this implies she is both physically and mentally mature. See Ali b. al-Husayn al-Murtada, *Al-Intiṣār* (Najaf: Maktabat al-Haydariyyah, 1971), 120.
64. The *qudamā'* may include Shaykh al-Saduq, Tusi, and Murtada among others. the *mutā'khirūn* may include Shahid al-Awwal, Thani, al-Hurr al-'Amili, Yusuf al-Bahrani, and Muhammad b. Hassan al-Najafi (d. 1266 AH). For a summary of the various legal opinions, see al-Hassan b. Mutahar al-Hilli, *Mukhtalaf al-Shī'ah fī Aḥkām al-Shar'īyah* (Qum: Jami'at al-Mudarrisin, 1999) and Ja'far Subhani, *Niẓām al-Nikāḥ*, 173-75. For a summary of both early and later opinions, in addition to an extensive analysis of the various positions and historical trajectory of this *mas'alah*, see Shaykh Murtada' al-Ansari, *Kitāb al-Nikāḥ*, (Qum: al-Mu'tamar al-'Alami li Takhlid Dhikra' Shaykh al-'Azam, 1995), 108-28.
65. For instance, Jawad Maghniyya goes further to claim the following: Most of the Imamis (hold) that the physically mature and mentally sound woman, by means of her physical maturity (*bulūgh*) and mental soundness (*rushd*) possess agency (*tamalak*) in all aspects of her behavior (and endeavors) with respect to (commitment to and fulfillment) of contracts and otherwise. This (agency) extends to marriage, regardless of whether she is a virgin or non-virgin. Thus, she can contract (a marriage) for herself (*ta'qadu li nafsihā*) or for someone else (*ligharihā*) directly or via proxy, and may respond (*ījāb*) and accept (*qubūl*) the marriage proposal (without necessary recourse to a guardian). This is equally allowable if she has a father, a grandfather, other male blood relatives, or none at all. Furthermore, it does not matter if the father is pleased or displeased (with her marital arrangement). And it is all the same whether she is of elevated (*rafī'ah*) or lower (*waḍī'ah*) social status, or if she marries a man of high status or low status. See al-Mughniyya, *Al-Fiqh 'alā Madhāhib al-Khamsah*, 2:322.
66. See note 18.
67. Ibn Idris (d. 598 AH) states the following: "*Wa raja'a 'ammā dhakarahu fī nihāyatihi wa sā'ir kutubihi li'anna kitāb al-tibyān sannafahu ba'da kutubihi jamī'ihā wa istiḥkām 'ilmihi*." He then extracts a gloss from al-Tusi's commentary on Q. 2:237, stating that there is no *wilāyah* except that given to the father or grandfather upon the non-pubescent virgin (*'alā al-bikr ghayri al-bāligh*). See Ibn Idris al-Hilli, *Al-Sarā'ir al-Ḥāwī li Tahrīr al-Fatāwī* (Qum: Jami'at al-Mudarisin, 1990), 2:563. However, this selection must be scrutinized further because upon referring to the *Tibyān*, al-Tusi follows this gloss by stating the following: "*wa fīhi khilāf bayna al-fuqahā' dhakaranāhu fī al-khilāf wa qawaynā mā akhbararnāhu hunāka*" which translates as "and in it (the issue of guardianship over the marriage contract) there is disagreement between the jurists. We

have discussed it in *Al-Khilāf* (al-Tusi's work on comparative jurisprudence) and supported what we have reported there." This statement could be interpreted as meaning that the full explanation of his position vis-à-vis the Sunnis can be found in the *Khilāf*. Upon referring to this book, al-Tusi clearly states that the pubescent virgin of sound mind does not have the authority to contract a marriage without the consent of her father(s). See al-Tusi, *Al-Tibyān fī Tafsīr al-Qur'ān* (Beirut: Dar al-Ihya' Turath al-'Arabi, 1989), 2:273; al-Tusi, *Al-Khilāf*, 358. Despite all of these apparent incongruences, Ibn Idris cites another of al-Tusi's opinions from *al-Mabsūṭ*, in which after noting the intra-Imami *ikhtilāf* he states: "*idhā tazawwaja man dhakarnāhu gibhayri walīn kāna al-'aqd saḥīḥan*" which translates "as if whom we mentioned (the pubescent virgin) was to marry without the *walī* (without his permission), the contract would be valid." See al-Tusi, *Al-Mabsūt fī Fiqh al-Imāmīyah* (Qum: Jami'at al-Mudarrisin, 2006), 3:387. Now, the question as to which statement best reflects his final position is subjective, at least for the reason that if the *Tibyān* was really his final work (which most biographies confirm), then the shaykh himself is giving preference to what he has mentioned in the *Khilāf*. Therefore what is found there can be considered his most authoritative opinion on the matter. However, this may only be limited to comparative jurisprudence since the *Khilāf* is a comparative work and his more profound work is without doubt, the *Mabsūṭ*. Nevertheless, any conclusions drawn from this or claims to *shuhra* are speculation at best.

68. Al-Mufid, *Al-Muqni'a*, 510-11, and al-Mufid, *Aḥkām al-Nisā'* (Qum: Collection of Shaykh Mufid's Works, 1992), 36.

69. The reason for such uncertainty lies in the fact that we are not sure if the *Aḥkām al-Nisā'* was written before or after the *Muqni'a*, especially since al-Najashi, while mentioning both of these works, does not mention when they were completed. Furthermore in al-Tusi's canonical hadith collection, namely, *Tahdhīb al-Aḥkām fī Sharḥ al-Muqni'a*, he does not mention this alternate position of Mufid, but rather supports the *istiqlāl al-ab* position. Further yet, Yusuf al-Bahrani and Muhammad Mahdi Niraqi (d. 1245 AH) have both taken issue with and attempted to grapple with the apparent contradictory or variant opinions of early jurists such as al-Tusi, al-Mufid, and al-Murtada' in addition to questionable claims to *ijmā'*. Al-Bahrani cites a partial treatise in his possession, written by Zayn al-Din al-'Amili (Shahid al-Thani), in which al-'Amili cites seventy occasions in which al-Tusi states one legal position only to contradict himself (*mukhālafat al-shaykh li nafsihi*). See al-Bahrani, *Ḥadā'iq al-Nāḍirah,* 4:98. Sayyid Muhammad Husayni al-Husayni al-Jalali kindly gave me a copy of the original manuscript of this unpublished treatise attributed to Shahid al-Thani, in which he lists in detail the numerous occasions in which al-Tusi seems to contradict himself from the chapters of marriage and divorce to foodstuffs. In it, Shahid al-Thani provides no explanation for these except to state the shaykh (al-Tusi) has made claims to *ijmā'* only to oppose these very same claims elsewhere, and therefore the jurist cannot establish two opposite claims to consensus and,

"in doing so *faqad waqa'a fī al-khaṭa'* (he falls into error)." However, he does not cite guardianship and the marriage contract as instances of conflict, perhaps because al-Tusi never claims consensus on the matter. See Zayn al-Din al-'Amili, *Risālah 'ala Masā'il Da'a' fīhā al-Shaykh al-Ijmā' wa Khālafa Idā' al-Ijmā' fīhi* Collection of Sayyid Muhammad Husaynī al-Husaynī al-Jalālī, Chicago, MS# unknown. On the other hand, Niraqi cites Shahid al-Awwal as stating that these apparent conflicting *ijmā'āt* (pl. *ijmā'*) are in fact not contradictions at all, but merely attestations to the *riwāyat* of the *ḥukm*, meaning that the ruling has been reported and there exists evidence for it within the corpus of *akhbār* and upon this there is consensus. See Muhammad Mahdi Niraqi, *'Awā'id al-Ayyām* (Qum: Maktabat Basirati, 1980), 693-95.

70. "*Wa huwa thubūt al-walāya lahumā mustaqillan muṭlaqan bal huwa al-mansūb ilā al-mashūr bayna al-qudamā'*," which translates as " and it (this legal position) consists of the confirmation of guardianship to both of them (father and paternal grandfather(s)." See Ruhani, http://www.imamrohani.com/arabic/kotob/fokh/21/02.HTM#fehrest18
71. Khu'i, *Muḥādarāt*, 223. "*Ama al-shuhra, lam tudhakir fīhā 'adā al-marfū'ah wa al-maqbūlah*."
72. Muhammad Rida Muzaffar describes this as *al-shuhra fī al-riwāyah*, when the "large" number of reporters is not sufficient to be described as constituting *al-tawātur*. See Muzaffar, *Uṣūl al-Fiqh*, 2:143.
73. Khū'i's representative told me that the *mujtahid*s do not do *taqqadus* of past scholars, meaning that they do not sanctify their legal judgment. This disposition can be described as applying to the vast majority of contemporary Imami *mujtahid*s. One example can be found in al-Khu'i's *Mābānī al-'Urwat al-Wuthqa*, in which he critiques Sayyid al-Murtada's claim to consensus that if a couple commits adultery they are forbidden to each other permanently. Credit for this key reference goes to Sayyid Muhammad Rizvi, who lent me his copy of al-Khu'i's lecture notes notes. See al- Khu'i, *Mabānī*, 1:280-81.
74. Al-Ruhani, *Zubdat al-Uṣūl* (Qum: Amin Publishers, 2004), 4:186-87; Ibid, 6.
75. These are strong words, insofar as al-Muzaffar is accusing those who vest al-*shuhra al-fatwāiiyyah* with *hujīyah* to essentially be guilty of performing a form of unacceptable *taqlīd* and thus not living up to their commitments as bona fide *mujtahid*s. See al-Muzaffar, *Uṣūl al-Fiqh*, 2:144.
76. I have used Wolfart Heinrichs' analysis of *qawā'id fiqhīyah.* After stating this concept's contested definition, he cites Taj al-Din al-Subki (d. 771 AH) as describing the *qawā'id* in the following way: "The *qā'idah* is the generally valid rule with which many particular cases [*juzīyāt*] agree whose legal determinations can be understood from it [the *qā'idah*]." Therefore jurisprudential maxims can be understood as overarching theoretical concepts that may potentially make sense of individual rulings and cases. See Wolfart P. Heinrichs, "*Qawā'id* as a Genre of Legal Literature," in *Studies in Islamic Legal Theory*, ed. Bernard Weiss (Leiden: Brill Publications, 2002), 401-02. The most common example cited is that

if anything causes undue harm, then it can be rendered as non-compulsory or even impermissible, or that everything is considered pure unless it is proven that it is impure. This is one of the juristic principles behind *ṭahārah* (purity). See Baqir Irwani, *Al-Qawā'id al-Fiqhīyah* (Qum: Dar al-Fiqh, 2006), 2:96-98. In Shi'i jurisprudence, the term *naṣṣ* carries superior evidentiary value that is described as being a direct textual ruling in the form of Qur'anic verses or a hadith deemed to be authentic. See the glossary of Muhammad Baqir al-Sadr, *Principles of Islamic Jurisprudence*, tr. Arif Abdulhussein (London: ICAS Press, 2003), 137.

77. Shi'is consider the Fourteen Infallibles to include Muhammad, Fatimah, Ali, al-Hassan, al-Husayn, and the remaining nine Infallible Imams who are select descendents of al-Husayn.
78. For a discussion concerning *qa'ādat sulṭanat al-nafs*, see Irwani, *Al-Qawā'id al-Fiqhīyah*, 2:96-113. The closest synonymous principle I could discover is *qā'adat min al-milk* (the principle regarding authority), namely, the endowed authority given to every free and sane human being to willfully enter into financial contracts and purchase slaves and *iqrār al-'uqalā'* (affirmation of those with intelligence). This has similar implications indicative of the freedom to spend one's wealth as one pleases, witness in court, loan money to others, as well as accept the responsibility of taking a loan and paying it back. See al-Tusi, *Al-Mabsūṭ*, 3:4-6.
79. Nasr Makarem Shirazi, *Al-Qawā'id al-Fiqhīyah* (Qum: Madrassah Ali b. Abi Talib, 2004), 2:20-22.
80. Jawad Maghniyya makes a similar argument in his *Al-Fiqh 'alā Madhāhib al-Khamsah*, 322. Allama al-Hilli has also used a similar concept, namely, *iqrār al-'uqlā':* "*law aqārat al-hurrah al-bālighah al-'āqilah bi al-nikāh, siḥḥah iqrārahā 'inda 'ulamā'inā 'ajma'a* (If the free pubescent and mentally sound woman decides to marry, her decision is vaild in the view of our scholars by consensus)." He then states that Abu Hanifah used a similar rationale to support the same viewpoint. See Allama al-Hilli, *Tadhkīra*, 2:583-84.
81. The vast majority (if not all) of Imami scholars forbid abortion unless the mother's life is at risk, as well as organ donation after death. They also do not give a woman the unadulterated right given to men to divorce at will.
82. Khu'i, *Muḥāḍarāt*, 221-23.
83. See Araki, *Kitāb al-Nikāḥ*.
84. This *muwāqafah* entails that which could be described as *iṭlaqāt al-ayāt* or *muṭlaq*, meaning that the verse may not directly address the issue at hand, but it nevertheless implies a general ethic or ethos of understanding
85. See Q. 5:2 and Q. 2:232, 235.
86. Q. 2:232. See Jawad Maghniyya, *Tafsīr al-Kāshif* (Tehran: Dar al-Kutub al-Islamiyyah, 2003), 1:354-55. While Maghnīyya's use of this verse and others to assert the virgin's agency is novel from a contemporary perspective earlier scholars (e.g., al-Murtada', Ibn Idris al-Hilli, and Allama al-Hilli) used the same verse and others, despite their exceedingly unrelated content. In fact, Ibn Idris states that if the verse's open meaning stands, in order to specify or limit it a proof

must be brought forward. See al-Murtada, Ibn Idrīṣ al-Hilli, 541-43, Allamah al-Hilli, *Tadhkīra*, 2:585, and al-Murtada, 1*Al-Intiṣār,* 19-20.

87. Sayyid Muhammad Husyan Fadlallah has a very similar line of argument. See http://english.bayynat.org.lb/se_002/womenfamily/partner.htm. Similar sentiment has been expressed via email from his office. Maghniyya draws upon similar ethical arguments in his legal work *Al-Fiqh 'alā Madhāhib al-Khamsah* (Beirut: Dār al-Jawad, 2001), 321-22.
88. For an extensive discussion, see Takim, "Shortened Prayers," 403-04. I use "apparent" because Imami jurists only consider it *ta'ārad* in an apparent (*ẓāhir*) manner and because one of the purposes of *uṣūlī* hermeneutics is to discover the reality and resolve this bifurcation.
89. *Taqīyah* became especially popular under the Abbasids, when Imami Shi'ism entered a stage of quietism. See Lynda Clarke, "Taqiyya in Twelver Shi'ism" in *Reason and Inspiration in Islam*, ed. Todd Lawson (London: I.B. Tauris, 2005), 43-63.
90. Susan Spektorsky, *Women in Classical Islamic Law* (Leiden: Brill Publications, 2010), 67-68.
91. See Muhammad b. Idris al-Shafi'i, *Kitāb al-Umm* (Cairo: Maktaba al-Kalimat al-Azhariyyah, 1961), 7:171-73. Also see Spektorsky, 67-68.
92. Ibid. Also see Muhammad Fadel, "Reinterpreting the Guardians Role in the Islamic Marriage Contract: The Case of the Maliki School," *The Journal of Islamic Law* 3, no. 1 (1998): 3.
93. Ibid.
94. For the opinions of al-Saduq and al-Tusi, see Fadel, "Reinterpreting the Guardian's Role," 3.
95. See Ibn Rushd al-Qurtubi al-Andalusi, *Sharḥ Bidāyat al-Mujtahid*, ed. Abdullah al-'Abari (Cairo: Dar al-Sala, n.d.), 3:1248. That is, if the virgin marries without her guardian's consent, is the marriage valid or not?
96. The Imamis hold that only the father and the paternal grandfather have compelling authority or agency.
97. The contemporary Imami jurists that share this position are Ruhani, Maghniyya, and Fadlallah.
98. See Abi Zayd Abd Allah b. 'Umar al-Dabusi al-Hanafi (d. 430 AH), *Kitāb al-Nikāh min al-Asrār* (Beirut: Dar al-Manar, 1993), 191-201. Also see John L. Esposito, *Women in Muslim Family Law*, 2d ed. (Syracuse: Syracuse University Press, 2001), 15.
99. Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 2003), 466. For an extensive discussion regarding the variant Sunni positions, see Kecia Ali, *Marriage and Slavery in Early Islam* (Cambridge: Harvard University Press, 2010), 33-41.
100. Muhammad b. Idris al-Shafi'i, *Kitāb al-Umm* (Beirut: Dar al-Wafa', 2001), 6:47.
101. Al-Murtada', *Al-Intiṣār,* 120 and Muhaqiq al-Hilli, *Mukhtaṣar al-Nāfi'*, 183.
102. See note 29. For a detailed discussion regarding Allama al-Hilli's *istidlāl* and

his contention that the *'illa* for agency is her physical and mental maturity, see al-Allamah al-Hilli, *Tadhrīkat al-Fuqahā'* (Tehran: Maktabat al-Murtadawiyyah li Ihya' al-Athar al-Ja'fariyyah, 1968), 2:568-88.

103. Imami scholars still debate the age of majority.
104. Ibid., 585.
105. "*Naqala al-ikhtilāf al-'āmmah fīhi wa la na'lamu annahu fī zamān suḍūr al-khabar ayḍan, kāna ilā ayī man al-'aqwāl qdātahum amīlun, la yumkin lanā al-tarjīḥ bihadhā al-wajh*. See al-Araki, *Kitāb al-Nikāh* (Qum: Nur Nagar, 1998), 43.
106. Maria Dakake and others have posited the notion that either the Fifth or the Sixth Imams and their companions formed parts of their theological doctrines in dialogue with Hanafis-Murji'is and Mu'tazalis. One example is the doctrine of postponing opinion, which essentially states that the non-Shi'a sinner has a middle position and it is not known whether he will benefit from salvation or not. Hence it is better to postpone judgment upon him. See Maria Dakake, *The Charismatic Community* (Albany: State University of New York Press, 2007), 128-39.
107. *Liyakat* Takim, *Heirs*, 101-07.
108. Muhammad Taqi al-Hakim states that it is entirely possible that the *sā'il* (the one posing the question to the Imam) transmitted what he chose (or what was in his best interest) from the Imam, essentially procuring a fatwa for himself. Meanwhile, the imam's actual fatwa does exist. Furthermore, al-Hakim states that due to the prevelaence of divergent legal opinions, including that of the Imam, he (the *sā'il*) would select what he feels is nearest to the Imam's views, which may in reality oppose their actual viewpoint, hence creating opposing reports. This is as far as the traditional scholar will go, because accusing the Imam of double speak or contradictory juristic positions would compromise the tenet of infallibility (*'iṣmah*). This is not included within the *mujtahid*'s exegetical temperament. See Muhammad Taqi al-Hakim, *Uṣūl al-'Āmmah,* 356.
109. Wael B. Hallaq, *Sharī'a* (Cambridge: Cambridge University Press, 2009), 275-76.
110. This respect and obedience owed to the father extends through the paternal line.
111. For a few examples, see Araki, *Kitāb al-Nikāh,* 48. al-Ruhani, http://www.imam-rohani.com/arabic/kotob/fokh/21/02.HTM#fehrest18; Khu'i, *Mabānī*, 269; Najafi, 183-84; al-Hilli, *Mukhtalaf al-Shī'ah*, 7:116; and Maghniyya, *Fiqh al-Imām al-Ṣādiq*, 5:232.
112. See Sistani, 439 and Subhani, *Niẓām al-Nikāḥ*, 193. Sayyid Murtada has claimed that Abu Hanifah held that even if the virgin posseses agency and marries someone (*bi ghayri kafū'*), the father has the right to intervene and stop the marriage or annul an completed marriage contract. See: al-Murtada, *Intṣār*, 120. With regards to Abu Ḥanifah's position, he states: "*laysa li walīuhā al-'itirāḍ alayhā illa idhā waḍa'at nafsahā fi ghayri kafū'*".
113. I owe this insight to Lynda Clarke.

114. Tusi, *Istibṣār*, 3:144. Tusi attempts to interpret the Sa'dan b. Muslim tradition as either applying to temporary marriage or a case of *al-'aḍl*. Also see Muhaqqiq al-Hilli, *Sharā'i' al-Islām*, 2:220. Hilli also claims there is *ijmā'* on this matter.
115. For a list of related traditions, see Kulyani, *Al-Furū',* 347-54.
116. That is, his task would be difficult in legal terms.
117. Subhani, 193-95.
118. Muhaqqiq al-Hilli, *Sharā'i' al-Islām*, 221. The Arabic reads as follows: "*Ammā idhā 'aḍalahā al-walī wa hūwa an la yuzawijuhā min kafu'in ma'a raghbatihā fa-innahu yajūzu lahā an tazawwaja nafsahā wa law karhan ijmā'an*." Al-Ruhāni expresses a very similar (if not identical) sentiment. http://www.imamrohani.com/arabic/kotob/fokh/21/02.HTM#fehrest18; Sayyid Sistani, *Minhāj al-Ṣāliḥīn* (Beirut: Dar al-Muarrikh al-'Arabi, 2003), 3:28.
119. Upon examining the positions and reports concerning the *bikr*, al-Allamah al-Hilli states that even if we were to give her agency, she would be unaware of the nature and functioning of men (*lā ta'rifu aḥwāl al-rijāl*). Such statements are not universal; rather, they are based upon his common view of the *bikr* and perhaps those in his region of southern Iraq. See Allamah al-Hilli, *Mukhtalaf al-Shī'ah*, ibid.
120. Ibid. Also see Ruhani, http://www.imamrohani.com/arabic/kotob/fokh/21/02.HTM#fehrest18. Both Subhani and al-Ruhani emphasized the need to prevent any undue hardship as the underlying purpose of the *nahī al-'aḍl* clause. I should also note that terms such as *undue hardship* or *haraj*, when used in the context of this ruling, are particularly modern. I have not come across it in medieval compendiums on marital law written by Muhaqqiq al-Hilli, Shahid al-Thani, Shaykh al-Tusi, or other jurists.
121. Such a scenario is not implausible; however, each case would have to be evaluated on its own merit.
122. This line of reasoning would indicate the interconnectedness of positive and substantive law in contemporary Imami Shi'ism.
123. *Makārim al-Shīrāzī*, 2:25-26.

Bibliography

Unpublished Work(s)

Zayn al-Din al-'Amili (Shahid al-Thani). *Risālah 'alā Masā'il Da'a' fīhā al-Shaykh al-Ijmā' wa Khālafah Idā' al-Ijmā' fīhi*, Collection of Sayyid Muhammad Husayni al-Husayni al-Jalali, Chicago, MS# unknown.

Published Works

Abd al-Rahman, Mahmud. *Mu'jam al-Muṣtalaḥāt wa al-Alfāẓ al-Fiqhīyah* v. 3. Cairo: Dar al-Fadliyyah, n.d.

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

Al-'Amili, Muhammad b. Ali. *Nihāya al-Marā'im fī Sharḥ Mukhtaṣar Sharā'i' al-Islām*. 2 vols. Qum: Jami'at al-Mudarrisin, 1992.

Al-'Amili, Muhammad b. al-Hassan al-Hurr. *Waṣā'il al-Shī'ah*. 10 vols. Qum: Dhu al-Qurba', 2007.

Al-'Amili, Zayn al-Din Ahmad b. Ali. *Masālik al-Ifhām illā Tanqīh Sharā'i' al-Islām*. 10 vols. Qum: Mu'assasat al-Ma'arif al-Islamiyyah, 1992.

Al-Andalusi, Muhammad b. Hassan ibn Rushd al-Qurtubi. *Sharḥ Bidāya al-Mujtahid wa Niḥāya al-Muqtaṣid*, ed. and commented on by Abdullah al-Abari. 4 vols. Cairo: Dar al-Salam, n.d.

Al-Araki, Muhammad Ali. *Kitāb al-Nikāh*. Qum: Nur Nagar, 1998.

Al-Ansari, Shaykh Murtada'. *Kitāb al-Nikāḥ.* Qum: al-Mu'tamar al-Alami li Takhlid Dhikra' Shaykh al-'Azam, 1995.

Al-Bahrani, Yusuf. *Ḥadā'iq al-Nāḍirah fī Aḥkām al-'Itra al-Ṭāhirah*. 25 vols. Qum: Jama'at al-Mudarrisin, 1984.

Calder, Norman. "Doubt and Prerogative: The Emergence of an Imami Shi'i Theory of *Ijtihād.*" *Studia Islamica* 70 (1989).

Clarke, L. and Cross, P. *Muslims and Canadian Family Laws: A Comparative Primer*. Toronto: Canadian Council of Muslim Women, 2006.

Clarke, Lynda. "Taqiyya in Twelver Shi'ism." In *Reason and Inspiration in Islam*. Edited by Todd Lawson. London: I.B. Tauris, 2005.

Dakake, Massi Maria. *The Charismatic Community: Shi'ite Identity in Early Islam*. Albany: State University of New York Press, 2007.

al-Dawari, Muslim. *Uṣūl 'Ilm al-Rijāl*. 2 vols. Qum: Mu'assasat al-Muhibin, 2005.

Delong-Bas, Natana J. and Esposito, John L. *Women in Muslim Family Law*. 2d ed. Syracuse: Syracuse University Press, 2001.

al-Fayad, Muhammad Ishaq. *Muḥāḍarāt fī Uṣūl al-Fiqh: Taqrīran li Abḥāth Ayatullah Khu'i* v. 3. Qum: Mu'assasah Ihya' Athar al-Imam al-Khu'i, 2002.

Fadel, Mohammad. "Reinterpreting the Guardian's Role in the Islamic Contract of Marriage." *Journal of Islamic Law* 3, no. 1 (1998).

Gleave, Robert. "Between Hadith and Fiqh: The Canonical Imami Collections of Akhbar." *Islamic Law and Society* 8 (2001).

———. "The Imami Shiite Conception of the Madhhab." In *The Islamic School of Law: Evolution, Devolution, and Progress.* Edited by Peri Bearmen, Rudolph Peters, and Frank E. Vogel. Cambridge: Harvard University Press, 2005.

Al-Hakim, Muhammad Taqi. *Al-Uṣūl al-'Āmmah li al-Fiqh al-Muqāran*. 3d ed. Qum: Majma' al-'Alimi li al-Ahl al-Bayt, 1998.

Al-Hakim, Sayyid Muhsin al-Tabataba'i. *Mutamasak al-'Urwat al-Wuthqa'*. 14 vols. Qum: Maktabat Ayatullah al-Mar'ashi al-Najafi, 1983.

———. *Minhāj al-Ṣāliḥīn*. 2 vols. ed. Sayyid Muhammad Baqir al-Ṣadr. Beirut: Dar al-Ta'aruf, 1980.

Hallaq, B. Wael. *Sharī'a: Theory, Practice, and Transformations*. Cambridge: Cambridge University Press, 2009.

Heinrichs, P. Wolfart. "*Qawā'id* as a Genre of Legal Literature." In *Studies in Islamic Legal Theory.* Edited by Bernard Weiss. Leiden: Brill Publications, 2002.
Al-Hilli, Ja'far Muhammad b. al-Hassan Muhaqiq. *Mukhtṣar al-Nāfi'*. Qum: Mu'assasah Matbu'at Dini, 1997.
———. *Sharā'i' al-Islām*. 4 vols. Qum: Mu'assasat al-Isma'iliyan, 1988.
al-Hilli, Ibn Idris. *Al-Sarā'ir al-Ḥāwī li Tahrīr al-Fatāwī*. 3 vols. Qum: Jami'at al-Mudarisin, 1990.
Al-Hilli, Ibn al-Mutahhar al-Hassan b. Yusuf. *Mukhtalaf al-Shī'ah fī Aḥkām al-Shar'īyah*. 10 vols. Qum: Jami'at al-Mudarrisin, 1999.
———. *Tadhīkat al-Fuqahā'*. 12 vols. Tehran: Maktabat al-Murtadawiyyah li Ihya' al-Athar al-Ja'fariyyah, 1968.
Al-Hanafi al-Dabusi, Abi Zayd 'Abdullah b. 'Umar. *Kitāb al-Nikāh min al-Asrār*. Beirut: Dar al-Manar, 1993.
Al-Irwani, Baqir. *Al-Fiqh al-Istidlāl 'alā al-Madhhab al-Ja'farī*. 3 vols. Beirut: Dār al-Amirah, 2008.
———. *Al-Qawā'id al-Fiqhīyah*. 2 vols. Qum: Dar al-Fiqh, 2007.
Kamali, Mohammad Hashim. *Principles of Islamic Jurisprudence*. Cambridge: Islamic Texts Society, 2003.
Al-Khu'i, Sayyid Abul Qasim. *Mabānī al-'Urwat al-Wuthqā'*, 3 vols. Najaf: Manshurat Madaris al-'Ilm, 1984.
———. *Mu'jam Rijāl al-Ḥadīth*. Qum: Markaz al-Athar al-Shi'ah, 1990.
Al-Kulyani, Muhammad b. Ishāq. *Al-Furū' min al-Kāfī*. 5 vols. Beirut: Dar al-Ta'aruf, 1981.
Lane, Edward Wiliam. *Arabic-English Lexicon*. 2 vols. Cambridge: Islamic Texts Society, 2003.
Moussavi, Kazemi Ahmad. *Religious Authority in Shi'ite Islam: From the Office of Mufti to the Institution of Marja'*. Kuala Lampur: The International Institute of Islamic Thought and Civilization, 1996.
Al-Murtada', Ali b. al-Husayn. *Al-Intiṣār*. Najaf: Maktabat al-Haydariyyah, 1971.
Muzaffar, Muhammad Rida'. *Uṣūl al-Fiqh*. 2 vols. Beirut: Mu'assasat al-'Alami al-Matbu'at, 1970.
Al-Najafi, Muhammad Hassan b. Baqir b. 'Adl al-Rahman. *Jawāhar al-Kalām fī Sharḥ Sharā'i' al-Islām*. 43 vols. Beirut: Dar al-Ihya' Turath al-'Arabi, n.d.
Al-Najashi, al-'Abbas Ahmad b. Ali. *Rijāl al-Najāshī*. 2 vols. Beirut: Dar al-Adwa', 1988.
Niraqi, Muhammad Mahdi. *'Awā'id al-Ayyām*. Qum: Maktabat Basirati, 1980.
Al-Mughniyyah, Muhammad Jawad. *Fiqh al-Imām al-Ṣādiq*, 5 vols. Qum: Mua'ssasah Sibtayn al-'Alamiyyah, 2002.
———. *Al-Fiqh 'alā l-Madhāhib al-Khamsah*, 2 vols. Beirut: Dar al-Jawad, 2001.
———. *Tafsīr al-Kāshif*, 7 vols. Tehran: Dar al-Kutub al-Islamiyyah, 2003.
Al-Mufid, Muhammad b. Muhammad al-Nu'man. *Al-Muqni'a*. Beirut: Dar al-Mufid, 1993.
———. *Aḥkām al-Nisā'*. Qum: The Collection of Shaykh al-Mufid's Works, 1992.

Ruhani, Sayyid Muhammad Sadiq. *Fiqh al-Ṣādiq*. 26 vols. Qum: Dar al-Kitab, 1992.
———— *Fiqh al-Ṣādiq*. http:// www.imamrohani.com/arabic/kotob/fokh/21/02.HTM# fehrest18 (last accessed April 1, 2011).
————. *Zubdat al-Uṣūl*. 6 vols. Qum: Amin Publishers, 2004.
Al-Sadr, Muhammad Baqir. *Principles of Islamic Jurisprudence*, tr. Arif Abdul Hussein. London: Islamic College for Advanced Studies Press, 2003.
————. *Durūs fī 'Ilm al-Uṣūl: Ḥalaqah al-Awwal*. Qum: Munzamat al-Hawzat al-'Ilmiyyah al-Buldan, 2004.
Al-Saduq, Muhammad b. Ali al-Husyan. *Man Lā Yaḥḍuruhu al-Faqīh*. 4 vols. Beirut: Mu'aassat al-'Alami al-Matbu'at, 1986.
Spectorsky, Susan A. *Women in Classical Islamic Law*. Leiden: Brill Publications, 2010.
Al-Seestani, Ayatullah al-Uzama Syed Ali al-Husaini. *Islamic Laws: English Version of Tauhihul Masa'el*. London: World Federation of KSIJ, 1994.
Al-Sistani, Sayyid Ali al-Husayni. *Minhāj al-Ṣāliḥīn*. 3 vols. Beirut: Dar al-Muarrikh al-'Arabi, 2003.
Al-Shafi'i, Muhammad b. Idris. *Kitāb al-Umm*. 7 vols. Cairo: Maktabat al-Kalimat al-Azhariyyah, 1961.
Al-Subhani, Ja'far. *Irshād al-'Uqūl ilā Mubāḥath al-Uṣūl*. Beirut: Dar al-Adwa', 2001.
————. *Kulliyāt fī 'Ilm al-Rijāl*. Qum: Imam Sadiq Foundation, 2006.
————. *Niẓām al-Nikāḥ fī al-Sharī'ah al-Islāmīyah*. Qum: Imam Sadiq Foundation, 1995.
al-Tabrasi, Abu al-Fadl b. al-Hassan. *Majma' al-Bayān fī Tafsīr al-Qur'an*. 10 vols. Tehran: Nasr Khusraw Publications, 1993.
Takim, Liyakat. "Offering Complete or Shortened Prayers? The Travelers Salat at the Holy Places." *Muslim World* 96 (2006): 401-22.
————. *The Heirs of the Prophet: Charisma and Religious Authority in Shi'ite Islam*. Albany: State University of New York Press, 2006.
————. "The Origins and Evaluations of Hadith Transmitters in Shi'i Biographical Literature," *The American Journal of Islamic Social Sciences* 24, no. 4 (2007).
Al-Tunakabuni, Muhammad b. Sulayman. *Qiṣaṣ al-'Ulamā'*. Beirut: Dar al-Mahajjah al-Bayda', 1992.
Al-Ṭurayhi, Fakhr al-Din Muhammad. *Majma' al-Baḥrayn*. 11 vols. Najaf: Dar al-Thaqafah, n.d.
Al-Tusi, Abu Ja'far Muhammad b. Hassan. *Istibṣār fī mā Ikhtalafa al-Akhbār*. 4 vols. Tehran: Dar al-Kutub al-Islamiyyah, 1969
————. *Kitāb al-Khilāf*. 3 vols. Qum: Sharikat Dar al-Ma'arif al-Islamiyyah, 1958.
————. *Kitāb al-Āmālī*. Tehran: Dar al-Kutub al-Islamiyyah, 2001.
————. *Al-Mabsūṭah fī Fiqh al-Imāmīyah.* 6 vols. Qum: Jami'at al-Muddarisin, 2007.
————. *Tahdhīb al-Aḥkām*. 7 vols. Qum: Dar al-Kutub al-Islamiyyah, 1988.
————. *Al-Tibyān fī Tafsīr al-Qur'ān*. 10 vols. Beirut: Dar al-Ihya' Turath al-'Arabi, 1989.

Discussion

Discussant: Mahmoud Ayoub
These are real, not just theoretical, issues. Whatever the jurists say among themselves, the people in southern Lebanon are not aware of it and the father assumes complete authority. If the daughter does not submit, she will get the beating of her life. There have been cases where daughters asked to consent have refused, even if it meant they would be killed … and some have been. You can attribute whatever you want to *taqīyah*, so it is not a helpful tool. The clear injunction of Ja'far al-Sadiq is that the Shi'a may not turn to Sunni scholars. Anyway, there is no *ijmā'* among the Sunnis. We have no choice but to give people authority over themselves. The Lebanese scholar Shamsuddin wrote that the ideal state of the Righteous Caliphs is impossible today, as is the divine rule of the infallible Imam, and thus people must have authority over their own affairs. This minimizes the jurists' authority over people in their own affairs. *Wilāyat al-faqīh* is not a new concept. It goes back to the Twelfth Imam; however, it was a moral and juridical authority. All Khomeini did was add a political aspect, which led to the Iran of today. I believe that two kinds of people should never be allowed to rule: the military and the religious. Ja'far al-Sadiq said: "The scholars are God's trustees over His revelation until they knock at the doors of the ruling authority; when they do, suspect them." I ask, then, what happens when the ulama themselves become the ruling authority?

Discussant: Mohamed Adam El-Sheikh
This is my first opportunity to learn about the Shi'a schools. According to the Sunnah, by my own investigation it has not reached that level. All the hadith on this subject have some defect, even the most commonly applied ones. According to Imam Malik, the ability of the guardian to force belongs to the father or grandfather, or, if they are not present, to another man from the father's side. It might be justified because daughters or sisters were pledged to marriage at a very early age, thirteen or fourteen, and were unable to negotiate their dowries or conditions. Thus it was for the protection of minors. In Egypt or my own country of Sudan – even though it is Maliki in other respects – people now adopt Abu Hanifah's position as being well thought out. His opinion is also applied in America: A woman of mature mind, whether virgin or previously married, has the right to marry without her guardian's consent, although obtaining her consent is preferred. We used to ask the imam to be a woman's *walī*, but that led to some collusion and so we found it better to let the woman be her own *walī*. Marriage must be a contract between two competent individuals. The most acceptable Sunni hadith, in my opinion, is the one of the woman who told the Prophet, "My father has given me in marriage to his nephew." The Prophet asked her father to justify his action. The daughter then told the Prophet that she consented to the marriage; she only wanted his confirmation that her consent was required.

General Discussion

- Imami can mean Ja'fari or Isma'ili, but in my paper it refers only to the Twelvers (or Ja'fari). The view that we have called the position of Abu Hanifah may have been the custom of Iraq that may have been attributed to him retroactively.
- During the mid-tenth to the mid-eleventh century ("the Shi'a Century"), the Shi'as were completely open to Sunni ideas. Only after the fourteenth century did that change. The whole idea of *mukhālafah li al-'āmmah* must be used with caution.
- Kecia Ali's *Marriage and Slavery in Early Islam* (Cambridge, MA: Harvard University Press, 2010) is commendable. During that period, as in rabbinic Judaism, marriage and slavery had much in common. There is no agreement, however, as to whether a girl's emancipation is achieved by majority or by marriage.
- Anyone can represent a woman, including herself. The question is not who represents her, but "Who is her guardian?" This is the difference between the *wakīl* and the *walī*.
- In very conservative families we send the *walī* and two witnesses to ask: (1) "Does she accept this man?" (2) "Does she accept the advanced and deferred dowries?" and (3) "Does she have conditions that she wants to be mentioned?" Sometimes we might ask if there is a prenuptial agreement.
- Tabari maintained that a woman can lay down any conditions she wishes in the marriage contract, even refusing to do housework, with only one limit: She cannot refuse sex, because that is the point of the marriage.
- Some imams will refuse to marry a couple if they have not negotiated a contract.
- This conversation is interesting, but seems out of place, out of time, and very literal. Does the woman have agency? Can women control their own bodies? Young American-born women hearing this conversation might be driven away by it. How can we say women can be judges or even rulers and still ask whose permission they need to marry? If people who care about Islam continue to return to those arguments, Islam will continue to be marginalized. The *fuquhā'* are approaching the text with a preconceived conclusion in mind.
- We cannot just jump out of what we know into something that is foreign to our background. Change will come, but gradually.
- The jurists have serious pastoral concerns almost to the brink of defending women's rights. It is so simple for a woman to marry whomever she wishes. Marriage has always been a family enterprise instead of an individualistic one. Scholars emphasize their fear of a father being high-handed with his daughter and categorically reject such behavior. Maybe there should never have been a ruling giving the guardian agency in the first place; however, in all fairness, someone like Allamah al-Hilli, a contemporary of Ibn Taymiyyah, gives so many reasons for allowing the woman absolute agency while at the same time cautioning that she be protected from the possible machinations of her intended.

- Islam liberates, of course, but our history is open for everyone to study. Either we study it or we end up in apologetics, which leads nowhere. Academic freedom is important, and the study of history and culture is important even if we must study things that, from the perspective of the twenty-first century, seem lacking. Intention aside, in the end avoiding our history doesn't work.
- This study is appropriate in the context of this scholarly meeting. It would be inappropriate for a public lecture in a mosque.
- It is valuable to integrate the best of this history and integrate it into the thought of our time.
- This is not the time to go back in time.
- The first thing we should learn from this is that it is not an easy matter. The compilation of the hadith has still not been resolved. Second, this paper shows the relevancy of such debates to those of us in the West to formulating a methodology. The great scholars are the liberal scholars: the more you know, the more you know that you don't know. Our approach is family-oriented, but we live in a society that is not family-oriented. Our concern is to protect the family, which is a society's founding unit.
- It is important for the fatwa to be relevant to our times. The presentation comes from the lecture notes of their students. In the *fiqh* books they give their one-sentence conclusions, which is not enough. The presentation doesn't support anyone, but only exposes the reality to which we must face up. We must not water down the patriarchal history of the Abrahamic religions. We must recognize that there are patriarchal and misogynistic hadith, even if we wish to reject them.
- Virginity is sexual; maturity is psychological.
- When we speak of the virgin of sound mind, we speak of a woman who is unmarried but who knows the ways of the world. This is why these texts are relevant to modern society, where unmarried working and educated women are common.
- A young convert received three marriage proposals through women (mothers) at an extremely conservative mosque; all of the questions put to her by women through her friend. Her husband never received a single question from the prospective husbands' menfolk, usually the fathers, who seemed to play no role at all. It seemed to be totally controlled by the women. Is this case unusual?
- Like rabbinic jurisprudence, these academic analyses can be very divorced from social reality.
- There have been real efforts among Shi'a ulama to come closer to Sunni thought. We should bless and work with such efforts, because above all we need unity. Legal jargon in Islam makes a distinction between a virgin and a non-virgin, one that is applied to both men and women in different ways. Virginity is a marker of immaturity, as girls in that society usually married early. Many of early female Muslims, including the Prophet's daughters, died young because they got pregnant before their bodies were ready. It was a cultural problem.
- In a manuscript of all the claims to *ijmā'* among the early Shi'a, there is the case of a shaykh who contradicted his own claim to *ijmā'* seventy times. This raises

the question of what *ijmā'* means in such a case. As some of the early scholars rejected solitary traditions, some of the claims of *ijmā'* may have referred not to literal consensus, but rather to a tacit consensus that such an opinion exists and has some support or evidence. Whether we agree with this or not, it is there.

- For the Shi'a, the Imam is the safeguard of the society's integrity. In his absence scholars can err. And if each scholar can err individually, it is possible that all can err collectively, which means that you can have no *ijmā'*. If the entire Shi'a community were to agree on an error, that would be a cause for the Imam to return.
- Was anyone ever attracted to Islam by *fiqh* or *'aqīdah*; people are attracted by the heart in the community or because of Sufism. As far as women being the agents of the marriage contract, Moroccan women do everything and the men are informed at the end. Perhaps the scholars have distanced themselves from the ummah.
- Harvard published a wonderful book devoted to the Islamic marriage contract: *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (2008). According to Shi'a law, couples can amend the contract by mutual consent regardless of the terms included by the *walī*.