

Gendering the Legal Subject

Masculinity and Femininity in Legal Discourse

In his 1940 book *Purdah from a Social and Legal Perspective*,¹ the South Asian scholar Abu'l A'la Maududi argues for a hierarchical relationship between men and women as authorized by the Islamic social system.² In making a case for this hierarchy, however, Maududi does not begin with the nature of the sexes but instead with a theory of nature. Likening God to a master engineer, Maududi argues that God has created and ordered the entire universe (likened to a machine) on the principle of pairing (*zawjiyyat*). All that exists in the universe is thus in a paired relationship, and all that one can see in this world is the resultant effect of the interaction of these pairs.³ Maududi calls this interaction between the pairs the “law of sex” (*qanun-e-zawji*).⁴ His conception of the relationship between men and women is therefore set within a broader cosmological framework where the necessity of the active/passive binary relation is not only divinely ordained but also natural. This is perhaps most evident in Maududi’s insistence that all created pairs function within this sexual principle, which entails that the parties must be defined through difference, granting them different roles. Indeed, it is the interaction between their different roles that is generative. A divinely ordained and harmonious relationship between the pair is only possible if one partner acts on the other and must be structured along this hierarchical ordering of active and passive.⁵ Maududi writes:

Activity [*fi'l*] in its essence is superior to passivity and receptivity [*qabul o infi'al*]. This superiority does not mean that there is honor [*izzat*] in activity vs. humiliation [*zillat*] in passivity. It is rather due to the fact of possessing dominance, power, and activity [*athar*]. A thing that acts upon something else does so precisely because it carries the power to dominate, to assert power, and to act. And the thing that receives [the active party’s] act is acted upon, the reason for its receptiveness and passivity is precisely because it is

dominated, weaker, and inclined to receive the effect of an act . . . Then, the nature of the active partner in a pair [*zawjayn*] requires that it have the qualities of dominance, power, authority—which is understood as masculinity [*mardangi*] and manliness [*rujuliyyat*—as this is necessary for it to fulfill its service as a part of the machine. In contrast to this, the passive nature of the other party demands that it be characterized by softness, delicacy, elegance, and reception—referred to as femininity [*unuthat nisaiyat*]—because these qualities alone can help it perform its passive role successfully.⁶

This utility of the active/passive binary in the construction of gender roles becomes more apparent once Maududi begins to talk about marriage and family, both of which he considers to be crucial building blocks of society and thus subject to regulation and scrutiny. In regulating the marriage relationship, Maududi argues, Islam has established equality between men and women to the extent possible. Islam does not endorse a notion of equality that violates the laws of nature, however;⁷ the husband maintains a certain superiority to the wife. As the active subject, the husband takes charge of the family (*qawwam*), serving as its protector and watching over the virtue and conduct of the family members.⁸ The wife and children, in turn must obey the husband/father, setting them in a passive position that they must take on in order for him to fulfill his role.

When describing the woman's role in society, Maududi explains a number of legal restrictions on her mobility and access to her as a matter of honor and respect for the woman. Given that she is freed from the obligation to earn a living or providing for the family, she is the “queen” of the household and responsible for its management.⁹ Because of this responsibility, she does not have to attend communal prayers in the mosque, the weekly Friday prayer, or funeral prayers. In describing this easing of obligations, Maududi vacillates between a language of relief from obligation and prohibition.¹⁰ The woman is not obligated to go for *jihad*, but she is prohibited from traveling without the escort of a male family member.

For those familiar with Hellenic philosophy, Maududi's insistence on the active/passive binary ordering creation will sound quite familiar. His argument about the creative and generative abilities of the active/passive pair resonates with Aristotle's theory of nature. For Aristotle, nature was a composite of form and matter, in which form is associated with activity, directive agency, and the masculine, and matter with passivity, reception, and the feminine. In this relation between form and matter, it is form that directs matter toward a purpose.¹¹ Feminist philosophers have made a similar criticism of the gender hierarchy embedded in Western philosophy. In critiquing Aristotle's theory of hylomorphism, feminist philosophers have argued that matter and form are gendered notions: as form and matter are not equal (i.e., form is better than matter), this sets up a gendered hierarchy in Aristotelian metaphysics.¹² Connecting Aristotle's metaphysics to his cultural context, Susan Okin argues that Aristotle's functionalist theory served as a means for justifying the hierarchical social order of Athens, in which enslaved people and women were subordinated to free men.¹³ Elizabeth Spellman argues similarly that

Aristotle's political theory depends on a gendered conception of the soul. Aristotle's assertion that men are by nature rulers over women is based on the theory of the relationship between rationality and irrationality in the human soul. As the irrational element in the soul overpowers the rational more easily in women, men, with their greater control over their irrational element, are more suitable to rule over not only women but also enslaved people and children.¹⁴

Maududi's insistence on the active/passive binary as a necessary and essential aspect of the cosmos finds resonance in early Hanafi legal texts as well. While legal texts are rarely explicit about their philosophical assumptions, there are several instances where early Hanafi jurists justify gendered legal rulings by appealing to the active/passive binary. Like Maududi, these jurists insist that masculinity possesses the power and ability to act on the passive element. This understanding of masculinity translates into the public visibility of men and a bodily disposition that exhibits power and dominance.

In this chapter, I explore case studies where this gender norm appears in rationalizations in defense of the legal school's precedence. In doing so, I utilize R. W. Connell's theorization of hegemonic masculinity in order to draw out idealized conceptions of gender norms.¹⁵ Connell describes hegemonic masculinity as the form of masculinity that legitimates unequal gender relations in society. Hegemonic masculinity, then, is understood in relation to emphasized femininity, the construction of femininity that accommodates and adapts to legitimize hegemonic masculinity. For Connell, gender is inherently relational; that is, ideas of masculinity and femininity do not exist outside their contrasting relation to one another.¹⁶ To study hegemonic masculinity, then, one must consider the processes and relationships that both construct and legitimate these gendered constructions.¹⁷ I find this relational approach particularly useful for my exploration of gender in Islamic law, as it points out the ways in which the jurists always conceptualize masculinity and femininity in relation to one another, requiring each to act in particular ways in order to legitimate the gendered norm. Connell's focus on nonhegemonic masculinities is also useful for demonstrating how Hanafi jurists did not have a singular construction of masculinity. In fact, hegemonic masculinity may very well be what only a minority of men are able to enact, especially in relation to nonhegemonic masculinities. Hegemonic masculinity, then, is not hegemonic because it is the only form of masculinity; rather, it is instead what is considered normative, the ideal conception of what it means to be a man.

This chapter explores idealized gender constructions in early Hanafi law by thinking through the relation between hegemonic masculinity and emphasized femininity. Exploring this relation shows the asymmetry between masculinity and femininity in the social order. What I find particularly useful about Connell's theorization of hegemonic masculinity is that it does not need to correspond to the lives of a particular group of men.¹⁸ As I will argue throughout this book, the construction of hegemonic masculinity and emphasized femininity is disrupted by

the intersection of numerous social identities in legal personhood. This gendered norm articulated by the Hanafi jurists does not point to a particular group of men who take on the most privileged status in society but is instead an idealized notion of gender that makes an appearance when needed in order to justify unequal relations in the social hierarchy. The first section of this chapter explores a case study on illicit sexual intercourse and the conceptions of criminal culpability that hinge on this gender norm. As sexual autonomy is a foundational aspect of masculinity, the first section will look at how masculinity was enacted through a reading of bodily practices in sexual intercourse. Through an exploration of legal discourses on illicit sexual intercourse and the conception of the marriage contract, I demonstrate that an asymmetrical gender relation was used to justify the law's construction of marriage and sexuality. In the second section, I turn to legal discussions on the distinctions between vaginal and anal sexual intercourse. Among the Sunni legal schools, the Hanafis were the only school to insist that anal penetration did not constitute sexual intercourse and thus would not require the punishment for illicit sexual intercourse. The legal rationalizations for this position rely again on the conception of masculinity as active, acting on a receptive subject. The last section of the chapter then turns to juristic discussions on gendered prayer postures and bodily coverage to trace the gendered dispositions and bodily practices that gave meaning and legitimation to these idealized gender norms. While this chapter outlines the early Islamic definitions of hegemonic masculinity and emphasized femininity, it also notes the moments where legal precedence countered such a gendered narrative.

HEGEMONIC MASCULINITY AS ACTIVE AND EMPHASIZED FEMININITY AS RECEPTIVE

He [al-Sarakhsi] said: If an insane man coerces a sane woman and commits illicit sexual intercourse with her, there is no *hadd* punishment on either one of them. As for the woman, this is because she is coerced, and it is impossible for her to be willing. As for the man, this is because he is insane and not liable for punishment. If a sane adult woman invites [*da'at*] an insane man or a male child, and he commits illicit sexual intercourse with her, there is no *hadd* on her according to us [the Hanafi legal school].¹⁹

The scenario presented above is part of a longer discussion in the *Book of Hudud* by the eminent eleventh-century Hanafi jurist Muhammad b. Ahmad al-Sarakhsi. In providing these hypothetical cases, al-Sarakhsi engaged in an exercise to determine which cases meet the requirement for *hadd* punishment. In the excerpt I have translated above, he considers two cases of illicit sexual intercourse (*zina*) between a legally insane man and a legally sane adult woman. In Islamic law, sexual intercourse between a man and a woman is deemed licit based on the legal relationship between the individuals. More specifically, sexual relations are deemed lawful only if the man possesses usufructuary right over the sexual commodity of

the woman. Thus, if the two are married or the enslaved woman is a concubine, then intercourse between them is considered licit. The punishment for illicit sexual intercourse, referred to as *hudud*, is either lashing or stoning, depending on the marital and sexual status of the individuals. If a man and a woman willfully engage in sexual intercourse outside the bonds of marriage or slavery, both of them are to be punished. As the punishments are severe, the standards for evidence are stringent, requiring four male witnesses to attest to the act of penetration. In addition to the high bar for evidence, punishment was also avoided in cases where doubt (*shubha*) existed about the illicitness of the act or whether the parties were aware that they were committing an illicit act.²⁰ There are numerous circumstances that provide grounds for doubt in the case of illicit sexual intercourse, circumstances that could subsequently exonerate the accused. For example, if a man had sex with his wife's female slave or his son's female slave under the mistaken belief that he was her enslaver, then he was not punished for engaging in illicit sexual intercourse.²¹ In cases with reasonable doubt, penalties could be reduced to lighter discretionary punishments (*ta'zir*) or dropped altogether.²²

Here, al-Sarakhsi considers cases of illicit sexual intercourse where one of the individuals is not legally liable. If the man is legally classified as insane, he is exempt from punishment because of the impediment to his legal capacity. The adult woman of the second case, on the other hand, is culpable, as she possesses all markers of legal capacity: she is both of legal majority and of sound mind. As a free person of legal majority, she is a full legal agent and thus should be liable for punishment. What we find, however, is that neither party is punished.

In rationalizing the Hanafi position in this scenario, al-Sarakhsi relies on the legal construction (similar to what we saw in Maududi earlier) of masculinity as active and femininity as passive. He argues that in sexual intercourse, man is the acting subject (*al-fa'il*) while the woman receives the act (*maf'ul biha*).²³ Alternative terms used to describe the man's penetrative act carry similar connotations: he is the principal agent in the sex act and the effective cause.²⁴ The woman, on the other hand, is described as following the man's action by enabling the sexual act (*al-tabi'ah*).²⁵ In such a conception of sexual intercourse, the man's act of penetration not only constitutes his culpability in an illicit sexual encounter but also brings the act into legal existence. As the passive party in the sex act, the woman serves as a receptacle (*mahal*). Her culpability is understood as the *enablement* of the act by willfully making herself available for penetration.²⁶ In the scenario with the insane man, since the acting subject is not legally culpable, his penetrative act does not constitute sexual intercourse under the law. Subsequently, in both cases, the woman acts only to enable the man by making herself available as a receptacle. Her action, then, has no bearing and is legally insignificant.

This construction of hegemonic masculinity and emphasized femininity along the active/passive binary appears in legal justifications for other cases of illicit sexual intercourse as well. When considering a case of illicit sexual intercourse

with a minor girl, al-Sarakhsi argues that the child is of legal minority and thus exempt from punishment. The adult man, however, should be punished, as he played his role as an active, penetrating subject and fulfilled his sexual desire illicitly.²⁷ In this case, since the girl takes on status as receptacle and receives the penetrative act, the issue of legal significance is not her legal capacity but her desirability. As long as the minor girl is of an age that is considered desirable, she is legally recognized as a receptacle where a man's desire can be licitly or illicitly fulfilled. Thus, she can serve as a receptacle, completing the illicit sex act, despite the fact that she is not legally culpable.²⁸

Al-Sarakhsi adopted this position from earlier Hanafi texts. He recounts that Abu Yusuf and Muhammad b. al-Hasan al-Shaybani, two of the three most prominent students of Abu Hanifa, the eighth-century jurist and eponym of the Hanafi legal school, differed on the conclusion of this scenario. Abu Yusuf held that the woman in the second such situation, where she has intercourse with a boy or an insane man, should be punished, whereas al-Shaybani argued the opposite. Abu Yusuf supposedly argued that illicit sexual intercourse is by definition any act of sexual intercourse that occurs outside of a marital contract or enslavement (i.e., concubinage). Sexual intercourse between an insane man or minor male and an adult woman fulfills the legal definition of sexual intercourse. The male party exemption from punishment is owing to his insanity, and not because the sex act did not occur. Thus, the woman is culpable and should receive punishment, since she fulfilled her sexual desire in an illicit manner when she willingly made herself available for penetration.²⁹ Al-Shaybani, however, argued that if a minor male or an insane man commits illicit sexual intercourse with a woman who willingly submits to his sexual advances, neither party should be prosecuted.³⁰ Al-Shaybani's legal compendium formed some of the most authoritative texts in the Hanafi legal school, and thus his legal ruling won over that of Abu Yusuf's in this matter. By the time al-Sarakhsi was writing in the eleventh century, this opinion had become the well-established position of the school.

Al-Sarakhsi wrote to justify this Hanafi position against those of other legal schools. The Shafi'i legal school, for example, held that a woman who engages in illicit sexual intercourse with a man who is not legally liable would still receive *hadd* punishment. They judged the culpability of each party to be independent of the other. As proof for their conclusion, the Shafi'i jurists cited a Qur'anic verse that refers to the woman who commits illicit sexual intercourse as the active party (*al-zaniyah*).³¹ Linguistically, the terms used in the verse confer subject status on both genders, negating al-Sarakhsi's assertion that only men are active parties in intercourse. Anticipating a Shafi'i critique that the Hanafi position defied scriptural evidence, al-Sarakhsi turned again to idealized masculinity and femininity for legitimization. He argues that although the verse might linguistically indicate that a woman, too, is an active subject, what is intended in meaning is the passive participle: *mazny biha*—that is, one who receives the sexual act.³²

How could Hanafi jurists argue for the opposite meaning in a verse that clearly describes women as active participants in sexual intercourse? Such a reading of the verse might also raise major theological and hermeneutical issues. How could Muslims be assured that the common sense and apparent meaning of words in Qur'anic verses were in fact the intended meaning? If a word can carry both its apparent meaning and its opposite, this would leave the Qur'an open to innumerable interpretive possibilities.

To explain why the word *zaniya* in verse 24:2 necessarily means the opposite, al-Sarakhsi relies again on idealized gender norms, arguing that it is the construction of femininity as passive and receptive and masculinity as active that serves to adjudicate how we read the Qur'anic verse. The commonsensical meaning of referring to a woman as an adulteress could only be that she is one who receives the act, rather than one who actively commits it herself.

Such a conception of masculinity and femininity along the active/passive binary was not unique to the Hanafis alone. The prominent thirteenth-century theologian and exegete Fakhr al-Din al-Razi (d. 606/1209), for example, argued that anal intercourse between two men is repugnant, because masculinity is characterized by activity.³³ In ascribing activity to masculinity and passivity to femininity, only vaginal intercourse is conceptualized as natural and desirable along the active/passive binary. Anal intercourse, then, becomes repugnant because of its disruption of this foundational binary.³⁴ Hadith literature also presents male and female sexuality in similar ways. As Ash Geissinger has shown, male sexuality is depicted as active and assertive while female sexuality remains, even in paradise, passive and receptive.³⁵

Al-Sarakhsi's argument became popular among Hanafi jurists of the classical period. Two prominent Hanafi jurists of the twelfth century, al-Kasani and al-Marghinani, both made similar arguments. Arguing in defense of the Hanafi position on this issue, al-Kasani followed an analogous structure of argumentation to al-Sarakhsi's. He asserted that a woman is punished for illicit sexual intercourse not because she is the one who commits the act but because she enables it. If the one who commits the act is the male but his act does not constitute illicit sex, then her enablement also carries no legal significance. The Qur'anic reference to the woman as an adulteress, he concludes, is only metaphoric.³⁶ In his well-known and highly influential text *al-Hidaya fi Sharh Bidayat al-Mubtadi'*, al-Marghinani also follows the exact same pattern, arguing both for her status as enabler rather than acting party as well as the metaphoric meaning of adulteress in the Qur'anic verse.³⁷

This conception of masculinity as active and femininity as passive is not limited to the Hanafi legal imaginary alone. While the Shafi'i legal school held that male and female subjects' culpability in illicit sexual intercourse was independent of one another, they nonetheless exhibited a similar construction. Like other Sunni legal schools, the Shafi'i conception of marriage relies on this construction of gender

where masculinity confers subject status, granting one party control and dominion over the other party. In justifying this conception of the marriage contract, al-Shafi'i stated quite emphatically that man is a penetrator (*al-nakih*) and woman is penetrated (*al-mankuha*).³⁸ As both Ali and Katz have demonstrated, the Shafi'i school certainly employed a similar understanding of hegemonic masculinity in legal reasoning, sometimes even using it as a defense for abandoning clear textual evidence.³⁹

EMPHASIZED FEMININITY AS RECEPTIVE: WOMEN, SEX, AND DOMINATION

Nowhere is the construction of hegemonic masculinity as a subject position of control and dominance and emphasized femininity as receptive and submissive clearer than in the Hanafi construction of the marriage contract and female sexuality. Marriage in Islamic law is understood as a form of dominion (*milk*) that the husband asserts over the wife. This idea of marriage does not emerge clearly from the textual sources of the Qur'an and Prophetic traditions, being instead a construction that formed early in Islamic law and that cuts across the different legal schools. As Ali notes, in Islamic law, "licit sex was possible only when a man wielded exclusive control over a particular woman's sexual capacity."⁴⁰ Marital claims were differentiated along gendered lines, granting husbands the right to sexual access and control of the wife's mobility and wives the right to financial support and companionship.⁴¹

Hanafi jurists recognized that such a construction of marriage put women, particularly free women, in a precarious position. In order to fulfill her sexual desire and have children, something that jurists considered not only a desire of all humans but also a free wife's right in marriage, she would have to compromise her freedom (and, by extension, her legal autonomy as a free subject) by allowing her husband to acquire dominion over her.

Among the different legal schools of thought, the Hanafis were perhaps the most attuned to this predicament. As al-Sarakhsi states explicitly, "The establishment of dominion [of marriage] over the woman is a form of humiliation."⁴² Quoting a Prophetic tradition, al-Sarakhsi draws an analogy between marriage and slavery.⁴³ This status of the wife analogous to an enslaved person is an ethical conundrum for al-Sarakhsi owing to another Prophetic tradition that prohibits any free Muslim from humiliating themselves.⁴⁴ Furthermore, while Islamic law permitted slavery, it recognized freedom as both the fundamental condition of each human being, as well as the preferred means of social existence. That is, Muslim jurists held that freedom grants individuals a dignity that they should not abandon. It is for this reason that individuals were encouraged to emancipate enslaved people as a means of reparations for sins. With such a legal construction

of marriage, al-Sarakhsi had a pressing need to rationalize why the free woman should justly curtail her freedom.⁴⁵ In other words, why is it permissible for free Muslim women to enter into a relationship of dominion, and thus humiliation, in the form of marriage?

Hanafi jurists answered this ethical conundrum by appealing to a narrative of social order and harmony that necessitated unequal gender relations. Al-Sarakhsi argues that human sexual desire is essential to the fulfillment of the divine command for the continued existence of humanity. Marriage is the primary legitimate means by which humans are to fulfill their sexual desire and procreate, as it carries multiple religious and social benefits and wards off social discord.⁴⁶ Innate sexual desire and the necessity of procreation could be fulfilled through rape or illicit sexual intercourse, but both of these are of course undesirable methods: rape, because it would cause great social discord (*fasad*), and illicit sexual intercourse because it would entail the destruction of patrilineality.⁴⁷ The only means by which humans can then fulfill their sexual desire, procreate, and yet maintain a harmonious social order is within an institution that allows a husband to establish dominion, sexual exclusivity, and control over his wife. This dominion also ensures that the lineage of children can be ascribed to the father, who is then obliged to provide for them financially. For al-Sarakhsi, men's financial responsibility is essential for maintaining social order. He argues repeatedly that women have little means to provide for themselves. In fact, to require them to financially provide for themselves and their children would create social discord, as they would turn to sex work.⁴⁸ Al-Sarakhsi concludes, then, that marriage allows for the protection and financial maintenance of the free wife, despite the reduction of her autonomy as a free subject, because she would otherwise be forced into sex work in order to provide for herself and her children.⁴⁹

Al-Kasani makes a similar argument about the social and individual benefits of marriage that are only possible if the husband acquires dominion over the wife. He argues that marriage offers tranquility and love to the individual, allows for licit procreation and abstinence from illicit sex, and gives the wife financial maintenance. All these benefits of marriage, he argues, are only possible through the imposition of dominion over the wife.⁵⁰ While the free adult woman is a free subject and thus entitled to self-determination and relative autonomy, social order and harmony necessitate that in her role as a wife, she yield aspects of her freedom.

The conception of gender along the active/passive binary was not unique to Islamic law but permeated the Near Eastern world more broadly. Historical studies of gender and sexuality in Greek and Roman civilizations have made similar observations regarding the active/passive binary that was understood not only as a matter of biology but also held cosmological significance.⁵¹ Masculinity was granted subject status and femininity object status. This subject/object dichotomy was fundamental to how those societies understood sexual behaviors and identities.

As feminist historians and philosophers have argued, Aristotle's biological and philosophical concepts of sexual difference, which saw masculinity as active and femininity as passive, was partly based on Aristotle's notion of humors, according to which males have greater heat in their bodies than females.⁵² As the male-generated sperm was the seed from which the embryo grows, the male thus became the active, generative sex. Woman contained raw material that was activated by the man's action. The male was form, the female matter.⁵³

Craig Williams argues that ancient Romans closely associated masculinity with a penetrative role and femininity with a receptive role. Free Romans of both sexes were granted sexual integrity; that is, one could have sex with free Roman women only through marriage, and sex between free Roman men was unacceptable.⁵⁴ However, while free Roman women were largely confined to sex within marriage, free Roman men could engage in sexual intercourse not only with their wives but also with male and female slaves, as well as sex workers of both genders. Sex with male slaves and noncitizen male sex workers did not call the free Roman man's masculinity into question as long as he could maintain the appearance of being in the penetrative role: "the distribution of physical roles was at least notionally aligned with the power-differential between master and slave: the master must be seen as playing the active role and the slave the passive role."⁵⁵ It was not biological sex but gender that determined people's social status in Roman society. While masculinity was defined by impenetrability and femininity by penetrability, not all men inhabited hegemonic masculinity; young boys and enslaved men were penetrable.⁵⁶ Williams describes this system as a phallic masculinity, where free adult Roman males were understood to be penetrators, and women, enslaved men, and sex workers were understood to be penetrated.⁵⁷

The Islamic intellectual tradition that developed in the broader milieu of the Near East incorporated the hierarchical worldview that was characteristic of both Hellenic and Sasanian thought. The eleventh-century Islamic philosopher Ibn Sina (d. 428/1037; known in the West as Avicenna), for example, conceived of human reproduction as a result of the active/passive binary. He held that both males and females have sperm but that, while reproduction happens with the mixing of the two, it is the male sperm that acts (*al-fa'il*) on the female sperm.⁵⁸

In her work on early Islamic thought, Louise Marlow explores the tension between hierarchy and egalitarianism in Islamic thought from the seventh to the thirteenth centuries. She argues that early Islam carried with it an egalitarian impulse, as the idea of one God put all members of humanity on par with one another as part of a collective family. The tribalism of pre-Islamic Arabia also emphasized communitarianism rather than the kingship that was more common in the empires surrounding seventh-century Arabia. This egalitarian impulse, Marlow argues, can be found in the Qur'an and Prophetic sunnah, which deride class and tribal hierarchy. Marlow cites several hadith in wide circulation in the first century of Islam, including the statement, "The nobility of this world is in riches,

the nobility of the next world is in piety, you are male and female, your nobility is your riches, your high birth your piety, your inherited merit [*ahsab*] your moral characteristics [*akhlaq*], your genealogies your deeds,"⁵⁹ which deliberately rejects the importance of lineage and tribal affiliation in individuals' societal status. The Qur'anic verse 49:13, "Human beings, We created you all from a male and a female, and made you into nations and tribes so that you may know one another. Verily the noblest of you in the sight of Allah is the most God-fearing of you. Surely Allah is All-Knowing, All-Aware," can also be read as leveling many of the social hierarchies that existed in a tribalistic system, giving all people the opportunity to cultivate personal dignity and social esteem regardless of their tribal or class background.⁶⁰ Marlow argues, however, that this egalitarian potential of early Islam was eventually superseded by a more hierarchical orientation. The early Muslim conquests brought with them significant wealth and power and an established elite who were invested in a stratified society. The conquests also led Arab Muslims to settle in Syria and Egypt, places with a long tradition of social hierarchies centered on heredity, occupation, and intellectual aptitude. These hierarchies were seen as necessary for social harmony. Muslim interest in Hellenic thought and the translation of Greek texts in the 'Abbasid period further solidified this hierarchical orientation, providing Muslim scholars with a philosophical framework for justifying a hierarchical social order.⁶¹

More recently, Elizabeth Urban's book on the conquests and imperial expansions in early Islamic history explores how the tensions between spiritual equality and social hierarchy in the Qur'an developed during this period.⁶² By focusing on enslaved and freed people in early Islam, Urban notes the shifts taking place in the newly forming Muslim empire as it moved from a less hierarchical pietistic movement to one that favored a hierarchical social order in the model of the recently conquered Byzantine and Sassanian Empires. This shift, however, was not without resistance, as enslaved and free populations negotiated a place for themselves in the increasingly hierarchical social order.

Leila Ahmed's work has similarly argued for a gender egalitarian impulse in early Islam that was superseded by a gender hierarchy.⁶³ For Ahmed, Islam continued and reinforced an increasingly patriarchal shift that was already under way owing to the Greek, Roman, and Christian periods that preceded Islam.⁶⁴ Despite an early egalitarian impulse, the status and autonomy of women was increasingly restricted while Islamic law developed and matured as an intellectual tradition.

This gender hierarchy, according to which hegemonic masculinity was ascribed subject status and emphasized femininity object status, was pervasive throughout the different genres of the Islamic intellectual tradition. As Ash Geissinger has demonstrated in their survey of the premodern exegetical tradition on the Qur'an, commentators from the formative and medieval periods constructed gender in a manner that presented

the free Muslim male in the abstract as embodying human intellectual, physical and spiritual potential in its most complete form. Such emblematically masculine completeness is constructed in these texts over and against the deficiencies and weaknesses in intellect, linguistic expression and body as well as religious practice that supposedly typify femininity.⁶⁵

Geissinger argues that this gender trope remained compelling in the exegetical tradition because it was bolstered by similar gender constructions in other genres, such as the legal tradition.⁶⁶

In her expansive exploration of pre and postcolonial Qur'anic exegetical tradition, Ayesha Chaudhry shows the power of this unequal gender system in shaping the interpretation of Qur'anic verses. Building on amina wadud's earlier work, Chaudhry refers to this gender hierarchy as a patriarchal idealized cosmology,⁶⁷ a vision of the world with an ontological ordering of society with God at the top. In such a conception of the world, men not only sit above women but they also mediate the relationship between women and God.⁶⁸ This is particularly evident in the marriage relationship, where the husband is charged with overseeing the wife's moral well-being.⁶⁹

The conception of gender along the active/passive binary existed in Islamic philosophical literature as well. In Zahra Ayubi's close reading of the ethical treatises of Abu Hamid al-Ghazali (d. 505/1111), Nasir ad-Din Tusi (d. 672/1274), and Jalal ad-Din Davani (d. 907/1502), she argues that these ethicists' hierarchical worldview demonstrates a "construction of femininity as inferior, instrumental, and irrational, and the construction of masculinity as powerful, authoritative, and rational."⁷⁰ In marriage and the home, men were counseled to have dominion over the wife and other members of the household in order to live a virtuous life and flourish.⁷¹ In this understanding of masculinity, women were instrumentalized, as control over them was linked to the man's ethical refinement.⁷² In describing the ethicists' gendered assumptions, Ayubi points out the fundamental tension in their discourse. At one level, they believed that both men and women shared equally in their humanity and were thus metaphysically equal. On the other hand, they considered man to have greater control of his emotions and possess a more complete rational capacity. Thus, while men and women may be metaphysical equals, the focus on rationality in ethical refinement gendered the ethical discourse male and centered man as "the primary ethical subject."⁷³ Islamic ethics, she argues, is

based upon concepts of being, ontology, and metaphysics that are actually not egalitarian at all, but rather starkly gendered and hierarchical in nature. That is, women of all classes, men of lower classes, and enslaved people are excluded from the discipline of ethics on the assumption that they are less rational or less human.⁷⁴

This section has demonstrated that the conception of gender along the active/passive binary rendered emphasized femininity as necessarily receptive and

passive in its role and therefore opposite to the conception of hegemonic masculinity as active and dominant. This construction of emphasized femininity is reflected in early Hanafi legal discourse and was shared by the Islamic intellectual tradition more broadly.

HEGEMONIC MASCULINITY AS PENETRATIVE:
CAN MEN BE PASSIVE?

Hanafi jurists made emphatic claims about the relational nature of hegemonic masculinity and emphasized femininity, according to which hegemonic masculinity is construed as necessarily penetrative and emphasized femininity is construed as receptive. This insistence raises the question as to whether Hanafi jurists could recognize and conceptualize situations where sexual activity challenged this active/receptive binary, as the realities of human sexual expression are far more complex than the mode of sexual intercourse imagined in the discussions on illicit sexual intercourse. How, then, might Hanafi jurists understand and narrate sexual encounters where the man takes on a receptive role? To explore this further, I turn to the regulation of what the law identifies as anal intercourse between two men (*liwat*). Same-sex sexual intercourse serves as an interesting case for two reasons: firstly, the law's recognition of the fact that male bodies are also penetrable serves as a challenge to the understanding of masculinity as active and impenetrable. Secondly, the shifting opinion on anal sex among the first generation of Hanafi jurists demonstrates that the juristic deliberations on this gendered norm took on a hermeneutical role in determining legal rulings.

In Islamic law, the legal term *liwat* refers to an act of anal penetration, although jurists disagreed over whether this pertained to the anal penetration of men alone or both men and women.⁷⁵ Between the four Sunni legal schools and the Shi'i Ja'fari legal school the main debate was whether anal intercourse was equal to penetrative vaginal intercourse. The Hanafi legal school concluded that anal intercourse was unlike vaginal intercourse; thus, acts of anal penetration were not to be punished as illicit sexual intercourse. In this, the Hanafi jurists diverged from the other three legal schools of Sunni Islam and the Shi'i Ja'fari legal school, all of which held that sodomy was to be classified as illicit sexual intercourse.⁷⁶ Early Hanafism, however, was not united on this distinction between anal and vaginal penetration. Whereas Abu Hanifa held that they were two distinct sexual acts, his disciples disagreed. They argued instead that both the vagina and anus were conducive to male sexual pleasure. Eventually, however, Abu Hanifa's opinion won out, and the Hanafi legal school defined sexual intercourse as exclusively a vaginal penetrative act. In al-Sarakhsi's rationalization of the eventual Hanafi position on anal intercourse, we can observe the ways in which the penetrative role of masculinity and the receptive role of femininity came to play a central role in justifying the school's opinion.⁷⁷

The central disagreement between Abu Hanifa and his two disciples centered on the definition of illicit sexual intercourse (*zina*), and whether anal penetration legally falls into that category. Abu Hanifa's two disciples, Abu Yusuf and Muhammad al-Shaybani, argued that since anal and vaginal sexual intercourse are both penetrative activities, anal intercourse and illicit sexual intercourse should receive the same punishment. Foundational to the position of the two disciples was the argument that both anal and vaginal penetration fulfill male sexual desire. Figuratively, they argued, illicit sexual intercourse refers to any act carried out with the explicit goal of "illicitly inserting a genital organ into another with the intent of ejaculation."⁷⁸ Anal penetration fulfilled this definition, as both the vagina and the anus come under the broad category of genital organs. The disciples' argument rested not only on the fact that according to Islamic law both vagina and anus require covering as *'awra* (parts of the body to be covered) but also that the vagina and the anus are "naturally desirable"⁷⁹ as marked by their shared physiology—that is, they are both characterized by "suppleness and warmth."⁸⁰ In this, penetration of both the vagina and the anus facilitates male ejaculation.

Abu Hanifa, on the other hand, argued that anal and vaginal penetrative intercourse are fundamentally different acts. This distinction between the two is embedded not only in a linguistic difference but also in normative claims about appropriate objects of desire. Abu Hanifa asserted that in everyday language, anal and vaginal intercourse are distinguished linguistically. Whereas the term *zina* denoted illicit vaginal penetrative acts, *liwat* specifically designated anal penetration. For Abu Hanifa, language was not arbitrary but instead signified essences. Thus, the inability to refer to anal intercourse as *zina* linguistically marked it as an essentially different act that could not be subsumed under the same ruling as *zina*.

These differing opinions also rested on the question of the "naturalness" of anal intercourse. For the disciples of Abu Hanifa, men's sexual desire was expressed in their penetration of a genital orifice with the goal of ejaculating.⁸¹ As this was achieved by the penetration of either a vagina or an anus, they argued that anal intercourse between men was an act of illicit sexual intercourse. Abu Hanifa, on the other hand, was concerned not only with the act of penetration but also the object of desire. In reconstructing his argument about the unnaturalness of anal penetration, al-Sarakhsi claimed that Abu Hanifa was of the opinion that men naturally desire not just penetration but specifically vaginal penetration. In an instance of anal intercourse, the man who is penetrated should not desire to be in a receptive role. If he does in fact incline toward being penetrated, then such an act can only be understood as a deficiency (*nuqsan*). Al-Kasani made a similar argument about the unnaturalness of desire for anal intercourse. Illicit sexual intercourse, he contends, is punished as deterrence, since it is a very prevalent sexual act. Anal intercourse, on the other hand, is not prevalent and thus not punished as a form of deterrence. To justify this latter claim, al-Kasani makes an argument similar to Abu Hanifa's about the naturalness of vaginal penetration. Whereas

both parties desire the penetrative act in vaginal sex, in anal intercourse, al-Kasani argues, there is no desire on the part of the man who is penetrated.⁸²

While the disciples and Abu Hanifa differed on the desirability of anal penetration, both agreed that the man who is penetrated acted against his nature.⁸³ In *How to Do the History of Homosexuality*, queer theorist and historian of sexuality David Halperin argues that in the ancient Greek world, sexual identity was determined by a person's gender and social status, not identified as a pathological condition.⁸⁴ In ancient Greece, the *kinaidos* was an adult male who preferred to take on the receptive role in sexual intercourse. The offense caused by his behavior, however, was defined more centrally in relation to gender than to desire. It was common in the ancient Greek world for a man to desire other men and seek them out for sexual encounters. Thus, as long as men maintained their proper penetrative sexual role, they were acting in accordance with their nature. It was his abandonment of his proper gender role and the desire for the passive role that marked the *kinaidos's* sexual deviance.⁸⁵

In the Islamicate context, scholars like Everett Rowson, Dror Ze'evi, and Khaled El-Rouayheb have similarly observed that premodern understandings of same-sex sexual acts have some discontinuities with the idea of sexuality as an orientation. They point out that Islamic law is largely inattentive to an individual's desire and more concerned with classifying the licit or illicitness of sexual acts.⁸⁶ We see this in a juristic discussion of male-male anal intercourse in which both al-Sarakhsi and al-Kasani assert that it is the male that takes on the passive, receptive role who acts against his natural disposition.⁸⁷ For Hanafi jurists, gender roles, rather than the sexual object, determine the naturalness of sexual inclinations. The man who willingly assumes the passive role and desires to be penetrated is censured for violating the fundamental conception of masculinity as penetrative. What is censured in same-sex sexual encounters, then, is not the sexual object choice but instead the violation of gender roles. Daniel Boyarin has made a similar observation regarding the rabbinic prohibition against male-male anal intercourse in late antiquity. He argues that while in the Roman context, it was role reversal or "gender deviance" that was problematized, in the Talmud it was concern around "mixing of the kinds."⁸⁸ Talmudic concerns centered on the man in the receptive role taking on the position of the female, rather than with him degrading his status as a free adult male.⁸⁹

Despite their different positions regarding anal intercourse's classification, early Hanafi jurists were united in their understanding of masculinity as penetrative and femininity as receptive. The discussion was not about the gender of the partner as much as about the desirability of the anus for the male penetrator in terms of its physiology.⁹⁰ They did not argue that some men desired to take on a receptive role. Abu Hanifa, on the other hand, naturalized male sexual desire as wanting penetration of the vagina alone, arguing that men not only desire the penetrative, dominant role but also penetration of a particular genital organ. Both parties

also shared the conclusion that anal intercourse between men was an illicit sexual activity, even if it did not meet the strict legal definition of illicit sexual intercourse. For the Hanafis, anal intercourse was to be punished by discretionary chastisement (*ta'zir*) rather than the more stringent *hadd*.⁹¹ In the Hanafis' rationalization of this position, we see the solidification of the legal construction of gendered personhood along the active/passive binary. The Hanafi legal construction of anal intercourse as "not sex" establishes men as the only penetrative subject.

SATR AND 'AWRA: HEGEMONIC MASCULINITY AND EMPHASIZED FEMININITY AS BODILY DISPOSITIONS

Hanafi jurists constructed hegemonic masculinity in a manner that legitimated and justified unequal gender relations. Hegemonic masculinity in this legal discourse is associated with dominance and control. Emphasized femininity enables and accommodates hegemonic masculinity, thus defining it as passive and dominated. This construction is most evident in the law's conception of the gendered body as evinced in legal rulings pertaining to sexuality. In this section, I will explore how these gendered notions shape the conception of emphasized femininity as not only submissive but also concealed, giving us insight into the law's bolstering of hegemonic masculinity as associated with control and dominance and also with visibility. Exploring hegemonic masculinity and emphasized femininity as a *relation* allows us to see the interdependence of the gender-subject construction. To this end, this section will focus on Hanafi legal discussions on the covering of the human body and gendered prayer postures.

In a discussion of bodily covering and the legal parameters of the desirous gaze, al-Sarakhsi states: "From her head to her feet, a woman is '*awra*."⁹² The term '*awra*, which al-Sarakhsi uses here to describe the default condition of women, refers to the parts of the human body that must remain concealed from sight. In Islamic law, men also have '*awra*; that is, even a man has parts of his body that must be concealed.⁹³ However, in al-Sarakhsi's categorical statement, it is not that woman has '*awra*, but that she *is* '*awra*. Whereas men have parts of the body that must remain covered, women in their very being and existence must be concealed.⁹⁴

In Islamic law, looking on the human body is only permissible within certain boundaries and relationships. A man could look at the bodies of his wife and concubine, desirously or otherwise, without much restriction, since this was the only relationship in which the fulfillment of desire can be licit.⁹⁵ With unrelated free women, enslaved women owned by others, and even female relatives, there were greater degrees of restriction around bodily exposure.⁹⁶ For the law, the fundamental conception of femininity was that it must remain concealed from the male gaze. This construction of the female body as '*awra* is produced through the male gaze, which views the female body as always potentially desirable. Here, hegemonic masculinity is the consumer of female sexuality. For the Hanafis, male

desire was all pervasive and potentially present in any relationship between men and women. Marion Katz has argued that early Islamic law saw the desirability of women largely through their life cycle.⁹⁷ Postmenopausal women had significantly fewer restrictions on their covering and mobility, as they were seen as beyond the age of desirability.⁹⁸ Katz argues, however, that by the eleventh century, these life-cycle distinctions had largely collapsed.⁹⁹ Al-Sarakhsi, for example, does not consider women of any age to be beyond desirability. He even mentions the possibility of incestuous desire for female relatives.¹⁰⁰

Given this presumption regarding women as always a potential source of temptation and desire, the legal implication would be that any amount of bodily exposure of women should be categorically prohibited, except where desire can be fulfilled licitly (i.e., with a wife or concubine). Al-Sarakhsi explains the exceptions to this principle by appealing to social necessity. That is, there are certain exceptions in which the male gaze is permissible.¹⁰¹

What emerges most clearly from this discussion of covering is the legal construction of hegemonic masculinity as not only visible but also as the desiring subject, on the one hand, and emphasized femininity as desirable and in need of concealment, on the other. While al-Sarakhsi certainly recognizes that men must also cover parts of their bodies and that women might also experience desire while looking on a man,¹⁰² the legal discussion of covering and the desirous gaze is extensively and disproportionately concerned with male desire. It is his desirous gaze that falls upon her. This gendered assumption structures the entire section on the gaze. Whereas al-Sarakhsi's rationalization of the legal precedent regarding the covering of the female body centers on male desire, the discussion of the female gaze has no such consideration of female desire. The parts of the male body that must be covered are deemed so owing to legal precedent, not because of their desirability. In the discussions of the male gaze upon the male body, desire does not arise as a concern at all. For al-Sarakhsi, men are not a subject of desire in relation to other men.¹⁰³

Concealment and visibility were not confined to matters of clothing alone. Concealment was seen to be a condition so essential to femininity that it had to be embodied by women in all aspects of their existence. This is most evident in the legal distinction between the body postures of men and women in prayer. While prayer postures are largely the same for everyone, there were some minor distinctions that were motivated by legal assumptions about masculinity and femininity. In general, Hanafi jurists argued that women should pray in a manner that reflects the concealment that characterizes femininity.¹⁰⁴ While men were encouraged to pray while maintaining separation between their limbs and other parts of their bodies, women were advised to pray in a compact manner. While standing in prayer, women are supposed to place their hands on their chests, while men place them lower, by their navel. In bending over to perform the *ruku'*, men are to flatten their back, placing their hands on their knees and spreading their fingers. Women,

on the other hand, are to only bend slightly, so that their fingertips reach the top of their knees. They are also advised to keep their knees slightly bent, to not spread their fingers, and to pull their arms in close to their torso. In prostration (*sujud*), men should maintain distance between their torso and their thighs and place their elbows above the ground. Women are to prostrate in a manner that takes up less space, placing their hands close to their ears, their forearms and elbows on the ground, and flattening their stomach on their upper thighs. Men raise their hands to their ears in the opening invocation to God for prayer (*takbir*); Hanafi jurists differed regarding this stipulation for women. While a report attributed to Abu Hanifa held that women should also raise their hands to their ears, another opinion held that women should only raise their hands to their shoulders, “because this is more concealing of her and the matters concerning women are established on the basis of concealment.”¹⁰⁵

In their article on the gendering of the body in prayer postures, Geissinger has argued that the discussions of gendered prayer postures demonstrates the concern with maintaining and marking hierarchical difference even in a space that should largely transcend difference.¹⁰⁶ The concern here, Geissinger explains, is with making sure that an individual’s position in the social order is marked even as her or she prays. Such concern with marking gendered difference and hierarchy through bodily practices is not unique to Muslim debates alone. Feminist analysis of bodily and nonverbal behavior has long noted the gendered ways in which people occupy space. Writing about feminist campaigns on social media that target manspreading,¹⁰⁷ Emma Jane argues:

women and men’s different sitting styles have close and complex relations with power. Open and expansive body positions, for instance, are characteristics of dominant individuals, while submissive people take up less space by contracting their postures, sitting with closed arm and leg positions, and using diminutive, if any, gestures . . . Furthermore, embodied cognition research reveals that adopting an expansive or “power” posture *stimulates* rather than merely *reflects* a state of dominance. In other words, the links between expansive body posture and power are co-constitutive.¹⁰⁸

Feminist critiques of gendered postures are useful for thinking about the Hanafi legal discussion of gendered dispositions and comportment. We saw that femininity was considered to be fundamentally a condition of concealment. While free adult Muslim women were expected to cover their entire bodies, the assumption was that other categories of women were exempted from this essential feature of femininity owing to impediments to their legal agency, such as age and enslavement. Men, on the other hand, were expected to be public, visible, and establish their presence in the spaces they occupy. While the differences in prayer posture are mostly minor, they reflect a juristic effort to locate and enact the construction of hegemonic masculinity and emphasized femininity in bodily practices.

As R. W. Connell has noted, gender constructions are not only discursive but also enacted bodily practices through which men and women find their place in the gendered social order.¹⁰⁹ Masculinity is thus expressed and maintained through bodily postures and increased bodily visibility and mobility. Such a disposition reflects power and control not only over oneself but also over others and public spaces. Bodily dispositions attached to femininity, on the other hand, reflect meekness, concealment, and submission.

This performative and acquired aspect of gendered dispositions is also apparent, for instance, in al-Sarakhsi's discussions of custody and parenting of children in the case of divorce. In Hanafi law, a mother gains custody of girls younger than twelve and boys younger than seven. After this age, the girl and boy return to the father's household, which maintains guardianship over them. In explaining why a boy must leave the mother's care at a younger age than a girl, al-Sarakhsi insists that a boy of that age needs to maintain the company of men (i.e., be parented by the father). If he were in the company of women for too long, al-Sarakhsi argues, the boy would be socialized into a feminine disposition, which would affect his mannerisms and speech, causing him to become effeminate.¹¹⁰

CONCLUSION

In a discussion of guardianship in marriage, al-Kasani, like other Hanafi jurists before him, argued that a free adult woman can marry of her own will. The other Sunni legal schools disagreed, arguing that a free adult virgin woman needed the consent of her guardians to contract a marriage. Anticipating the argument about women's deficient intelligence, al-Kasani devotes a lengthy paragraph to addressing this point. The argument about women's deficient intellect comes from a hadith in which the Prophet is reported to have said that women are inferior in both their intellect and their religion. When the women inquired about the specificities of this deficiency, the Prophet responded that the fact that two women witnesses are required in the place of one man is evidence of their intellectual deficiency. The deficiency in their religiosity is evident in the fact that women can neither pray nor fast while menstruating.¹¹¹

The argument about women's intellectual deficiency emerges here and there in legal texts, often to justify particular restrictions on the agency of female subjects. Al-Kasani argues, however, that the form of intellectual deficiency that women suffer from does not prevent them from understanding the benefits and purpose of marriage. Women—that is, free adult women—he claims, have the requisite legal capacity to engage in commercial transactions and thus have control over their own wealth. They also carry the legal capacity to confess, to receive punishment, and to be held accountable as a subject of the divine law. Given that in all these matters their intellect is not deemed insufficient, then women have sufficient intellectual abilities to choose their spouse.¹¹²

The appearance of the argument about women's intellectual deficiency is always interesting to trace in legal reasoning. Here we see that the Hanafis challenge Shafi'i jurists on their use of the deficiency argument to deny women the right to contract their own marriages. In justifying the legal precedence of his school, al-Kasani disagrees with the deficiency argument. He insists that an adult woman has no limitations on contracting commercial transactions and disposing of her property as she wishes, and therefore the argument that she is deficient in her intellect with regard to contracting a marriage makes little sense. In the case of divorce, however, we see this deficiency claim appears to justify the legal ruling that deprives the mother of the legal right to custody. A woman's intelligence is lacking and thus she cannot be trusted to make sound decisions regarding her children. One could argue that if she has a sound enough intellect to make decisions for herself, then she can make sound decisions on behalf of her children. Certainly, a woman who is of legal majority, a mother and a matron, should not be expected to rely on her male relatives to make decisions on her behalf. Instead of making this argument, however, Hanafi jurists use the deficient intellect argument to justify their school's legal precedents. At no point is women's intellectual deficiency defined. The intellectual deficiency of femininity is instead a convenient tool of legal argumentation that aids in justifying the curtailment of free adult women's legal agency and autonomy in certain areas of the law.

I conclude this chapter with this discussion of women's intellectual deficiency because it helps us reflect on the hermeneutical role played by these normative constructions of hegemonic masculinity and emphasized femininity along the active/passive binary. As I have demonstrated throughout this chapter, early Hanafi jurists articulated a gender relation in which masculinity was endowed with power, control, and dominion, and femininity with meekness, submissiveness, and concealment. While at times this gender relation was used as a justification for a legal precedence, the above discussion indicates that it was not actively at play in all gender-differentiated aspects of the law. The Hanafi legal school, for example, held that free adult women could serve as a judge, a position of significant public authority, in cases where they were permitted to serve as witnesses.¹¹³ They also allowed a free adult woman to contract her own marriage, thereby granting a recognition of her legal autonomy not given by other Sunni legal schools.¹¹⁴ A free mother could contract the marriages of her minor children, and a free adult woman who had the financial means acquired authority and dominion over enslaved people, both male and female. These dissonances in legal discourse indicate that the jurists did not expect all men and women to embody and enact hegemonic masculinity and emphasized femininity in all situations. We see in al-Kasani's discussion, for example, that hierarchies other than gender come into play in determining the individuals' legal agency. Al-Kasani's discussion of the right of the woman to contract her own marriage is not concerned with women as a monolithic category but with free adult women—that is, a legal personhood

constructed around three social identities: freedom, legal majority, and gender. These intersecting social identities meant that hegemonic masculinity and emphasized femininity were not the only constructions of gender in the law. At the intersection of numerous social identities, men and women as legal subjects occupied a number of nonhegemonic masculinities as well as non-emphasized femininities. Geissinger notes precisely this point in their discussion of bodily postures in prayer: the concerns around gendered prayer postures show a distinction not only between men and women but between men and nonmen, free men and enslaved men, and free women and enslaved women.¹¹⁵ The hierarchical social order of gender in early Islam was not a binary, but a spectrum.¹¹⁶ While this chapter has focused on explicating the construction of hegemonic masculinity and emphasized femininity in Hanafi legal discourse, gender was not the only hierarchy that informed Islamic law's conception of a just social order. This was not a social order in which all men were granted a privileged status above all women. Nor were all women unable to occupy a privileged social status. Other factors like enslavement and age played a role in constructing a complex social order in which there were multiple masculinities and femininities.¹¹⁷ There are hints of these complex distinctions in some of the legal discussions that I have engaged in this chapter. We see, for instance, that the concealment of the body is not permitted to the enslaved woman. While she is still gendered female in legal discourse, she is not allowed to embody the concealment that is so essential to femininity. The enslaved woman is permitted to pray with significant bodily exposure, as her *'awra* is deemed to be similar to a man's.¹¹⁸ These legal rulings pertaining to the enslaved woman raise critical questions as to the stability of this gender hierarchy. In the following chapter, I consider enslavement as one of the other axes on which a hierarchal social order is established through legal rulings. In doing so, however, I will look specifically at how gender intersects with enslavement in the creation of legal subjects. Looking at the intersection of enslavement and gender allows us to see the ways in which the categories of "man" and "woman" that are so essential to the gendered narrative are disrupted and displaced when they intersect with enslavement as a legal institution.