

## Gender and the Construction of Enslaved Subjects

In a discussion of sales contracts, al-Sarakhsi discusses a scenario where a buyer purchases an enslaved person with the understanding that they are male but then discovers that they are female. The legal question of concern here was whether the difference in the enslaved person's gender was a significant enough factor to nullify the sale contract. Al-Sarakhsi stated that the sale was indeed nullified (*fasid*) because enslaved men and women were fundamentally different commodities and not interchangeable in a purchase:<sup>1</sup>

Human males and females, with regards to legal rulings, are two different genera because the purpose [*al-maqsud*] of the one cannot be actualized in the other. The purpose of [purchasing] the enslaved female [*jariyah*] is concubinage [*istifrah*] and reproduction [*istilad*], and some part of this cannot be actualized in [purchasing] an enslaved male [*ghulam*].<sup>2</sup>

In Islamic law, the assigned purpose (*maqsud*) of a commodity was one of the most critical criteria employed to determine the commodity's genus.<sup>3</sup> Establishing the commodity's genus was thus of utmost importance in commercial exchange, particularly in deciding whether a sale was valid or licit. There were several considerations that determined genus, among them the commodity's origin (*asl*), name, form (*hai'a*), and method of production (*san'a*, *minhaj*).<sup>4</sup> Among these, however, purpose was a key criterion. In this scenario, we see al-Sarakhsi center purpose in determining whether this sale can be nullified. In explaining that the reason for which enslaved men and women are purchased is significantly different (i.e., enslavers make sexual use of enslaved women in a manner that they cannot with enslaved men), he creates a distinction between human males and females

as separate genera. At first glance, this statement reads similarly to the ones we saw in chapter 1, where jurists articulated an essentialist understanding of gender to justify a particular legal ruling. We might read al-Sarakhsi's statement here as affirming that gender is the most fundamental difference between humans—so fundamental that it trumps enslavement and other social distinctions. If we look more closely, however, we realize that al-Sarakhsi's claim is not about a difference between all humans gendered male and female but specifically in relation to enslaved men and women. The genus difference between enslaved people, then, is based on the law's assertion that licit sexual and reproductive use can only be made of enslaved women, and not enslaved men. This differentiation is reflected in Islamic law's permissive attitudes toward concubinage and the rejection of a parallel institution for enslaved men. As Kecia Ali has demonstrated, early Islamic sources mention that female slave owners attempting to claim sexual rights over their enslaved men were immediately chastised.<sup>5</sup>

Baber Johansen has argued as follows: "Where slavery is combined with the gender difference it destroys the unity of the human kind. With regard to human genders, the commercial and social exchange produce, in fact, different genera of human bodies."<sup>6</sup> Contrary to Johansen's claim, I read al-Sarakhsi's argument about a gender-based genus differentiation not as a statement about humanity but instead as a statement about the gender-differentiated legal personhood of enslaved people. Enslaved men and women were fundamentally different legal persons, and what constituted enslavement in Islamic law was different for the enslaved man and the enslaved woman. In purchasing an enslaved woman, the enslaver acquired ownership not only over her bodily labor but also her sexual and reproductive labor. Since the enslaved status of a child depended on that of the mother, the reproductive use of enslaved men and women had different ramifications for the enslaver. In purchasing an enslaved woman, the male enslaver not only had the right to make sexual use of her; any children she had would also be born into slavery (provided they were not the enslaver's offspring). The enslaved man's sexual and reproductive labor was, of course, also the purview of the enslaver. Islamic law only allowed an enslaved woman to be used sexually by her enslaver; however, if we expand our conception of the sexual violence endured by enslaved people beyond concubinage, we can see that the law allowed enslavers to inflict certain forms of sexual violence on enslaved men as well by allowing for their sexuality to be transacted in coerced marriages.<sup>7</sup> Thus, the difference between enslaved women and enslaved men was marked by the particular forms of sexual violence (concubinage) that could be inflicted on one (enslaved women) that could not be licitly inflicted on the other (enslaved men). Furthermore, an enslaved man's children would not acquire his enslaved status or automatically become the property of his enslaver. Only the enslaved woman's child might increase the size of the enslaver's holdings.

Given these legal ramifications, we should read al-Sarakhsi's statement here less as a reflection of some fundamental ontological difference between human males and females and more as an indication of the difference in the legal personhood of enslaved people. Enslaved men and enslaved women were not the same commodity.

I begin this chapter with the statement by al-Sarakhsi to demonstrate that while Muslim jurists do indeed make essentializing assertions about gender, their claims cannot be read as an organizing principle that determined an individual's status under the law. If we read these statements alongside particular cases where jurists were actively constructing individuals' legal capacities, we see a complex matrix of social identities that shaped an individual's legal personhood. Neither gender nor enslavement alone shaped the legal personhood of an individual, nor did an individual's legally assigned gender consistently receive greater weight over other social identities. We must explore the intersections of these social identities in order to grasp the process of subjectification by which the subject of law was produced.

In order to understand this process, I focus in this chapter on a few case studies where gender and enslavement were both factors that Hanafi jurists considered in determining the legal capacity of enslaved people. An enslaved man's ability to marry and the enslaver's right of coercion were both issues that early Hanafi jurists weighed as they navigated the privileged status of masculinity alongside the powerlessness of enslavement. As we saw in the previous chapter, Hanafi jurists argued that hegemonic masculinity was characterized by autonomy and self-determination, giving men not only a privileged status as a legal subject but also greater control over their own persons. Simultaneously, Hanafi jurists saw femininity as a marker of passivity, of being dominated and subjected to the will of another. However, as I noted at the end of chapter 1, these essentialist articulations of masculinity and femininity often break down in different aspects of the law. In looking at the legal personhood of enslaved people, this chapter demonstrates that the law was populated with male subjects who were unable to inhabit the autonomy and self-determination that characterized hegemonic masculinity. We also see different types of female subjects, since the passivity and powerlessness of femininity were inhabited differently by enslaved women and free women. In the discussion of marriage, as well as of the covering of enslaved women's bodies, we can see that for the enslaved woman as legal subject, enslavement intersected with femininity to further compound her vulnerability. The free woman, on the other hand, held a greater level of autonomy and bodily integrity in relation not only to enslaved women but also to enslaved men. Thinking at the intersections of gender and enslavement also allows us to see that the enslaved person was not a singular legal subject; that is, enslavement did not entail a set of static and predictable legal impairments that were shared by all enslaved people. Instead, we see that the gender and enslavement intersected to

produce different configurations of legal capacity. Enslaved women and enslaved men, in other words, were different legal persons.

#### WHAT DID IT MEAN TO BE ENSLAVED IN ISLAMIC LAW?

In Islamic law, freedom is understood to be an essential aspect of the human condition. The statement “*al-asl huwa al-hurriya*” (the fundamental condition is freedom) appears often in legal texts.<sup>8</sup> In explaining the shared humanness of both the free and the enslaved, al-Sarakhsi argued that the original condition of the human is freedom, after which slavery enters as an accident (*‘arid*).<sup>9</sup> Unlike the Aristotelian notion that slavery was part of the enslaved person’s nature, enslavement in Islamic law was understood to be a temporary condition. Once enslavement was removed as a legal impediment, the individual would return to their original state as a free subject.<sup>10</sup> The broader Near Eastern world at the advent of Islam recognized multiple avenues through which a person could be enslaved. Capture in warfare was one of the most common ways; the selling of oneself or one’s wife or children into enslavement or debt bondage were also recognized as legal avenues for enslavement. Hammurabi’s Code, for example, allowed for a husband to sell a dishonest wife into slavery and also regulated the enslavement of abandoned children in situations of warfare or famine.<sup>11</sup> Slavery could also be conferred through birth; that is, a child born of one or both enslaved parents was also considered to be enslaved.<sup>12</sup>

While borrowing heavily from preexisting empires, the early Islamic movement enacted some fundamental changes to these older systems of enslavement in the broader Near East. One of the most critical changes was the drastic reduction in the avenues for enslavement. The Qur’an and Sunnah permitted enslavement only through capture in warfare. With regard to enslavement conferred through the womb, Sunni and Shi’i jurists differed. While Sunni jurists followed the Roman legal principle *partus sequitur ventrem* (that which is brought forth follows the belly) and held that enslavement was conferred from enslaved mother to child, Shi’i jurists held that a child was free at birth if either (or both) of its parents were free.<sup>13</sup>

Religion was also a key factor in determining enslavement, as only non-Muslims could be enslaved in warfare.<sup>14</sup> Non-Muslims living within the Muslim empires, however, were granted protection; their acquired status of *dhimmis* meant they could not be enslaved. Treaties also often specified that a recently conquered population would not be subjected to enslavement. In the early conquest of Syria, for example, the treaty stipulated that the Syrians could continue their lives undisturbed provided they agreed to pay *jizya* and *kharaj*, two forms of taxes paid by non-Muslim subjects of the Muslim empires.<sup>15</sup> While tribal or ethnic identities were not initially a consideration in enslavement, the second caliph ‘Umar prohibited the enslavement of Arabs, introducing not only a religious but also an ethnic

element to slavery laws.<sup>16</sup> Bernard Freamon argues that this prohibition shifted the Qur'anic conception of enslavement, which had not previously been perceived as a demeaning condition. In prohibiting Arabs from being enslaved, he argues, 'Umar turned enslavement into a humiliating and debased condition to which certain ethnic groups (in this case Arabs) could not be subjected.

These factors—the prohibition against enslaving Muslims, Arabs, and *dhimmis*—led to the development of a system where early Muslim empires acquired enslaved people from the areas on their borders. With the conquest of Iraq, the new Arab Muslim rulers took over the trade routes of the Sasanian Empire, through which they acquired enslaved East Africans, known as *zanj*. Unlike other enslaved people in the early Muslim Empire who did domestic labor in urban households or in the caliphal and royal households, *zanj* were condemned to the horrifying conditions of labor in agriculture or on the marshes.<sup>17</sup> The conquest of Egypt also led to a treaty with the bordering Nubian kingdom. Unlike Syria, where the local population was neither enslaved nor required to provide slaves, the treaty with the Nubian king stipulated that he would provide a fixed number of slaves every year.<sup>18</sup> The armies of the newly established Abbasid caliphate also entered into Eurasia, enslaving people from those areas and bringing them back to the caliphal palace.<sup>19</sup> The Abbasid caliphs also shifted the makeup of the caliphal armies from free Arab soldiers to enslaved Turkic soldiers. Increasingly anxious about the ever-present possibility of disloyalty from free Arab commanders, the Abbasid caliphs felt greater security with an army of enslaved people foreign to the local communities. Their family and kinship ties had been destroyed by enslavement, so they were beholden and loyal to no one other than the caliph. This shift began a long-standing market for Turkic boys from the Asian steppes who were captured, enslaved, and sold in the Muslim empires. These military slaves were an elite group who often acquired a significant amount of power and wealth and developed political interests of their own, at times even becoming a threat to the caliph.<sup>20</sup> Several centuries after the advent of Islam, the slave trade was a thriving industry in the Muslim empires, bringing enslaved people through the Persian Gulf, India, East Africa, Southeast Asia, and China. Ibn Butlan's eleventh-century guidebook to purchasing slaves, for example, lists enslaved people from over twenty places.<sup>21</sup> With the exception of *zanj* and Slavs, most of these enslaved people came from just outside the Muslim empires.<sup>22</sup>

While Islam certainly did not abolish slavery, it encouraged an emancipatory ethic.<sup>23</sup> Manumission was considered a pietistic act and was highly encouraged. Islamic law also established other mechanisms, such as *mukataba* and *tadbir*, which facilitated emancipation. *Tadbir* granted an enslaved person their freedom upon the death of the enslaver. An enslaved person who received this grant of enfranchisement took on the legal status of a *mudabbar(a)*. *Mukataba* described contractual enfranchisement, whereby the enslaver guaranteed the enslaved person freedom in return for an agreed-upon sum. The Qur'an counsels enslavers to

enter into such a contract with people they have enslaved.<sup>24</sup> An enslaved person who entered into such an agreement was known as a *mukatab(a)* and was granted certain legal rights not given to other enslaved people. The *mukatab* could not be sold by the enslaver, and an enslaved woman who acquired this contractual agreement would no longer be used sexually by her enslaver.<sup>25</sup> If an enslaved person was able to provide this sum of money, often in installments, they usually received this amount back from the enslaver after emancipation.<sup>26</sup> While contractual enfranchisement was theoretically gender neutral, it was possibly less accessible to enslaved women. The monetary nature of the agreement meant that the enslaved person would need to find gainful employment. It is quite possible that opportunities for employment would have been more restricted for enslaved women; indeed, this possibility is reflected in the juristic discouragement of entering into a contract with an enslaved woman who did not have a licit source of income.<sup>27</sup> In her historical account of women and enslavement in the late Ottoman Empire, Madeline Zilfi notes this gendered dynamic in enslaved women's possibilities for emancipation.<sup>28</sup> Women, she argues, seldom had the financial resources or opportunities to be able to negotiate for their freedom. While enslaved men had different employment opportunities, licit and socially respectable employment for enslaved women was largely limited to the household economy. This gendered disparity among enslaved people bears out in legal opinions from the late Ottoman period as well. Several legal opinions pertain to situations where a *mukataba* was unable to fulfill the terms of the agreement and her contract was rendered null or void.

The welfare of enslaved people and other vulnerable segments of society is also a central concern of the Qur'an, which urges believers to act kindly toward enslaved people.<sup>29</sup> Several hadith also cautioned the enslaver to be mindful of their power over enslaved people. The Prophet famously referred to enslaved people as brethren of free people and outlined the enslaver's obligations:

Your slaves are your brothers; whom God has put under your command. So whoever has a brother under his command should feed him of what he eats and dress him of what he wears. Do not ask them [slaves] to do things beyond their capacity [power] and if you do so, then help them.<sup>30</sup>

Several hadith also chided enslavers for striking enslaved individuals and discouraged them from using naming practices that would remind the individual of their enslaved status.<sup>31</sup> In assessing this Qur'anic and Prophetic ethos regarding slavery, Bernard Freamon argues that in its early days, Islam upheld an ideal that abandoned existing hierarchies and distinctions and instead emphasized a pietistic egalitarianism.<sup>32</sup> It was this egalitarian and emancipatory piety that rejected social hierarchies, Freamon argues, which attracted so many enslaved people and other vulnerable populations in Arabian society to Islam.

Islam's emancipatory ethic was reflected in Islamic law not only in its recognition of freedom as an essential condition of humanness but also in the recognition

of the enslaved person as a (limited) rights-bearing subject.<sup>33</sup> While the different Sunni legal schools held varied opinions on the particular legal rights of enslaved people, they agreed that enslaved people had the freedom to choose and practice their own religious beliefs. Thus, enslaved Muslims could not be prevented from performing their daily obligatory prayers, and enslaved non-Muslims could not be forced to convert to Islam or be prevented from fulfilling their religious obligations. Islamic law also permitted enslaved people to take on certain positions of authority, provided that this position was administrative and not political in nature. Marriages of enslaved people were legally recognized but required the permission of the enslaver. The rights and obligations of a husband and wife are very much gendered in Islamic law, and so granting enslaved people the right to marry also required jurists to work out what legal status they could occupy as enslaved husbands and wives. The juristic tendency to halve the rights or obligations placed on an enslaved person played out in marriage as well. Islamic law granted both free and enslaved husbands the unilateral right of divorce. However, the enslaved husband held only two pronouncements of divorce rather than the three granted to the free husband. Similarly, the waiting period after a divorce was calculated at three menstrual cycles for a free wife but only two for an enslaved wife. In the case of a divorce, Hanafi law granted the free mother the right to custody (*hadana*) of her young children, but no such right was granted to the enslaved mother. An enslaved mother, however, could not be separated from her young children (up to the age of seven) by her enslaver. Hanafi jurists in particular discouraged separating prepubescent enslaved people from their close blood relatives.<sup>34</sup> Enslaved people had a right to life and could not be killed extrajudicially without some form of punishment accruing to their killer.

While the enslaved person was a rights-bearing subject, enslavement certainly hindered an individuals' agency. With the exception of the Maliki legal school, which allowed an enslaved person to acquire property if the enslaver permitted, the other legal schools did not grant enslaved people any ownership rights.<sup>35</sup> Nor could enslaved people give testimony (the one exception in this regard was the Hanbali legal school, which nevertheless restricted such testimony to non-*hadd* cases).<sup>36</sup> Enslaved people also could not acquire or confer *ihsan*, a status acquired by free individuals through sexual intercourse in marriage.<sup>37</sup> Enslavement was also a sufficient cause for voiding religious and legal obligations on enslaved people. This was done primarily in the interests of securing the rights and authority of the enslaver over the enslaved. Thus, while Muslim men are required to attend Friday prayer services, enslaved men were not so obligated because their primary role and duty was to perform labor for the slave owner. Obligating them to attend prayer services would impinge on the rights of their enslaver. Similar arguments were made with regard to the mobility and modesty of enslaved women. Sunni jurists often argued that to restrict an enslaved woman's mobility would impose on the right of the enslaver to make use of her labor. Similarly, preventing



men from looking on or touching her body would impinge on the purchasing right of enslavers.

The legal status of enslaved people put them in a liminal space between person and property. The juridical construction of freedom as an innate human condition meant that humans were theoretically protected from being transacted as a commodity. For the Hanafis, freedom granted an individual dignity (*karama*) and the right of inviolability (*hurma*). Given this, allowing a human to be subject to commercial exchange would entail a profanation (*ibtidal*) of the sanctity of humanness.<sup>38</sup> The enslaved person, however, was subject to commercial exchange by virtue of their enslaved status. Despite freedom being an innate human condition, the opposite is true of the enslaved person, who, al-Sarakhsi argued,<sup>39</sup> is an owned commodity.<sup>40</sup> This status between legal subject and property is evident in the many aspects of the law where enslaved people are mentioned alongside animals.<sup>41</sup> Juristic formulations, for example, often discuss enslaved people alongside livestock. Similar terminology is often also used to describe reproduction. The birth of an enslaved child, for instance, is described as the “fruit” (*ghalla*) of the mother, the same term used for animals. In the same vein, the *muhtasib* ensures that people treat their animals and slaves well. And, like livestock, enslaved people could be jointly owned by multiple enslavers.

The equating of enslaved people with property led to a number of dissonances, however. Unlike livestock, there were much greater restrictions placed on the return of an enslaved person based on certain redhibitory vices (*‘aib*).<sup>42</sup> The law also recognized the immediate kinship relations of enslaved people, prohibiting the enslaver from separating an enslaved mother from her young children. Additionally, the Hanafis held that if an enslaved person was a direct relative of the enslaver, they were to be automatically emancipated.<sup>43</sup>

The question of what constitutes slavery in Islamic law has been a subject of significant scholarly conversation. Different forms of human bondage and dependent relationships were a normal part of life in the premodern world, including premodern Islam, and even continue to exist in many forms in our world today. Moses Finley, a historian of the Greco-Roman world, has argued that any historical study of slavery must carefully account for what the terms “slave” and “slavery” mean in one’s particular historical context.<sup>44</sup> He correctly points out that there are many relationships in the premodern world that might look like slavery to us that were in fact not understood as such in their original contexts. Indeed, if we do not critically analyze our own assumptions about slavery, we are likely, as scholars, to gloss over or misunderstand certain forms of enslavement. In writing about slavery in medieval Scandinavia, for example, Ruth Mazzo Karras argues that it is “difficult to create a definition of slavery comprehensive enough to cover all social institutions generally classified as slavery yet sufficiently clear to distinguish it from other forms of dependence.”<sup>45</sup> And in speaking to the particular context of Islamic law, historians have similarly disagreed on definitions of slavery. Franz Rosenthal has



claimed that freedom in Islamic law is defined as the absence of slavery.<sup>46</sup> Bernard Freamon has contended, on the other hand, that Islamic law's definition of slavery was rooted in the idea of property; enslaved people thus occupied a liminal status between person and property.<sup>47</sup> Criticizing Orlando Patterson's argument that it was power and not ownership that defined the enslaver-enslaved relationship, Freamon says that ownership is a critical dimension of slavery, as this legal concept allowed enslavers to convince both the enslaved and society in general that they had the right to exercise power over enslaved individuals.<sup>48</sup> Critiquing most existing definitions and attempts to categorize slavery, Jonathan Brown prefers the term *riqq* to speak of Muslim histories of enslavement. He argues that enslaved people in Islamic law were rights-bearing subjects, similar to other dependent subjects in society, such as legal minors and wives.<sup>49</sup>

While the precise definition of slavery in Islamic law might be useful for understanding the legal mechanisms by which jurists granted certain individuals power and dominance over others, it does not help us understand what was entailed by enslavement in Islamic law. What constitutes freedom and unfreedom is indeed complicated. As Brown puts it, no person is truly autonomous and free in a way where they do not live in some form of dependency on other individuals.<sup>50</sup> Karras showed that in medieval Scandinavian society, while the nobles might be perceived as free by others in their society, they were in fact dependent on the king for the privileges and freedoms that defined their status.<sup>51</sup> Freedom and enslavement, then, are not absolutes but instead *relational*.<sup>52</sup>

Elizabeth Urban has argued that the concept of "unfreedom" is more useful in studying enslaved people in early Islam. "Unfreedom" not only allows us to step away from definitional understandings of enslavement; it also brings our focus to its relational aspects.<sup>53</sup> To bring this concretely to Islamic law, the social and legal status of the enslaved person was created through the granting and restricting of rights to them and to others. In making these determinations, jurists were also always considering the rights of free people. This chapter thus focuses on the legal personhood of the enslaved person rather than definitions of slavery to account for what constitutes enslavement in Hanafi legal discourse. An exploration of legal personhood allows us to observe that freedom and enslavement were mutually constituted; that is, what it meant to be enslaved was defined through its difference from freedom.

#### THE ENSLAVED MAN: BETWEEN MASCULINITY AND ENSLAVEMENT

Marriage is a particularly useful case study, as it demonstrates the process by which the enslaved man's legal personhood was constructed at the intersection of gender and enslavement. Jurists dealt with the enslaved man as both a male and an enslaved subject. These two aspects, however, were not distinct juridical categories

that either gave the enslaved man greater autonomy (owing to masculinity) or decreased capacity (owing to enslavement). Instead, jurists engaged in a complex and contested process, considering the enslaved man's different social identities in a manner that constructed a legal personhood that was particular to him and not shared with other enslaved people who were female or intersex.

The marriage of enslaved people in Islamic law was a complicated issue. Enslavement significantly impaired legal agency, and this impacted marriage in multiple ways. Unlike free adult individuals, enslaved people did not have the right to enter into marriage of their own accord. Any enslaved person wishing to marry had to first garner the permission of their enslaver, for whom the marriage had particular implications. For example, if an enslaved man married, the enslaver was obligated to pay the dower (*mahr*) and financial maintenance (*nafaqa*) to the free wife because enslaved people had no right to property and wealth ownership (except if the enslaver permitted this), and so the enslaved husband would have no wealth of his own to keep his wife. Moreover, since a male enslaver had the right to make sexual use of his enslaved woman, if she were to marry, he would have to agree to give up his sexual access to her. This was why marriage was seen as a "defect" when purchasing enslaved people and could reduce their value.<sup>54</sup> Given these conditions, jurists made the marriage of enslaved people contingent on the enslaver's permission.

As mentioned in chapter 1, marriage in Islamic law was understood to be a transactional exchange in which access to the wife as a sexual commodity came into the husband's exclusive possession. Such a construction of marriage, however, would only allow men who had the legal right to own property to marry, putting enslaved men's very ability to marry in peril. This legal inability to own property created a significant problem for the enslaved man, as marriage was his only avenue to participate in licit sex. In Islamic law, fulfillment of sexual desire was available to men through two avenues: marriage and concubinage. Hanafi jurists were insistent that an enslaved man could marry but could not take on a concubine.<sup>55</sup> In this they differed from the Maliki legal school. The Maliki position was founded on the similarities between marriage and concubinage as forms of ownership over sexual access to women. If the enslaved man retained the legal capacity of ownership in marriage, then he should also retain that in relation to concubinage. The Maliki permission for enslaved men to take on concubines, however, was not without its limitations. The eminent Hanafi jurist al-Shaybani argued that while Maliki jurists allowed an enslaved man to take on a concubine, they did not allow him to acquire ownership over her. This is evident in the fact that he had no right to emancipate her, sell her, or gift her without the enslaver's permission. It was thus the enslaver and not the enslaved man who had ownership of the concubine.<sup>56</sup> For the Hanafi jurists, in order for the enslaved man to take on a concubine, he would have had to acquire the legal status of an enslaver, which they held was a legal contradiction.<sup>57</sup>

This left marriage as the only licit avenue through which an enslaved man could engage in sexual intercourse. However, given that Hanafi jurists insisted that

the enslaved man had no right to ownership and marriage was a transactional exchange, how could an enslaved man marry? This conundrum was resolved by distinguishing between patrimonial (*malkiyyat al-mal*) and nonpatrimonial (*malkiyyat ghayr al-mal*) forms of ownership.<sup>58</sup> This distinction allowed Hanafi jurists to give enslaved people the right to administer property (a role often taken on by elite enslaved individuals) and also lay claim to possession of property without having the right to full ownership.<sup>59</sup> The distinction between patrimonial and nonpatrimonial forms of ownership allowed the enslaved man to marry while still preventing him from acquiring the mode of ownership necessary for concubinage.

The debate between the Maliki and Hanafi jurists on this position reveals the contradictions present in legal discourse, as Muslim jurists worked out how much of the rights, agency, and privilege granted to the free adult male could be acquired by the enslaved male. For Hanafi jurists, the legal conundrum was worked out through negotiating the enslaved man's status between the juridical construction of an idealized masculinity and enslavement. If the jurists elevated masculinity over enslavement and granted the enslaved man the right of ownership, they would be granting him the social power and privilege of property rights, which would contradict the very definition of enslavement. It is this that al-Sarakhsi is alluding to when he argues that granting the enslaved man the legal capacity to marry not only diminish the right of the enslaver but also begins to erode the enslaved status of the individual by increasing his legal capacity.<sup>60</sup>

Conversely, to insist that the enslaved man had no ability to make use of a commodity would leave him unable to marry. This would deprive him of the ability to licitly fulfill his sexual desire and also to have progeny, a right that jurists took seriously not only as a fundamental part of God's divine plan but also a basic human desire. In accounting for the existence of sexual desire in humans, al-Sarakhsi argues that divine will has decreed the continued existence of humanity, which is only possible through procreation.<sup>61</sup> The desire for progeny was also understood by the jurists to be an innate human desire. It is for this reason that jurists prohibited husbands from practicing coitus interruptus without a wife's consent and also allowed for the annulment of marriage to an impotent husband, as this would deprive the wife of children.<sup>62</sup> To prevent the enslaved man from marriage, then, was seen by the jurists as a significant injustice. So important was the fulfillment of sexual desire and the right to progeny to the legal idea of masculinity that al-Sarakhsi hinges the resolution to this conundrum on precisely this point: the law allows him this form of dominion owing to the necessity of fulfilling his sexual desire and preserving his lineage.<sup>63</sup>

Once Hanafi jurists found themselves past the legal dilemma of an enslaved man's ownership rights in marriage, they had to consider whether an enslaved man could be coerced into marriage by the enslaver.<sup>64</sup> Sunni jurists in general required that the enslaver consent to the marriage of an enslaved person. Yet, while

they were agreed on the right of the enslaver to coerce the enslaved woman into marriage, only the Hanafi legal school allowed for the enslaved man to be coerced into marriage. In explaining the Shafi'i discomfort with coercing an enslaved man into marriage, Kecia Ali explains that "a certain irreducible masculinity prevented an adult male slave from losing the right to sexual self-determination for Shāfi'ī."<sup>65</sup>

The early generation of Hanafi jurists took different positions on this issue. Like al-Malik and al-Shafi'i, Abu Hanifa reportedly held that the enslaver could not marry off an adult enslaved man without his consent (*ridahu*). In providing his rendition of Abu Hanifa's reasoning, al-Kasani argues that the enslaver has no right to the sexual commodity of an enslaved man. Given this, the enslaver cannot make decisions for the enslaved man in matters that pertain to his sexuality without his consent. The same is true, al-Kasani contends, in other modes of enslavement where the enslaved person has acquired the status of a *mukatab*, a contractual agreement to purchase their freedom, because here the enslaver has agreed to relinquish some of their ownership rights.<sup>66</sup>

Other Hanafi jurists disagreed with Abu Hanifa's position and in fact abandoned his precedent. Defending the dominant opinion adopted by the Hanafi legal school allowing the enslaver to coerce the enslaved man into marriage, al-Kasani returns to the legal status of the enslaved person as property. The right of ownership (*milk*), he argues, not only grants the enslaver full ownership over every part (*ajza'*) of the enslaved person; it also entails the right to transact and make use of the commodity without concern for the property's consent.<sup>67</sup> He argues further that every property owner (*malik*) has the right (*wilayah*) to make use of their property, particular in matters where they stand to benefit (*maslaha*, *fa'idah*). Preventing the enslaver from compelling the adult enslaved man into marriage, then, would not only hinder the enslaver's ability to make use of their property as they wish but also deprive them of the benefit they might receive from arranging such a marriage. Among the potential benefits to the enslaver that al-Kasani lists is an increase in the number of enslaved people owned by the enslaver through reproduction. Marriage would also ensure, he argues, that the enslaved man will not resort to illicit sexual intercourse to fulfill his sexual desire, a defect that would decrease the property value of the enslaved person.<sup>68</sup>

As we will discuss in the next chapter, Muslim jurists granted the patriarchal head of household (father and paternal grandfather), as well as legal guardians, the right to compel other nonnormative legal subjects into marriage. Marriages of children, both male and female, could be contracted by the patriarchal head of household as well as by their legal guardians; moreover, while legal majority granted the adult woman the right to contract her own marriage under Hanafi law, her male kin could challenge her choice of spouse. The power granted to the patriarch over his dependent subjects (wife, children, and enslaved people) was embedded in a paternalistic ethic of care that imagined a father or paternal

grandfather would make decisions in the best interest of the dependent. This paternalistic ethic of care did not raise much concern for the jurists.<sup>69</sup>

The jurists assumed a similar paternalistic ethic of care in the enslaver/enslaved relationship. In premodern Muslim societies, particularly in early Islam, enslaved people were considered to be a part of the broader household of the enslaver. While they were by no means integral members of the natal family, they were incorporated into the household and its kinship networks. Enslaved people were expected to be loyal to their enslavers and act in a manner that preserved the interest of the enslaver and his household.<sup>70</sup> This connection between the manumitter and the freed person continued even after emancipation, through a system of patronage that gave the manumitter access to the estate of the freed person and also obligated the manumitter to pay blood money. This relationship of patronage was similar to other kinship connections in Islamic law in that the manumitter could not relinquish his duties; nor, however, could the freed person decide to change their patron. The patronage connection also continued intergenerationally, passing on to the children of the patron.<sup>71</sup>

Given this relation between enslaver and enslaved, jurists assumed that enslavers would act in the best interest of those they had enslaved, thus granting them significant power over the marriage of enslaved people. This power of coercion was granted not only to the male enslaver but also to the female enslaver. Sunni jurists disagreed on whether the female enslaver could contract the marriage herself. As Hanafi jurists recognized a free adult woman's right to marry without the consent of her guardian, this legal capacity to self-determination in marriage carried through in her capacity as an enslaver. Maliki jurists, on the other hand, required the female enslaver to delegate a male representative to contract the actual marriage. Shafi'is were even more particular, requiring the female enslaver's own marriage guardian to contract the marriage of her enslaved woman.<sup>72</sup> The juristic discussion of the female enslaver's ability to coerce enslaved people into marriage is an interesting case study on the intersections of freedom and gender in their impact on legal capacity. As Ali has noted, femininity could indeed intervene to prevent the female enslaver from exercising ownership rights similar to male enslavers.<sup>73</sup> In making this point, Ali speaks specifically of an instance in which the second caliph 'Umar adjudicated a case where a female enslaver was making sexual use of her male slave. The woman claimed that she had the right, just as male enslavers did, to make sexual use of her enslaved man. 'Umar judged otherwise, stating that she had engaged in illicit sex and commanded the family to sell the enslaved man in an area that was beyond the woman's control. Here we see the status of the enslaver as a woman limiting her from exercising the same property rights as a male enslaver. In the case here of the female enslaver's right to coercion, however, femininity does not necessarily intervene to limit her. Despite their disagreements on how exactly she could exercise that right, all the Sunni legal schools maintained that the female enslaver had the same right as a male enslaver to coerce

enslaved people into marriage. For the jurists, then, emphasized femininity did not always function in a similar and predictable manner in constraining the legal capacity of female legal subjects.

Despite the fact that the dominant Hanafi position allowed the enslaver to compel an enslaved man into marriage, the enslaved man subsequently had full control of the rights of a husband. He had ownership over sexual access to his wife and the right of unilateral divorce. Ali notes similarly that the law insisted on the sexual agency of the enslaved man and did not turn him into a sexual object. Once the enslaved man became a husband, the enslaver could neither compel the enslaved man to divorce his wife nor could he have sexual access to her, because she was now the wife of another man.<sup>74</sup> These rights acquired by the enslaved man as husband were quite obvious to the jurists. In fact, Abu Hanifa's reasoning for not granting the enslaver the power of compulsion was the recognition that the enslaved man could simply exercise his power of divorce. There was essentially no point in the right of compulsion if the enslaved man could exit the marriage of his own accord.<sup>75</sup>

The vulnerability of enslavement could, of course, keep the enslaved man from exercising a husband's rights. In fact, his inability to contract a marriage without the permission of the enslaver constrained his unilateral right of divorce. Al-Kasani was clearly attuned to this point. In responding to Abu Hanifa's reasoning that the enslaved husband's right of divorce effectively negated any meaningful compulsion into marriage, al-Kasani claimed:

Indeed, desire for women is in the nature of a virile man [*fahl*]. What is evident is fulfillment of sexual desire particularly in the absence of obstacles—i.e. the forbidden-ness [of sexual intercourse]—and what is also evident is that the condition of an enslaved person is such that he would refrain from rejecting the actions of the enslaver out of respect and in this way the marriage would continue and the full benefit of marriage will be actualized.<sup>76</sup>

If an enslaved man desires licit sexual intercourse with a woman, then he must marry. However, as marriage requires the permission of the enslaver, he becomes beholden to the good will of the enslaver for the fulfillment of his sexual desire. For al-Kasani, being caught in such a bind forces the enslaved man into a calculus whereby he might not exercise his right of divorce in a forced marriage because this might be his only avenue to fulfill his sexual desire. To exit a marriage the enslaver favored not only risked angering his enslaver but potentially risked their refusal to let the enslaved man marry again. While theoretically the enslaved man retains the divorce rights of a free husband, the vulnerable and dependent status of enslavement restricts his ability to fully exercise these rights.

The three legal discussions I have covered in this section—(1) the enslaved man's legal (in)capacity to marry, (2) coercion into marriage, and (3) his right of divorce—all provide insight into juristic reasoning on legal personhood. In all

three discussions, we see Hanafi jurists navigate between idealized masculinity and enslavement. As we saw in chapter 1, Hanafi jurists articulated an idealized masculinity that was characterized by autonomy, self-determination, and the ability to exercise power over others. Enslavement, on the other hand, was a legal impediment that entailed the loss of autonomy and self-determination, subjecting one to the will of their enslaver. In determining the legal personhood of the enslaved man, Hanafi jurists engaged in a complex process of reconciling these two contradictory legal capacities. The negotiation between idealized masculinity and enslavement produced a male legal subject who was significantly different from other male legal subjects. Unlike the free adult man, the enslaved man was subject to the will of his enslaver and could be coerced into marriage. In fact, his very ability to marry came into question because the marital contract was imagined through idealized gendered norms that could not be inhabited by the enslaved man. Even after Hanafi jurists resolved this conundrum by granting him the ability to marry through a distinction between forms of ownership, his capacity in marriage (as in other aspects of the law) was halved. Instead of the simultaneous four wives permitted to free men, the enslaved man could only marry two. Similarly, while he retained the right of divorce, he could only take his wife back after one pronouncement of divorce rather than the two available to the free man.

While this section has largely noted the different constructions of free and enslaved men as legal subjects, it is important to consider that enslavement was also not a shared legal status between all enslaved people. Enslavement was certainly a legal impediment for both enslaved men and women. However, what was entailed by that impediment differed significantly. Just as the enslaved man's legal personhood was constructed at the intersection of idealized masculinity and enslavement, the enslaved woman's personhood was constructed at the intersection of idealized femininity and enslavement. In the following section, I focus on juristic discussions about the marriage of enslaved women to demonstrate that the intersections of femininity and enslavement produced significantly different legal capacities for enslaved men and women.

#### THE ENSLAVED WOMAN: BETWEEN FEMININITY AND ENSLAVEMENT

In addition to the marriage of enslaved men, Hanafi jurists also gave considerable attention to the marriage of enslaved women. Interestingly, however, the legal issues raised in relation to the enslaved woman's marriage rarely mirrored those discussed in the case of the enslaved man. For one, there was little juristic concern over her coercion into marriage. As I discussed in chapter 1, the jurists understood the fulfillment of women's sexual desire only within a framework of dominion. Hanafi jurists were perhaps most explicit about this, arguing that free women were



in an odd bind since the fulfillment of their sexual desire always had to come at the expense of their self-determination.<sup>77</sup> Unlike free women, who had to surrender themselves to the dominion of the husband in order to fulfill their sexual desire and have children, enslaved women had no ability to surrender, as Islamic law allowed enslaved women to be used sexually by their enslavers. This permissive attitude toward the sexual use of enslaved woman was by no means unique to Islamic law. The institution of concubinage was prevalent in the late antique world in which Islam came into existence. In Roman society, for example, a male Roman citizen could make sexual use of any people he enslaved, including young boys and enslaved men.

While Islamic law continued both slavery and concubinage as institutions that were prevalent in the broader Near East and the Arabian Peninsula, it prohibited the sexual use of enslaved men by male or female enslavers.<sup>78</sup> Islamic law's abandonment of this Roman practice meant that gender became a differentiating aspect of enslavement. Enslaved men retained some of the sexual autonomy that was so critical to masculinity. They could be coerced into marriage, but doing so put them in a position of gaining sexual access to a woman. Enslaved women, on the other hand, shared with free women the commodification of their sexuality but did not have to the same sexual agency as the latter group. The legal debates I discussed in the previous section on the enslaved man's marriage were animated by the masculinity of the enslaved man. For the enslaved woman, her legal status was negotiated in relation to femininity.

In the Hanafi legal school, free women had the legal agency to contract their own marriages. Although Hanafi jurists preferred that free women still be married off by a guardian, this appearing to have been the norm in practice as well, they nonetheless had the right to arrange marriages themselves. A free adult woman also had the autonomy to resist marriages that she did not desire: as she was seen as owner over her sexuality, her male kin could not compel her into marriage.<sup>79</sup> The other Sunni legal schools prioritized not just age but also sexual status in the acquisition of legal agency of free adult women. For them, a virgin adult woman could also be compelled into marriage by her father and paternal grandfather. For the Hanafi jurists, legal majority and freedom granted the free woman greater legal agency and autonomy than the enslaved man.

Conversely, the law did not recognize an enslaved woman's ownership over herself as a sexual commodity. In fact, the permissive attitude of Islamic law toward concubinage meant that enslavement for women necessarily entailed a loss of ownership over their sexual availability and that the enslavers held the right to compel them in sexual matters. As Ali notes, "in contrast to the male slave and the free female, sexual and marital self-determination was never available to an enslaved female."<sup>80</sup> This right, however, had particular restrictions. Unlike the Roman law, whereby an enslaver could force enslaved woman into sex work,

the Qur'an expressly prohibited such a practice. If an enslaved woman was co-owned by several men, they could not all demand sexual services from her. Additionally, if the enslaved woman became pregnant by her enslaver, Sunni jurists agreed that she acquired the status of *umm walad*. The *umm walad* could no longer be sold and was emancipated at the death of the enslaver. Gaining the status of *umm walad* allowed an enslaved woman some mobility in her legal status, since she thereby moved from the legal status of an enslaved woman toward that of a free wife.<sup>81</sup>

The sexual use made of enslaved women was also not limited to male enslavers. While female enslavers could not licitly engage in sexual intercourse with enslaved women, they could still transact the sexuality of enslaved women. Historical accounts tell us that female enslavers often gifted their husbands enslaved women in an effort to acquire his goodwill or favor.<sup>82</sup> Female enslavers who trained singing girls (*qiyan*) often did so in the hopes that they would make a profit through their sale.<sup>83</sup> Male enslavers, like their female counterparts, also transacted the sexuality of enslaved women but were additionally given the right to make sexual use of them personally. The enslaved woman had effectively no legally recognized means of offering consent, since she had no control or ownership over her sexual commodity.

The question of the coercion of enslaved women into sexual intercourse is one that has been the subject of significantly scholarly disagreement. Some scholars of Islamic law contend that the Qur'an does not permit the enslaver to make sexual use of the enslaved woman unless she consents. They argue that in legitimizing sexual intercourse between an enslaver and the enslaved woman, Islam grants her a status akin to the wife.<sup>84</sup> Sexual use of the enslaved woman for these scholars was a means by which kinship ties were created and the enslaved woman incorporated into the household of the enslaver. Ali has noted, however, that the jurists do not really discuss the issue of an enslaved woman's consent.<sup>85</sup> The legal status of an individual was so significant in determining their sexual autonomy that the jurists could not conceive of the enslaved woman as a legal subject who held the autonomy to offer consent. Granting her such a right could undermine the jurists' very conception of the legal subjecthood of an enslaved woman.

It is precisely because of this recognition of her inability to offer meaningful consent that the law gave her a right of annulment (*khiyar al-'ataqah*) of marriage after emancipation—that is, when she came into possession of herself as a sexual commodity. This right of annulment has precedents in Prophetic practice. A hadith often quoted in legal texts is that of an enslaved woman by the name of Barira, who, after being emancipated, decided to end her marriage. Mughith, the husband, still desperately in love with his wife, was deeply distressed by her decision. Al-Sarakhsi described the love-stricken Mughith, crying profusely while he followed his wife around town. But she was insistent in her rejection of the marriage. The Prophet intervened in this situation, hoping to change Barira's mind,

urging her to remember that this was her husband and the father of her children. She, however, was adamant and, after confirming that the Prophet was only offering counsel and not commanding her to remain with Mughith, she chose separation. The language used in the hadith to indicate the woman's right to choose emancipation is couched again in the language of ownership and dominion, as the Prophet told Barira: "You have come into ownership of your genital organs so choose [to remain or separate]."<sup>86</sup> Whereas the free woman has ownership over her own body and sexuality, which she transacts to the husband in marriage, the enslaved woman acquires that ownership only through emancipation.

The jurists differ on precisely why an enslaved woman was granted the choice of annulling a marriage at emancipation. Shafi'i jurists held that the annulment was only granted when the husband was also enslaved. While they were compatible (*kafa'a*) as spouses when they were both enslaved, as a free woman she now rises in social rank above her husband. To force her to remain in such a marriage would thus cause her harm (*darar*). Hanafi jurists, however, center the newly acquired sexual autonomy of the emancipated wife in justifying the right of annulment. The harm is not the status difference between the couple but instead the increase in his power (through the marital bond) over the wife. After emancipation, the enslaved woman moved from the legal status of enslaved wife to free wife, which increased the number of divorces the husband could pronounce (from two to three) before an irrevocable divorce. This move also increased her remarriage waiting period from two to three menstrual cycles. It would cause harm, the Hanafi jurists argued, to inflict this on the recently emancipated wife, regardless of whether she had been married off by her enslaver or had chosen to marry with their consent. The option at emancipation was granted to her precisely because of the dominion entailed by marriage. Once freed, she could not be forced to endure the resultant effects of a form of dominion that was placed on her during enslavement, when she could not offer meaningful consent. Al-Kasani states quite explicitly that to keep the emancipated wife in such a marriage would also result in the uncompensated and coercive use of a free woman's sexual commodity by the husband. A free woman, he argues, enters of her own consent into a marriage contract with the agreed on exchange (i.e., the dower) for her sexual commodity. In the marriage of an enslaved woman, it was not the enslaved woman but the enslaver who both negotiated and received the dower (*mahr*) amount.<sup>87</sup> As a free woman, she became owner of her own sexual commodity; she also acquired the legal agency to make decisions regarding her own person and to protect herself from the infliction of harm.<sup>88</sup> The sexual autonomy of legal subjects, then, was set on a spectrum from those who retained full sexual autonomy (free adult men) to those who had very little (enslaved women).

While Hanafi jurists allowed for an enslaved man to be compelled into marriage as well, a similar right of annulment was not granted to him after emancipation. Since marriage meant that the enslaved man came into ownership over

the wife's sexual commodity and he held the unilateral right of divorce, Hanafi jurists saw no apparent harm inflicted on the enslaved man when he was compelled into marriage. Despite the fact that the sexuality of the enslaved man was transacted in marriage, the resultant effect of this was not the sexual use of him but rather the acquisition of the right of sexual use. As we saw in the debate around the consent of the enslaved man to marriage, the Hanafi jurists' understanding of masculinity made it very difficult for them to recognize compulsion of men into sexual intercourse.<sup>89</sup>

Given the broader construction of femininity as passive and as the object of male desire, the juristic discussions of the coercion of enslaved women into marriage were not concerned with the enslaver's right of compulsion or her ability to marry. While the legal discussions around the enslaved man were concerned with justifying how and why a male subject could be coerced into marriage, the discussions around the enslaved woman were concerned with the legal implications of the right over her sexual commodity that she acquired after emancipation. Juristic concerns in this case revolved around the dominion of the husband over the wife and the fact that the freedwoman could no longer be subjected to that particular form of dominion if she had not chosen to enter it of her own will. Despite the fact that both the enslaved man and the enslaved woman shared in their status as enslaved persons, enslavement had different implications for their legal capacities. The legal personhood of the enslaved woman was negotiated between idealized femininity and enslavement, which together only compounded her vulnerability, negating her legal agency and autonomy. Gender intersected with enslavement to configure enslaved men and women as different legal persons.

#### COVERING THE FEMALE BODY: FRAGMENTED GENDERED LEGAL SUBJECTS

Just as the implications of being enslaved were different for men and women, the implications of being female differed for free and enslaved women. This section will focus on juristic discussions of bodily exposure and the modesty of enslaved woman to trace how jurists conceptualized these two classes as different female legal subjects.

In the previous chapter, I considered al-Sarakhsi's discussion of the fundamental condition of women as concealed subjects. Although men must also cover parts of their body in many circumstances, it is women whose entire bodies must be concealed and their presence in public spaces minimized. The inclusion of this discussion under al-Sarakhsi's chapter on juristic discretion (*istihsan*) is perhaps most indicative of the situation-dependent conception of women's bodies as in need of concealment. This statement about women being '*awra*' does not mean that the law actually holds that all women must be fully concealed in all circumstances. Rather, this is a categorical statement about the default condition of women that

simultaneously recognizes the practical exceptions that allowed different groups of women to expose their bodies to varying degrees both publicly and in certain relationships.<sup>90</sup>

While men could look on certain parts of the body of their wives, concubines, and female relatives, their ability to look at women not related to them in these ways was restricted to their faces or, depending on the legal school in question, only the eyes. Enslaved women, however, were subjected to significant bodily exposure. Despite the categorical character of the statement about the need for women's concealment, it did not, in fact, apply to enslaved women. Across the Sunni legal schools, clothing marked the distinction between free and enslaved women, the latter of whom were prohibited from covering their head or face lest they resemble free women.

The practice of using covering to distinguish between enslaved and free women takes its precedent from the companions of the Prophet, in particular the second caliph 'Umar. Hanafi jurists recount that 'Umar strongly rebuked an enslaved woman who veiled her face (*mutaqanni'a*), threatening to beat her and ordering her to remove the veil, saying, "Remove the head covering from yourself, you stinking one!"<sup>91</sup> Early sources, however, seem conflicted on the covering of the enslaved woman's body. The *Musannaf* 'Abd al-Raazaq, for example, narrates that Hassan al-Basri would order married enslaved women or those who had been taken on as concubines to cover their heads.<sup>92</sup> A few other texts recount that during the Prophet's life, enslaved women veiled their heads during prayer.<sup>93</sup> Another recounts that the scholars of Madina held that enslaved women should cover their heads but not wear an outer cloak (*jilbab*) when venturing outside.<sup>94</sup> Malik b. Anas holds that it is preferable for the *umm walad* to pray with her head covered and that she make up her prayer if she had done so with her head uncovered; he did not, however, require her to cover her head as a free woman must.<sup>95</sup> The only reports that indicate an explicit prohibition against enslaved women veiling their heads or faces all return to the second caliph, 'Umar b. al-Khattab. We can see in the report above—the report most cited by Hanafi jurists—that an enslaved woman who dressed in a manner that concealed her body was severely rebuked by 'Umar for doing so. In the *Musannaf* *ibn Abi Shayba* we receive another account of 'Umar's attempt to mark the difference between free and enslaved women through clothing:

'Ali b. Mashar told it to us from al-Mukhtar b. Fulful from Anas b. Malik who said: An enslaved woman entered upon 'Umar and he knew her to be enslaved by one of the Emigrants [*muhajirin*] or Helpers [*ansar*]. She had an outer cloak [*jilbab*] over her with which she had covered her face [*mutaqanni'atan bihi*]. So he ['Umar] inquired: "Have you been emancipated [*'utiqt*]?" She responded in the negative. He said: What's with the cloak? Take it off your head, the outer cloak [*jilbab*] is only for free women from the women of the believers. [The enslaved woman] hesitated so he struck her with a switch<sup>96</sup> until she took it off her head.<sup>97</sup>

The caliph 'Umar's need to maintain a clear differentiation between enslaved and free women conflicted with the practice of other people, including the wives of the Prophet, who did not see such a distinction as necessary. For instance, in a text recounted in the *Musannaf 'Abd al-Razzaq*, 'Umar rebukes his daughter Hafsa, one of the wives of the Prophet, for permitting an enslaved woman working in her home to dress in the manner of free women.<sup>98</sup> As these different narrations demonstrate, the issue of enslaved women's covering was a conflicted and contentious issue among the early generation of Muslims. Early reports seem to indicate that enslaved Muslim women were asserting their right to bodily dignity and integrity by covering their bodies as free women would. They were met, however, with physical violence and forced to expose their bodies in a manner that marked their enslaved status.

Many societies have used clothing to mark difference and status distinctions. In writing about Ottoman sartorial laws, Madeline Zilfi has observed that often apparel was more indicative of social place in Ottoman society than housing, transport, or alimentation.<sup>99</sup> The use of veiling to mark social distinction among women was not particular to the Arabian context but had earlier precedents. Assyrian law, for example, carefully delineated which women could veil. Wives, daughters, and concubines had to veil, as did married women who had previously been sacral sex workers. All other sex workers, as well as enslaved women, were prohibited from veiling and would be severely punished for doing so.<sup>100</sup> Veiling in the early generation of Muslims was a physical marker of the social and legal hierarchy separating enslaved and free women. The enslaved woman's decision to cover her head blurred this distinction between those women who were sexually available through concubinage as opposed to through marriage. This distinction is made clear in another report where 'Umar expressed his frustration with a covered enslaved woman whom he mistook for a free woman such that he desired to have sex with her.<sup>101</sup>

Veiling and the bodily exposure of women marked not only the status between free and enslaved but it also conferred certain social protections to free women from male harassment. Al-Sarakhsi mentions, for example, that it was a common practice among pre-Islamic Arabs to engage in jestful banter (*mumazaha*) with enslaved women. It was in the context of this social practice, al-Sarakhsi argues, that the Qur'anic verse ordered free believing women to take on clothing that marked the difference between them and enslaved women.<sup>102</sup> It is common in contemporary Muslim ethical discourse to equate the covering of the female body with reduced sexual harassment. While al-Sarakhsi's argument here might sound similar, he is not claiming that bodily exposure reduces sexual harassment but instead that covering marks those women who are granted social and legal protection from male sexual attention and its lack—that is, those who must bear it as part of their social situation.<sup>103</sup> Prohibiting enslaved women from covering their

bodies, particularly their heads and faces, meant not only greater vulnerability to inappropriate male behavior but also some level of exclusion from practices that marked the community of believers.

From among these early conflicting opinions about enslaved women's veiling, 'Umar's insistence on bodily covering as a means for differentiation between free and enslaved women won out. However, while early Hanafi jurists agreed that enslaved women could not dress like free women, they disagreed on the specific areas of the enslaved woman's body that could be exposed. Al-Shaybani held that a man can gaze upon the chest, breasts, hair, and legs (below the knee) of an enslaved woman if he is looking to purchase her.<sup>104</sup> He may also touch these parts of her body, even if such a touch is animated by desire. Outside the context of purchase, a man may still look on these parts of her body, but it is reprehensible to do so if it is animated by desire unless he is her enslaver. The tenth-century Hanafi jurist al-Jassas similarly mentions the opinion that an enslaved woman—regardless of whether she is *umm walad* or partially emancipated—prays without a head covering.<sup>105</sup> In discussing Qur'an 33:59, he argues that covering is only obligatory for free woman so as to distinguish between free and enslaved women.<sup>106</sup> While some jurists held that the entirety of the enslaved woman's body could be exposed (except the area from navel to knee), others held that she must also cover her back and torso, including the breasts.<sup>107</sup> Eventually, the dominant opinion of the Hanafi legal school held that men could look on and touch the entire body of an enslaved woman except for her torso, upper thighs, and genitals.

While the early generation of Muslims was often concerned with marking social hierarchy and difference through clothing, for the early Hanafi jurists the justifications offered for modesty or exposure were more attuned to the dynamics of the slave market and the right of the enslaver to the labor of enslaved people. These are two most commonly appearing justifications in early Hanafi legal texts regarding the covering of enslaved women. Hanafi jurists commonly argued that, as a commodity bought and sold on the market, the enslaved person's body had to be available for inspection in order to ascertain its value.<sup>108</sup> In that vein, not just looking but also touching was necessary in order to verify the condition of the enslaved woman's body.<sup>109</sup> As sexual access to the enslaved woman was an enslaver's right of the enslaver, a man's ability to determine his sexual attraction to the woman was significant. So important was this consideration that, while the jurists generally allowed looking at or touching an enslaved woman's body only if doing so was not animated by desire, this was not the case at the slave market. Al-Sarakhsi states explicitly that if a man wishes to purchase a slave woman, he may look on her body even if he experiences desire just as one must look on a commodity in order to determine its appropriate value. Touching with desire, however, is not always necessary to ascertain the monetary value of the slave woman and is thus prohibited.<sup>110</sup>



The jurists' second concern pertained to the enslaved woman's need to go out in public spaces. Unlike free elite women, who had the privilege to stay within their homes, an enslaved woman must of necessity emerge into the world of men. To this end, Hanafi jurists often argued that requiring her to cover her body significantly would put an unnecessary burden on her. Al-Jassas argues that because the enslaved woman travels without close male kin, unrelated men have to be able to interact with her without too many restrictions.<sup>111</sup> This concern for creating ease for men when women emerge into the public space is expressed by other jurists as well. Al-Kasani also mentions that the law allows men to interact with enslaved woman as they do their female relatives, in order to prevent difficulties for men.<sup>112</sup> Otherwise, they would be inconvenienced in having to engage enslaved women in a very restrictive manner and might also experience an element of religious guilt for touching or looking at an unrelated woman. As the public space was the sphere that belonged to men, it was their need rather than the bodily dignity of the enslaved woman that was paramount.

The jurists were also concerned with maintaining the enslaver's property rights by not imposing restrictions that would hinder his ability to make use of an enslaved person's labor. For the law, the main responsibility and obligation of enslaved people is to fulfill the enslaver's demands on them. Al-Sarakhsi notes that an enslaved woman must emerge outside the home to fulfill the needs of her enslaver and does so in clothing that she wears within the home.<sup>113</sup> To require her to cover in the manner of a free woman would impose restrictions on her mobility and infringe on the rights of the enslavers to make use of the enslaved woman as they saw fit, an imposition that the jurists were clearly reticent to make. For the jurists, the rights of enslaved persons as human beings was in tension with the rights of enslavers over them. As we see in this discussion of an enslaved woman's body, the desire to ease men's interaction with enslaved women, as well as the right of the enslaver to make use of enslaved labor, took priority for the jurists over the bodily integrity of the enslaved woman.

The legal debates over the veiling of enslaved women gives us insight into the juristic process of determining individuals' legal rights and obligations. Despite the juristic statement about the need to cover the female body, we can see that enslaved women were not only exempted from veiling themselves; they were not even permitted to do so. Throughout these discussions, Hanafi jurists made clear distinctions between free and enslaved women. While both free and enslaved women were construed as passive legal subjects, their legal agency was vastly different. The discussion of bodily exposure and sexual autonomy demonstrates that enslaved women and free adult women were in fact differently constructed as female legal subjects. Idealized femininity intersected with freedom and enslavement to produce different legal persons despite their shared anatomical sex. Whereas freedom granted greater agency and autonomy to the free woman, the intersection of enslavement and

femininity compounded the enslaved woman's subservience and subjection to dominion.

### CONCLUSION

This chapter began with a statement by al-Sarakhsi about the fundamental difference between human males and females. This difference is supposedly so significant for al-Sarakhsi that it leads him to argue that males and females do not share the same genus. Based on that argument, we might assume that gender should cut across all other distinctions, such that enslaved men and free men are of the same genus despite the difference in their status as free and enslaved persons. Al-Sarakhsi's opinion matches other statements made by Hanafi jurists about an essential nature of gender that we considered in chapter 1. Such ideas would seem to indicate that Hanafi jurists held that men's and women's gendered natures were innate and transcended all other distinctions among humans. The case studies that we discussed throughout this chapter, however, indicate otherwise. In fact, we see that Hanafi jurists took seriously not only gender but other social identities (in this case enslavement) in determining individuals' legal capacity.

While Hanafi jurists certainly articulated essentializing statements about gender, the case studies on the marriage of enslaved people and the bodily exposure of enslaved women demonstrate that legal personhood was at the intersection of a number of different social identities. Rulings based on gender could be displaced when they conflicted with those based on enslavement. Free women had ownership over their own sexual commodity and surrendered their bodily autonomy of their own volition. Enslaved women, on the contrary, were bought and sold at the slave market and thus did not have the right to prevent men from touching or looking at them. They could be used sexually by their enslavers and could also be coerced into marriage. It is for this reason that after emancipation a freedwoman could choose whether to remain in a marriage that was contracted while she was enslaved. Moreover, just as the passivity and subservience that marked femininity did not mean that free and enslaved woman shared the same legal incapacities, so too the shared biological sex between enslaved and free men did not grant them the same legal personhood or degree of autonomy. While both the enslaved man and the enslaved woman shared enslavement as a legal impediment, the intersections of gender with enslavement were such that they produced different legal personhoods, and the enslaved man had greater legal agency than the enslaved woman.

Yet, despite the increased legal capacity of the enslaved man owing to masculinity, he did not have greater legal capacity than all other female legal subjects. The contrast between the legal personhood of the enslaved husband and the free adult woman is particularly illuminating. The free adult woman's legal personhood was constructed at the intersection of femininity, freedom, and legal majority. While idealized femininity was characterized by passivity and subservience,

the intersection of gender, freedom, and legal majority granted the free adult woman greater sexual autonomy than enslaved men. If she had the financial means, as an enslaver she held power and dominion over enslaved people, both men and women. She could marry of her own will and could not be coerced into marriage. As a wife, however, she did not have the unilateral right of divorce that the enslaved husband held. Here it was the husband/wife relation that granted the enslaved husband greater right of divorce than the free wife. In contrast to these two legal persons, the enslaved woman had neither the sexual autonomy to make decisions regarding her sexuality nor the right of divorce. Thus, neither gender nor enslavement were the sole determiners of an individual's position in the social hierarchy. In determining the legal capacity of enslaved men and women, Hanafi jurists did not consider gender or enslavement as distinct categories, and neither had a fixed and predictable impact on the legal capacity of individuals. Instead, the two identities were coconstitutive. In the construction of the enslaved people's legal personhood, neither gender nor enslavement had a fixed and predictable impact on the legal capacity of individuals. The idealized gender norms articulated by Hanafi jurists that we discussed in chapter 1 were constantly in negotiation in relation to enslaved people.