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## Gender and Legal Personhood
in Hanafi Law

In 1995, Jamal Badawi published *Gender Equity in Islam: Basic Principles.*[1] Badawi, an Egyptian-Canadian professor, preacher, and popular speaker, is professor emeritus at the Sobey School of Business at Saint Mary's University in Halifax, Nova Scotia. He is a member of the Fiqh Council of North America and a highly sought-after speaker. *Gender Equity in Islam* was one of the most widely read English-language texts on women's rights in Islam, there having been five reprints in the twenty-five years since its publication. Badawi continues to be invited to speak on this topic in Muslim communities around North America.[2] The book attempted to clarify misconceptions among Muslims and non-Muslims about spiritual, social, and economic relationships between men and women in Islam through an examination of the Qur'an and the Sunnah. Most importantly, Badawi's book insists on equity rather than equality in thinking about gender relations in Islam. He argues that "equality" is often used to refer to absolute equality—that is, equality in every aspect of comparison. He instead prefers the term "equity" because it connotes "justice and overall equality in the totality of rights and responsibilities of both genders and allows for the possibility of variations in specific items within the *overall balance and equality*."[3] That is, while there might be particular aspects of the law that differentiate based on gender, Badawi claims that in the overall balance, the genders are equal in God's eyes. How, then, might we understand the need for gender-differentiated laws? For Badawi, this can be understood if we keep in mind that the roles played by men and women in society are "*complementary and cooperative* rather than competitive."[4]

While Badawi's book is an innovative and intriguing attempt to grapple with Qur'anic passages, Prophetic traditions, and legal rulings that gender privileges, its silences are just as compelling. There is next to no mention of legal rulings regarding

enslaved people or children. For example, in a discussion of property rights, Badawi is at pains to insist that Islamic law granted women property rights just as it did for men. He further argues that women were granted financial security through the dower at marriage as well as through their continued status as independent property owners even as a married woman. In this entire discussion, no mention is made of enslaved people, who had no property rights, whether men or women. Nor is any mention made of the enslaved wife, whose dower was considered the property of her enslaver.[5] One might argue that legal rulings regarding enslavement are not mentioned because this is no longer a relevant social category. Consider, however, that differences in women's legal rights based on their status (female child, virgin, mother, postmenopausal) also do not receive any attention in *Gender Equity in Islam*. Badawi does not recognize that gender was not the only element that determined an individual's legal rights in Islamic law. The only ethical conundrum that the author feels compelled to contend with is the one that exists between men (assumedly all men) and women (assumedly all women). The entire conversation about gendered rights and obligations is framed within the gender binary.

Badawi's assumption about the gender binary is not unique. Many scholars writing on gender in Islam make similar assumptions. Seyyed Hossein Nasr, a scholar of Sufism, makes a similar argument about the complementary roles of men and women. God, he contends, has created humans in pairs (i.e., men and women) and there must therefore be some level of difference between the two parties of the pair.[6] These differences are not just anatomical and biological but also psychological and spiritual.[7] Islam has legislated these differences between the genders in a complementary orientation so as to maintain social harmony and equilibrium that facilitate an individual's ability to live a virtuous life, which is the ultimate goal of human existence from an Islamic perspective. Both Badawi's and Nasr's accounts of Islamic gender relations exhibit what Ayesha Chaudhry has described as traditionalists and neotraditionalists among postcolonial Muslims upholding a patriarchal, idealized cosmology.[8] In this cosmology, God sits at the top of the hierarchy, with the rest of creation ontologically ranked: humans sit above all other creation, with men ranked above women.

While I agree with Chaudhry that premodern Muslim discourse functioned within a patriarchal idealized cosmology, the hierarchical ranking was not established through gender alone. As I have demonstrated throughout this book, multiple social identities determined the position of different collectives within the social hierarchy. In the social order imagined by both Badawi and Nasr, there is no mention of freedom, enslavement, or age as social factors that mediate whether an individual can occupy those reified constructions of masculinity and femininity.

This understanding of men and women as singular categories is a post-Enlightenment idea. As Omaima Abou-Bakr has argued, in the early twentieth century, modernist Muslims adopted an idea of strict gender roles based on biological essentialism.[9] This essentialist understanding of gender came to be seen as

a fundamental aspect of the Islamic worldview that was then read back into the premodern Islamic tradition. The gender binary looms large in modern Muslim discourse, where power relations are largely thought through two figures alone: men and women. While they may play different roles throughout their lives as husband/wife, mother/father, and so on, their essential and static gendered natures mean that they must occupy the same roles despite their changing relations or life situations. This is not a social world in which you will find enslaved men who cannot inhabit the activity and power that characterizes masculinity. In such a narrative, how might we account for the female enslaver who was given control over an enslaved man? Despite her femininity, as an enslaver she held dominance, power, and authority over a man who, owing to his enslavement, was configured as passive.

In this chapter, I provide an overview of legal personhood in early Hanafi jurists' discourse. I argue that legal personhood was constructed at the intersection of different social identities rather than gender alone. This book has focused on three key social identities (gender, age, and enslavement) in order to demonstrate the intersectional and relational nature of legal personhood. These three identities, however, were not the only ones considered by Hanafi jurists, who also took lineage, religion, class, and so on into account. Along with gender, these categories formed a complex matrix that saw many different iterations throughout legal discourse. While Hanafi jurists often articulated hegemonic masculinity as active and emphasized femininity as passive, this idealized gender construction spoke to a hierarchical understanding of social existence rather than an essential and unchanging nature of gender. Although Hanafi jurists held anatomical sex to be male, female, and intersex, the juristic imagination was populated by a multitude of gendered legal persons.

Thus, in this chapter, I make three central arguments about legal personhood in early Hanafi law:

1. Gender was not the only social identity Hanafi jurists considered in constructing legal personhood. Rather, a variety of social identities functioned alongside gender in the construction of legal personhood, key among them being age and freedom/enslavement. Gender, then, is not *the* category by which Hanafi jurists ordered society. In this complex legal terrain, the most advantaged position in the social hierarchy could not be determined through a singular social identity or in abstraction. While we might say that the fullest legal personhood was granted to the free adult Muslim man, class, lineage, and race were also given legal consideration.

2. Legal personhood was, therefore, constructed intersectionally—that is, at the intersection of different social identities. These different social identities cannot be parsed from each other and do not simply compound their effects but instead must be understood as interconnected entities.

3.  In addition to its intersectional nature, legal personhood in early Hanafi law was also shifting and relational. While Islamic legal discourse fixed a set of social identities through which it recognized legal persons, these social identities were not fixed to an individual. The legal personhood of an individual shifted with changes in their life circumstances, as well as in their relations to other legal persons. Whether a child grew to adulthood or an enslaved person was emancipated, the change in an individual's life cycle or life circumstances shifted their legal personhood. Similarly, as a free, adult woman became a wife, or an enslaved man became a husband, or an enslaved woman became an *umm walad* (mother of a child), their shifting relations to other legal persons also caused a change in their legal personhood. This relational aspect of legal personhood gives us a sense that legal persons were not imagined by Hanafi jurists as autonomous and independent subjects. Legal persons were mutually constituted and interdependent.

This chapter sketches out these arguments by bringing in supporting evidence from the case studies analyzed throughout the earlier chapters of the book. In bringing these arguments together, I aim to demonstrate that the category of "gender" did not exist as a group that had shared interests or a shared social position that led to a shared legal personhood as men or women. In questioning gender as a useful category for studying power relations in Islamic law, I seek to show how the focus on gender as a category of analysis in the study of Islamic law presents legal discourse as a "straightened tradition."[10] As Fatima Seedat has argued, such a reading of the legal tradition excludes any discussion of the fluidity and ambiguity that premodern Islamic law was able to accommodate. Reading against this tendency allows us to trace the process by which modern Muslims have imposed their own gendered assumptions onto premodern Islamic law.

## THEORIZING LEGAL PERSONHOOD IN HANAFI LAW

In a discussion of the marriage of enslaved women, the tenth-century Hanafi jurist Abu Bakr al-Razi al-Jassas said:

> And God named enslaved women "maidens" [*fatayat*] through the verse: "from among the believing maidens."[11] *Al-fatah* is the word used for a young girl [*al-shabbah*] whereas the free elderly woman is not called *fatah*. The young and elderly enslaved woman, however, are both called *fatah*. It is said that she [the elderly enslaved woman] is called a young girl, even if she is elderly, because an enslaved woman is not dignified with the respect and reverence given to an elderly [free] woman.[12]

Al-Jassas's statement here distinguishes between several different types of women. A young woman, usually also assumed to be a virgin and never previously married, is distinguished from the older woman. The difference between them is not

simply one of age but also of social status. As women age, they receive more respect and reverence and are allowed greater mobility. Jurists were far more comfortable with the public presence of matronly women who were considered to be undesirable to men.[13]

Age was not the only marker of social status here, however. As al-Jassas goes on to explain, an enslaved woman could never attain the status of a matron. Regardless of her age, she had to remain in a subordinate position in the social hierarchy. While age and life cycle were means by which women could climb the social hierarchy, this was true for free women alone.[14] Here, enslaved women (both young and old) sat at the bottom of the hierarchy.

How might we understand the nature of legal personhood based on al-Jassas's statement? How did age, enslavement, and gender come together in determining the legal capacities and legal agency of these different categories of women?

### Intersectional Personhood

In her 1989 article, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics," the Black feminist and critical race theorist Kimberlé Crenshaw provides a framework for analyzing the specificities of the intersectional subordination and discrimination faced by Black women.[15] The existing dominant feminist and antiracist frameworks, she argues, have taken a single-axis approach, looking at sexism and racism as distinct categories of oppression. Such a framework builds an understanding of discrimination from the experiences of those who are most privileged within the singular category—that is, those who would not face discrimination *but for* their racial or sexual identities. Our understanding of sexism, Crenshaw argued, is based on the experiences of White women, those who are privileged by their Whiteness and would not face discrimination if it were not for their sexual identity. Similarly, the understanding of racism is based on the experiences of Black men who are discriminated against on account of to their racial, but not their sexual, identity.

To clarify her critique, Crenshaw discusses several cases in which the court's framing and interpretation of the experiences of Black women failed to understand the intersectional discrimination they faced. In a lawsuit filed by five Black women against General Motors (GM), the court rejected the plaintiff's claim, arguing that Black women workers were not considered a special class in antidiscrimination laws. The court reasoned further that since GM had hired women (albeit White women) prior to 1964, there was no sex-based discrimination in the seniority system. For Crenshaw, this and other cases demonstrate that single-issue analysis, one that can only see sex and race discrimination as distinct categories, fails to recognize that Black women sit at the intersection of these different categories and thus experience discrimination in a number of ways.[16] Crenshaw gives us the metaphor of traffic at a four-way intersection: if an accident takes place at the

intersection, it will likely be because of cars traveling from many different directions. Similarly, we can understand that an incident of discrimination can be the result of multiple intersecting factors rather than one alone.

While Crenshaw developed intersectionality as a critical lens for thinking about the discrimination faced by Black women, the concept has become a useful lens for analyzing the intersecting nature of social structural arrangements of power more generally.[17] In my reading of Islamic law, it opens up rich analytical possibilities for thinking about the power relations that were at play in the construction of legal personhood. Furthermore, examining the intersections of different categories that were at play gives us a more holistic understanding of the systems of power authorized by the law.

If we return to al-Jassas and read his statement through Crenshaw's metaphor, we can see how gender, age, and enslavement intersect to create at least *three* distinct categories of women: free young women, free elderly women, and enslaved young and old women. As Marion Katz has argued, "gender and its attendant legal implications are deeply modulated by reference to other markers of personal and social status."[18] Seedat has gone even further and argued that the category "woman" does not exist in the law. By comparatively examining women's legal capacity in modern and premodern legal discourses, she demonstrates that women's legal subjectivity in premodern legal discourse was situational and varied, insisting that jurists did not have a concept of "woman."[19] There is no assumption about shared interests or social position that would construct them as a single preexisting group prior to the categories of enslavement and age. Subsequently, legal rulings were also not based on "woman" as an abstract category. Furthermore, gender, age, and enslavement also cannot individually account for the complicated nature of the social hierarchy that was authorized and naturalized by Hanafi legal discourse. Early jurists did not assume that gendered legal rulings would apply consistently to all women. Instead, they developed different legal rulings for different categories of women based on their age and social statuses. Free women, enslaved women, free female children, enslaved female children, married women, and unmarried women were all different categories of women subject to different legal rulings.

If the different categories of women did not share legal personhood as "women," how did the law differentiate between them based on the particular configurations of their social identities? How did those identities interact with one another and how did they impact individuals' legal capacities? In order to better understand the nature of intersectional legal personhood, I propose that we read the relation between these social identities as co-formative rather than additive. An additive framework, Patricia Hill Collins argues, addresses the absence of certain identities in analysis by calling attention to their absence.[20] In such an approach, we might consider enriching our analysis by adding those other identities to those already under examination. The additive approach, however, runs the risk of centering one identity as a "master category of analysis" while making others peripheral.[21]

That is, it would largely center gender as the primary social identity and then bring in age and enslavement as additional but less important identities that shape legal personhood. Such an approach would assume that free women, enslaved women, adult women, and female children are all members of the single category "woman." Conversely, free men, enslaved men, male children, and so on are also all assumed to share in their masculinity as a privileged status. Age and enslavement would be brought in to demonstrate the particularities of gendered vulnerabilities without decentering the assumption that the fundamental vehicle of their oppression is gender. Analyzing the relation of these identities through coformation, by contrast, "posits holistic analysis of a seamless process of mutual construction."[22] Such an approach recognizes that these social identities are interdependent and mutually constructed and thus cannot be disassembled and analyzed as separate entities. Regarding legal personhood in early Hanafi law, a coformative approach allows us to recognized that the intersection of different social identities create an entirely *new self*—that is, a new legal person who must be analyzed and understood as a separate entity. To analyze each intersection of social identities as creating a unique legal person would require us to abandon the idea that gender had a greater role in shaping the legal personhood of an individual than the other identities.

To make clearer my point about the creation of a new personhood, let us consider the figure of the enslaved woman whom we have encountered throughout this book. In an additive approach, her legal personhood would be understood as the convergence of three distinct sets of legal incapacities: gender, age, and enslavement. If she were an enslaved girl, then her legal minority would be assumed to add another layer of legal incapacity and vulnerability. An additive approach would see "woman" as a singular legal person and assume that "femininity" imparts a shared set of legal impediments to all individuals sexed female. Gender would stand as a social identity with a defined set of legal incapacities that exist prior to the legal person. Enslavement would be understood similarly. As we saw in chapter 1, the jurists articulated a conception of masculinity and femininity that was understood through the active/passive binary. Masculinity was characterized by activity, read as self-determination, bodily and sexual autonomy, and the ability to hold authority over others. The foil of masculinity was femininity, defined by its passivity, a lack of self-determination, inhibited bodily and sexual autonomy, and subordination to authority. In reading the enslaved woman's legal personhood through an additive approach, we might assume that both the enslaved woman and the free woman shared in femininity. The difference between the two would be understood as the further disadvantage of enslavement that affected the enslaved woman.

An additive framework for analyzing legal personhood, however, would be unable to account for the many discrepancies in the legal personhood of free and enslaved women and the different ways that gender and enslavement impact them. The enslaved woman certainly shares with the free woman certain constraints to legal agency. For example, both these legal categories of women would be unable

to lead men in ritual prayer owing to their gendering as women. They would also be unable to hold political authority. There are, however, also significant differences in their legal capacities for which an additive framework would be unable to account. The free woman had to consent to her marriage, had to the right to demand a dower from her husband, and had the right of property ownership, which opened up for her the possibility of acquiring both wealth and authority over other individuals, particularly as an enslaver. The enslaved woman as a sexual commodity was seen as the property of her enslaver, who could compel her into marriage or make sexual use of her if the enslaver were male. The enslaved woman also had no right over her dower in marriage, as this was seen as the rightful property of the enslaver. Finally, jurists put fewer restrictions on the enslaved woman's mobility, arguing that such restrictions would infringe on the enslaver's right to her labor. In permitting the male gaze on and the physical touching of the enslaved woman's body, Hanafi jurists differentiated between enslaved and free women through the mechanisms of bodily autonomy and integrity. While we might see restrictions on mobility and required modesty as legal and social disadvantages today, in the early modern Islamic social world, increased restrictions marked an elevated social status. Thus, we can see how gender did not entail a fixed legal personhood.

Enslavement also did not extend a shared legal personhood to all enslaved people. We see this particularly in the legal discussions of marriage and sexual use of enslaved people. While Hanafi law permitted the enslaver to compel both the enslaved man and woman into marriage, the enslaved husband held the right of divorce and thus held greater avenues for exiting a marriage into which he was compelled. This difference in enslaved-gendered agency was even more pronounced in the other Sunni legal schools, which did not allow for an enslaved man to be compelled into marriage. Similarly, the sexual accessibility granted to the enslaver by Hanafi law differed according to the gender of the enslaved person. Enslaved women could be used sexually by their enslavers. The enslaved man, on the other hand, was not conceptualized by the law as a sexual commodity in the same manner and thus retained a greater level of sexual autonomy. In the figure of the enslaved man we can see that maleness also did not entail a fixed set of legal advantages that extended to all individuals sexed male. The enslaved adult man was not characterized by any of the qualities of self-determination, autonomy, or authority that characterized maleness. While the enslaved man could not be made use of sexually, he could be compelled into marriage, his sexual and reproductive capacities considered the property of the enslaver.

To understand the vulnerabilities of the enslaved woman, then, we must think of the intersection of gender, age, and enslavement particular to her as a space where a new legal person was created. Yet the enslaved adult woman's legal personhood cannot be understood simply as the compounded vulnerabilities of femininity plus enslavement. I propose instead that these different social identities come

together in a seamless manner, mutually constructing one another. The nexus of these different identities then acquires particular meaning in each articulation of legal personhood. They cannot be disaggregated from one another in order to see how each individual part works outside its interaction with the whole.[23]

The coformative approach thus helps us understand the discrepancies in legal agency between the free and enslaved men and women that I have discussed in the first three chapters of the book. Each social identity does not carry meaning that exists prior to its intersection with others; instead, the synthesis of a unique configuration of social identities creates a particular set of legal in/capacities. If we look at things this way, we can see that the intersection of freedom, adulthood, and femininity rendered the free adult woman subordinate as a sexual subject but also granted her a degree of sexual autonomy and ownership over herself as a sexual commodity. In the enslaved man, we note that he was protected from sexual use but deprived of self-determination. Looking at matters through the issue of sexual autonomy, we see there is little distance between the free woman and enslaved man, despite the fact that one is sexed female and the other male. We cannot uncouple gender from enslavement, freedom, or age. Neither gender nor enslavement as social identities were characterized by a particular legal capacity or a particular set of constraints on legal agency that were shared across all people sexed female or designated as enslaved. Rather, each of these social identities are interdependent and take on particular meaning as they conform.

## Legal Personhood as Relational

The feminist legal theorist Ngaire Naffine argues that modern legal systems, particularly those emerging from liberal traditions, present themselves as impartial, treating all individuals equally regardless of their particularities. This legal person is thought of as sovereign, self-legislating, and autonomous, unencumbered by relations of dependence, deriving their rights and duties from personally chosen contracts. This frees them from customs and traditions, as well as familial relations and community obligations that are not of their choosing. Naffine describes this imagined legal person in modern systems as one who, "only ventured into society when he chose to do so, when he needed something done; when other people served a clear instrumental purpose. Otherwise, he was largely content with his own company and could manage well on his own."[24] This idea of the modern legal person is also understood to be universal, an abstraction that can be applied equally to all individuals, allowing for the assigning of liberal rights and duties to all individuals irrespective of human variation and difference.[25] Feminist legal theorists have, of course, critiqued this triumphalist account, arguing that women have never been allowed to be sovereign, autonomous, and rational subjects. What is important about their critique is the argument that this abstracted notion of the modern legal person is in fact based on a conception of the social

order in which only particular types of individuals can flourish. The legal person imagined by the law, Naffine contends, is a middle-class man who is able-bodied, autonomous, rational, educated, monied, competitive, and self-interested.[26]

Legal historians contrast this modern legal person with the socially stratified medieval worlds in which a person's legal status depended on custom, law, and one's location within the family. Legal personhood in early Hanafi law was neither abstracted nor did it center the individual outside of their social, familial, and communal ties. In this legal world, personhood was constructed as both relational and situational, by which I mean that: (a) legal personhood was established based on the social relations in question and was mutually constructed/constituted by those relations; and (b) legal personhood was dependent on the situation. As situations and relations changed, so did the individual's legal personhood. Legal personhood was therefore not fixed but dynamic and constantly shifting. Autonomy existed instead on a spectrum, with individuals acquiring greater or lesser autonomy depending on the relation in question. No individual, however, was seen as fully autonomous in the sense of being free from their social relations or from the obligation to exist in relations except through their own personal choice. Social relations were understood to be a fundamental aspect of human existence. The relational and situational nature of legal personhood meant that the authority and privilege, or, conversely, the legal incapacities and subordination, ascribed to an individual were not seen as essential to them but instead pertained to that particular combination of relation and situation alone.

To understand the relational and situational nature of legal personhood, let us consider the power to compel children into marriage granted to the father and paternal grandfather that I discussed in chapter 2. While the other Sunni legal schools held that only the father and paternal grandfather had this authority of compulsion, the Hanafis allowed other individuals who were designated as legal guardians of a minor child to also compel the child into marriage. The difference between the marriage contracted by the father and paternal grandfather versus other legal guardians was manifested in the child's ability to exit the marriage after reaching puberty (legal majority). The marriage contracted by agnate relatives could be broken at that point, whereas the marriage contracted by the father and paternal grandfather was not subject to rescission. Instead, the minor child would have to wait until legal majority to exercise their right of divorce (in the case of the minor groom) or petition for divorce (in the case of the minor bride). The extensive powers given to the father and paternal grandfather were embedded in the juristic assumption that these two individuals were of sound opinion and had the child's best interests in mind. Despite the fact that historical records show that mothers routinely arranged the marriages of their minor daughters (less so minor sons), Hanafi jurists presumed that the mother could not be relied on to make sound judgements in establishing new kinship connections.

If we look at the juristic determination to grant the paternal grandfather greater authority than the mother in contracting these marriages, it would seem that it is the shared masculinity of the father and paternal grandfather that confers this authority; however, it was in fact an effect of the father/child relationship. Certainly, if we look at the juristic determination to grant the paternal grandfather greater authority than the mother in contracting these marriages, we might think that it is the shared maleness between the father and paternal grandfather that confers this authority. I point to the relational aspect of this authority, however, not to downplay the gendered nature of authority but to urge us to consider that this authority is neither essential to individuals who were sexed male by the law nor is it acquired by all men. If we analyze this authority as one granted to legal persons sexed male, then there are several discrepancies that we would have to account for. The most obvious of these is the fact that the minor son, also sexed male, was subject to compulsion in marriage. While the marriage of minor sons was perhaps less prevalent as a social practice than the marriage of minor daughters,[27] as a matter of legal principle the son's masculinity did not grant him the self-determination that would protect him from compulsion. Similarly, the law did not recognize all fathers as patriarchs. Islamic law generally did not recognize kinship ties of enslaved people, who could not exercise authority over others in society and thus could not serve as guardians. As an enslaved person, the enslaved father was neither a patriarch of a family nor did he carry the legal capacity to exercise authority over his children. The law recognized only free fathers as carrying the power and authority of a patriarch.

The free father was believed to have a vested interest in the family and in controlling the kinship relations that were established through marriage. As the father of a son, the paternal grandfather also held the position of patriarch and was equally invested in these decisions. The paternalistic ethic of care that governed the father-child relationship assumed that paternal instincts would prevent the father/paternal grandfather from making decisions that would harm the child's welfare. Furthermore, since the child was also a member of the family, marital decisions that were of benefit to the family were also seen to be in the best interest of the child. It is for this this reason that Hanafi jurists did not allow rescission for the marital decisions of the father/paternal grandfather. The father and paternal grandfather's authority and power were thus only acquired when a particular relation was established—that is, once a man was married and became a father (and subsequently when his own children had children). Yet this paternal authority did not extend to all the relations that that individual was embedded in. That is, while the father/paternal grandfather also held authority as a husband and enslaver, those relations differed significantly. While we might be tempted to see children, wives, and enslaved people all as dependents, each one of these represented a unique form of dependency that constructed unique legal personhoods, creating different modes of legal agency and power relations. The legal personhood of father and minor child, then, are relational and mutually constructed.

Thus, a change from a father/minor child relation to a father/adult child relation shifted the legal agency ascribed to both.

As a free child approached puberty, they entered into a liminal stage defined by Hanafi jurists as prepubescence (*murahaqa*). In this stage, the free child began to acquire rights to self-determination. Thus, they could contract their own marriage, with the marriage being suspended until the guardian consented to it.[28] Hanafi jurists also allowed a free prepubescent child to begin engaging in commercial transactions under the supervision of their guardian, so that they might acquire experience in handling financial matters.[29] In this liminal stage, the free child was being socialized to enter the world of free adults.

As free children came into legal majority, they attained greater legal agency. In a world where the ability to procreate and fatherhood were markers of increased social status, puberty (marked by nocturnal emission) marked a free boy's entrance into society as a potential patriarch. As al-Kasani argued, nocturnal emission marks the boy's ability to procreate, which allows him to move from the domain of children into that of fathers.[30] For a free girl as well, puberty marked the possibility of marriage and procreation. If she was already married, consummation and moving into the marital home marked a shift in her legal personhood, granting her greater social status and autonomy. We can see this most clearly in the juristic discussions of virginity and matronhood, where the former is marked by shyness, timidity, and naiveté, and the latter by emotional and intellectual maturity and a greater say over her own matters.[31] The free adult, then, whether male or female, could no longer be compelled into marriage. Unlike the other Sunni legal schools, Hanafi jurists did not permit a free woman to be married off by her father without her consent. She could also contract her own marriage, although it could be challenged by her male kin if they held that her choice of spouse was not suitable.

The relational nature of legal personhood meant that individuals occupied multiple legal personhoods at the same time, depending on the different relations in which they were embedded. For an individual to occupy multiple legal personhoods meant that the intersectional configuration of social identities that shaped an individual's legal personhood was not an essential aspect of an individual but instead dynamic and constantly shifting. Theories of identity as performative might be helpful in grasping legal personhood's relational nature in early Hanafi law. In writing about the complex creation of identity between personal and social structures, Stuart Hall writes that "identity is not a set of fixed attributes, the unchanging essence of the inner self, but a constantly shifting process of *positioning* . . . In fact, identity is always a never-completed *process* of becoming—a process of shifting *identifications*, rather than a singular, complete, finished state of being."[32] Hall's account points to the fact that identity is not simply a personal matter but is shaped by social structures (in our case, a legal system). These social structures not only create identities as a vehicle through

which power relations are exercised but they also provide the conditions that result in the internalization of these identities by the individual. This allows us to see that identity is not a reflection of an individual's essence but instead something that is acquired and differentially performed based on shifting contexts and social relations.[33]

To demonstrate this point, let us turn to the free adult wife. As a free woman, she had ownership over her own sexual commodity and the self-determination that allowed her to contract her own marriage. Neither the free minor girl nor the enslaved adult woman had the legal capacity to exercise such self-determination. Both the free minor girl and the enslaved adult woman could be compelled into marriage and neither could exit that marriage until emancipation (in the case of the enslaved wife) or legal majority (in the case of the minor bride). The free adult woman, on the other hand, acquired self-determination both through freedom and legal majority. Once she married, however, the free woman acquired the legal personhood of a wife, a relation that required her to take on a subordinate position to her husband and to relinquish her sexual autonomy and mobility.[34] Her legal agency was only constrained in relation to her husband, however. She still maintained ownership rights and, as such, could be an enslaver, thereby exercising power and authority over the people she enslaved. As Kecia Ali has mentioned, femininity certainly constrained the position of the female enslaver.[35] She could not, for example, make sexual use of enslaved men. Where early sources mention instances of female enslavers interpreting scripture to claim such a right, there was no hesitance in intervening in a manner that violated her ownership rights.[36]

Femininity was certainly at play in the position given to the female enslaver; we should be hesitant, however, to read this femininity as a shared identity across the female enslaver and enslaved women. The role that femininity played in the construction of the legal status of an individual was "relational and not absolute."[37] Like male enslavers, female enslavers were oriented toward slavery as a relation of property that gave them both an economic advantage as well as a means for acquiring authority and social status.[38] She still held ownership over the sexual capacities of both enslaved men and women. She could compel them into marriage, and any children born to the women she enslaved were her property. Additionally, as Islamic law did not have coverture laws, a wife retained her property rights—her husband could not exercise control over the people she enslaved. As both a wife and a female enslaver, then, a free adult woman could occupy different legal personhoods at the same time. This allowed her to have different positions in the power structure that shaped the social order, moving between a position of power and submission depending on the relation and situation.[39]

The relational and situational nature of legal personhood can also help us understand the socially stratified mode of enslavement in the Islamicate context.

While enslaved people were deprived of property ownership and were subject to the authority of their enslavers, those enslaved by the elites in society could acquire a significant amount of wealth and also take up positions of public authority. Even those enslaved in urban households, particularly enslaved men, might find themselves managing a business or engaging in commercial transactions on behalf of the enslaver. Hanafi jurists often discuss what manner of financial and commercial transactions were permissible for an enslaved person and which ones would be invalid or suspended until the enslaver's consent could be ascertained.[40] In early Hanafi law, no single legal capacity or legal agency defined an individual at all times or in all relations.

The social world imagined by early Hanafi jurists was made up of a complex web of social hierarchies, and an individual's place in this world was not defined by one identity but a multitude of intersecting identities. While I have focused in this book on gender, age, and enslavement, social identities relating to religion (Muslim versus non-Muslim), class, and race were also at play in determining an individual's social location and their resultant legal status.[41] Understanding the intersectional nature of legal personhood allows us to recognize, as Marion Katz has argued, that neither "man" nor "woman" were legal persons. Gender was only one of the social identities that shaped a person's legal status. What mattered was not that you were a man or woman but instead what *kind* of man or woman you were, free/enslaved, adult/child, and so on. I have also argued that each one of these intersecting social identities created an entirely new legal person. While we might be tempted to privilege the shared gender of the free adult man and the enslaved adult man, they were in fact very different legal persons. The enslaved adult man, despite the fact that he is sexed male, did not occupy any of the characteristics of activity, self-determination, and autonomy that marked maleness. Centering the gender of these two figures would prevent us from recognizing the social marginalization and vulnerabilities of the different categories of people sexed male who did not enjoy the power and privilege occupied by the free adult male. Even among free men, status and lineage (*nasab*) made a significant difference in one's social status.

In addition to its intersectional nature, legal personhood in early Hanafi law was also relationally constructed; that is, individuals acquired a particular legal personhood as they came into a particular social relation. This is evident in Hanafi jurists' imagination of the individual as one who was embedded in a network of complex social relations. Recognizing the relational nature of legal personhood helps us understand how the enslaved man could be compelled into marriage by his enslaver and yet, once oriented as an enslaved adult husband, retain a husband's right of divorce (albeit in two pronouncements rather than three). As I have argued, individuals inhabited multiple legal personhoods at the same time,

allowing them to exercise different legal capacities depending on the particular relation in question.

## WHAT CAN WE SAY ABOUT GENDER IN EARLY HANAFI LAW?

If, as I claimed above, neither "man" nor "woman" was a legal person in early Hanafi law, what can we say about the role of gender in constructing legal personhood in legal discourse? In this section, I will demonstrate that while early Hanafi jurists certainly articulated idealized gender norms, these conceptions of gender along the active/passive binary were used to justify legal precedents and were not a functioning logic of the law. As we saw in chapter 1, there are many instances where early Hanafi jurists both articulated and reasoned with assumptions about hegemonic masculinity as active, agential, and dominant, and emphasized femininity as passive and subordinate. However, we have also observed that individuals sexed male and female by the law could occupy both activity and passivity. Masculinity and femininity in early Hanafi law were, therefore, not the primary logic through which jurists determined individuals' legal agency and capacity.

Gender was in fact not the primary mode of ordering social relations in early Hanafi law. In fact, the intersectional and relational nature of legal personhood helps us see that early Hanafi law did not function on the assumption of a gender binary. While jurists assumed that humans exist as two sexes and also recognized intersexuality and gender ambiguity, this did not translate into two gendered subjects.[42] Hanafi legal discourse was populated by a multitude of gendered subjects. Following decolonial feminist scholars who have argued that gender as a mode of organizing relations is a colonial construct, I propose that these observations about legal personhood force us to question whether gender as a salient category of analysis can seamlessly map on to premodern Islamic law. In the sections that follow, I begin with an overview of the critiques made by gender historians and decolonial feminists about gender as a category of analysis. Employing this scholarship as my theoretical framework, I then argue for decentering gender in the study of Islamic law in order to fully grasp the complex web of relations through which power was exercised in legal discourse.

### Is Gender a Useful Category of Analysis?

There are perhaps few pieces that have had such tremendous impact as Joan Wallach Scott's 1986 article, "Gender: A Useful Category of Historical Analysis."[43] Published around the time that women's history as a field felt the urgency for a clearly articulated theory about the concept of gender, Scott's article was an attempt to offer a more "usable theoretical formulation" of gender as a category of analysis.[44] She critiqued feminist historians who tended to analyze gender as a distinct category from other relations of oppression and also for their reliance on

physical difference as fixed and universal across historical time. Such an assumption, Scott argued, gave gender an ahistorical character and saw history as "epiphenomenal, providing endless variations on the unchanging theme of a fixed gender inequality."[45] In Scott's assessment, the field needed a concept of gender that could stand as a category of analysis while at the same time rejecting that the gender binary must necessarily exist in an antagonistic relationship that is both inevitable and universal.[46] She thus proposed a theory of gender as a category of analysis that rested on two propositions: "gender is a constitutive element of social relationships based on perceived differences between the sexes, and gender is a primary way of signifying relationships of power."[47] These two propositions draw on four interrelated elements: (1) culturally available symbols that can have multiple and at times contradictory meanings; (2) normative concepts that give meanings (and constrain meaning) of these symbols; (3) politics and social organizations that structure these normative concepts; and (4) gender's subjective identity.[48]

Scott's article and analytical framework have had a tremendous impact in the fields of gender history, as well as women's studies more broadly, with the *American Historical Review* describing it as "canonical."[49] The idea of gender as an category of analysis, however, has not been without its own set of critiques. Gender historian Jeanne Boydston argues that while Scott criticizes the assumed fixity and universality of the oppositional gender relation, her theory still falls back on the gender binary. Scott's proposal that "gender is a constitutive element of social relationships based on perceived differences between the sexes" only deflects the assumption about sexual difference away from a naturalized body to a perceived body.[50] While the four interrelated elements make room for changing and culturally distinct gender systems, it only offers variations to—but does not challenge— the assumed universality of the gender binary.[51] Boydston argues that Scott's second proposition not only further entrenches the gender binary but also renders difficult the possibility of imagining "distinctions between males and females that are not invidious to one or the other group, and thus correspondingly difficult to conceive of distinctions that do not register as primary axes for allocating authority."[52] Boydston cautions that gender as a named category now functions as a set of universalized premises, flattening complex historical processes and meanings;[53] she further contends that certain feminist historical accounts disregard the very local character of the concept, instead universalizing the *local* that is particular to the United States and Western Europe.

Many non-Western historians have argued that not all societies were organized around gender. Boydston offers as an example historical and anthropological studies that abandon questions focused on sexual opposition (such as gendered division of labor or authority) and center instead on the character and status of the sexual binary. Historians of Native American cultures have pointed out, for example, that while the male/female binary was present historically in Native American cultures, it always intersected with other binaries such as war/peace, young/old,

or plant/animal.[54] These studies challenge our assumption that the male/female binary was the primary signifier of differential relations of power. Anthropological accounts of the two-spirit people in Native American cultures also push us to complicate the gender binary by recognizing that for many cultures, the sexed body was not tied to gender.[55] Fundamentally, then, these studies give us different possibilities for defining gender, "from social relations in which a male/female binary may be present and important, but not necessarily primary, to a system of gender in which multiple other axes of identity frequently modify and sometimes entirely overwhelm the binary and in which the binary, even when present, cannot be reduced to oppositionally sexed bodies."[56]

Decolonial feminists have posed similar questions about both the universality of gender and the gender binary as a colonial construct. The decolonial African feminist Oyèrónkẹ́ Oyèwùmí has argued that feminist scholars treat both gender as a category as well as women's oppression as a universal, assuming also that gender is the explanatory factor to understand the subordination of a group called "women."[57] The modern Western system, Oyèwùmí argues, is animated by a bio-logic, a mode of thinking that centers biology as the rationale according to which society is ordered and hierarchies are established. In this bio-logic, an individual's biology determines their social status. The social category of woman is then based on a particular body type, understood always in relation to the other body type that is categorized as man. In the Western system, "physical bodies are *always* social bodies . . . [;] there is really no distinction between sex and gender."[58] Oyèwùmí contrasts this system to precolonial Yorùbán society, which, she argues, did not know the category "woman" until its introduction by colonizers. That is, "women" were not assumed to be a preexisting group based on a shared body type that coalesced around shared interests or social status.[59] In the traditional Yorùbán family, kinship roles and categories were not based on gender, and thus power centers within the family were also diffused and not gender-specific. This is in sharp contrast to the modern Western construct of the nuclear family in which gender is both the fundamental organizing principle as well as the primary source of gendered oppression. As the nuclear family is defined by two parents and children, this leaves little room for other kinship relations and essentially traps a woman in the role of "wife," which she carries with her throughout her other social locations.[60] In Yorùbán society, it was instead seniority that formed the fundamental organizing principle.

> Yorùbá society was hierarchically organized, from slaves to rulers. The ranking of individuals depended first and foremost on seniority, which was usually defined by relative age. Another fundamental difference between Yorùbá and Western social categories involves the highly situational nature of Yorùbá social identity. In Yorùbá society before the sustained infusion of Western categories, social position of people shifted constantly in relation to those with whom they were interacting; consequently, social identity was relational and was not essentialized.[61]

Through her analysis of precolonial Yorùbán society, Oyèwùmí presents a critique of the universality of gender assumed by feminist scholars. She argues that if we take the idea of gender as a social construction seriously, then we must also understand the possibility that it does not look the same in every place and every time period. If we can recognize this, Oyèwùmí argues, then we must also accept the possibility that there were both social and temporal contexts in which gender did not exist.[62] Gender, then, cannot always serve as the appropriate map for studying non-Western and precolonial societies.[63]

The challenges of using gender as a category of analysis in the study of the Islamicate context more specifically has been raised by the feminist historian and gender theorist Afsaneh Najmabadi. Describing her study of gender's role in the formation of Iranian modernity, she explains that her initial reading of gender in Qajar Iran (1785–1925) could not contend with some of the materials she was finding in her research. It was only after she interrogated the narrative implicit in the category of gender that she realized the binary construction of man/woman was a production of early modern Iran and not the cultural logic of gender for premodern Iran. This realization led her to question whether gender as a category of analysis can travel transhistorically without an investigation into our assumptions about the category. In speaking of Qajar Iran, Najmabadi argues that this was not a world of a gender binary where men and women were considered complimentary, but instead one where men and women were thought to be of the same essence, with woman being an imperfect man. In such a world, all genders were defined in relation to adult manhood.[64] She proposes instead that we study both masculinity and femininity as concepts that are "internally fractured."[65] In a binary understanding of gender, both masculinity and femininity are fixed and stable, leading us to read any fractures of masculinity as effeminization. An understanding of these concepts as internally fractured would then lead us to abandon the idea that these categories are coherent or exist in a simplistic binary relation.

These critiques about the Eurocentricity of the category of gender provide a useful theoretical framework for thinking about gender and premodern Islamic law. Analyzing legal personhood through a decolonial framework allows us to recognize that gender was neither a binary in legal discourse nor the primary identity for ordering social relations. It is only through a decentering of the category of gender in our analysis that we can grasp the nature of the complex social hierarchy through which individuals acquired legal personhood in Islamic law. Decentering gender also allows us to recognize and name the power relations that existed among different categories of people, a recognition that challenges the universal assumption of women's subordination.

### Beyond Gender in the Study of Islam

The issue of women's legal personhood in Islamic law is a vexed question, and women's disadvantaged status in Islamic law has been a contested subject

of critique since the nineteenth century. Focusing primarily on positive law, Orientalist scholars painted a picture of Islamic law as rigidly patriarchal and unchanging.[66] Gender scholars have intervened in this debate to complicate such narratives of gender oppression by looking at legal practice. Social historians like Judith Tucker and Leslie Peirce have argued that while legal courts upheld social hierarchies, they often intervened to mediate the excesses of male power and authority. Rather than presenting women as disadvantaged objects of the law, these scholars demonstrate that women often expected the judge to intervene on their behalf and employed gendered strategies to influence court decisions in their favor.[67] Scholars have also turned to substantive law as a means to further explore and investigate women's legal status and its implications in how jurists developed legal rulings and institutions. Scholars like Leila Ahmed have argued that women's autonomy and legal status was greatly reduced through Islamic law.[68] Alternatively, Muslim women scholars like Azizah al-Hibri and Asifa Quraishi-Landes approached Islamic law with an eye to extract gender egalitarian legal rulings while critiquing the patriarchal elements as the resultant effect of juristic bias.[69]

The early 2000s saw a shift away from a reclamation of legal rulings and broad historical narratives to a more focused study of the historical context within which Islamic law and its resulting gendered assumptions developed. These scholars also explored legal personhood, offering different arguments about the status of women as legal subjects. In interrogating the legal construction of marriage and divorce, Kecia Ali has noted the relation between gender and slavery as categories of legal disability in Islamic law.[70] These two categories, she argues, were not independent of one another; both enslaved people and women "were overlapping categories of legally inferior persons constructed against one another and in relation to one another—sometimes identified, sometimes distinguished."[71] However, despite their interconnectedness, only gender is a permanent and enduring impairment to legal subjecthood in Islamic law, while conditions such as enslavement and legal insanity are temporary in nature. Gender, she argues, is the most crucial distinction between individuals in Islamic law.[72]

Judith Tucker sees woman as a legal subject as a matter of "doctrinal tension."[73] She notes that while women's agency in economic matters was largely similar to that of men, in other aspects of the law women were more constrained. Thus, while women were recognized by law as independent property owners, their agency, insofar as they were members of families, was hampered by the interests of the family and the patriarchal society to which they belonged. This is particularly evident in women's mediated right to contract a marriage and their lack of the unilateral right to divorce.[74] Depending on the legal arena, Tucker claims, the tension between women's full and impaired legal agency was resolved by allowing the interests of a patriarchal society to supersede: "Woman as family member (whose marriage will affect her male relatives and therefore must be vetted by them) and Woman as part of patriarchal society (whose behavior must be policed

and restricted, thereby limiting her knowledge of and activity in the public sphere) trump the Woman as equal legal subject."[75]

Echoing Tucker's observation about women's inconsistent legal agency, Marion Katz argues that while gender has a central role in juristic thought, "gender and its attendant legal implications are deeply modulated by reference to other markers of personal and social status."[76] That is, in early Islamic legal discourse, "woman" was not a homogeneous category but was mediated by other factors such as age and enslavement.[77] Similarly, Baber Johansen recognizes the multiple social hierarchies that functioned in shaping an individual's agency in social exchange (i.e., the exchange of noncommodities for goods or monetary values, typified by marriage).[78] Speaking of the distinction between commercial (commodity for commodity) and social exchange, Johansen argues that while commercial exchange was accessible to all who were deemed to have rational capacity, an individual's admission into social exchange depended on their (or their family's) location within five social hierarchies: religion, gender, kinship, generation, and freedom as opposed to enslavement.[79] Johansen also remarks that for the Hanafis, "the importance of the gender criterion outweighs that of the difference between free male persons and male slaves."[80]

These observations raise critical questions about how Islamic law determined individuals' legal capacity and, subsequently, their legal agency. All four of the scholars I mentioned above recognize the important role played by gender in legal discourse while also noting a tension in its centrality in relation to other social identities. My interrogation of gendered legal personhood in early Hanafi law builds on this scholarly conversation, exploring the ambiguities and tensions outlined above, although I argue that neither man nor woman exists as legal persons in early Hanafi law. The question about women's legal status is one that scholars bring to Islamic law rather than one that animates Islamic law from within. As Fatima Seedat has claimed, "while femaleness functions as a distinguishing characteristic of the legal subject, what characterizes femaleness is inconsistent; it is a mobile concept that seldom coincides in all respects with any singular physical woman."[81] The impulse to search for women's legal status or speak of men's legal advantage and privilege assumes the naturalness and universality of the gender binary. It also assumes that gender was the primary category that structured power relations. This assumption, however, fails to grasp the complex web of intersecting social identities that constructed an individual's agency and personhood in legal discourse. As I have demonstrated in this book, the intersectional nature of legal personhood in early Hanafi law meant that an individual inhabited not just gender but a multitude of other identities that ordered social relations. The different social identities were also mutually constitutive, meaning that neither man nor woman (nor free nor enslaved) carried meaning as a legal category outside their particular formulation in a particular legal person. The relational nature of legal personhood also alerts us to the fact that power was exercised not through

individual identities but through their relations to other legal persons. As scholars who are motivated by a desire to critique the exercise of power in securing inequitable relations, we must question the universality of the gender binary and the utility of gender as a category of analysis in order for us to grasp the power relations that were authorized by Islamic law.

I recognize that posing this argument about decentering gender as a category of analysis can come across as an attempt to question and thus further marginalize gender in the study of the Islamic intellectual tradition. It is not unusual for those of us who do this work to get asked whether the concern with patriarchy and gender inequality is a distinctly modern one that we are projecting back onto the premodern Islamicate context. In order to distinguish myself from those whose critique is intended to marginalize such questions that scholars bring to the Islamic tradition, I wish to clarify the intent and import of my questioning of gender as a useful analytical category in the study of premodern Islamic law. Over the past several decades, there has been a tremendous amount of work done on the study of gender in the premodern Islamicate context. This body of scholarship is sophisticated in its historical approach and analytical engagement. However, as I have argued, studying Islamic law with gender as an analytical category has given us a rich and complex picture of the law's intricacies. Over the past several decades, a tremendous amount of sophisticated work has been done on gender in the premodern Islamicate context more generally, without which my argument here would not be possible. This body of scholarship has posed critical questions about the relationship between positive law and legal practice, the dialectical relationship between legal practitioners and those subjected to the law, as well as the gendered assumptions that have shaped legal hermeneutics.[82] My purpose in decentering gender, then, is not to argue that questions pertaining to gender are irrelevant to premodern Islamic law. Rather, my intent in posing this argument is twofold: (1) to consider that the concept of gender changes as it moves transhistorically and (2) to reckon with the Eurocentricity of gender as a category, both in its assumed meaning as well as the methodological purposes to which it is deployed. If we are to take decolonial feminist scholars' proposals seriously, then we must critically interrogate our assumptions regarding the category of gender and its content, abandoning both any assumption of its coherence as well as the role it might play in social relations.[83]

Recent scholarship on gender and Islam more broadly has noted the inadequacy of thinking about the premodern Islamicate context through a simple male/female binary, moving toward both the study of masculinities as well as a complication of the gender binary. Analyzing genres like exegesis, Islamic ethics, Islamic medicine, and Sufism, scholars have argued that only a particular category of elite men was able to occupy the privileged status of men. In her analysis of Islamic ethical discourse, Zahra Ayubi has noted that ethicists constructed the ethical male subject not just in relation to men but also in relation to men who were seen as unrefined

owing to their lower-class status.[84] Sara Abdel-Latif has also noted the binary of elite man/women and other non-elite actors in Sufi hagiographies. She argues that focusing on the ways in which gender, skin color, class, age, non-Arab origin, and so on intersect allows us to see how elite free men secured their position in the social hierarchy by effeminizing these other figures and rendering them inferior.[85] In their study of hadith and exegesis, Ash Geissinger proposes that in the hierarchical understanding of gender, it was the sane, able-bodied, freeborn Muslim adult man who inhabited the masculinity that acquired power and authority. In the context of Islamic law, "all other categories of persons are positions at various removes below."[86] Elsewhere, Geissinger argues that gender in Islamic discourses was "internally fractured" by social distinctions such as enslavement, lineage, religion, age, and so on.[87] Serena Tolino's piece on the gender binary in premodern Islamicate societies also supports complicating the gender binary. Through an analysis of Arabic lexicography, Islamic medicine, and Islamic law, Tolino demonstrates that Islamicate societies and discourses were based on a binary of man and "other," where "man" was adult, urban, male, sane, and able to procreate, and all "others" were understood in opposition to this privileged subject:

> we should imagine the two genders as a continuum on a scale of perfection, on top of which we find the free adult Muslim man. It is difficult to make a proper classification on who we find below him on the ladder, but certainly we do not only find women, as a proper gender binary would suppose.[88]

The turn toward a more complex analysis of the gender binary, as well as the study of varied constructions of masculinities is a critical development in the study of Islam and gender. The scholarship of Geissinger, Ayubi, Tolino, and Abdel-Latif complicates a universalizing assumption of women as an oppressed category in the premodern Islamicate context. They present us instead with a complex picture of the different ways in which the social hierarchy was modeled. The most advantageous individuals were not all males but a particular category of elite men whose power and privilege was maintained through the subordination and instrumentalization of a multitude of other collectives in society, including nonelite men, enslaved people, children, non-Muslims, non-Arabs, and so on. Despite these complications, the hierarchy is still governed by the logic of a binary—that is, one group of subjects (elite men, instead of all men) are ranked above the oppressed (i.e., all others, instead of just women). Such a logic "translates any fractures of masculinity into effeminization,"[89] which is most evident in the lumping together of all subordinated people into one category, in binary opposition to elite men. While this binary is helpful for understanding how certain masculinities are constructed in relation to hegemonic masculinity, it is not helpful for mapping the power relations that existed between individuals in the subordinated category. It is also unable to account for the fact that power and authority were not fixed in one particular gender or identity but were instead fluid and shifting in nature.

That is, one individual—who might be disadvantaged in relation to elite men—could occupy a position of power and authority in relation to another individual who was also in a subordinated class. Thus, rather than studying gender in Islamicate societies and discourses, I propose that we study the *relations* through which power was exercised. This approach would allow us to move away from questions about what counted as man, effeminizing other men as a way of recognizing their social subordination, or placing free women and enslaved women in a shared category of the oppressed. I suggest instead that we think about the relations between the different legal persons and how power functioned in each relation to establish a particular place in the social hierarchy for different legal persons.

To make my point clearer, let us consider the free/enslaved relations that I have discussed in this book. We would not be able to understand the power and authority granted to enslavers over the enslaved if we approached this relation through gender as a category of analysis. An enslaver acquired their status not through their gender but through their status as both an adult and a free person. Given this, both men and women were able exercise power and authority through the enslaver/enslaved relation, provided they were propertied people. To approach Islamic law through gender as an analytical category, with the assumption of the universality of gender oppression as well as the legal incapacity of women, would not allow us to see the ways in which free adult women exercised power over enslaved men. In fact, it was through their relation to the people they enslaved that they acquired a certain power and authority in society. As the historian Stephanie Jones-Rogers has argued regarding White women enslavers in the American South, they were invested in the institution of slavery because their status as enslavers gave them an ability to negotiate their position in society through their economic power.[90] We see this in the Islamicate context as well. Free adult women were not only enslavers but also participated in the slave trade, particularly in the training and selling of both *qiyan* (enslaved singing girls) and *jawari* (enslaved women). Free adult women also utilized enslaved women as sexual commodities to negotiate their own power and agency, as when the free wife might gift her husband an enslaved woman (particularly one that he might desire) as a way of pleasing him.[91]

An analytical approach that centers gender would also prevent us from understanding the ways in which the free woman's legal agency and capacity were negotiated through the vulnerabilities of the enslaved woman. The form of sexual autonomy granted to the free adult woman, as well as her status as property owner, or her social and legal status as free wife and mother, can only be understood as a privilege through the presence of enslaved women, who was not granted similar rights or legal status. To place free and enslaved women in a singular category of gender oppression would fail to recognize the power differentials between them and the ways in which free adult women might actively participate in the vulnerabilities and oppression of enslaved women. We see this, for example, in the

juristic discussion of the impermissibility of bringing in an enslaved woman as a co-wife if a man is married to a free woman. Jurists prohibited such a marriage because it would harm the free woman to bring in a co-wife of lower status. The opposite scenario—in which a man took on a free woman as a wife when he was already married to an enslaved woman—was met with no such objection.[92] We can see this hierarchy between free and enslaved women maintained even in social practices of physical violence. In writing about the enslaved courtesan (*jariya*) in early Abbasid Baghdad, Pernilla Myrne has noted that while the practice of whipping an enslaved person might have been common practice, this was not acceptable with regard to the free wife.[93] She tells, for example, that when Inan, a well-known and celebrated enslaved courtesan, was flogged by her enslaver, she cried out that she was a free woman and thus should not be treated in this way.[94] While both the free wife and the enslaved woman endured violence, the form it took reflected their different positions in the social hierarchy. They both occupied status as dependents of the husband and enslaver, but their dependency did not impart a shared position in the social hierarchy. Similarly to Oyèwùmí's observation regarding Yorùbán society as a context where biology did not determine social roles, we see in early Hanafi law as well a distinction between the legally assigned sex and assigned gender roles. While different subjects might all be legally assigned female, this did not mean that they shared a single legal personhood.

In the world of early Hanafi law, gender was not the primary mode for ordering social relations and the complex terrain of legal personhood cannot be mapped by relying on gender. As Seedat has argued, a woman's legal agency and ability to act were determined through the social facts that jurists attached to the female-sexed body.[95] Where jurists articulated conceptions of hegemonic masculinity as active and emphasized femininity as passive, we must be attuned not just to that articulation but also what function it served for the jurists. As we have seen in case studies throughout this book, this idealized gender norm was constantly disrupted or displaced where it intersected with other social identities. They appeared when they were useful in justifying legal precedence and were set aside where they contravened the complex social hierarchy imagined by the jurists.

In making this point, I am not arguing that jurists did not hold this idealized conception of gender. The gendered narrative would serve no use in justifying legal precedence if it did not reflect commonly held beliefs around gender. Certainly, the appearance of this idea in other genres of the Islamic intellectual tradition also points to its pervasiveness. What I am saying, however, is that this idealized conception of gender was not an overarching logic of the law or the guiding framework for determining individuals' legal agency. Hanafi jurists routinely constructed a varied and complex understanding of gender at its intersection with other social identities. To read these gendered norms as a reflection of a gendered ontology is perhaps more reflective of a modern conception of gender than one that reflects the worldview of the jurists. Sa'diyya Shaikh has made a similar

argument with regard to gender in the work of the Sufi luminary Muhyi al-Din ibn al-ʾArabi, critiquing contemporary scholars who have read Ibn al-ʿArabi's use of masculine and feminine states to correspond with biological gender. Shaikh argues instead for reading this as a "gendered symbolic," i.e. a gendered language for describing the nature of reality.[96] Contrary to other scholars who have read the masculine/feminine binary as an authorization of traditional gender roles and naturalized it as an Islamic metaphysics,[97] Shaikh argues that reading it in a different way opens up the possibility for using this binary as a means to subvert patriarchal gender constructs.

I find Shaikh's reading of Ibn al-ʿArabi useful as a framework for thinking about the juristic articulation of masculinity and femininity. As I mentioned in chapter 1, while jurists both articulated and at times reasoned with the stated principle of masculinity as active and femininity as passive or receptive, there are other aspects of the law where Hanafi jurists argued for the active role of women as a means for defending an earlier ruling by the Hanafi legal school. Gender, then, carried no fixed meaning in legal discourse but acquired meaning as it intersected with other social identities and through particular social relations. Gender was neither primary in ordering social relations, nor was it a binary. Rather than being informed by a gender binary that dictated gender roles, early Hanafi legal discourse was populated by sexed subjects who took on many gendered roles leading to a multiplicity of gendered subjects. Gender was both unstable, multiple, and varied.

## CONCLUSION

Throughout the different chapters of this book, I have asked what role gender plays in the construction of legal personhood in early Hanafi law and, specifically, how gender interacted with other social identities. As we saw in chapter 1, Hanafi jurist often articulated gendered norms around masculinity and femininity that point toward an essentialized understanding of gender. If we step away from these idealized gender norms and engage in a close reading of case studies, however, we can see that the juristic process for determining the legal rights and obligations of individuals was informed by a lot more than just the individual's gender. Gender instead intersected with several other social identities in the construction of legal personhood. Not only did gender intersect with other social identities, but gender was also more complex than a simple binary. Idealized conceptions of masculinity and femininity did not always map on to legally assigned sex; that is, a male-identified legal subject did not necessarily inhabit the characteristic features of masculinity. The intersectional nature of legal personhood does not mean gender was not relevant as a juristic category. As we have seen through the many case studies discussed in this book, an individual's assumed gender continued to play a significant role in determining their legal agency. Gender had certain ramifications that at times cut across the other social identities, cutting off some possibilities

entirely for people who shared anatomical sex. We saw this, for example, in the legal determination of the impermissibility of all women holding positions of political authority. Despite these particular legal rulings, throughout the different aspects of the law, gender did not operate as a distinct category but instead intersected with a number of other identities that collectively shaped the legal personhood of an individual and determined their place in the social hierarchy.

Studies of gender in Islamic law often conceptualize it as a separate category of analysis, distinct from enslavement, age, religion, class, and so on. Studies of slavery or religious difference in Islamic history have similarly considered their analytical categories as distinct from gender. The effect of such an approach is the flattening of otherwise complex hierarchies in the social world imagined by jurists. An intersectional approach reveals instead a far more complicated social hierarchy, one in which social identities were not an essential aspect of an individual but shifted depending on their social positions and relations. As their relations and positions shifted, so did their legal personhood. The free man who was both Muslim and propertied held perhaps the most privileged position in this social hierarchy. However, even the power and privilege of this free propertied man were complicated by particularities of race and lineage. Whether one was of Arab descent or from the tribes related to the Prophet, all impacted an individual's agency in different aspects of the law.

The intersectional and relational nature of legal personhood is a productive theoretical space for Muslim feminists. The hierarchical social order imagined and authorized by Islamic law meant that jurists insisted on the inherent differences between humans rather than their similarities. This insistence on difference led to a construction of legal personhood that recognized the complexity of human subjectivity by constructing a multiplicity of legal persons based on their positions and situations in society. This mutability of legal personhood viewed the human as always in the process of becoming rather than a fixed and static self. The relational aspect of legal personhood also recognized that humans grow and change through their relations to others. The focus on the relational self rather than the autonomous self of liberal thought not only recognizes that ethics is situational but also centers mutuality in ethics. Such a conception of the self is powerful in its recognition that our humanity is realized only through our relations to others. While the notion of legal personhood in early Hanafi law was certainly hierarchical, its intersectional and relational nature provides space for Muslim feminists to move beyond a mode of critique to think with and through the Islamic legal tradition.