

Hermeneutics of Desire: Ontologies of Gender and Desire in Early Hanafi Law

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Dissertation submitted in partial fulfillment of
the requirements for the degree of Doctor
of Philosophy in the Graduate Program in Religion
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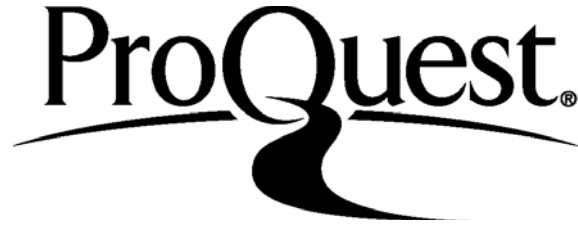
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ABSTRACT

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Abstract

This dissertation examines the construction of gendered legal subjects in the influential legal works of the eleventh century Ḥanafī jurist, Muḥammad ibn Aḥmad al-Sarakhsī (d. 483 A.H./1090 C.E.). In particular, I explore how gendered subjects are imagined in legal matters pertaining to sexual desire. Through a close reading of several legal cases, I argue that gendered subjects in his legal work *al-Mabsūṭ* are constructed through an ontological framework that conceptualizes men as active and desiring and women as passive and desirable. This binary construal of gendered nature serves as a hermeneutical given in al-Sarakhsī's legal argumentation and is produced through a phallogocentric epistemology. Al-Sarakhsī's discussions of desire and sexuality are mediated through the experience of the male body. While the dissertation endeavors to show the centrality of the active/passive binary in al-Sarakhsī's legal reasoning, it also highlights the dissonances and fissures in the text's construction of gendered subjects of desire. By tracing the intricacies of al-Sarakhsī's legal reasoning, I note moments in which the text makes contradictory claims about gender and desire, as well as moments in which al-Sarakhsī must contend with realities that seemingly run up against his ontological framework. These moments in the text draw our attention to al-Sarakhsī's active attempt at maintaining the coherence of the gendered ontology. I thus argue that the gendered ontology in al-Sarakhsī's text is a legal fiction that both reflects his assumptions about gendered nature but is also constructed to rationalize legal precedence.

Contents

Abstract.....	iv
Acknowledgements.....	vii
1. Introduction.....	1
1.1 Overview.....	4
1.2 Framing the argument.....	14
1.3 Why al-Sarakhsī?.....	23
1.4 Methodology.....	29
1.5 Chapter outline.....	41
2. The Legal Construction of Desire.....	46
2.1 A tale of two fatwas.....	46
2.2 Legislating desire.....	52
2.2.1 Legally significant desire.....	57
2.2.2 Fulfilling desire.....	69
2.2.3 The peripheries of desire.....	75
2.3 Thinking through the male body.....	83
2.4 Conclusion.....	89
3. The Male as Subject of Desire.....	92
3.1 Illicit sexual intercourse: man as active sexual agent, woman as locus.....	97
3.2 Gender and the experience of desire.....	108
3.3 Is sodomy sex? Naturalizing man as penetrator and woman as penetrated.....	117
3.4 The slave man and his desire.....	123

3.5 Desiring the slave woman: fragmented gender subjects.....	129
3.6 Conclusion	134
4. The Female as Subject of Desire	137
4.1 The sexually unfulfilled wife	140
4.2 Tasting his honey	150
4.3 Women, sexual intercourse, and dominion.....	159
4.4 The virgin girl and the previously married woman	167
4.5 Conclusion	175
5. Children as Subjects at the Margins.....	179
5.1 Consummating minor marriage and the active/passive binary	183
5.2 Consummation and the (un)knowability of desire.....	192
5.3 Children as intersexed subjects.....	200
5.4 Conclusion	220
6. Conclusion	223
References.....	239
Biography.....	247

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1. Introduction

Prior to starting the doctorate program, I spent a considerable amount of time in Egypt studying Arabic and familiarizing myself with Islamic legal texts. In the summer of 2010, after my first year in the program, I returned overseas for research, this time to Jordan. I had exhausted my opportunities in Egypt and was looking to go elsewhere. As a woman who was attempting to study Islamic law at a more specialized level, I was frustrated by the many obstacles I faced. Many of the legal scholars refused to teach women out of fear of temptation or insisted that they could only teach women as a group. Additionally, I found that ongoing private study circles were usually organized and dominated by male students who jealously guarded access to their teachers. They, too, generally did not allow women in their circles out of a discomfort with mixed-gender gatherings, or only allowed women to attend from behind some form of barrier. One friend reported that she attended a circle in which the women sat on the floor, behind a sofa, and were not allowed to ask questions.

In my first year of graduate study, my advisor Dr. Ebrahim Moosa advised that I track down, and study with, Dr. Ṣalāh Abū al-Ḥājj, a *mufī* and renowned scholar of Ḥanafī law. When I was able to locate and contact him, he graciously accepted my request to study with him. Dr. Abū al-Ḥājj is a dedicated teacher, and in the five years that I read legal texts with him, he never differentiated between his male students and me. Throughout the first summer with him in 2010, I sat in his small worn-down office in Amman, learning the intricacies of these dense and coded legal manuals. Dr. Abū al-Ḥājj has an almost encyclopedic knowledge of the law, and our sessions were fast-paced as he

moved back and forth between different aspects of the law, with plenty of questioning on my part. Our lessons, however, also often included long digressions on Western norms and their imposition on Muslims. Dr. Abū al-Ḥājj took his adherence to Ḥanafī law seriously and explicitly stated that he derived his morals and norms from the legal framework alone. High on his list of grievances was the changing conception of gender and gendered roles in society. While I had never explicitly stated my feminist commitments, he seemed to have an inkling of my gender politics and often made such statements with a wry smile on his face. He knew my discomfort with his long digressions about gender norms and enjoyed being provocative.

In one such digression he stated emphatically that the law's gendered rules and provisions are based on the natural and innate dispositions (*fiṭra*) of men and women. The naturalness of these norms, for him, was evident in social and material realities. As I often did, I pushed back. The gender norms and dispositions he was referring to as natural are not the norm in other parts of the world, I argued. For me, pointing out such cultural diversity in gendered norms demonstrated that there is no essential characteristic of men and women, but rather cultural norms that construct individuals into particular gender identities. He, however, was unmoved by my appeal to such counter-evidence. The alternative cultural realities I pointed to were simply an indication of an unsound person who had moved away from his/her nature. Frustrated, I asked him how, then, does one determine which social and cultural reality reflects the naturalness of gender. To this he responded simply that it is whichever one matches the gender roles laid out by the law.

* * *

This exchange with a preeminent contemporary scholar of Islamic law was one of many formative moments in the process of my coming to understand the nature of legal discourse. Throughout the course of my study of Ḥanafī law, encounters such as this highlighted for me the centrality of ontological claims about reality and the nature of things to the project of law making. In particular, I came to realize the significance of assumptions about gendered nature and the selective appeal to social and bodily “facts” in the development of legal discourse. This dissertation is thus an exploration into the legal impulse to determine gendered nature and the purpose it serves in laying down laws and justifying rulings. Through a close reading of the legal texts of Muḥammad ibn Aḥmad al-Sarakhsī (d. 483 A.H./1090 C.E.), a key jurist in the early development of the Ḥanafī legal tradition, I unpack and analyze the gendered ontology that informs his legal hermeneutics.

The question I posed to Dr. Abū al-Ḥājj regarding social realities that challenge the law’s construal of gendered nature is one that I also bring to al-Sarakhsī’s legal work. Furthermore, Dr. Abū al-Ḥājj’s response exemplifies a central argument of this dissertation. His ability to recognize disparate social realities that contradict his notion of what is natural, while nonetheless holding on to his particular gendered ontology, is central to what this dissertation illustrates in terms of how the law functions. What struck me in listening to his commentary is the process through which facts are selected in constructing this gendered ontology; legal discourse and norms determine what is natural, and this determination of nature is, in turn, validated by appealing to social realities, but only those that confirm the constructions of the law. Conflicting social facts are ignored

or dismissed as aberrations. This dissertation thus analyzes the fissures and inconsistencies in the law's construction of a gendered ontology and the ways in which the discrepancies are rewritten back into the ontological framework of the law.

1.1 Overview

This dissertation project began as a seminar paper on child marriage in Islamic law. I was particularly intrigued by how Islamic law makes ethical sense of sexual intercourse between adult men and minor girls. I came to this issue through contemporary controversies over child marriage. Concerns about child marriage are not only centered on sexual intercourse but also on conceptions of childhood. Sexual intercourse between adults and children in contemporary discourse is pathologized as pedophilia and considered rape. In an ethical worldview where consent is fundamental to the licitness of sexual intercourse, children are considered incapable of offering consent and thus any sexual activity between an adult and a person of legal minority is considered rape. Campaigns against child marriages also focus on the right of the child to an education and to be free from such responsibilities that are deemed inappropriate for children.

In March of this year the United Nations Population Fund (UNFPA) and United Nations Children's Fund (UNICEF) launched the Global Programme to Accelerate Action to End Child Marriage. As part of the campaign, several videos have been circulating that depict child marriages to evoke a visceral response from the viewers. A video produced by UNICEF depicts the wedding ceremony of a man and his child bride. The video, titled "A storybook wedding—except for one thing," juxtaposes images of a beautiful wedding with pictures of the child bride crying, her eyes and face

expressionless as the man puts his arm around her shoulders. One of the shots in the video shows a plaque with the words: “He owns me,” and the child is shown sitting in her wedding dress while hugging a stuffed teddy bear.¹ One particular video was shot in Lebanon and depicts a middle-aged man with greying hair with his “bride,” who looks like she is barely twelve, taking pictures along a boardwalk near the ocean. The video depicts the reactions of people as they walk by the “couple.” While several individuals, particularly women, censure the man and call him a criminal, several men walk by and congratulate the man on his marriage.² The video depicts a tension in many Muslim-majority societies with regards to child marriage. In response to these campaigns to end the practice in Muslim communities, there is often a significant backlash from those who find such efforts to be contrary to Islamic law. It was this controversy between those who oppose child marriage and those who argue for it that animated my research.

I began exploring this topic by looking at legal discussions on child marriage in different Ḥanafī legal texts. In all the discussions, I was struck by the conceptions of gender that informed the legal reasoning around child marriage. Gendered subjects were conceptualized by the law in a binary between activity and passivity. That is, maleness was defined as active and desiring, and femaleness as passive and desirable. Within this matrix, sexual intercourse between an adult man and a female child was conceivable, as the law’s concern was with the man’s desire and the female child’s desirability. The

¹ UNICEF, “A storybook wedding - except for one thing,” YouTube video, 1:32, posted by UNICEF, March 7, 2016, <https://www.youtube.com/watch?v=wfb3Cx3Lw>.

² Rachael Revesz, “Video of Child Bride in Lebanon Shines Spotlight on 37,000 Child Marriages Every Day,” *Independent*, February 15, 2016, <http://www.independent.co.uk/news/video-of-child-bride-in-lebanon-shines-spotlight-on-37000-child-marriages-every-day-a6875326.html>.

ethical concern in permitting sexual intercourse in such a situation was centered not on consent but instead on the legal validity of the marriage and the ability of the female child to bear penetration without harm.³

Observing the critical importance of this construction of gender in making sexual intercourse between adult men and female children conceivable, I embarked on a dissertation project to explore this gendered ontology and its function in the construction of legal subjects. Kecia Ali, a feminist scholar of Islamic law, has noted that gender is a permanent aspect of women's legal subjecthood in Islamic law. Only femaleness permanently limits a person's legal capacity. Other impediments to full legal subjecthood are factors such as enslavement and insanity, both of which can change. One cannot, however, ever stop being a woman. Gender, she argues, is the most crucial distinction between individuals in Islamic law.⁴ Judith Tucker argues that women's agency as legal subject is only hampered by the interests of the family and a patriarchal society. This is particularly evidenced in the woman's legal agency in matters pertaining to marriage and divorce. In other aspects of the law, particularly those related to property rights, women exercise full autonomy as legal agents.⁵ Thus, while a woman may contract sales on her own behalf, she does not possess the unrestricted right to contract a marriage or a unilateral right to divorce.⁶ "Woman as family member (whose marriage will affect her

³ For a more detailed engagement with the legal reasoning behind child marriage in Hanafi law, see Chapter Four.

⁴ Kecia Ali, *Marriage and Slavery in Early Islam* (Cambridge, MA: Harvard University Press, 2010), 47.

⁵ Judith Tucker, *Women, Family, and Gender in Islamic Law* (Cambridge, UK: Cambridge University Press, 2008).

⁶ Of the four Sunni legal schools, only the Hanafis allow a virgin woman to contract her own marriage. However, the father of a virgin woman retains the right to contest the marriage if he finds the match incompatible. For more information see Mona Siddiqui, "Law and Desire or Social Control: An Insight into the Hanafi Concept of *Kafa'a* with Reference to the Fatawa 'Alamgiri," in *Feminism and Islam: Legal and Literary Perspectives*, ed. Mai Yamani (New York: New York University Press, 1996), 49-68.

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.”⁷

In her book *Women in the Mosque: A History of Legal Thought and Social Practice*,⁸ Katz echoes Tucker’s observation regarding the shifting legal agency of the woman, bringing into question the very category of “woman” in the law.⁹ In tracing the development of Sunnī legal thought on the question of women’s mosque attendance, she argues that in the first two centuries of Islamic law, “woman” was not a homogenous category. At this early moment of the law’s development, the concept of the “woman” always intersected with other factors such as age and enslavement. “Early jurists universally presumed,” she argues, “that women of different ages or statuses were subject to significantly different standards of behavior; there was no assumption that a consistent rule could be applied to “women” as a group.”¹⁰ By the thirteenth century, however, this category became increasingly monolithic as women across the board came to be associated with sexual chaos (*fitnah*).¹¹ Despite this growing cohesion of the category of “woman,” the emerging concern in post-eleventh century legal texts with the sultry youth (*al-amrad*) introduced a new fracture into the law’s gender binary. The sultry youth was understood to be an adolescent boy whose beard had just begun to emerge and was an object of male desire. Katz observes that legal texts after the eleventh century were

⁷ Tucker, *Women, Family, and Gender in Islamic Law*, 173.

⁸ Marion Katz, *Women in the Mosque: A History of Legal Thought and Social Practice* (New York: Columbia University Press, 2014).

⁹ *Ibid.*

¹⁰ *Ibid.*, 3.

¹¹ *Ibid.*, 104-105.

greatly concerned with forbidding the desirous gaze upon this young boy as well as his presence in homosocial male spaces. Just as the rising concern with sexual chaos was constructing women into a monolithic category in the law, the figure of the sultry youth fractured the binary distinction between the male and female by making certain categories of males also desirable to other men.¹²

Ali's observation regarding femaleness as an enduring impediment to women's legal agency, and Tucker's and Katz' arguments regarding the shifting nature of female agency and fragmentation of "woman" as a category, are the points of departure for my dissertation. While scholars like Tucker and Ali have investigated the gendered nature of different institutions and practices of the law (in particular marriage and divorce), I focus on how the law constructs gendered subjects. In speaking about legal subjecthood, I interrogate how the law acts upon individuals and construes them as accountable to the law. As I noted above, gender is crucial in the law's conception of legal subjects because legal rights, obligations, and consequences are determined by the assumed gender identity of the subject in question. While legal capacity (*ahliyya*) is not differentiated by gender in legal theory,¹³ a deeper investigation shows this not to be the case. By attuning to the different impediments to legal capacity, for instance, we can begin to see how the free adult male is the only individual with complete legal subjecthood. In addition to legal minority and insanity, legal capacity is impeded by factors such as enslavement, menstruation and lochia, and mental incompetence. It is this intersection of legal

¹² Ibid., 106.

¹³ Legal capacity (*ahliyya*) is of particular concern as it determines who is morally and legally accountable for their actions. It is defined in legal theory as having legal majority (i.e. onset of puberty) and sanity.

subjecthood and the assumptions regarding gender that I explore in the dissertation. My exploration of gendered legal subjects follows al-Sarkahsī's categories, namely free adult males and females, enslaved adult males and females, male and female children, and intersexed children.¹⁴

I focus, in particular, on how such gendered subjects are constructed in relation to sexual desire. Desire is a helpful lens for mapping gendered subjects, as it is not limited to legal institutions in which gender is the primary mode of engagement. At the center of the limitations on women's agency and subjecthood is the anxiety around sexual desire in Islamic law. As sexual intercourse is highly regulated and carries stringent penalties, the law is exceedingly attentive to the presence of desire and devotes considerable attention to its curtailment. Desire cuts across the various aspects and concerns of the law, from marriage and sexual relations to matters of ritual observance, women's mobility in the public domain, and interpersonal interactions between individuals. Because of this pervasiveness of desire, my work offers an account of gendered subjects of desire at different moments and intersections of the law. Given this broad expanse, desire serves as a helpful analytical tool to attend to the various ways in which the law constructs gender.

My dissertation focuses in particular on the Ḥanafī legal school, one of the four legal traditions of Sunnī Islam, and one of the most widely followed legal traditions both

¹⁴ Islamic law defines intersexuality as possessing both a penis and a vulva. Al-Sarakhsī is adamant that gender ambiguity cannot proceed past puberty; individuals will inevitably manifest gender-specific signs at that point. Thus, my exploration of intersexual subjects is largely confined to children. For a detailed discussion about this, see Chapter Four.

historically and in the present.¹⁵ Ḥanafī law was also the official religious law of the Ottoman Empire and the predominant religious legal system in India. Even under British colonialism, Ḥanafī law was implemented in a modified form. Due to its adoption by the Ottoman Empire, Ḥanafī law remains, to this day, perhaps the most widely adhered to among Muslims around the world, especially in adjudicating matters related to women, family, and gender.¹⁶ While different legal schools share the construction of gender along the active/passive binary, it leads to different conclusions in legal rulings across the multiple legal traditions. Thus, in this dissertation I focus on the intricacies of gender within just one legal school, which allows me to analyze in depth the process of reasoning that leads to the construction of gender particular to that school.

To trace this construction, I turn to the eminent Ḥanafī jurist of the classical period, the eleventh-century Central Asian Muḥammad ibn Aḥmad al-Sarakhsī.¹⁷ I choose to focus on al-Sarakhsī given his importance within the Ḥanafī legal tradition. According to Ḥanafī historiography, al-Sarakhsī was not only one of the foremost jurists of the classical period, but he was also among the *mujtahid* of the legal school who used their independent reasoning to formulate legal rulings that had no precedence,¹⁸ thus they

¹⁵ The Ḥanafī legal school originated in Iraq and was favored by the first ‘Abbasid caliphs. Early on it spread to Khurāsān, Transoxiana, and Afghanistan, then later to South Asia, Turkish Central Asia, and China. For more information see Heffening and Schacht, “Ḥanafīyya,” in *Encyclopaedia of Islam, Second Edition*, ed. P. Bearman, et al., Brill Online, 2016, http://referenceworks.brillonline.com.proxy.lib.duke.edu/entries/encyclopaedia-of-islam-2/hanafiyya-SIM_2703.

¹⁶ Heffening and Schacht, “Ḥanafīyya.”

¹⁷ For more information on al-Sarakhsī’s life and historical significance, see the section below explaining why I focus on him.

¹⁸ This historiography of the Ḥanafī legal school was provided by Shams al-Dīn Aḥmad b. Sulaymān b. Kamāl Pāsha (d. 1534), an Ottoman scholar who held the official post of *Shaykh al-Islām*. Kamāl Pāsha divides the jurists of the Ḥanafī legal school into seven generations. The first of these is the generation of the eponyms (in the case of the Ḥanafīs, this was Nu’mān b. Thābit also known as Abū Ḥanīfa) who were retrospectively seen as having the singular authority to establish the methodology and basic legal rulings of the school. The second generation is that of the

became binding for later generations of jurists. As such, al-Sarakhsī's legal works not only contributed to the development of Ḥanafī law but also were highly influential on subsequent generations of Ḥanafī jurists.

This exploration of early Ḥanafī law is not only historically significant, but also has deep contemporary relevance. The pre-modern Islamic legal tradition continues to have a life in the contemporary period, informing Muslim ethics on gender and sexuality. Within contemporary Muslim debates on ethics, gender is not only an issue of primary concern but is also the site of rifts between different Muslim groups. A significant number of contemporary debates on Islamic law revolve around questions pertaining to gender. While some groups argue for a continued application of the pre-modern legal tradition, others assert that the historical legal tradition is at odds with modern ethical norms. This dissertation attempts to investigate and intervene in these debates by making an argument about the nature of legal discourse and how legal knowledge is produced. Legal texts are often read as repositories of a sacred knowledge that is understood to be timeless and ahistorical. In contrast to this presentation of the law, my dissertation asserts that legal discourse constructs legal fictions to give stability to the fluidity and messiness

students of Abū Ḥanīfa, who could give their own independent legal rulings as long as they stayed within the methodology laid out by the previous generation. The third generation, of which al-Sarakhsī was a prominent member, was of those jurists who could issue legal rulings through their independent legal reasoning only in matters for which there was no precedent, and they were bound by the legal school's methodology. The subsequent generations did not have the authority to issue their own legal rulings or depart from the methodology of the legal schools. Another typology was provided by 'Abd al-Hayy al-Lakhnawī (d. 1848), who divided the jurists into five generations. While he placed al-Sarakhsī in the second of the fifth generation, his description for the particularities of that generation were the same as Kamāl Pāsha's. For more information see Muḥammad Rashād Maṣṣūr Shams, *Al-Madkhal ilā al-Madhhab al-Ḥanafī* (Damashq: Dār al-Nahḍah, 2006), 35-8. I mention here the typology in Ḥanafī legal historiography to show the importance given to al-Sarakhsī within the historical narrative of the legal school. It is also important to point out, however, that these distinctions between the different jurists were established largely in hindsight for the purposes of stabilizing the legal tradition and are not always an accurate reflection of how the law continued in practice.

of life. I argue that the gendered ontology established in early Ḥanafī law is a legal fiction that should be understood as a reflection of the internal world of the text. To read this gendered ontology as a representation of a presumed naturalness of gender would be to misunderstand the functioning logic of legal discourse.

In order to demonstrate the fictional nature of the gendered ontology, this dissertation takes a two-pronged approach: 1) to demonstrate that the law constructs gender along the active/passive binary and 2) to note dissonances and fissures within the legal text where al-Sarakhsī struggles to maintain the coherence of the gendered ontology. In examining these moments of incoherence we can observe the legal process through which gender was constituted in early Ḥanafī law.

When I began the dissertation, I adopted a method of close textual reading of al-Sarakhsī's legal argumentation, as it would allow me to pay close attention to the way gender was constructed through the technicalities of legal argumentation. I began by putting together a series of legal cases in which desire was at work in teasing out the contours of male and female legal subjects. Each case explores a particular legal question and conclusion for which al-Sarakhsī offers legal argumentation and justification. My close textual analysis of these legal cases revealed not only the specificities of gender in the legal imaginary but also traced how the conception of gender functioned in legal hermeneutics. As I worked through my material, however, I was struck by how al-Sarakhsī's arguments regarding gender shifted across the different cases. On the one hand, he clearly articulated the legal imagination of men's active and desiring nature and women's passivity and desirability. It was clear that in al-Sarakhsī's legal thought, gender

was constructed along the active/passive binary.¹⁹ This took on many different manifestations: men as actors and women as acted upon, men as penetrators and women as penetrated, men as desiring and women as desirable, men as visible and women as hidden, men as bold and women as coy. The discussions around desire and legal rulings pertaining to it in the varied cases made clear that the construction of gender along the active/passive binary was the narrative arc in al-Sarakhsī's legal thought. On the other hand, however, were a series of legal cases in which he had to account for legal considerations that inadvertently challenged the binary. In such situations, al-Sarakhsī struggled to maintain the coherence of this gendered ontology.

Reading the cases alongside one another, what emerged was not a seamless and coherent narrative about a singular gendered ontology. I was struck by the incoherence of the legal imagination of gender and the hermeneutical effort al-Sarakhsī exerted to maintain the coherence of this seemingly natural binary. At times the materiality of the body challenged the binary, as in the case of intersexuality, and al-Sarakhsī struggled to write that body back into the binary. At other times, it was the law's own categorizations of different legal subjects that challenged the binary. For example, in the legal question

¹⁹ Feminist scholars of Greek and Roman sexuality have also noted the prominence of the active/passive binary as an organizing structure of gender and sexuality. In the Islamicate context in particular on this subject, see Khaled el-Rouayheb, *Before Homosexuality in the Arab-Islamic World, 1500-1800* (Chicago: Chicago University Press, 2005); Dror Ze'evi, *Producing Desire: Changing Sexual Discourse in the Ottoman Middle East, 1500-1900* (Berkeley: University of California Press, 2006); and Ahmad Dallal, "Sexualities, Scientific Discourses: Premodern," in *Encyclopedia of Women and Islamic Cultures*, ed. Joseph Suad (Leiden: Brill, 2006). The construction of men and women as active and passive is not unique to Islamic law alone. In fact, this conception of gender was widespread through the Near East and particularly influenced by Aristotelian thought. My findings are thus in conversation with scholarship on Roman and Greek civilizations and early Christianity, which has made similar observations regarding activity/passivity and subject/object, as the main mode of thinking about gender in the ancient world. For more information, see Judith Hallett and Marilyn Skinner, ed., *Roman Sexualities* (Princeton: Princeton University Press, 1997); Marilyn Skinner, *Sexuality in Greek and Roman Culture* (Chichester: Wiley-Blackwell, 2014); and Maryanne Horowitz, "Aristotle and Woman," *Journal of the History of Biology* 9, no. 2 (1976): 183-213.

about whether male slaves can marry, al-Sarakhsī has to contend with the fact, that as an owned object, the male slave does not retain the right to ownership according to the Ḥanafī legal tradition. Marriage for him thus becomes a legal impossibility, as he cannot come into ownership of the sexual use of a woman. How, then, can the male slave marry? As al-Sarakhsī attempted to work through this conundrum, I began to see how this gendered ontology was challenged within the law itself.

As I noted these incoherencies and dissonances, I knew that I had to reformulate my argument. There was no easy story to tell about al-Sarakhsī's construction of gender. My reading of the legal cases thus shifted from simply an analysis of the gendered ontology in al-Sarakhsī's legal thought to a deconstructive reading of the law. Given this dissonance, this dissertation argues that the gendered ontology of active/passive is a legal fiction in al-Sarakhsī's legal works. This fictive ontology was produced further through the gaze and experience of the male body.

1.2 Framing the argument

My argument and reading of the law are informed by key observations in the anthropology of law and feminist epistemology. Drawing on these fields, I make a two-pronged argument: first, the gendered ontology in al-Sarakhsī's legal thought is a fiction that he constructs in order to represent a reality of gender for the purposes of legislation. This gendered ontology is less a reflection of the corporeality of the sexed body and more a reality in the internal world of al-Sarakhsī's legal text.²⁰ Secondly, I argue that this

²⁰ Yan Thomas's historical anthropological study of Roman law makes a similar observation regarding institutional fictions. Thomas uses the concept of "negative fiction" to explain the ways in which actual events were declared to not

legal fiction establishes facts through a process of selection that is influenced by a phallogocentric epistemology in which male experience and male ways of knowing are normativized by the law.

Theorists in anthropology of law and critical legal studies have observed that legal systems require the creation of “legal categories” through which the messiness and instability of social realities can be ordered and thereby legislated. The law, of course, needs an object to legislate, and facts serve as the means through which this object is created. Lawrence Rosen observes that facts are what legal systems use to determine what is to be considered in the process of adjudicating legal disputes.²¹ The process of fact-finding, Rosen argues, is “partly about seeking truth, partly about defusing conflict, partly about maintaining a workable sense of one’s experience of the world.”²² Legal categories, therefore, provide the framework for the law through which facts are selected and thus the social world is interpreted.²³ Facts must fit within these legal categories, which is how realities external to the law become intelligible to the legal edifice.²⁴

have occurred. An example of this negative fiction was the rule that Roman citizens who were taken captive by enemies lost their testamentary power. Despite this, however, Roman citizens who died as captives were considered to not have been captured at all and thus did not lose their capacity to bequeath their wealth. This process was accomplished through the use of a fiction that negated the actual fact that these citizens had been captured. In a way, the fiction operationalized facts in a way that was reflective of the internal dynamics of the institution of the law itself rather than external reality. As Thomas observed, “The difference between law and fact is not a difference of fact but one of law, and this is what defines the essence of the institution, and what makes fictions so revelatory of the artificiality of the institution.” Yan Thomas as cited in Allain Pottage, “Introduction: The Fabrication of Persons and Things,” in *Law, Anthropology, and the Constitution of the Social*, ed. Alain Pottage and Martha Mundy (Cambridge: Cambridge University Press, 2004), 11. As Thomas’s writings are predominantly in French, I was unable to access the original source myself and have had to rely on secondary sources.

²¹ Lawrence Rosen, *Law as Culture: An Invitation* (New Jersey: Princeton University Press, 2006), 68-9.

²² *Ibid.*, 93.

²³ While this observation largely pertains to the judicial process, not legal codes, I am employing this observation here to the legal discourse in Islamic law. I believe this observation is very apt for how al-Sarakhsī constructs gender, the instability and incoherence of the facts that are produced as a result, and the difficulty of fitting them into the legal

Given that legal categories are a creation of the law, it is important not to read them as a simple representation of material and corporeal realities. As legal scholar Alain Pottage has argued, “There is no warrant for extending the action of the persons and things invented by law beyond the horizon of the institution. Minimally, and most importantly, this means that the legal person has no necessary correspondence to social, psychological, or biological individuality.”²⁵ As the purpose of law is the adjudication and legislation of society, it must necessarily create these fictive legal categories as “epistemic filters”²⁶ for determining and organizing facts to be taken into consideration. As Bruno Latour has argued, “Knowledge does not reflect a real external world that it resembles via mimesis, but rather a real interior world, the coherence and continuity of which it helps to ensure.”²⁷

Building off of these observations about the legal process of ordering and representing social reality, I argue that we must understand the gendered ontology that functions in al-Sarakhsī’s legal works as an internal reality of the law. Gendered subjects of desire are constructed through the law’s attempt to capture and stabilize the fluidity of gender and desire, and they serve as a useful legal category for the purposes of adjudication. The gendered subject of desire is a constructed reality internal to the world

categories he creates. For more information on the creation of legal categories, see Fernanda Pirie, *The Anthropology of Law*, (Oxford: Oxford University Press, 2013), 54.

²⁴ Ibid., 56.

²⁵ Pottage, “Introduction,” 11.

²⁶ Tim Murphy, “Legal Fabrications and the Case of ‘Cultural Property,’” in *Law, Anthropology, and the Constitution of the Social*, ed. Alain Pottage and Martha Mundy (Cambridge: Cambridge University Press, 2004), 122.

²⁷ Bruno Latour, *Pandora’s Hope: Essays on the Reality of Science Studies* (Cambridge: Harvard University Press, 1999), 58.

of the legal text. In constructing the gendered subject, the active/passive binary is a fictive creation of the law, a mechanism for the selection and ordering of facts that are taken to represent the reality of gender. These facts are then utilized to construct the gendered subject of desire through a process of selection by which only certain corporeal realities are registered as natural and representative of reality.

In order to demonstrate this process of selection in constructing gender, I read for the dissonances and incoherencies in al-Sarkahsī's legal discourse on gender. Throughout the different chapters I demonstrate the incoherence of the facts taken into consideration in constructing different male and female subjects. I note how sometimes the male is desiring and active, and yet at other times certain legal cases construct the male subject as desirable or passive. Similarly, sometimes the female subject is constructed as desirable and passive and yet at other times, in the interest of the law, can also be desiring. By noting these incoherencies and dissonances I demonstrate not only the constructed nature of the active/passive binary but also argue that the law is plagued by indeterminacy as it struggles to capture and make stable the very complicated and fluid realities of human existence.

To be clear, by arguing that the gendered ontology is a legal fiction, I do not mean to imply that there is no correspondence between this legal category and corporeal reality. In fact, as we see in some of the case studies, al-Sarakhsī reads the materiality of certain bodies as a means of demonstrating the naturalness of the gendered ontology. However, it is precisely in those moments where al-Sarakhsī struggles to keep this ontology coherent in the face of the materiality that challenges it that we can observe

this ontology as a legal fiction. I also do not mean to imply that al-Sarakhsī understood this ontology to be unreal or untrue. I found very little evidence in the text indicating that he was aware of the discrepancies and inconsistencies that I point out in his construction of gendered subjects. Thus, al-Sarakhsī generally does not comment on the fluid and shifting constructions of gender in the text. In a handful of cases, though, he does recognize that his assertions regarding gender are in conflict with other legal categories and determinations or textual evidence. Then he attempts to reconcile and smooth over these discrepancies through different legal maneuvers and argumentation. Despite these brief moments, al-Sarakhsī seems to have understood this gendered ontology to be natural, its naturalness made apparent through the particular corporeal realities to which he turns. The incoherencies of this ontology that were apparent to me and led me to the conclusion that this ontology is a legal fiction do not seem to have been apparent to him.

The second core argument of my dissertation connects the law's constructed legal categories to a phallogocentric epistemology. Facts and legal categories are the means through which legal knowledge is created, urging us to examine the mechanisms the law uses to determine how one can acquire knowledge. Who is the knowing subject in the creation of legal knowledge? My dissertation argues that the "facts" that are selected to give life and substance to the active/passive binary are based on male experience and male ways of knowing. My argument is informed by feminist epistemological critiques of Western philosophy in general and the philosophy of science in particular.

Contrary to many of their predecessors and fellow epistemologists who have ignored the role of gender in knowledge production, feminist epistemologists have argued

that there is an androcentric bias in how we conceptualize knowledge, who is considered to be a knowing subject, and how rationality and reason are defined. Feminist epistemology as a field has been most interested in demonstrating that gender does, in fact, influence our conception of knowledge and that male experience and perspectives are often universalized and couched in the language of objectivity. There are two main arguments of feminist epistemology that inform my reading of al-Sarakhsī: firstly, that knowledge is not objective but instead socially situated, reflecting the gendered perspective of the knowing subject; and secondly, that there is a connection between the production of knowledge and the sexed body.

My first assertion regarding the connection between knowledge and experience is informed by feminist standpoint epistemologists. Standpoint theory asserts not only that knowledge is socially situated but that socially marginalized and disadvantaged groups have ways of knowing that are not available to those who are privileged. Fundamental to the argument of standpoint theorists is the assumption that lived experience is and should be a source for knowledge production. Influenced by Marxism, they draw a close connection between material experience, power, and knowledge production. The observation of feminist standpoint theorists regarding situated knowledges and the connection between material experience, knowledge, and power have been the cornerstone of my analysis and critique that al-Sarakhsī produced his gendered ontology through the assumptions of male experience.²⁸

²⁸ I draw here on the works of two famous standpoint theorists, Donna Haraway and Sandra Harding. For more information on socially situated knowledge see Donna Haraway, "Situated Knowledges: The Science Question in

My argument also builds on the observation of feminist philosophers on the connection between knowledge production and the sexed body. While the observations of standpoint theorists about socially situated knowledges allow me to observe the role of male experience in the production of legal knowledge, the feminist epistemological critique of the mind-body dualism allows me to think about the connection between knowledge production and the sexed body. I am particularly interested in the link between masculinity, knowledge, and the sexing of legal subjects. What is the impact of the subject's sexed body on the production of knowledge?

Feminist philosopher Elizabeth Grosz argues that Western knowledge systems have failed to recognize the role of the body in knowledge production. Arguing for the link between corporeality and knowledge, she asserts that patriarchal forms of knowledge are produced through the materiality of the male body. Grosz refers to this relationship between the models and goals of knowledge systems and the sexually specific male body as the “sexualization of knowledge.”²⁹ Her critique of Western philosophy attempts to “draw out some of the effects that a concept of *sexed corporeality* may have on relations between knowers and objects known and on the forms, methods, and criteria of

Feminism and the Privilege of Partial Perspective,” *Feminist Studies* 14, no. 3 (1988): 575-99; and Sandra Harding, “Rethinking Standpoint Epistemology: What Is ‘Strong Objectivity’?” *The Centennial Review* 36, no. 3 (1992): 437-70. I should emphasize that while I am building my argument off of some of the observations of standpoint epistemology, I am not making a prescriptive argument about privileging women as knowing subjects in the creation of law. The epistemic privileging of women as knowing subjects has been the subject of significant critique by other feminist epistemologists—one of their most significant being been the assumption in standpoint epistemology that all women somehow have a shared perspective. While I agree with some of the critiques, I find their observation about socially situated knowledges to be a very important observation in feminist epistemology.

²⁹ Elizabeth Grosz, “Bodies and Knowledges: Feminism and the Crisis of Reason,” in *Feminist Epistemologies*, ed. Linda Alcoff and Elizabeth Potter (New York: Routledge, 1993), 188.

assessment governing knowledges today.”³⁰ Like feminist standpoint theorists, Grosz also proposes that this masculinist epistemology can be subverted through women’s “right to know” that is independent of patriarchal forms of knowledge. For Grosz, making the female body the subject of knowledge can challenge and reveal the hegemony of male forms of knowing. Such an approach would demonstrate the phallogocentric nature of masculinist knowledge systems. I take Grosz’s “sexualization of knowledge” as a theoretical method in analyzing al-Sarakhsī’s construction of gender. Grosz’s approach is of particular interest to me as she attempts to demonstrate the phallogocentric nature of masculinist knowledge systems through its fissures and contradictions.

Following from the theoretical frameworks of feminist standpoint theorists and feminist philosophers, this dissertation demonstrates that al-Sarakhsī’s construction of gender is not only produced through the male as knowing subject, but that sex and desire more broadly are read through the experience of the male body. Indeed, Islamic law as a legal tradition was largely male dominated, with few female jurists engaged in the process of knowledge production. In looking at male jurists as producers of the law, I am particularly interested in the role of the male body in the production of the legal discourse. As several of the case studies demonstrate, the founding presumption of al-Sarakhsī’s construction of gender emerges from the standpoint of an active (penetrating) and impenetrable male body; its foil is the female body and femininity, which are passive and always available for penetration. In relation to the active male body, the female becomes the locus or arena where male desire is enacted and fulfilled. This conception of

³⁰ Ibid., 188.

the female body, the rendering of female sexuality as mysterious and unknowable, and the lack of substantive concern for female desire are evidence of a phallogentric epistemology.

Grosz's reflections on the production of knowledge provide a very helpful synthesis of the two theoretical frameworks I have just presented (on legal fictions and phallogentric epistemology). Grosz outlines several dimensions of the crisis of reason in Western philosophy that are relevant for my feminist reading of Islamic law. To begin, she critiques the assumption that knowledge simply describes or explains its object, such that methods of knowing are assumed to be transparent and neutral. Secondly, there is a parallel assumption that the object of investigation has a reality that is independent of the knowledge produced regarding it. There is, she argues, "the presumption of a rift between the object of knowledge and knowing, such that the knowledges can be judged in terms of their adequacy to the object, as if this object were somehow independently accessible and outside knowledge, a kind of prediscursive referent of knowledges."³¹ Thus, knowledge is seen as perspectiveless and the knowing subject is bracketed from the knowledge that is produced. She of course rejects this epistemological model in favor of one that acknowledges the involvement of the embodied subject in producing knowledge.

Grosz's critiques are deeply relevant for my reading of al-Sarakhsī. The law presents its construction of male and female subjects of desire along the active/passive binary as a representation of an ontological reality. This "reality" of gender is not only assumed to exist outside of representation, but in fact there is little awareness in the law

³¹ Ibid., 191.

of its own perspective and self-development. My case-study approach in this dissertation attempts to show precisely these moments of rupture and dissonance in the law's construction of gendered subjects of desire, thus illustrating the way in which the law's object of legislation is not simply a representation of sexual corporeality but instead a construction of a particular gendered ontology. It is at those moments, when certain gendered subjects disrupt that representation, that we can catch a glimpse of this legal construction.

1.3 Why al-Sarakhsī?

For such an eminent figure in the Ḥanafī school of law, relatively little is known about al-Sarakhsī. Not only is there no credible date of birth³² ascribed to him, but scholars also dispute his date of death, though most place it in the final decade of the eleventh century.³³ He was probably born in Sarakhs, a city in present-day Turkmenistan.³⁴ He later moved to Bukhara to study under the famous 'Abd al-'Azīz al-Ḥalwānī (d. 448/1056), who was granted the title Shams al-A'imma (splendor of the scholars). As Ḥalwānī's star pupil, al-Sarakhsī later inherited this title from his teacher. After completing his studies, al-Sarakhsī settled in Uzjand, a town near Farghāna in Transoxiana.³⁵ Here he ran into trouble with Qarakhanids and was thrown into prison for

³² Osman Tastan asserts that al-Sarakhsī was born around 400 C.E./1010 A.H. Osman Tastan, "al-Sarakhsī (D. 483/1090)," in *Islamic Legal Thought: A Compendium of Muslim Jurists*, ed. Oussama Arabi, et al. (Leiden: Brill, 2013), 239-59. Rume Ahmed, however, contests that this date of birth is unlikely, as it would mean that he was jailed between the ages of sixty-six to eighty. Ahmed asserts that at such an advanced age, al-Sarakhsī would not have been able to survive fourteen years in a dungeon, leave alone survive for three years after his release. Rume Ahmed, *Narratives of Islamic Legal Theory* (Oxford: Oxford University Press, 2012), 164n18.

³³ See Tastan, "al-Sarakhsī," and Ahmed, *Narratives of Islamic Legal Theory*.

³⁴ W. Heffening, "al-Sarakhsī," in *Encyclopaedia of Islam, First Edition*, ed. M. Th. Houtsma et al. Brill Online, 2016.

³⁵ Tastan, "al-Sarakhsī," 239; and Heffening, "al-Sarakhsī."

fourteen years. He seems to have been imprisoned in the castle of Uzjand for a certain period of time.³⁶ His biographers claim that al-Sarakhsī was imprisoned in an underground dungeon (*jubb*), but there is scholarly disagreement as to the accuracy of this report as well. Osman Tastan argues that while al-Sarakhsī wrote about his experience of imprisonment, he does not describe in detail where he was being held. He wrote mostly about the pain of isolation from his family, his son, and books, and the hardship he endured due to his detainment.³⁷ Rume Ahmed, on the other hand, argues that given the level of detail his students provided about the placement and dimensions of the dungeon, there is no reason to doubt the accuracy of the claim that he was held in a dungeon.³⁸ The reason for his imprisonment is also disputed, with some scholars arguing that he was jailed over theological issues while others claim he was being punished for encouraging subjects to refuse to pay the heavy taxes imposed by the Qarakhanids.³⁹ The most popular reason given for his imprisonment is that he issued a legal opinion that chided the local Khan for allowing his officers to marry his *umm walads*⁴⁰ without observing the necessary waiting period.⁴¹ While in prison, al-Sarakhsī began dictating several books to his students. There he began his work on legal theory, *al-Muḥarrar fī Uṣūl al-Fiqh*, and the bulk of his legal commentary, *al-Mabsūṭ*, the primary text I use in this dissertation.⁴² Upon release, al-Sarakhsī left for Marghīnān or Farghāna, where the

³⁶ See Muḥammad ibn Aḥmad al-Sarakhsī, *Uṣūl al-Sarakhsī* (Beirut: Dār al-Kutub al-‘Ilmīyah, 2005), 1:9.

³⁷ Tastan, “al-Sarakhsī,” 243.

³⁸ Ahmed, *Narratives of Islamic Legal Theory*, 164n23.

³⁹ Tastan, “al-Sarakhsī,” 242. Tastan argues that both these reasons are not well substantiated by evidence.

⁴⁰ The *umm walad* in Islamic law is a slave woman who has a child through her slave owner.

⁴¹ Tastan, “al-Sarakhsī,” 242.

⁴² It is very clear from the text of *al-Mabsūṭ* that it was dictated to his students while he was in prison. The book begins with a preface that indicates that this was being dictated to the students and that al-Sarakhsī was in prison in Uzjand.

local ruler, Imām Sayf al-Dīn (or al-Amīr Ḥasan), offered him hospitality and allowed him to complete some of his works. Al-Sarakhsī died three years after his release, around 483/1090.⁴³

Al-Sarakhsī's legal works strongly influenced the development of the Ḥanafī legal tradition. He was one of the most prominent figures in the Ḥanafī legal school. Ya'akov Meron identifies al-Sarakhsī as the second of the four most prominent Ḥanafī jurists of the classical period.⁴⁴ Al-Sarakhsī's texts explore and organize the works of Muḥammad al-Shaybānī (d. 189/805), one of the most prominent students of Abū Ḥanīfa (d. 150/767), the eponym of the Ḥanafī legal school. Al-Sarakhsī's legal works then became authoritative for later seminal texts such as the *al-Hidāya* of al-Marghīnānī (d. 593/1197), which represent a more mature Ḥanafī legal tradition.⁴⁵ As an intellectual figure, al-Sarakhsī remained a point of reference in the development of Ḥanafī legal theory (*uṣūl al-fiqh*) and positive law (*furū'*).⁴⁶

My interest in al-Sarakhsī's work is animated by his position at an important juncture in Ḥanafī legal history. As a Ḥanafī jurist of the eleventh century he formed a crucial link between the formative, classical, and post-classical periods in Ḥanafī legal

Subsequently, each chapter of the book begins with the day and date of dictation and with the phrasing, "al-Sarakhsī said."

⁴³ Tastan, "al-Sarakhsī," 243.

⁴⁴ These four jurists were Aḥmad b. Muḥammad al-Qudūrī (d. 428/1037), followed by al-Sarakhsī (d. circa 483/1090), and then 'Alā' al-Dīn al-Samarqandī (d. 539/1144), and lastly Samarqandī's son-in-law Abū Bakr b. Mas'ūd al-Kāsānī (d. 587/1189). Ya'akov Meron, "The Development of Legal Thought in Hanafi Texts," *Studia Islamica* XXX (1969): 78.

⁴⁵ Many of al-Sarakhsī's biographers state that one of his students was Abū Ḥafṣ 'Umar b. Ḥabīb, the maternal grandfather of al-Marghīnānī, author of the *Hidāyah*. Tastan, "al-Sarakhsī," 240.

⁴⁶ Norman Calder, "al-Sarakhsī," in *Encyclopaedia of Islam, Second Edition*, ed. P. Bearman et al. Brill Online, 2016.

historiography.⁴⁷ Islamic law went through significant development in the first few centuries (defined as the formative period). At that time, the substantive law and legal methodology were developed, but scholars did not yet divide themselves into different legal schools.⁴⁸ The latter were formed in the late ninth and early tenth centuries, and it is in this time period that we start to see juristic writings attempt to defend the substantive legal rulings and doctrines of the particular schools.⁴⁹ Ahmed Fekry Ibrahim identifies

⁴⁷ I am using here the periodization offered by Ahmed Fekry Ibrahim, who categorizes the pre-modern period of Islamic legal history along four periods: 1) the formative period, from the birth of Islam until the early tenth century, when legal schools began to form; 2) the classical period, which begins with the rise of schools and lasts until the end of the twelfth and beginning of the thirteenth century, when the legal discourse matured significantly and also became more institutionalized; 3) the postclassical period, from the early thirteenth century until 1500; 4) and lastly, the early modern period, from 1500 C.E. until the rise of the modern period, which he marks at the mid-nineteenth century. Ahmed Fekry Ibrahim, *Pragmatism in Islamic Law: A Social and Intellectual History* (Syracuse: Syracuse University Press, 2015), 21.

Periodization is, however, tricky business, and scholars of Islamic legal history disagree on what constitutes the shift from one time period to another. Ya'akov Meron gives three periods of the development of Ḥanafī law: ancient, classical, and post-classical. For Meron, the ancient period (what others have referred to as the formative period) lasted until the end of the tenth century and was a period in which the developing law was characterized by chaos and a lack of systemization. This period does not demonstrate a highly developed legal thought. Meron marks the beginning of the classical period with the works of the Baghdadi jurist Muḥammad al-Qudūrī (d. 428/1037) in the eleventh century and ends it with Abū Bakr b. Mas'ūd al-Kāsānī at the end of the twelfth century. Meron argues that the classical period was characterized by a greater systemization of the legal material and more sophisticated argumentation and explanations of the legal rulings. While Joseph Schacht argues that the classical period was characterized by *taqlīd* (what Schacht considers a blind adherence to the precedent of the previous generations), Meron argues that it would be erroneous to see the legal development of the classical period in this manner. According to him, it is the post-classical period in which the jurists stayed close to the precedent of their particular legal schools and primarily produced commentaries to explicate and defend those legal rulings. The post-classical period, then, according to Meron, starts in the early thirteenth century with the famous text *al-Hidāyah* by Burhān al-Dīn al-Marghīnānī (d. 593/1197). Meron, "The Development of Legal Thought in Hanafi Texts."

Christopher Melchert, on the other hand, places the beginning of the classical period almost a century earlier than Meron. He argues that the classical period begins with Abū Ja'far al-Ṭaḥāwī (d. 321/933) when we see the development of a self-conscious affiliation with the Ḥanafī school. Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th-10th centuries C.E.* (New York: Brill, 1997), 116. See also the periodization schemes of Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 2-3; and David Vishanoff, *The Formation of Islamic Hermeneutics: How Sunni Legal Theorists Imagined a Revealed Law* (New Haven: American Oriental Society, 2011), xv.

⁴⁸ Wael Hallaq argues that it was in the formative period (the end of which he marks as the middle of the tenth century) that the distinguishing and constitutive features of Islamic law developed. Any subsequent developments after this period, he argues, were "'accidental attributes' that—despite their importance for legal, social and other historians—did not affect the constitution of the phenomenon we call Islamic law. With or without these changes, Islamic law, for our present purposes, would have remained Islamic law, but without the legal schools or the science of legal theory, Islamic law cannot be deemed, in hindsight, complete." Hallaq, *The Origins and Evolution of Islamic Law*, 3.

⁴⁹ For more information on the development of the legal schools, see Melchert, *The Formation of Sunni Schools of Law*, xxii-xviii; Noel Coulson, *A History of Islamic Law* (Piscataway: Transaction Publishers, 2011), 62-73; Ahmed El Shamsy, *The Canonization of Islamic Law: A Social and Intellectual History* (New York: Cambridge University Press,

this period as the beginning of the transformation of Islamic law from a method of juridical discretion (*ijtihād*) to the codification episteme (*taqlīd*).⁵⁰ In this shift and transformation, it was the eleventh and twelfth centuries that saw the emergence of the “codification episteme,” which helped the legal schools to solidify and the legal discourse to mature and stabilize.⁵¹ Ibrahim argues that the shift to the codification episteme was largely a move towards legal determinacy and canonization. By the thirteenth century, he argues, this process had been crystallized and scholars began to articulate legal rulings in the language of the authoritative or official position of the school.⁵² Al-Sarakhsī sits at precisely this juncture, the turn towards legal determinacy in

2013), 167-93; and Brannon Wheeler, *Applying the Canon in Islam: The Authorization and Maintenance of Interpretive Reasoning in Hanafī Scholarship* (Albany: State University of New York Press, 1996), 1-113.

⁵⁰ Ibrahim, *Pragmatism in Islamic Law*, 22. Ibrahim refers to *taqlīd* as the codification episteme. Historians of Islamic law have long argued over the role of independent legal reasoning (*ijtihād*, what Ibrahim refers to as juristic discretion) and adherence to the precedent of one’s legal school (*taqlīd*, often referred to as blind adherence). Joseph Schacht argued that while the formative period (which according to him ended in the ninth century) was characterized by dynamism and legal ingenuity, the end of that period saw the “closing of the gates of *ijtihād*.” For Schacht, the subsequent periods of Islamic legal history were marked by a blind adherence to the precedent of one’s legal school, which led to the stagnation in Islamic law. In his historical narrative, Schacht was undoubtedly influenced by the historical trope of the rise and fall of empires that was common in nineteenth-century historiography. This narrative representation of the “golden age” of the formative period, which was followed by a period of decline, went a long way in justifying European colonization as the rise of another civilization after the inevitable decline of those areas that were being colonized. Wael Hallaq challenged Schacht’s historical narrative, arguing that there was, in fact, no such demise of the dynamism of Islamic law, that the controversy over the role of *ijtihād* only began to emerge in the twelfth century, and that independent juristic reasoning, in fact, continued until the sixteenth century. Sherman Jackson, however, argued that both Schacht and Hallaq shared a negative perception of the concept of *taqlīd*. He argued instead that the practice of this adherence to legal precedent was essentially a search for established sources of authority that could then be utilized to give authority to more recent rulings (Jackson refers to this process as legal scaffolding). Jackson thus asserts that *taqlīd* was not a sign of the decline or stagnation of Islamic law but instead a marker of a more advanced state of legal development. For Jackson, despite the closing of the gates of *ijtihād*, the law remained innovative and creative through the use of legal scaffolding as a means of creating change. Mohammad Fadel has also argued that the *taqlīd* is a maturation of the legal tradition. For more information, see Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1967); Wael Hallaq, “Was the Gate of Ijtihad Closed?” *International Journal of Middle East Studies* 16, no. 1 (1984): 3-41; Sherman Jackson, “*Taqlīd*, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory: *Muṭlaq* and *‘Amm* in the Jurisprudence of Shihāb al-Dīn al-Qarāfī,” *Islamic Law and Society* 3, no. 2 (1996): 165-92; Mohammad Fadel, “The Social Logic of *Taqlīd* and the Rise of the *Mukhtaṣar*,” *Islamic Law and Society* 3, no. 2 (1996): 193-233.

⁵¹ Ibrahim, *Pragmatism in Islamic Law*, 23.

⁵² *Ibid.*, 37.

the historical development of the Ḥanafī legal school. His works are characterized by their depth and breadth of coverage and hermeneutical argumentation made in defense of the substantive legal rulings of the legal school to which he adhered. Exploring his works in detail allows me to capture Ḥanafī legal discussions on desire at a historical moment in which the diversity of legal rulings and hermeneutical method were undergoing initial efforts at standardization.

This dissertation primarily relies on *al-Mabsūṭ*, al-Sarakhsī's work in positive law (*furū'*). The *Mabsūṭ* is a commentary on an earlier legal work by Muḥammad b. Muḥammad al-Marwazī (d. 334/945) which was, in turn, a summary of the works of Muḥammad b. al-Ḥasan al-Shaybānī.⁵³ Abū Ḥanīfa left no extant writings, but his work was recorded and preserved by his students, including al-Shaybānī. Indeed, al-Shaybānī's writings are among the foundational texts of the Ḥanafī legal school.

The *Mabsūṭ* spans thirty volumes and over fifty chapters, with numerous sections and sub-sections, and is characterized by its depth of legal argumentation. It is not unusual to find several pages of discussion on a single legal issue. One case in point is al-Sarakhsī's attempt to determine the parameters of a desiring gaze. Al-Sarakhsī creates a typology of different forms of the desiring gaze and the many configurations of the gazing subject and desired object. This issue alone spans over fifteen densely packed pages, with no punctuation or space between sentences.

The *Mabsūṭ* is organized around points of dispute in the law, regarding which al-Sarakhsī presents the positions of different authorities. He then reasons through the

⁵³ Calder, "al-Sarakhsī."

evidence to arrive at what he considers to be the authoritative judgment on the issue. Norman Calder notes that in the *Mabsūṭ*, al-Sarakhsī looks at the rulings established by al-Shaybānī and organizes the material around points of dispute. Al-Sarakhsī also incorporates aspects of the local Ḥanafī tradition as well as information about other schools of law.⁵⁴ Al-Sarakhsī himself states that he set out to write a text that would give the reliable judgment on the different legal issues and justify and elaborate upon the positions of the Ḥanafī legal school.⁵⁵ Given this breadth of information, the detailed legal argumentation, and his extensive rationalizations for legal rulings, I have primarily turned to the *Mabsūṭ* in exploring and explicating the gendered ontology that informs al-Sarakhsī's legal thought.

In addition, I occasionally turn to al-Sarakhsī's legal theoretical text, *Uṣūl al-Sarakhsī*, in which he expounds his legal methodology through detailed analysis of particular cases, while also providing philosophical justifications for various aspects of law and ethics. It is thus a helpful supplement not only for the additional discussions of legal cases but also for the connections he draws between those legal issues and broader theoretical considerations.

1.4 Methodology

In her 2005 essay "A New Agenda for the Cultural Study of Law: Taking on Technicalities," Annelise Riles argues that to scholars engaged in cultural studies, the technical dimensions of the law are mundane and uninteresting. Against this impulse,

⁵⁴ Ibid.

⁵⁵ Tastan, "al-Sarakhsī," 246-47.

Riles encourages culturalists to focus on the technicalities of the law, within which one can observe the very aspects of the law that culturalists theorize. Riles refers to this approach as the “technical aesthetics of law,”⁵⁶ in which scholars would focus on the agency of the technical aspects of the law as a subject of its own. Such an approach would move away from studying law as a product of social and cultural forces and instead make the technical aspects of the law into the object of study.⁵⁷ Riles outlines four specific technical aspects of the law that culturalists must focus on in order to develop a more expansive conception of legal knowledge: 1) the ideologies that influence the law; 2) legal actors, i.e. those who see themselves as technicians of the law; 3) the problem-solving paradigm of the law, i.e. how problems are defined and solutions crafted; and 4) the form of technical legal doctrine and argumentation.⁵⁸ My methodological approach to the law emerges from Riles’ call to explore the technical dimensions of legal discourse. I take al-Sarakhsī’s legal text as the object of my study, detailing the ways in which the minutiae of legal doctrine and argumentation shape gendered legal personhood.

At the start of my dissertation I envisioned the project as an intellectual history in which I would trace the ontological assumptions of the law and demonstrate their role in shaping it. I realized that a social historical approach to al-Sarakhsī’s legal texts would pose a tremendous challenge. Central Asia in the eleventh century has not been studied in

⁵⁶ Annelise Riles, “A New Agenda for the Cultural Study of Law: Taking on the Technicalities,” *Buffalo Law Review* 53 (2005): 976.

⁵⁷ Alain Pottage, “Law After Anthropology: Object and Technique in Roman Law,” *Theory, Culture, and Society* 31, no. 2/3 (2014): 147.

⁵⁸ Riles, “A New Agenda for the Cultural Study of Law,” 976.

much depth and suffers from a scarcity of resources. Locating al-Sarakhsī within the broader milieu would prove to be a challenge. Additionally, with the sparse biographical information about al-Sarakhsī, it would be difficult to ascertain the varied intellectual and cultural influences that affected his conception of gender. What was clear, however, was his placement within the Ḥanafī legal tradition and his stated purpose in providing a legal and intellectual justification for those positions. As such, placing him within an intellectual tradition and noting the ways in which he contributed to the further solidification of the gendered ontology that was circulating in the Ḥanafī legal discourse seemed a more feasible project. As I explored a variety of legal cases in his text, however, I found myself increasingly engaged in a close reading of the text, lingering on the minutiae of legal reasoning. I became much more interested in how this gendered ontology was made and articulated, how it reverberates throughout the text, and where it becomes unstable. Taking from the recent turn in the anthropology of law, my interest in this dissertation has been a focus on the technical aspects of the law. I follow the legal doctrine and argumentation in order to draw out the conceptual relations internal to the text, not between the text and the social and cultural context within which it was produced.

In order to engage the specifics of legal argumentation, I decided to do a close reading of several legal cases in al-Sarakhsī's substantive legal text. Taking this case-studies approach allowed me to trace the ways in which gendered legal subjects were formed and reformed within each case study. It also gave an unintended nuance to my argument regarding the law's construction of a gendered ontology. At the beginning of

the dissertation, I set out to explicate the gendered ontology that informs al-Sarakhsī's legal thought. The purpose then was to demonstrate that this ontology imagined gender along the active/passive binary and, furthermore, that al-Sarakhsī's legal hermeneutics were informed by this gendered ontology. As I began my research, I found that gender functioned at different registers in al-Sarakhsī's legal thought. On the one hand were his stated beliefs on the natural dispositions of men and women,⁵⁹ and on the other were his assumptions about gender that factored into his legal reasoning. Noticing the multiple ways in which gender was articulated and functioned in al-Sarakhsī's legal thought, I decided to put these case studies in conversation with one another. This allowed me to demonstrate the inconsistencies in the law's stated goal with regards to gendered norms and the instability and incoherence of the gendered legal subject. The case-studies approach not only demonstrated how al-Sarakhsī's construction of gender functioned in his legal reasoning but also threw into relief the dissonances and ruptures in his stated conceptions of gender, as well as how these conceptions shifted as the gendered subject was reformulated in individual case studies.

Given this methodological approach, each chapter of the dissertation employs a close reading of different case studies. Whereas the first few case studies demonstrate al-Sarakhsī's narrative arc, the remaining ones demonstrate instances and moments in the text where that ontology is challenged or indeed falls apart. At times the ontology is challenged by the law's recognition of certain subjects that do not fit the gender binary,

⁵⁹ An example of such stated beliefs is his discussion on child custody and the socialization of children into their gendered roles. In explaining that the male child must return to his father at the age of seven and cannot remain in the care of his mother, he argues that doing so would cause the child to adopt feminine ways in his speech and gait. This would cause the male child to deviate from his perceived nature. For more information on this, see Chapter Three.

and at other times it comes from the law's inability or hesitance to enforce the rulings that would result from the assumptions of the stated gendered norms. Putting these case studies in conversation with one another in this manner allowed me to take a deconstructive approach to the ontological, noting the instability and incoherence of a reality that is presented as natural.

My process for gathering the case studies followed al-Sarakhsī's legal reasoning and legal categorizations. I organize the chapters of the dissertation based on the different categories of gendered subjects discussed by al-Sarakhsī: male, female, children, and intersex. My main aim in setting up the chapters in this fashion was to interrogate each category and the different formulations and reformulations of that singular category in each chapter. The case studies I searched for were those that made specific mention of gendered legal subjects or employed that category in legal argumentation. As I explored a single case study, questions would emerge for me about how the legal argumentation in that case would speak to other legal cases that al-Sarakhsī might consider. I was searching for case studies that were dissonant with one another.

For example, my exploration of the legal discussion on sexual intercourse and rape brought me to the case study on sodomy. As I worked through the construction of male and female subjects of desire in al-Sarakhsī's attempt to provide a legal definition for sexual intercourse, I began to wonder how this construction would hold up in the case of a sexual act in which the male or female actors did not occupy their "proper" roles. There were plenty of case studies in which the male subject was consistently active and desiring and the female passive and desirable, but I was looking specifically for case

studies in which no such easy categorization was possible. Thus I turned my attention to al-Sarakhsī's consideration of sodomy (*liwāṭ*)⁶⁰ to explore how he maintained the active/passive binary and the construction of gendered legal subjects in the face of this disruption (that is, a case in which men are also acted upon).⁶¹ I employed a similar approach in the case studies I engaged for exploring al-Sarakhsī's construction of the female subject of desire. In each chapter, as I searched for case studies I was guided by two determining factors: my previous knowledge of the varied legal questions that are considered in the genre of substantive law (*fiqh*) and my attention to the complexities of corporeality and the challenges of sexing the body. The end product of this close reading of case studies was a simultaneous account of the function the gendered ontology served in legal argumentation and its instability within the very discourse through which it was produced.

My methodological approach also differs from other scholarly works that take gender as a category of analysis in the study of pre-modern Islamic law.⁶² These studies

⁶⁰ In Islamic law, sodomy (*liwāṭ*) refers to any act of anal penetration and includes male penetration of both a female and male body. Here I am specifically referring to same-sex anal penetration.

⁶¹ Unfortunately, I was not able to bring into consideration any legal case study in which women were considered an active or penetrative partner in the sex act. While Islamic law does discuss tribadism (commonly referred to as *siḥāq*), I did not find any references to tribadism (or, in fact, any usage of that term) in al-Sarakhsī's categorization of different sexual acts.

⁶² My focus here is specifically on scholarship on pre-modern Islamic law. While there is a quite extensive literature that focuses on gender in contemporary Islamic law, that scholarship looks primarily at the engagement of women with Shariah courts. Works such as Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law* (New York: IB Tauris, 2000) and Susan Hirsch, *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court* (Chicago: University of Chicago Press, 1998) have primarily focused on women's manipulation of the court systems to negotiate their rights. Using the social and legal histories mentioned previously, many scholars in this field have also offered critiques of the modern Islamization projects. Amira Sonbol has explored women's interaction with Ottoman courts in *Women, the Family and Divorce Laws in Islamic History* (Syracuse: Syracuse University Press, 1996). She argues that the historical transformations over the past two centuries have greatly restricted the flexibility of the court systems and the possibilities of maneuverability for women. She further argues that it is an erroneous belief that the current Shariah codes are a continuation of a centuries-old legal tradition. What these modern nation states are attempting to do, she argues, "is the institution of new customs labeled as 'shariah' that deny previous freedoms while

have taken two different methodological approaches in relation to Islamic law. While one set of scholars has used legal opinions (*fatāwā*) and court records as sources to explore Islamic law in practice, other scholars have turned to the legal discourse, in particular substantive law (*fiqh*). Such feminist engagements with the law investigate different aspects of it where gender disparity is apparent. The most prominent objects of study within this genre of scholarship have been the institution of marriage and divorce. The reason for this narrow focus has to do with contemporary politics. Most modern nation states with Muslim-majority populations have instituted some form of Islamic law. Unlike the function of Islamic law in the pre-modern period, the legacy of colonialism in the post-colonies has reduced the application of Islamic law almost entirely to matters of marriage, divorce, child custody, and inheritance. With this reduction of Islamic law to matters that most directly affect women, there has been significant activism and scholarship that has critiqued the patriarchy of Islamic law.

One of the most prominent methodological approaches to the study of gender in Islamic law has been a focus on law in practice. Scholarship in this vein utilizes Islamic

emphasizing earlier discriminations” (Sonbol, *Women, the Family and Divorce Laws*, 11). Asifa Quraishi’s work on the Hudood Ordinance in Pakistan has employed a similar critique, not only arguing that these ordinances are not in accordance with the classical legal tradition, but also that this tradition thus offers possibilities of reform that would lead to more gender-egalitarian laws. Asifa Quraishi, “Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective,” in *Windows of Faith: Muslim Women Scholar-Activists in North America*, ed. Gisela Webb (Syracuse: Syracuse University Press, 2000). Ziba Mir-Hosseini’s second book, *Islam and Gender: The Religious Debate in Contemporary Iran* (Princeton: Princeton University Press, 1999), does not take women’s interactions with Islamic legal courts as its object of inquiry, but the legal discourse of the clerics in Iran, instead. Through face-to-face encounters with the clerics, Mir-Hosseini’s book gives us a rich sense of the way in which religious discourse, political interests, and gender interact in the creation of law. Similarly, Shahla Haeri’s work, *Law of Desire: Temporary Marriage in Shi’i Iran* (Syracuse: Syracuse University Press, 2014), not only focuses on the law in the courts but on the legal discourse of the clerics in general, as well as broader cultural dynamics and the lived experiences of individuals.

legal court records and legal opinions (*fatāwā*) as objects of study. These sources help us understand the legal realities of women and the avenues through which they negotiated their position in society.⁶³ Islamic legal opinions, coupled with court records, provide a strong contrast to the jurist discourse on women while allowing us to see the impact of this discourse on women. Such studies “have criticized the one-sided evaluation of Islamic family law as a rigid and patriarchal institution and have also drawn attention to legal mechanisms women may use to their advantage.”⁶⁴ One of the earliest works of this kind was produced by Ronald Jennings in 1975. Jennings’ work concentrated on the legal position of women in the Ottoman city of Kayseri in the sixteenth century. Among his results was the finding that the women of Kayseri frequently approached the court with their problems. He argued that the judge often played a protective role, and women depended on him to uphold their rights granted under Islamic law.⁶⁵

Subsequent scholarship reached similar findings. Judith Tucker, for example, also found that women approached the Sharī‘a court to demand their rights with the expectation that the court would accommodate their needs. Tucker argues that Islamic law, as practiced in Ottoman Syria and Palestine, was flexible in practice, compensating women for its patriarchal bias. She provides the issue of divorce as one example: the

⁶³ See, for example, Judith Tucker, *In the House of Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley: University of California Press, 1998); Yvonne J. Seng, “Standing at the Gates of Justice: Women in the Law Courts of Sixteenth-Century Uskudar, Istanbul,” in *Contested States: Law, Hegemony, and Resistance*, ed. Mindie Lazarus-Black and Susan F. Hirsch (New York: Routledge, 1994); Leslie Peirce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley: University of California Press, 2003).

⁶⁴ Annelies Moors, “Debating Islamic Family Law,” in *Social History of Women and Gender in the Modern Middle East*, ed. Margaret Meriwether and Judith Tucker (Boulder: Westview, 1999), 143.

⁶⁵ Ronald Jennings, “The Legal Position of Women in Kayseri, a Large Ottoman City, 1590-1630,” in *Studies on Ottoman Social History in the Sixteenth and Seventeenth Centuries*, ed. Ronald Jennings (Istanbul: ISIS Press, 1999), 120.

courts, she demonstrates, while upholding men's privilege to unilateral repudiation, were nevertheless careful about women's entitlements to dower and financial support and ensured that these rights were fulfilled. Additionally, in matters of annulment initiated by women, the court accommodated their needs by accepting and adopting more flexible rulings from among the schools of law.⁶⁶

Leslie Peirce's *Morality Tales* represents another such analysis of Sharī'a court records. Written as a microhistory of the city of Aintab in the sixteenth century, this work illustrates that women also accessed the Sharī'a court of the city, where both the judge as well as the men and women who brought their cases to court negotiated and interpreted the law. Based on her observation of women's interactions with the court, Peirce concludes that the "law as process was considerably less sharply gendered than normative law."⁶⁷ In opposition to previous works that portrayed a monolithic image of the presumably oppressed Muslim woman, such scholarly analysis presents a more complex and nuanced picture. The historical image of women in such works is one in which they are financially independent and active members of society while working within the constraints of a system that maintained and enforced a gender hierarchy. Challenging the idea of Muslim women cloistered in the harem, these studies argue instead that seclusion was commonly practiced by upper-class elite women. As such, the practice of seclusion was an emblem of prestige and did not necessary entail passiveness or the lack of

⁶⁶ Tucker, *In the House of Law*, 180.

⁶⁷ Peirce, *Morality Tales*, 382.

opportunities for women to engage with their society.⁶⁸ The studies of these scholars have challenged the notion that Islamic law was primarily a vehicle for enforcing the subjugation of women. These works, instead, explored the interaction of women with the legal process, contending that the Sharī‘a court was a space where both sexes contested and negotiated the law.

The second methodological approach in the study of Islamic law and gender has investigated the classical legal tradition, in particular substantive law (*fiqh*). One of the crucial works in this genre is Kecia Ali’s work on the construction of marriage in early Islamic law. In *Marriage and Slavery in Early Islam*, Ali analyzes early texts from three major Sunni legal schools. The central aim of her book is to demonstrate how the institution of slavery structured the jurists’ conceptualization of marriage and divorce. In this analogical framework between marriage and slavery, marriage granted a type of ownership “to the husband over the wife in exchange for dower payment, which makes sexual intercourse between them lawful.”⁶⁹ Ali’s scholarship also focuses on how the interests of male authority within the family influenced legal hermeneutics. In her article, “‘The best of you will not strike’: Al-Shafi‘i on Qur’an, Sunnah, and Wife-Beating,” Ali demonstrates how the eminent ninth-century jurist and eponym of the Shāfi‘ī legal school, Muḥammad b. Idrīs al-Shāfi‘ī, departed from his own stated legal methodology in the interest of establishing and enforcing the authority of the husband over his wife. While al-Shāfi‘ī held that rules must be supported through revelation, he also held that a

⁶⁸ Iris Agmon, “Women’s History and Ottoman Sharia Court Records: Shifting Perspectives in Social History,” *HAWWA* 2, no. 2 (2004): 177.

⁶⁹ Ali, *Marriage and Slavery*, 165.

recalcitrant (*nāshiza*) wife was no longer entitled to financial support (*nafaqa*) from her husband. While verse 4:34 of the Qur'an prescribed various disciplinary techniques that a husband may employ to establish his authority over a recalcitrant wife, loss of financial support was not one of them. Ali concludes that while there are many potential explanations for why al-Shāfi'ī moved away from his stated methodology, one of the reasons was the transactional model of marriage in which the wife's sexual availability and obedience were tied to a monetary exchange.⁷⁰

Another prominent scholar who has investigated the legal tradition is Hina Azam, whose work explores the juristic writings on sexual violation and rape in Islamic law, from the formative to the end of the classical period. Looking at the Mālikī and Ḥanafī legal schools, Azam provides a genealogy for the concept of sexual violation that emerged through a conflict between a theocentric and proprietary ethic in the legal tradition. The fundamental question the jurists debated was whether a victim of sexual violation should receive monetary compensation. Like Ali, Azam's work also demonstrates the close linkage between sexuality, property, and the female body in Islamic law, and the ways in which these assumptions formed the framework for particular legal cases. Azam's book also places the law within the context of the broader late antique and medieval Oikumene. This contextualization of Islamic law within the broader Near East is necessary, she argues, in order to understand that the Islamic legal

⁷⁰ Kecia Ali, "'The best of you will not strike': al-Shafi'i on Qur'an, Sunnah, and Wife-Beating," *Comparative Islamic Studies* 2, no. 2 (2006): 143-55.

discourse did not emerge from an engagement with sacred sources alone but also in conversation with the broader religious, cultural, and legal systems that preceded Islam.⁷¹

While the works of scholars like Ali and Azam have presented crucial feminist critiques of the *structures* of Islamic law, my dissertation contributes to this body of scholarship by turning to the conceptions of gender, desire, and the body that are necessary to make such structures possible. My turn to ontology is motivated primarily by the recognition that many of the legal rulings pertaining to gender relations make certain assumptions regarding the natural dispositions of men and women. By engaging ontology, I hope to chart how these assumptions regarding gendered human nature order the juristic understanding of how men and women ought to “be” in this world. My working assumption is that the legal tradition constructs reality and sustains that conception of reality through an ontological framework. As ontologies are conceived through our social and material practices, I turn to desire, the body, and gendered existence to map the intricacies through which a gendered ontology is informed by and constructs these ways of being in the world.

Additionally, my work also differs from works by Ali and Azam, as well as others such as Corlyn Baugh and Behnam Sadeghi,⁷² in that I am not locating Islamic law within a broader cultural and social world, nor am I conducting an overarching diachronic study of the development of the legal schools over time to note trends and

⁷¹ Hina Azam, *Sexual Violation in Islamic Law: Substance, Evidence, and Procedure* (Cambridge: Cambridge University Press, 2015), 9.

⁷² Behnam Sadeghi, *The Logic of Law Making in Islam: Women and Prayer in the Legal Tradition* (Cambridge: Cambridge University Press, 2013); Carolyn Baugh, "Compulsion in Minor Marriages as Discussed in Early Islamic Legal Texts" (PhD diss., University of Pennsylvania, 2011).

shifting concepts in the legal tradition. By conducting a detailed analysis of a variety of case studies in the work of a single author, I am able to focus on the gendered ontology imagined by the law and investigate the technical processes by which it both produces this ontology and yet struggles to maintain its coherence in the face of fissures and inconsistencies.

One of the main aims of scholarship in gender and sexuality in Islamic law has been to investigate the relationship between the law and women as recipients of the law. In order to do so, what is required is an archeology of the juristic assumptions regarding personhood, the legal subject, and male and female natures.⁷³ Thus, this dissertation is doing foundational work by providing not only an account of the law's construction of gender, but also deconstructing the law's presentation of this gendered ontology as natural.

1.5 Chapter outline

The dissertation comprises four chapters. The first focuses on al-Sarakhsī's efforts to create desire as an object of legal analysis, while the remaining three look at gendered subjects of desire—male, female, and those who do not fit the gender binary. I develop the argument of the dissertation over the four chapters, with each chapter posing a question to al-Sarakhsī's legal text that emerged from the previous chapter.

The first chapter stands on its own and is foundational to understanding al-Sarakhsī's legal treatment of desire. It begins by giving the reader a semantic and

⁷³ For a recent study on gender and legal subjecthood, see Fatima Seedat, "Sex and the Legal Subject: Women and Legal Capacity in Hanafi Law" (PhD diss., McGill University, 2014).

conceptual map of desire in al-Sarakhsī's legal works. Additionally, it provides an initial glimpse into the shifting and fluid nature of al-Sarakhsī's construction of desire and his attempt to capture and define desire into discrete categories. In order for the law to legislate desire, it must stabilize and freeze its messiness. This process results in the law's construction of the category of desire, demonstrating its ideal of a proper correspondence between norm and nature. Chapter One thus illustrates how the law attempts to fix an object of legislation by normalizing certain forms of desire. This analysis also introduces the importance of legal rationalization to al-Sarakhsī's discourse. It illustrates the way in which the demand to justify legal precedent often dictates the construction of desire. Finally, the chapter also demonstrates that al-Sarakhsī's discussion on desire is largely concerned with male desire. In fact, the seemingly gender-neutral conversation about desire is predominantly concerned with the male experience. This has the effect of presenting the male subject as universal.

Chapters Two through Four explore how the legal conception of desire works in constructing gender along the active/passive binary. Chapter Two focuses on the male as subject of desire, while Chapter Three focuses on the female subject. The last chapter treats subjects at the margins, i.e. those legal subjects who do not easily fit the law's construction of masculinity and femininity. The first several case studies in each chapter demonstrate the narrative arc of the active/passive binary and the ways in which this binary constructs gendered subjects of desire. Thus, Chapter Two demonstrates how males are constructed as active and desiring and women as passive and desirable. The subsequent case studies, however, demonstrate the instability of the legal subject through

different instances where the legal argumentation reformulates the gendered legal subject in defiance of its “natural” positioning within the binary. Each chapter presents an analysis of the legal hermeneutics al-Sarakhsī employs to maintain the coherence and stability of the active/passive binary.

Chapter Two investigates the male subject of desire through several case studies. By looking at those pertaining to sexual intercourse, it demonstrates how al-Sarakhsī’s legal thought constructs the male as active and desiring, his body impenetrable. The female, on the other hand, is passive and desirable; her body is always penetrable. Having established this, the remaining case studies turn to male subjects who challenge the active/passive binary. In demonstrating how the law attempts to preserve this stricture in the face of the challenge these subjects pose, we can see how the law struggles to maintain the coherence of what is presented as natural.

Having demonstrated how the active/passive binary constructs the male subject of desire, Chapter Three focuses particularly on the female as subject of desire. The central question that animates this chapter is how the law engages female desire. As women are also subjects of the law, this chapter attempts to understand how female desire can be recognized when the female subject is constructed as always desirable. Furthermore, what happens to the active/passive binary if the female subject can also be desiring? How can the binary be maintained if the female subject can move between activity and passivity? In exploring these questions, Chapter Three demonstrates that the law does, indeed, recognize the female as a desiring subject. In fact, female desire factors into legal reasoning and can be the basis for particular legal rulings. Despite this recognition,

however, female desire is not addressed in any meaningful or substantive way. While male desire is described in intimate detail, female desire is simply assumed, with no discussions about its markers or the means by which its presence can be determined. The recognition of female desire also does not disrupt the active/passive binary, as al-Sarakhsī re-narrates female desire back into passivity in order to maintain the coherence of the binary.

The last chapter turns to subjects who are not considered desiring, nor do they fit easily within the active/passive binary. Looking at these subjects at the margins helps us to understand better how the active/passive binary is constructed and negotiated. Thus, in Chapter Four I turn to legal discussions around children, both gendered as well as intersex. The chapter begins by asking whether children are considered desiring subjects and where they fit into the active/passive binary. In the first section we see that whereas children are not seen as having desire (and, in fact, are not to be approached sexually, either), al-Sarakhsī considers children at the cusp of puberty as beginning to experience the inclinations of desire. These children, both male and female, are not yet legal adults; instead, they are considered to be in a liminal stage where they are still of legal minority, but particular legal rulings that apply to adults begin to apply to them as well. It is at this stage that the active/passive binary comes into play again in informing the legal rulings pertaining to children. In particular, I examine the legal permission to marry and consummate a marriage between an adult and a child. In the legal rulings pertaining to child marriage, the active/passive binary again constructs the female child as desirable in a way that allows the consummation of a marriage based on male desire for her and her

ability to serve as a locus without physical injury. For the male child, however, consummation is only imagined possible once his erection is considered by the law to be marked by desire. While al-Sarakhsī does assert that the male child at the cusp of puberty can be desirable to an adult woman, his desirability is located in his own desire and ability to penetrate.

The second section of this chapter looks at intersex children who do not fit easily into the gender binary at all. Looking at intersex individuals allows us to see how al-Sarakhsī maintains the gender binary while recognizing that certain individuals are born without a clear gender. The intersex body exposes the incoherence and instability of the binary as a legal fiction by resisting representation within it. As we see in this chapter, the intersex body cannot remain in a space of gender ambiguity because such a subject would undo the legal fiction. Through different legal maneuvers and mechanisms, al-Sarakhsī manages to fit intersex individuals back into a binary construction in order to maintain the object of legislation, the gendered subject.

2. The Legal Construction of Desire

2.1 A tale of two fatwas

In a legal opinion (*fatwā*) that was recently circulated on social media, a questioner inquired about the legal rulings pertaining to the purificatory bath (*ghusl*) that an adult must take after nocturnal emissions. The questioner seems familiar with some of the basic rulings regarding this issue but seeks further clarification.

Question: I have learned that if a women [sic] who has reached puberty has an erotic dream and sees some discharge afterwards, she has to make ghusl. If she sees discharge alone without remembering a dream, she would also have to take ghusl. But if she remembers only the dream without seeing discharge, she doesn't have to take ghusl.

What if a women [sic] constantly has discharge? How does she know when to take ghusl and when not?¹

The legal opinion was posted on SeekersHub, a prominent online Sunni Islamic educational institute.² SeekersHub provides a wide variety of programs and services,³ including a forum for readers to ask legal questions and scholars to provide opinions.⁴ As part of a growing trend in American Muslim communities that is often referred to as

¹ "Rules Regarding Ghusl and Wet Dreams for Men and Women," *SeekersHub*, February 26, 2013, <http://seekershub.org/ans-blog/2013/02/26/rules-regarding-ghusl-and-wet-dreams-for-men-and-women/>.

² SeekersHub has an active online presence and an extended reach. According to their website, they have over 3,000 students each term and issue over 10,000 legal opinions every year.

³ Some of the other programs and services SeekersHub offers are a regular podcast, a blog, and free virtual classes in a wide array of subjects. There are classes in Islamic law (*fiqh*), Beliefs (*'aqidah*), Prophetic Guidance (*Sīrah*), Quranic Studies, Arabic, Spirituality, and Living Religion. These categories are listed on the SeekersHub website. The different courses primarily use pre-modern texts that the instructors translate and teach in English. The courses taught under the category of "Spirituality" and "Living Religion," for instance, use pre-modern texts that focus on virtue ethics. One of the most prominent texts taught in these courses is the book *Revival of the Religious Sciences (Ihyā' 'Ulūm al-Dīn)* by Muḥammad al-Ghazālī, a well-known twelfth-century Muslim scholar. The category of "Living Religion" includes a myriad of topics from marriage advice to parenting, masculinity, and theological ruminations. For more information see: www.seekershub.org

⁴ SeekersHub refers to these legal opinions (*fatāwā*) as "Answers."

“neo-traditionalist,”⁵ SeekersHub emphasizes the authority of the Sunni schools of law and the necessity of not departing from their framework and conclusions.⁶ The legal answers they post on their site therefore often quote pre-modern legal texts as authoritative references, and in many matters they tend to stay close to the legal opinions stated in these texts.⁷ This answer, in particular, reiterates the legal discussions and categorizations of sexual fluids in many pre-modern legal texts, and is thus a vivid depiction not only of the ongoing relevance of these texts but also the ways in which sexual desire and the gendered body are read and constructed by them.

As we saw, the questioner begins by stating that the legal rulings he/she is familiar with require a woman to perform a purificatory bath after having a nocturnal emission. Even if she does not remember having an erotic dream, the woman is still required to perform the ritual bath if she sees discharge. However, if she does not see any discharge then no ritual bath is necessary. The ritual bath is connected to discharge, the presence of which then necessitates the ritual washing. The questioner then asks what the requirement would be if the woman were to see discharge constantly. The assumption

⁵ This intellectual and pedagogical trend calls for a turn to the Sunni textual tradition as authoritative for the contemporary context. In contrast, modern Islamic revivalism, which was popular throughout the twentieth century, viewed these texts with suspicion and called for a “return” to the original source texts, the Qur’an and Prophetic example (*Sunnah*). Islamic revivalists tend to follow certain parts of the legal tradition and eschew others. So-called neo-traditionalist groups like SeekersHub, however, emphasize the authority of the intellectual tradition and how one should not depart from its conclusions. The different Islamic disciplines, from law to theology and Sufism, are not read as intellectual conversations developing in historical time but instead as an unchanging body of knowledge transmitted across the different generations since the Prophetic period. For a historical ethnography of the rise of such “traditionalist” imaginations, see Zareena Grewal, *Islam is a Foreign Country: American Muslims and the Global Crisis of Authority* (New York: New York University Press, 2013).

⁶ See, for example, the answer given by Zainab Ansari on how a non-specialist can determine which scholars to follow for religious guidance. In her response she states that the determining factor of a “qualified scholar” is one who does not contravene “generational consensus.” See: “Differences of Opinion & Determining Sound Scholarship,” *SeekersHub*, May 20, 2012, <http://seekershub.org/ans-blog/2010/05/20/differences-of-opinion-determining-sound-scholarship>.

⁷ SeekersHub offers answers primarily based on the Shāfi‘ī and Ḥanafī schools of law.

here seems to be that, to require a ritual bath with a continuous presence of discharge would create an undue challenge and difficulty.

The question is answered by Shaista Maqbool, one of the teachers at SeekersHub who regularly answers legal questions pertaining to women. She states that there are two rulings if one does not remember having a wet dream yet sees discharge. On the one hand, if the individual “believes the discharge could be sexual fluid from an ejaculation/orgasm,” then they must perform the ritual bath. Or on the other hand, “if the individual knows that the fluid is pre-ejaculate sexual fluid (*madhī*), i.e. that which exists when aroused,” then the ritual bath is not required. What is most striking in her response is the vague language regarding female sexual fluids and vaginal discharge. Maqbool does not address the specificity of the term “discharge” in her answer, or the possibility of “constant discharge” that is not a sexual fluid. She uses the term discharge without offering any details about the different types of discharge and bodily fluids in the woman’s vagina.

In contrast, in another answer posted on SeekersHub about the sexual fluids of a man, the responder goes into significant detail about the different types of male bodily fluids outlined in the legal texts and their corresponding requirements of ritual purification.⁸ The answer mentions sperm (*manī*), pre-ejaculatory fluid (*madhdhī*), and *wadī*, a fluid that emerges from the penis during urination.⁹ The responder provides not

⁸ What is perhaps most interesting here is that the questioner does not specify that the inquiry pertains to men. However, since the question mentions sperm and semen, the responder assumes that the question pertains to male sexual fluids and responds as such.

⁹ “Male Sexual Fluids and Ghusl,” *SeekersHub*, August 2, 2012, <http://seekershub.org/ans-blog/2012/08/02/male-sexual-fluids-and-ghusl/>.

only a categorization but also detailed description of the color and texture of each type of bodily fluid. The experiential aspect of male desire (from sexual arousal to ejaculation) finds detailed expression in the legal texts, with descriptions of the different types of sexual fluids emanating from a male body that experiences desire. In contrast, as we saw, the question regarding women's sexual fluids has no such detailed categorizations or descriptions. There is no mention of differences between sexual fluid and other vaginal discharge that is normal for women to experience. There is additionally no attempt to explain the color or texture of this discharge as was explained in the answer pertaining to men's sexual fluids. The working assumption is that the only discharge possible for women is that which emerges due to sexual arousal, and that is a known entity that requires no explanation and is the same as the sexual discharge of men. There is no recognition of the physiological specificities of the female body, and in fact the only time there is any description of types of discharge, it is in relation to the excretion of *wadī* in men.

The juxtaposition of these two answers offers a vivid depiction of the way in which Islamic law constructs knowledge about sexual desire through an androcentric epistemological framework. The answers discussed above engage not only the legal rulings from pre-modern legal texts, but also the categories and conceptual frameworks created by the legal discourse.¹⁰ What we see is that the specificities of the female bodily response to sexual desire are largely ignored and do not serve as knowledge upon which

¹⁰ The categories of semen, pre-ejaculate, and fluid released by men during urination are reproduced from these legal manuals. The answer about male sexual fluids, for instance, cites the Ḥanafī legal text *Marāqī al-Falāḥ* by a seventeenth-century Ḥanafī jurist, Abū al-Ikhlāṣ al-Shurumbulālī (d. 1069 C.E./1659 A.H.).

legal rulings are based, as they cannot be conceptualized by the legal tradition. Rather, it is the male experience of desire and the biological specificities of the male body's response to desire that are known intimately and taken into consideration in creating legal categories and determinations. The categorization of bodily fluids that are articulated in both of the answers above demonstrates that the body that was rendered knowable for the law was the male body. That is, the categorization of semen and pre-ejaculate as the only two types of sexual fluids, and *wadī* as the only form of non-sexual discharge, makes evident that these categories emerged from male experience.¹¹ While the questioner is speaking about female bodily experience, the response is unable to consider this experience, as the female body is absent from the legal categorization. The response in such a situation is often to map the specificities of the male body on to the female.¹² This also shows us the ways in which the law selectively constructs "facts" for the purpose of legislating desire.

¹¹ It is interesting that in this answer Maqbool considers male non-sexual discharge but does not speak of non-sexual vaginal discharge. Islamic law does of course recognize vaginal discharge. However, this form of discharge is not considered in the same legal discussion as those on sexual fluids, which is a demonstration of the law's attempt to distinguish and categorize one thing from the other. The answers on SeekersHub often follow that categorization and make no mention of vaginal discharge in this answer but do mention it in other answers. For some answers on vaginal discharge, see: "Does Vaginal Discharge Break Wudu?" *SeekersHub*, January 26, 2011, <http://seekershub.org/ans-blog/2011/01/26/does-vaginal-discharge-break-wudu>; and "White Discharge and Preventing Discharge from Breaking Wudu," *SeekersHub*, May 26, 2014, <http://seekershub.org/ans-blog/2014/05/26/white-discharge-and-preventing-discharge-from-breaking-wudu>.

¹² It is important to note that Islamic law does indeed consider female bodily experiences that are particular to women. There is plenty of legal discussion on menstruation, lochia, and pregnancy in legal texts. However, much of the legal rulings pertaining to these experiences are based off of Quranic verses and Prophetic traditions rather than female experience. I should also note that both the legal discourse as well as the courts recognized that certain cases required knowledge of lived life that could only be sought through women. Thus in certain legal issues, such as establishing virginity, or physical competence for sexual intercourse, women were preferred as expert witnesses. For more on women's expert testimony see Chapter Five of Tucker, *In the House of Law*, and Chapter Three of Ron Shaham, *The Expert Witness in Islamic Courts: Medicine and Crafts in the Service of Law* (Chicago: University of Chicago Press, 2010). For a critique of legal rulings pertaining to menstruation, please see Celene Ayat Lizzio, "Gendering Ritual: A Muslima's Reading of the Laws of Purity and Ritual Preclusion," in *Muslima Theology: The Voices of Muslim Women Theologians*, ed. Ednan Aslan et al. (New York: Peter Lang, 2013), 167-80.

Shifting our focus from contemporary discourse to the “classical” legal tradition that SeekersHub holds to be authoritative, we find this process of selectively constructing facts and categories mirrored in the legal text of al-Sarakhsī. Throughout his positive legal text, al-*Mabsūṭ*, al-Sarakhsī devotes extensive attention to the nature of sexual desire and its complex manifestations, because it is a key factor in the law in a wide variety of issues. As we shall see in this chapter, desire is a critical concern in shaping legal rules regarding marriage and sexual relations, matters of ritual observance, women’s mobility in the public domain, and interpersonal interactions between individuals.

In order to arrive at clear determinations about the legal consequences of desire in these various legal issues, al-Sarakhsī attempts to delineate the precise contours of desire as an object of the law. He thus constructs desire into a tangible and knowable phenomenon that can be legislated. At other points in his text, however, al-Sarakhsī recognizes that desire is a complex subjective phenomenon and experience that does not necessarily correspond to the fixed category that he has constructed. That complexity and subjectivity is elided, however, for the purpose of having a clearly delineated “legal fact” through which to legislate. Despite al-Sarakhsī’s efforts to construct desire as a stable legal concept, as we will see in this chapter, even this legal construction is fluid, shifting, and inconsistent.¹³

¹³ For an overview of the range of concepts and terms that al-Sarakhsī uses to discuss desire, see the beginning of the next section.

In order to understand the incoherence in al-Sarakhsī's construction of desire in his text, we have to attend to the nature of legal discourse. While his construction of desire is a seemingly straightforward and systematic empirical account of the nature of desire, if we align his different claims regarding desire from different parts of the text, that systematicity begins to break down. This results from the demands of a complex project and process of lawmaking that dictates the legal construction of desire and moves between three constitutive elements: 1) the need to determine discrete objective facts for the purpose of legislating¹⁴; 2) the demand to uphold the authority of the inherited legal tradition and thus justify its precedents; and 3) his (and other jurists') assumptions about desire and sexuality, which are grounded in androcentric male experiential knowledge. Insofar as he is responding to these different impulses and demands of the law-making process at different points in the text, we can see that al-Sarakhsī's construction of desire in the text is ultimately incoherent and unstable. Despite this instability, the ways in which he speaks about desire nonetheless point us to crucial assumptions that al-Sarakhsī held about gendered nature and sexuality.

2.2 Legislating desire

The construction of social facts is crucial to the process of lawmaking. In their study of the American legal system, anthropologists John Conley and William O'Barr demonstrate that the law is selective in how it processes information into facts that are

¹⁴ The term legislation connotes a conception of law that is produced by a governing body such as a parliament or a legislature. However, I am using the term here to indicate more specifically the desire or urge to make or enact laws. Thus, when I use the phrase "object of legislation," I mean to investigate how a concept becomes available as an object that aids in the making or enacting of laws.

then considered for litigation. They look at small-claims courts in six different American cities and observe the ways in which people approach the court and negotiate legal discourse. They describe their study as an “ethnography of legal discourse,”¹⁵ a method that turns language into an object of analysis. Conley and O’Barr focus on two main aspects of the legal process: how litigants describe their problems in everyday language, and the legal discourse that institutions and practitioners employ. This legal discourse, they argue, is a means by which the law determines what is relevant for legal proceedings and sets boundaries for definitively legal facts.¹⁶ In their critical analysis of legal discourse, they conclude that the American legal system is selective about hearing, reporting, and preserving particular voices, and it is through this selective processing that “legal institutions shape both the questions they address and the answers they provide. ... The law selects among these voices, silencing some and transforming others to conform to legal categories and conventions.”¹⁷

Conley and O’Barr’s study is one illustrative case of a broader intervention in the anthropology of law that has highlighted how legal systems construct certain “facts” and accounts of reality on the basis of which law is produced. Such insights about the role of legal discourse as a mechanism for creating and maintaining legal categories--within which certain voices, perspectives, and facts are recognized--mirror my own observations regarding the construction of desire in al-Sarakhsī’s legal thought. In his attempt to capture and define desire for the purpose of legislating it in particular cases, al-Sarakhsī

¹⁵ John Conley and William O’Barr, *Rules Versus Relationships: The Ethnography of Legal Discourse* (Chicago: University of Chicago Press, 1990), xi.

¹⁶ *Ibid.*, 1.

¹⁷ *Ibid.*, 168.

must stabilize and freeze its messiness. This process results in the law's fixing desire into discrete categories that presumably represent reality, demonstrating the law's ideal of a proper relation of correspondence between norm and nature. While this legal construction of desire is at times motivated by the need to make it a discrete, legislatable object, it is also at times a matter of explaining and justifying the precedent of the Ḥanafī school of law. In both cases, however, al-Sarakhsī is engaged in a particularly *legal* reading of the reality of desire that is constrained and dictated by the demands of the lawmaking project.¹⁸

Desire is of particular legislative concern for Islamic law. Al-Sarakhsī argues that sexual desire was created in humans so that they may be inclined to have sexual intercourse and thus procreate and contribute to the continuance of the human race.¹⁹ While desire is seen as productive and purposeful, it also something that has to be carefully regulated and controlled at a number of levels. At the individual level, al-Sarakhsī argues, desire is something that should be curtailed and resisted in order to attain a virtuous self, which brings one closer to God. It is also necessary to regulate the expression and manifestation of desire for ritual purposes. Since ritual worship is conditioned upon ritual purity, the presence of desire becomes a concern, as it could

¹⁸ In her study of ritual law, Marion Katz makes a similar observation regarding the shifting nature of legal categories. Katz argues that ritual law in classical Sunni law was largely gender-neutral, where the concern was the polluting functions of the human body and not the female body in particular. She cautions, however, against reading the category distinctions in ritual law that do not center gender as representative of other aspects of Islamic law. She argues: "The category distinctions evoked in a specific ritual are highly situational, and ... we should not expect the relevant category distinctions to be active in all ritual activities within one religious system [...] Thus we may understand Sunni legal discourse to have declined (increasingly over time) the distinctions of gender, confessional identity, and even biological life as organizing principles of the law of ritual purity; this does not imply that the same is true for Islamic legal discourse as a whole." Marion Katz, *Body of Text: The Emergence of the Sunni Law of Ritual Purity* (New York: SUNY Press, 2012), 201-02.

¹⁹ Muḥammad ibn Aḥmad al-Sarakhsī, *Uṣūl al-Sarakhsī* (Beirūt: Dār al-Kutub al-‘Ilmīyah, 2005), 1:110.

invalidate acts of worship. In addition to those, the law's most central concern in relation to desire regards its social implications. Al-Sarakhsī suggests that desire has the power to destroy social order through sexual encounters that the law deems illicit. To leave desire unlegislated would lead to social chaos and the breakdown of a patrilineal system, where children would not know their fathers and women would be left responsible for financially providing for them.²⁰ Given this perceived power of sexual desire, it must be legislated in order to determine the acceptable parameters and relationships within which desire can be enacted and fulfilled, as well as to determine the legal consequences of experiencing and acting on desire.

The imperative to legislate, however, necessitates the creation of desire as an object of legislation. In the process of identifying desire, the law engages in the construction of a discretely specified object that is referred to as desire. For instance, as sexual intimacy is prohibited while fasting or on the pilgrimage, the law must consider what constitutes desire and desire-bearing acts for the sake of legislating it. This is particularly challenging, however, given the complex nature of desire, as it can give rise to sexual acts or physiological responses, or it can simply be an emotion or affective state. As certain legal rulings come into effect due to the presence of desire, al-Sarakhsī must determine what legally constitutes desire and how the law can ascertain that it is in fact present.

In the following sections, therefore, I carefully consider the language al-Sarakhsī uses in describing the complex human experience of desire. By attuning to the semantic

²⁰ Ibid.

range used to mark desire, and the contexts in which these concepts are mobilized, we can observe how al-Sarakhsī draws lines around what legally constitutes sexual desire. Al-Sarakhsī uses many terms to refer to sexual desire, but by far the most common and central concept is *shahwa*, which I generally translate simply as desire.²¹ The term *shahwa* has multiple valances in al-Sarakhsī’s legal text. At times it is used interchangeably with *ladhdha* (what I generally gloss as “pleasure”) to indicate a general human yearning²² or a feeling and inclination towards a desirable object. Both these terms are used to refer to other forms of desire as well, such as the desire for food and the pleasure of food consumption. In other instances, however, *shahwa* describes specific actions and physiological experiences that have legal implications. In what follows, I focus on how *shahwa* is used in al-Sarakhsī’s legal reasoning to signify different aspects of human desire. I also attend to other terms, such as *shabaq* (excessive lust), through which the legal boundaries of desire are marked. By focusing on the subtleties of legal argumentation and the different situations and moments at which particular terms are used, we can observe al-Sarakhsī’s attempt to capture the nuances of a complex human

²¹ My translation here of this term is based partially on the linguistic meaning of the word but also takes into consideration how al-Sarakhsī describes desire as he uses the different terms. The use of the term “desire” for the Arabic word *shahwa* does create some challenge for me. While al-Sarakhsī uses *shahwa* to mean very specific physiological experiences of desire, he also uses the term to speak more broadly of the human instinct. This causes some confusion in my usage of the word “desire,” as this can sometimes refer both to the very particular legal categories that al-Sarakhsī is referring to or more generally to desire as a human instinct, or indeed the experience of pleasure. I have retained my usage of the term, however, as it gives the reader a sense of the difficulty of deciphering the different usages of desire in the Arabic text.

²² I am using the term “yearning” here in describing desire as a human instinct because of the purpose that al-Sarakhsī ascribes to it. In his account for why God created desire in humans, al-Sarakhsī argues that divine will has decreed the continued existence of humanity, which is only possible through procreation. The believer thus engages in the act of intercourse for the sake of fulfilling this divine command and not for the sake of fulfilling one’s desire. However, for those individuals who do not seek divine pleasure, the fulfillment of sexual desire becomes the motivating factor for engaging in sexual intercourse. In this manner, al-Sarakhsī argues, all of humanity fulfills God’s plan by procreating. In this narrative, desire serves as yearning that an individual feels for the fulfillment of sexual desire. This yearning is then the motivating factor for engaging in sexual intercourse for those who are not guided by virtue and righteousness.

instinct. This process not only makes available certain actions and experiences as legally actionable while excluding others, but also deems certain aspects of desire and sexuality to be outside the norm established by the law.

In order to legislate desire in certain contexts, the law must determine two things: whether desire is present in a particular situation, or whether an individual's desire was fulfilled in a given situation. In a number of legal issues, the presence of desire or its fulfillment causes legal rulings to go into effect. In order to determine this, al-Sarakhsī must precisely delineate what counts as desire in both situations. He responds to these legislative needs by developing two particular concepts: *al-shahwa al-mu'tabara* (literally “desire that is taken into consideration,” which I gloss as “desire that has legal significance”) and *qaḍā' al-shahwa* (the fulfillment of desire). While the first term is the means by which al-Sarakhsī determines what aspects of desire are legally significant, the second term allows the law to determine whether an individual has indeed indulged their desire. Through these two phrases, al-Sarakhsī constitutes desire as an object of legislation. In the following two sections, I unpack how al-Sarakhsī understands both of these concepts and what that tells us about his construction of desire more broadly.

2.2.1 Legally significant desire

One case in which al-Sarakhsī attempts to determine the nature of “desire that has legal significance” is in his discussion on the legal issue of marital prohibitions (*ḥurmat al-muṣāharah*). In Islamic law, marriage is not allowed between certain groups of people. These people are usually close and extended relatives but also include individuals where

kinship has been established through milk-fostering or marriage. Outlining these prohibitions, a Qur'anic verse states:

Forbidden to you are your mothers, and your daughters, and your sisters, and your aunts paternal and maternal, and a brother's daughters, and a sister's daughters; and your milk-mothers, and your milk-sisters; and the mothers of your wives; and your step-daughters--who are your foster children--born of your wives with whom you have consummated your marriage; but if you have not consummated your marriage, you will incur no sin [by marrying their daughters]; and [forbidden to you are] the spouses of the sons who have sprung from your loins; and [you are forbidden] to have two sisters [as your wives] at one and the same time--but what is past is past: for, behold, God is indeed much-forgiving, a dispenser of grace.²³

Marital prohibitions established through marriage are the subject of much legal discussion, as the law must determine what particular actions can cause the prohibition to come into effect. As the verse above mentions, a man is prohibited from marrying his mother-in-law and step-daughter (after the marriage with the mother has been consummated).²⁴ The Ḥanafīs, however, interpret this prescription in the Qur'an more broadly and establish marital prohibitions not only through sexual intercourse within marriage but also through acts that are animated by desire. This includes illicit sexual intercourse as well as kissing and touching. By contrast, the Shāfi'ī school of law interprets the verse more restrictively and only establishes this prohibition based on sexual intercourse within marriage or concubinage. The Ḥanafīs thus give much greater consideration and significance to desire in establishing relationships between individuals. This position of the legal school produces a rich discussion on the nuances of desire in al-

²³ Qur'an 4:23.

²⁴ Consummation is only necessary in prohibiting marriage to the step-daughter. That is, if a man marries a woman then he is prohibited from marrying any of her daughters, provided he has consummated the marriage. However, he is not allowed to marry his mother-in-law regardless of whether he has consummated the marriage with his wife.

Sarakhsī's text as he attempts to delineate what the law considers to be desire in establishing these prohibitions.

For al-Sarakhsī, both kissing and desire-bearing touch are actions that are on a par with licit and illicit sexual intercourse. The association between these actions and sexual intercourse does not extend to criminal prosecution and punishment, however, as the law does not punish non-penetrative sexual intimacy between two individuals with lashing or stoning. Kissing and touching with desire do, however, carry the same implication as sexual intercourse in establishing relationships and prohibiting marriage between individuals. Al-Sarakhsī justifies this position of the Ḥanafī school by quoting several traditions from the early generation of Muslims whose precedence carries significant weight for the legal tradition. He follows these traditions with his own legal reasoning, arguing that both kissing and desire-bearing touch initiate sexual intimacy and eventually lead to sexual intercourse. As such, in establishing marital prohibitions they carry the same legal ruling as intercourse. For al-Sarakhsī, the intimacy established between two individuals through desire is such that it creates a relationship between them that mirrors, in certain aspects, the relationship of marriage.

The desire-bearing touch poses a particular challenge for the Ḥanafīs.²⁵ Desire must become an object of legislation to consider it the reason (*sabab*)²⁶ that puts legal

²⁵ One might also argue that kissing should also create this challenge for al-Sarakhsī, as the law would need to determine what counts as a kiss. However, al-Sarakhsī does not take this into consideration; he seems to assume that a kiss is known and does not need further inquiry. For him what is of greatest concern is what counts as a desire-bearing touch and a desire-bearing gaze.

²⁶ The word *sabab* here implies a technical meaning and not a linguistic one. While linguistically the word means reason, in legal methodological tradition the word *sabab* indicates that which is a path to the legal ruling but does not have any legal import of its own or effect on the legal ruling. For example, the reason for prayer is the beginning of prayer times; i.e. each prayer comes into effect once its appointed time begins. The *sabab* contrasts with the *'illah*

rulings into effect. However, given that desire is a complex human experience, the law must establish some framework for determining what legally constitutes desire and how to determine its presence. The law must also determine what amount of desire puts these legal rulings into effect. To assert that marital prohibitions are established when an individual is touched with even the slightest feeling of desire would create a great number of people prohibited to one another in marriage. Al-Sarakhsī responds to this challenge by attempting to define desire in a manner that is tangible and knowable, turning desire into an object of legislation. This process takes place through a discussion of the term *al-shahwa al-mu'tabara* (desire that has legal significance).

In the discussion on marital prohibitions, al-Sarakhsī states that it is not any desire-bearing touch that puts the legal ruling into effect, but only desire that is of legal significance (*al-shahwa al-mu'tabara*). This, he argues, is when the desire-bearing touch brings on an erection (*tantashir bihi al-ālah*) or increases the intensity of an already existing erection (*yazdād intishārahā*). “Solely desiring with one’s heart” (*mujarrad al-ishtihā bi al-qalb*), on the other hand, without being accompanied by a physiological response, has no legal implications. To make his point clearer, al-Sarakhsī offers the example of an old man (*al-shaykh al-kabīr*).²⁷ He is able to experience the emotion of

(effective cause), which has an effect on the legal ruling itself. For more information, see: Ṣalāh Abū al-Hājī, *Sabīl al-Wusul ila 'Ilm al-Usul* (Ammān: Dār al-Furqān, 2006).

²⁷ Interestingly, al-Sarakhsī characterizes the old man as not having desire at all (*al-shaykh al-kabīr al-ladhī lā shahwa lahu*). While the character of the old man provides an example of desire that is felt in the heart but is of no legal significance, the descriptor he uses for the old man is “one who has no desire.” This is a particularly vivid example of the challenge of accounting for al-Sarakhsī’s usage of the word “desire.” Muḥammad ibn Aḥmad al-Sarakhsī, *Al-Mabsūṭ* (Beirūt: Dār al-Ma`rifah, 1993), 4:208.

desire, what al-Sarakhsī refers to above as desire that is experienced in the heart, but is unable to have a physiological response.²⁸ “Desire in the heart” is an affective condition, a feeling that is neither tangible nor objectively knowable. It is a subjective experience that the law cannot ascertain or determine and thus is of no legal significance.

While he recognizes the existence of such subjective experiences of desire, al-Sarakhsī cannot include them in the construction of desire as a legally actionable concept because they cannot be fixed and made tangible. The law cannot take all of the complex manifestations of desire into consideration in its attempt to legislate the phenomenon. When he does acknowledge such subjective experiences of desire, it is in contexts where there is no precise legal ruling or consequence tied to desire, and thus no determinations have to be made about its precise nature. His references to desire in those cases thus remain vague and imprecise. In fact, he leaves it to the individual to determine intuitively and experientially that desire is present and thus respond in the way that is most in accordance with virtue.²⁹

²⁸ Ibid.

²⁹ This is most evident in al-Sarakhsī’s legal discussion on the desire-bearing gaze. In defining the parameters within which a man may desirously look upon the female body, al-Sarakhsī does not attempt to define the desire-bearing gaze but instead leaves it to the man to determine whether desire is present and then look away. In Islamic law, the extent of the female body that a man may look upon is dependent on their relationship. While a man may look desirously at the body of his wife and concubine, with other women he is only permitted to look with their exhibiting varying degrees of bodily exposure. The boundaries for appropriate bodily exposure are based on the Qur’an and Prophetic example. Beyond these boundaries, however, al-Sarakhsī asserts that desire may indeed be present. For al-Sarakhsī male desire is ever-present and always remains a possibility regardless of the relationship. Thus, while a man may look at the face, hair, arms, and legs of his female relatives, al-Sarakhsī asserts that it is indeed possible for him to feel desire for them, and in such a situation he has a religious duty to look away. The law establishes the boundaries for the female relatives’ body parts that he can look at. However, in asserting that a man might feel desire for his female relatives, al-Sarakhsī does not attempt to define what constitutes a desire that would require that the man lower his gaze. As the law is not concerned here with determining desire for the purposes of legislating, it is left up to the man and his subjective experience of desire to determine when he is looking upon a female relative with desire and thus religiously obligated to look away.

Even his particular legal construction of “desire that has legal significance,” however, does not hold up in al-Sarakhsī’s own text. Given his extensive discussion on touch, we could ask whether he considers *looking* with desire to affect legal rulings as well. If desire, as a legal object, is considered to be an action that causes an erection, then it is plausible that marital prohibitions could be established based on a desire-bearing gaze that leads to an erection. Is not the gaze as much an action as touch? His response to this question reveals a number of inconsistencies, illustrating the challenge of constructing desire as a clearly defined legal object.

He addresses this consideration by bringing in the perspective of the Shāfi‘ī school of law and contrasting it to the position of the Ḥanafī school. Al-Sarakhsī mentions that al-Shāfi‘ī, the eponym of the Shāfi‘ī school, held that merely looking with desire triggered marital prohibitions. This is because al-Shāfi‘ī considers a look to be the same as a mere thought (*tafakkur*) if it is unaccompanied by touch. By this logic, a thought does not have legal implications. What we see here is the establishment of a distinction between an internal mental state and an external action, and looking, according to al-Shāfi‘ī, falls into the former category. Were he to accept this argument, al-Sarakhsī could then exclude looking with desire from the category of *al-shahwa al-mu‘tabara* (desire that has legal significance). Instead, he disagrees with al-Shāfi‘ī’s designation, arguing that a gaze is at times more akin to touch than to a mental thought.

At this point in his argument, we can see two inconsistencies in al-Sarakhsī’s legal reasoning. Firstly, it is important to note that elsewhere in his text, in a discussion on the pilgrimage (*Ḥajj*), al-Sarakhsī himself argues that looking with desire is akin to a

thought and therefore does not take on the legal ruling in question. While sexual activity generally takes one out of the state of temporary consecration (*iḥrām*) that is required for *Hajj*, al-Sarakhsī asserts that looking with desire has no such consequence, since looking is not an action.³⁰ Thus we see that in different contexts, al-Sarakhsī constructs different “facts” about desire that fit with his legal reasoning in that particular case. His construction of desire is not consistent with itself.

Secondly, even if we take his argument in this passage at face value (that the gaze at times can be more than just a thought), he does not fully accept the implications of this premise by applying his earlier definition of *al-shahwa al-mu‘tabara*. We saw earlier that he defined “desire that has legal significance” as a desirous action that causes an erection. Regarding the issue at hand, this definition would seem to require that a desire-bearing look that is accompanied by an erection should be considered “desire that has legal significance.” This is not the case in al-Sarakhsī’s legal argumentation, however. Rather, he goes on to distinguish between different kinds of looking. With regards to establishing marital prohibitions, al-Sarakhsī argues that the only desire-bearing gaze that is legally significant is the gaze upon the vulva (*farj*) of a woman. Looking upon other parts of the body, even if animated by desire and accompanied by an erection, has no legal

³⁰ While on pilgrimage, an individual must enter into a state of temporary consecration (*iḥrām*). In order to enter into this state, an individual must make a statement of intent and perform certain rites. Men must wear a particular garment and are restricted from engaging in sexual intercourse. If two individuals were to engage in sexual intercourse they would no longer be in a state of temporary consecration. With regards to these prohibitions, al-Sarakhsī argues that while sexual intercourse breaks this state, looking with desire does not carry the same implication, even if a man were to ejaculate due to a desire-bearing look. This, he argues, is because looking is like a thought if it is not accompanied by an action. In defending the position of his legal school regarding the gaze upon the vulva, al-Sarakhsī’s justification asserts that looking upon the vulva is not akin to a thought but instead to touch due to the intensity of desire the man feels. However, where the Ḥanafī legal school does not take the desire-bearing look into consideration for enacting juridically enforceable legal rulings, al-Sarakhsī makes the same assumption about a desire-bearing look that he refuted elsewhere.

significance.³¹ In this case, his determination of what counts as a desire-bearing gaze that establishes marital prohibitions relies not on his definition of what counts as real desire, but rather focuses on a particular type of gaze, as we shall see below.

As is typical of al-Sarakhsī's text, he begins justifying a legal ruling by first referencing Qur'anic verses, prophetic traditions, or traditions from the first generation of Muslims to support the ruling. He then goes on to offer his own legal reasoning in order to justify already existing rulings in his legal school. In this case, to explain why looking at the vulva is distinct from other forms of looking al-Sarakhsī cites a prophetic tradition in which the Prophet stated that if a man looks upon the vulva of a woman with desire then he is prohibited from marrying her mother and daughters.

In order to determine the implications of this prophetic tradition, al-Sarakhsī must again engage in a process of determining what constitutes a desire-bearing look upon the vulva. Unlike the discussion on touch, however, here al-Sarakhsī does not attempt to define what constitutes the phenomenon of desire itself. It is assumed that looking at the vulva is necessarily desirous. In justifying this distinctiveness of gazing upon the vulva, al-Sarakhsī argues that one looks at an object³² either for its beauty or to derive sexual

³¹ The desire-bearing gaze in al-Sarakhsī's legal thought takes on many different legal rulings. Despite the fact that al-Sarakhsī states that looking at other parts of the body with desire is not of legal significance in prohibiting marital relationships, for instance, the desire-bearing gaze on the rest of the body is still of concern to the law. Indeed, al-Sarakhsī goes into great depth in making moral judgments concerning the desire-bearing gaze, as I will discuss later in this chapter. The difference between the discussion here and the later one has to do with the legal distinction between what has concrete legislative consequences versus religious observance as a matter of personal virtue.

³² Al-Sarakhsī here uses the word *maḥal* (place). I am translating the term as "object" largely because that is how the term is used throughout the text. In Chapter Two, this term will reappear and will be used to refer to the woman as the locus of penetration.

pleasure.³³ The vulva, however, is not looked upon for aesthetic appreciation, he argues, but only for sexual pleasure.³⁴ Therefore, rather than defining what constitutes desire in this case (since any look upon the vulva is necessarily desirous), he instead focuses on the circumstantial details and particularities of the act of looking. He stipulates that in order for marital prohibitions to go into effect, the woman must be sitting in a manner that allows the man to look past the pudendal cleft and labia majora³⁵ to the internal anatomy of the vulva, presumably the clitoris and the vaginal opening. If the woman is *standing* or *sitting* upright then the legal ruling does *not* go into effect.³⁶

Given his attempt to determine the kind of desire that establishes marital prohibitions, how might we account for al-Sarakhsī's shift from defining desire to defining the gaze? As we have seen, in his discussion on touching with desire, his attention focused on determining what counts as desire (i.e. having an erection). In the discussion on looking with desire, however, the legal object shifts to determining the specificities of the act of looking, rather than the embodied experience itself. We can infer three reasons for his shift in argumentation, all of which shed light on the process of

³³ The word used here is *istimtā'* (pleasure). Whereas this word refers more generally to the human experience of pleasure and not specifically to sexual pleasure, al-Sarakhsī generally uses the term to refer to sexual pleasure, as we will see later in the chapter. Hence I have translated the term here as sexual pleasure.

³⁴ This prophetic tradition, however, is not the only determination about looking at the vulva. In an earlier discussion on ritual ablution, al-Sarakhsī cites a report by Ibn 'Abbās, a close companion of Muhammad, that equates looking at the vulva to a thought. Here al-Sarakhsī cites this report to justify the position of the Ḥanafī school that looking upon the vulva does not invalidate the ritual ablution. There is conflicting evidence in the source texts regarding the desire-bearing look on the vulva. While al-Sarakhsī uses the Prophetic tradition to bolster his conclusion that looking upon the vulva with desire produces such intensity of desire that it establishes sexual intimacy between two individuals, elsewhere he uses another report to argue the opposite case.

³⁵ Al-Sarakhsī uses only the term *al-khārij* (external) and *al-dākhil* (internal). Based on the details he presents regarding the position the woman must be in, I am extrapolating what he intends to convey with those terms. Al-Sarakhsī, *Al-Mabsūṭ*, 4:208.

³⁶ *Ibid.*

lawmaking: 1) curtailing the application of the ruling; 2) the need to have an objective marker of a subjective experience; and 3) rationalizing the precedent of the legal school.

To begin, if al-Sarakhsī were to hone in on a definition of desire that can apply to a desire-bearing gaze, this might have drastic social and legal consequences. For instance, were he to continue defining “desire that has legal significance” as that which causes an erection, then any gaze accompanied by an erection would establish marital prohibitions. That could, in turn, lead to a situation in which far too many people might be prohibited from marrying each other, but they might not even know it. This would be an unfeasible situation for the law. Therefore, al-Sarakhsī restricts the legal consequences of looking with desire by shifting away from defining the experience of desire itself to instead defining a very narrow subset of the desire-bearing look as having legal consequences. How he constructs the legal category of desire is thus tied to the needs of the legislative process.

Additionally, al-Sarakhsī also seems to be taking the nuances of the male experience of desire into account in distinguishing between a desire-bearing look upon the vulva and a desire-bearing look upon other parts of the body. In singling out the look upon the vulva from other forms of the desire-bearing look, al-Sarakhsī is making a determination that the desire a man feels in looking at the vulva is more intense than when he looks at other parts of the female body. It is this intensity that accounts for the similitude between looking at the vulva and touching a woman’s body with desire.³⁷ The

³⁷ In arguing that the vulva is not looked upon for beauty but instead for sexual pleasure, al-Sarakhsī concludes that the desire felt in looking upon the vulva is like that felt when touching with desire (“thus we know that it [looking at the

intensity of desire, however, is not something tangible that can be objectively known, and thus cannot be the basis upon which to determine if laws go into effect. Thus, al-Sarakhsī must come up with a more tangible and objective marker for this intensity of desire (namely, looking directly at the inside of the vulva) in order to allow for juridical enforcement.

Thirdly, al-Sarakhsī's attempt to determine the parameters of what constitutes "looking with desire" is also prompted by argumentation across different legal schools. The reasoning he provides in this issue is not only a justification for the legal precedent of the Ḥanafī legal school but also attempts to defend its legal determinations against those of other competing legal schools. As mentioned above, al-Sarakhsī recounts that al-Shāfi'ī held that a look is similar to a "thought" if it is unaccompanied by touch, and pointed to the absurdity of distinguishing a look at the vulva from looking at other parts of the female body. In arguing that it is similar to touching the body in terms of the intensity of desire the man experiences, al-Sarakhsī defends the position of his school from al-Shāfi'ī's criticism. Al-Sarakhsī's focus on the contours of looking responds to the challenge of legislating what is seemingly a thought. With this move, it is not desire that becomes the object of legislation but instead a particular object of the gaze that can be defined and made available for legislation.

vulva] is like touch in the type of desire. This is unlike the look upon the rest of the limbs." *Fa 'arafnā annahu naw' istimtā' ka al-mas bi khilāf al-naẓar ilā sā'ir al-a'dā'*). Ibid.

We can thus see the role al-Shāfi‘ī’s critique plays in his legal argumentation. In her book on marriage in early Islamic law, Kecia Ali argues that disputation in Islamic legal texts serves as a mechanism for defining the boundaries across disparate groups of jurists. She notes two types of disputation: that which is internal to the group and that which is external.³⁸ Whereas the former engaged differing opinions within the group, the latter went across the different legal schools. External disputation served as a way to define the boundaries of the particular legal school. Al-Sarakhsī’s recounting of the Shāfi‘ī argument on looking as a type of mental thought is an example of this mode of engagement between the different legal schools. I focus on the idea of disputation to call attention to the fact that the boundaries al-Sarakhsī draws in constructing desire is not simply a reflection of his own assumptions regarding desire but also the product of internal and external disputations, both with other Ḥanafī scholars and other schools of thought. Al-Sarakhsī often recounts the legal opinions of his predecessors, in particular the eponym Abū Ḥanīfa and his students, and his reasoning is often a post-hoc justification for the legal precedents of his school. It is also common practice for al-Sarakhsī to be in conversation with other Sunni legal schools, in particular the Shāfi‘ī legal tradition. The legal opinions and counter arguments of the Shāfi‘īs often frames the conversation and forms legal reasoning in particular ways. In our example here, al-Sarakhsī’s statements about the nature of desire are not only motivated by an impetus to defend the Ḥanafī position on the look upon the vulva but also to counter the legal positions of rival schools.

³⁸ Ali, *Marriage and Slavery*, 20.

Through this detailed analysis of al-Sarakhsī's discussion about touching and looking with desire, we have seen that the mode of argumentation in these legal texts challenges any attempt to read his arguments as a straightforward and coherent empirical account of the nature of desire. Al-Sarakhsī's construction of desire as a legal category is a complicated process that moves between his assumptions regarding the nature of gender and sexuality, the need to delineate clearly defined facts about desire that can be legislated, and the need to defend the legal precedents of the Ḥanafī legal school and counter the challenges that rival legal traditions pose. This complex process leads to the inconsistency in his construction of desire that we have already begun to see.

2.2.2 Fulfilling desire

The second term that al-Sarakhsī uses to construct desire into a legal object is *qaḍā' al-shahwa* (fulfillment of desire). In the discussion above we saw how al-Sarakhsī creates tangible ways to mark the presence of desire through the use of the phrase "desire of legal significance." It is not enough, however, for the law to determine whether desire is present in a particular act. Several legal rulings, especially those pertaining to ritual law involving things like fasting and pilgrimage, regulate the indulgence of one's desire. Such rulings come into effect once the law can determine that an individual has realized his/her desire in a manner or time that is impermissible. Once again al-Sarakhsī must determine what legally constitutes the fulfillment of an individual's desire. Which act in the complex experience of human desire relieves the individual of that sexual yearning? Is an individual's desire fulfilled when they are able to come into physical contact with the object of their desire? Is it the ability to engage in sexual intimacy, what al-Sarakhsī

refers to as *al-jimā' fī mā dūn al-farj* (non-vaginal intercourse)? Does penetration suffice or does it leave the person's desire unfulfilled if they are unable to orgasm? In addition to ascertaining fulfillment, al-Sarakhsī must also determine tangible markers to make this concept available for legislation.

The first time al-Sarakhsī discusses the concept of sexual fulfillment is in the chapter on fasting. He argues that fasting is prescribed so that individuals may learn to control sexual desire and their desire for food. Thus, consumption of food and beverage as well as sexual activity are all prohibited while fasting. As engaging in sexual acts could vitiate an individual's fast, the law must make determinations about the effect different desirous acts have on the validity of fasting. In this discussion, al-Sarakhsī considers eleven different expressions of sexual desire:³⁹ kissing, desirous touch, desirous look, desirous thoughts, nocturnal emissions, vaginal penetration, anal penetration, ejaculation, masturbation, bestiality, and necrophilia. Each of these acts take on one of three legal rulings: 1) those that do not invalidate the fast at all; 2) those that do invalidate the fast and require that it be made up; and 3) those that invalidate the fast, requiring not only that the fast be made up but also expiation (*kaffāra*).⁴⁰ Of the twelve acts, kissing, looking or touching with desire, desirous thoughts, and nocturnal emissions do not invalidate the fast. Despite this similarity, they do not take the same ruling when they cause an ejaculation. Looking, thinking, and nocturnal emissions do not invalidate the

³⁹ I have charted these aspects of desire through my reading of al-Sarakhsī's exposition on what acts vitiate the fast.

⁴⁰ Expiation is fasting for sixty consecutive days in a year without any breaks. If the individual misses a day then they must begin again. The only exceptions are for women menstruating or in a state of lochia who continue their fast as soon as the bleeding stops. For those who are unable to fast, they may feed sixty poor people two meals, or provide two meals to one poor person for sixty days, or give a stipulated amount of wheat or dates to sixty poor people or one poor person for sixty days.

fast even if the man ejaculates, since they are merely “thoughts” and an individual cannot be held liable for the physiological response they cause.⁴¹ Kissing and touching, on the other hand, are considered to be acts that physically stimulate desire; thus if they cause a man to ejaculate, he is required to make up the fast. He does not, however, owe expiation. The only acts that both invalidate the fast and require expiation are penetration (both vaginal and anal). The distinguishing factors between these three different rulings center on al-Sarakhsī’s attempt to determine facts about desire that are legally actionable. He does this discussing what constitutes the fulfillment of sexual desire. For the Ḥanafīs, the ideal sexual act is vaginal intercourse,⁴² and penetration is legally determined to be the fulfillment of an individual’s desire. Because al-Sarakhsī considers penetration to be the complete fulfillment of sexual desire, it requires making up the fast and paying expiation.

In a discussion on fasting, al-Sarakhsī states that if a man has vaginal intercourse with his wife, then their fast is invalidated as soon as the head of the penis enters the vagina. This is the case regardless of whether the man ejaculates, and both husband and wife must make up the fast and pay expiation because they fulfilled their desire through penetration.⁴³ Anticipating the objection that it is ejaculation that fulfills an individual’s

⁴¹ Al-Sarakhsī, *Al-Mabsūṭ*, 3:70.

⁴² Al-Sarakhsī does consider anal sexual intercourse and whether it invalidates the fast. Like vaginal sexual intercourse, anal penetration also invalidates the fast and requires not only that the fast be made up but also expiations. While anal penetration takes on the same legal ruling as vaginal penetration, I argue that al-Sarakhsī does not seem to consider the anal penetration to be the fulfillment of sexual desire. From the founding generation of Ḥanafī jurists, there was a question about whether sodomy is a form of sexual intercourse. While Abū Ḥanīfa held that sodomy is not akin to sexual intercourse, his disciples argued that both anal and vaginal penetration come under the category of sexual intercourse. The fundamental disagreement between the two positions centered on the desirability of the vagina and anus. Whereas Abū Ḥanīfa argued that only the vagina is the natural object of sexual desire, his disciples concluded that both the anus and the vagina are desirable. The Ḥanafī legal school eventually adopted the position of Abū Ḥanīfa and does not consider sodomy to be sexual intercourse. Given this discussion, I hold that it is only vaginal penetration that al-Sarakhsī considers to be the true fulfillment of sexual desire.

⁴³ Al-Sarakhsī, *Al-Mabsūṭ*, 3:79.

desire, al-Sarakhsī asserts that the act of penetration alone fulfills desire. Ejaculation, for him, is a consequence that “follows” (*tab‘*) penetration and thus itself is not the fulfillment of desire.

However, despite al-Sarakhsī’s assertion that it is vaginal penetration and not ejaculation that fulfills sexual desire, we find that in considering other aspects of sexual intimacy, he does in fact deem ejaculation to also satisfy sexual desire. With regards to kissing as a form of sexual intimacy, al-Sarakhsī considers the scenario of a man who, while fasting, kisses his wife and consequently ejaculates. In such a situation, he argues, the husband’s fast is broken and he must make it up at a later date.⁴⁴ He does not, however, have to pay expiation. To rationalize the legal ruling, al-Sarakhsī argues that because ejaculation constitutes the fulfillment of sexual desire the man’s fast is invalidated.

How might we understand al-Sarakhsī’s inconsistency here? We can perhaps best understand this if we move our attention to the legal rulings on the twelve different sexual acts I mentioned earlier. Looking at those will allow us to see that pre-existing legal rulings account for al-Sarakhsī constructions of legal facts. These facts then shift and change depending on the legal ruling and argument needed to defend the school’s precedents. As I mentioned previously, there are three legal rulings that pertain to sexual activity that apply to the myriad expressions and experiences of sexual desire. Any penetrative act invalidates the fast and requires both expiation and that the fast be made

⁴⁴ Kissing in itself does not invalidate the fast. The one exception would be if the couple were to kiss in a manner that would result in the exchange of saliva. The reason for invalidation in such a case, however, is not the act of kissing but instead swallowing another person’s saliva.

up. Ejaculation that results from physical stimulation (i.e. through kissing and touching) also invalidates the fast and requires a make up but not expiation. Lastly, ejaculation that results from an individual's thoughts does not invalidate the fast. To justify the position of the Ḥanafī legal school that it is penetration and not ejaculation that requires expiation, al-Sarakhsī argues that this is because penetration is the individual's desired goal. However, this reasoning conflicts with the legal rulings pertaining to ejaculation, which also invalidates the fast if it results from physical stimulation. Al-Sarakhsī responds to this discrepancy by creating a distinction between penetration that fulfills sexual desire and ejaculation that fulfills sexual desire but came about due to an act that is not undertaken with the goal of satisfying sexual desire.⁴⁵

While this line of reasoning provides a narrative for explaining why penetration and ejaculation take on different legal rulings, it makes it difficult for al-Sarakhsī to keep the “fulfillment of desire” stable as a legal fact. In one scenario he argues that it is penetration and not ejaculation that fulfills an individual's sexual desire, and yet in another scenario he construes ejaculation as the fulfillment of sexual desire. Post-hoc rationalizations of legal rulings lead to incoherence in the construction of desire as an object of legislation. As we saw in the previous section, it is in fact not unusual for al-Sarakhsī to make conflicting statements about the nature of desire based on his need to justify particular legal rulings. As a further example, in the previous discussion on the desire-bearing look establishing marital prohibitions, we saw that al-Sarakhsī

⁴⁵ In the scenario of the man who ejaculates due to kissing, al-Sarakhsī argues that expiation is not required because “kissing is subsidiary and is not intended for its own sake” *al-taqbīl tab' wa laysa bi maqsūd bi nafsihi*. Al-Sarakhsī, *Al-Mabsūṭ*, 3:65.

distinguished between looking at a woman’s vulva and looking upon other parts of her body. He argued that looking at the vulva creates such intensity of desire that it is akin to the desire-bearing touch. Thus, looking at a woman’s vulva establishes marital prohibitions whereas looking at other parts of her body with desire would not create similar prohibitions. With regards to fasting, however, al-Sarakhsī states the opposite, arguing that if a man looks at his wife’s vulva, his fast is not invalidated. The reasoning he provides to justify this legal ruling is the exact opposite of what he argued earlier. He argues, “The look is like the thought in the sense that it is restricted to him and not connected to her” (i.e. there is no physical contact between them).⁴⁶ Whereas the justification for the legal ruling on marital prohibitions depends on distinguishing between looking at the vulva and a thought, here the legal reasoning hinges on the look being akin to a thought.⁴⁷ Any attempt to trace desire in al-Sarakhsī’s legal thought must not only account for the ways in which al-Sarakhsī makes desire into an object of legislation but should also note that this object is fluid and shifting, not stable. The determining factor in this fluidity is two-fold: the need to construct knowable “facts” about desire that can be legislated, along with the need to provide justifications for the Ḥanafī school’s legal precedents.

⁴⁶ “*al-naẓar ka al-tafakkur ‘alā ma ‘nā annahu maqṣūr ‘alaihi ghayr mattaṣil bihā.*” Ibid., 3:70.

⁴⁷ The influence of post-hoc rationalizations in shaping legal reasoning is apparent not only in the way al-Sarakhsī constructs legal concepts alone but in his interpretations of source texts as well. In this scenario of the husband who ejaculates while kissing his wife, al-Sarakhsī cites prophetic tradition as evidentiary proof for the legal ruling. The prophetic tradition states simply that when asked about a man who kissed his wife while they were both fasting, the Prophet stated that their fast had been vitiated. It is odd of al-Sarakhsī to provide this tradition as evidence given that it does not in fact support the legal ruling regarding kissing. In fact, this tradition poses a problem as the Ḥanafī legal school does not consider kissing to vitiate the fast. Al-Sarakhsī offers the interpretation (*ta’wīl*) that while this tradition does not mention it, the Prophet came to know through revelation (*min tarīq al-wahy*) that the man ejaculated due to the kiss. Ibid., 3:65.

2.2.3 The peripheries of desire

In our discussion so far we have seen how the law constructs desire as a legal concept and object of legislation by determining which aspects of desire are of legal significance and which acts satisfy an individual's sexual desire. In his attempt to construct desire into a legal concept, however, al-Sarakhsī not only makes positive determinations about what constitutes desire; he also goes on to delineate the boundaries of "real desire" by identifying certain expressions of sexuality as beyond the limits of what is properly considered "desire." Thus in order to define the legal category of desire, he not only has to define what it *is*, but also what it is *not*. One means through which al-Sarakhsī establishes such boundaries is through the term *shabaq* (lust).

Linguistically the word *shabaq* means excessive lust or lechery, and can be used to refer to both men and women.⁴⁸ al-Sarakhsī defines *shabaq* as lust that "overtakes an individual to such a degree that he is unable to refrain from sexual intercourse." In fact, so strong is this urge that "the person cannot focus on anything except on the fulfillment" of that carnal lust.⁴⁹ As with the word *shahwa* (desire), al-Sarakhsī uses the term *shabaq* (lust) in multiple valences. At times he uses the term to talk about actions that result from being overtaken by desire, while at other times he uses it to dismiss certain sexual acts as beyond the pale of desire. Through his discussion of *shabaq*, he thus constructs further facts about the nature of desire. While he mobilizes the category for quite different

⁴⁸ The famous fourteenth century lexicon, *Lisān al-'Arab* defines *shabaq* as "intense lust and desire for sexual intercourse" (*al-shabaq shiddat al-ghulma wa ṭalab al-nikāḥ*). Muḥammad Ibn Manẓūr, *Lisān al-'Arab* (Beirut: Dār Ṣādir, 1956), 2187.

⁴⁹ "*Al-shabaq qad yaḡhlib 'alā al-mar' 'ala wajh lā yaṣbir 'an al-jimā' wa 'inda ghalabat al-shabaq yadhhab min qalbihi kullu shay' siwā dhālika al-maqṣūd.*" Al-Sarakhsī, *Uṣūl al-Sarakhsī*, 1:246.

purposes in different parts of the text, it generally contributes to the process of teasing out the details of legal rulings and justifying them.

In some cases, al-Sarakhsī classifies certain acts as *shabaq* in order to construct legal boundaries around sexual activity, such that only certain sexual acts and behaviors are recognizable as desire within the law. We can see this by returning to the previous discussion on fasting and sexual acts that vitiate the fast. Of the twelve aspects I outlined earlier, there are three--masturbation, bestiality, and necrophilia--that al-Sarakhsī argues are a manifestation of *shabaq* and thus do not take on the rulings they otherwise would. Al-Sarakhsī asserts that these three acts are born of excessive lust, not normal desire, and thus the law does not consider them to be the fulfillment of sexual desire. As such, they do not take on the full legal consequences of fulfilling desire while fasting.

In the many sexual encounters and scenarios that al-Sarakhsī considers as vitiating the fast, he mentions sexual intercourse with animals and corpses. The Ḥanafī school holds that if a man penetrates an animal or a corpse, his fast is invalidated but he is not required to pay expiation. Earlier we saw that al-Sarakhsī considers any act of penetration while fasting to require expiation. To justify this unique legal ruling, he had offered the rationale that penetration is the only act that constitutes the complete fulfillment of sexual desire. In the scenarios under consideration here (bestiality and necrophilia), however, penetration while fasting does not require expiation. To reconcile this discrepancy, al-Sarakhsī turns to lust, *shabaq*, as a rationalization for the differential treatment given to these penetrative acts. He argues that the fulfillment of desire is tied to the locus (*maḥal*) of penetration, which is the genitalia (*farj*). As the genitals of an animal

or the corpse are not considered to be desirable, penetration of them cannot fulfill an individual's desire. Elsewhere in discussing whether penetrating an animal begets the punishment for illicit sexual intercourse, al-Sarakhsī makes a similar argument likening penetration of an animal's genitalia to "inserting the penis into a vessel or peephole."⁵⁰ If indeed a man experiences fulfillment through such an act, he argues, it is due to being overtaken by lust.⁵¹ For al-Sarakhsī, it is not natural for an individual to act in this manner.⁵² Even masturbation, while resultant in ejaculation, is rendered beyond the pale of proper desire. In this same passage on acts that vitiate the fast, al-Sarakhsī likens masturbation to bestiality, arguing that it is an act of desperation due to the intensity of carnal desire.⁵³ Ejaculation is only considered as a consequence of real desire when it is the result of foreplay related to vaginal penetrative intercourse, such as kissing and touching.

By insisting that certain sexual acts do not take the same legal ruling as vaginal penetration because they are lustful and not animated by normal desire, al-Sarakhsī makes certain expressions of sexuality normative within the law while also naturalizing them. By insisting that it is vaginal penetration and not ejaculation alone that constitutes the fulfillment of desire, al-Sarakhsī renders the desiring male subject as penetrative and the human female body as the singular arena where male desire should be actualized. Penetration of other bodies (whether of animals or corpses) or ejaculation that is not

⁵⁰ *Wa al-īlāj fīhi bi manzilah al-īlāj fī kūz aw kuwwa*. Al-Sarakhsī, *Al-Mabsūṭ*, 9:102.

⁵¹ *Ibid.*, 3:79.

⁵² He states, "The nature of sound individuals does not incline sexually towards animals as animals are not to be desired with respect to humans." *Wa lā yamīl ṭab' al-'uqalā' ilā ityān al-bahīmah fa innahā laysat bi mushtahā fī ḥaqq banī ādam*. *Ibid.*, 9:102.

⁵³ *Ibid.*, 3:79.

connected to normative sexual activity are both rendered outside the realm of proper desire through an appeal to lust and natural disposition.⁵⁴ We thus see al-Sarakhsī utilizing the concept of *shabaq* to delineate certain acts that the law does not recognize as real desire. Designating certain acts thusly allows him to rationalize the legal ruling at hand while also concluding that his earlier definition of the “fulfillment of desire” as penetration does not include all acts of penetration but instead vaginal penetration alone.

At other points in his text, however, al-Sarakhsī utilizes the concept of lust (*shabaq*) for a different purpose, with quite different legal consequences. Rather than classifying certain acts as lustful for the purpose of excluding them from the legal implications of desire, at times he invokes the category for the opposite purpose: to explain why something that is considered beyond the bounds of proper desire must nonetheless be taken into account in legislating desire. For instance, in a discussion on the permissibility of women visiting mosques, we see al-Sarakhsī employ *shabaq* as a reason to justify certain restrictions on women’s attendance. This was a contentious issue in early Islamic law. The legal problem centered on the tension between the desire to maintain male control over women’s mobility on the one hand, and prophetic statements that seemingly gave women an unrestricted right to attend mosques on the other hand. Jurists arrived at a number of solutions to deal with the conflicting evidence and priorities in this matter. In the context of these debates, early Ḥanafīs created a distinction between women of different ages. Whereas it was considered reprehensible for younger women to

⁵⁴ As we will see in Chapter Two, even anal penetration is not considered to be sexual intercourse. While this does not happen through the mechanism of lust, al-Sarakhsī turns to the idea of natural disposition (*tabʿ*) to assert that sodomy, whether between a man and a woman or two men, is contrary to the natural desires of individuals.

attend the mosque, older women had significantly less restrictions on their mobility. Abū Yusuf and Muḥammad, the two disciples of Abū Ḥanīfa, gave blanket permission for elderly women (*al-‘ajūz*) to visit the mosque. Their teacher, Abū Ḥanīfa, however, restricted even the mobility of older women, only allowing them to attend the dawn and nighttime prayer.

Al-Sarakhsī accounts for the differing opinions by turning to desire and lechery as rationalizations. He argues that the two disciples allowed elderly women unrestricted access to the mosque because they are not a source of sexual temptation, since they are not desirable.⁵⁵ We thus see that there is a certain cultural assumption that elderly women are not proper objects of desire. Abū Ḥanīfa’s position on the matter, on the other hand, seems to run contrary to this assumption. In al-Sarakhsī’s account of Abū Ḥanīfa’s position, the latter held that older women should only emerge for the dawn and nighttime prayer, as these are the times when the darkness of the night acts as a barrier between her and the male gaze. Al-Sarakhsī argues that this is because even elderly women can cause sexual temptation and disorder. He makes a case for this in part by challenging the assumption about the undesirability of old women by suggesting that even if young men do not find her desirable, she could still stir the desire of old men.

More relevant to my analysis here, al-Sarakhsī goes on to rationalize Abū Ḥanīfa’s position by introducing the idea of *shabaq* and suggesting that even if the older woman is not a proper object of desire, she can be an object of excessive lust. In this

⁵⁵ I have translated the term *fitnah* as temptation. Marion Katz argues that whereas the term *fitnah* tends to refer to religious or political dissidence both in the Qur’an and the corpus of Prophetic traditions, it did show up in some prophetic traditions in reference to women. Thus, by the first half of the third/ninth century we see an association between the concept of *fitnah* and women’s sexuality, which was seen as disruptive. Katz, *Women in the Mosque*, 103.

regard, al-Sarakhsī argues that even young men--who should not find the older woman desirable--might be overcome by lust (*shabaq*), find her desirable, and thus attempt to jostle her.⁵⁶ For this reason, the older woman's ability to attend the mosque must also be restricted, as such sexual misconduct should be regulated. By describing the desire of young men for an old woman as excessive and unnatural lust, al-Sarakhsī acknowledges the cultural and juristic logic that elderly women are not proper objects of desire.

Whereas the desire of the old man for the old woman is not considered out of the norm, the young man's desire for her can only be understood as emerging from such deep sexual frustration as to cause an individual to act contrary to his own natural desirous inclinations.⁵⁷ Despite this recognition, he nonetheless appeals to such unnatural lustfulness to justify the further restriction of female mobility. Such lust might not be proper desire, but it remains a social concern of the law that must be regulated. Unlike the previous usages of "lust" as a mechanism to exclude certain desirous acts from legal concern, in this case we see the reference to *shabaq* serving as a means to explain why something that is considered beyond the bounds of proper desire still needs to be taken into account in legislating desire. He thus normativizes certain assumptions about appropriate male desire and female desirability, while nonetheless seeking to regulate and curtail such unnatural expressions of sexual desire.

This case thus illustrates the complex functions that such legal definitions of desire serve. I noted earlier in the chapter that al-Sarakhsī's construction of desire often

⁵⁶ Al-Sarakhsī, *Al-Mabsūt*, 2:41.

⁵⁷ Elsewhere al-Sarakhsī uses lust to describe the actions of a woman who commits adultery, argues that it is possible that she was compelled to do so out of an intense lust and thus acted in a manner that is not characteristic of her. *Ibid.*, 5:7.

functions as post-hoc rationalizations to justify and explain legal precedent. This case shows us, however, that this is only part of the story and cannot be seen as overly determinative. On the one hand, his legal reasoning here *is* in part a rationalization of legal precedent, as is often the case. We have seen that al-Sarakhsī uses the concept of *shabaq* to argue that elderly women could still be a source of temptation, even if they are not proper objects of desire. Through this argument, he is offering a rationalization for Abū Ḥanīfa's restrictions on elderly women's ability to attend the mosque. If elderly women are not considered desirable, then why did Abū Ḥanīfa restrict them from attending the mosque only under the cover of darkness? Al-Sarakhsī justifies this position by making an argument for a non-normative form of desire (lust) that the law must consider in its rulings about female mobility.

On the other hand, however, his introduction of the category of *shabaq* does more than simply justify the precedent of past jurists. His argument also indicates a subtle move towards disrupting the distinction between young and old women based on desire, thus justifying further restrictions on women's mobility. We can see this more clearly by considering Marion Katz's historical account of the legal debates around women's mosque attendance. In her book, *Women in the Mosque*, Katz traces the shifting rationalizations regarding women's attendance in the four Sunni schools of law. She argues that the distinction made between young and elderly women's mosque attendance by the eponymous generation of the four schools was largely about women's life cycle. In this, she believes, the distinction was rooted in the social practice of the early

generation of Muslims.⁵⁸ Younger women's mobility restrictions were largely based on their sexual maturity, reproductive capacity, and eligibility for marriage. Elderly women were primarily considered to be those who were post-menopausal. As they were no longer capable of reproduction, they were considered too old for marriage and thus could appear more freely in society.⁵⁹ Katz argues that by the fifth/eleventh century there was a shift away from this understanding of life cycles and social practice. She argues that by al-Sarakhsī's time, the differential legal rulings pertaining to young and elderly women's mosque attendance was instead justified in terms of sexual allure and temptation. Not only was there a shift in the rationalization but in fact a discomfort with the leniency granted to post-menopausal women.

Al-Sarakhsī's argument--that while young men may not find elderly women desirable they may still be tempted by them due to excessive lust--is an indication of the increasingly restrictive Ḥanafī attitudes towards women's mobility.⁶⁰ His argument also served as a means for changing pre-existing legal rulings to create greater restrictions on women's mosque attendance. While he himself did not restrict elderly women's access, his assertion that no woman is beyond desirability, whether it was due to proper desire or excessive lust, moved the rationalization away from women's biological life cycles to male desire. This undoing was the initial step in a historical legal process of curtailing women's mosque attendance. A century after him, the Ḥanafī jurist Abū Bakr al-Kāsānī (d. 587/1191) made a similar argument. Casting doubt on the possibility of a woman of

⁵⁸ Katz, *Women in the Mosque*, 100.

⁵⁹ *Ibid.*, 101.

⁶⁰ *Ibid.*, 74 and 102.

any age being sexually innocuous, he argued that it is possible for individuals to desire elderly women and thus fall into temptation.⁶¹ He was also the first to speak about the complete prohibition of mosque attendance for young women.⁶² Later Ḥanafīs went even further in restricting women’s access to the mosque by arguing that it is objectionable for all women to attend the mosque regardless of age.⁶³

We can thus see how al-Sarakhsī’s assertion about the difference between desire proper and *shabaq* is not only an indication of his cultural and juridical assumptions entering into the rationalizations for legal rulings, but in this case it also serves as a means of effecting legal change. In both this legal issue and the previous legal consideration of the vitiation of fasts, he carefully delineates what is considered beyond the scope of “real” desire in order to justify and tease out the details of legal rulings.

2.3 Thinking through the male body

Throughout the previous sections, I have demonstrated that al-Sarakhsī constructs desire through a complex interplay of juridical enforceability and the rationalization of legal precedent. The urge to legislate desire necessitates that it be made tangible, which he accomplishes by turning to sexual acts and physiological manifestations of desire. Desire is also constructed through post-hoc rationalizations of the precedents in the Ḥanafī legal school. The third component that must be highlighted to understand how al-

⁶¹ Al-Kāsānī does not use lust (*shabaq*) to describe the desire of the individuals here or make a distinction between old men and young men. Abū Bakr ibn Mas`ūd ibn Aḥmad Al-Kāsānī, *Badā`i` al-Ṣanā`i` fī Tartīb al-Sharā`i`* (Beirut: Dār al-Kutub al-`Ilmiyya, 1986), 3:86.

⁶² Ibid. Behnam Sadeghi also makes the argument that al-Kāsānī is the first jurist to argue that young women are prohibited from visiting the mosque which is a significant shift from the position of reprehensibility. Sadeghi, *The Logic of Law Making in Islam*, 115.

⁶³ Katz, *Women in the Mosque*, 77.

Sarakhsī constructs desire as a legal concept is the link between knowledge and male-embodied experience. In making this argument, I draw on the contributions of feminist standpoint theorists and feminist philosophers (such as Elizabeth Grosz), as I discussed in the introduction to the dissertation. In critiquing what she refers to as the “sexualization of knowledge,” Grosz highlights the ways in which patriarchal forms of knowledge are grounded in the male body as a knowing subject. This insight helps us see the ways in which al-Sarakhsī’s assumptions regarding desire are a product of male-embodied experiences. This also highlights the androcentrism in al-Sarakhsī’s construction of desire. Not only is his consideration of desire largely restricted to male desire (while he recognizes female desire, he rarely engages it substantively); furthermore, we also see the way in which it is the male who is constructed as the primary and proper subject of desire.

Throughout the different case studies pertaining to desire that I have discussed in the chapter, this androcentric and male-embodied experiential knowledge has been very evident. In defining the physiological manifestations of desire that carry legal import, for instance, we saw that the only marker he considers is related to the male body: it is the desire-bearing touch coupled with an erection that creates marital prohibitions. Al-Sarakhsī not only relies on the male subject in teasing out legal definitions, but also gives extensive and detailed attention to the intricacies and nuances of male desire. This is a manifestation of the male-embodied knowledge of the jurists.

Al-Sarakhsī’s discussion of male desire demonstrates an intimate knowledge of the physiology and experience of male desire. We saw, for instance, the ways in which he

creates a distinction between the different levels of intensity of the male experience of desire and its resulting physiological effects. In thinking about the male desirous gaze and touch, he takes into consideration the possibility that a man may look upon or touch a woman with desire and yet not experience that desire physiologically. This level of desire is of no legal significance. In asserting that the law only takes into consideration the desire-bearing gaze that produces an erection, al-Sarakhsī displays knowledge of the intensities of male desire and how they manifest physiologically. This is evidenced even further in his consideration of the possibility that a man might already have an erection prior to looking upon or touching a woman with desire, a look that may then increase the intensity of the erection.

In discussing the male gaze on the vulva, al-Sarakhsī again displays a similar familiarity with male bodily experiences. He argues that looking upon the vulva is unlike the look upon other parts of the female body. While a man might look at a woman's body and experience different levels of desire, al-Sarakhsī asserts that looking upon the vulva is so intense that it can only be desirous in a manner that brings legal rulings into effect. His assertion that the vulva is not looked upon for beauty but instead for sexual pleasure is a further indication of how the male gaze functions in Islamic law to construct the female body. The vulva, for al-Sarakhsī, is so deeply associated with sexual intercourse that he cannot imagine any other reason for looking upon this part of the female body other than for sexual purposes. Intense desire is thus inevitable when a man looks at the vulva.

On the other hand, the silence regarding female desire is blaring. With regards to female desire, there is no consideration of women's bodily experience of desire. In determining which manifestations of desire take on legal significance, al-Sarakhsī does not consider the physiological markers of desire that pertain to the female body. It is certainly conceivable that a woman might also touch a man with desire, which should also create marital prohibitions. However, al-Sarakhsī neither considers such a scenario nor attempts to provide tangible markers for a female desirous touch or look. When he does recognize female desire, there is no detail about its precise manifestations. To the extent that al-Sarakhsī does engage in a process of determining the physiology of female desire or how female desire is fulfilled, he does so without turning to the female body or female experience as a source of knowledge. Instead al-Sarakhsī uses two mechanisms in making determinations regarding female desire. The first is to turn to prophetic traditions as source texts from which knowledge about female desire can be acquired, and the second is to map male desire onto the female, as we saw briefly in this chapter and will see in the rest of the following chapters.

Al-Sarakhsī does not engage with female desire substantively because it is an unknowable entity to him. As we will see in Chapter Four, al-Sarakhsī states explicitly that it is impossible to regard the sexual fluid of women because it is internal and cannot be used in making legal determinations.⁶⁴ Instead female desire is determined by her desirability and suitability for sexual intercourse. In considering tangible markers of

⁶⁴ *Li'anna ḥaqīqat al-ba'dīyya wa in kānat bi i'tebār al-mā' fa huwa bāṭin lā yumkin al-wuqūf 'alayhi.* Al-Sarakhsī, *Al-Mabsūṭ*, 5:148.

desire to establish marital prohibitions, al-Sarakhsī does not even provide one that might stand in for female desire. A woman's desire is entirely dismissed.

While the physiology of female desire goes largely unacknowledged in al-Sarakhsī's text, other intellectual genres of the Islamicate⁶⁵ world, by contrast, give it more consideration. Towering intellectual figures like Ibn Sīnā (d. 428 A.H./1037 C.E.) and Ibn Rushd (d. 520 A.H./1126 C.E.) held that women, like men, had sperm. This was largely the consequence of the influence of ancient medicine on the scientific discourse of the Islamicate world. The ancient world largely understood sexual difference through the Galenic idea of the one-sex model, i.e. the belief that there is only one ideal type body, which is the male, and the female is its inverse.⁶⁶ Ibn Sīnā, who died about half a century before al-Sarakhsī, argued that women's sperm contributes to the process of reproduction.⁶⁷ Given the shared role of male and female sperm in reproduction, Ibn Sīnā held that conception was not possible without female ejaculation.⁶⁸ Ahmad Dallal, in his study of the scientific discourses of the Islamicate world, argues that this theory of conception made women's sexual fulfillment a necessity rather than simply an erotic act:

⁶⁵ I am using here Marshall Hodgson's term *Islamicate* that he developed in his highly influential work, *The Venture of Islam*. Hodgson proposed using the term *Islamicate* to distinguish between *Islamic* as a religious concept and *Islamicate* as the products of regions where Muslims were culturally dominant.

⁶⁶ The second-century A.D. Greek philosopher Galen held that the difference between men and women was that of the bodily humors. The female body lacked heat, which caused sexual organs to be held internally as opposed to being visible externally. In his imagined sexual body, the vagina was an interior penis, the labia was the foreskin, the uterus was the scrotum, and the ovaries were the testicles. See Thomas Laqueur, *Making Sex: Body and Gender from the Greeks to Freud* (Cambridge, MA: Harvard University Press, 1990), 4.

⁶⁷ For Ibn Sīnā, the female sperm originated from the same source as the woman's menses and was in fact concocted menstrual blood. He likened conception to the coagulation of cheese, with the female sperm serving the role of the milk and male sperm the yeast that causes the milk to ferment. Dallal, "Sexualities, Scientific Discourses."

We also see traces of this ancient-world conception of reproduction in al-Sarakhsī's text. In speaking of a sense of a biological link that exists between parent and child, al-Sarakhsī describes the child as the product of the sexual fluids of both the man and the woman. *Fa al-walad al-makhlūq min al-mā'in yakūn ba'd kullu wāhid minhumā*. Al-Sarakhsī, *Al-Mabsūṭ*, 4:207.

⁶⁸ Dallal, "Sexualities, Scientific Discourses."

A central feature of Islamic scientific discourse on female sexuality is the notion that a woman's semen, which results from sexual fulfillment, accounts for her emission of sperm and for the generation of the fetus; as such, pleasure and procreation are coupled in Islamic scientific discourse not just for men but for women as well. Moreover, the female semen is useful in inciting the woman to the sexual act and in opening the neck of the uterus during coitus. If the emissions of the man and the woman occur at once, the contraction of the vagina produces a high suction effect that attracts the male semen into the womb. Therefore, the synchronized orgasms of the man and the woman produce better chances for inception.⁶⁹

Al-Sarakhsī is not entirely silent regarding female desire, but it is peripheral and inconsequential to the construction of his categories. He does indeed consider that women, like men, have sperm and experience ejaculation. In a discussion on fasting, al-Sarakhsī quotes a prophetic tradition in which a woman by the name of Umm Salīm asked the Prophet whether a woman is required to perform the ritual purificatory bath if she has a nocturnal emission. To be more precise, the woman asked what should be done if “a woman sees in her sleep what a man sees.”⁷⁰ The Prophet responded in similar analogous language stating that if “what emerged from her is like that which emerges from the man,” then she should perform the ritual purificatory bath.⁷¹ Al-Sarakhsī quotes this prophetic tradition in responding to a question about ejaculation invalidating a fast. The scenario he considers is of a man who, while fasting, kisses his wife and consequently ejaculates. As an afterthought to this discussion, al-Sarakhsī states that a woman would also invalidate her fast if she were to ejaculate, and he provides this prophetic tradition as evidentiary proof of his conclusion. Despite the fact that al-

⁶⁹ Ibid.

⁷⁰ *Imra' a tarā fī manāmiḥā mithal mā yarā al-rajul*. Al-Sarakhsī, *Al-Mabsūṭ*, 3:65.

⁷¹ *Fa qāla in kāna minhā mithal mā yakūn minhu*. Ibid.

Sarakhsī does seem to recognize that women also experience sexual climax, it is the ejaculation of the man that is central to legal discussions. In every instance in which he discusses ejaculation, the subject of the conversation is not only male, but the details provided for identifying sexual discharge only consider male sexual fluids.⁷² The recognition of female ejaculation and sperm is largely peripheral to legal rulings and is often mentioned only in passing as an afterthought to legal accounts of the physiology of male sexual desire.

The absence of female desire in al-Sarakhsī's construction of desire thus establishes the male subject as the primary acting subject. Given that desire and sexuality is understood through an androcentric lens, the male desiring subject becomes primary and the woman is rendered a desirable object. In the discussion on marital prohibitions it was apparent that while both male and female desire technically effect them, it is only the male subject who has full legal agency. Only his desirous act is of legal significance. It is this gendered construction of desiring subjects that I turn to in the following chapter.

2.4 Conclusion

Legislating desire is an intricate and challenging task. Sexual desire is a rich human experience and relates to different aspects of social and interpersonal relationships. It manifests itself in different affective states, through physiological responses, and a wide array of sexual acts. This chapter demonstrates the centrality of

⁷² In speaking of female semen, al-Sarakhsī states that it pours out into the woman's womb and thus cannot be seen. Al-Sarakhsī, *Al-Mabsūṭ*, 1:70. Some later Ḥanafī scholars, however, did attempt to describe female semen. al-Shurunbulālī, mentioned earlier, characterized it as thin in texture and yellow in color. Al-Shurunbulālī, *Marāqī al-Falāḥ*, 42.

sexual desire in the law and its pervasiveness across different aspects of legal discourse. It also provides an account of how al-Sarakhsī conceptualizes of the complexity of human sexual desire. In Islamic law heavily regulates desire in matters that pertain to both individuals as well as societal order. Al-Sarakhsī considers desire to be purposive, created by God not for pleasure and enjoyment, but for the purpose of fulfilling God’s command for continued human existence. Desire is a positive and productive force, the fulfillment of which is connected to divine will. But desire also carries the power to create social unrest and upheaval if it is left unregulated.⁷³ Given the power of desire as a social force as well as a strong human yearning, it is considered to be an important object of legislation. In order to legislate desire, however, al-Sarakhsī must provide a description and definition of it, and determine what aspects of this human experience the law should take into consideration.

In tracing al-Sarakhsī’s assertions regarding desire, I argue that he is engaged in a process of constructing desire into a legal concept. Desire, in his text, is the product of a complicated legal process in which facts regarding desire are generated through the male-embodied experience of desire and are deployed to defend the conclusions of the Ḥanafī legal school. Throughout the chapter we have seen that the tangible markers of desire that al-Sarakhsī considers emerge entirely from male physiology and the male experience of desire. However, desire is not constructed simply through an adoption of male desire, but is instead always negotiated and presented in a manner that serves to rationalize legal precedent. The knowledge acquired through the male experience of desire is always read

⁷³ Al-Sarakhsī, *Uṣūl al-Sarakhsī*, 1:100.

in conjunction with the need for post-hoc rationalizations. This means that at times al-Sarakhsī makes disparate claims regarding desire in different areas of the law. Thus, these two observations--the androcentric nature of desire and the defense of legal precedent--are essential for understanding how desire functions in al-Sarakhsī's legal reasoning. In the following chapters I will consider how this androcentric notion of desire and the instrumentalization of desire in rationalizing legal precedent produce gendered subjects of desire.

3. The Male as Subject of Desire

“From her head to her feet, a woman is ‘*awra*,” argues al-Sarakhsī.¹ This emphatic statement regarding women commences a discussion on the legal parameters of the desirous gaze. The term ‘*awra*, which al-Sarakhsī uses here to describe the default condition of women, refers to the parts of the human body that must remain concealed from sight. Men also have ‘*awra*; that is, even a man has parts of his body that must be concealed.² However, here in al-Sarakhsī’s categorical statement, it is not that woman *has* ‘*awra*, but that she *is* ‘*awra*. Whereas men have parts of the body that must remain covered, women in their very being and existence must be concealed.³

In Islamic law, looking upon the human body is only permissible within certain boundaries and relationships. A man can look at the body of his wife and concubine, desirously or otherwise, without much restriction, since this is the only relationship in which the fulfillment of desire can be licit.⁴ With unrelated free women, slave women owned by others, and even female relatives, there are greater degrees of restriction

¹ “*Al-mar’a min qarnihā ilā qadamihā ‘awrah.*” Al-Sarakhsī supports his claim by citing a prophetic tradition to the effect that a woman’s very being is to be concealed (“*al-mar’a ‘awratun mastūratun*”). Al-Sarakhsī, *Al-Mabsūt*, 10:145.

² Men’s ‘*awra* is between the navel and the knee. They must cover this part of their body in front of all individuals, male and female, and are only allowed to reveal their entire body to their wives and concubines.

³ Al-Sarakhsī’s emphatic statement does not mean that he actually holds that women’s bodies must always be concealed in all circumstances. Rather, this is a categorical statement about the fundamental nature of women, while nonetheless recognizing the practical exceptions that allow women to expose their bodies to varying degrees in certain relationships.

⁴ Despite this permission to look at the naked body of one’s spouse or concubine without restriction, al-Sarakhsī continues to argue that it is in fact more appropriate for the two not to look at each other’s full naked bodies. This discomfort with nakedness is partly based on prophetic traditions and the cultural norms of the early generations that al-Sarakhsī provides as proof texts. He mentions, for example, a tradition by ‘Āisha that she never saw the full nakedness of the Prophet’s body. The legal discussion on gazing is guided not only by concerns about desire but also by a broader ethic about the rights and dignity of the human body that is independent of the individual who inhabits it. Even in situations where individuals are legally permitted to look upon the naked body, they are discouraged from doing so. In fact, the dignity of the body extends so far that an individual is discouraged from looking upon his/her own body. Al-Sarakhsī, *Al-Mabsūt*, 10:149.

around bodily exposure.⁵ For al-Sarakhsī the fundamental conception regarding women is that their entire body must be concealed. This construction of the female body as *'awra* is produced through the male gaze, which views the female body as always potentially desirable. For al-Sarakhsī, male desire is all pervasive and potentially present in any relationship between men and women. As we saw in the previous chapter, for instance, al-Sarakhsī does not consider women of any age to be beyond temptation. He admits the possibility of incestuous desire even for female relatives. (Thus he is adamant that bodily exposure between a man and his female relatives is only permissible if he is certain that both he and the female relative do not feel any desire.⁶) Given this presumption regarding women as always a potential source of temptation and desire, the legal implication would be that any amount of bodily exposure of women should be categorically prohibited except where desire can be fulfilled licitly (i.e. with a wife or concubine.) Al-Sarakhsī explains the exceptions to this principle by appealing to social necessity. Thus, while the

⁵ Al-Sarakhsī lays out four categories of women that a man may look upon: 1) the male gaze upon his wife or concubine, 2) male gaze upon his female relatives, 3) the male gaze on the female slave of another, 4) male gaze on unrelated, free women. The male gaze on a wife or concubine is perhaps the least complex for al-Sarakhsī. He argues that it is permissible for a man to look upon the entire body of his wife or female slave, whether that look is animated by desire or otherwise. Since that desire can be fulfilled licitly, the law does not concern itself much with the presence of desire. With female relatives he may look upon the parts of her body that the law considers places of beautification, which normally include the hair, head, face, chest, arms, and legs. The free, unrelated woman is the category that carries the greatest restrictions in covering. The free woman is required to cover the most in public and men may not look upon most of her body with the exception of the face or just the eyes, depending on the legal school. Slave women are not allowed to cover in ways that resemble free women. They are thus prohibited from covering their head and face. There is significant disagreement over what parts of the slave woman's body a man is allowed to look upon. For the early Ḥanafīs men were allowed to touch and look upon all parts of the slave woman's body except between the navel and knee and her torso and back.

⁶ To support his point here regarding the possibility of incestuous desire, al-Sarakhsī cites a report in which 'Ammār b. Yāsir, a companion of Muḥammad, exited his home in a state of fear (*madh'ūran*). When asked about this he stated that he was alone with his daughter at home and feared for himself (i.e. felt desire for her) (*fa khashītu 'alā nafsī*) and thus left. Al-Sarakhsī, *Al-Mabsūṭ*, 10:149.

basic principle is that women's bodies must always be covered for fear of illicit desire, there are certain exceptions in which the male gaze is permissible.⁷

What emerges most clearly from this discussion is the legal construction of an ontological binary of the male as desiring and the female as desirable. In the previous chapter, we saw that al-Sarakhsī's engagement with sexual desire, and the legal category of desire he thus conceives, is thoroughly androcentric and takes only male desire into consideration. Similarly, the abovementioned passage on the desirous gaze reveals the same androcentrism, as al-Sarakhsī engages extensively and disproportionately with male desire. It is the man who is assumed to be the subject of desire, the foil of which is the desirable object, the woman. It is his desirous gaze that falls upon her. This gendered assumption regarding desire structures the entire section on the gaze. While al-Sarakhsī discusses the different types of gendered gazes and recognizes the female as a gazing

⁷ Al-Sarakhsī argues that to require women to be concealed from all men would create undue hardship. This notion of hardship is not so much out of concern for women's comfort but primarily for the fulfillment of social roles. With regards to female relatives, for example, he argues that to require them to cover their entire bodies in front of the male members of their family would create undue hardship as women often dress at home in a manner that allows them to do household work. In talking about slave women, al-Sarakhsī makes a similar claim. Unlike free women who are required to cover most of their bodies when emerging in public, slave women are not allowed to cover in ways that resembled free women. Thus, a man is permitted to look upon a significant part of the body of a female slave. The rationalization that al-Sarakhsī provides for this discrepancy is that if slave women were to be totally covered they would not be able to emerge in public for work. This would be an inconvenience to the slave master who has purchased slaves for this very purpose. Al-Sarakhsī, *Al-Mabsūt*, 10:149.

Given the hardship that would result from following the logical conclusion of this principle regarding the female, the most direct legal conclusion is abandoned for the sake of ease through the legal principle of *istihsān*. This is a legal method employed when jurists, due to certain considerations, diverge from the conclusions of analogical reasoning. As a juristic principle it was largely adhered to by the Ḥanafī legal schools and justified through material conditions. Al-Shāfi'ī rejected *istihsān* as he felt this allowed for the jurist to go beyond methodologically secure and well-founded legal principles in favor of arbitrary decisions. Responding to the Shāfi'ī critiques, Ḥanafī jurists argued that this legal method is a form of "concealed analogy" in which the jurist leaves the apparent analogy in favor of an inner or self-conditioned decision. Al-Sarakhsī argues that *istihsān* is a methodological principle by which a jurist can diverge from analogical reasoning (*qiyās*) in favor of arriving at a position that is more appropriate (*awfaq*) for subjects of the law. In fact, al-Sarakhsī is very clear that *istihsān* is a legal principle by which the jurist can create ease for people in the face of harsh legal rulings. For more information on *istihsān*, see R. Paret, "Istihsān and Istiṣlah," in *Encyclopaedia of Islam, Second Edition*, ed. P. Bearman, et al., Brill Online, 2016. Also see Al-Sarakhsī, *Al-Mabsūt*, 10:145.

subject,⁸ male desire for the female maintains complete primacy in legal discussions (while the discussion of the male gaze on the female is well over ten pages, the inverse is a mere half page). Al-Sarakhsī acknowledges female desire but does not engage it substantively or in detail. Furthermore, when he does consider female desire, it is peripheral to the legal determination and is not embedded in the female experience of desire. Whereas al-Sarakhsī's rationalization of the legal precedent regarding the covering of the female body centers on male desire, the discussion on the female gaze has no such consideration of female desire. The parts of the male body that must be covered are deemed so due to legal precedent, not because of their desirability. Given this fundamental interplay of male desire and female desirability, this chapter explores this legal ontological construction of the male as subject of desire and by extension the female as desirable object. I focus in particular on how al-Sarakhsī conceptualizes this dichotomy by examining how he construes maleness and femaleness in relation to desire.

While my focus in this chapter is on the law's presentation of the male subject of desire, I also attend to how the female subject is imagined in relation to the male. In her incisive critique of the Western intellectual canon, feminist philosopher Luce Irigaray has illustrated "how the feminine has been colonised by a male fantasy of an inverted other through which he can project himself as subject, while woman functions only as object for and between men."⁹ I take this insight as a methodological tool in reading al-Sarakhsī's construction of the male subject of desire. Attuning to the legal imagination of

⁸ He considers four possible forms of the gaze: 1) male gaze on the male body, 2) female gaze on the female body, 3) female gaze on the male body, and lastly 4) male gaze on the female body.

⁹ Yvette Russell, "Thinking Sexual Difference Through the Law of Rape," *Law and Critique* 24, no. 3 (Nov 2013): 255-75.

the female subject of desire will give us further insight into how the law bolsters the male as a subject. Al-Sarakhsī configures the male as desiring only in relation to the female object--for example, where al-Sarakhsī considers the male looking at the female. In the abovementioned passage concerning the male gaze on the male body, desire does not arise as a concern at all. Man is not a subject of desire in relation to other men.¹⁰

Exploring the male and female together allows us to see the interdependence of the subject construction, as maleness and femaleness are presented as a foil of one another.

In order to unpack this interplay of male desire and female desirability, I focus throughout the chapter on al-Sarakhsī's extensive discussions on the regulation of sexual intercourse and how he conceptualizes the act of sex--perhaps the most fundamental expression of desire, and a heavily legislated aspect of human and social interaction. Given the very harsh punishment for illicit sexual intercourse in Islamic law, the jurists dedicate considerable energy in matters pertaining to the nature and intricacies of the sex act so as to determine what actions are deserving of such severe punishment. Given the centrality of desire to sexual intercourse, it is a particularly useful case study for exploring the construction of subjects of desire in al-Sarakhsī's legal thought. By understanding how al-Sarakhsī conceptualizes the sex act through a number of different legal issues pertaining to sex, we can trace not only how desire influences the way

¹⁰ Generally al-Sarakhsī does not consider the possibility of homoerotic desire. Marion Katz argues that the figure of the beardless youth as an object of male desire only emerges in legal texts after the 11th century. Katz, *Women in the Mosque*, 105. This argument seems to be confirmed by my reading of al-Sarakhsī. Same-sex desire only arises in his text as a concern in the context of sodomy. See the section below on sodomy for an in-depth discussion of his treatment of same-sex acts between men.

gendered subjects are construed, but also the embodiment of desire and the way in which bodies are gendered through desire and desirability.

3.1 Illicit sexual intercourse: man as active sexual agent, woman as locus

In a discussion on illicit sexual intercourse (*al-zinā*),¹¹ al-Sarakhsī considers a case in which an adult woman engages in illicit sexual intercourse with an insane man. In this situation, al-Sarakhsī argues, neither the man nor the woman is liable for punishment. For the man, legal accountability is hindered by insanity, which gives him immunity from punishment.¹² This does not, however, explain why the woman does not incur punishment either. As a free person of legal majority, she is a full legal agent and thus should be liable for punishment. The issue in this case is not simply about the impaired legal agency of one party in the act, as it is when al-Sarakhsī considers a scenario in which a free adult man engages in illicit sexual intercourse with a minor girl. In this latter case, the man is punished while the female child is vindicated due to legal minority. Why,

¹¹ In Islamic law, sexual intercourse between a man and a woman is deemed licit based on the legal relationship between them. More specifically, in Islamic law sexual relations are only deemed lawful if the man possesses usufructuary (*milk*) right over the sexuality of the woman. If the two are married or the woman is the female slave of the man, then intercourse between them is licit. The punishment for illicit sexual intercourse is fixed: either whipping or stoning, depending on the marital and sexual status of the individuals. If a man and a woman willfully engage in sexual intercourse outside of the bonds of marriage or slavery, both of them are to be punished. As the punishments were severe, the standards for evidence were stringent, requiring four male witnesses to attest to the act of penetration that must have been witnessed in a space that cannot be construed as private. While both men and women are to be held equally responsible for sexual transgressions, as we saw in the above scenarios, there are instances where men are punished and women are vindicated.

¹² In Islamic law, all humans by virtue of their humanity are granted legal agency (*ahliya*). The Ḥanafīs in particular divide legal agency into the agency of obligation (*ahliyat al-wujūb*) and agency to act (*ahliyat al-adā'*). This distinction allows them to grant legal agency to all human actors (agency of obligation) while maintaining that not all individuals are full legal agents in terms of acting upon their obligation. A full legal agent is understood to be one who is free, sane, and of legal majority, i.e. the onset of puberty. In addition to legal minority and insanity, legal capacity can also be impeded by factors such as enslavement, menstruation and lochia, and mental incompetence. See Abū al-Hājj, *Sabīl al-Wusul*, 243-44.

then, is there a discrepancy in the legal rulings based on gender? As adults, both men and women are accountable to the law. So why is the adult woman not punished?

By analyzing the process through which al-Sarakhsī seeks to rationalize and justify this gendered differentiation, we can see how he constructs the male subject of desire as active and desiring and the female subject as passive and desirable. Al-Sarakhsī imagines sexual intercourse as the interplay between the male active subject and female passive object. This subject/object construction in sexual intercourse is foundational to the legal imagination of gendered subjecthood. The material body is also read through this ontological framework. For al-Sarakhsī the male body is impenetrable and the female body the locus of penetration, the arena where male desire plays out. In this phallogocentric construction of gender, the legal designation of active subject/passive object and desiring subject/desirable object are the parameters that constitute legality in sexual intercourse. It is in this way that the female subject is constructed as an inverse foil to the male.

In his justification for the woman's vindication in the second scenario, al-Sarakhsī asserts that in the act of sex, man is the "acting subject" (*al-fā'il*) while the woman is "acted upon" (*maf'ūl bihā*).¹³ While linguistically the terms *fā'il* and *maf'ūl bihā* mean actor and acted upon, grammatically they are used to indicate subject and object. In Arabic grammar the subject in a verbal sentence is referred to as *ism fā'il* and the direct object as *ism maf'ūl*. Between their linguistic meaning and their grammatical usage, the two terms *fā'il* and *maf'ūl bihā* designate the male as an active subject and the female as a passive object. Al-Sarakhsī uses two other terms to describe the man's penetrative act:

¹³ Al-Sarakhsī, *Al-Mabsūṭ*, 9.55

that he is the immediate acting agent (*al-mubāshir lil fi'l*) in the sex act and the effective cause (*aṣl al-fi'l*).¹⁴ The other term used to describe the woman is subsidiary (*al-tābi'ah*). She follows the act of the man, enabling the sexual activity. Whereas the male is culpable of the act of penetration that brings the sexual act into legal existence, the woman is culpable for making herself willingly available as the arena where male desire is fulfilled. In the scenario with the insane man, the active male subject--the effective cause who brings the sexual act into legal existence--is not legally accountable. His action does not legally constitute sexual intercourse and thus the subsidiary act of the woman, in making herself available, has no meaning and is legally insignificant.

To summarize, as the passive party in the sex act, the woman's contribution is understood as making herself available (*makkanat nafṣahā*) for penetration. The female body is imagined as the locus or place (*maḥall*) where the sex act is performed.¹⁵ In the act of sex, her role enables the male action but does not in itself constitute sexual intercourse. It is for this reason, according to al-Sarakhsī, that she is not to be punished when she engages in illicit sexual intercourse with a man who is not legally accountable. While recognizing women's sexual agency in providing sexual access, the woman's intent and participation remain irrelevant in both the legal definition of intercourse as well as the legal determination of the occurrence of illicit sex. She does not enter into

¹⁴ While the term *aṣl al-fi'l* literally means the "source of the act," I am translating it here as the effective cause. The idea of the effective cause mirrors the Aristotelian conception of the male sperm as the effective cause or generator of reproduction. In referring to the male as the source of the sex act, al-Sarakhsī is using a similar notion of the penetrative act as the generator of the sex act. Without this penetrative act of the male subject there is no sexual intercourse that is recognizable under the law.

¹⁵ Al-Sarakhsī, *Al-Mabsūṭ*, 9:55.

juridical consideration until after the man's act comes into effect.¹⁶ As a phallogentric system, Ḥanafī law has no conceptual framework for recognizing a woman's sexual agency independent of her intent to serve as the locus of the man's penetrative act.¹⁷ In determining whether an act can be legally considered illicit sexual intercourse, Ḥanafī law only considers the legal agency of the male actor.

In absolving the woman of punishment, al-Sarakhsī must confront and settle two legal issues. The first pertains to a woman's culpability. This position leads to a legal and moral conundrum in that it would allow women to engage in illicit sexual intercourse without fear of punishment. Since sexual intercourse is defined through the legal subjecthood of the man, then the obvious question that arises is: what is the legal culpability of the woman? As the Ḥanafī position bolstered by al-Sarakhsī holds both men and women accountable but only considers the man's action to be legally consequential, why punish women? The second conundrum pertains to the culpability of the male subject. While the legal imagination of the sex act as the interplay of the active subject and passive object is rooted in dominance, it also creates an interdependency between the two genders. Since sexual intercourse is legally defined as vaginal

¹⁶ It is important to note a nuance to al-Sarakhsī's argument here. He argues that while the act of the young boy or the insane man is considered adultery linguistically, it is not considered so juristically. However, he argues, adultery is legally defined as an act that is prohibited by revelation and is not disconnected from moral culpability. Thus, since the actions of the minor boy and insane man are lacking in culpability, their participation in intercourse does not meet the legal definition of adultery. As the act is not constituted thus, the woman (the passive partner) cannot be considered to have committed the act.

¹⁷ Elizabeth Grosz argues that phallogentricism is "a form of logocentricism in which the phallus takes on the function of the *logos*. The term refers to the ways in which patriarchal systems of representation always submit women to models and images defined by and for men. It is the submission of women to representations in which they are reduced to a relation of dependence on men." Among the three forms of phallogentricism is the attempt to represent women as the opposite or negative of men. Phallogentricism always images woman as a variation or version of masculinity. Elizabeth Grosz, *Sexual Subversions: Three French Feminists* (Boston: Allen & Unwin, 1989), xx.

penetration,¹⁸ the male can only be constituted as an active subject when the woman makes herself available as a locus. While the female is legally construed as a passive object, her agency is in fact instrumental for the male to actualize his active agency. This interdependence poses a challenge to the Ḥanafī legal rulings regarding culpability in sexual transgressions. Does the woman’s refusal to make herself available for penetration put into question the man’s liability for the act? If sexual intercourse is understood as the active male subject’s penetration of the passive female locus, then why should the male be punished when the female subject refuses to serve as locus (as in the case of rape) or where the female subject is not legally accountable (as in the case of the minor girl)?

Al-Sarakhsī addresses this second conundrum in his discussion on sexual violation. While Islamic law does indeed consider sexual violence to be a punishable crime, it does not classify it as a crime separate from illicit sexual intercourse. Thus, any claim of rape is assessed first and foremost as an act of illicit sexual intercourse in which both parties are potentially culpable. It is after coercion has been established on the part of the woman that she is vindicated and the man alone punished for willingly engaging in the sex act. However, Al-Sarakhsī must consider the claim that the woman not being punished due to coercion raises legal doubt about whether the sex act in question would be technically considered *zinā*, and thus whether the man would be liable for punishment. In Islamic law, doubt (*shubha fī al-fi‘l*) is a mechanism for ensuring that harsh punishments are not easily implemented. There are numerous circumstances that provide

¹⁸ As I outlined in the previous chapter, it is only vaginal penetration that takes on all the legal rulings pertaining to sexual intercourse in the Ḥanafī legal school. While sodomy is also understood as a penetrative act, it is not understood to be sexual intercourse. Later in this chapter I will discuss sodomy and how al-Sarakhsī uses the language of “nature” to justify the distinction between vaginal and anal penetration.

grounds for doubt in the case of illicit sexual intercourse and could subsequently prevent the punishment from being implemented. For example, if a man has sex with his wife's female slave or his son's female slave under the mistaken belief that she is his own slave, then he is not punished for engaging in illicit sexual intercourse.¹⁹ If doubt is introduced into a case, penalties could be reduced to lighter discretionary punishments (*ta'zīr*) or dropped altogether.

Al-Sarakhsī responds to this possibility by arguing that in the situation of rape or sex with a minor, there is no doubt that the act occurred, since the man played his role as active, penetrating subject and the woman as passive locus of penetration. Al-Sarakhsī reaches this conclusion by arguing that coercion does not diminish the physiological features of the vagina. Elsewhere he has asserted that the sexual allure of the vagina is its suppleness and warmth, which is conducive to producing an ejaculation.²⁰ Thus the woman is able to serve as the place (*maḥall*) where sex is performed, even where she did not willingly make herself available for penetration.²¹ As far as the woman is concerned, the desirability of the locus--characterized by its suppleness and warmth--is not reduced or diminished by factors such as coercion, insanity, or legal minority. Therefore, in the case of rape there is no doubt that illicit sex has occurred, since the acting party was an adult male and the locus of penetration was a desirable one.

Al-Sarakhsī's reading of the man as penetrator and the woman as the locus is particularly telling of the law's assumptions regarding gendered bodies. The male body is

¹⁹ For more information see Rudolph Peters, *Crime and Punishment in Islamic Law* (Cambridge: Cambridge University Press), 62.

²⁰ Al-Sarakhsī, *Al-Mabsūt*, 5:148 and 9:76.

²¹ *Ibid.*, 9.55.

not only penetrating but, in fact, impenetrable. The male body, by virtue of its maleness, is acting and cannot be acted upon. It is the male body that holds the privilege to act upon the female body, which is penetrable. In reading the sex act as the active/passive performance of penetration, al-Sarakhsī not only conceptualizes the woman as the object figuratively but also equates the female body to the vagina. The *maḥall* (place) is simultaneously the woman and the vagina; the line between the desirability of the two is blurred. It is an interesting juridical move in which the woman is identified with, located, and fixed within her body. Place, object, vagina--the penetrated all become a metonymy for woman. The categories of subject/object and the juridical reading of the act of intercourse confirm each other in a self-affirming juridical construction. Ontological assumptions about gender inform the hermeneutical horizons for the sex act and become synchronized with the material body, simultaneously interpreting and being confirmed by embodied sexual practices.

This gendered ontology is not particular to Ḥanafī law alone; indeed, it permeated the Islamic intellectual tradition and the Near Eastern world. Historical studies of gender and sexuality in Roman and Greek civilizations have made similar observations regarding activity/passivity, which was not only a biological or philosophical concept but held cosmological significance.²² Maleness was a subject and femaleness an object. This subject/object dichotomy was not only the mode through which gender was constructed in the ancient world, but it was also fundamental to how those societies understood

²² For more information see Hallet and Skinner, *Roman Sexualities*; Skinner, *Sexuality in Greek and Roman Culture*; Horowitz, "Aristotle and Woman"; and Ruth Mazo Karras, "Active/Passive, Acts/Passions: Greek and Roman Sexualities," in *The American Historical Review* 105, no. 4 (2000): 1250.

sexual behaviors and identities. Thus, adult male citizens were understood to be active and penetrators, whereas women, young boys, male slaves, and other subjects were understood to be passive subjects to be penetrated. Aristotelian metaphysics also understood sexual difference along the active/passive binary. As feminist historians and philosophers have argued, Aristotle's biological and philosophical concepts of sexual difference saw maleness as active and femaleness as passive. This distinction was partly based on Aristotle's notion of humors, in which males have greater heat in their bodies than females.²³ As the male-generated sperm is seen as the seed from which the embryo grows, the male thus becomes the active, generative sex. The other sex, the woman, contains raw material that is activated by the action of the male. The male is form, the female matter.²⁴

The Islamic intellectual tradition developed in the broader milieu of the Near East, and particularly Hellenistic thought. The eleventh-century Islamic philosopher Ibn Sīna (d. 428 A.H./1037 C.E.), who was a contemporary of al-Sarakhsī and also lived in the broader region of Transoxiana, had a conception of human reproduction that was formed through this gendered ontology. Ascribing to the notion of activity and passivity with regards to gender, he held that both males and females have sperm and that it is the mixing of the two that leads to conception.²⁵ While reproduction happened with the

²³ Horowitz, "Aristotle and Woman," 192.

²⁴ Ibid., 196-97.

²⁵ Even the sex of the child was determined based on this relationship of domination between the male and female. If the male sperm dominated in quantity and quality then the child was born male, and if it was the female sperm that dominated then the child was sexed female. Intersexuality in this conception was understood as the absence of prevalence of either sperm over the other. Ze'evi, *Producing Desire*, 37-38.

mixing of the two, Ibn Sīna was adamant that it is the male sperm that acts (*al-fā'il*) upon the female sperm.²⁶

Given the ubiquitous nature of the active/passive binary, it is not surprising that al-Sarakhsī also demonstrates a similar understanding of sexual difference. There are important distinctions, however, between the active/passive dichotomy that scholars of Greek and Roman societies observed and what we see in this chapter. We can better understand these differences, for instance, if we attend to the status of the slave in Islamic law. In Roman society a free adult male who was a Roman citizen could make sexual use of both young boys and also his male slave. For Aristotle, slavery was a natural condition that an individual could not escape. As scholars have argued, it is not biological sex but in fact gender as a social status that more accurately reflects how the active/passive binary functioned. Thus, in Roman society not all men were considered active or penetrators, as young boys or male slaves could take the passive position in the binary.²⁷ In Islamic law, on the other hand, slavery is not a natural condition but a temporary impediment that can be removed through emancipation. Whereas there are hindrances to men's legal agency as well, and instances where they take on the passive role (i.e. as a male slave), it is not maleness that hinders the legal agency of the man, but rather a

²⁶ Ibn Sīna's position was a departure from the Aristotelian account of conception in which there is no female sperm. Aristotle held that in reproduction, the female contributes the material cause or matter, which is menstrual blood. The male, on the other hand, contributes sperm, which is the efficient cause that acts upon the menstrual blood. Ibn Sīna's theory is a synthesis of the Aristotelian and Galenic theories of conception. Galen admitted both male and female sperm. Unlike Aristotle, he held that both sperms contribute to form and matter but insisted that the female sperm is less powerful than the male sperm. This weakness was by virtue of being female. Ibn Sīna synthesized these two theories of conception, arguing that there is female sperm but that it is the same species as menstrual blood. However, he held that the male sperm is characterized by a greater degree of fermenting power and the female sperm by a greater degree of receptivity to fermentation. For more information about the Aristotelian and Galenic accounts of conception, see Laqueur, *Making Sex*, 39-42. For Ibn Sīna's theory, see Dallal, "Sexualities, Scientific Discourses."

²⁷ Jonathan Walters, "Invading the Roman Body: Manliness and Impenetrability in Roman Thought," in *Roman Sexualities*, ed. Judith P. Hallett and Marilyn B. Skinner (Princeton: Princeton University Press, 1997), 32.

temporary condition that can be removed or alleviated. However, with regards to women, it is femaleness itself that hinders women's full legal agency.²⁸ This is most evident in the case of enslavement, where Islamic law does not allow a man or woman to make sexual use of a male slave. The same is not true for a female slave, who can be taken on as a concubine by her male slave owner. In fact, the sexual use of the female slave is the reason why al-Sarakhsī argues that males and females are fundamentally different from one another.²⁹ In Islamic law, it is not slavery but femaleness that is a permanent and natural condition. In a sense, the shift in Islamic law regarding slavery and the prohibition of making sexual use of male slaves reinforced gender as the primary indicator in the active/passive binary.

While the active/passive binary is the narrative arc within which al-Sarakhsī constructs gendered subjects of desire, the particularities of that construction are unique to al-Sarakhsī. For example, in relation to sexual intercourse, the Shāfi'ī legal school also held that men are active in the act of sex and women passive. Al-Shāfi'ī, the eponym of the Shāfi'ī legal school, stated that man is a penetrator (*al-nākih*) and woman is penetrated (*al-mankūḥa*).³⁰ The Shāfi'ī legal school, however, did not arrive at the same conclusion regarding women's culpability in illicit sexual intercourse. They held that men

²⁸ For more information on femininity serving as a hindrance to women's legal agency, see Tucker, *Women, Family, and Gender in Islamic Law*.

²⁹ See the section below on slavery to see a quotation of al-Sarakhsī in this regard and a more in-depth discussion of the matter. See also: Al-Sarakhsī, *Al-Mabsūṭ*, 13:13.

³⁰ The words *nākih* and *mankūḥa* can vary in meaning, depending on the context in which they are spoken. They can be construed to mean penetrator and penetrated but also "one who marries" and "one who is married." al-Shāfi'ī's statement could thus also be translated as "man is the one who marries" and "woman is the one who is married." Regardless of the polyvalence of the terms, what remains constant is the attribution of activity to the male and passivity to the female. Muḥammad ibn Idrīs al-Shāfi'ī, *Al-Umm* (al-Qāhirah: al-Dār al-Miṣriyah lil Ta'lif wa al-Tarjamah, 1966), 5:156.

and women are culpable independent of one another. Thus, an adult free woman would be punished for illicitly satisfying her sexual desire regardless of the legal accountability of the man. Thus while both schools function within the broader ontological imagination of activity and passivity, the details of how that gendered ontology gets constructed in particular cases is open to contestation. There are thus competing construals of the facts and realities about gendered nature in relation to specific legal cases.

Not only does al-Sarakhsī have to contend with alternative constructions of the details of this gendered ontology, but he must also at times confront evidence that more fundamentally challenges this ontological framework. Perhaps the most compelling challenge to al-Sarakhsī’s legal determination regarding women’s culpability is a Qur’anic verse that refers to the woman as *al-zāniyah* (adulteress), using the active participle.³¹ Linguistically the terms used in the verse indicate an actor and doer for both genders, negating al-Sarakhsī’s assertion that only men are truly active parties in intercourse. In an interesting hermeneutical move, he argues that while linguistically the verse would indicate that she too is an active subject, what is intended in the meaning is the passive participle: *muznā bihā* (one on whom *zinā* is committed). As scriptural evidence for his argument, al-Sarakhsī cites another passage in the Quran where the active participle is used with the intended meaning of the passive; a Quranic verse that speaks of paradise as a recompense for believers in the afterlife uses the words (in literal translation): he will be in a life that is pleased. However, the intended meaning is: he will

³¹ “As for the adulteress and the adulterer flog each of them with a hundred stripes, and let not compassion with them keep you from [carrying out] this law of God, if you [truly] believe in God and the Last Day; and let a group of the believers witness their chastisement.” Quran, 24:2.

be in a life that is pleasing. With this hermeneutical move, al-Sarakhsī secures his assertion of woman’s passive participation in sexual intercourse. Woman, it seems, is never active in the act of sex, in spite of what revelation might have to say. She remains always acted upon, the locus where sexual intercourse comes into existence through the action of the man. Such cases illustrate the extent to which al-Sarakhsī must actively build this ontological framework in the face of conflicting and inconsistent facts and evidence.

3.2 Gender and the experience of desire

The construction of male and female subjects along the active/passive binary renders the gendered experience of desire in fundamentally different ways. As we saw in the previous section, the Ḥanafī legal conception of sexual intercourse construes the male as active, desiring, and impenetrable and the female as passive, desirable, and penetrable. But this creates a peculiar dilemma for the law in determining what constitutes female desire and, consequently, the legal and moral culpability of the woman in sexual intercourse. Because sexual transgressions are punished to discourage sexual desire from being fulfilled illicitly, it becomes important to identify what marks sexual desire. In the case of men, penetration is not only the man’s “act” in sexual intercourse but also the marker of his desire, thus it is the act of penetration that the man is held culpable for. In the woman’s case, however, the situation is more complex. First, her culpability is always determined in relation to the legal subjecthood of the man, as we saw in the previous section. If the man is not a full legal subject, then the woman does not incur punishment despite her own willingness or desire to engage in sexual intercourse. Nor does her

culpability simply reside in her being penetrated, since her body is defined by penetrability. Thus it would be unjust to punish her in cases of sexual violation. If the woman is not culpable simply for her intent or the act of being penetrated, then what marker of desire does al-Sarakhsī use in determining whether a woman should be punished? If the female body is always already penetrable, how can her desire be known?

We can best explore this conundrum by investigating the legal concept of *tamkīn* (making available). *Tamkīn* is central to al-Sarakhsī's understanding of the role of the female subject and the female body in sexual intercourse. The woman's culpability, al-Sarakhsī argues, is defined by her intent to be available for penetration. He states emphatically that the actions of the man and woman in sexual intercourse are of a different categories (*jins*) altogether. As he is the immediate acting party during sex, he is held accountable for his penetrative act. She, on the other hand, is the locus of penetration and can be culpable for making herself available for the fulfillment of male sexual desire.³²

In a discussion about sexual coercion, al-Sarakhsī asserts that if witnesses attest that a man coerced a woman and forced illicit sexual intercourse upon her (*fa zanā bihā*),³³ then the woman does not incur punishment because she was coerced and thus "refused to make herself available" (*abat al-tamkīn*) for penetration. For al-Sarakhsī, coercion does not negate the legal conceptualization of the sex act as having occurred.

³² Al-Sarakhsī, *Al-Mabsūt*, 9:194.

³³ The preposition "*bi*" followed by the third-person pronoun "her," can be translated either as "he committed fornication with her" or "he committed fornication upon her." Given al-Sarakhsī's insistence that women are not the subject in the sex act but instead the object of penetration, I have translated this phrase in a manner that demonstrates the object status of the female.

The legal construction of the female body as penetrable allows for the law to adjudicate illicit sexual intercourse and sexual violation as the same criminal act, while allowing women to escape punishment by establishing culpability in their intent.³⁴ Her “participation” in any sex act, coercive or otherwise, is being penetrated. The difference then between an illicit sex act and sexual coercion is the absence of the woman’s intent to make herself available for penetration, not the absence or lack of her role (i.e. penetration) in making the sex act possible. Al-Sarakhsī states clearly, “Her serving as a locus is not negated by coercion.”³⁵

Hina Azam makes a similar observation in her work on sexual violence in Islamic law. Drawing on the discourse around sexual intercourse and sexual violation in the first two centuries of Islam, she argues that by the end of the formative period of Islamic law, “a consensus had emerged that sexual violence, or what we call ‘rape,’ was to be categorized as a variant of unlawful sex, or *zinā*. Put another way, the basic definition of *zinā* that had emerged by the end of the formative period did not distinguish between consensual and coercive forms of unlawful sex.”³⁶ In order to designate an act as sexual

³⁴ The classification of rape under illicit sexual intercourse has been a subject of tremendous controversy in the contemporary period. The evidence for proving illicit sexual intercourse is quite stringent, requiring four male witnesses to see the act of penetration. This puts victims of rape at a significant disadvantage if they cannot find the number of male witnesses needed to punish the rapist. Additionally, pregnancy can also be presented as evidence under Ḥanafī law, which can unduly punish women who become pregnant through rape. As sexual violation is considered first and foremost an act of illicit sexual intercourse, if the woman is not able to produce evidence as to her coercion, she can potentially find herself being punished instead. For more information on the application of laws pertaining to illicit sexual intercourse in the modern nation state, see Quraishi, “Her Honor,” and Azam, *Sexual Violation in Islamic Law*, 1-20.

³⁵ “*Li’ana al-mar’a maḥall al-fi’l wa lā tan’adim al-maḥalliyya bi kawnihā mukraha.*” Al-Sarakhsī, *Al-Mabsūṭ*, 9:118. The legal conception of sexual violation as first and foremost illicit sexual intercourse is so entrenched that a man who accuses a woman who was raped of adultery cannot be punished for the false accusation (*al-qadhf*). To explain this ruling, al-Sarakhsī asserts that even though the woman is not legally or morally culpable for the sex act (i.e. she is not an adulteress), she was indeed party to an illicit sexual act. Ibid.

³⁶ Hina Azam, “Rape as a Variant of Fornication (*Zinā*) in Islamic Law: An Examination of the Early Legal Reports,” *Journal of Law and Religion* 28, no. 2 (2012): 7.

coercion, it first had to be determined whether the act qualified as illicit sexual intercourse.³⁷ Coercion or the volition of the woman became secondary to this designation. Both parties are considered liable for punishment (as both had “participated” in the act) until it is determined that the woman was coerced.³⁸ The woman is first and foremost penetrable, the locus (a thing), and only secondarily a legal and moral subject.

Basing the woman’s culpability on her intention to serve as the locus of penetration differentiates between the female experience of desire and her participation in sexual intercourse. With regards to men, however, a similar separation is not made, as intent is already present when men engage in sexual intercourse.³⁹ For the male subject, intent, desire, and penetration are all linked. This is most evident in al-Sarakhsī’s discussion on the sexual coercion of men. On this subject, the Ḥanafī legal school is not concerned with the rape of men by other men or women, but instead with men coercing other men to commit acts of illicit sexual intercourse.⁴⁰ In fact, Ḥanafī jurists devoted significantly more attention to this form of coercion in sexual intercourse than to the

³⁷ Hina Azam argues that there was no conception of marital rape or sexual coercion of one’s slave woman in Islamic law precisely because of this melding of sexual coercion under the category of illicit sexual intercourse. As both marriage and concubinage made sexual intercourse licit, there could be no legal conception of sexual coercion within these relationships. Azam, *Sexual Violation in Islamic Law*, 69.

³⁸ In describing the Ḥanafī legal tradition’s understanding of sexual violation, Azam asserts that the majority of the legal school’s attention was devoted to determining the legal categorization of a sex act and very little on the volition of the woman. Azam, *Sexual Violation in Islamic Law*, 168.

³⁹ This is when men are penetrative subjects. Al-Sarakhsī does consider the possibility that men can be, like women, in the receptive position in sexual intercourse. However, as I will discuss in the following section on sodomy, it is considered to be unnatural, and the nature of men is assumed to gravitate only toward penetration.

⁴⁰ Whereas much of the Ḥanafī legal discussion on sexual coercion focuses on that of men, it is interesting to note the senselessness al-Sarakhsī felt in conceptualizing what a man might gain by forcing another man into a sexual act. In murder, he argues, coercion functions as a means by which an individual can fulfill his/her goal through another. It is for this reason that coercion in murder is punishable despite the fact that the homicide was committed through another person. For al-Sarakhsī, it is not possible for a man to fulfill his sexual desire through the erection and penetrative act of another man. It is quite possible that the sexual coercion of men was taken into consideration due to legal precedent rather than an immediate social concern. Al-Sarakhsī, *Al-Mabsūṭ*, 24:88.

sexual violation of women.⁴¹ In general, the Ḥanafī legal school rejects the idea that a man can be coerced into sexual intercourse. According to al-Sarakhsī, the early Ḥanafīs held conflicting opinions on this issue. Abū Ḥanīfa initially held that a man who claims to have been coerced into sexual intercourse is to be punished for illicit sexual intercourse.⁴² Abū Ḥanīfa’s disciples later adopted the position that a man is not liable for punishment unless he is coerced by a ruler (*sulṭān*).⁴³ Rationalizing Abū Ḥanīfa’s initial legal position, al-Sarakhsī asserts that penetration is not conceivable without the presence of an erection, which is, in turn, an indication of male desire.⁴⁴ As such, an act of penetration marks the volition and intent (*ṭawā’īyah*) of the man to engage in sexual intercourse.⁴⁵ Al-Sarakhsī argues that when coerced, a man would not be able to achieve an erection out of fear. Thus, his ability to penetrate a woman, even if in compliance with the coercive demands of another, is an indication of his desire to engage in the act.

The perceived biological difference between the male and female sexed body results in different conclusions regarding culpability in illicit sexual intercourse. As the active subject, the male body’s act of penetration cannot be coerced. When the male

⁴¹ Azam also makes a similar observation about the Ḥanafī legal tradition and sexual coercion. Azam, *Sexual Violation in Islamic Law*, 147.

⁴² Al-Sarakhsī, *Al-Mabsūṭ*, 24:88.

⁴³ Mohamad Fadel argues that the term *sulṭān* in Islamic law does not refer to an individual but to the power granted to an individual, including the sovereign. Intisar Rabb argues as well that the term *sulṭān* is used to refer to a person who holds political authority, is a representative of the caliph, and is in charge of enforcing criminal laws. Thus, if a person who is endowed with public authority violates the law, a subject of the law has no recourse to justice. It is for this reason that the early Ḥanafīs allowed for an exception when the person endowed with public authority coerces a man to commit a sexually transgressive act. Abū Ḥanīfa’s disciples subsequently expanded the exception granted to coercion by the *sulṭān* to include any individual who has the power to make good on his/her threat. For more information see Mohammad Fadel, “Public Authority (Sulṭān) in Islamic Law,” in *The Oxford International Encyclopedia of Legal History* (New York: Oxford University Press, 2009); and Intisar Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (Cambridge, UK: Cambridge University Press, 2015), 138.

⁴⁴ *Wa lā tantashir ālatuhu illā bi-ladhdha*. Al-Sarakhsī, *Al-Mabsūṭ*, 24:88.

⁴⁵ Ibid.

subject acts, it is necessarily intentional and desirous. On the other hand, the female body as the locus of penetration can be acted upon with or without her volition.⁴⁶

This conception of male physiology and desire is not without contention in al-Sarakhsī's legal text. Abū Ḥanīfa and his disciples subsequently adopted the position that coercion by a *sulṭān* is the only sufficient grounds for overcoming an accusation of illicit sexual intercourse. This exception, made for a public authority, required rationalization. If, as al-Sarakhsī argued, the male body is not able to achieve an erection due to fear, how then can the man penetrate a woman under duress? Providing a justification for the Ḥanafī position regarding coercion of men, al-Sarakhsī asserts that a man's erection is not necessarily an indication of the absence of fear. The man's erection, he argues, can either be a physiological reflex due to his virility (*fa-qad tantashir al-ālah ṭab'an bi al-fuḥūla*) or it can be a sign of his volition to engage in sex (*wa qad yakūn dhālika ṭaw'an*).⁴⁷ Thus, when a man is coerced into sexual intercourse by a public authority, he acts out of a restraint that is placed on his volition and a fear for his life and safety. In such a situation, his penetrative act is not intended to fulfill his sexual desire but instead to protect himself from harm. It is for this reason, al-Sarakhsī argues, that legal culpability in this case is dropped. While in justifying the earlier position, al-Sarakhsī insisted that an erection is necessarily a sign of a man's sexual volition, here, however, he recognizes that an erection can occur as an unintended physiological reflex.

⁴⁶ Ibid.

⁴⁷ Ibid., 24:89.

In this passage, al-Sarakhsī does not seem to be attempting to articulate his conception of the true nature of the embodiment of male desire. He is instead considering the multiple possibilities of conceptualizing male physiology in a way that could provide a rationalization for the inherited positions of his legal school. In serving that interest, the male body is configured and reconfigured in the justification of legal precedent. This example further illustrates the fragmented and inconsistent construction of gendered subjects of desire in al-Sarakhsī's text, as he confronts the complex and messy realities of sexual desire. While he operates with certain assumptions and a general picture of gendered subjects of desire, he also has to contend with facts that complicate or challenge this general narrative, resulting in inconsistencies in how he constructs sexual desire and gendered subjects.

Despite the fragmented construction of the embodiment of desire in the male sexed body, desire is always tied to the man's erection and act of penetration in al-Sarakhsī's legal imagination. The legal recognition that men may be coerced into sexual intercourse in extraordinary cases does not question the juristic assumption that male subjects of desire initiate sexual activity and that their desire is knowable and hence legislatable. With regards to women, there is a clear distinction between her penetrability, her volition, and her desire. As al-Sarakhsī argued, a woman can be coerced into making herself available, and thus her sexual desire cannot be known simply by her availability. In the legal imagination, *tamkīn* is related to the conscious intentional act of the female subject in serving as a locus, whereas her *maḥalliyah* (locus) is a bodily condition (i.e. her penetrability). Within this conception of the female body, the woman can be present

and enable a sex act without her desire being present. It is intent and willingness to be penetrated that creates culpability for the female subject, rather than the fulfillment of her sexual desire.⁴⁸

We can understand this difference in the construction of male and female culpability in sexual intercourse if we take into consideration the sexual commodification of women's bodies in early Islamic law. Hina Azam describes the tension in early Islamic legal positions on sexual violence as the tension between a theocentric and proprietary ethic. She argues that prior to the emergence of Islam in the Near Eastern world, the sexual violation of women was understood primarily as a property crime:

In the case of sexual violation, the thing usurped was the sexual (and thus reproductive) capacity of the woman in question. Because a woman's sexual capacity in many of these systems carried a potential monetary value when exchanged in marriage (or in sale, in the case of a slave woman), sexual violation was often regarded as causing a loss of both monetary and symbolic capital to her, her kin, and her community.⁴⁹

With the emergence of Islam, the Quran and the Prophet reconfigured sexuality within theocentric terms in which the licitness of sexual activity was determined first and foremost by God's command. Furthermore, she argues, the theocentric ethic created room for thinking about the internal disposition of the individual, making concepts of consent and coercion legally meaningful.⁵⁰ This theocentric ethic, however, did not fully replace the proprietary ethic; even the Quran and Prophet, Azam argues, continued to adhere to

⁴⁸ Azam argues that the Hanafi legal school's doctrine on sexual coercion demonstrates that a woman's consent or objection to sexual intercourse did not carry much legal significance. Azam, *Sexual Violation in Islamic Law*, 169.

⁴⁹ *Ibid.*, 24.

⁵⁰ *Ibid.*, 62.

an understanding of female sexuality as a type of commodity.⁵¹ This understanding of sexual violation through both a theocentric and proprietary ethic is most clear in the Mālikī school of law. The Mālikīs instituted a dual punishment in cases of sexual violation, in which the man received the prescribed punishment for illicit sexual intercourse and was also required to pay monetary compensation to the woman. The Ḥanafī legal tradition, on the other hand, leaned more heavily toward the theocentric ethic and did not provide monetary compensation in sexual violation.⁵² Despite this theocentric focus, however, the Ḥanafī school of law continued to see women’s sexuality through the prism of sexual commodification.⁵³

Given the tension between a theocentric and proprietary ethic in framing women’s sexuality as a commodity, *tamkīn* (the woman’s intent to be available for penetration) emerges as a mode for thinking about a woman’s internal disposition as a legal and moral subject of desire who is both a sexual commodity as well as the owner of her own sexual commodity.⁵⁴ The woman turns over her sexual property for use in an illicit manner, thus leading to her legal and moral culpability. In such a conception of women’s sexual desire (her status between both legal and moral subject and sexual commodity), the law’s focus on women’s culpability is not on the female desire for sexual intercourse or the

⁵¹ Ibid., 84.

⁵² Azam asserts that the theocentrism and proprietarism that characterized these two legal schools should not be understood as dichotomous but instead as an orientation. Each school retained elements of both these concepts but leaned more toward one over the other. Ibid., 150.

⁵³ Azam argues that the Ḥanafī legal school largely rejected the use of the term “usurpation” (*ghaṣb* or *ighṭiṣāb*) to refer to sexual coercion as they rejected the commodification of the free woman’s sexuality that was implied in the concept of usurpation. Nonetheless, Ḥanafī jurists did take on a proprietary approach to women’s sexuality to a certain degree. This is particularly evident in their conception of the sexual coercion of a slave woman as sexual usurpation, which then required payment in compensation for the reduction of her value. Even with regards to free women, Ḥanafī jurists held that her sexuality could be accessed through the payment of a dower. Ibid., 151-53.

⁵⁴ Azam argues that with regards to free women, Islamic law sees them “as both loci of sexuality and fully individuated moral subjects, as syntheses of person and thing, of proprietor and property.” Ibid., 62.

fulfillment of that desire in the sex act. The internal disposition of the female legal subject is understood as her volition in making her sexual commodity available for illicit use rather than her desire for sexual fulfillment through illicit means. The same is not true for men who are not a sexual commodity but in fact consumers of the female body and female sexuality. The acting male subject enacts his desire on the female body. His act of penetration becomes a marker of both his intent to fulfill his sexual desire and his participation in an illicit sex act. For men, desire, volition, and their role as the penetrator are closely linked, whereas for women, desire is separated from volition (as a legal subject) and penetrability (as the locus of the sex act). The law's construction of gendered subjects along the active/penetrator and passive/penetrated binary conceptualizes sexual desire in fundamentally different ways for both men and women.

3.3 Is sodomy sex? Naturalizing man as penetrator and woman as penetrated

In the legal discussions on sexual intercourse in al-Sarakhsī's legal text, it is apparent that the binary between male as active, desiring, and impenetrable, and the female as passive, desirable, and penetrable is the narrative arc that frames the Ḥanafī legal conception of sexual intercourse. Given this framework, we might ask how al-Sarakhsī understands and narrates situations where the male is not penetrating but instead the object of penetration. In this section I turn to the regulation of sodomy (*liwāṭ*) in al-Sarakhsī's legal text. In Islamic law, sodomy refers to any act of anal penetration and includes male penetration of both a female and male body. How then does al-Sarakhsī maintain the gendered subjecthood that I have outlined so far in this chapter? Does the

penetration of the male body not serve to disrupt the dichotomous account of gender?

Sodomy serves as an interesting case for this chapter for two reasons. Firstly, the law's recognition of the fact that male bodies can also be penetrated by other males serves as a challenge to the understanding of the male as active and impenetrable. Secondly, the shifting opinion on sodomy among the first generation of Ḥanafī jurists demonstrates the conflicting accounts of gendered subjecthood that they entertained as possibilities.

The Ḥanafī school holds that sodomy is unlike vaginal intercourse. Thus, illicit acts of anal penetration are not to be punished as illicit sexual intercourse. In this, the Ḥanafī jurists were unlike the other three legal schools of Sunni Islam, all of which held that sodomy was to be classified under illicit sexual intercourse (*zinā*).⁵⁵ Early Ḥanafism, however, was not united on this distinction between anal and vaginal penetration.

Whereas Abū Ḥanīfa held that sodomy and vaginal sexual intercourse are two distinct sexual acts, his disciples disagreed. They argued instead that both the vagina and anus were conducive to male sexual pleasure. Eventually the opinion of the eponym won out, and the Ḥanafī legal school defined sexual intercourse as exclusively a vaginal penetrative act. In al-Sarakhsī's rationalization of the eventual Ḥanafī position on sodomy, we can observe the ways in which his conception of gendered subjecthood is further naturalized through the legal determinations regarding sodomy.⁵⁶

⁵⁵ For more information on the legal position on sodomy in the four Sunni legal schools and Twelver Shi'i law, see El-Rouayheb, *Before Homosexuality*, 118-23.

⁵⁶ As is al-Sarakhsī's manner throughout his legal text, he provides an account of Abū Ḥanīfa's justification for his legal opinion. This account, however, is more reflective of al-Sarakhsī's defense of legal precedent than a transmission of the legal arguments articulated by the early generation of jurists.

Abū Ḥanīfa’s two disciples, Abū Yusuf and Muḥammad al-Shaybānī, argued that since sodomy and vaginal sexual intercourse are both penetrative activities, sodomy and illicit sexual intercourse should receive the same punishment. The central disagreement between Abū Ḥanīfa and his two disciples is around the definition of illicit sexual intercourse. Given their differing interpretations of the term *zinā* (illicit sexual intercourse), they disagreed about whether anal penetration legally falls in that category. Foundational to the position of the two disciples was the argument that both anal and vaginal penetration fulfill male sexual desire. Figuratively, they argued, illicit sexual intercourse refers to any act that is carried out with the explicit goal of “illicitly inserting a genital organ into another with the intent of ejaculation.”⁵⁷ This definition, they argued, was fulfilled in the act of anal penetration as both the vagina and the anus come under the broad category of genital organs. The argument of the two disciples with regards to the equivalence between the vagina and the anus rested not only on the fact that according to Islamic law both these areas require covering as objects of shame, but also that the vagina and the anus are “naturally desirable.”⁵⁸ The desirability of the two is based on their shared physiology as they are both characterized by “suppleness and warmth.” In this, penetration of both the vagina and the anus facilitates male ejaculation.

Abū Ḥanīfa, on the other hand, argued that sodomy and vaginal penetrative intercourse are fundamentally different acts. This distinction between the two is embedded not only in a linguistic difference but also in normative claims about

⁵⁷ The precise phrase used by al-Sarakhsī is “*ilāj al-farj fī al-farj ‘ala wajh maḥzūr lā shubhah fihi li qaṣd saḥf al-mā’.*” Al-Sarakhsī, *Al-Mabsūt*, 9:77.

⁵⁸ “*mushtahā ṭab ‘an.*” Ibid.

appropriate objects of desire. First, Abū Ḥanīfa argued that sodomy and vaginal sexual intercourse are distinguished linguistically. Whereas the term *zinā* is used to denote vaginal penetrative acts, *liwāṭ* is designated for anal penetration. For Abū Ḥanīfa language is not arbitrary but instead signifies essences. Thus the inability to refer to sodomy as *zinā* linguistically marks them as essentially two different acts that cannot be subsumed under the same ruling. Al-Sarakhsī's justification also depends on claims regarding the natural disposition (*al-ṭab'*) of men and women. The fundamental disagreement between Abū Ḥanīfa and his disciples is whether anal penetration is naturally desirable. While the two disciples argued that anal sex also fulfills male desire, Abū Ḥanīfa naturalized heterosexual desire. For the disciples, it is not the gender of the object-choice but rather the physiology of the sexual object that determines whether an object is the appropriate locus of penetration. Had the legal opinion of the two disciples been adopted as the authoritative opinion of the Ḥanafī school, it would have also rendered the male subject potentially passive, desirable, and penetrable. However, in rationalizing the legal school's position on sodomy, al-Sarakhsī further solidifies the legal construction of gendered subjects along the active/passive binary.

Abū Ḥanīfa's claim here about sexual deviance does not pertain to anal penetration as such but to the desire of a male to be penetrated. He declares such a desire to be unnatural and hence not illicit sexual intercourse, but an aberration. In anal penetration between two men, it is the man who desires to be penetrated, not the man

who takes on the penetrative role, who is considered to be acting against his nature.⁵⁹ In *How to Do the History of Homosexuality*, queer theorist and historian of sexuality David Halperin argues that in the ancient Greek world sexual identity was determined by a person's gender and social status, not identified as a pathological condition. In the context of the ancient Greek world, the *kinaidos* was an adult male who preferred to take on the passive, receptive role in sexual intercourse. The offence caused by his behavior, however, was defined more centrally in relation to gender than desire. It was common in the ancient Greek world for a man to desire other men and seek them out for sexual encounters. Thus, as long as men maintained their proper insertive sexual role, they were acting in accordance with their nature. However, it was his abandonment of his proper gender role and the desire for the passive role that marked the *kinaidos*' sexual deviance.⁶⁰

Halperin's observation regarding deviance and sexual morphology is helpful in understanding the Ḥanafī legal school's position on sodomy. Abū Ḥanīfa maintained that the male subject is naturally disposed to penetration. In an instance of male-to-male sexual penetration, al-Sarakhsī asserts, the male who takes on the passive, receptive role is acting out of a deficiency in his natural disposition.⁶¹ For Ḥanafī law, it is gendered norms that determine the naturalness of sexual inclinations, not the object of desire. The man who willingly assumes the passive role and desires penetration is not censured for

⁵⁹ Al-Sarakhsī, *Uṣūl al-Sarakhsī*, 1:243.

⁶⁰ David Halperin, *How to do the History of Homosexuality* (Chicago: University of Chicago Press, 2004), 38.

⁶¹ The exact phrase that al-Sarakhsī uses is: “*wa ṭab ‘ kullu wāḥid min al-fā ‘ ilayn yad ‘ ū ilā al-fi ‘ l fi al-qubl wa idhā āla al-amr ilā al-dubr kāna al-maf ‘ ūl bihi mumtana ‘ an min dhālika bi ṭab ‘ ihi fa yatamakkan al-nuqṣān fi da ‘ ā al-ṭab ‘ ilayhi.*” Al-Sarakhsī, *Al-Mabsūṭ*, 9:78.

desiring another man but instead for violating the fundamental conception of maleness as active and penetrative. It is for this reason that the man who penetrates another man is censured for sexual transgression, not for fulfilling his sexual desire on another man's body.⁶²

Regardless of Abū Ḥanīfa and his disciples' different positions on sodomy, they share a phallogocentric understanding of human sexuality. While the disciples' argument that the anus is also a desirable locus of penetration rendered the male body as potentially desirable and penetrable, it did not challenge the insertive role of the male subject. For his part, al-Sarakhsī only considers vaginal and anal penetration as possibilities for sexual fulfillment. While these two sexual acts can be configured with different partners--male-to-male or male-to-female--it is the male subject who maintains the sole role as penetrator of a passive female or male object. In al-Sarakhsī's consideration of the diversity of human sexual expressions, there is near silence on tribadism and the possibility of sexual intimacy between two women. In fact, in the discussion on sodomy, al-Sarakhsī only mentions tribadism to further solidify his assertion that the reference to sodomy as illicit sexual intercourse in prophetic traditions is metaphorical (*majāz*). As there are prophetic traditions that refer to sodomy as a form of illicit sexual intercourse (*zinā*), al-Sarakhsī must reconcile the Ḥanafī legal position regarding sodomy with these

⁶² This analysis is similar to the line of argument put forward by scholars like el-Rouayheb, Ze'evi, and Kugle, who have noted that the pre-modern understanding of same-sex sexual acts cannot be understood as an orientation but are instead about the classifications of the permissibility and impermissibility of particular acts, rather than focusing on the desire of the individual for a particular object of desire. El-Rouayheb, in particular, brings our attention to the importance of activity and passivity in the pre-modern law's understanding of homosexual sex acts rather than objects of desire. See el-Rouayheb, *Before Homosexuality*; Ze'evi, *Producing Desire*; and Scott Siraj al-Haqq Kugle, *Homosexuality in Islam: Critical Reflection on Gay, Lesbian, and Transgender Muslims* (Oxford: Oneworld, 2010).

prophetic traditions. He does so by arguing that the reference to such an act in the prophetic tradition is metaphoric (*majāz*). The equivalence drawn between the two acts, he argues, is not one of their essence (*haqīqah*) but instead to the licentiousness of the act. Thus, the analogy between vaginal penetration and sodomy in the prophetic tradition is limited to the fact that both are sinful acts. To support this claim he brings attention to the fact that the prophetic traditions also refer to tribadism as a form of illicit sexual intercourse, which presumably everyone knows is not *zinā*.⁶³ This is one of the only times that al-Sarakhsī refers to female same-sex acts. Sodomy has the potential to de-center the conception of the female body as the sole desirable object of male desire, but it does not disrupt the law's construction of the male as the only active and penetrative subject.⁶⁴

3.4 The slave man and his desire

Al-Sarakhsī's insistence on the active nature of male subjects engenders a dilemma for the law. Whereas the free man is a full legal agent, other configurations of the male subject are constrained in their legal agency. We saw a few of these male subjects earlier in al-Sarakhsī's discussion on illicit sexual intercourse. The penetrative acts of both the insane man and the male child do not carry legal significance. In this

⁶³ Al-Sarakhsī, *Al-Mabsūṭ*, 9:78.

⁶⁴ Whereas the modern concept of homosexuality is focused on sexual orientation and object choice of sexual desire (thus male and female same-sex desire to be classified under the broader category of homosexuality), sodomy and illicit sexual intercourse for al-Sarakhsī are largely concerned with an active and desiring male subject's object of penetration. Thus while same-sex sexual activity between two men is classified as sodomy since penetration of the anus has taken place, same-sex sexual activity between two women cannot be classified in the same manner as there is no penetrative subject. While modern constructions of sexuality couple male and female same-sex acts under the umbrella of homosexual sex, the gendered ontology that informs the pre-modern legal tradition places male homosexual acts closer to heterosexual acts than female homosexual acts due to the conception of sexual intercourse along the active/passive, subject/object relation.

section, I turn to the male slave to explore his position within the legal construction of gender. The status of the male slave as a legal subject presents a conundrum for the gender binary. As a man, the male slave is an active and desiring subject, yet enslavement turns him simultaneously into an object of ownership. As al-Sarakhsī states emphatically, “The male slave is a commodity that is owned so it is not permissible for him in turn to own commodity.”⁶⁵

In Islamic law, slaves (both male and female) retain legal agency that is impaired by enslavement. For example, while Muslim men are required to attend Friday prayer services, male slaves are not because their primary role and duty is to provide labor for the slave owner. Obligating them to attend prayer services would impinge the slave owner’s right. Enslavement thus becomes a sufficient cause for voiding religious and legal obligations. Enslavement not only restricts the rights and obligations of male slaves but also puts them into an object status. In a world where relationships are conceived in hierarchies, slave men become owned objects. As Kecia Ali notes, “An adult slave’s maleness, which would have given him full and sole control over his marital destiny if he were free, stood in tension with his status as a slave.... Enslavement either feminized or infantilized the male with regard to consent.”⁶⁶ What happens to the construction of the man as a desiring and active subject when a free man or woman owns him? How might such a relationship disrupt the ontological account of gender? To respond to some of

⁶⁵ The precise phrase: “*wa hādhā lianna al-‘abd mamlūk mālan falā yajuz an yakūn mālikan lil māl.*” Al-Sarakhsī, *Al-Mabsūṭ*, 5:129.

⁶⁶ Ali, *Marriage and Slavery*, 39-40.

these queries, I will engage al-Sarakhsī's legal discussion on the right of the male slave to marry.

The marriage of slaves in Islamic law is a complicated issue. Given that marriage is a contract of ownership⁶⁷ and a slave has no ownership rights of his own, entering into such a contract is a legal impossibility.⁶⁸ This conflict creates a unique problem. In Islamic law, fulfillment of sexual desire is available to men through two avenues: marriage and ownership of a female slave. According to Ḥanafī law, slave men do not retain the right to own a slave and thus cannot fulfill their sexual desire through those means. In order for a slave man to fulfill his desire, then, he must get his master's permission to enter into a marriage contract. However, given that marriage is a contract of sale in which the man acquires ownership over his wife's vulva and the sexual enjoyment of her body, a slave man cannot enter into a marriage contract because he has no legal right to ownership. This contradiction is resolved by making a determination regarding which legal identity takes precedence. Al-Sarakhsī argues that despite the fact that the male slave does not have the legal agency to own sexual access (*milk al-mut'ah*), the law allows it so that he might fulfill his sexual desire and preserve his lineage.⁶⁹ It is this need, al-Sarakhsī argues, that becomes the reason for permitting the male slave to marry; this decision is based on his maleness and the need to fulfill male desire. Legally,

⁶⁷ For a brief introduction to the conceptualization of the marital contract in Islamic law through the prism of slavery and ownership, see Kecia Ali, "Marriage in Classical Islamic Jurisprudence," in *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (Cambridge, MA: Harvard University Press, 2008), 11-45.

⁶⁸ Unlike the Ḥanafīs, the Mālikī school grants restricted rights to ownership, even allowing them to own a concubine. Thus this dilemma regarding the right of men to marry is not necessarily shared across all the schools.

⁶⁹ "Li ḍarūrat ḥājatihi ila qaḍā' al-shahwa wa baqā' al-nasal." Al-Sarakhsī, *Al-Mabsūṭ*, 5:129.

the male slave is an object, yet as a male he remains a sexual agent.⁷⁰ In solving the legal contradiction about the male slave's right to marriage, maleness trumps his status as a slave.⁷¹

Interestingly, given the conception of femaleness as passive, a similar conundrum does not arise for the female slave. In fact, with regards to sexual desire in particular, women are in an odd bind since the fulfillment of their sexual desire must always come at the expense of their freedom.⁷² Female slaves serve as concubines, a relationship made permissible due to the ownership granted to the slave owner over them. Free women, on the other hand, must enter into a relationship of ownership with men (i.e. marriage) in order to fulfill their desires. Given the broader construction of women as passive and objects of male desire, there is no legal conundrum in a slave woman's ability to fulfill her sexual desire, because she is always an object in both slavery and marriage. The

⁷⁰ Kecia Ali notes similarly that the law insisted on the sexual agency of the male slave and did not turn him into a sexual object. This is most evident in the fact that the male slave, unlike the female slave, cannot be used for sexual services. However, even in marriage, Ali argues, the male slave retains the rights granted to husbands. Whereas the law granted the slave owner rights over the male slave's ability to enter into a marriage, once he became a husband the slave owner could not impinge on his rights. Ali, *Marriage and Slavery*, 48.

It is also important to note that the permission granted to the male slave to fulfill his sexual desire is restricted to marriage alone and does not extend to concubinage. Contrary to the Hanafīs, the Mālikī school held that a slave man may take on a concubine. Al-Sarakhsī recounts the argument put forward by Mālik ibn Anas, stating that if the male slave retains the agency of ownership with regards to the marital contract, then he should also retain the right to own a concubine. The Mālikī position reveals the contradictions present in al-Sarakhsī's argument regarding the male slave's right to marriage. If the male slave has been granted ownership rights over sexual access, then why should he not retain this with regards to concubinage? Al-Sarakhsī responds to this challenge by citing a tradition in which Ibn 'Umar, a companion of the Prophet, states that the sexual use of a slave woman is not permitted except to the person who has the legal agency to manumit her or gift her to another person. Al-Sarakhsī argues that while the male slave has been granted limited ownership rights over the marital contract so that he might fulfill his sexual desire, he does not have the legal agency to authorize such acts. Thus, it is not permissible for him to own slaves or take on a female slave as a concubine. Al-Sarakhsī, *Al-Mabsūṭ*, 5:129.

⁷¹ The same is not true when it comes to the rights of the female subject as both slave owner as well as a slave. As a slave owner, a woman does not retain the same rights over her slaves as does a man. Thus, she may not use her male slave for sexual services, and the four Sunnī legal schools differ on her right to contract a marriage for her slaves. Ali argues that with regards to marriage, in Islamic law, "femaleness trumps other legal considerations." Ali, *Marriage and Slavery*, 45.

⁷² For more information on this, see the section "Women, sexual intercourse, and dominion" in Chapter Three.

gender binary configures enslavement differently for both men and women. Unlike the male slave, the female slave has no right over her sexuality. Al-Sarakhsī alludes to this at different moments in the chapter on marriage, citing prophetic traditions that state that the female slave has no ownership over herself, as the master owns both her and her sexual commodity (i.e. sexual access to her body). Despite the fact that the body of the male slave is owned, his sexuality remains his own. While one might argue that a male slave owner may not make sexual use of his male slave, as this would constitute sodomy, even a female slave owner cannot make sexual use of her male slave.⁷³

The problem of the slave man and his desire arises due to the gendered ontology we have discussed so far. Marriage is based on an assumed male subject that is active and desiring, and an assumed female subject that is desirable and passive. Furthermore, sexual intercourse is only allowed through financial maintenance, and thus the solidification of this subject/object relation between the two: a relationship of ownership over the sexual body of the woman. As the legal agency of the slave man is impaired by enslavement, he finds himself unable to inhabit and perform the maleness that is normativized and naturalized by the law. These factors create a unique situation in which the male slave is left with no legal avenue to fulfill his desire, while the female slave faces no such challenge. The performance of femininity necessitates a passive object of desire; enslavement only enhances this for the slave woman. However, it is precisely the masculinity of the slave man that takes him out of his predicament. The desiring male

⁷³ For more information on how this ruling regarding the prohibition of female slave owners taking on their male slaves for sexual services developed and solidified in early Islam, see Ali *Marriage and Slavery*.

subject cannot be left unfulfilled, and therefore the male slave is allowed to marry so that he can fulfill his desire.⁷⁴ As Baber Johansen notes in his article, “The Valorization of the Human Body in Muslim Sunni Law,” the gender criterion outweighs enslavement. Thus, free males and male slaves are considered to be of the same genus because they are of the same material origin and purpose (*maqṣūd*).⁷⁵ For al-Sarakhsī this shared genre is evidenced in the fact that once the impediment of slavery is removed, there is no difference between the male slave and the free man.

The female slave’s condition is also deeply tied to the law’s conception of femaleness. As a woman the fulfillment of her desire happens both in passivity and in ownership, thus she is not a challenge for the law. Enslavement is not only constructed differently based on the gender of the slave, but in fact the essence of female slaves is different from that of male slaves. According to Ḥanafī jurists, males and females belong to two different genera altogether. The reason for the difference relates to the purpose for which the female slave is used. Al-Sarakhsī asserts, “The male and the female of Adam’s children are classified in two genera with regards to legal rulings (*fī ḥukm*). This is because the purpose (*al-maqṣūd*) that is assigned to one cannot be realized by the other.

The purpose of the female slave is concubinage (*istifrāsh*) and reproduction (*al-istīlād*)

⁷⁴ It is important to note that while al-Sarakhsī states the importance of the fulfillment of male desire in explaining why the male slave can contract a marriage even though he has no right to ownership, the male slave is still dependent on his slave owner to exercise his ability to marry. The male slave’s owner retains the right to marry him to any woman he wants or can forbid him from marrying. This legal right of the slave owner can effectively prevent the male slave from fulfilling his desire, as he is not allowed to take on a concubine according to Ḥanafī jurists. Baber Johansen, “The Valorization of the Human Body in Muslim Sunni Law,” *Interdisciplinary Journal of Middle Eastern Studies* 4 (1996): 84.

⁷⁵ *Ibid.*, 82. The full passage reads: “The free and slave are one genus. As far as his origin is concerned, the human being is free. Slavery intervenes as an accident. The emancipation annihilates this accidental slavery. So slavery does not bring about a change in the genus, neither through a difference in the (material) origin nor the form nor the purpose, because this (difference) does not exist between free males and slave males.”

and a male slave cannot do this.”⁷⁶ While the male slave is also owned, he retains a right over his own sexuality, whereas the female slave is a sexual commodity. As the prophetic traditions cited by al-Sarakhsī state, she does not maintain ownership over her vulva, it is only granted to her once she is free.⁷⁷ As Johansen observes, “Where slavery is combined with the gender difference it destroys the unity of the human kind.”⁷⁸ In slavery, the gendered ontology produces two different types of human subjects altogether.

3.5 Desiring the slave woman: fragmented gender subjects

I began this chapter with al-Sarakhsī’s categorical statement about women’s very essence being *‘awra-*-that which must be concealed from sight. This statement is one of the more emphatic expressions of al-Sarakhsī’s androcentric construction of gendered subjects that sees men as desiring and women as desirable. Throughout this chapter, we have seen that what underlies this view is a more basic ontological framework that sees the world through the binary prism of activity and passivity, mapping the former onto maleness and the latter onto femaleness. Alongside this binary construction, however, I have also explored how al-Sarakhsī’s conceptualization of gender along this ontological binary begins to evince fissures and inconsistencies. These inconsistencies betray a fundamental instability in his position. As I conclude the chapter, let me return to the legal discussion on the desirous gaze. In the different forms that al-Sarakhsī considers, he mentions the parameters of looking at a female slave that one does not own. His

⁷⁶ Al-Sarakhsī, *Al-Mabsūt*, 13:12-13.

⁷⁷ *Ibid.*, 5:98.

⁷⁸ Johansen, “The Valorization of the Human Body,” 84.

discussion of this case presents a rather different picture regarding male desire and female desirability than the categorical statement he begins with would seem to suggest.

As a general rule in Islamic law, slave women are not allowed to cover in ways that resemble free women. So stringent was the distinction made between free and slave women based on covering that ‘Umar, the second caliph and father-in-law of the Prophet, strongly rebuked a slave woman who had her face covered and threatened to beat her.⁷⁹ In considering the parameters of the male gaze on a slave woman, al-Sarakhsī argues that a man may look at her in the same manner that he looks at female relatives (i.e. those female relatives who are prohibited to him in marriage). That is, a man may look at and touch all parts of the slave woman’s body except for her torso, upper thighs, and genitals. Given al-Sarakhsī’s assertion that the entirety of the female body is a cause of temptation and must remain hidden from sight, he must justify why the body of the slave woman is permitted such significant exposure. To do so, al-Sarakhsī turns to hardship and necessity as the determining factors in easing the ruling regarding women. A man may look upon and touch the body of a slave woman, he argues, as she must often emerge in public to serve the needs of her owner. Al-Sarakhsī’s working assumption here is that slaves are purchased to provide free labor and thus their primary obligation is to fulfill the slave owner’s demands in this regard. For the law to enforce extensive covering of the slave woman’s body would impose restrictions on her mobility, as it would require her to

⁷⁹ Al-Sarakhsī, *Al-Mabsūṭ*, 10:151.

emerge in public in particular attire.⁸⁰ Given the role of the female slave and the realities of her life circumstances, she was allowed to expose more of her body.

However, the slave woman's role in society necessitates more than bodily exposure alone. As a commodity that is bought and sold on the market, the slave's body must be available for both looking and touching in order to ascertain worth.⁸¹ This permission, however, comes with a caveat. Al-Sarakhsī insists that if the man experiences desire he must not avail himself of these legal allowances. The desire-bearing gaze, however, is still permissible. As the slave woman is considered by law to be a commodity that is bought and sold on the market, prohibiting the desirous gaze would impinge on the market economy. Al-Sarakhsī states explicitly that if a man wishes to purchase a slave woman, he may look upon her body even if he experiences desire. In financial matters, he argues, one must be able to look upon the 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.⁸²

In al-Sarakhsī's discussion on the appropriateness of the male gaze and touch in relation to the slave woman, his assumptions regarding the desiring male subject are intriguing in their contradictory nature. Whereas al-Sarakhsī holds that women are a cause of temptation and no woman is beyond desirability, in relation to the slave woman very different assumptions are made with regards to the male subject. He is not only considered capable of controlling his desire when looking upon the uncovered female

⁸⁰ Al-Sarakhsī refers to this as "work clothes" in relation to both the slave woman and the female relatives of the male. "*Wa innamā takhruj fī thiyāb mihnatihā.*" Ibid., 10:151.

⁸¹ Ibid., 10:151.

⁸² Ibid., 10:160.

body, but in fact al-Sarakhsī assumes that he is able to look upon and touch the body of an unrelated woman without necessarily experiencing desire. This discrepancy cannot be explained by arguing that the slave woman, like a man's female relatives, should not induce desire. Indeed, the slave woman is an object of male desire according to the law and can be used for sexual services by her slave owner. However, given that legal precedent does not require the covering of the slave woman's body, the assumption that women are always desirable and a source of temptation--and thus the anxiety around desire--is far less pronounced in this case. Here the presence of desire does not require that slave women cover their bodies as free women do. Instead, looking upon the body of the slave woman is permitted, as necessity requires that she must remain an object of his gaze even if the man experiences desire.⁸³

How should we understand the discrepancy between al-Sarakhsī's initial assertion that women as a category are *`awra* and must be concealed, and his subsequent discussion of the slave woman that makes competing claims? The slave woman is not only prohibited from being fully concealed, but must also remain the object of the male gaze even when he desires her. We can better understand these competing claims about male desire if we attend to the ways in which gender, in Islamic law, is not the sole

⁸³ It is important to note here that al-Sarakhsī does recount several disagreements between Ḥanafī jurists with regards to the specific areas of the body that count as the *'awrah* of the slave woman, as well as the permission to touch. While some jurists argued that a man may not touch the slave woman, others, such as al-Sarakhsī, argued that it is indeed permissible to touch the body of the slave woman, provided that the touch is not animated by desire. With regards to the *'awrah* of the slave woman, some jurists held that the slave woman's *'awrah* is similar to the man in that she must cover everything between the navel and the knee. However, others, like al-Sarakhsī, argued that she must also cover her torso and back and may not reveal her breasts. For more information see *Ibid.*, 10:151-153.

determinative social marker, but rather functions alongside and intersects with other systems of distinction and social identity.

In making this observation, I am drawing on the work of decolonial feminists and feminist historians who have challenged us to critically interrogate and historically contextualize the gender binary.⁸⁴ Oyeronke Oyewumi, in particular, urges us to consider that if we take seriously that gender is a social construction, then gender cannot operate in the same way across time and space. In her historical account of gender in pre-colonial Yoruba society, she argues that systems of distinction other than male and female were important--often more important--as the primary symbols for the ordering and structuring of society and power relations.⁸⁵ Oyewumi refers to these different matrices as “social facts,” noting the different ways in which gender in Yoruban society is constructed alongside other social facts.⁸⁶

In al-Sarakhsī’s account of the slave and free women as objects of the male gaze, the gender binary intersects with the “social fact” of slavery and produces a different configuration of desire and desirability. Thus the same male subject can be construed as desiring and undesiring in different circumstances and in relation to different female subjects. The law can maintain that the man can look upon the exposed body of the slave

⁸⁴ Jeanne Boydston, “Gender as a Question of Historical Analysis,” *Gender and History* 20, no. 3 (2008): 560. For examples of such studies in the context of Native American history, see Nancy Shoemaker, *A Strange Likeness: Becoming Red and White in Eighteenth-Century North America* (New York: Oxford University Press, 2004), and Gunlog Fur, “Some Women are Wiser than Some Men,” in *Clearing a Path: Theorizing the Past in Native American Cultures*, ed. Nancy Shoemaker (New York: Routledge, 2002). For the Iranian context, see Afsaneh Najmabadi, “Beyond the Americas: Are Gender and Sexuality Useful Categories of Historical Analysis?” *Journal of Women’s History* 18 (2006): 11-21, and Afsaneh Najmabadi, *Women with Mustaches and Men without Beards: Gender and Sexual Anxieties of Iranian Modernity* (Berkeley: University of California Press, 2005).

⁸⁵ Oyeronke Oyewumi, *The Invention of Women: Making an African Sense of Western Gender Discourses* (Minneapolis: University of Minnesota Press, 1997).

⁸⁶ *Ibid.*, 11.

woman and not feel desire while arguing that any look upon the body of the free woman is necessarily desire inducing. Male desire is construed as having different implications and consequences depending on the type of female subject. Male and female subjects in al-Sarakhsī's legal thought are not singular, consistent legal subjects despite the fact that al-Sarakhsī presents them as such. Thus, any account of the gendered subjects of desire in the legal tradition has to contend with the different social matrices that converge in the construction of gendered subjects, thereby rendering them complex and fluid.

In the case of the slave woman, we see that a general categorical statement about the nature of women and male desire is then followed by an engagement with details of particular scenarios that complicate or belie this general representation. Al-Sarakhsī has to contend with many social facts and realities that do not easily fit his overarching narrative and construction of gender and desire, given the “unruly tangle of data” and “mess and variability of lived experience.”⁸⁷ At times this discrepancy goes unrecognized, while at other times he acknowledges the inconsistency and attempts to re-narrate those facts back into his general framework.⁸⁸

3.6 Conclusion

Through this chapter's exploration of the juristic conceptualization of the act of sex, two central arguments have emerged regarding the construction of male subjects of desire. The first is that the dichotomy of male desire and female desirability is best understood within the broader context of an ontological binary of activity and passivity.

⁸⁷ Boydston, “Gender as a Question of Historical Analysis,” 560.

⁸⁸ The moments where al-Sarakhsī is most clearly aware of discrepancies or inconsistencies in his construction of legal subjects is when he presents alternative legal conclusions of the other Sunni legal schools.

Gendered subjects of desire are constructed along the active/passive binary, in which male subjects are active and desiring and females are passive and desirable. This understanding of social order along a binary of activity and domination was pervasive throughout the Islamic intellectual tradition as well as the Near Eastern world at large. The active/passive binary is an organizing principle that is critical to the law's conceptual and hermeneutical framework, and is indicative of a broader cosmology that is mapped onto gender. Drawing on feminist philosophers like Elizabeth Grosz and Luce Irigaray, I argue that this binary framework is also indicative of a phallogentric epistemology in which the female is perceived through a male-centric lens and thus constructed in binary opposition to maleness.

While gender is imagined along the active/passive binary in other genres of the Islamic intellectual tradition as well, we have seen how this manifests uniquely in al-Sarakhsī's legal thought. Even within other legal schools--as well as the Ḥanafī tradition that al-Sarakhsī inherited--there were competing construals of gender within the binary. Given this diversity, it is evident that al-Sarakhsī is actively engaged in constructing a particular narrative about gender--a crucial hermeneutical assumption that influences and structures his legal interpretation.

This recognition of al-Sarakhsī's active construction of this gendered ontology leads me to the second central argument that has emerged in this chapter. While the active/passive binary forms a narrative arc in al-Sarakhsī's legal thought, this construction is troubled by other subject positions or facts within the law that challenge this ontological framework. In a number of passages (such as in the cases of sodomy and

slavery), al-Sarakhsī must contend with social realities, legal precedents, or scriptural evidences that conflict with his ontological framework. In response, he actively constructs maleness and femaleness back into activity and passivity in order to maintain the coherence of his narrative. This instability and inconsistency in his construction of gender is what I refer to as the “fictive” nature of the gendered ontology. As al-Sarakhsī weaves together a narrative around gendered subjects of desire, it is the presence of these alternative legal construals and inconsistencies that highlights the legal process by which facts are selectively presented in constructing the binary.

While we have seen glimpses of this fictiveness thus far, the case studies in the following two chapters will illustrate this further. Given the nuances, complexities, and inconsistencies in the construction of the male subject of desire, in the next chapter I turn to cases in which al-Sarakhsī constructs the female subject. I am not interested, however, in the construction of the female as passive and desirable but instead as the subject of desire. As we will see in the following chapter, the multiple subject positions of the female subject also potentially pose a disruption to the binary construction of gender.

4. The Female as Subject of Desire

The twelfth-century Ḥanafī jurist ‘Alā’ al-Dīn al-Kāsānī describes the mutual sexual rights of spouses in the following manner:

The ruling of deriving sexual pleasure [in marriage] applies to both spouses, for just as the wife is lawful for the husband, he is lawful for her.... It is the right of the husband to demand sex from her however he desires unless there is an impediment, such as menstruation, lochia, *zihār*,¹ being in the state of *ihrām* and other impediments. And it is the right of the wife to demand sex from him, as deriving sexual pleasure from him is her right just as it is his right to derive sexual pleasure from her. If she demands sex from him, he is obligated to comply and can be compelled by the judge only once. Beyond this, he is religiously obligated due to the ethics of intimacy and for fostering the marriage.²

What is striking in al-Kāsānī’s statement is not only his recognition of female sexual desire but also his assertion that the wife can in fact demand sexual intercourse of her husband. For al-Kāsānī, both men and women hold mutual rights to sexual pleasure in marriage. Thus, both are obligated to fulfill each other’s sexual needs. Such a depiction of male and female sexual desire seemingly challenges the gendered legal subjectivity of male as active and desiring and female as passive and desirable that I argued for in the previous chapter.

The mutuality of rights, however, does not necessarily translate into a mutual right to demand sexual intercourse. While al-Kāsānī’s statement here does not make very clear the gender imbalance, it is noticeable in the subtlety of language. Whereas the

¹ This was a practice in pre-Islamic Arabia, where men would swear never to have intercourse with their wives. The result was that the wife was left sexually unfulfilled but remained married to the man, so she could not marry someone else. The Qur’an prohibited such a practice and gave the men a way out of their oath. In order to have sexual intercourse with his wife again, the husband had to pay penitence by fasting for sixty contiguous days or feeding people in financial need.

² Al-Kāsānī, *Badā’i’ al-Ṣanā’i*, 3:331.

husband's right is stated more emphatically, stipulating that he has the right to demand sex "however he wishes," the wife's right is not given such expansiveness. Furthermore, al-Kāsānī states that the wife only has the right to legally demand sexual intercourse once. The husband's subsequent obligation to fulfill the wife's sexual desire is only *religiously* obligated and is no longer in the purview of the law. For the wife, however, refusal to be physically available for sex can have significant consequences. In Islamic law, the wife's right to financial maintenance is tied to her sexual availability to her husband. The Ḥanafī legal school states that as long as the wife remains in the husband's house, she is still physically available for sexual intercourse. If she were to leave his house, however, she would lose her right to financial maintenance. Contrary to the price the wife must pay for refusing sexual access, the husband's refusal to fulfill his wife's desire for sexual intercourse might be sinful, but it does not have legal ramifications.

What do we make of al-Kāsānī's emphatic statement regarding a wife's sexual rights, but their lack of juridical enforceability? This is particularly glaring considering the legal ramifications of the husband's sexual frustrations. What does it mean for the law to recognize female sexual desire when its fulfillment is dependent upon the good will of the husband? There are many parallels between al-Kāsānī's assertions regarding gendered sexual rights and those articulated by al-Sarakhsī. Though the two were separated by half a decade (al-Sarakhsī died about fifty years before al-Kāsānī), they were both key figures in the developing Ḥanafī legal tradition. Like al-Kāsānī, al-Sarakhsī also recognizes women's sexual desire and is attentive to her sexual fulfillment within a marriage, and yet her right is always in tension with the husband's control over the marriage contract

and his autonomy as a desiring subject.³ While in the previous chapters I focused on explicating the gendered ontology in al-Sarakhsī's legal text, in this chapter I look to his assumptions regarding female sexual desire in order to further unpack the gendered ontology.

Within the ontological framework that constructs gender along the active/passive binary, male sexual desire is not only engaged and legislated in significant detail but it is, in fact, privileged. So pervasive is al-Sarakhsī's discussion of male desire that it is used exclusively as a referent to sexual desire in legal cases. This raises the question as to female sexual desire and what recognition it receives in al-Sarakhsī's text. Therefore, this chapter turns to legal cases in which al-Sarakhsī centers the female as a desiring subject. As the passage from al-Kāsānī's text above indicates, the law does indeed acknowledge female sexual desire. What, however, does this recognition *mean*? What does it do in constructing the female subject of desire? Is she also a desiring subject? If so, how does she differ from the male as a subject of desire? How is the presence of female desire determined by the law? And lastly, how is the female as desiring subject configured in relation to the active/passive binary? Is the binary disrupted when the female is recognized as desiring? And what place does the male subject take along the binary when the female is desiring?

³ Interestingly, al-Sarakhsī only considers and makes mention of certain manifestations of female sexual desire. While men are seen as acting out of desire with women, pubescent girls, other men, and animals, women are only spoken of in terms of their desire for men and pubescent boys. In al-Sarakhsī's legal text, there is no mention of women's desire for non-male partners.

4.1 The sexually unfulfilled wife

The first case that I turn to in examining al-Sarakhsī's recognition of female sexual desire is that of the impotent husband. If a woman were to marry a man and find out that he is impotent, how does the law respond to the fact that her husband cannot meet the woman's sexual needs? In such a marriage the position of the woman is particularly acute. The challenge arises from the dual restriction on a woman with regards to both fulfilling her sexual desire as well as acquiring a divorce.

In Islamic law, while men are legally permitted to marry up to four wives and have an unrestricted number of concubines, women are only able to fulfill their sexual desire within a monogamous bond. This creates a peculiar challenge for women, as they are not only reliant on a single partner for their sexual needs but also enter into the marriage contract with limited opportunities to leave it. While Islamic law grants a husband the right to unilateral divorce (*talāq*), the woman's access to divorce is more restricted. Marriage is considered a contract and is transactional in nature, granting the husband a type of ownership (*milk*) over his wife in exchange for dower payment.⁴ It is this dower payment that makes sexual intercourse lawful between the husband and wife.⁵

In this marital relationship, the man stood in the position of the active and owning party

⁴ It is important to recognize, though, that this relationship is "vexed" and, as we will see later, jurists often disagreed on the extent to which this analogy could be extended in different aspects of marriage. While the linkage between marriage and sale are clear in legal texts, there is a disagreement among scholars of Islamic law on whether marriage effectively grants the husband some form of ownership over his wife. While some note the continuities between marriage and sale (the analogy between unilateral divorce and manumission, for example), others note the discontinuities (the woman, for example, does not lose control over her property in marriage and her husband cannot pass her on to another owner). For more information on this conversation, see Ali, *Marriage and Slavery*, 50-51.

⁵ Kecia Ali, "Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Law," in *Progressive Muslims: On Justice, Gender, and Pluralism*, ed. Omid Safi (Oxford: Oneworld, 2003), 165.

while the woman was both a contracting party but also contracted. The marriage contract thus gave the man sole ownership of the contract, granting only him the unilateral right to divorce. Women, on the other hand, could initiate a divorce through a process known as *khul'*, in which a woman could attain divorce through financial compensation, typically by returning the dower amount. Unlike the husband's unilateral right to divorce, however, *khul'* required the husband's consent, thus making their exit from a marriage dependent on the husband's good will.

With such constrained access to divorce, a woman married to an impotent man would find herself in a bind, requiring the law to consider what a woman can do when she is sexually unfulfilled in a marriage. What are her options for leaving, particularly if the husband refuses to concede a divorce? Al-Sarakhsī's consideration of female sexual desire is very apparent in the case of the impotent husband. He is both aware of and concerned with the woman's lack of sexual fulfillment in such a marriage. By exploring this case, I demonstrate that al-Sarakhsī does, in fact, recognize and consider female sexual desire to be significant, allowing for the annulment of a marriage in which the woman is sexually unfulfilled. However, the details of the legal solution also demonstrate that while female sexual desire is considered, it is only treated formalistically in order to maintain the theoretical coherence of the law's conception of the marital contract.

This case study allows us to pose two important questions: 1) How does al-Sarakhsī engage female sexual desire in legal hermeneutics, and 2) how is the male subject configured in relation to the desiring female subject? In dealing with the issue of impotence, al-Sarakhsī is attuned to the precarious situation of a woman who is bound in

marriage to a man who is impotent (*'innān*). He argues that because the woman's husband is her only available option for sexual fulfillment, forcing her to remain in a situation where he is not able to fulfill her desire and has no need for her would be unjust. He asserts, in fact, that as long as she remains in his marital bond, she cannot fulfill her desire with anyone else. This leaves her hanging (*mu'allaqah*), neither a married woman (*dhāt al-ba'l*) nor divorced. In this case, al-Sarakhsī argues, the woman can petition to dissolve the marriage.

It was not just the Ḥanafīs but all four Sunni schools of law that held that a woman was entitled to an annulment if the husband was impotent. Because that situation made it impossible to fulfill the basic purpose of marriage in legitimating sexual intercourse, it warranted an annulment. The disagreement within the schools, however, was on the procedure for determining the man's impotence and the process for annulment.⁶ The Ḥanafīs followed the precedent set by the second Caliph 'Umar ibn al-Khaṭṭāb, who adjudicated the case of a woman with an impotent husband by setting a fixed term of one year. In keeping with this decision, al-Sarakhsī argues that in order to determine impotence, the husband is granted a year within which to penetrate his wife.⁷ If

⁶ Tucker, *Women, Family, and Gender in Islamic Law*, 92.

⁷ While the one-year rule is established through precedent (i.e. the ruling determined by the second Caliph, 'Umar ibn al-Khaṭṭāb), al-Sarakhsī does provide his own understanding of the usefulness of this rule, which is rooted in notions of the body in ancient medicine. He argues that impotence can be a natural condition (*aṣl al-khilqah*), or due to environmental factors or disease. Here he provides an account of the humors of the body and the manner in which the given season can affect the balance of the humors in the man and cause impotence. If it is caused by environmental factors, then the one-year waiting period will allow for the passing of different seasons to determine whether he is permanently impotent or suffers from a medical condition that requires treatment. Al-Sarakhsī, *Al-Mabsūṭ*, 5:101.

⁷ Describing the proceedings of the case, al-Sarakhsī states that if the husband claims that he penetrated his wife and she claims the opposite, the judge should take into consideration if the wife is a virgin or not. To do this, women inspect her, confirm her virginity, and the judge then issues a ruling based on their findings. While it is not clear from the text, it seems that al-Sarakhsī is referring here to the practice of inspecting whether the woman's hymen is intact in order to determine virginity. The woman's virgin status is considered tangible. In fact, al-Sarakhsī argues that had the

he is unable to do so within the year, the judge offers the woman a choice to either remain with her husband or leave the marriage. If she exercises her choice to leave, then the judge dissolves the marriage.⁸ For the woman, dissolution of the marriage through annulment was the most advantageous avenue, as it allowed her to walk away with her marital property rights fully intact, retaining the full amount of her dower.

The law's willingness to grant an annulment out of concern for the woman's unfulfilled sexual desire is not a light matter. Given the husband's sole unilateral right to end the marriage, Ḥanafī jurists were deeply reluctant to impinge upon that right over the marital contract. In the case where a woman's husband went missing, for example, Ḥanafī jurists in particular did not grant the woman the right to leave the marriage. Other legal schools established a waiting period in order to see if the husband would return. The Mālikī legal school, for example, set a four-year waiting period for the husband to return. If the husband was still missing after that term, the woman was granted a divorce.⁹ The Ḥanafīs, in contrast, argued that a woman remained under the husband's marital tie until she received notice of his death or until he could be presumed dead.¹⁰ Thus, Muslim jurists in general and Ḥanafī jurists in particular did not allow for the annulment of the marital bond except in very specific circumstances.

husband been able to penetrate his wife, she would not have been able to remain a virgin (presumably the hymen would no longer be intact).

⁸ Al-Sarakhsī, *Al-Mabsūṭ*, 5:102.

⁹ Tucker, *Women, Family, and Gender in Islamic Law*, 92.

¹⁰ The presumption of death was established through assumptions of a natural lifetime, which could be ninety-nine years, 120 years, or until all members of the husband's peer group passed away. *Ibid.*, 94.

The Ḥanafī jurists' accommodation of the annulment in the case of an impotent husband is an indication of the law's sensitivity to a woman's disadvantageous position in marriage. Not only is the woman unable to fulfill her sexual desire but she cannot leave without incurring financial loss (i.e. the return of the dower in exchange for *khul'*) and the husband's consent. Interestingly, a man in a similar situation does not have the right to an annulment. While the Shāfi'īs allow a husband whose wife has a vaginal occlusion to remain or leave the marriage contract,¹¹ the Ḥanafīs do not. Recognizing the imbalance of the marriage relationship, al-Sarakhsī argues that unlike the woman, a husband does not depend exclusively on his wife for the fulfillment of his sexual desire because he can have multiple sexual partners at one time. Alternatively, he is secure in his unilateral right to divorce his wife, which he may exercise to walk away from an unfulfilling marriage. If the man were to pronounce a divorce, however, he would be required to pay some amount of the dower. Thus, dissolution of the marriage contract through annulment is valuable to the husband. Given the monetary transaction at stake, annulment of the marriage contract would allow the husband to walk away without any financial obligations. While the Shāfi'īs are attentive to this financial loss, the Ḥanafīs do not consider his financial loss to be of much consequence.¹²

¹¹ The Shāfi'īs allow for the dissolution of the marriage for one of five specified defects: vaginal occlusion (*al-ratq* and *al-qarn*), insanity (*al-junūn*), leprosy (*al-judhām*), and leprosy (*al-baraṣ*). These defects were considered to prevent the husband's sexual fulfillment. Vaginal occlusion would prevent penetration entirely, whereas insanity and leprosy, the Shāfi'īs claim, are visceral and naturally repugnant, preventing the husband from wanting to engage in sexual intimacy with such a woman. If, prior to consummation, the husband repudiates a wife who has one of these defects, then the marriage is annulled and he is not required to pay the dower amount. However, if the marriage was consummated before he was made knowledgeable of the physical defect, he is required to pay the dower amount comparable to a woman of her social class and status (*mahr mithl*). For more information on the role of dower in marriage, see Chapter One of Ali, *Marriage and Slavery*.

¹² Al-Sarakhsī, *Al-Mabsūṭ*, 5:97.

Despite al-Sarakhsī's extensive discussions about the injustice caused to the woman who is sexually unsatisfied when forced to remain married to an impotent husband, in examining the finer points of the legal proceedings it becomes evident that the legal understanding of her sexual fulfillment does not take her subjective experience into consideration. The law is instead concerned with a formalistic and tangible concern with the man's ability to achieve an erection and penetration. In fact, while al-Sarakhsī recognizes a woman's desire for sexual intercourse in marriage, it is largely meaningless. As I mentioned previously, an impotent husband has one year to penetrate his wife. If the husband is able to penetrate his wife just once during this time period, she can no longer exercise her option to demand separation. This would be true, al-Sarakhsī argues, even if the man was unable to penetrate her again.¹³ Furthermore, in establishing whether the husband had indeed penetrated his wife and was capable of doing so, it was the husband's claim to virility that was given precedence over the wife's claim (if she not a virgin).¹⁴

Given that the main concern al-Sarakhsī expresses in this case has been the wife's right to and need of sexual fulfillment, it is odd that the wife would no longer retain the

¹³ Ibid., 5:103.

¹⁴ As mentioned earlier, al-Sarakhsī states that if the husband claims that he penetrated his wife and she claims the opposite, the judge should take into consideration if the wife is a virgin or not. If the wife claims she is a virgin, she is inspected by women who confirm her virginity, and the judge rules in her favor. On the other hand, if the wife is not a virgin, the judge is to rule in favor of the husband. It seems that the issue here is not only the impossibility of providing a perceived tangible proof of sex (as in the case of the virgin wife), but also assumptions about masculinity. Al-Sarakhsī states that the judge rules based on the husband's claim because it is evident that a man who is able to engage in sexual intercourse will inevitably engage in sexual activity when alone with a woman ("*li'anna al-zāhir min hāl al-faḥl annahu idhā khalā bi unthā nazā 'alayhā*"). He continues that in matters of legal claims, judgment is granted in favor of the one whose claim is supported by evidence ("*wa fī al-da'awā al-qawl qawl man yashhad lahu al-zāhir*"). The working assumption, it seems, is that a man who is able to engage in sexual intercourse would not hold back from doing so; masculinity is equated with sexual aggressiveness (quite literally, al-Sarakhsī states: "If he is in seclusion with a woman, he will pounce on her"). It is interesting that in this case, it is the body of the husband that is not readable. One would imagine that just as the body of the virgin woman is open to examination and empirical verification, the erection of a man might also be sufficient evidence to prove that the man is no longer impotent. Al-Sarakhsī, *Al-Mabsūt*, 5:103. In fact, the Ḥanbalīs placed the burden of proof on the man and required that he produce a sample of his semen as evidence of his virility. Tucker, *Women, Family, and Gender in Islamic Law*, 93.

option to separate from a husband if he could only penetrate her once. Since this is a case of suspected impotence, why would the law assume that a single instance of intercourse would fulfill a woman's sexual desire indefinitely? Why does al-Sarakhsī not consider that the wife would need continued sexual intercourse? In explaining this legal determination, al-Sarakhsī argues the following: If the man is able to engage in intercourse with his wife just once, she has achieved her desired objective in marriage, which is attaining the state of *iḥṣān*.¹⁵

While al-Sarakhsī argued earlier that a woman should not be held captive in a relationship where she cannot be sexually fulfilled, the legal intricacies of obtaining that separation do not place the same priority on the woman's experience of sexual fulfillment. In fact, here al-Sarakhsī shifts his argument about the woman's objectives in marriage from the fulfillment of sexual desire to the attainment of the state of *iḥṣān*, which is achieved by one act of penetration. In Islamic law, the state of *iḥṣān* marks an individual's sexual status, which gives them a special social and legal status. However, only a person who is Muslim, free, sane, and of legal majority can enter into this state. *Iḥṣān* is only acquired in a legally valid marriage with another individual who fulfills the three aforementioned qualifications. Thus, a man who engages in sexual intercourse with his concubine or a couple who consummate a marriage that is not legally valid do not

¹⁵ Al-Sarakhsī, *Al-Mabsūt*, 5:103. The word *iḥṣān* literally means fortification and is used in the Qur'ān to refer to chastity (see 4:25 or 24:4). The word *muḥṣan* is used in the Qur'ān to refer to a person who is either chaste, or in some cases a married woman (see for example, 4:24). The concept of *iḥṣān* in Islamic law, however, develops an alternative meaning that is not found in the Quran. *Muḥṣan*, in Islamic law, denotes a person who is liable for stoning if he or she commits adultery. An individual can become *muḥṣan* if they are free, sane, and of legal majority and engage in sexual intercourse within a legally valid marriage to another person who is also Muslim, free, sane, and of legal majority. For more information, see J. Burton, "Muḥṣan," in *Encyclopaedia of Islam, Second Edition*, ed. P. Bearman, et al., Brill Online, 2016.

enter the state of *iḥṣān* through their relations. While the state of *iḥṣān* is largely a legal category that determines whether an individual will incur stoning as punishment for adultery, al-Sarakhsī describes it as a coveted social status that marks the individual as a recipient of divine favor. In al-Sarakhsī's account of the different sexual relationships possible, intercourse between an adult free man and an adult free woman sits at the top of the hierarchy and is the only act that can confer the status of *iḥṣān* on the two individuals. Al-Sarakhsī argues that both marriage and freedom are blessings granted to individuals.¹⁶ Thus, the ability to be both free and engage in sexual intercourse within marriage to another individual who is free is not only a blessing but also the ideal state (*kamāl al-ḥāl*) for fulfilling one's sexual desire.¹⁷ In the case of the impotent husband, then, simply one act of penetration would allow the woman to acquire this status, thus fulfilling one of the objectives of being in a marital state. Despite these claims regarding *iḥṣān*, one could well ask whether a woman who has only engaged in intercourse once with her husband would consider herself sexually fulfilled. If married to a man who was able to consummate the marriage but cannot engage in continued sexual intercourse, the woman effectively remains trapped (unless he agrees to divorce her) and sexually unfulfilled in her own subjective experience. For the law, however, that single act of penetration was enough to alleviate the concerns regarding sexual fulfillment.

The lack of serious engagement with women's desire for sexual intercourse in marriage is best understood if we consider that the marriage contract granted the husband

¹⁶ Al-Sarakhsī, *Al-Mabsūṭ*, 6:60.

¹⁷ “*Fa inna al-iḥṣān ‘ibāratun ‘an kamāl al-ḥāl fa lā yathbut illa bi waṭ’ mawṣūf bi kawnihi ni‘matun kāmīlatun min al-jānibayn.*” Al-Sarakhsī, *Al-Mabsūṭ*, 5:147.

certain sexual rights. As Kecia Ali notes in her book, *Marriage and Slavery in Early Islam*, for Muslim jurists, “sex is a husband’s right and [financial] support is a wife’s right.”¹⁸ While the wife could refuse to consummate the marriage if the stipulated dower was not paid to her, once the marriage was consummated, she no longer retained the right to refuse sexual access.¹⁹ If the wife refused sexual availability or left the marital home, she was considered recalcitrant (*nāshizah*) and effectively forfeited maintenance.²⁰ Al-Sarakhsī is similarly adamant that any attempt by the wife to leave the marital domicile, or any refusal to shift domiciles along with him, would qualify as recalcitrance and thus allow the husband to stop maintaining her. For the Ḥanafīs, financial maintenance is not an exchange for sexual availability but for the physical restriction on her mobility (*habs*) that effectively ensures she will be sexually available to her husband as he wills. As Ali notes, for the Ḥanafīs sexual refusal did not constitute recalcitrance because as long as the wife remained within the marital home, even if she refused sexual access, the husband could still make sexual use of her, even against her will.²¹ In contrast to the wife’s right to sexual fulfillment, the husband’s right to sexual access is not only recognized by the law but carries significant legal and financial ramifications for the wife. The law takes the satisfaction of the male libido far more seriously.

¹⁸ Ali, *Marriage and Slavery*, 94.

¹⁹ As Ali notes, Abū Ḥanīfa held that a wife could refuse sexual access even after consummation if she was not paid the dower amount. She could do this without fear of losing financial maintenance. However, his disciples and later Ḥanafīs disagreed with his assertion. Ali, *Marriage and Slavery*, 78.

²⁰ Ibid., 78. The wife was responsible for making herself sexually available, not to actual sexual intercourse itself. In fact, given extenuating circumstances, the jurists did consider that other forms of sexual intimacy could still allow for continued financial maintenance.

²¹ Ibid., 82-83.

The female as subject of desire is not parallel to the male as subject to desire. While al-Sarakhsī recognizes the wife's need for sexual fulfillment, that need has no significance or meaning beyond a formalistic attention to consummation. What remains largely ignored is the potential sexual frustration of a wife who must remain in a marriage with a husband who is unable to engage in consistent and sustained intercourse. This attitude towards women's sexual desire is evident in al-Sarakhsī's resistance to extending the exception made in impotence to other possible cases where a woman might find herself sexually unfulfilled. He argues, for example, that the legal provisions for a wife with an impotent husband would not extend to a case in which the husband is insane or a leper. While insanity or leprosy might decrease her desire for him, al-Sarakhsī argued, those two factors do not prevent sexual intercourse. Thus, while impotence prevents consummation entirely, marriage to a man with mental or physical illness would only decrease her sexual pleasure.²² Elsewhere al-Sarakhsī considers the possibility of a man who is unable to penetrate his wife due to the size of his penis and his low libido (*da'f ḥālihi fī bāb al-nisā'*).²³ We can imagine that in this scenario a woman would find herself unable to fulfill her sexual desire and incur a financial cost if she decides to leave, through no fault of her own. While the woman's situation here is exactly the same as in the case of impotence, she does not have a choice to remain or leave the marriage. Al-Sarakhsī, then, is less concerned with the sexual satisfaction and fulfillment of the woman than he is with the potential of consummation. He instrumentalizes female sexual

²² Al-Sarakhsī, *Al-Mabsūṭ*, 5:97.

²³ Al-Sarakhsī, *Al-Mabsūṭ*, 5:100-101.

desire to justify the Ḥanafī legal position and only engages it formalistically. The concern with the husband's impotence is his inability to consummate the marriage.²⁴ As consummation is a key element of consolidating the contract of marriage and its transactional nature, her desire only comes into consideration when it disrupts the logic of law with regards to marriage.

4.2 Tasting his honey

The second legal case that highlights the law's recognition of female desire pertains to the legal validity of a marriage between a pubescent boy and an adult woman. This is particularly pertinent in *zawāj al-tahlīl*, a form of marriage that allows a previously married couple to remarry each other. In Islamic law, the unilateral right of divorce (*ṭalāq*) is granted only to the husband; it does not require the wife's consent and can be either revocable (*raj'ī*) or irrevocable (*bā'in*) based on certain conditions. In a revocable divorce, the husband has the right to rescind the pronouncement of divorce during a waiting period (*'iddah*) of three menstrual cycles, or if the wife is pregnant, the entire gestational period (regardless of the woman's consent). If the divorce is finalized after the end of the waiting period and the couple wishes to reconcile, they must marry again under a new marriage contract. If the divorce is irrevocable, however, the husband may not rescind the utterance of divorce and at the end of the waiting period the couple is permanently divorced. In order for the couple to remarry in this a situation, the wife must

²⁴ The importance given to consummation in this case is most evident in al-Sarakhsī's claim that even if the husband is able to have sexual intercourse with another woman but remains unable to penetrate his wife, she may still request an annulment. The fact that the husband is able to penetrate another woman, he argues, does not alleviate the harm caused to the woman. In such a situation, the husband is clearly not impotent. Thus, it is his inability to consummate that particular marriage that is of key significance. Al-Sarakhsī, *Al-Mabsūt*, 5:103.

marry another man, consummate the marriage, and get a divorce before remarriage.²⁵ The interim marriage that makes remarriage to the first husband possible is referred to as *zawāj al-tahlīl*.²⁶

As the two parties become permissible to one another through the second marriage, the law must consider the different categories of male individuals and whether their penetrative act in the second marriage is considered consummation.²⁷ While marriage, sexual intercourse, and divorce with an adult male (free or slave) would allow for remarriage to the original husband, sexual intercourse with a pubescent male²⁸ is a matter of legal disagreement. In Islamic law, the pubescent boy is a child who is nearing puberty and is considered to be in a liminal state between childhood and adulthood. In male children this state is based on physiological markers: the pubescent male child is one who has the ability to achieve an erection (that the law construes as desire-bearing²⁹) but is not yet able to ejaculate.³⁰

²⁵ While the second marriage permits remarriage to the first husband, it is not supposed to be entered into with the intent to make remarriage possible. While such a marriage is legally valid, it is considered sinful. In his work on marriage and divorce in the Mamlūk period (1250-1517), Yosef Rapoport describes how men who had irrevocably divorced their wives would contract a marriage between their male slave and the ex-wife with the intent of divorce and remarriage. They would engage in this practice so as to ensure that the second marriage would promptly end in divorce. Jurists at that time spoke out vociferously against such a practice. Yossef Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society* (Cambridge, UK: Cambridge University Press, 2005).

²⁶ For more information, see Ali, *Marriage and Slavery*, 84-85.

²⁷ This penetrative act must happen within a marital relationship. Thus, if the woman were to engage in illicit sexual intercourse, she could not remarry her previous husband.

²⁸ The phrase used here is *sabī al-ladhī yujāmi*, which is used to describe the boy who would, in customary practice, engage in sexual intercourse.

²⁹ Al-Sarakhsī recognizes that it is in fact possible for a male child who is not at the cusp of puberty to also achieve an erection. This erection, however, is not considered to be animated by desire but instead an involuntary physiological response. While al-Sarakhsī considers male desire to be knowable and marked in male physiology, he in fact has to engage in a process of delineating when these physiological responses are desire-bearing. This, however, never calls into question the ability of the law to know and determine male desire. For a more detailed discussion of this issue, see Chapter Four.

³⁰ For the female child, entrance into this liminal stage is not gauged by physiological markers of her desire but of her desirability to men. For a more detailed discussion on this, see Chapter Four.

In this situation, Ḥanafī law considers the penetration of the adult woman by the pubescent boy to be a legally significant act. Thus, if a woman were to marry a pubescent boy, engage in sexual intercourse with him, and then acquire a divorce, remarriage to her first husband would be permissible. Contrary to the Ḥanafīs, the Shāfi‘ī school of law does not consider marriage and sexual intercourse between an adult woman and a pubescent boy to be sufficient. The Shāfi‘ī position on this centers on the legal status of the pubescent boy. On the surface, the boy’s penetrative act is not different from other sexual acts in which legal rulings would go into effect: there is a valid marriage contract within which the act of penetration takes place. However, for the Shāfi‘īs the boy’s legal minority renders this act lacking. As a legal minor, they argue, his penetrative act does not fulfill the legal parameters of sexual intercourse. Thus, while his act is indeed considered to be desire bearing, even for the Shāfi‘īs, his diminished legal status makes his penetrative act akin to non-vaginal sexual intercourse.³¹ By linking the pubescent boy’s penetrative act to non-vaginal sexual intercourse, the Shāfi‘īs are able to deny that such an act legally constitutes sexual intercourse.

The Shāfi‘ī position poses a challenge for Ḥanafī jurists because the legal minority of the pubescent boy should render his act insufficient for establishing legal rulings. Recall, as I demonstrated in the discussion on illicit sexual intercourse in Chapter Two, that Ḥanafīs do not consider illicit sexual intercourse between a pubescent boy and an adult woman to be legally significant. Al-Sarakhsī thus responds to the Shāfi‘ī argument in this case primarily by shifting focus away from the legal status of the boy and turning

³¹ Al-Sarakhsī uses the term *al-jimā‘ fīmā dūn al-farj*, quite literally “non-vaginal sexual intercourse.”

instead to female sexual desire as the determining factor in the legal validity of such a marriage.

To support the Ḥanafī legal school’s position on this issue, al-Sarakhsī turns to a prophetic tradition in which the Prophet stipulated that remarriage to the previous husband was contingent on the woman “tasting the honey” of the second husband, who in turn must also “taste of her honey.”³² The prophetic tradition is vague and lends itself to multiple interpretations. Recognizing this ambiguity, al-Sarakhsī acknowledges that the word “honey” could be read as a metonymy for ejaculation and thus disqualify the marriage and intercourse with the pubescent boy as legally valid. However, the Ḥanafīs, he argues, understand “honey” to be the sexual pleasure and enjoyment (*al-ladhdha*) that the woman attains through sexual intercourse. While the pubescent boy may not be an adult male, he is able to penetrate the woman and she in turn derives pleasure from such an act. Interestingly, while al-Sarakhsī’s argument is predicated on the woman’s sexual pleasure, he does not provide any markers for determining its presence. The fulfillment of her desire in engaging in sexual intercourse with a pubescent boy is simply assumed.

The legal disagreement here between the Shāfi‘ī and Ḥanafī jurists provides an interesting lens for examining the legal construction of the female as a subject of desire. The Shāfi‘ī position, in this case, holds that it is the legal maturity of the male actor that

³² The prophetic tradition is found in *Ṣaḥīḥ al-Bukhārī* and refers to a woman who came to the Prophet complaining about her sexual dissatisfaction with her husband. In her complaint she narrated to the Prophet that she was previously married to another man who had divorced her, after which she married her second husband. While she attributed her sexual dissatisfaction to the diminutive size of her husband’s penis, the Prophet perceived her complaint to be an excuse to return to her first husband, to which he responded by stipulating that this would be possible only after her second marriage was consummated (*ḥattā yadhūq ‘asīlatakī wa tadhūqī ‘asīlatahi*). Ḥadīth number 4960 in Muḥammad ibn Ismā‘īl al-Bukhārī, *Ṣaḥīḥ al-Imām al-Bukhārī*, ed. Muḥammad Zuhayr ibn Nāṣir al-Nāṣir (Beirut: Dār Ṭawq al-Najāt, 2001), 15: 84. Also quoted in Al-Sarakhsī, *Al-Mabsūṭ*, 5.148.

is important in determining legal validity. The Ḥanafīs, on the other hand, turn to the experience of the woman, arguing that since she derives sexual pleasure from intercourse with the pubescent boy, the intended purposes of the second marriage have been fulfilled, making the marriage legally valid. What can we make of al-Sarakhsī's attention to female desire in this case, given that his attention to it in the case of impotence was largely meaningless? In this case, the woman's desire is not only recognized but is fundamental to the legal hermeneutics. How then does he engage female sexual desire in this scenario? What is the nature of her desire and how can it be determined?

As with our previous discussion on impotence, a closer look at the finer points of legal argumentation reveals that al-Sarakhsī deploys female desire here as a means for justifying legal precedent. This instrumentalization of female desire becomes apparent when we consider two points. First, take the significance given to the woman's sexual pleasure in this legal ruling next to the discussion on illicit sexual desire in the previous chapter. There is an inconsistency in al-Sarakhsī's construal of gendered subjects in the act of sex. We can reconcile this if we consider that he is engaged in a process of argumentation that bolsters the legal position. Secondly, the instrumentalization of female desire is apparent when we consider the lack of engagement with markers of female desire.

While al-Sarakhsī centers female sexual pleasure as the legally determinative factor in this case, his attentiveness to the female sexual experience is not a consistent hermeneutical principle upheld across different legal issues. In his discussion on the legal definition of illicit sexual intercourse that I explored in the previous chapter, we saw that

Ḥanafīs do not legally recognize as sexual intercourse any act in which the male acting subject is not also a full legal subject. The result of this understanding of female passivity is the Ḥanafī insistence that if a woman engages in illicit sexual intercourse with a minor boy, then neither party incurs punishment. The minor boy was not to be punished because his legal status as a minor made him not accountable to the law.³³ The adult woman would face no punishment because she engaged in a sex act where the acting subject was not legally liable. The Shāfi‘īs, on the other hand, held that despite the legal status of the male actor, the female actor was to be punished due to her willful engagement in the act. In the case of illicit sexual intercourse, the Shāfi‘īs focused on the woman’s desire for sexual intercourse and her agency as a legal subject, whereas the Ḥanafīs focused on the legal subject status of the male and rendered female sexual desire insignificant. In this case, however, al-Sarakhsī insists on precisely the opposite: the diminished legal status of the pubescent boy does not render his penetrative act legally insignificant, and in fact al-Sarakhsī legitimizes his act by referring to the sexual pleasure the woman feels.

In juxtaposing these two cases what emerges is not a consistent and systematic construal of the nature of gendered subjects of desire, but rather an inconsistent portrayal that depends on the particular concerns and needs of each legal issue. As I argued in Chapter One, al-Sarakhsī’s construction of desire as a legal category is determined to a significant degree by the need to justify already established positions within the Ḥanafī

³³ A pubescent child, whether male or female, is not entirely free of legal accountability. They are obligated in certain legal issues (such as the female child having to complete the waiting period after she has been divorced), and some of their actions carry legal implications (such as the penetrative act of the pubescent boy in this situation). However, they are not yet fully legal subjects or fully accountable under the law. It is for this reason that I characterize the legal condition of the pubescent child to be liminal.

legal school. The inconsistency between al-Sarakhsī's arguments and claims regarding female sexual desire suggest that his concern in this case is not so much for the desire of the female subject. Again, his purpose in arguing for her sexual satisfaction is largely to justify the precedent of his legal school.

The instrumentalization of female desire is also evident in the fact that little consideration is given to what constitutes female desire. It is rather curious that the female sexual pleasure upon which the primary justification for the legal ruling depends is not defined or engaged. At no point does al-Sarakhsī deliberate on how the desire of the woman can be determined or what the physiological markers of that desire are. In fact, despite al-Sarakhsī's assertion that marriage to the pubescent boy makes the woman lawful to the previous husband because of the woman's experience of sexual pleasure, there is no discussion about what constitutes it. Does she feel desire for the pubescent boy himself? Does his classification as a pubescent boy indicate that she finds him to be a potential object of desire and thus attains pleasure through sexual intercourse with him?³⁴ None of these questions are considered by al-Sarakhsī. Given that the pubescent boy is identified as one who can penetrate but not yet ejaculate, the implicit assumption is that the woman's desire, pleasure, and fulfillment are all centered on penetration. This would be in line with al-Sarakhsī's assertions elsewhere in his text that sexual desire is fulfilled through the act of penetration. There is no consideration, then, of the specific bodily markers that might indicate her pleasure or desire. As penetration has already been

³⁴ The desirability of the minor girl for the adult male is largely how al-Sarakhsī understands sexual intercourse between adult men and minor girls. For more information, please see Chapter Four.

determined to mark the fulfillment of desire, the ability of the pubescent boy to penetrate the woman is sufficient evidence.³⁵ The pubescent boy's desire, on the other hand, is marked by his erect penis and penetrative act. Male desire is understood by the law to be embodied in the penis and present in erections and ejaculation. The male body is both knowable and produces knowledge. Female desire, while assumed to be present, is not knowable or marked by the body.

In light of the discussion in the previous chapter concerning the binary between desiring/desirable and activity/passivity, al-Sarakhsī's emphasis on female sexual desire over the subject status of the pubescent boy does pose a challenge to the binary and raises important questions regarding al-Sarakhsī's conception of gendered subjects of desire. Is the female subject conceptualized differently in such cases where her desire is being centered? Does she emerge as an active and desiring subject? Conversely, what happens to the male subject? Is the boy configured by the law as a desirable object?

Despite his assertions regarding the sexual pleasure that a woman actively experiences in sexual intercourse with the boy, in examining the language al-Sarakhsī uses to describe this relationship we see that it is the pubescent boy who remains an active subject who acts upon the woman. Al-Sarakhsī describes the pubescent boy using the phrase, "a boy, the like of which engages in sexual intercourse" (*sabī al ladhī yujāmi'*

³⁵ In the thirteenth-century Ḥanafī legal text, *al-Hidāya*, Burhān al-Dīn al-Marghīnānī mentions the same legal ruling regarding marriage to a pubescent boy making an adult woman eligible to remarry her previous husband. He mentions the woman's desire in particular by stating that the act of penetration (literally: the meeting of the two circumcised parts) is the reason for the release of her sexual fluids (*wa huwa sabab li nuzūl mā'ihā*). 'Alī ibn Abī Bakr ibn 'Abd al-Jalīl al-Marghīnānī, *Al-Hidāya fī Sharḥ Bidāyat al-Mubtadī*, ed. Ṭalāl Yūsuf (Beirut: Dār 'Iḥyā' al-Turāth al-'Arabī), 377.

mithluhu).³⁶ This phrase is descriptive not of the pubescent boy's desirability but instead his own desire and ability to engage in sexual intercourse. Additionally, the act of penetration that makes the woman permissible to her first husband is described as "the penetrative act of the boy" (*dukhūl al-ṣabī*). Regardless of the acknowledgement of the female subject as desiring, such language indicates a continued conception of the penetrability of the female body, the impenetrability of the male body, and a legal understanding of intercourse as the action of the male subject on the female object.³⁷ If we step away from this recognition of female desire, this case compounds the passivity of the woman as a subject of desire: she is divorced by her first husband, she is made permissible to the first husband again by the second husband's penetrative act, and is then divorced by the second husband.³⁸

³⁶ Al-Sarakhsī, *Al-Mabsūṭ*, 5:148. Al-Sarakhsī uses a similar phrase to describe a pubescent girl, "the one, the like of which one does sex to" (*al-latī yujāma' mithluhā*). While the verb *jāma'a* is used for both the pubescent boy and girl, I am interpreting the phrase as a passive participle (*yujāma'*) for the pubescent girl and as an active participle for the pubescent boy: i.e. "the one, the like of which has sexual intercourse" (*ṣabī al-ladhī yujāmi' mithluhū*). Pre-modern Arabic texts do not provide diacritical marks and thus the active and passive participles are not marked, requiring interpretation on the part of the reader. My interpretive choice here is justified by the gendered usage of the verb (*j-m-*). As Kecia Ali notes, the verb "to have intercourse" (*j-m-*) in Arabic takes a direct object and not a prepositional phrase (i.e. the man sexes the woman rather than having sex with her). Ali, *Marriage and Slavery*, 141. While the verb itself does not stipulate a particular gender as the subject, al-Sarakhsī never uses the female as the subject in the legal text. Thus, when using the verb "to have intercourse," the jurists never use the phrase "she sexes him" but always, "he sexes her." Elsewhere in his text, when talking about pubescent boys and sexual intercourse, al-Sarakhsī always speaks of the boy as the active subject of sexual intercourse. In the section on the legal definition of sexual intercourse in Chapter Two, we saw that al-Sarakhsī linguistically describes illicit sexual intercourse between an adult woman and a pubescent boy as the active agency of the pubescent boy in penetration and the passive agency of the adult woman in making herself available (for more information see al-Sarakhsī, *Al-Mabsūṭ*, 9:55). Given the gendered usage of the verb "to have sexual intercourse" and its direct object, I have chosen to read the phrase used to describe the pubescent girl as a passive participle and the phrase used to describe the pubescent boy as an active participle.

³⁷ A second rendition of this conception of the activity of the pubescent boy is al-Sarakhsī's usage of the phrases "the action of the boy" (*fi'l al-ṣabī*) or "the sex act of the boy" (*bi waṭ' al-ṣabī*) to describe sexual intercourse between the adult woman and the boy. Al-Sarakhsī, *Al-Mabsūṭ*, 5:148.

³⁸ The one place in al-Sarakhsī's discussion of this case study where the woman is mentioned as an active agent is in the citation of a verse regarding *zawāj al-tahlīl*. Legitimizing the Ḥanafī position of allowing marriage with a pubescent boy to make the wife permissible to the first husband, al-Sarakhsī cites as a proof text the Qur'anic verse regarding this form of marriage: "And if he divorces her [the third time], she shall no longer be lawful to him unless she marries another husband (*hattā tankih zawjan ghayrahu*): then, if the latter divorces her, there shall be no sin upon either of the two if they return to one another—provided that both of them think that they will be able to keep within the bounds set

4.3 Women, sexual intercourse, and dominion

Al-Sarakhsī's treatment of female desire in the previous section highlights that even recognizing the female as a desiring subject does not disrupt the ontological construction of maleness and femaleness along the active/passive binary. The female as desiring subject does not engender a male subject that is constructed as desirable, nor does she become an active subject. Even when al-Sarakhsī recognizes that a man can animate a woman's sexual desire and be an object of her desire,³⁹ the man as legal subject is not rendered passive and desirable. He maintains his position as active and desiring even when he is the object of a woman's desire and the woman in turn maintains her position as the passive legal subject who is acted upon, despite the law's recognition of her active desire for the male subject. In order to more fully understand how the female subject is constructed as both desiring and passive, I turn now to the Ḥanafī understanding of the relation between marriage, sexual intercourse, and ownership in the laws pertaining to marriage. I focus in particular on al-Sarakhsī's rationalization of the

by God: for these are the bounds of God which He makes clear unto people of knowledge." Quran 2:230. In this verse, while the woman is the passive recipient of the divorce of both the husbands, the verse places her as the active subject in marrying the second husband (i.e. "she marries another husband"). Al-Sarakhsī mentions this phrase from this verse as proof text for his argument, stating that the verse specifies "husband" (*zawj*) as a qualification for making her permissible again to her previous husband. He further argues that as the term "husband" can be applied to the pubescent boy, marriage to him is legally valid in *zawāj al-taḥlīl*. However, it seems unclear whether al-Sarakhsī uses the verse to argue that the woman has agency in determining her second marriage (i.e. she marries the other man) but instead focuses on the word "spouse" in the verse to assert that the pubescent boy would fit within this category. In fact, it is intriguing that other than this verse, there is no other moment in al-Sarakhsī's discussion of this case study where the woman's action is expressed linguistically in an active form.

³⁹ An example of this appeared in the section on impotence where I described how al-Sarakhsī does see the male as an object of female desire. He argued that a woman who is married to a man who is insane or suffers from leprosy does not have the right to annulment. His argument rests on the idea that in such a marriage, the woman is still able to fulfill her sexual desire even though her desire (*raghbah*) for him is diminished by his insanity or illness. Al-Sarakhsī, *Al-Mabsūṭ*, 5:97.

precarious position of free women within marriage, as they, according to him, allow a man to have dominion over them despite their status as a free individual. This discussion further confirms the way in which al-Sarakhsī recognizes female desire while maintaining the woman's position of passivity in the ontological binary.

The central dilemma that al-Sarakhsī seeks to resolve in this discussion is the necessity for a woman to enter into a relationship of dominion in order to fulfill her sexual desire. As mentioned previously, marriage in Islamic law is understood as a sort of dominion (*milk*) that the husband asserts over the wife. This construction of marriage does not emerge clearly from the textual sources of the Qur'an and prophetic traditions but is a working logic of the law that formed early in Islamic law and cuts across the different legal schools. As Kecia Ali notes, in Islamic law "licit sex was possible only when a man wielded exclusive control over a particular woman's sexual capacity."⁴⁰ Unlike men, women in Islamic law cannot make sexual use of their male slaves,⁴¹ and thus the only licit avenue for Muslim women to fulfill their sexual desire is to enter into a marriage contract.⁴² This is particularly problematic for the free woman who, despite her freedom, must allow a man to have some form of dominion over her.

⁴⁰ Ali, *Marriage and Slavery*, 25.

⁴¹ There are some discussions in early Muslim sources about female slave owners engaging in sexual intercourse with their male slaves. In one story, the case is brought to the caliph 'Umar. When he asks her why she made such a decision, she responds that she was exercising her right as a slave owner, as indicated in the Qur'an. Her assumption was that the right of sexual access given to male slave owners in the Qur'an also applied to her as a slave owner. 'Umar reprimanded her for her interpretation of the verse and judged that those verses did not apply to her as a female slave owner. For more information, see Ali, *Marriage and Slavery*, 13-16.

⁴² While slave women might potentially also fulfill their desire through concubinage, given that their slave owners do not need their consent to make sexual use of them, I find it unethical to argue that concubinage was a potential avenue for the fulfillment of female desire. Slave women could, of course, be married to a male slave or a free man. However, here again they did not have the right to consent.

Among the different legal schools of thought, the Ḥanafīs are perhaps the most attuned to this predicament for women. As al-Sarakhsī states brazenly, “The establishment of dominion [i.e. the dominion of marriage] over the woman is a form of humiliation.”⁴³ Quoting a prophetic tradition, al-Sarakhsī equates marriage with slavery,⁴⁴ arguing that marriage for women is a humiliation in that they enter into a form of slavery.⁴⁵ This relation between marriage and humiliation and the “slave-like” status of the wife is an ethical conundrum for al-Sarakhsī, however, due to another prophetic tradition that prohibits any free Muslim from humiliating themselves.⁴⁶ Furthermore, while Islamic law permitted slavery, it recognized freedom as both the fundamental condition of each human being as well as the preferred means of social existence. That is, Muslim jurists held that freedom grants individuals a dignity that they will not and should not abandon. It is for this reason that individuals were encouraged to emancipate slaves as a means of reparations for sins. With such a legal construction of marriage, al-Sarakhsī has a pressing need to rationalize why it is justified for the free woman to curtail her

⁴³ “*Wa fī asl al-milk ‘alā al-mar’ah naw’ dhillah.*” Al-Sarakhsī, *Al-Mabsūṭ*, 5:23.

⁴⁴ “*Fa qāla al-nikāḥ riqq.*” Al-Sarakhsī, *Al-Mabsūṭ*, 5:23.

⁴⁵ It is important to recognize that while marriage and slavery are analogized by the jurists, wives are not their husbands’ slaves. Scholars have also disagreed on continuities and discontinuities that exist between the conceptual parallels of marriage, ownership, sale, and slavery in Islamic law. For more information about this scholarly conversation, see Ali, *Marriage and Slavery*, 51.

⁴⁶ The word al-Sarakhsī uses here is *al-mu’min* (a believer). This statement by al-Sarakhsī is instructive not only as a commentary on a gender hierarchy in his text but also a religious cosmology. Muslims should not be under the control and dominion of non-Muslims and were deserving of a respect and dignity that non-Muslims did not necessarily have a right to. What is perhaps most interesting here is that, in theory, Muslim women should also receive the same dignity and respect as Muslim men; the gender hierarchy *should* be disrupted by the religious hierarchy. However, as we will see later, social order necessitates that the gender hierarchy prevail. The gender hierarchy, of course, is mediated by other social hierarchies. For example, a Muslim woman could not be married to a non-Muslim man, as she would have to enter into his dominion, allowing a non-Muslim to have dominion over a Muslim. Additionally, a female slave owner could not marry her own male slave. While she had ownership over him, marriage to him would require that he have dominion over her, which was logically impossible in the jurists’ eyes.

freedom.⁴⁷ In other words, why is it permissible for free Muslim women to enter into a relationship of dominion, and thus humiliation, in the form of marriage?⁴⁸

For al-Sarakhsī the response is “necessity” (*darūra*). While he does not elaborate in this passage what this “necessity” consists of, elsewhere in his text he makes it clear that the necessity he refers to is the maintenance of a divinely ordained social order that necessitates a particular gender hierarchy. As mentioned in the first chapter, in al-Sarakhsī’s cosmology human desire for sexual intercourse is essential to fulfilling the divine command for the continued existence of humanity. In fulfilling this divine command, marriage is the primary legitimate means by which humans are to fulfill their sexual desire and procreate.⁴⁹ At the beginning of the chapter in his legal text on marriage, al-Sarakhsī lists a series of social and religious benefits of the institution of marriage. Among the religious benefits is safeguarding individuals from illicit sexual intercourse and increasing the number of Muslims in the world. Among the social benefits, he mentions that marriage makes possible the protection and financial maintenance of women (*hifz al-nisā’ wa al-qiyām ‘alayhinna wa al-infāq*).⁵⁰ For al-Sarakhsī, the institution of marriage is necessary within the following logic: God has created humanity with the desire for sexual intercourse so that they may procreate and

⁴⁷ For al-Sarakhsī it is not the law’s construction of marriage that produces this dilemma. As I will discuss later in this section, al-Sarakhsī considers the gendered imbalance in the marriage relationship to be a social and biological necessity that is ordained by God.

⁴⁸ In arguing for marriage as dominion, what needs justification is not the gendered power imbalance but instead the compromise of freedom. That is, the dilemma is not with regards to the woman entering into the dominion of a man but instead why a *free* person would enter into such a relationship.

⁴⁹ While Islamic law conceives of licit sex both within marriage as well as through concubinage, there is a clear distinction for al-Sarakhsī between sexual intercourse between a married couple and a slave owner and his female slave. For more information on this, please see the discussion on *iḥṣān* in the previous section on impotency.

⁵⁰ Al-Sarakhsī, *Al-Mabsūṭ*, 4:190.

fulfill a divine command. In order to procreate they must have sexual intercourse. Rape (*taghālub*) is one possibility, but that would create tremendous social discord (*fasād*). Furthermore, he argues, procreation without establishing dominion, sexual exclusivity, and control over the woman would mean the destruction of patrilineality.⁵¹ Given these grave dangers, he argues, God legislated that sexual intercourse take place within a relationship of marriage where the man has dominion (*milk*) over the woman so that the lineage of children can be ascribed to the father, who is then obliged to provide for them financially.⁵² This is the necessity (*darūra*) that, for al-Sarakhsī, requires that free Muslim women enter into the dominion of another person in order to fulfill their sexual desire. To fail to do so would wreak social havoc, leading to children never knowing their father and women having no recourse but to turn to prostitution! It is this argument and conception of marriage that forms the bedrock for the concept of suitability for the Ḥanafīs. Since the woman is already humiliating herself through marriage, it would be unjust to inflict further humiliation on her by marrying her to someone who is not her equal.⁵³

The gendered nature of this “necessity” with regards to sexual intercourse is illuminated by a comparison with the case of the male slave’s right to marriage. As discussed in Chapter Two, al-Sarakhsī again entertains the idea of “necessity” (*darūra*)

⁵¹ “*Fī al-taghālub fasādan wa fī al-iqdām bighayri milk ishtibāh al-ansāb wa huwa sabab li-dīyā’ al-nasl.*” Ibid., 4:191.

⁵² For al-Sarakhsī, the financial responsibility of men to provide for children and financially maintain their wives is very important for maintaining social order. He argues repeatedly that women are incapable of financially providing for themselves (*wa bi al-nisā’ ‘ajz zahīr ‘an al-iktisāb*). In fact, to require them to financially provide for themselves, he continues, would create social discord (*fitmah*), as women who must provide for their own financial needs turn to exchanging sex for money (*fa inna al-mar’ah idhā umirat bi al-iktisāb iktasabat bi farjihā*). Ibid., 5:185.

⁵³ Ibid., 5:23.

with regards to the male slave's sexual desire. The dilemma in that case was that as a slave he has no right of ownership, but in order to marry and fulfill his sexual desire, he must establish dominion (*milk*) over the woman. Given this conundrum, al-Sarakhsī argues that divine law (*al-shar'*) has given the male slave "ownership of sexual enjoyment" (*milk al-mut'ah*) out of necessity (*darūra*). While the necessity for the male slave is explicitly about his need to fulfill his sexual desire,⁵⁴ in the case of women the necessity is about the maintenance of a social order. While her desire and need for sexual fulfillment are recognized, it is not centered in the same way as it is for the male slave. The second point to highlight is the difference in what is being allowed due to necessity. Given the law's construction of the male as active and female as passive, for the woman necessity allows her to enter into a relationship of dominion and humiliation in order to fulfill her desire. In the case of the slave man, on the other hand, necessity requires a legal exception be made to allow for him to *have* dominion over a woman ("ownership over sexual enjoyment") in order to fulfill his sexual desire. While women have to concede dominion, men *must* dominate.

This reading of gender along the active/passive binary in relation to marriage is further confirmed if we look to al-Sarakhsī's discussion of the slave woman and marriage. In her case, neither her position in the gender binary nor her enslavement disrupts the logic of the law. As a slave woman she can be taken by her owner as a concubine regardless of her consent. As licit sex is only possible within a relationship of dominion, the slave owner has the legal right to make sexual use of his female slaves.

⁵⁴ Ibid., 5:129. The necessity in this case is also about the continuation of his lineage.

Furthermore, the law need not make any legal accommodations or exceptions for her in the case of marriage. As a woman enters into the dominion of a man in marriage, the slave woman can marry or be married off without any concern.⁵⁵ A legal concern does arise, however, with regards to the slave woman if she is emancipated. When she was under the complete dominion of her slave owner she had no meaningful ability to consent to marriage. What, then, happens to her marriage if the slave woman is emancipated?

Al-Sarakhsī presents such a situation by recounting a prophetic tradition in which a slave woman, Barirah, was emancipated and given the option to remain with her husband or separate. Mughith, the husband, was desperately in love with his wife and was distressed to learn that she did not want to stay with him. Al-Sarakhsī describes that the love-stricken Mughith would follow his wife, crying, but she was insistent in her scorn and rejection. The Prophet intervened in this situation, counseling Barirah to change her mind. She, however, was adamant and after confirming that the Prophet was counseling her and not requiring her to remain with her husband, she chose separation. The language used in the prophetic tradition to indicate the woman's right to choose at emancipation is couched again in the language of ownership and dominion. According to the prophetic tradition, the Prophet told Barirah, "You have dominion over your vulva so

⁵⁵ The slave woman is perhaps in the ultimate position of domination. She can be taken by her owner as a concubine without regard to her consent. Furthermore, she may not marry without her owner's consent and, in fact, she can be coerced into marriage. For the Ḥanafīs the male slave may only marry with the consent of his owner and there are varied opinions on whether he may be coerced by his owner. Kecia Ali notes that Ḥanafī texts of the formative period are silent on this issue but later texts are split, the dominant position allowing coercion. See Ali, *Marriage and Slavery*, 41. Al-Sarakhsī held that a slave owner may coerce both his male and female slave into marriage (al-Sarakhsī, *Al-Mabsūt*, 5:113.) With regards to the slave woman marrying another man, thus entering into his dominion, it is intriguing that the jurists do not raise a concern with the establishment of two forms of dominion and ownership on the woman simultaneously, the first being enslavement (*milk al-yamīn*) and the second being marriage (*milk al-nikāh*). In determining the legal impermissibility of marriage between a female slave owner and her male slave, the jurists held that since the female slave owner had dominion over the male slave, he could not establish dominion over her through marriage.

choose [to remain or separate]” (*malakti buḍ‘aki fa-khtārī*).⁵⁶ Whereas the free woman has dominion over her own body, which she transacts to the man in marriage, the slave woman acquires that dominion over her body only through emancipation. As a married woman, however, she remains under the dominion of her husband. Thus, the law gives her the option, upon the removal of one form of ownership, to choose to remain or remove herself from the second relationship of dominion (i.e. marriage). She has this option regardless of whether she was married off by her slave owner or herself chose to marry with the consent of her owner. For al-Sarakhsī, the option at emancipation is granted to the slave woman precisely because of the dominion over the woman that is entailed by marriage. Once she is freed, she cannot remain in the second form of dominion that was placed upon her during enslavement. Having acquired freedom from one form of dominion, she retains the right to decide whether she wishes to exit or remain in the second relationship of dominion.⁵⁷

The legal discussions on the marriage of free women, slave men, and slave women highlight for us the gendered intricacies of sexual fulfillment. What, then, does it mean for the law to recognize female sexual desire? Throughout this chapter, I have demonstrated that the law does, in fact, recognize women as desiring subjects and, at times, even grants female desire significance in legal hermeneutics and argumentation. Their status as desiring subjects, however, does not shift the place of women within the active/passive binary. In all cases we have observed so far, women continue to be

⁵⁶ Al-Sarakhsī, *Al-Mabsūṭ*, 5:98-99.

⁵⁷ Al-Sarakhsī, *Al-Mabsūṭ*, 5:99.

conceptualized as passive and acted upon. In this case study in particular, this passivity becomes an object of explicit reflection by al-Sarakhsī, as he considers the dilemma posed by the fact that free women can only fulfill their sexual desire within a relationship of dominion and humiliation. Al-Sarakhsī rationalizes this situation by naturalizing female passivity as necessary to the divinely sanctioned natural order of things. This also correlates with what we saw (in the previous chapter) of the way that al-Sarakhsī imagines the female body itself as embodying passivity and object status, as the locus where sexual intercourse takes place.

4.4 The virgin girl and the previously married woman

Having highlighted the way in which al-Sarakhsī recognizes female desire while perceiving it through the ontological framework of the active/passive binary, I now turn to a final case study that further confirms this point through an investigation into the construction of femininity in al-Sarakhsī's legal text. If the female subject of law is constructed as passive and desirable and can only fulfill her desire within a relationship of domination, how then is this ontological conception of femaleness embodied in the female legal subject? More specifically, this section explores the correspondence between this ontological conception of the female and al-Sarakhsī's assertions regarding femininity.

This exploration demonstrates the fragmented nature of al-Sarakhsī's conception of femininity. In thus arguing, I recall the discussion in the conclusion to the previous chapter. Drawing on decolonial feminist Oyeronke Oyewumi, I argued that the gender binary must be understood as functioning alongside and intersecting with other systems

of distinction and social identity. In the case of the male gaze upon the female slave, we saw that the intersection of the gender binary with the “social fact” of slavery produced a different configuration of desire and desirability. In this section, my attention turns to al-Sarakhsī’s construction of femininity in relation to desire. By exploring his justification for the presence of a male guardian for contracting the marriage of an adult woman and the intricacies of female consent in marriage, we can observe al-Sarakhsī’s assumptions about femininity that both confirm and challenge the ontological construction of the female subject as passive.

Despite acknowledging female sexual desire, al-Sarakhsī also considers a necessary aspect of femininity to be the silence of the woman with regards to her desire. This is most evident in his discussion regarding the presence of a guardian for contracting the marriage of an adult woman. Unlike the other schools of law, Ḥanafī law allows for an adult virgin woman to contract her own marriage and does not require the permission of her guardians,⁵⁸ provided she marries a man who is suitable (*kafā’a*) for her.⁵⁹ While

⁵⁸ This Ḥanafī position, however, was not without significant controversy among Abū Ḥanīfa (d. 150/767) and his disciples. Within Ḥanafīsm’s hierarchical taxonomy of legal authority, these figures sit at the top and thus their opinions carry much weight as authority for later Ḥanafī jurists. For more information on this taxonomy, see Wael Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge, UK: Cambridge University Press, 2004), 14-17. Abū Ḥanīfa held that an adult woman may contract her own marriage, regardless of whether she is a virgin or a *thayyib*. For Abū Ḥanīfa, such a marriage was valid even if the woman married someone unsuitable for her and the marriage only came under challenge if her guardians challenged the woman’s decision. In contrast, al-Ḥassan bin Ziyād al-Lu’lu’ī, a student of Abū Ḥanīfa, held that the marriage of a woman without a guardian was valid only if the groom was suitable. A third position of Abū Yusuf, one of Abū Ḥanīfa’s two most prominent students, vacillated between different opinions, from stating that a marriage without a guardian was not valid, to the marriage being valid if the groom was suitable, to the marriage being valid regardless of suitability. Al-Shaybānī, the second of Abū Ḥanīfa’s two prominent students, held that a marriage without a guardian should be held in suspension until the guardians were consulted. If they validated the marriage it would be accepted, and if they challenged her decision then the marriage was invalidated unless she married a suitable spouse. In such a case the marriage was not validated by default but instead a judge was tasked with renewing the marriage contract (al-Sarakhsī, *Al-Mabsūṭ*, 5:10). Despite these differing opinions, it is clear that the right of a woman to contract her own marriage could not be separated from kinship structures and the stake of the family in the marriage of a woman. Indeed al-Sarakhsī makes clear that the family is given the right to question the woman’s decision because an unsuitable partner would impact them negatively (al-Sarakhsī, *Al-Mabsūṭ*, 5:13). For

the law allows an adult virgin bride to contract her own marriage, what is normative in the legal texts is the presence of the guardian (*walī*) who contracts the marriage on her behalf.⁶⁰ Al-Sarakhsī argues, in fact, that it is recommended (*mustahab*) for the guardian to contract the marriage on behalf of the woman.⁶¹ This is based on a construction of femininity founded upon shyness and timidity, particularly for a young woman who has not been previously married. Al-Sarakhsī argues that demanding the presence of the guardian is a *right* (*ḥaqq*) granted to the woman, as she would feel shy attending a gathering of men and openly expressing her consent. Such an act, he further asserts, would be seen as flippant (*ru'ūna*), impudent, and impertinent (*waqāḥa*) on her part.⁶² Al-Sarakhsī's conception of femininity finds validation in a prophetic tradition in which Muhammad counsels fathers to seek the consent of their virgin daughters with regards to

more information on the different legal considerations regarding the guardian's role in contracting women's marriages, see Ali, *Marriage and Slavery*, 40-44.

⁵⁹ Ḥanafī law allows an adult virgin woman to contract her own marriage, but this permission is conditional on the suitability (*kaḥā'a*) between the bride and groom. *Kaḥā'a* is measured according to six considerations: descent, Islam, profession, freedom, good character, and wealth or means. Thus, if a woman marries a man who is not her equal (based on these six considerations), her father and paternal grandfather reserve the right to have the marriage annulled. It is important to note that the role of the guardian in contracting a marriage is contingent based on the bride's age and sexual status. Thus, a minor bride may not contract her own marriage. The marriage must be contracted by her guardian. The other three schools of Sunnī law do not allow an adult virgin woman to contract her own marriage without the consent of her guardian. For more information on the role of Ḥanafī law regarding the woman's ability to contract her own marriage and conditions of compatibility, please see Siddiqi, "Law and the Desire for Social Control."

⁶⁰ Marriage in Islamic law is only valid with the consent of both parties. The ultimate decision to accept or reject a marriage lies with the adult bride. A guardian cannot coerce a woman into a marriage. The expression of consent, however, is dependent on age and sexual status. As a virgin, an adult woman's consent can be expressed through her silence; the absence of an objection is her consent. However, once a woman has been married and become sexually experienced (*ṭhayyib*), any subsequent marriage requires her verbal consent. Marriage and sexual intercourse changes the legal status of the woman. For minor brides, however, the father retains the right to contract a marriage regardless of her consent (this right is granted to the father for his minor children, regardless of gender.) Even in this situation, however, the minor bride retains the option to reject the contract at legal maturity (provided it has not been consummated). Siddiqi, "Law and the Desire for Social Control," 52-53.

⁶¹ Al-Sarakhsī, *Al-Mabsūṭ*, 5:12.

⁶² *Ibid.*, 5:13.

their marriage. When his wife ‘Āisha pushed him, insisting that a virgin girl might be shy in expressing her consent, Muhammad replied that her consent could be intimated through her silence.

In contrast to the virgin adult female, the virgin adult male (*al-ghulām*) may not express his consent through silence. Al-Sarakhsī argues that unlike the virgin bride who would feel shy from expressing her consent openly, the masculinity of the virgin groom does not shy away from expressing sexual desire for women.⁶³ Thus, his father cannot married him off without his verbal consent. What is praised and appreciated in the young virgin (her shyness and timidity) is blameworthy in a young man, and considered effeminate (*al-takhannus*).⁶⁴

Al-Sarakhsī’s discussion on the gendered nature of consent in marriage shows the close linkage between legal constructions of masculinity and femininity and the expression of desire. On the one hand, the femininity of the young virgin woman (*al-bikr*) must conceal a desire she feels through the timidity of silence; otherwise, it would betray her desire for men, a boldness that would be unbecoming of femininity. On the other hand, the masculinity of the young virgin man is not only comfortable in the expression of desire but, in fact, the law requires it. Masculinity and femininity are defined in binary opposition to one another: men are bold, women are timid; men desire and express it, women desire and conceal it.

⁶³ “*fa innahu lā yastahyī min al-raghbah fī al-nis ā*.” Ibid., 5:6.

⁶⁴ Ibid.

Al-Sarakhsī's construction of femininity, however, is not static or all encompassing, even in this particular case. Rather it exhibits the fluid, shifting, and internally fragmented nature of the legal construction of gendered subjects of desire. Such universalist statements regarding gendered subjects must also account for the complex and messy realities that do not always fit the law's predetermined categories and ontological frameworks. In contrast to the virgin adult woman, the non-virgin woman (*al-thayyib*) is presumed to inhabit a different femininity. A woman who has been previously married does not have a femininity based on silence, shyness, and timidity, as a virgin does; she must express her consent verbally in marriage, an act that makes clear her sexual desire but is not considered inappropriate.

What, then, causes this shifting construal of femininity? Seemingly, the main difference between the virgin and non-virgin woman is her sexual experience. Sexual intercourse has important implications in this cosmology; the act of engaging in sexual intercourse reshapes the femininity a woman embodies in certain respects. The change in the status of the non-virgin accords her a more mature social status, allowing her to appear bolder and claim more space as a public actor. The loss of virginity in the female subject brings her closer to maleness, transforming her legal agency. Not only is she granted the ability to actively express herself but she can also act more independently in relation to family and kinship networks.⁶⁵ The non-virgin, al-Sarakhsī argues, can be

⁶⁵ The shifting status of the woman in relation to kinship and family structures is particularly important in understanding the female as legal subject. As Judith Tucker notes, the family was the site for the curtailment of women's legal subjecthood. While the law saw men and women as equal legal subjects and autonomous individuals with regards to property, women's legal subjecthood as members of a patriarchal family was much more curtailed.

independent of her father's care as she is not as gullible as the virgin. As she has had experience with men, she is able to gauge them well and is familiar with their wiles and deceit. An unmarried woman is, therefore, able to live on her own and exist independently of male protection or guardianship, provided she is no longer a virgin.

While the difference between the femininity inhabited by the virgin and the non-virgin seems primarily related to their sexual experience, there is also some connection for al-Sarakhsī between such social experience and age. He argues, in fact, that if a virgin woman grows older and becomes experienced and opinionated,⁶⁶ then she can also gain the independence of the non-virgin woman. The main reason for placing the virgin under male protection, he argues, is out of fear of social discord (*fitnah*). This no longer remains a concern once a woman matures and develops a sense of independence.⁶⁷

Woman as family member and woman as a member of patriarchal society, Tucker argues, often trumped woman as equal legal subject. Tucker, *Woman, Family, and Gender in Islamic Law*, 172-73.

⁶⁶ “*fa in kānat al-bikr qad dakhalat fī al-sin fa ijumi ‘a lahā ra’yuhā wa ‘aqluha.*” Al-Sarakhsī, *Al-Mabsūt*, 5:213.

⁶⁷ While the virgin is seen as embodying a shy and timid femininity and the non-virgin is one that is bolder and independent, this raises an interesting question for us about women who do not fit this neat dichotomy between virgin and previously married. What about the woman who is neither a virgin nor previously married? What or which femininity is she expected to embody? Al-Sarakhsī engages in a tangential conversation regarding a woman who is an adulteress but was not previously married (and thus not socially recognized as a non-virgin). He argues that such a woman may not consent to marriage through silence, as shyness in expressing desire is not appropriate for her. He asserts further that after committing an act like adultery, expressions of shyness (*al-ḥayā’*) would not appear praiseworthy but instead come across as flippant (*al-ru’ūna*). How can a woman who did not shy away from expressing desire for a man in the most abominable of ways shy away from expressing her desire in the best of ways? (Al-Sarakhsī, *Al-Mabsūt*, 5:11). In contrast to his own position, al-Sarakhsī cites the position of Abū Hanīfa, the eponym of the Ḥanafī school, who argued instead that an adulteress may consent through silence as she might still inhabit that shyness. He argues further that it is possible that she had illicit sexual intercourse either through coercion or because she was overcome by lust. Given her abominable act, she might be shy about expressing her consent to marriage out loud, as this would make public her status as an adulteress. Shyness, he argued, is a commendable trait, as she is trying to hide her sins and should be accommodated in her desire to do so.

Another scenario that al-Sarakhsī considers is that of a minor girl who is divorced. While she is technically no longer a virgin, should she be granted the status given to the non-virgin? Al-Sarakhsī argues that the minor girl, while having engaged in sexual intercourse, has not acquired the experience that characterizes the non-virgin adult woman. While sexual intercourse shifts the legal status of the female subject, it has a complex and interwoven relationship with age. Al-Sarakhsī, *Al-Mabsūt*, 4:197.

What we see in the comparison between the virgin and non-virgin in this case is the way in which the gender binary is not a singular or universal framework through which al-Sarakhsī constructs legal subjects of desire. Rather, we see the gender binary intersecting with other axes of social identity--in this case sexual status and age--that subtly influence how gender is constructed in particular cases. While the active/passive binary is an overarching ontological framework through which al-Sarakhsī both explicitly and implicitly interprets the law and constructs gendered legal subjects, there are instances in which the implications of that binary logic do not fully apply. In the case at hand, sexual experience and age allow the female subject to acquire some degree of activity in relation to her expression of desire.

Finally, in concluding, it is important to recognize that while al-Sarakhsī argues that the loss of virginity and age transforms the female legal subject, rendering her closer to maleness, she can never acquire the status granted to the male as the ideal and full legal subject. Though shifting constructions of femininity certainly allow women to negotiate and expand their position as legal subjects, femininity remains a permanent impediment that acts as a constraint on women's legal agency. The idea of deficiency in women (*nuqṣān*) often appears in al-Sarakhsī's text to justify their impaired legal status.⁶⁸ In discussing a mother's right to custody of her children in cases of divorce, al-

⁶⁸ The language of women's deficiency alludes to a prophetic tradition. The narration is as follows: "The Prophet (peace and salutation be upon him) set out for the place of prayer on the day of 'Eid al-Fiṭr or Aḏḩā and walked past the women. He said 'O women, give charity for I have seen that you will make up the majority of the inhabitants of hell fire.' They replied: 'For what, O Prophet of God.' He said: 'You curse a lot and are ungrateful to your husbands (*al-ashūr*). I have not seen anyone as deficient in intellect and religion. Even the mind of a prudent man is swept away by one of you.' They asked: 'And what is the deficiency in our religion and intellect, O Prophet of God.' He said: 'Is not the testimony of a woman half the testimony of a man?' They said: 'Yes.' He continued: 'And that is the deficiency of her intellect. And is it not that when she is menstruating she does not pray or fast.' The woman replied: 'Yes.' He

Sarakhsī claims that the mother has priority of both her male and female children while they are in need of her care. The boy may remain in her care (*ḥaḍāna*) until he is able to clothe and feed himself (i.e. does not need her physical care) and the girl remains with her until she reaches legal maturity. At this point, the children must enter into the care of the father. In justifying this, al-Sarakhsī argues that a girl who enters legal maturity becomes the object of temptation (*‘urḍatun lil fitnah*) and an enticement for men (*maṭma ‘atun li al-rijāl*).⁶⁹ Furthermore, she becomes ready for marriage and in need of a guardian’s protection. For al-Sarakhsī, the father is best suited for this role not only because he has a sense of vigilance and jealousy (*ghīrah*) as a man (which women do not) but also because the mother is gullible and lacking in soundness of intellect.⁷⁰ Since women are more easily deceived and not as intelligent as men are, it is best for the young

concluded: ‘And that is the deficiency in her religion.’” Ḥadīth number 298 in al-Bukhārī, *Ṣaḥīḥ al-Imām al-Bukhārī*, 1:154.

Perhaps the most interesting aspect of the argument about women’s deficiency is the ways in which it appears in legal reasoning. As we saw in our earlier discussion on women contracting their own marriages, the Ḥanafīs challenge the Ṣhāfi‘īs on their use of the deficiency argument to deny women their right to contract their own marriages. Al-Sarakhsī argued that if an adult woman has no limitations on contracting commercial transactions and disposing of her property as she wishes, why make the argument that she is deficient in her intellect with regards to contracting a marriage. In the case of granting a woman legal rights over her children we see the deficiency argument appear. The woman is deficient in her intellect and thus cannot be trusted with making sound decisions regarding her children. Presumably one could argue that if she has sound enough intellect to make decisions with regards to herself, then she can make sound decisions on behalf of her children. Certainly a woman who is legally mature, and furthermore a *thayyib*, is not expected to rely on her male relatives to make decisions on her behalf regarding her matters. However, what we see instead is the argument of deficiency. Al-Sarakhsī never defines the deficiency of women’s intellect. He does not delve much into what this deficiency is, what it entails, and where it curtails women’s ability as legal agents. The deficiency of femininity (*nuqṣān al-unūtha*) is, instead, a convenient tool of legal argumentation that aids in justifying the curtailment of women’s legal subjecthood in certain areas of the law.

⁶⁹ Al-Sarakhsī, *Al-Mabsūṭ*, 5:208.

⁷⁰ In terms of care for and legal rights over children, al-Sarakhsī argues that mothers have greater compassion for their children than the father does. This is his reasoning for giving preference to the mother in granting custody (*ḥaḍāna*) of young children, in addition to what he sees as her unique ability (*qudrah*) to physically care for little children. The father, on the other hand, has legal rights (*ḥaḳ al-taṣarruf*) over the children (even when they are in the custody of the mother) due to his compassion for them but also the soundness of his opinions (*li quwwat ra’yihim*). Al-Sarakhsī, *Al-Mabsūṭ*, 5:207.

girl to return to her father's care for marriage.⁷¹ Despite the fact that the mother is a *thayyib* and thus is seen as someone who has experience in the world, she still remains deficient in some capacity in relation to an adult man. The woman as legal subject, no matter her shifting femininity, is never "whole" as a male legal subject is.

4.5 Conclusion

In his book, *Islamic Guide to Sexual Relations*,⁷² UK-based Ḥanafī jurist Muhammad Ibn Adam al-Kawthari states that Islam has granted both men and women the right to sexual satisfaction in marriage. Despite these abstract statements about the mutuality of sexual rights, looking at the particulars presents a different story. In speaking of the right of the husband to sexual intercourse, he states, "A man is entitled to have sex with his wife whenever he is desirous of it, and it is her religious duty to make herself available to him. Failing to do so without a valid excuse is a major sin."⁷³ In describing the wife's sexual right, however, his language shifts from "whenever" and "making available" to "every so often."⁷⁴ Unlike the wife's, the husband's legal obligation is not based on his spouse's needs but instead on juristic determinations. Al-Kawthari recounts different juristic opinions, from those that require a husband to have intercourse with his wife once every four nights, to once a month, and once every four months. Mediating these different legal opinions, al-Kawthari concludes that the most legally sound opinion is that the husband should have sexual intercourse with his wife

⁷¹ Ibid., 5:208.

⁷² Muhammad Ibn Adam Al-Kawthari, *Islamic Guide to Sexual Relations* (Huma Press, 2008).

⁷³ Ibid., 13.

⁷⁴ Ibid., 16.

every so often, enough to keep her from resorting to adultery. To consistently refuse to have sex with his wife would be considered sinful.⁷⁵

Al-Kawthari's attitude towards female sexual desire demonstrates that these legal texts have a continued life in contemporary Muslim discourses on sexuality. Much like al-Sarakhsī, al-Kawthari does not deny female sexual desire, but he does not grant it the urgency and importance that male desire gets. As this chapter has demonstrated, al-Sarakhsī does indeed engage female sexual desire and argues that it is a necessary component in the woman's fulfillment in a marital relationship. This consideration, however, does not translate into any meaningful rights to sexual pleasure and gratification for the woman. As we saw in the case of impotence, al-Sarakhsī's statements regarding the injustice of keeping a woman in such a marriage were largely meaningless if we consider that her right is to consummate the marriage, not to continued sexual intercourse. The pattern that emerges from both al-Sarakhsī's discussion on impotence, as well as the validity of a marriage between a pubescent boy and an adult woman, is the instrumentalization of female desire to justify legal precedent.

A striking aspect of al-Sarakhsī's discussion of women as desiring subjects is the near absence of any engagement with the nature of their desire and its fulfillment. If the law is indeed concerned with the legislation and regulation of sexual desire, then it is necessary to define this desire so that it can be an object of legislation. What we see with female sexual desire, however, is both the assumption of its presence and a lack of concern for the tangible markers of desire. This is quite unlike al-Sarakhsī's discussions

⁷⁵ Ibid., 21.

regarding the male experience of desire. His legal text abounds with conversations about the intricacies of penile erections and male sexual fluids in determining the presence of male desire.⁷⁶ Not only does al-Sarakhsī never question how women experience desire, but in fact when he does attune himself to female desire he renders the male experience of penetration a marker of sexual fulfillment for women.

We can perhaps best understand this discrepancy if we consider that while al-Sarakhsī does recognize female desire, he renders it subordinate to male desire. It is this subordination that allows legal hermeneutics to only take the details of the male sexual experience into consideration. In his study of discourses on sex in Talmudic culture, Daniel Boyarin makes a similar observation. He argues that while female desire is not stigmatized in the Talmud, it is the brazen and open expression of that desire by the woman that is considered inappropriate. In contrast to the silence of the female subject in relation to her desire, the man is enjoined to use speech to arouse his wife's sexual desire. Rather than seeing this as a negation of female desire or the reduction of the female to "pure sexual object," he argues that this indicates a greater asymmetry in gender relations. He argues, "The position of women in sexuality is subordinate, and the position of men is dominant. The very consideration that *he* is supposed to show *her* is the marker of this magnanimous but confining patriarchy."⁷⁷ Boyarin's observation is a useful framework for thinking about al-Sarakhsī's conception of female desire in his legal text.

⁷⁶ For more information on these differences, see Chapter One.

⁷⁷ Daniel Boyarin, *Carnal Israel: Reading Sex in Talmudic Culture* (Berkeley: University of California Press, 1993), 131.

While he does not negate female desire, he does render it passive in relation to male activity and dominance.

My investigation into the female subject of desire makes apparent that while al-Sarakhsī does consider the female to be *desiring*, she is never configured as a desiring subject in relation to the male. If desiring/desirable and active/passive are the two binaries that inform al-Sarakhsī's construction of gender, the female moves across the desiring/desirable boundary while the male subject remains static. At no point does the male as a legal subject become the desirable object of a female desiring subject.

5. Children as Subjects at the Margins

In recent years, the renowned religious scholar Ḥabīb ‘Alī al-Jifrī has been an outspoken opponent of child marriages, and in particular criticizes those who make religious justifications for the practice. As al-Jifrī is located in Yemen, where child marriage has been the subject of significant controversy, his position is of great consequence. Over the years there have been several attempts to establish a minimum age of marriage in Yemen. In 2009, the parliament passed a bill raising the age of marriage to seventeen, but the Islamic Sharia Codification Committee ultimately rejected it. The committee argued that the law was un-Islamic.¹ When censured for marrying off their children, parents often provide religious and cultural justifications.² Opposing these practices are women’s rights and human rights organizations, which have a different conception of marriage and childhood. “These early marriages rob the girl of the right to a normal childhood and education,” argues Wafa Ahmad Ali of the Yemeni Women’s Union.³ “The girls are forced to have children before their bodies are fully grown instead of going to school and playing with other children.”⁴ The epistemological disconnect between these competing parties is evident in their comments. Whereas one side invokes the idea of childhood to oppose these marriages, the other appeals to the precedent of prophetic practice and the legal tradition. As Muhammad married his youngest wife when she was six and consummated the marriage at the age of nine, to make moral or ethical

¹ IRIN, "Yemen: No Law Protecting Children against Early Marriages," *Women Living Under Muslim Laws*, February 21, 2010, <http://www.wluml.org/node/6000>.

² Ibid.

³ Ibid.

⁴ Ibid.

claims against child marriage would run against this precedent and Muhammad as an exemplar. These groups also argue that Islamic law has not laid down any minimum age for marriage.

It is within this landscape of competing norms that al-Jifrī has been speaking in recent years. For instance, in 2014 he posted a strong condemnation of child marriages on his English-language Facebook page, arguing that there is no religious sanction for the practice.⁵ Labeling child marriage a crime, he chides those who support such a practice in the interest of upholding the authority of Islamic law as the arbiter of moral norms. Islamic law, he argues, is guided by legal maxims that prohibit practices that cause harm. Thus, he argues, it is impermissible to marry a female child who cannot endure the demands of marriage.⁶

While al-Jifrī invokes the authority of Islamic law in advocating his position, there are important discontinuities between his discussion of child marriage and similar discussions of the matter in pre-modern Islamic law. His rendition of the law is couched in modern conceptions of marriage, childhood, and harm. To begin, much of the contemporary debate regarding child marriage, including al-Jifrī's position, does not make a distinction between contracting a marriage and consummation of the marriage. Al-Jifrī's statement collapses the distinction, arguing that such marriages themselves are prohibited. Additionally, Al-Jifrī's assertions assume a modern conception of childhood

⁵ The post appeared in April 2014, a couple of weeks before a bill stipulating a minimum age for marriage was submitted to the Prime Minister. The post's appearance on his English-language page, however, raises some question as to the intended audience of the message.

⁶ Ḥabīb 'Alī al-Jifrī's Facebook page, posted April 6, 2014, accessed September 30, 2016, <https://www.facebook.com/habialienglish/posts/568187313279190>.

that is based on age rather than biological developments such as puberty.⁷ Human rights organizations in Yemen consider an individual under the age of eighteen to be a child and thus consider any marriage in which the individual is under that age to be a violation of the rights of children. The groups who oppose these efforts argue that Islamic law establishes puberty as the distinguishing marker between children and adults. Thus, any girl who has entered puberty is no longer a child and marriage to her is permissible under Islamic law. By intervening in this debate and deeming child marriages to be prohibited under Islamic law, al-Jifri redefines Islamic legal conceptions of childhood to conform to modern norms. Finally, what is perhaps most intriguing about al-Jifri's claims regarding Islamic law is his appeal to concerns for not just bodily harm but also mental and emotional anguish. "It is forbidden to marry off a young girl," he argues "whose body and soul cannot tolerate the demands of marriage."⁸

As we will see in this chapter, al-Jifri largely seems to sidestep much of the basic conceptual parameters that historically constituted the legal conversation on child marriage, despite his claims to be speaking from the framework of legal precedent. Instead, he largely focuses on broader legal maxims about the prevention of harm. While

⁷ It is important to note here a differentiation between the term "minor" that I use in this chapter and the concept of the "child" in what we today refer to as child marriages. Childhood and adulthood are configured along different parameters in pre-modern Islamic law in relation to contemporary discourses. Legal majority was defined as the onset of puberty for men and women (i.e. nocturnal emissions in boys and menstruation in girls). Thus, a marriage between a fifteen-year-old girl who had entered puberty and a pubescent ten-year-old boy would be understood as a marriage between an adult female and a male child in Islamic law. Similarly, a marriage between two individuals, aged fifteen, would be considered a marriage of two adults if both individuals had already entered puberty. However, both these situations would be constituted as child marriage within different contemporary legal systems. Much of what we consider child marriage today would not be classified as such in pre-modern Islamic law.

⁸ Ibid. The English-language post uses the phrase "body and soul." In an Arabic interview on this topic, al-Jifri uses the language of "*darar nafsi*." The word *nafsi* can be understood to refer to harm that is both physical as well as psychological. See: <https://www.youtube.com/watch?v=ufswELr22og>, YouTube video, 4:56, posted by CBC Egypt, April 18, 2015.

this concern with avoiding harm to minor children in marriage is certainly present in al-Sarakhsī's discussion of the issue, the parameters of what constitutes such harm are understood quite differently. This is largely due to conflicting assumptions about children as subjects and objects of sexual desire. The juxtaposition of al-Jifrī's conception of child marriage with that of al-Sarakhsī's thus sheds light on the ways in which ontological assumptions about desire, gendered existence, and personhood shape the process of legal interpretation. It also highlights the way in which such construals of gendered existence are constructions of the law.

In the previous chapter, I explored a particular subject position (the female as desiring) that seemingly challenges or does not easily fit within al-Sarakhsī's ontological framework of gendered subjects. Given that the two central binaries that inform his construction of gender are that of desiring/desirable and active/passive, the chapter analyzed how the recognition of the female as a desiring subject impacts this binary framework. Similarly, in this chapter I explore another set of subjects that presumably do not easily fit this framework: children. The law generally understands children to be neither desiring nor properly desirable (as al-Jifrī suggests); yet at the same time, there are scenarios in which their sexuality or participation in sexual activity is recognized. How, then, do the desiring/desirable and active/passive binaries manifest themselves in such cases? The first two sections of this chapter explore this question through the legal issues that surround the consummation of marriages with minor children.

Analyzing al-Sarakhsī's legal conception of children also allows us to examine how he responds to legal subjects who challenge an even more fundamental and basic

binary in relation to gender: that of maleness and femaleness. Because al-Sarakhsī recognizes that some children are born gender ambiguous, he must contend with how the law should classify such individuals who defy the basic male-female binary. The third section of the chapter thus explores al-Sarakhsī's response to a variety of legal issues in relation to intersex individuals. By turning to gender-ambiguous children, I ask how al-Sarakhsī maintains the gender binary while acknowledging that certain individuals can and do exist outside of it.

This chapter thus addresses child subjects who sit at the margins or peripheries of the gender binaries that inform al-Sarakhsī's legal hermeneutics. They do not easily fit within the binary distinctions between male and female adult legal subjects. Through this exploration, I aim to demonstrate the constructedness of these gender binaries, despite their presentation by the law as natural. The case of gender-ambiguous children in particular presents a vivid illustration of the way in which al-Sarakhsī contends with empirical realities that challenge his basic ontological frameworks in relation to gender. These final case studies thus make apparent the instability and indeed fictive nature of the ontological framework that informs al-Sarakhsī's legal hermeneutics.

5.1 Consummating minor marriage and the active/passive binary

In her book, *In the House of Law*, Judith Tucker mentions a legal opinion issued by Khayr al-Dīn al-Ramlī, a seventeenth-century Ḥanafī jurisconsult. He was presented with a question regarding a man who wished to consummate his marriage to a girl who was a legal minor. While the law permitted the marriage contract to be conducted at any age, consummation was usually delayed until both parties came of age. In this case, the

husband wanted to consummate the marriage, but the girl's father claimed that his daughter was not yet ready. Al-Ramlī responded by stating that if the girl was “plump and buxom and ready for men”⁹ and the stipulated dower had been received, then the father had no right to prevent the husband from consummating the marriage.¹⁰

In making this judgment, al-Ramlī--a Ḥanafī jurist himself--was drawing on a long tradition of reasoning about marriage and sexual intercourse that was deeply shaped by al-Sarakhsī's position and argumentation in relation to this issue. This case evinces a similar sexual imaginary to what we have seen throughout the dissertation: that is, a construction of sex in which the male is a desiring subject and the male body is active and penetrative, while the female subject is constituted as desirable, her body passive and the locus that is acted upon. In exploring how the law constructs children as ambiguous subjects of desire, I observe a similar logic and ontological framework at play, although it manifests itself in a different fashion than we have seen in other case studies.

Marriage between legal adults and minor children was a normative practice within Islamic legal texts.¹¹ While there is little legal and historical record of the practice of child marriage in the eleventh-century Central Asian context within which al-Sarakhsī lived and wrote, social and legal histories of the Ottoman period, for instance, reveal that the marriage of minors was quite common.¹² Historically, Islamic law did not take age

⁹ Tucker, *In the House of Law*, 148.

¹⁰ Ibid. He argues that whether she is “ready for men” is determined based on appearance and the opinion of family members who raised her. If neither is possible, then the court consults with other women regarding the girl's physical readiness.

¹¹ For more information on child marriage from a socio-legal perspective, see Tucker, *In the House of Law*, 148.

¹² However, legal opinions from that period also demonstrate that consummation of the marriage when the female child had not entered puberty was an exceptional practice. Mahmoud Yazbak, "Minor Marriages and Khiyār al-Bulūgh in

into consideration in determining the legal validity of marriage contracts. While both parties' consent was necessary in the case of marriage between free individuals of legal majority, minors (i.e. those who had not yet entered puberty) could be married off by their immediate guardians without regard to their consent.¹³ At puberty, both the male and female child had the option to remain in the marriage or get an annulment. This option, known as *khiyār al-bulūgh*, was contingent, however, on whether the marriage had been consummated. The choice to remain in the marriage or annul it was only possible if the marriage had not been consummated prior to puberty. Additionally, like marriage between adults, consummation of the marriage carried with it financial implications. The minor bride and her family had the right to demand the dower prior to consummation; once sexual activity commenced, the minor girl was obligated to move into the man's home and he was legally required to financially maintain her. Thus determining whether consummation has occurred in such a marriage, and whether it was a legally valid act, becomes an issue of key importance in the law.

Ottoman Palestine: A Note on Women's Strategies in a Patriarchal Society," *Islamic Law and Society* 9, no. 3 (2002): 395.

¹³ In Islamic law, a child's most immediate guardian was considered to be the father and, in his absence, the paternal grandfather. It was only in the absence of those two that guardianship transferred to other relatives. As immediate guardians, they were the only ones granted full guardianship over minors. As such, they had the right to make all decisions regarding the minors under their charge, including the right to contract their marriages and dispense of their property. Guardians other than the father and paternal grandfather could also contract marriages of minors, but their decision was held under greater scrutiny. Whereas the father and paternal grandfather could marry off the minor to whomsoever they considered suitable and set any amount for the dower, non-immediate guardians were under greater scrutiny by the law. While the father could marry his daughter to a man who was not suitable for her or agree to a dower amount that was not appropriate for a woman of her class background, the non-immediate guardian was required by law to consider the suitability of the suitor and the appropriateness of the dower amount. However, with both immediate and non-immediate guardians, minors were subject to their decisions until they reached legal majority. The main difference between the immediate and non-immediate guardian lay in the force of their legal decision. The option to leave the marriage upon puberty (*khiyār al-bulūgh*) was only granted to the girl if a non-immediate guardian had contracted the marriage. Unlike the minor girl, the minor boy gains the right to pronounce a divorce upon puberty. Thus, he is not in need of a stipulated right to leave the marriage at puberty.

The permission to consummate the marriage raises the question as to how the law could allow for sexual intercourse between adults and minor children if the law considers them to be undesiring and undesirable. Ḥanafī law considers children to be both, subjects who neither experience desire themselves nor are they appropriate as the objects of sexual desire of other individuals. This begins to change, however, as the child begins to transition to puberty, a liminal stage between childhood and adulthood. The bodily changes that the child undergoes as he/she approaches puberty are understood by the law to be a sign of sexual maturity. It is at this stage that the law considers that the child begins to experience sexual desire, making sexual activity a possibility.

Thus for the Ḥanafī legal school, consummation of a marriage with a minor child was permissible and valid prior to puberty, given certain legal--and deeply gendered--considerations. Reflecting the ontological construction of gender along the active/passive binary, the main considerations for the minor girl were her desirability and her physical ability to serve as a locus of penetration, whereas the main considerations for the minor boy were his own desire and ability to penetrate.

Similar to what we observed above in the case adjudicated by al-Ramlī, al-Sarakhsī's central concern in determining a minor girl's "readiness" for consummation is focused on her physical body and her ability to endure penetration. Readiness, for al-Sarakhsī, is not defined by age or indeed even the awakening of her sexual desire but instead by cultural norms regarding female desirability. Al-Sarakhsī argues that a minor girl whose body is plump and buxom is both desirable to men and also able to endure

penetration. As sexual intercourse is legally defined as vaginal penetration,¹⁴ these two considerations (the desirability of the female body and its ability to endure penetration) are sufficient for determining readiness. The desire of the female child herself becomes mostly inconsequential for the law.

The discussions concerning the minor girl's ability to endure penetration arise in the context of determining whether the law would consider consummation to have gone into effect in certain circumstances, and thus whether the various financial consequences of consummation would go into effect. The question is what constitutes sufficient evidence for establishing the legal occurrence of consummation. For classical jurists, the

¹⁴ The Ḥanafī conception of sexual intercourse as vaginal penetration is most apparent in the juridical conversation around the time of “actual intercourse” (*ḥaqīqat al-waṭʿ*) and in its importance in determining whether financial compensation is due to the wife. The term “actual intercourse” is an expression used often in the passages relating to marriage with minor brides. Often appearing in relation to the question of physical harm caused to the girl, the term refers to the act of penetration. Thus, should the act of penetration cause injury to the minor child, then the husband is liable to pay recompense. In contrast to this phrase, we also find reference to the coinage “non-vaginal intercourse” (*al-jimāʿ fī mā dūn al-farj*.) Here the jurists bring into discussion the necessity of maintenance (*nafaqa*) for the minor bride who is not yet capable of enduring sex. Ibn Humām, a phenomenal jurist of the fifteenth-century has a discussion on the question of maintenance for a minor bride that is both telling and illuminating on the construction of sexual intercourse. Much in line with the discursive style of classical legal texts, he begins by stating the legal issue at hand: the necessity of maintenance (*nafaqa*) for minor brides. Ibn Humām states that opposing jurists are of the opinion that a minor bride who is desirable (*mushtahā*) but incapable of enduring penetration can still be utilized by the husband in non-vaginal intercourse. In such a case, maintenance becomes the husband's obligation due to his sexual enjoyment of her body. Ibn Humām, however, disagrees with this distinction drawn between vaginal and non-vaginal intercourse. He responds by arguing that if a minor girl is desirable for non-vaginal intercourse then that only indicates her readiness and desirability for vaginal intercourse. He concludes thus that the obligation for maintenance enters the realm of ambiguity only if the minor bride is not capable of enduring penetration due to the specificities of her husband's body. In such a case, maintenance becomes obligatory since the impediment for sexual access comes from him. As for a minor girl who is incapable of enduring penetration, the husband is not obligated to maintain her regardless of his ability to engage in non-vaginal intercourse.

Ibn Humām's discussion here is illustrative of a legal definition of sexual intercourse as penetration. Firstly, the legal distinction between actual intercourse and non-vaginal intercourse calls attention to the conception of sex as penetration. Whereas vaginal intercourse is understood literally as the actuality of sex, non-vaginal intercourse is understood figuratively. Even though the oppositional juristic opinion obligates maintenance because of sexual enjoyment of the minor girl's body (and not because of actual intercourse), Ibn Humām rejects the obligation of maintenance due to the lack of penetration. This argumentation around financial compensation is played out on the legal definition of sex as penetration. As an adult woman would be capable of enduring sex, the obligation of maintenance is a given. However, in the case of minor brides, the inability to penetrate creates ambivalence regarding the obligation. Whereas certain juristic articulations took into consideration non-vaginal sexual enjoyment of the minor girl's body in obligating maintenance, Ibn Humām critiques this distinction. Maintenance is in exchange for sexual access that is fulfilled through vaginal, penetrative sex. The lack of intercourse, for Ibn Humām, thus invalidates the necessity of financial maintenance. Muḥammad ibn ʿAbd al-Wāḥid Ibn Humām, *Sharḥ Faṭḥ al-Qādir* (Beirut: Dār al-Fikr), 9:430.

obligation for financial maintenance is triggered by the event of actual consummation itself, but also simply in the occurrence of valid privacy (*khalwa ṣaḥīḥa*) between the spouses.¹⁵ With regards to the minor girl, the question that arises is whether valid privacy is sufficient evidence of consummation. The classical jurists define valid privacy to be when the spouses are alone in each other's company and no other individual would enter that space without their permission.¹⁶ The assumption is that in the moment of such privacy, sexual intercourse would take place. However, a crucial element in the definition of valid privacy is the absence of any impediment to the act of penetration. Al-Sarakhsī argues that valid privacy is sufficient for obligating financial maintenance of the wife, provided that no natural (*tab'ī*) or legal (*shar'ī*) impediments exist that would prevent penetration.¹⁷ In a long passage in his authoritative legal text, 'Alā' al-Dīn al-Kāsānī, a twelfth-century Ḥanafī jurist, explicates these hindrances. Among the impediments to sexual intercourse, al-Kāsānī mentions minors who are not appropriate objects of sexual desire. He states that if the spouse is a minor boy or girl who is not culturally understood to be the object of sexual intercourse, then the possibility of penetration is hindered.

The notion of a distinction between desirable and undesirable minors is thus crucial to determining whether consummation can be assumed to have occurred in the event of valid privacy. The phrase al-Sarakhsī uses to describe a desirable minor girl, "one does have sex with those like her,"¹⁸ and the undesirable minor girl, "one does not

¹⁵ Ali, *Marriage and Slavery*, 75.

¹⁶ Ṣalāḥ Abū al-Ḥājj, *Subul Al-Wifāq fī Ahkām Al-Zawāj wa Al-Ṭalāq*. ('Ammān: al-Warrāq, 2005), 151.

¹⁷ Al-Sarakhsī, *Al-Mabsūṭ*, 5:150.

¹⁸ "al-lati yujāma' mithluhā." Ibid., 5:148.

have sex with those like her,”¹⁹ seems to rely on a cultural norm regarding the desirability of the female body. Al-Sarakhsī does not actually provide any specific details on how desirability was determined in his cultural context. What is evident, however, is that desirability is tied to the body size of the female child and her ability to serve as a locus of penetration without incurring physical injury.

This linkage between desirability, body size, and the physical ability to endure penetration appears in a discussion on the *ḥudūd* punishments for illicit sexual intercourse. Al-Sarakhsī considers whether a man who commits illicit sexual intercourse with a female child and causes perineal tearing (*ifḍā'*) should be punished. For the Ḥanafīs, punishment for illicit sexual intercourse is legislated to discourage individuals from satisfying their sexual desire in an illicit manner. This conceptualization thus requires that both individuals involved in the sex act be considered appropriate for the fulfillment of sexual desire. Punishment for illicit sex is thus contingent on the locus of penetration's legal construal as desirable.²⁰ Al-Sarakhsī argues that since the female child was harmed physically in the act of penetration, she is clearly not desirable and cannot serve as a legally recognized locus of penetration (*kamāl al-maḥal*). In this case, then, the

¹⁹ “*al-lati lā yujāma' mithluhā.*” Ibid.

²⁰ This juristic consideration is not limited to the punishment for illicit sexual intercourse alone but also to other legal rulings that are brought into effect through the act of sex. For example, legal prohibitions that are established in marriage due to sexual intercourse would not go into effect if the minor child is considered undesirable. Thus, if an adult man were to have sex with an undesirable female child, he would not be prohibited from marrying the mother of the girl due to the sex act. Interestingly, however, legal rulings pertaining to ritual purification do go into effect, as here the legal rulings are not dependent on the legal definition of the act but instead on the act of penetration. Thus, a man must perform ritual washing (*ghusl*) even after penetrating an undesirable female child.

man is not legally liable for the punishment of illicit sexual intercourse.²¹ On the other hand, if the man had penetrated her and not caused perineal tearing, then it would be evident that she is desirable, since she was able to endure penetration.²² Furthermore, if he causes severe perineal tearing, then he is required to pay the entire requisite amount in indemnity (*al-diyah*) in addition to the dower.²³ In explaining the need for the dower, al-Sarakhsī clarifies that sex (*al-waṭʿ*) is the insertion of one genital into another, an act that transpired even if the female child was not yet desirable. The punishment does not go into effect, however, due to the deficiency in the legal definition of the sex act; in other words, the locus of penetration was not desirable and the perineal tearing affirmed this.

One could well argue that the individual man's sexual arousal and his act of penetration are an indication of his desire for the female child. However, the juristic construction of sexuality precludes such a possibility. In this a case, the action of the man does not legally constitute sexual intercourse, and his experience of desire for the female child does not render her legally desirable. Her desirability is determined by juristic discourse and its determinations regarding her body size, which is then the interpretive lens through which sexual acts are interpreted.²⁴ In fact, al-Sarakhsī condemns the man

²¹ While the man is not liable for the mandatory punishment (i.e. flogging for fornication and stoning for adultery), he is still subject to discretionary punishments (*al-ta'zīr*) because he acted in a manner that is not permitted to him legally (*li-irtikābihi mā lā yaḥillu lahu shar'an*). Ibid., 9:75-76.

²² Ibid., 9:75.

²³ Al-Sarakhsī here is referring to third-degree and fourth-degree tears. Third-degree perineal lacerations are a tear in the vaginal tissue, perineal skin, and perineal muscles that extend into the anal sphincter. Fourth-degree lacerations are the most severe in which the tear goes through the anal sphincter. Al-Sarakhsī refers to this as the inability of the female child to control her bowels due to the tearing (*lā tastamsik al-bawl*).

²⁴ In contrast to al-Sarakhsī's unspoken assumptions about what constitutes desirability, later Ḥanafī jurists began to define desirability in females through both fixed age markers and physical attributes (plumpness). Almost three hundred years after al-Sarakhsī, 'Uthmān b. 'Alī al-Zayla'ī, a famous fourteenth-century Ḥanafī jurist, argued that a girl over the age of nine is considered desirable and a girl under the age of five is categorically undesirable. The age of nine is not simply arbitrary but emerges from precedent regarding 'Āisha's age when the marriage between her and the

who has intercourse with a minor girl who is not yet desirable per the law. Such individuals, he argues, act contrary to nature,²⁵ as the “nature of sensible people does not incline towards sexual intercourse with a female child who is not desirable and is not able to endure penetration.”²⁶ This discussion not only highlights the centrality of the ontological construction of the female subject as a passive and desirable locus of a man’s sexual action, but it also further illustrates the way in which al-Sarakhsī must determine certain objective “facts” about sexual desire that serve to order the unruly terrain of the diversity of human sexual practices and experiences.

In contrast to the legal considerations concerning the possibility of consummating a marriage with a minor girl, the situation for the male child is very different. As with the female child, the male child also enters into a liminal stage as he gradually transitions into puberty. Unlike the female child, however, the male child’s liminality is clearly marked by his physiological ability to achieve an erection. What distinguishes him from legal majority, then, is the inability to ejaculate. Once he is able to ejaculate, the male

Prophet was consummated. While al-Sarakhsī does not state as explicitly as al-Zayla‘ī that the age of nine is categorically desirable, he does bring in the example of the marriage of ‘Āisha to the Prophet at age six and the consummation of that marriage at age nine as evidence for the permissibility of marriage and sexual intercourse with minor children. Interestingly, al-Sarakhsī does recount early juridical opinions that challenged the permissibility of marriage and sexual intercourse with minor children. Based on a Qur’anic passage that they interpreted as equating marriageability with puberty (Quran 4:6), they argued that the marriage contract is only valid between individuals of legal majority (Al-Sarakhsī, *Al-Mabsūṭ*, 4:212). For medieval Ḥanafis, the desirability of the female child is ambivalent between the ages of six and eight, in which the ability to endure penetration must be determined. A girl in this age range who is plump was considered to be desirable and thus able to endure penetrative vaginal sex. Late Ḥanafism maintained the same position. In his expansive legal commentary *Ḥāshiyat Radd al-Muḥtār*, Ibn ‘Ābidīn, a nineteenth-century Hanafī jurist, also defines the minor girl as one who has not yet reached nine years of age. Muḥammad Amīn ibn ‘Umar Ibn ‘Ābidīn, *Ḥāshiyat Radd al-Muḥtār ‘alā al-durr al-Mukhtār* (Beirūt: Dār al-Fikr, 1992), 1:307.

²⁵ In Chapter Two, I discussed how the concept of “nature” emerges in al-Sarakhsī’s discussion on sodomy as another means by which to normalize certain acts as properly desirous and certain objects as properly desirable.

²⁶ “*Wa ṭab ‘al-‘uqala’ lā yamilu ilā waṭ ‘al-ṣaghīrah al-latī lā tushtahā wa lā taḥtamīl al-jimā’.*” Al-Sarakhsī, *Al-Mabsūṭ*, 9:75.

child is immediately granted the legal status of an adult.²⁷ Similarly, a marriage in which one partner is a male child is only consummated with the awakening of his sexual desire. His desirability, though considered, was at best peripheral to the legal discussions.

5.2 Consummation and the (un)knowability of desire

In addition to further illustrating the centrality of the active/passive binary in the construction of gender, the case of consummating marriage with minor children also highlights the phallogocentric epistemology through which gendered subjects of desire are constructed. In Chapter One, I discussed in detail the link between the male-embodied experience and al-Sarakhsī's assumptions regarding desire. This is most evident in his attention to the physiological markers of desire, which are restricted to those of the male body: erections, ejaculation, and penetration. There is little consideration for physiological or experiential markers of female desire; furthermore, to the extent that al-Sarakhsī addresses female desire, he does so without turning to the female body or female experience as a source of knowledge. There is, thus, a legal inability to "know" female desire. The case of consummating a child marriage vividly illustrates this male-centric production of knowledge, as al-Sarakhsī deems female desire to be hidden and unknowable, while male desire is easily known and identified, despite similar ambiguities inherent in reading the male body.

In my discussion so far on the juridical considerations regarding sexual intercourse with a female child, I have argued that for al-Sarakhsī the primary

²⁷ Ibid., 6:52.

considerations are the desirability of the female child and her ability to endure penetration without physical harm. We have seen little concern for the desire of the minor girl herself for sexual intercourse. The previous chapter demonstrated, however, that al-Sarakhsī does indeed recognize and acknowledge female desire, even if it is subordinated to male desire. The question that arises, then, is whether he also recognizes female desire in the case of the minor child. Is there any evidence that al-Sarakhsī takes the female child’s desire into consideration? And if so, how is her desire to be known? As mentioned earlier, while pre-pubescent children are not considered desiring or appropriate objects of desire, Ḥanafī jurists hold that as children approach puberty, they enter a liminal stage in which they begin to experience desire. While for the minor boy, his ability to have an erection clearly marks this stage, determining whether minor girls have entered this liminal stage is much more challenging for the law.

To investigate whether al-Sarakhsī considers the desire of the female child in making consummation permissible, let us return to his discussion on establishing marital prohibitions of consanguinity. As discussed in Chapter Two, Islamic law holds that if a man marries and has sexual intercourse with a woman, then certain female relatives of the wife become permanently prohibited to him in marriage (the woman’s mother, for example). These are “prohibitions of consanguinity.” One of the main considerations in determining these prohibitions is the validity of the marriage relationship²⁸ and the legal agency of the woman. Among the different considerations, the following question arises:

²⁸ The Ḥanafī scholars here would disagree with Shāfi‘ī scholars who do not establish these prohibitions when sex takes place outside of marriage.

Are prohibitions of consanguinity established if a man consummates a marriage with a minor girl? In response to this question, al-Sarakhsī argues that if the female child is considered desirable,²⁹ then the prohibitions of consanguinity go into effect as soon as the man consummates the marriage. As we have seen, however, rulings that go into effect due to sexual intercourse do not apply in situations where the female child is considered undesirable. What is most interesting for our discussion here is al-Sarakhsī's argument for why the prohibition is not established despite the act of penetration. Recounting Abū Ḥanifa's position, he argues that the prohibition is generally established not due to penetration but instead a physical bond (*ba' dīya*) in the act of sex. With the undesirable female child there is no such bonding between the husband and wife.

The concept of bonding is important here as it allows us to note the ways in which the law constructs men and women in a relation of subject and object, and yet holds to an ethic of mutuality in marriage and sexual intercourse. This mutual bond is not one of partnership and equality but the notion that the husband and wife become a part of each other's material existence, albeit within the confines of a hierarchical relationship. This concept of *ba' dīya* also shows up in other relationships outside of marriage. In particular, al-Sarakhsī makes similar arguments about a mutual bond that exists between parents and child, through milk fostering, and in the sexual intercourse of the parents. The idea of this bond is very physical; individuals become a part of the other person's material existence. In relation to parents, for example, al-Sarakhsī argues that parents and children share *ba' dīya* as the child quite literally carries within itself elements of the material body of

²⁹ The exact phrase he uses translates to "the kind of girl who would be approached sexually."

the two parents.³⁰ This shared materiality is not just established in cases of biological parents but also through milk fostering. In this situation as well, al-Sarakhsī argues, the wet nurse and child are bonded to one another as the breast milk of the woman contributes quite literally to the flesh and bone of the child.³¹ In the case of a married couple, the mutual bond forms in the mixing of their sexual fluids, which carries the potential for procreation.³² Al-Sarakhsī explicitly states that this *ba'dīya* between spouses is established through sexual fluids (*al-mā'*).

In making this argument, al-Sarakhsī implicitly suggests that there is a sense of shared intimacy and mutual sexuality between the spouses. Does this, then, indicate that he also views the desirable minor girl to be a desiring subject as well? Returning to our conversation on sexual intercourse with minor females, the authoritative Ḥanafī position holds that sex with an *undesirable* minor girl does *not* trigger prohibitions of consanguinity, as there is no sense of mutuality of intimacy (*ba'dīya*) in that act. For the *desirable* minor girl, however, prohibitions of consanguinity *do* go into effect, indicating that al-Sarakhsī characterizes this type of relationship through the mutual bond. This also suggests that the sexual fluids of both parties must be present, and thus that the desirable

³⁰ Al-Sarakhsī, *Al-Mabsūt*, 4:205.

³¹ Interestingly, this is only considered as such with a child who has not yet been weaned and is seen as developing physically in flesh and bone. *Ibid.*, 5:135-37.

³² As discussed earlier in the dissertation, Islamic medical writings often adopted the ancient idea of the one-sex model and the inverse similarity between the sexual organs of men and women. With regards to procreation in particular, they held that conception required the coming together of both male and female sperm. Dallal, "Sexualities, Scientific Discourses." In a similar vein, al-Sarakhsī also asserts that the child is created through the coming together of the sexual fluids of the two individuals. Al-Sarakhsī, *Al-Mabsūt*, 4:205.

In the case of illicit sexual intercourse, al-Sarakhsī argues, the refusal to ascribe lineage to the child is not because this mutual bond is considered to be absent but because of doubt regarding lineage. He argues that an adulteress is the sort of woman who does not engage in illicit sexual intercourse with one man alone, thus establishing the lineage of the child carries the possibility of error. Al-Sarakhsī, *Al-Mabsūt*, 4:207.

minor girl is not only desirable to men but herself has begun to experience some form of sexual desire.

In further explicating the reasoning behind the ruling, however, al-Sarakhsī also makes clear his assumption about the hiddenness and unknowability of her desire. In explicating the evidence for the Ḥanafī position on prohibitions of consanguinity, he asserts:

While the actual mutual bond [*ḥaqīqat al-ba'diya*] is established through sexual fluids, these fluids are hidden and not evident [*bāṭin*], and thus cannot be confidently relied upon as evidence. Therefore, instead of this [presence of sexual fluids], the more discernable cause is considered [in establishing the validity of consummation], which is the girl's reaching the stage of desirability. Thus if she is one who would be desired, then she takes on the position of the adult woman in that prohibitions of consanguinity take effect upon her being penetrated.³³

The language in this passage is gender ambiguous. Al-Sarakhsī does not clearly state whether he is speaking here of the sexual fluids of both men and women or just women. Upon reflection, however, it is clear that al-Sarakhsī is referring to the sexual fluids that the woman releases during sexual activity, as it does not seem that al-Sarakhsī holds male sexual fluid to be hidden or unknowable. Indeed, the law establishes ejaculation as evidence of male puberty, for instance. The intricacies of male sexual fluids are also the subject of robust conversation in legal discussions on ritual purification. Thus, for al-Sarakhsī to claim that male sexual fluids are hidden (*bāṭin*) would be uncharacteristic and highly unlikely. It would seem, then, that he is referring to

³³ The passage reads: "*ḥaqīqat al-ba'diya wa in kānat bi-i'tibār al-mā' fa huwa bāṭin lā yumkin al-wuqūf 'alayhi fa yuqām al-sabab al-zāhir maqāmahu wa huwa bulūghuhā ḥad al-shahwa fa idhā kānat min man yashṭahī [sic] anzalat manzilat al-bāligha fī thubūt al-ḥurmah bi waṭ'ihā bi-khilāf mā idhā kānat lā tushtahā.*" Al-Sarakhsī, *Al-Mabsūṭ*, 5:148.

female sexual fluids in particular. Women's biological processes are thus unknowable and not empirically verifiable, and consequently cannot enter into the law as evidence. In the legal imagination of Hanafi jurists, whereas the sexual desire and fulfillment of the male body is knowable and verifiable (erection and ejaculation), empirical markers of female sexual desire are seen as hidden and thus cannot serve as evidence for legislation. The female body is thus rendered private and enigmatic. This understanding of the anatomical male and female bodies is also mapped onto the social body. It is not simply in sexual intercourse, but also in society at large that men are present and knowable while women are hidden, out of reach, and unknowable.³⁴

Given this unknowability of female desire, al-Sarakhsī argues that the minor girl's desirability is the only available evidence for *ba'diya*, in place of knowledge about her sexual fluids or desire. In addition to the passage above, al-Sarakhsī makes this claim elsewhere, stating that "her reaching a stage of desirability becomes the basis for permitting this action [consummation of the marriage], in place of actually reaching puberty."³⁵ That is, when the female child reaches the age when she is considered desirable, the rulings that apply to desiring women of legal majority begin to apply to her as well. In a very interesting move, male desire for the female object is made to stand in for female desire. Thus, while the female child is possibly also seen as a desiring subject, her desire is not only subsumed under male desire, but in fact her desirability becomes a

³⁴ This configuration pertains primarily to free women, as slave women inhabit a very different femininity and female body. For more information see Chapter Three.

³⁵ "ithumma ju'ila bulūghuhā hadd al-shahwa fī hukm ibāḥat hādihā al-fī 'l qā'imān maqām haqiqat al-bulūgh." Al-Sarakhsī, *Al-Mabsūt*, 5:148.

marker of her own desire. If the man desires the female child, then it can be safely assumed that she is, herself, desiring.

The unknowability of female sexuality is an interesting case study to illustrate how Ḥanafī law has articulated knowledge from a male perspective. As Islamic law was primarily a male enterprise in which the male perspective and experience informed the epistemological and ontological assumptions of the law, Ḥanafī jurists held that female sexuality was largely unknowable (i.e. without tangible markers) and thus rendered unlegislable. What stood in for her own desire, instead, was the knowable, male desire for her. As Elizabeth Grosz states, representations of the female are “chosen by and affirm masculinity.”³⁶ In fact, in the different issues of legal consideration regarding consummating marriage with a minor girl, the only issue regarding the female body that al-Sarakhsī articulates with certainty is the suppleness and warmth of the vagina that makes it a desirable locus of penetration (i.e. the male experience of intercourse). Sexual desire is, of course, riddled with ambiguities, and the law must deal with tangible and objective markers in order to legislate. However, as we will see in what follows, the ambiguities of male sexuality do not garner the same sense of bewilderment.

In contrast to the case of the female child, al-Sarakhsī recognizes the ambiguity of male physiological markers of desire but does not render male desire unknowable. For instance, the jurists consider the erect penis and ejaculation to be two tangible markers of male desire. However, not every erection is considered desirable. In our earlier discussion in Chapter Two about al-Sarakhsī’s conversation regarding illicit sexual intercourse, we

³⁶ Grosz, “Bodies and Knowledges,” 208.

saw how the adult female subject does not receive capital punishment if she engages in sexual intercourse with an insane man or minor boy, since the male party in the act is not a legally accountable subject (sane and of legal majority). In this discussion, al-Sarakhsī explains why the law not considers the act of a woman who has sexual intercourse with a pre-pubescent boy to be illicit intercourse. He argues that the erect penis of the boy, in this situation, is like the movement of a finger and not animated by sexual desire; the intended goal of committing illicit sexual intercourse is missing in the penis.³⁷

This distinction indicates an intuitive sense of familiarity with the male body and desire. We have seen how the marker of the pubescent minor boy is his ability to achieve a desirous erection and his inability to achieve ejaculation. Al-Sarakhsī, however, does not attempt to explain how to differentiate between the pubescent minor boy's desire-induced erection and one that is a physiological response unconnected to desire. Both can achieve an erection, and neither can ejaculate. Presumably, this ambiguity should create significant problems for the legal identification of desire for the jurists, rendering male desire similarly enigmatic. Yet for the jurists, male desire seems clear: it is about erections and ejaculations.³⁸

This discussion demonstrates a “sexualization of knowledge”³⁹ in the legal tradition, an epistemological foundation in which knowledges are constructed through

³⁷ Al-Sarakhsī, *Al-Mabsūṭ*, 9:55.

³⁸ For more information on the law's designation of male physiological markers of desire for the purposes of legislation, please see Chapter One.

³⁹ As mentioned earlier in the dissertation, my argument here regarding phallogocentric knowledge and epistemology is building off of feminist critiques of epistemology. Elizabeth Grosz, in particular, employs the term *sexualization of knowledges* to refer to the “relationship that models and goals of knowledges have to sexually specific (male) bodies.” Grosz, “Bodies and Knowledges,” 188.

male bodies. For the male jurists, male desire is intuitively knowable, whereas female desire cannot be known. As I have attempted to show throughout the dissertation, both the male and female subjects of desire are constructions of the law. Like female desire, male desire is also constructed. While the law presents its knowledge of male desire as based on empirical and material realities, it does indeed construct male desire within certain parameters. The pre-pubescent boy who presumably achieved an erection and penetrated a woman is not considered desirous, simply because he cannot be configured as such by the law. The “facticity” of male desire is also always constructed and delimited by the law. What we see here is a compelling moment where the subjectivity and positionality of the jurists as men is a significant contributing factor in their conception of knowledge, what is knowable and how. The ambiguities of the male body are considered knowable, yet the ambiguities of the female body become unknowable; what stands in its place instead is the male gaze and desire for the minor girl. The case of consummating marriage with minor children thus illustrates for us a very complex arena of the phallogocentric ontological and epistemological frameworks that produce and sustain Ḥanafī law.

5.3 Children as intersexed subjects

The discussion on consummating minor marriages has highlighted the way in which al-Sarakhsī constructs male and female desire in the case of legal subjects that do not easily fit into the binary of desiring/desirable subjects. This section investigates another binary construction of the law, that of maleness and femaleness, by turning to al-Sarakhsī’s discussion of intersexuality.

The gender binary is of course central to the law's basic assumptions regarding social existence and legal subjecthood. Many legal rulings, such as on inheritance and testimony, are differentiated based on gender, and thus the gender identity of an individual is a key legislative concern. The male/female binary is also essential to the law's imagined ideal of a gender-segregated society in which men and women existed in separate spheres. The boundaries of these spheres were, of course, porous, and certain individuals such as slave women, eunuchs, and children travelled across them. Despite the porousness, however, the social segregation of men and women is important to the legal imagination. Additionally, the stakes for gendered existence are also high considering its role in salvation. Individuals are held accountable in the afterlife for living in accordance with God's will, and it is the responsibility of the jurists to lay out ethical obligations. As many aspects of these ethical norms are gendered, an individual who is ungendered faces the challenge of not knowing their ethical obligations, a problem that has salvific ramifications.

Despite the centrality of the gender binary, Islamic law does, in fact, recognize intersexuality. The Arabic term used to describe intersex individuals is *khunthā*. The medical understanding for the existence of intersexuality in Islamic medicine is interpreted largely through the active/passive conception of gender. Abū Bakr al-Rāzī (d. 313/925), the major Muslim physician and philosopher, holds that the gender of the fetus is established based on the dominance of the male or female sperm. If neither sperm was dominant then the child was considered intersexual, i.e., it possessed both a penis and a

vulva.⁴⁰ While this was the primary view of Islamic medicine, it is difficult to fully map Islamic medical discourses onto Islamic law. Legal texts are largely concerned with ethical and legal norms and do not explicate broader philosophical or medical assumptions. Thus al-Sarakhsī does not attempt to provide a causal explanation for the existence of intersexuality; rather, he simply attends to the process of how intersexed individuals should be identified and how to assign them a proper gender. In this regard, we do see certain overlaps that indicate a resonance with Islamic medicine within al-Sarakhsī's legal thought.

Much like al-Rāzī and Ibn Sīnā, al-Sarakhsī also holds that intersexuality is marked by the presence of both male and female genitalia rather than an ambiguity in resemblance. The intersex subject is not seen as being of a middle sex or even as both male and female. Rather, the intersex subject is presumed to have a gender, either male or female, that is difficult to determine due to the body's ambiguity.⁴¹ Furthermore, attention to the functionality of the genital organs as a means of determining gender was also common to both al-Sarakhsī and major Muslim physicians.⁴² The process through which Islamic law contends with intersexuality indicates that its primary aim is to develop legal mechanisms for assigning the subject a particular gender identity. The law is concerned not so much with discovering the "true sex" of the individual, but with establishing legal facts about the body that would allow for the law to assign gender, and

⁴⁰ Dallal, "Sexualities, Scientific Discourses." See also Paula Sanders, "Gendering the Ungendered Body: Hermaphrodites in Medieval Islamic Law," in *Women in Middle Eastern History: Shifting Boundaries in Sex and Gender*, ed. Nikki Keddie and Beth Baron (New Haven: Yale University Press, 1991), 76.

⁴¹ Sanders, "Gendering the Ungendered Body," 77.

⁴² Dallal, "Sexualities, Scientific Discourses."

for the individual to inhabit and perform it. This function-oriented approach allows for the maintenance and stability of the gender binary.⁴³

For the law, the first marker of sexual differentiation is the genital organ and its functionality (namely, which one the child uses for urination). The chapter on intersexuality (*Kitāb al-Khunthā*) begins with mention of a prophetic tradition in which the Prophet is asked about a child who is born with “that which is for women” (*mā lil mar’a*) and “that which is for men” (*mā lil rajul*). The concern in this prophetic narration is not for determining the sex of the child but responding to legal concerns regarding inheritance. As inheritance in Islamic law takes into account the gender of the beneficiary, it would be impossible to determine the inheritance for an individual who is gender ambiguous. According to the narration, the child’s inheritance was determined based on the genital organ used for urination. This practice, according to al-Sarakhsī, was an established custom in pre-Islamic Arabia.⁴⁴

The turn to the genitalia in determining the sex of the child can perhaps be best explained if we consider that prior to modern medicine this was practically the only physical marker available for assigning sex at birth. In the contemporary period, blood

⁴³ Sanders argues similarly that when confronted with gender ambiguity, the law’s first concern was with gendering the subject. She uses the term “gendering” to refer to the legal mechanisms that the law used to construct the intersex individual into the gender binary. By engaging in this process of gendering, she argues, the jurists “changed their focus from the true sex of the individual to the prescriptions for whole categories (male and female). This process, in turn, reaffirmed those categories and maintained the boundary between male and female while retaining the emphasis on male and female in relation to one another.” Sanders, “Gendering the Ungendered Body,” 79-80.

⁴⁴ In explaining the pre-Islamic origins of this practice of determining the gender of an intersex individual, al-Sarakhsī mentions a story of a judge who is confronted with such a case. The initial response of the judge was to rule that the person was both male and female, but he found his people (*al-qawm*) unwilling to accept such a conclusion. Bewildered, he retired to his home and was unable to sleep due to the challenge this case posed to him. According to the story, a young girl in his house noticed his bewilderment and asked him about his predicament. He explained the situation to her, and her solution was to consider the genital organ used in urination. Convinced by her solution to the problem, the judge returned to his people and ruled accordingly; this time they found his ruling acceptable. Al-Sarakhsī, *Al-Mabsūt*, 30:103.

tests and ultrasounds can help determine what today are called disorders of sex development (DSD).⁴⁵ Barring such medical possibilities, the law could only rely on material markers of sexual difference that were observable to the naked eye. At birth this was understood to be the genitalia (and at puberty, other markers such as menstruation, ejaculation, or the growth of breasts or a beard). Given the dependence on the genitalia and its function in urination, al-Sarakhsī argues that if the child urinates from the male genitalia it is determined to be male and if it urinates from female genitalia then it is considered female. It is important to note here that for al-Sarakhsī it is not the resemblance between male and female genitalia but the presence of both that determines intersexuality. However, given the importance placed on the genitalia as the functioning difference between male and female bodies, it is interesting that he does not attempt to describe what constitutes having both. In fact, there is no attempt to describe the form of sexually differentiated genitalia, it is simply assumed.

The ambiguity regarding the distinction between male and female genitalia is most apparent in the text's linguistic terminology. The prophetic tradition that al-Sarakhsī quotes does not name distinctive genitals but instead uses the phrase "that which is for women" and "that which is for men." Despite the centrality of genitals in determining the sex of an individual, throughout the text al-Sarakhsī does not use terms specific to male and female genitals. In other parts of his legal work, al-Sarakhsī often uses gendered terms for genitals: the word *dhakar* (penis) is used specifically for the penis; incidentally,

⁴⁵ For more information please see, "Disorders of Sex Development (DSD) Resources," University of Michigan Health System, November 2012, <http://www.med.umich.edu/yourchild/topics/dsd.htm>.

this word also means male. And the word *bud'* (vulva) is used specifically for the vulva of the woman. There are other words used to indicate genitalia: *al-ālah* (the instrument), which is used primarily for the penis and *farj*, which can mean both the vulva as well as genitals in general. In his discussion on intersexuality, however, al-Sarakhsī refers to both male and female genitals not as penis and vulva or vagina but instead as *al-ālah* (the instrument). As the focus of the law is on the function of genitalia as instruments of urination, there is no gender differentiation in the language used to describe them. In fact, in addition to using the term “the instrument,” the other term al-Sarakhsī uses to talk about male and female genitalia is an equally gender-neutral term: *mabāl*, meaning “the place of urination.” What this does effect, however, is a further linguistic ambiguity with regards to the already gender-ambiguous body.

The attention to the presence and function of both genitalia in constituting intersexuality, rather than the ambiguity of their form or resemblance between them, is true for medical texts as well. Social histories of the Ottoman Arab world show that surgeries were performed on adult men with breasts or women with unperforated vulvas for cosmetic reasons rather than as “corrective” surgeries. In some accounts, cosmetic surgeries were performed on women with clitorises that extended beyond the labia, became erect like a penis, and could in fact attain coitus. There seems to be no question in these accounts about the sex of the individual; they are men with breasts and women with penis-like clitorises. Intersexuality is about the presence of both genitals and not

about the resemblances between them.⁴⁶ Ibn Sīnā, one of the foremost classical Muslim philosophers and the author of many texts on Islamic medicine, also holds a similar view. He asserts that intersex individuals either lack male and female genital organs or have both. In cases where an individual has both organs, one is usually dominant over the other in urination, though he does recognize, as does al-Sarakhsī, that it is possible for both organs to be equally dominant in function.⁴⁷

Thus a child born with both genitalia is classified as intersexual and begins to undergo a multistep process of gendering. As mentioned above, the first step in determining the gender of an intersexed individual concerns the function of the genitals. The immediate legal concern in such a case is to determine which genital organ the child uses for urination, and the remaining genitals are considered an aberration.⁴⁸ The issue is complicated, however, by the possibility that the child could urinate from both genitals. In responding to this dilemma, al-Sarakhsī recounts that according to Abū Hanīfa, consideration should be given to the genital organ that precedes the other in urination. Al-Sarakhsī explains that this legal consideration is based on a legal principle that gives precedence to the prior over that which follows.⁴⁹ These two legal procedures--which genitalia is used for urination and if the child urinates from both, then considering the

⁴⁶ For more information see Sara Scalenghe, *Disability in the Ottoman Arab World, 1500-1800* (Cambridge, UK: Cambridge University Press, 2014), 133-34.

⁴⁷ Dallal, "Sexualities, Scientific Discourses."

⁴⁸ While al-Sarakhsī does not mention surgical removal of the other genitals in his legal text, Ibn Sīnā in his treatise *Qānūn* suggests that the treatment for intersexuality is to cut off the less visible and weaker of the two genital organs. Ibid.

⁴⁹ Al-Sarakhsī refers to this legal principle as "*al-tarjīhu bil sabaq 'inda al-mu'āraḍa wa al-musāwāh*" (preponderance is given to that which is precedent in cases of opposition and equivalence). Al-Sarakhsī, *Al-Mabsūṭ*, 30:103.

genital organ from which the child urinates first--are the first mechanisms the law uses to rewrite the gender-ambiguous body back into the gender binary.

These initial means through which the law determines the gender of an intersex individual highlight the very pragmatic and legalistic concerns that animate al-Sarakhsī's discussion of intersexuality. The legal process begins with the determination that sex and the resulting gender identity of an individual are established based on physiology. However, the jurists are challenged by the material reality that some bodies not only possess both genitals but, in fact, use both for urination. In such a situation, the concern is allayed not by an argument regarding the ability to "know" the gender of an individual or, in fact, even a biological argument regarding the location of sex in the function of a genital organ, but on a legal principle. In fact, al-Sarakhsī argues that once a legal judgment has been made based on urination, it cannot be reversed.⁵⁰ Thus, if a child at birth urinates from the female genital organ first, it is designated a female. However, if at a later stage the child were to urinate primarily from the male genital organ, it would not be considered male but would instead retain a gender identity as a female. If attuning to the function of genital organs resolves the ambiguity of the intersex body, then any change in the function of the genitals would presumably create some concern regarding the gender assignment, or at least re-open the door to the individual's gender ambiguity.

Al-Sarakhsī, however, does not seem concerned here with whether the law misjudged the "true sex" of the individual given the new evidence. This situation highlights the fluid and shifting nature of the intersex body that the law cannot easily fix.

⁵⁰ Al-Sarakhsī, *Al-Mabsūṭ*, 30:104.

It briefly escapes the legal matrix, and the law must contend with its arbitrariness. This labile and unfolding body becomes more what it is by behaving as it does. For al-Sarakhsī, the fluid materiality of the body is a source of anxiety, as the law relies on the notion of a fixed body for representation. At birth, when the child is born with both male and female genitalia, maintaining the gender binary hinges on a moment of fixity that focuses on determining urination from one particular genital organ at birth. Any subsequent fluidity of the body, even if it mirrors the initial criteria for gender assignment, must be made legally insignificant. We can once again see the way in which al-Sarakhsī constructs fictive “legal facts” that are necessary for the law-making process, but which highlight the instability of the legal system’s construal of reality.

Despite the law’s attempts to fix the fluidity of the intersex body, urination did not turn out to be the entire story in the legal process of gendering. Al-Sarakhsī continues in his discussion of the issue to consider the possibility that one of the genitals might not, in fact, be dominant or primary in urination. Given this possibility, what is the law to consider in gendering the intersex body? How can the gender binary continue to be maintained if the intersex body continues to defy representation within it? The law refers to the intersex child who cannot be gendered based on urination as *khunthā mushkil*, literally “ambiguously intersex.” Whereas the first category of intersex individuals are gendered at birth based on urination, the ambiguously intersex body cannot be fixed through this process. In the early formative period of the Ḥanafī legal school, such a consideration was perplexing and did not have any clear resolutions. Al-Sarakhsī argues, in fact, that in response to such a situation, Abū Ḥanīfa reportedly stated that he was

unsure of the legal ruling regarding such a child.⁵¹ The law, however, could not leave the ambiguously intersex (*khunthā mushkil*) person ungendered. The legal matrix in which the gender binary is so fundamental would render such an existence unintelligible. To the extent that a legal ruling does not take into account gender differentiation, the ambiguously intersex individual poses no challenge to the law. However, once they near puberty and become legally accountable, the law must contend with how gendered rulings apply to such a person.

Al-Sarakhsī's legal innovation in this regard is two-fold: he argues that judgment must be suspended in such a case until puberty, when other markers of the sex of the individual would appear. In that intermediary period, however, legal rulings are applied by ascertaining the legal obligation of the individual based on whether they were male or female, and then considering which ruling is most appropriate for the situation.

Interestingly, the law does not take into consideration the possibility of legal rulings specific to or accommodating gender ambiguity. Thus, when the law is confronted with

⁵¹ Al-Sarakhsī narrates that Abū Ḥanīfa responded: *lā 'ilm lī bidhālik* ("I have no knowledge regarding this"). Al-Sarakhsī does mention that Abū Ḥanīfa's two eminent disciples, Abū Yusuf and Muḥammad, proposed a possible solution to the legal enigma regarding the child who urinates from both genitals at the same time. They suggested collecting the urine excreted from each genital organ and measuring its volume. The genital organ that produced the greatest amount of urine would then determine the gender of the individual. Their reasoning in this matter, according to al-Sarakhsī, was that just as the legal principle gave precedence to that which precedes over that which follows, by extension precedence should be given to that which is more over that which is less. Following this reasoning would lead to the conclusion that the genital organ that produces the most urine is dominant and thus should be taken into consideration when determining the sex of the child. According to al-Sarakhsī, Abū Ḥanīfa rejected this solution on two grounds: that the volume of urine excreted is dependent on the size of the urethra (*sa'a al-makhrāj*) and this is not of legal significance in this decision. Furthermore, he argued, the female urethra is wider than that of the man's which could account for the greater volume. His other objection was that the volume that is being considered here is apparent in the urine and not in the function of the genital organ. Sexual difference, he argued, is marked by the genital organs and their function, rather than the urine. He further argued, when the law considers which genital organ urinates first, this is due to the fact that the organ that urinates first is immediately designated the functioning genital organ and the second is discarded from consideration. However, when both genital organs urinate simultaneously, both of them acquire the designation of the functioning genital organs. This, according to Abū Ḥanīfa, is why the legal principle that gives precedence to the genital organ that urinates first cannot be extended to the one that produces a greater volume of urine. For al-Sarakhsī, it is due to Abū Ḥanīfa's reasoning that judgment is suspended until puberty if the child urinates from both genital organs. Al-Sarakhsī, *Al-Mabsūṭ*, 30:104.

an intersex body that it cannot gender immediately, its mode of enforcing the gender binary in the face of such individuals is to insist that all humans are either male or female, and thus legal rulings must be applied to intersex individuals as if they were men or women. While this insistence allows the law to maintain the centrality of the gender binary, it does create a further problem in that such a solution creates a situation where certain individuals exist in society either temporarily ungendered or vacillating between the performance of masculinity and femininity. This legal mechanism again challenges the law's depiction of the gender binary as natural, opening up the possibility that gender is a performance rather than a sign of an ontological reality or essence.

In order to make my point clearer, I will discuss some examples of legal rulings that al-Sarakhsī considered with regards to the ambiguously intersex individual. I will begin here with legal rulings pertaining to prayer. According to Prophetic tradition, men and women line up separately during ritual prayer. Men line up in the front and women line up in rows behind them. The question arises, however, as to where the ambiguously intersex should stand in prayer. There were two concerns with the validity of prayer. According to Ḥanafī law, if a man touches a woman during prayer, his prayer is invalidated. The second concern relates to sexual anxiety and the possibility that men and women standing close to one another will create sexual desire. According to al-Sarakhsī, the solution is that the ambiguously intersex individual should stand for prayer behind the rows of men and before the rows of women. At first glance, the response to the dilemma regarding ritual prayer seems like the law accommodates gender ambiguity by creating a third space for intersex individuals. If we look at the legal reasoning more closely,

however, this is a temporary spatial accommodation and not a conceptual shift. The reasoning given for this solution is as follows: If in fact the ambiguously intersex person is a man, then standing in prayer with the women would invalidate “his” prayer. If it is a woman, then standing in prayer with men would invalidate “her” prayer. The answer to this dilemma, then, is to place intersex individuals in a physically liminal space between men and women. Thus the law’s entire framework for thinking about the intersex individual is to consider what the legal obligation would be if they were a man or a woman and then err on the side of caution. The possibility that they might not be either, or that they might be both, is never considered.

The challenge regarding prayer is not simply the spatial arrangement but also ritual performance. Unlike other Islamic legal traditions, Hanafi law stipulates that men and women must take on different prayer postures: men take on a power pose and women a submissive one. Masculinity and femininity is embodied in the performance of prayer. So what prayer posture is the ambiguously intersex individual to take? The solution, al-Sarakhsī argues, is for that individual to pray like a woman.⁵² This would mean that the ambiguously intersex pray with a head covering and perform the prayer postures of women, which are fashioned to effect a demure and meek posture. For al-Sarakhsī, this solution is most appropriate, as men can pray like women given exceptional circumstances, and gender ambiguity does qualify as such.⁵³ In an intriguing solution to the problem of prayer, the law creates a subject who stands in a liminal space within the

⁵² Ibid., 30:107.

⁵³ Ibid., 30:106.

gender binary, neither man nor woman, and yet simultaneously performs femininity while praying.

Another example of this legal solution pertains to the ritual performance of Ḥajj for ambiguously intersex individuals. Ḥajj is an annual pilgrimage to Mecca that every Muslim is obligated to complete once in a lifetime, and pilgrims must adhere to particular ritual obligations during the completion of the pilgrimage. As part of the ritual obligations, pilgrims must wear unceremonious clothing. Men are required to dress in white and cannot wear clothing that is stitched; in other words, they are required to wear two large white sheets that are wrapped around their bodies. Additionally, they must reveal at least one shoulder, thus leaving parts of their bodies exposed. Women, on the other hand, are exempt from these requirements, as they are legally obligated to cover their entire bodies and must wear stitched clothing so as not to lead to inadvertent exposure of their bodies during the strenuous physical demands of Ḥajj rites. The question then emerges, what is the ambiguously intersex to wear during the Ḥajj? Al-Sarakhsī's solution again reveals the law's inability to consider gendered existence beyond the binary. In such a situation, the law turns again to thinking of the gender ambiguity of the intersex person as a problem of not being able to read the gender of the individual through their body, rather than an absence of gender itself. The intersex individual is necessarily either male or female. Al-Sarakhsī argues that if the ambiguously intersex individual is female but dresses as a male, then wearing unstitched clothing and exposing the body would be sinful and also lead to enticement and sexual desire. If, however, the ambiguously intersex individual is a male and dresses like a

female pilgrim, then “he” will be violating the requirements of the Ḥajj rites. In such a situation, there does not seem to be much room for a third space. The solution, al-Sarakhsī states, is for the ambiguously gendered person to dress like a woman. The legal argumentation here, like that for prayer posture, is based on the cautionary principle. In the face of doubt, the law errs on the side of caution. If the ambiguously intersex is a woman, then to expose her body would be sinful. Male pilgrims, on the other hand, can cover their bodies and wear stitched clothing due to extenuating circumstances. If the ambiguously intersex individual is a man, then wearing stitched clothing would not be sinful given extenuating circumstances. Again, for al-Sarakhsī, intersexuality certainly qualifies as an extenuating circumstance.⁵⁴

Where al-Sarakhsī is unable to apply a gendered legal ruling to the ambiguously intersex individual, he suggests suspending judgment until the gender of the individual can be determined and established. Al-Sarakhsī argues, for example, that if a man kisses an ambiguously intersex individual, then that man cannot marry the mother of the intersex individual until the gender of the individual can be determined. This is due to the fact that if the intersex individual is a woman, then her mother becomes prohibited to the man in marriage after the kiss. If, on the other hand, the intersex individual is male, then the kiss has no legal effect and the mother remains marriageable. In another instance, al-Sarakhsī argues that if a father marries his ambiguously intersex child to a man or a woman, then the marriage is suspended (*mawqūf*) until the intersex person reaches puberty and a gender identity can be established. The reason for the suspension, he

⁵⁴ Ibid.

argues, is due to the fact that a man enters into marriage as a proprietor⁵⁵ and a woman as possessed (*mamlūka*). Given the gender ambiguity of the individual, there is no legal evidence for establishing proprietary rights or establishing ownership. One might ask, then, why the marriage contract is not simply voided. In response to this, al-Sarakhsī states that given that there is no legal reason to void the decision of the guardian, the contract is not voided. Interestingly, here al-Sarakhsī's interest seems to be for maintaining the authority of the guardian to contract a marriage of his minor child in addition to the legal problem of the gender ambiguity of the intersex individual. In such a situation, then, the marriage contract is suspended until puberty, when other signs of sexual difference must emerge. At that point, al-Sarakhsī argues, if it is determined that the intersex individual is a man and the father married him to a woman, then the contract is deemed valid. However, if the marriage cannot be consummated due to the fact that the "man" is not able to penetrate the woman, the law does not reconsider its decision. In an interesting move, al-Sarakhsī asserts that in this case the "man" is analogous to the impotent man and the same rules apply to this marriage as in the case of a woman married to an impotent man.⁵⁶ If, on the other hand, the intersex individual is determined to be a man and the father had married him off to a man, then the marriage contract can be voided, as such a marriage is not valid.⁵⁷

While al-Sarakhsī discusses many other legal cases and scenarios with regards to the ambiguously intersex individual, the above cases illustrate the primary legal

⁵⁵ "*Lianna al-dhakar yadkhul fī al-nikāḥ dukhūl al-mālikīn.*" Ibid.

⁵⁶ For more information on the legal considerations in a marriage between a woman and an impotent man, please see Chapter Three.

⁵⁷ Al-Sarakhsī, *Al-Mabsūṭ*, 30:106.

mechanisms through which the law attends to the disruption the intersexed body poses to the legal system, which takes the gender binary as a hermeneutical framework. The law's first instinct is to determine whether the individual can inhabit a particular gendered ruling without any legal violations. When this is possible, the cautionary principle is applied to determine whether the intersex individual should follow the ruling specific to men or women. This approach requires the intersex individual to vacillate between the performance of masculinity and femininity. The same individual, depending on the case and situation, performs both masculinity and femininity until the "true gender" of the individual can be determined. If, however, the individual cannot perform a particular gendered ruling without legal violations, then the law's approach is to suspend judgment until puberty, when the gender identity of the individual can be established. Interestingly, what remains constant in both these legal approaches is the gender binary that continues to inform the mode of legal reasoning. In every situation, al-Sarakhsī considers the legal obligation of the intersex individual as if it were a man or a woman, and then attempts to reconcile the conflict by erring on the side of caution or suspending judgment altogether. Within the strongly established gender binary, it is simply not possible for the law to consider gender-ambiguous individuals as subjects of the law. The law's construction of the gender binary is such that it cannot accommodate gender ambiguity.

Al-Sarakhsī's final resolution to the problem of the ambiguously intersex individual further demonstrates his construction of a legal fiction through the selection of certain facts. In the face of gender ambiguity, the law faces a hermeneutical paralysis to which al-Sarakhsī responds by insisting that the gender ambiguity of the ambiguously

intersex individual is not a permanent but a temporary condition. A legal determination of the gender identity of the individual is only suspended until puberty, when other physiological markers of sex difference emerge. Among the markers considered are the growth of a beard or breasts, menstruation, pregnancy, lactation, or ejaculation. The ability to penetrate or be penetrated is also a marker. Al-Sarakhsī is adamant that at puberty it is imperative that gendered markers will emerge that will make manifest the gender of the individual. He asserts emphatically, “The ambiguity does not remain in him [the intersex] after puberty so it is inevitable that the ambiguity abate as markers become apparent.”⁵⁸ In the final possible scenario, if no apparent signs manifest themselves, then the individual is gendered male as long as they do not grow breasts. The absence of breasts, he argues, is a sign that the individual is male.⁵⁹

In this manner, the intersex body that challenges and baffles al-Sarakhsī is written back into the gender binary by the insistence that the ambiguity is temporary and due to the lack of available evidence. Deferment until puberty is the final consideration that the law is willing to grant gender ambiguity. If no markers appear, then al-Sarakhsī’s final conclusion is that the default gender is male, as there are no evident markers specific to femininity. Here al-Sarakhsī does not consider the possibility that an ambiguously intersex person at puberty might develop both a beard and breasts. While he recognizes variations in physical anatomies and struggles to fix the intersexed body, al-Sarakhsī only admits certain configurations of ambiguity. Thus the law’s concern in assigning a gender

⁵⁸ “*Wa innama lā yabqā al-ishkāl fīhi ba’d al-bulūgh fa lā budda an yazūl al-ishkāl bi zuhūr ‘alāmat fīhi.*” Ibid., 30:104.

⁵⁹ Ibid., 30:112.

identity is not necessarily with establishing the “true sex” of an individual, but with determining what gender identity is most closely approximated given certain tangibly knowable markers. In fact, where the law is made to recognize that the evidence it used to assign a particular gender identity has changed, or where there is complete lack of evidence, the legal rulings with regards to the gender identity remain unchanged.

This need to identify objective markers that determine the legal “fact” of an individual’s gender identity also manifests itself in al-Sarakhsī’s rejection of the subjective testimony of an intersex individual. Al-Sarakhsī argues that one cannot take the word of the ambiguously intersex individual about their own situation in making legal determinations. If such a person says, “I am a man,” or “I am a woman,” al-Sarakhsī asserts, the judge should not accept this claim as evidence.⁶⁰ The intersexed individual, he argues, is no more aware of their gender than the next person. Unless there are particular physiological markers that indicate a gender, the subjective experience of a gender identity is of no legal consequence. Thus the gender of an individual cannot be identified by interior experience or subjective testimony, but rather by tangible evidence, such as physiological markers of the sexed body.

In addition to this identification of certain facts that are used to determine the gender of an individual, al-Sarakhsī also relies on the performance of gender identities in order to resolve the ambiguity of the intersexed body. As we have seen, the law indeed insists that the gender-ambiguous person has a gender identity that temporarily cannot be known, and yet also asserts that such a person can perform both masculinity and

⁶⁰ Ibid., 30:110.

femininity until such time as their true gender can be determined. Indeed, the trueness of gender is not dependent on its performance. Once the legal reality of an individual's gender has been established, they are then socialized into masculinity or femininity, both of which are equally possible for every individual. This performative aspect of gender is apparent, for instance, in al-Sarakhsī's discussions on custody and parenting of children in the case of divorce. He maintains that a young boy past the age of seven should leave the care of his mother and maintain the company of men (i.e. be parented by the father). The harm of staying with the mother, al-Sarakhsī tells us, is that the company of women would socialize the boy into femininity, affecting his mannerisms and speech, causing him to become effeminate.⁶¹ Thus, in the case of the intersex individual, the role of the law is to read for morphological markers of "true gender" and then socialize the individual to embody that gender through learned behavior and performance.⁶² There is, thus, a seeming recognition of the fictive nature of this gender identity, while nonetheless taking for granted the ontological reality of the gender binary.

The challenge the intersex body poses to the law has highlighted a number of important themes. To begin, exploring how al-Sarakhsī responds to intersexuality has demonstrated how fundamental the gender binary is to the hermeneutical framework of the law. This section has illustrated the constructed nature of the gender binary by

⁶¹ Ibid., 5:208.

⁶² Thomas Laqueur also notes this performativity with regards to the conception of gender in Renaissance Europe. He argues that judges' concern was not for the underlying sex of the intersexed individual, but with gender: what clothes should they wear? What postures should they assume? There was also little regard for what we would call a core gender identity. "Gender as a social category" he argues, "was made to correspond to the sign of sex without reference to personhood. The authorities assumed that the transformation from one to another state was absolutely precipitous, like moving from being married to being unmarried. Subjects were assumed to change from being socially defined girls to being socially defined boys with no difficulty or inner turmoil." Laqueur, *Making Sex*, 138-39.

exploring the moments of rupture where the law must contend with gendered subjects that challenge the binary. However, the law develops different mechanisms for writing such subjects back into the binary, demonstrating that the gender binary in al-Sarakhsī's thought is formative to the law's understanding of legal subjects and is constitutive of its hermeneutical paradigm. In a similar vein, our exploring of intersexual subjects demonstrates that the law is unable to think of subjects outside of the gender binary. The only possibility for al-Sarakhsī is to consider legal rulings for male or female subjects, and assign temporary roles or rulings for intersexed subjects until the law can devise a mechanism to gender such subjects. The paralysis of the law in devising gender-neutral legal rulings and the urgency with which it genders the intersex subject--despite the vulnerability it opens up for the law in exposing the arbitrary nature of assigning a gender identity--is further evidence for the fundamental importance of the gender binary in legal hermeneutics. The law simply cannot think of human existence outside of the gender binary.

Secondly, the law's contention with the intersex body provides us a unique opportunity to observe its struggle to maintain the gender binary in the face of a rebellious, gender-ambiguous body. This provides a highly illustrative example of the process through which al-Sarakhsī creates legal fictions. The law is in need of a stable object, the instability and fluidity of the intersex body troubles the gender binary, and the law steps in and devises different mechanisms for maintaining the stability of the binary in the face of intersexuality. These mechanisms used to gender the intersex individual reveal for us the constructed nature of the gender binary that is presented as natural by the

law. As Jeanne Boydston argues, categories “tend to reduce the mess and variability of lived experience to a few elements that are allowed to stand, falsely, as a substitute for that experience, and to collapse complicated and distinct historical processes into stable, materialized representations.”⁶³ The intersex body belies representation, taking away from the law its object of representation. In exploring the multiple mechanisms the law uses to write that body back into the binary, we have seen the incoherencies and dissonances that must be negotiated in gendering the ungendered body. Furthermore, the arbitrary nature of determining and imposing a gender identity on the individual allows us to interrogate the law’s presentation of a coherent natural body by observing how it constructs and fixes this body. By exploring the complicated process through which the law attempts to make intersexed bodies intelligible, we see not only how the law struggles to fit the materiality of the body into its gender binary, but can also observe the legal matrix through which the binary is maintained.

5.4 Conclusion

Children as legal subjects in al-Sarakhsī’s work are an interesting case study for our exploration into the construction of gender in early Islamic law. My interest in children was largely motivated by a desire to think about the gender binary from the peripheries. Children sit as subjects at the margin of that binary, as they are not always desiring subjects and are also recognized by the law as potentially gender ambiguous.

⁶³ Boydston, “Gender as a Question of Historical Analysis,” 560.

As my discussion in this chapter has demonstrated, al-Sarakhsī's considerations regarding child marriage and intersexual children allow us to consider the different legal mechanisms employed to rewrite these subjects back into the gender binary. The legal discussion on the marriage of minors demonstrated that while the permissibility of marriage to minors is the same regardless of the gender of the child, the legal rulings regarding the consummation of the marriage are deeply gendered. It is in these considerations that we can see most clearly the work of the gendered ontology in the construction of gendered child subjects. In making the consummation of a marriage between an adult man and a minor girl permissible, the legal considerations center not on the desire of the girl but on her desirability and her ability to endure penetration without physical harm. While al-Sarakhsī does seem to consider the possibility of the desire of the female child for sexual intercourse, he constitutes female desire as empirically unknowable. The material reality of female sexuality, for the law, is an enigma. In its stead the law considers male desire for the female child. Thus, if the female child reaches the age and body size that the law considers to be desirable, then it is safely assumed that she might also be desiring. With the male child, on the other hand, consummation is only legally possible when the male child comes into his own desire. His desire is marked by his ability to achieve an erection and penetrate. What is not given much attention in legal considerations of consummation is the desirability of the male child. Thus, while the active/passive binary is seemingly absent in legal considerations regarding the permissibility of minor marriages, when we consider legal discussions regarding the

consummation of such marriages, we see how the binary functions yet again in legal hermeneutics.

In gender-ambiguous child subjects, on the other hand, the challenge posed to the binary is even more evident. A child born gender ambiguous belies representation in the gender binary, causing the law to consider how to gender such a subject. There are three main legal mechanisms that the law employs to do this: 1) gendering the subject based on the dominant genital used for urination; 2) if that cannot be determined, then suspending judgment until puberty and gendering the subject based on other markers of gender, such as the growth of a beard or the onset of menstruation; and 3) if no such markers appear, then gendering the intersex child male if there is no growth of breasts. Al-Sarakhsī is adamant, in fact, that no individual can exist in gender ambiguity after the onset of puberty. Focusing on gender-ambiguous child subjects, I argue, allows us to illustrate the instability of the gender binary that insists on its naturalness while having to account for the intersex subject that belies representation within that binary. However, by exploring how the law embarks on the process of gendering such subjects through various legal principles and legal mechanisms, we gain insight into the process through which the law constructs legal facts in the interest of maintaining gender and gendered subjects of desire as stable, legislatable objects.

6. Conclusion

Several years ago, while at a conference, I had an engaging conversation with one of the presenters. We were sitting next to one another during lunch, and after the first few moments of awkward silence, we began to introduce ourselves. When he mentioned his name, I realized that he is a well-known teacher at a renowned institute of Islamic education. His presentation was related to the development of early Islamic law and so I attempted to make a connection between our mutual interests. When I mentioned that my research is on the construction of gender in early Hanafi law, he responded with both intrigue and suspicion. Over the years, I have come to anticipate this response whenever I'm speaking to Muslims who feel beholden to the historical legal tradition. He proceeded cautiously, asking me questions about my dissertation, trying to ascertain if I take a critical approach to the law.

As we discussed gender-based differentiations in Islamic law, he hastened to assure me that the concerns of many Muslim women with regards to the imbalance of rights granted to men over women were misplaced. *Fiqh*, he argued, does not dictate morality but only provides us with the minimum guidelines. Thus, the legal rulings provided by the law are not the standard by which one should act, but instead the bare minimum that an individual is required to do in order not to sin. While men have been granted certain rights and authority over women, the higher ethical and moral behavior is for them to exercise their privilege in a manner that is not domineering. This argument about benevolent patriarchy is one that I have heard subsequently in many different circles.

I recently came across this argument again, this time in the form of a legal opinion regarding the right of a wife to sexual intercourse. The question was addressed to SeekersHub, a prominent online Islamic educational institute that I discussed in Chapter One. The questioner inquires what right a wife has if her husband refuses to have sex with her for several months. The respondent, Salman Younas, states emphatically that the wife has a right to sexual intercourse just as a husband does. This statement is followed by an account of the juridical considerations about how often a husband must fulfill his wife's right to sexual intercourse. After considering a range of positions, the respondent concludes that the wife has to the right to sexual intercourse every so often or based on what is culturally expected.¹ The legal manuals, Younas argues, aim to establish the minimum rights granted to an individual, which were formulated in a manner that could be implemented in court. These manuals are thus not concerned with the relationship dynamic necessary for fostering a healthy marriage but rather with legislating these relationships. "Not recognizing the function of legal manuals often leads to conflating many of the rules that are found in them with what an optimal marriage should look like, which is both incorrect and harmful," he asserts. One must think beyond the texts, taking "a higher and more holistic conception of marriage" that is based on "ethics of marriage grounded in the *sunna*" rather than "mere legal rules."²

¹ The range of legal opinions on this issue is anywhere from every so often to once every four nights, once every month, once every four months, once in a lifetime, or in accordance to cultural norms. "What Advice Can You Give for a Woman Whose Husband Does Not Want to Be Intimate With Her," *SeekersHub*, May 4, 2016. <http://seekershub.org/ans-blog/2016/05/04/13967>.

² *Ibid.*

This differentiation between law and ethics is apparent in a number of other answers on SeekersHub, often in relation to the authority and rights of the husband which are perceived by the questioner as unjust. In these cases, the tendency of the respondent is to redirect the conversation away from the hierarchy in the marriage relationship that is established by the law, and emphasize instead an ethic of mutuality. By appealing to virtue and higher ethical behavior, these respondents are able to maintain the authority of the husband with the promise that it will not be exercised in a manner that is domineering.

This strategy, while effective in mitigating male authority in the family, also works to maintain the authority of the legal texts by explaining away the imbalance of rights as simply the base level requirement of justice rather than an ethical ideal. Where the direct application of the law runs up against certain norms or vales, one can appeal to the difference between law and ethics to justify deviation from the law. As long as a ruling has not been violated, one is still within conformity of the law. While this mode of reasoning can be beneficial in curbing the full implication of the right's granted to the husband in the law, I argue that it reflects a reductionist and flawed reading of the law.

The impulse to create a strong divide between the law and higher virtue or ethics assumes that the law is limited to rules, simply setting baseline standards of decency. Aside from observing that baseline standards are themselves also ethical determinations, the more relevant critique here is that this perspective ignores the way legal discourse is informed by implicit and explicit assumptions about the world. This construal of reality is reflected in the framework and parameters of the rules. This defensive posture that

seeks to differentiate between baseline legal rules and ethical ideals does not account for the ways in which these rules construct and assume a framework that determines the parameters within which higher ethical ideals are imagined. It is ill-informed to hold on to the framework of the law while assuming that it will not deeply shape the higher standard of ethical ideals. In fact, there is an ethical imaginary embedded in the very gendered assumptions of the law. The assumptions about gendered existence that are present in the text are not value-neutral, but rather have serious normative and ethical implications.

My observation regarding the gendered assumptions that inform the law emerges from a vibrant body of feminist scholarship. Employing gender as a category of analysis, these works have highlighted how various legal institutions, structures, and regulations in the positive legal texts have been shaped by gendered assumptions. Two prominent examples of this feminist reading of the legal discourse are those of Kecia Ali and Hina Azam. Kecia Ali's work investigates the juristic construction of the marriage contract in early Islamic law, demonstrating the vital links between enslavement and femaleness and the marriage relationship and slave ownership.³ Marriage, in the formative period of Islam, she argues, was solidified as a relationship of male control and dominion over the wife. Marital claims were differentiated along gendered lines, granting husbands right to sexual access and control of the wife's mobility and the wife the right to financial support and companionship.⁴ This gendered hierarchy, however, was "undercut at numerous

³ Ali, *Marriage and Slavery*.

⁴ *Ibid.*, 189.

points by the recognition of female personhood, of women's needs, of slaves' humanity."⁵

Hina Azam's recent book focuses on sexual violation in Islamic law, calling attention to the link between female sexuality and property in the development of the legal concept of sexual violation in Ḥanafī and Mālikī legal schools. Her work documents the divergent legal conception of sexual violation between the two legal schools, locating Islamic legal discourse in the broader context of Near Eastern religious-legal traditions. These traditions were characterized by "a tension between regarding female sexuality as a type of commodity or property, on the one hand, and as the extension or locus for the individual's relationship with the gods or God, on the other."⁶

This abovementioned scholarship has been foundational in laying the grounds for the methodological and analytical framework of my dissertation. My dissertation has explicitly endeavored to show the intimate link between the law's assumptions regarding gender and the process of law-making in early Ḥanafism by focusing on the legal thought of Muḥammad ibn Aḥmad al-Sarakhsī. I have demonstrated, in particular, his assumptions regarding gendered being and the ways in which the ontological construction of gender informs his legal hermeneutics. The different legal cases and scenarios presented by al-Sarakhsī in his positive legal text demonstrate that the rules produce and demand certain constructions of gendered existence. These constructions of gendered nature simultaneously function as hermeneutical assumptions in the

⁵ Ibid., 190.

⁶ Azam, *Sexual Violation in Islamic Law*, 59.

interpretation and production of the law. Whereas the abovementioned works have primarily focused on the law's conception of femaleness, my dissertation builds on this literature by focusing on how maleness and femaleness both are constructed in a relational manner, as foils of one another. By exploring gendered legal subjects, I question and directly examine the gendered nature imagined by al-Sarakhsī and its construction along the active/passive binary.

As I mentioned in the Introduction, Kecia Ali, Judith Tucker, and Marion Katz have written on this intersection of gender and legal subjecthood. Ali argues that while slavery and minority hinder an individual's full legal subjecthood, it is only femaleness that is a permanent legal impediment.⁷ Tucker, on the other hand, narrates the hampered legal agency of women in the law by arguing that "woman" as subject of law is an equal and autonomous subject in relation to the male. To the extent that her legal autonomy is hindered it is due to her position within the family and patriarchal society at large. Katz's argument pushes Tucker's assertions further, questioning whether "woman" is a monolithic category in the law. In providing a historical account of the development of legal discourse on women's mosque attendance, she demonstrates that in early legal texts, the category of "woman" intersected with other factors such as age and enslavement. Gradually, however, "woman" became an increasingly monolithic category and women were largely associated with sexual chaos (*fitnah*).⁸ However, the rise of the figure of the

⁷ Ali, *Marriage and Slavery*, 47.

⁸ Katz, *Women in the Mosque*, 104-105.

desirable youth in the legal texts fractured any simple binary distinction between males and females.⁹

My dissertation reconciles Ali's insight regarding femaleness as a permanent impediment and Tucker's and Katz's assertions about the shifting and fractured category of "woman" in the law. My analysis of al-Sarakhsī confirms Ali's observation by illustrating the overarching ontological narrative that structures the law and legal hermeneutics. The construction of gender along the active/passive binary renders the female subject as passive and the male as active. The female, as a legal subject, is not understood to be a fully agential subject in the same manner as the free male.¹⁰

However, to present the active/passive binary as the only structuring principle of gender in al-Sarakhsī's text would not tell the entire story. As we have seen throughout the dissertation, numerous legal cases in al-Sarakhsī's text deal with legal subjects that do not neatly fit the gender binary. My dissertation thus also demonstrates the way in which the categories of both "man" and "woman" are unstable and fragmented in al-Sarakhsī's writings. While he often speaks categorically of male and female natures, such statements are belied elsewhere in his text where he must account for competing social facts such as age and enslavement that cut across assumptions about gender. These different matrices disrupt any simple construction of subjects of desire along the axis of gender.

⁹ Ibid., 106.

¹⁰ Slavery is an impediment that restricts the legal agency of the male slave. However, as Ali points out, slavery is unlike femaleness in that it is not a permanent impediment in the law. Once it is removed, the former slave man becomes a full legal subject as a free man. The same is not true for the female slave who, upon emancipation, acquires the status of the free woman who is not fully agential in the manner as the male.

The challenge posed to the gender binary by the different legal cases I examined has led me to interrogate my own assumptions about gender and its salience as a category of analysis. It became clear to me that gender is neither a stable category in al-Sarakhsī's legal thought, nor always the most salient category in explicating how he imagined human existence or ordered social relations. In investigating my own assumptions regarding the salience of gender as a category of analysis and attuning to the multiple categories that construct legal subjecthood, I am informed by feminist historiographers and their call to decenter and provincialize the Western cultural logic of gender.

In her article "Gender as a Question of Historical Analysis," Jeanne Boydston cautions that gender as a named category now functions as a set of universalized premises, flattening complex historical processes and meanings.¹¹ She argues that feminist historiography has treated gender as "non-historically-contingent – that is, as unfolding in much the same way and in much the same terms in all societies."¹² Such historical accounts disregarded the very local character of the concept, instead taking the *local* that is particular to the United States and Western Europe and universalizing it.

As an example of these sorts of histories, Boydston offers studies of Native American women that attempted to assess the relative power of male and females in Native cultures, posing questions about the gendered division of labor or the gendered division of authority, questions that emerge from a twentieth-century category of gender. Such studies focused on whether women's work was valued or whether it granted them

¹¹ Boydston, "Gender as a Question of Historical Analysis," 560.

¹² *Ibid.*, 559.

prestige in their communities, whether women participated in community council, or whether they served as chiefs. The questions posed by these studies, Boydston argues, “assumed in indigenous societies a stable sexual opposition functioning independently as a primary signifier of power – a system of gender, in other word, modelled closely on the presumed European system.”¹³

Pushing against this universalizing and simplifying tendency are certain feminist histories of gender that demonstrate that the male/female binary, even if present, was always intersecting with other binaries. In the context of Native American conceptions of gender, these studies show that while the male/female binary certainly existed, it was not more salient than other binaries such as war/peace, young/old, or plant/animal.¹⁴ These studies are not questioning the very category of gender itself as salient for historical analysis, but challenging our assumption that the male/female binary was the primary signifier or differential relation of power. These studies complicate for us our assumptions about the gender binary but do not fundamentally dislodge it.¹⁵

Turning to the Islamicate context, Afsaneh Najmabadi also pushes against the ethnocentricity of gender as a category of historical analysis. Describing her investigation into the work of gender in the formation of Iranian modernity, she asserts that she first had to break free of the narrative implicit in the category of gender. This was necessary in order to show how thinking of gender as the binary construction of man/woman was a production of early modern Iran. The gender binary as we understand

¹³ Ibid., 572.

¹⁴ Ibid., 572.

¹⁵ Ibid., 577.

it was not the cultural logic of gender for pre-modern Iran. She argues that there was a shift from a logic in which “all gender categories were defined in relation to adult manhood, to a view in which woman and man became opposite and complimentary, to the exclusion of other categories that would not fit.”¹⁶

Following Boydston’s and Najmabadi’s urging to interrogate and historicize the category of gender, my research into gendered legal subjects in al-Sarakhsī’s legal thought aims to historicize and localize the production of gender in early Islamic law. To begin, I have illustrated how al-Sarakhsī himself conceptualizes gender along the axis of activity and passivity. This conception of gender is very different from contemporary Muslim discourses and cultural logics of gender. Indeed, even those who claim to be upholding the pre-modern intellectual tradition conceptualize gender within a complementarity paradigm. This conception removes the gender hierarchy implicit in the active/passive binary, narrating the binary instead through the prism of social harmony and biological determinism.

In taking on Boydston and Najmabadi’s methodological critique, I do not wish to argue that gender is not a salient category for Islamic law. Indeed, I take seriously al-Sarakhsī’s claim that gender is a fundamental distinguishing factor in humans. Al-Sarakhsī himself routinely employs the terms “male/man” (*rajul* and *dhakar*) and “female/woman” (*mar’a* and *unthā*) to refer to gender as universal categories regardless of distinction between different types of men and women in the law. In fact, he is

¹⁶ Afsaneh Najmabadi, “Beyond the Americas: Are Gender and Sexuality Useful Categories of Analysis?” *Journal of Women’s History* 18, no. 1 (2006): 13-14.

adamant that the male and female are fundamentally different from one another. This is most apparent in his discussion of slavery along gendered lines: “The human male and female are legally two genera, because the purpose performed by one cannot be realized by the other. The purpose of the female slave is concubinage (*istifrāsh*) and birthing children and none of this can be realized by the male slave.”¹⁷ Despite the difference in the status granted to free and slave subjects in the law, they are united along gendered lines through a gendered power dynamic: the female is defined by the sexual use made of her by the male and by her ability to bear children for him.

What I am proposing, however, is that other systems of distinction also function within the law and at times they intersect with or even displace gender as systems of differentiation. We saw, for example, that the law at times does recognize the female as subject of desire, shifting her position within the binary. When the female subject’s position in the binary shifts, the gender binary is undone. The foil of the desiring female, however, is not a desirable male subject. Likewise, the category of both “man” and “woman” are disrupted and displaced when considering the nakedness of the slave woman. While al-Sarakhsī insists that women are fundamentally *‘awra* that must always be covered, the slave woman is prevented from covering a fair amount of her body. Enslavement both binds the slave woman to femaleness (in that she, unlike the male slave, can be used as a concubine) and yet also displaces it. In the matter of covering, the master/slave binary trumps gender as a system of differentiation. Given the shifting and fluid nature of the gender binary and its intersection with other binary constructions of

¹⁷ Al-Sarakhsī, *Al-Mabsūṭ*, 13:13.

the law (such as age, social and sexual status, and enslavement), I ask what the study of gender in Islamic law would look like if we analyze maleness and femaleness as internally fractured concepts in the law. How can we account for the multiple constructions of gender in the law, indeed even within a singular text?

I argue that the instability of the category of gender in al-Sarakhsī's thought is specifically a product of the genre of legal discourse and the project of law-making. As I have demonstrated throughout the dissertation, al-Sarakhsī's process of constructing gendered subjects is an attempt to capture and fix the messiness of the social world and lived experience, and to create categories and facts that the law can legislate. This ordering is most evident when we attend to the materiality of the body, the possibility of alternative legal opinions, and the inconvenient facts that briefly show up in the text but are immediately made invisible. Furthermore, the inconsistencies and fissures in his construction of gendered subjects alert us to the fact that, while the active/passive binary is the narrative arc that structures al-Sarakhsī's claims about gendered nature and gendered subjects of the law, these claims can often shift for the purposes of rationalizing legal rulings and justifying legal precedence. Given these fissures and dissonances, I argue that al-Sarakhsī's ontological claims regarding gender are a legal fiction.

It is important that scholars of Islamic law and gender – and Islamic law more broadly – attend to such particularities of the genre of legal discourse. I argue that it is important to not only understand the content of the law, but also the role of legal reasoning in justifying existing legal rulings of the legal school. In my analysis of al-Sarakhsī's legal reasoning, I have demonstrated the centrality of post-hoc rationalizations

in shaping legal arguments and normative claims. Al-Sarakhsī's construal of gender is often inconsistent and fragmented precisely because of this justificatory "logic" of the law. To point to the shifting nature of ontological claims in the service of post-hoc rationalization of legal precedence, however, is not to argue that these claims are a mere rhetorical move and have no substance in the law. Rather, as I have already suggested, this framework does important work in legal hermeneutics, despite its fictive and unstable nature. Furthermore, the pivotal position occupied by al-Sarakhsī within the development of Ḥanafī law meant that his legal reasoning and argumentation shaped later Ḥanafī jurists' conceptual frameworks through which they interpreted the law.

This attention to the particularities of the legal genre brings us back to the exchange I began with on the differentiation between law and ethics. While my interlocutor was eager to differentiate between law and ethics to justify the gender hierarchy in the law, such an apologetic defense of Islamic law still sees its rules and norms as timelessly applicable. The laws are still assumed to be based on the natural order of things. They consider the law to be legislating on the basis of gendered reality, as the authority of the law is tied to its presumed correspondence with gendered nature. As exhibited by the comment of my teacher that I mentioned at the start of the dissertation – as well as intellectual defenses of the law more broadly¹⁸ – there is an assumed correspondence in the law between rules/norms and reality.

¹⁸ See for example, Abdul-Hakim Murad's article, "Boys will be Boys: Gender Identity Issues." <http://masud.co.uk/ISLAM/ahm/boys.htm>

My interlocutor and those presenting similar perspectives are correct in pointing to a difference between legal discourse and other ethical discourses. I differ from them, however, in how this distinction is characterized and conceptualized. I have endeavored to show through this dissertation that this project of law-making arbitrarily freezes reality and selectively constructs facts, thus producing an ethical framework that is not necessarily in a direct relationship with lived reality. Behnam Sadeghi has made a similar observation with regards to legal reasoning in his book, *The Logic of Law Making in Islam: Women and Prayer in the Legal Tradition*.¹⁹ Through a discussion on the Ḥanafī legal school's position on women and communal prayer, Sadeghi analyzes how and why some laws persist and others change and the role of legal reasoning in doing so. He argues that three types of law influence legal reasoning in Islamic law: 1) the foundational texts, Qur'an and Sunnah (Sadeghi refers to these as canon law), 2) legal precedence (received law), and 3) values, needs, and circumstances of the jurists at hand.²⁰ He argues that historically, legal reasoning was not employed in the service of deriving laws from the foundational texts, but instead to justify existing law. Thus, while legal reasoning can at times be reflective of the social realities of the jurists, "it is worth asking whether the facts could be manipulated (in good conscience) to yield desired legal conclusions."²¹ Following Sadeghi's assertion, I argue that the law imagines and constructs a reality that is less reflective of social or material facts and more so an internal reality of legal discourse.

¹⁹ Sadeghi, *The Logic of Law Making in Islam*.

²⁰ Ibid., 13-14.

²¹ Ibid., 148-149.

My critique of the law's inconsistent construction of gendered subjects of the law has important implications for scholarship on Islamic law and gender. As I mentioned earlier, feminist critiques of the positive law have demonstrated the gendered assumptions and patriarchal nature of the law and legal hermeneutics. Muslim feminist engagement with the law has rightfully raised crucial questions about the injustices that ensue from an uncritical observance to the pre-modern legal textual tradition and the necessity for legal reform. Kecia Ali has pointed out not only the need for a critique of the discriminatory laws and patriarchal aspects of the law,²² but also the broader ethical norms assumed by the law on issues such as consent, coercion, and reciprocity.²³ Criticizing the tendency to take a right-based approach of many proposed legal reforms by Muslim feminist scholars,²⁴ Sa'diyya Shaikh urges for an interrogation of the gendered norms assumed by the law:

Particularly in relation to issues of gender, scholars and others must ask critical questions about the nature of human beings and gender differences assumed within the traditional *fiqh* discourse. Since the established legal canon implicitly operates on particular understandings of the nature of men and women and the relationships between them, it is necessary to interrogate the basis of such understandings.²⁵

My dissertation responds to this call to investigate the law's gendered assumptions regarding human beings. In doing so, however, I seek to push the

²² Ali, "Progressive Muslims and Islamic Jurisprudence," 183.

²³ Kecia Ali, *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith, and Jurisprudence* (London: Oneworld, 2016), xxvi.

²⁴ Examples of this type of scholarship are Quraishi, "Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective," and Azizah al-Hibri, "An Introduction to Muslim Women's Rights," in *Windows of Faith: Muslim Women Scholar-Activists in North America*, ed. Gisela Webb (Syracuse: Syracuse University Press, 2000).

²⁵ Sa'diyya Shaikh, *Sufi Narratives of Intimacy: Ibn 'Arabi, Gender, and Sexuality* (Chapel Hill: University of North Carolina Press, 2012), 223.

conversation beyond the question of legal reform to think about the functioning logic of the law. I argue that we must not only interrogate the gendered norms and assumptions about gendered nature embedded in the pre-modern Islamic legal tradition, but question the very efficacy of the law as an ethical discourse. My analysis of the fragmented nature of legal discourse raises questions regarding the law's relation and sensitivity to the particularities of lived experience and complex social realities. This thus presents a further challenge to the law, one aimed not only at its substantive conclusions or even its background ontological framework, but at the very guiding impulses of the genre and project.

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Biography

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