

# AN ISLAMIC PERSPECTIVE ON DOMESTIC VIOLENCE

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## INTRODUCTION

The impact of September 11, 2001, on the American Muslim community has been both severe and multi-faceted. It ranged from sadness regarding mass deaths to civil rights concerns that caused a significant number of immigrants to leave the United States altogether. The threat of sudden raids at home and at work, detentions, the use of secret evidence, profiling, and registration under the National Security Entry-Exit Registration System (“NSEERS”) program, are only some of the recent developments that gave rise to these concerns.<sup>1</sup> In the raids, which took place in Northern Virginia in the spring of 2002, women whose homes and offices were raided suffered severe trauma, and some sought counseling to overcome the ordeal.<sup>2</sup>

American Muslim men suffered greater trauma because they suddenly became suspects. For example, the NSEERS program was directed at men from several Muslim countries be-

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1. NSEERS is a program under which the *Immigration and Naturalization Service* (“INS”) has required all non-citizen males from certain Muslim countries to register at one of its offices by a specified date.

2. On September 25, 2002, KARAMAH and the Constitution Project co-sponsored a town hall meeting for the Muslim community of Northern Virginia at George Mason University. This unique event was precipitated by the experiences of the Muslim community since September 11, 2001, which included raids and detention. For more on these events and experiences, visit <http://www.karamah.org>. See *Liberty, Security and the Constitution: A Town Hall Meeting for the Muslim Community*, at [http://www.karamah.org/news\\_town\\_hall\\_meeting.htm](http://www.karamah.org/news_town_hall_meeting.htm) (reporting on the town hall meeting). Video recordings of the meeting are also available.

tween the ages of sixteen and forty-five. This registration program resulted in an unexpectedly large number of arrests based usually on no more than technical violations of immigration law that rendered the registrant "out of status." These arrests led to detentions, separation of family members, and a great deal of anxiety. The freezing of Muslim charities' bank accounts and the arrest of leading, as well as obscure Muslim men around the country, only served to increase communal insecurity, especially among the male Muslim population.

These mass communal problems have trickled down to impact the American Muslim family. Generally, Muslim men and women closed ranks in these difficult times and concentrated on constructively addressing their familial and communal affairs. As a result, the American Muslim community has experienced a new awakening and a determination to become an active part of the American democratic process. In some cases, however, the cumulative effect of fear, frustration, experiences of discrimination, and job insecurity, bled into the Muslim family. Where latent problems of domestic violence already existed, the new pressures made the situation worse.<sup>3</sup>

Well before September 11, KARAMAH was receiving scattered calls from Muslim women around the country complaining about domestic violence. These complaints were not in themselves surprising, since it has become common knowledge that domestic violence is a problem in the United States. What was surprising about the calls, however, was that generally the women received no support from their female friends or their local religious leaders. Women in the community counseled patience, greater obedience, and stoic silence. Some *imams* blamed the wife. Underlying all these attitudes was the unspoken belief that the man had the right to "chastise" his wife. I had encountered this belief earlier when I was a member of a religious leaders' task force for the prevention of family violence. There, a Christian member of the committee stated that some Christian sects held the belief that, according to the Bible, a man had the right to "chastise" his wife.

It is intolerable that any kind of violence, including domestic violence, be given religious cover and justification. Such a

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3. See, e.g., Sarah Childress, *9/11's Hidden Toll*, NEWSWEEK, Aug. 4, 2003, at 37 (noting a surge in domestic violence in the American Muslim community).

belief empowers the perpetrator, giving him “divine” permission to visit harm upon others. Worse yet, it often makes a victimized spouse a willing participant in her own oppression. The result is a sado-masochistic relationship that cannot provide the family environment necessary for the welfare and happiness of its members.

In light of these facts, it is imperative that the religious perspective on domestic violence be addressed seriously and in such a scholarly fashion that individuals whose behavior is truly affected by religion would revise their behavior accordingly. In this Article, I will address the traditional Islamic view of domestic violence. But to understand the Islamic perspective on domestic violence, we need first to understand the Islamic view of gender relations, especially within the family. This view is rooted in the Qur’an, to which we turn next.

### I. THE QUR’ANIC WORLDVIEW

The central concept in the Qur’an is that of *tawhid*, monotheism. From this concept flows the belief in only *one* God, a Supreme Being, who has no partners and whose Will supercedes those of all others. This concept defines Islam, permeates the whole Qur’an, and from it emanates the Qur’anic worldview. The Qur’anic story about the creation of Adam and the fall of Iblis [Satan] best illustrates this concept.<sup>4</sup>

#### A. Satanic Logic

According to the Qur’an, Iblis’ fall from grace was the result of his vanity. The Qur’an provides the story in some detail. When God was about to create Adam from clay and breathe into him His divine spirit, he ordered the angels to bow to Adam once created.<sup>5</sup> All the angels bowed when the time came, but Iblis refused to do so.<sup>6</sup> God asked Iblis: “What stopped you from being among those who bowed?” Iblis responded: “I am

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4. I would like to note that the significance of this story was first brought to my attention by Sheikh Hassan Khali, the late Mufti of Lebanon, may God rest his soul in peace.

5. THE HOLY QUR’AN: TEXT, TRANSLATION AND COMMENTARY 15:28-29 (a. Yusuf Ali trans., 1983) [hereinafter QUR’AN]. The cited verses of the Qur’an are often revised by the author to better reflect the subtleties of their meaning.

6. QUR’AN 15:31.

not one to bow to a man You created from clay."<sup>7</sup> Elsewhere in the Qur'an where the story is repeated, Iblis answers: "I am better than him; you created me from fire and created him from clay."<sup>8</sup>

The answer indicates that Iblis had adopted a value system based on an arbitrary hierarchical principle (i.e., fire is better than clay), which served his own arrogant and selfish purposes. Iblis was so committed to this hierarchical principle that he was willing to incur God's eternal wrath rather than violate it. In effect, Iblis deified his principle, for he permitted it to supersede Divine Will. Consequently, he violated the fundamental principle of *tawhid* and fell into *shirk* [the opposite of monotheism, that is a belief in more than one Supreme Being or will].

Iblis' arrogance was based on *jahl* [ignorance]. The Qur'an clearly tells us that "[v]erily, the most honored of you in the sight of God is the one who is most *atqakum* (righteous)."<sup>9</sup> Thus, the only legitimate "preference principle" in the sight of God is one based on *taqwa* [piety]. Any other preferential principle is likely to be rooted in *hubris*, and hence false. False principles lead to errors or worse.

In his *Ihya' Ulum Al-Deen*, the medieval jurist Al-Ghazali discusses this Satanic logic and the *shirk* it leads to.<sup>10</sup> He notes that every time a rich man believes that he is better than a poor one, or a white man believes that he is better than a black man, then he is being arrogant. He is adopting the same hierarchical principles adopted by Iblis in his *jahl*, and is thus falling into *shirk*.

For this reason, the Islamic State, in its proper form, is not based on an oppressive hierarchy. Rather, it is based on the free consent of the people as expressed by elections [*bay'ah*], consultation, and deliberation [together, *shura*] and a constitutionalism articulated by basic Qur'anic principles.<sup>11</sup> The "head" of the Muslim State is not the apex of an authoritarian hierarchy, but only of a formal organizational one. Like everyone else, his or her authority is limited by the Qur'an and is based on popular

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7. QUR'AN 15:33.

8. QUR'AN 7:12.

9. QUR'AN 49:13.

10. See 3 ABU HAMID AL-GHAZALI, 'IHYA' ULUM AL-DEEN 326-43 (Egypt: Mustafa Al-Babi Al-Halabi Press, 11th century, reprint 1939). See *id.* at 338, 342.

11. QUR'AN 60:12; 48:10; 48:18; 42:38; 3:159. See also, Azizah al-Hibri, *Islamic Constitutionalism and The Concept of Democracy*, 24 CASE W. RES. J. INT'L L. 1, 1, 1n.1 (1992).

will [*bay'ah*].<sup>12</sup> This is why in a Muslim State any citizen can hale the head of State into court.<sup>13</sup> There is no sovereign immunity, because there is no human sovereign. The only sovereign is God, and dominion belongs to Him alone. For this reason, Muslims have no "church hierarchy," but only *ulama*. True *ulama* are modest about their own views, recognizing that only God knows the truth with certainty.

This fact is illustrated by an early event in Islamic history. During the *khilafah* [caliphate] of 'Umar, young men complained about the large amounts of *mahr* women were demanding.<sup>14</sup> *Mahr* is an obligatory marital gift, sometimes monetary, that a Muslim man must give his prospective wife. The amount or type of *mahr* is usually determined by mutual agreement. Afraid that such a trend may discourage men from getting married, *Khalifah* 'Umar announced in the mosque that he was going to place an upper limit on the amount of *mahr*. An unknown old woman rose from the back of the mosque and said to 'Umar: "You will not take away from us what God has given us."<sup>15</sup> 'Umar asked her to explain her statement. Citing a clear Qur'anic verse, the woman established that the amount of *mahr* can be quite high.<sup>16</sup> 'Umar immediately responded: "A woman is right and a man is wrong."<sup>17</sup> He then abandoned his proposal.

Incidentally, the woman was quite on point. *Mahr* is purely the woman's right in Islamic law. She is entitled to set the amount she desires, and once she receives it, no one else may share in it.<sup>18</sup> She may decide to use it after marriage in starting her own business, or invest it for a later time when she may need it. It is the woman's safety net, given to her by a freely con-

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12. See al-Hibri, *supra* note 11, at 24-26; see also al-Hibri, *Islamic and American Constitutional Law: Borrowing Possibilities or a History of Borrowing?* 1 U. PA. J. CONST. L. 497, 505-11 (1999).

13. Khalifah Ali, for example, was haled into court by a non-Muslim. See ABDUL RAZZAK AL-SANHOURI, *FIQH AL-KHILAFAH WA TATAWURUHA* 213 (Egypt: Al-Hay'ah Al-Masriyah Al-'Ammah li Al-Kitab 1989) (discussing the story of *khilafah* and the absence of sovereign immunity).

14. 1 AL-GHAZALI, 'IHYA' 'ULUM AL-DEEN *supra* note 10, at 50.

15. *Id.*

16. QUR'AN 4:20.

17. *Id.*

18. MUHAMMAD ABU ZAHRAH, *AL-AHWAL AL-SHAKHSIYAH* 172 (pointing out that a woman's family has the right to protect her interests by insuring that *mahr* is not too low). See also 7 ABD AL-KARIM ZAIDAN, *AL-MUFASSAL FI AHKAM AL-MAR'AH WA AL-BAYT AL-MUSLIM* 48 (Beirut: Mu'assasat Al-Risalah 1994).

senting prospective husband as a gift [*nihlah*].<sup>19</sup> Unfortunately, fathers sometimes appropriate their daughters' *mahr*, and husbands sometimes pressure their wives into waiving the delayed part of the *mahr*, leaving the woman financially defenseless.

Today, we are living in a world awash with Satanic logic. It is a world ordered into hierarchies based on every conceivable *jahili* criterion, i.e., criteria that are similar to those of the pre-Islamic society of *Jahilia*, the Age of Ignorance. Among these modern criteria are color, wealth, gender, ethnicity, age, technological knowledge, and so on. Given his historical era, Al-Ghazali was able to recognize many of these categories, but not all. Later historical developments helped us uncover many more. What do we do in the face of this new *Jahilia*?

Al-Ghazali noted that Muslims who are vain and arrogant, whether for individual, racial, or economic reasons, engage in Satanic logic. I agree and add to this list gender-based reasons. The Qur'an states clearly and repeatedly that we were all, male and female, created from the same *nafs* [soul].<sup>20</sup>

#### B. *The Qur'anic Diversity Principle and the Prophetic Tradition*

The very first *ayah* [verse] in *Surat Al-Nisa'* states:

O people! Reverence God (show piety towards God) who created you from one *nafs* and created from [the *nafs*] her mate and spread from them many men and women; and reverence God, through whom you demand your mutual rights, and the wombs [that bore you], [for] God watches you.<sup>21</sup>

Reading this *ayah*, one wonders that if all humans are created from the same *nafs*, then why are we so different from each other. More specifically, why did God create different genders, even different races and ethnicities? The Qur'an provides us with an answer:

O people! We created you from a [single] male and female, and made you into nations and tribes, so that you may become acquainted with each other. Verily, the most honored of you in the sight of God is the one who is most righteous (*atqakum*). . .<sup>22</sup>

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19. QUR'AN 4:4.

20. *Id.* at 4:1; 6:98; 7:189.

21. *Id.* at 4:1.

22. *Id.* at 49:13.

I refer to this *ayah* as the Diversity Principle. It explains that we were created from two different genders and made into a multitude of different tribes and nations, so that we may enjoy each other's differences and company. Variety is the spice of life.<sup>23</sup>

The Prophet implemented this Qur'anic view of human relations in his own practices. He criticized the "elitism" of Quraish, his own tribe, when he said: "O kin of Quraish, God has removed from you the arrogance of *Jahiliyyah* and its patriarchal dynastic pride (*ta'ath.thumaha bi Al-aba*). People are of Adam and Adam is of dust."<sup>24</sup>

The Prophet's example in relating to women is also instructive. For example, at the dawn of Islam when the Prophet was still in Makkah, seventy-three men and two women gave the Prophet their *bay'ah*.<sup>25</sup> The two women were Nasibah bint Ka'b and Asma' bint 'Amru. The two women's *bay'ah* were given and accepted on the same terms as those of the men.<sup>26</sup> The men and women then elected twelve representatives of their tribes to discuss various matters with the Prophet. Subsequently, a delegation of Arab women came to the Prophet and gave him their *bay'ah* on behalf of other Arab women. This purely women's *bay'ah* was also accepted by the Prophet, who conversed with the women to clarify the bases of their commitment.<sup>27</sup>

These two events and other early meetings established two important principles: (1) that *bay'ah* and *shura* are the basic principles on which the Islamic model of governance is based, and (2) that women share in that system on equal footing. The second principle flows from the Qur'anic statement that both genders were created from the same *nafs*, and that the most favored in God's sight is the one who is most pious.<sup>28</sup> The events also make clear that, from the first moment of revelation, women played an important role. After all, Khadijah, the wife of

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23. *Id.*

24. ZAYD IBN ALI AL-WAZIR, AL-FARDIYYAH — BAHTH FI AZMAT AL-FIQH AL-FARDI AL-SYIYASI 'INDA AL-MUSLIM 62 (Virginia: Yemen Heritage and Research Center 2000).

25. *Id.* at 49 (citing 2 IBN HISHAM, AL-SIRAH AL-NABAWIYYAH 84 (Beirut: Dar Al-Qalam n.d.)).

26. Al Wazir, *supra* note 24, at 49 (noting that this *bay'ah*, incidentally, is earlier than the *bay'ah* given by a group of women to the Prophet and mentioned in the Qur'an itself).

27. QUR'AN 60:12.

28. AL-WAZIR, *supra* note 24, at 49.

the Prophet who stood by his side and supported him, was the first Muslim.

C. *The Qur'anic Harmony Principle and the Prophetic Tradition*

On the question of gender specifically, the Qur'an states in *ayah* 21 of *surat Al-Rum*:

And among His signs is this, that he created for you mates from among yourselves, so that you may dwell in tranquility with them, and He has put love and mercy between your (hearts): Verily in that are signs for those who ponder.

I will refer to this *ayah* as the Harmony Principle.<sup>29</sup> The thought contained in it is repeated in various forms in the Qur'an, an indication of its significance.<sup>30</sup> For example, in verse 2:187, the Qur'an states: "They (your wives) are your garment and you are their garment."<sup>31</sup>

This is a reference to the fact that spouses are each other's sanctuary insofar as each covers the other's shortcomings and preserves his or her privacy; hence the tranquility and harmony.<sup>32</sup>

In another verse,<sup>33</sup> the Qur'an states: "O Humans revere your Guardian Lord, Who created you from a single *nafs* (soul) and created from it [the *nafs*] its mate, and from this scattered (like seeds) countless men and women."

In light of these and other similar verses, we may justifiably conclude that the Qur'an articulates a basic general principle about proper gender relations; namely, that they are relations between mates created from the same *nafs*, which are intended

29. An earlier version of this discussion appeared in A. al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. J. OF INT'L LAW & POL'Y 1, 20, 26-27 (1997).

30. See 1 BADR AL-DIN AL-ZARKASHI, *AL-BURHAN FI ULUM AL-QUR'AN* 29 (1988); see also 1 AL-SUYUTI, *AL-ITQAN FI ULUM AL-QUR'AN* 35 (1951) (describing the significance of Qur'anic repetition); FARIDA BENNANI, *TAQSIM AL-'AMAL BAYN AL-ZAWJAYN* 27-28 (*Silsilat Manshurat Kuliyyat Al-'Ulum Al-Qanuniyah wa Al-Iqtisadiyah wa Al-Ijtima'iyah*, Jami'at Al-Qadhi 'Iyadh 1992). Bennani, a Moroccan Muslim who is also a law professor, argues in this award winning book that the Qur'an clearly states in several places that men and women are equal intellectually as well as physically. *Id.* She also relates *hadiths* to the same effect, and cites other evidence. *Id.*

31. QUR'AN 2:187.

32. 2 MUHAMMAD IBN AHMAD AL-ANSARI AL-QURTUBI, *AL JAMI' LI AHKAM AL-QUR'AN* 316 (Beirut: Dar Ihya' Al-turath Al-Arabi 1985); 2 MUHAMMAD IBN JAREER AL-TABARI, *JAMI' AL-BAYAN FI TAFSEER AL-QUR'AN* 94-95 (Dar al Ma'rifah 1978).

33. QUR'AN 4:1.



to provide these mates with tranquility, and are to be characterized by affection and mercy. Such relations leave no room for Satanic hierarchies, gendered or otherwise, which result only in strife, subordination, and oppression-characteristics abhorred by Islam.<sup>34</sup> The Prophet's example in his own household illustrates the Harmony Principle. In the absence of an oppressive family structure, his private relationships were based on open communication and mutual respect. 'A'ishah, his young wife, blossomed and felt free to think, argue, and disagree with the Prophet repeatedly. They treated each other with tender affection and kindness, and the Prophet nurtured 'A'ishah's young mind while at the same time integrating her into the life of the Muslim community where she played an important role. The Prophet told 'A'ishah that he always knew when she was annoyed with him. In those instances, she referred to God as the God of Abraham, otherwise, she referred to Him as the God of Muhammad.<sup>35</sup> When 'A'ishah's father found out about her behavior, he tried to strike her.<sup>36</sup> The Prophet intervened and admonished him for his behavior. The Prophet himself was a model "modern" husband and father, never asking anyone to wait on him and participating in household chores and childcare.<sup>37</sup> His great love and respect for 'A'ishah and Khadijah, even after her death, as well as his daughter Fatimah, are well-documented in history books.<sup>38</sup>

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34. BENNANI, *supra* note 30, at 13-14 (noting that Muslim patriarchal societies used the concept of *qiwama* to create a hierarchical structure within the family headed by the husband). She also argues that such hierarchy contradicts the basic principle of gender equality revealed in the Qur'an. *Id.* at 27-29.

35. 3 MUHAMMAD IBN ISMA'IL AL-BUKHARI, SAHIH AL-BUKHARI BI HASHIYAT AL-SINDI 265 (Beirut: Dar al Ma'rifah n.d.).

36. 3 OMAR RIDHA KAHALAH, A'LAM AL-NISA' FI ALAMAY AL-ARAB WA AL-ISLAM 14-15 (1977); MUHAMMAD SA'ID MUBAYYID, MAWSU'AT HAYAT AL-SAHABIYAT 539 (Dar Al-Thaqafah 1990) [hereinafter MUBAYYID]; *see also* 3 AL-BUKHARI, *supra* note 35, at 268.

37. AL-GHAZALI, *supra* note 10, at 354; *see also* ABU AL-HASSAN AL-NADAWI, AL-SIRAH AL-NABAWIYA 370 (1977) [hereinafter AL HASSAN]; 2 AKRAM DIYA' AL-'UMARI, AL SIRAH AL-NABAWIYA AL-SAHIHAH 644-45 (Maktabat Al-'Abikan 1995); *see also* al-Hibri, *supra* note 29, at 20 (citing ancient Arabic sources reporting that the Prophet used to mend his own clothes, cut meat, play with children, and perform chores around the house).

38. Indeed, all the *Sirah* [Prophet's biography] books acknowledge the Prophet's love of his family. *See, e.g.*, 2 AKRAM DIYA' AL-'UMARI, AL SIRAH AL-NABAWIYA AL-SAHIHAH 646-47 (Maktabat Al-'Abikan 1995); SA'ID FA'IZ AL-DAKHIL, MAWSU'AT FIQH 'AI'SHAH OUM AL-MU'MININ 51-2 (dar Al-Nafa'is li Al-Tiba'ah wa Al-Nashr wa Al-Tawzi' 1993). *See also* MUBAYYID, *supra* note 36, at 531-41, 626-27, 325-28 (discussing A'ishah, Fatimah, and Khadijah respectively).

Having explained the Islamic perspective on gender relations, especially within the family, it would seem clear that domestic violence has no place within that framework. But the matter is not that easy. There is a Qur'anic verse which appears to explicitly permit husbands to chastise their wives.<sup>39</sup> This verse has been used by many male scholars to argue in favor of the man having the right to "hit" his wife.<sup>40</sup> In my view, this reading of the verse is erroneous.

There is a quick and simple argument to prove my claim: the Qur'an is internally consistent because it is a divine revelation. The Qur'an repeatedly describes the relationship between husband and wife as one of tranquility, affection, and mercy. Further, it enjoins husbands to live with their wives in kindness or leave them amicably.<sup>41</sup> Domestic violence is diametrically opposed to each of these Qur'anic views and ideals expressed in the various verses. Because of its internal consistency, the Qur'an could not be exhorting one ideal and enjoining the related conduct in some passages, and its opposite in another one. Consequently, an interpretation of one of the elements involved in this apparent inconsistency is wrong. For example, a verse may be interpreted too broadly when it is specific or conditional, thus distorting its true meaning. In this case, the repeated Qur'anic statements about tranquil marital relations are both unconditional and grammatically simple suggesting a general rule. On the other hand, the structure of the verse speaking about "hitting" one's wife is both conditional and structurally complex, leaving room for erroneous, culturally skewed, or subjective interpretations. Therefore, the most likely scenario is that the interpretation of this single verse is responsible for creating the apparent inconsistency, and needs to be revisited.

## II. *THE "CHASTISEMENT PASSAGE"*

The so-called "Chastisement Passage" is usually translated as follows: "As to those women on whose part you fear *nushuz*, admonish them (first), (then) *wahjuruhunna fi'l madhaji'i* (abandon them in beds), (and last) *wadhrubuhunna* (hit them

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39. QUR'AN 4:34.

40. See, e.g., 6 AL-TABARI, *supra* note 32, at 39-44; 5 AL-QURTUBI, *supra* note 32, at 172-73.

41. QUR'AN 2:229.

(lightly); and if they obey you, seek not against them means (of annoyance or harm), for God is most high, and Great (above you all).<sup>42</sup>

### A. Background, Structure, and Interpretation

We turn first to the phrase “*wahjuruhunna fi'l madhaji'i*.” The history of the interpretation of this phrase is illustrative for later purposes. While the plain meaning of the phrase is “abandon them in bed,” this meaning became subject to various interpretations. Extensive discussions were conducted on whether “abandoning them in bed” meant: “turning one’s back to them in bed,” abandoning sexual activity in bed, “abandoning the marital bed only,” “staying in the marital bed,” but abandoning sexual activity,” “engaging in sexual activity, but without verbal communication,” or “engaging in sexual activity and communicating, but in a tough manner.”<sup>43</sup> The variations among these interpretations indicate that something more than a mere linguistic interpretation was at work. The reasoning of some jurists is indicative of their own cultural or personal views of gender and marital relationships.

A striking example of the intertwining of linguistic and patriarchal reasoning was provided by the respected interpreter Al-Tabari, who argued that “abandonment in bed” could not be the actual meaning of the Qur’anic phrase. He noted that if the woman is *nashiz* (which he defines as one who acts superior to her husband and dislikes and disobeys him),<sup>44</sup> then she would only be pleased by being abandoned in bed. Thus the word “*wahjuruhunna*” must have a different meaning. He combed the Arabic language for another meaning of the root word “*h.j.r*” and related derived forms, focusing on the noun “*hijar*.” “*Hijar*” is the rope used to tie animals. So he concluded that the better interpretation of “*wahjuruhunna fi'l madhaji*” is “tie them in bed.”<sup>45</sup> Luckily, other jurists were scandalized by this interpretation, presumably because it contradicted the Qur’anic model of

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42. QUR’AN 4:34. The translation used above is a slightly modified version of the modern translation of the Qur’an I have been using in this Article. I have preserved some of the phrases in the original Qur’anic language in order to highlight potential issues which will be considered in later discussion.

43. 5 AL-TABARI, *supra* note 32, at 41-3.

44. *Id.* at 40.

45. *Id.* at 43.

tranquility and affection. For example, Ibn Arabi exclaimed: "What an error by a scholar of Qur'an and Sunnah!"<sup>46</sup> Al-Zamakhshari, another respected jurist, was less circumspect. He called this interpretation, "the interpretation of the 'bores' (*Al-thuqala*)."<sup>47</sup> The bores of Al-Zamakhshari are prime examples of what I call "patriarchal jurists."

Having discussed this flagrant example of a patriarchal (mis)interpretation, we now turn to the rest of the "Chastisement Passage." At first glance, this is a difficult passage to square with the Harmony Principle. For this reason, it illustrates very clearly the danger of separating an *ayah*, or part of an *ayah*, from its context to reach an isolated interpretation of its meaning. The verse has been used by some patriarchal men to justify physical violence against women.<sup>48</sup> Indeed, based on this passage, the respected jurist Al-Kasani stated that God *ordered* the hitting of disobedient women.<sup>49</sup> On the other end of the spectrum, some modernists have tried to use the Al-Tabari approach, this time to help women, by altering the settled and plain meaning of the word "*wadrubuhunna*."

My first comment on this verse is simple. "*Wadrubuhunna*" has its plain Arabic meaning, namely, "hit them." Now that we have gone over this hurdle, we need to ask ourselves: Does the Qur'an advocate hitting women? And, how does that square with the Harmony Principle?

### 1. The Qur'anic Philosophy of Social Change and Asbab Al-Nuzul (Reasons for the Revelation)

Before answering this question, we need to lay some important groundwork. First, we need to discuss the Qur'anic philoso-

46. 1 MUHAMMAD IBN ABDILLAH IBN ARABI, *AHKAM AL-QUR'AN* 418 (Dar Al-Ma'rifah 1987). The Sunnah is the *hadith* [sayings], deeds, and example of the Prophet. It is used by Muslim jurists as a secondary source for further clarification and guidance.

47. 5 MUHAMMAD RASHID RIDHA, *TAFSIR AL-QUR'AN AL-HAKIM* (known as *Tafseer Al-Manar*) 73.

48. In fact, the *wahjuruhunna* has met a similar, though less illustrious fate in its interpretation by some overly patriarchal males as "tie them up." Under this interpretation, women who exhibit *nushuz* and ignore advice may be tied up in the home and beaten up until they give in. 5 AL-TABARI, *supra* note 32, at 43; 9 IBN HAJAR AL-'AS-QALANI, *FATH AL-BARI SHARH SAHIH AL-BUKHARI* 376-77 (1989). Ibn 'Arabi cast serious doubts on this interpretation. *Id.*

49. 2 'ALA' AL-DIN ABU BAKR IBN MAS'OOD AL-KASANI, *BADA'I' AL-SANA'I' FI TARTIB AL-SHARA'I'* 334 (1986).

phy of social change, then the reported reasons for the revelation of this verse [*asbab Al-nuzul*], and finally, the social conditions at the time of the revelation and the related prophetic interpretation.

It is a well-known fact that the Qur'an adopts a gradualist philosophy for social change. Gradualism is God's merciful recognition of the human condition and its limitations in the face of change. For this reason, the Qur'an was revealed gradually in accordance with the circumstances, needs, and capabilities of Muslims, since it would have been impossible to introduce the perfect Islamic society all at once. For example, Arabs consumed significant amounts of alcohol in pre-Islamic times. Therefore, the Qur'anic prohibition against drinking alcohol was imposed upon Muslims gradually. At first, the prohibition was only advisory, then it applied only to prayers. In the final stage, the prohibition became unconditional and comprehensive.<sup>50</sup>

Ancient books mention the story of the revelation [*asbab Al-nuzul*] of the "Chastisement Passage." It was revealed in a society which had barely emerged from *Jahiliyyah*. Makkan men, as opposed to Madinan men, were particularly rough with their wives, and used to hit them.<sup>51</sup> They carried this practice into Islam and were so violent that one night a woman complained about it to the Prophet.<sup>52</sup> The Prophet, a Makkan, had never raised his hand against anyone in his household.<sup>53</sup> When he heard about the problem, he chastised Muslim men who dared to hit their wives.<sup>54</sup> Acting on his own, the Prophet prohibited the practice by allowing the wife the right to *qisas* (a form of equitable retribution).<sup>55</sup> That very evening, the men complained loudly.<sup>56</sup>

50. QUR'AN, 2:219; 4:43; 5:90.

51. 5 MUHAMMAD FAKHR AL-DIN AL-RAZI, TAFSIR AL-FAKHR AL-RAZI 93 (Dar Al-Fikr 1985) (quoting Al-Shafi'i noting that the society of Madinah was gentler towards women). 'Umar Ibn al-Khattab said that: "We, the kin of Quraish, our men used to possess our women. Then we came to Madinah and found their women possessing their men. Then our women mixed with their women, and our women became bold and disobedient [*tha'arat alayna Al-nisa'*]." *Id.* See 1 AL-HASSAN, *supra* note 37, at 4-8, 52-61.

52. AL-Asqalani, *supra* note 48, at 280. NASR AL-DIN AL-BAYDAWI, TAFSIR AL-BAYDAWI 111 (Dar Al-Fikr, 19th century reprint 1982) (recounting the story of a woman who came to the Prophet to complain about her abusive husband).

53. 1 IBN MAJAH, SUNAN IBN MAJAH 638 (Dar Al-Kutub Al-Ilmiyyah). See 2 AL-GHAZALI, *supra* note 10, at 261.

54. 10 AL-RAZI, *supra* note 51, at 93.

55. AL-BAYDAWI, *supra* note 52, at 111; 5 AL-TABARI, *supra* note 32, at 37. For more

They came to the Prophet and revisited the issue. They argued that his ruling allowed their wives to gain the upper hand.<sup>57</sup> At that point, the Prophet sought and received a divine revelation which reflected the Qur'anic philosophy of gradualism: the "Chastisement Passage." It appeared to reverse the Prophet's earlier ruling but, in fact, it severely limited both the act and concept of "hitting," so as to empty both from their harmful content.<sup>58</sup> At the same time, the rest of the Qur'an articulated a higher standard of gender communication and interaction. This is the context in which the *ayah* must be understood and interpreted.

Unfortunately, given the remaining *Jahiliyyah* blinders and despite all efforts by the Prophet to the contrary, many Muslim men unjustifiably misconstrued the Qur'anic verse as sanctioning the reprehensible practice of wife beating, and ignored the Sunnah, powerfully exemplified in the Prophet's own household.<sup>59</sup> This fallacious reasoning was validated by powerful social prejudices and resulted in centuries of misinterpretation and oppression. More importantly, the reasoning misconstrued the basic Qur'anic philosophy of gradualism and change as well as that of gender relations.

The gradualism reflected in the "Chastisement Passage" was not instituted to prohibit "hitting." Unlike wine drinking, there was no gradual prohibition of hitting women. The prohibition was immediate, but the approach was quite complex. For example, as we shall see later, the Qur'an radically transformed the concept of "hitting" into a non-violent symbolic act. This is why I

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on the concept of *qisas*, see A. al-Hibri, *The Muslim Perspective on the Clergy-Penitent Privilege*, 29 LOY. L.A. L. REV. 1723-32 (1996).

56. 5 AL-TABARI, *supra* note 32, at 37; 1 IBN MAJAH, *supra* note 53, at 638.

57. 2 ABU DAWUD AL-SAJISTANI AL-AZDI, 2 SUNAN ABI DAWUD 252 (Dar Al-Jil, 9th century reprint 1988); 1 IBN MAJAH *supra* note 53, at 637.

58. QUR'AN 4:34 (describing the limitation on the act of "hitting"); 10 AL-RAZI, *supra* note 51, at 92-93 (containing a gradualist explanation of Qur'an 4:34). See 2 MALAKAH YUSUF ZIRAR, MAWSU'AT AL-ZAWAJ WA AL-'ALAQAH AL-ZAWJIYYAH FI AL-ISLAM WA AL-SHARA'I' AL-UKHRA AL-MUQARANAH (forthcoming) at 666-67. See also *infra* Section II.D. entitled "The Qur'anic Concept of Hitting" (explaining limitation on the concept of "hitting" in the Qur'an).

59. See, e.g. AL-'ASQALANI *supra* note 48, at 379 (concluding from the Prophet's statement that hitting wives is permissible "wholesale"). The Prophet's statement from which the conclusion is derived is: "The best amongst you will not hit your wives." *Id.* AL-'Asqalani does note that this position contradicts the kind relations required by the Qur'an in marriage; so he suggests utilizing threats without action. *Id.*

placed the word “hitting” in quotes. Also, the verse severely limited the “offense” for which a man may “hit” his wife.<sup>60</sup> It made “hitting” an act of last resort.<sup>61</sup> Thus, it is prohibited for the Muslim man to “hit” his wife for any reason other than the one specified in the verse. It is also prohibited for him to “hit” his wife without first going through a series of peaceful steps. In sum, the husband must first establish that the wife was *nashiz* (a concept which will also be discussed later), then the husband has to go through several steps of anger management and conflict resolution before he can even think of “hitting” his wife. If these steps do not work, then the husband is allowed to “hit” his wife *symbolically* (with a bunch of basil or a handkerchief) to express his anger and frustration. Any harm to the wife from his action is clear ground for divorce. Furthermore, this symbolic act defines the minimal standard below which no Muslim may stoop. As we shall see later, the Prophet then repeatedly articulated the higher standard in marital relations, that of tranquility and affection.

## 2. The Prophet’s Tradition — Women and Slavery

Before discussing the Chastisement Passage in detail, I would like to make some general observations about the treatment of women and slaves in the Qur’an, two of the most downtrodden populations throughout history, including the time of the Prophet Muhammad. While the subject of slavery is now only of historical interest, the statements linking it to patriarchy and the mistreatment of women are startling in their clarity. They force us to recognize patriarchy as an institution which enslaves women, that is, an institution which is a variant of slavery.

The Qur’an and the Prophet repeatedly mentioned slaves and women in the same passages, exhorting Muslims to treat them well.<sup>62</sup> In the case of slavery, the Qur’an recognized it only as an undesirable, transitional, socio-political condition and

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60. QUR’AN 4:34 (limiting the act of “hitting” to *nashiz* women).

61. See, e.g., ZIRAR, *supra* note 58, at 666-67; see also 10 AL-RAZI, *supra* note 51, at 92-93.

62. See, e.g., QUR’AN 49:13; 24:33; 8:70. See also, 2 MAJAH, *supra* note 53, at 1216-17 (quoting the Prophet as saying that slaves are “your brothers under your control, feed them of what you eat, dress them of what you wear, and do not charge them with tasks beyond their capabilities. If you do, then help them”).

spelled out many ways for its elimination.<sup>63</sup> The Prophet repeatedly addressed slavery through action and words. For example, he made Bilal, the Ethiopian slave, the *mu'ath.thin* [the one who calls for prayers] of all Muslims, to the envy of many Arabs.<sup>64</sup> The Prophet encouraged his wife 'A'ishah to purchase and free Barirah, a slave woman who desired liberty.<sup>65</sup> On one occasion the Prophet stated that slaves are "your brothers under your control, feed them of what you eat, dress them of what you wear, and do not charge them with tasks beyond their capabilities. If you do, then help them."<sup>66</sup> Finally, in his famous last speech, *Khutbat Al-Wadaa'*, the Prophet emphasized that all believers, whether free or enslaved, were siblings, and that no Arab was better than a non-Arab except to the extent of one's piety.<sup>67</sup>

In the same speech, the Prophet analogized the status of women in his society to that of powerless slaves, and he beseeched his male audience to treat them kindly, saying: "[b]e good to women; for they are powerless captives (*awan*) in your households. You took them in God's trust, and legitimated your sexual relations with the Word of God, so come to your senses people, and hear my words."<sup>68</sup> He also admonished the men:

63. For an excellent discussion of slavery in the Qur'an see ABD AL-WAHID WAFI, *HUQUQ AL-INSAN FI AL-ISLAM* 156-64 (Nahdhat Misr 1999); see also MUHAMMAD 'AMARAH, *AL-ISLAM WA HUQUQ AL-INSAN* 18-22 (Dar Al-Shuruq 1989).

64. 2 IBN HISHAM, *AL-SIRAH AL-NABAWIYYAH* 509 (Beirut: Al-Maktabah Al-'Ilmiyyah n.d.).

65. 4 AL-BUKHARI, *supra* note 35, at 168-9.

66. See IBN MAJAH, *supra* note 53, at 638.

67. See, e.g., 'AMARAH, *supra* note 63, at 162; WAFI, *supra* note 63, at 8.

68. 3 AL-BUKHARI, *supra* note 35, at 262 (quoting the Prophet as admonishing his male audience: "Let not one of you whip his wife like a slave, then have sexual intercourse with her at the end of the day"); 4 HISHAM, *supra* note 64, at 604 (quoting the Prophet, in his *Khutbat Al-Wadaa'*). The Prophet tells men: "Be good to women; for they are *awan* [powerless captives] in your households). You took them in God's trust, and legitimated your sexual relations with the Word of God, so come to your senses people and hear my words." *Id.*; 4 ABU JA'FAR AL-TABARI, *JAMI' AL-BAYAN FI TAFSIR AL-QUR'AN* 212 (Dar Al-Ma'rifa, 9th century reprint 1978) [hereinafter AL-TABARI, *JAMI' AL-BAYAN*] (quoting the same passage quoted by Ibn Hisham). This passage comes from *Al-Wadaa'*, and was also mentioned in 2 ABU JA'FAR AL-TABARI, *TARIKH AL-TABARI* 206 (Dar Al-Kutub Al-'Ilmiyya, 9th century reprint 1988) [hereinafter AL-TABARI, *TARIKH AL-TABARI*]. The Prophet recognized that the status of women was often no better than that of slaves, a fact which reflected his deep concern for women. Many authors have paired the two categories in their writings. See, e.g., 2 'ALA' AL-DIN AL-KASANI, *Kitab Bada'i' Sana'i' fi Tartib Al-Shara'i'* 334 (Dar Al-Kutub Al-'Ilmiyyah, 12th century reprint 1986) [hereinafter AL-KASANI] (stating that a husband is entitled to punish his wife as he does his slave). See also 5 AL-HAFIZ IBN KATHIR, *AL-BIDAYA WA AL-NIHAYA* 148, 170,



“[l]et not one of you whip his wife like a slave, then have sexual intercourse with her at the end of the day.”<sup>69</sup>

It is highly significant that, even after the revelation of the “Chastisement Passage,” the Prophet continued to prohibit men from hitting women.<sup>70</sup> In one case, he stated flatly: “Do not hit *ima’ Al-lah* (female servants of God).”<sup>71</sup> On another occasion, he stated that those who hit their wives are not the best among the Muslims.<sup>72</sup> On a third occasion, echoing various Qur’anic descriptions of ideal marital relations, he told the men: “[t]he best among you, are those who are best towards their wives.”<sup>73</sup> He added, “and I am the best among you in that respect.”<sup>74</sup> This statement is significant given the emphasis Muslims place on emulating the Prophet. Yet many Muslim men today forget such important Prophetic examples and limit their emulation of the Prophet to the style of his dress or his grooming habits.

Al-Shawkani notes that the Prophet flatly prohibited hitting women.<sup>75</sup> Yet, as the perfect Muslim, the Prophet is bound by the Qur’an, including the “Chastisement Passage” that should have overruled him. So, how can we explain the Prophet’s Sunnah in light of the “Chastisement Passage”?

First, it is important to note that the Prophet’s sayings on the subject and his behavior are both consistent with the Qur’anic Harmony Principle. So, it seems likely that it is the reading of the “Chastisement Passage” that is problematic and overreaching. The question therefore becomes: How can we understand the “Chastisement Passage” in a way that makes it consistent with the Qur’anic view of gender relations and the Prophetic tradition? We can do this by resorting to the interpretation I briefly outlined earlier.

As stated previously, in a society where wife beating was prevalent, the Qur’an changed the meaning of “hitting,” severely narrowed its justification and imposed a graduated approach to

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202 (Maktabat Al-Ma’arif, 2nd printing of a 14th century reprint 1977) [hereinafter IBN KATHIR, *AL-BIDAYA WA AL-NIHAYA*].

69. 1 MAJAH, *supra* note 53, at 638.

70. ZIRAR, *supra* note 58, at 667.

71. 1 MAJAH, *supra* note 53, at 638.

72. *Id.*

73. AHMAD FA’EZ, *DUSTUR AL-USRA FI THILAL AL-QUR’AN* 161 (Beirut: Mu’assasat Al-Risala 1982) [hereinafter FA’EZ]; 1 MAJAH, *supra* note 53, at 637.

74. MAJAH, *supra* note 53, at 636.

75. ZIRAR, *supra* note 58, at 675.

anger management designed to dissipate that anger before reaching the final stage. It also upheld an ideal of spousal relations to which both genders could aspire. For these reasons, many Muslim jurists of medieval times concluded that “hitting” one’s wife was “*makrouh*” [strongly disliked]. They also concluded that if the husband is unable to avoid this behavior completely, then he may only hit his wife as a last resort. The only justification for “hitting” one’s wife is that of *nushuz* (which will be discussed later), and only for *nushuz*. This was considered the narrow exception that God provided in the “Chastisement Passage.”

Finally, jurists educated their male contemporaries that if the husband were to “hit” his wife as a last resort, he may only do so by using a *miswak* (a soft small fibrous twig used as a toothbrush in the Arab Peninsula), a handkerchief, or some other similar object that communicates to the wife her husband’s frustration without causing her physical harm. If she is harmed, she is entitled to divorce and, in some circumstances, to retribution.<sup>76</sup> Further evidence that the Qur’anic permission to “hit” was highly limited and only symbolic, can be found in the next verse, which states: “If you fear discord between the two [spouses], then send an arbiter from his family, and another from hers; if they wish to repair [the situation], God will reconcile them. For God has full knowledge and is expert in all things.”

Domestic violence will cause more than a simple discord between spouses. It will cause fear, misery, and oppression. But, God is all-knowing, and thus domestic violence is not what is contemplated in the prior verse. Otherwise, the mediation and reconciliation recommended in this verse would be impossible to achieve.<sup>77</sup>

Let us now turn to the “Chastisement Passage” and examine it carefully.

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76. This approach is not much different from one used in the United States. Some marriage counselors provide angry spouses with styrofoam sticks to hit each other as a way of releasing their frustrations.

77. QUR’AN 4:35.

B. *The Concepts of “Nushuz,” “Qanitat,”  
and “fahishah mubayyinah”*

The verse permits husbands to “hit” their wives only for “*nushuz*.” So, what does this word mean? The word “*nushuz*” has many meanings in Arabic, but not all of them fit within the context of the *ayah*. The task is to determine the right scope of the meaning of the words in this context. Literally, “*nushuz*” means “to rise above, or act superior to.” Hence, it is understandable that the patriarchal perspective which casts marital life into a hierarchical structure would understand “*nushuz*” in its broader linguistic meaning as disobedience by the wife; an insurrection against the husband.

A “*nashiz*” wife is the opposite of a righteous wife. We know that because the immediately preceding passage in this verse suggests it. Taking both passages together, the Qur’an makes two different rules in the same verse: one for righteous women, and one for *nashiz* women. So, to understand the meaning of “*nashiz*,” we need to understand who the righteous women are.<sup>78</sup> The preceding passage in the verse defines them. It states (leaving critical terms in the original Arabic language):

(vi) So, the righteous women are *qanitat* and *hafithat li’ l-gaib bima God hafith*.

The noun “*Qunut*,” from which the adjective “*qanitat*” is derived, refers to the act of being devoutly obedient to God. So, “*qanitat*” means “women who exhibit ‘*qunut*,’” that is, “women who are devoutly obedient to God.” The medieval Islamic scholar Al-Razi, among other jurists, concluded that since this verse was about marital relations, the obedience of righteous women included obedience to their husbands as well as to God.<sup>79</sup> This conclusion was simply a *non-sequitur*!<sup>80</sup>

The word “*Al-gaib*” usually refers to the unknown; for example, the future which only God knows.<sup>81</sup> It also refers to that which is absent, as in “*gha’ib*.” The term “*ighthiab*” is derived from this latter meaning, which refers to gossiping about an absent

78. *Id.* at 4:34.

79. 5 AL-RAZI, *supra* note 51, at 91-92; RIDHA, *supra* note 47, at 70.

80. *See, e.g.*, 10 AL-RAZI, *supra* note 51, at 92.

81. 1 MUHAMMAD MURTADHA AL-ZABIDI, TAJ AL-AROUS MIN JAWAHIRI AL-QAMUS 416 (Beirut: Manshurat Dar Maktabat Al-Hayat, 18th century reprint n.d.).

person, a serious violation of Islamic ethics.<sup>82</sup> So, “*Al-gaib*” in the context of this verse could be logically and linguistically interpreted to refer to the absence of certain people. For a better understanding of the identity of these people, we need to look to the rest of the phrase.

The word “*hafithat*” is a feminine plural noun from the trilateral word “h.f.th,” pronounced “*hafitha*.” Like many Arabic words, the root word and its variants are rich with meanings. They have connotations of “keeping,” “protecting,” or “guarding.” In this *ayah*, righteous women are described by the phrase “*hafithat li'l-gaib*” *bima* God *hafitha* — i.e., they are women who guard and protect in *Al-gaib* that which God guards and protects (by ordaining that we do so).

One important meaning of “*hafith*,” the derivative deverbal noun from which “*hafithat*” is derived, is the following: “*Al-muhafathah ‘ala Al’ahd*” [keeping one’s covenants].<sup>83</sup> God and the Prophet ordered all Muslims to keep all their covenants and promises, especially their marital covenants.<sup>84</sup> Muslim women are equally subject to this injunction as men. The marriage contract is the contract most worthy of fulfillment, according to the Prophet, and a “solemn covenant” according to the Qur’an. In this light, one can understand the reference to righteous women as meaning those who observe their marital covenants even in the absence of those with whom the covenants were undertaken. In this case, the referent is clearly the husbands.<sup>85</sup> Note that there is no language of obedience to the husbands in this passage or its interpretation.<sup>86</sup>

Putting all these elements together within the context of the verse, which is that of marital relations, the proper interpretation appears to be the following: righteous women are those who honor their marital covenants, even in the absence of their husbands (with whom these covenants were undertaken). Consequently, *nashiz* women are those who do not honor their marital covenants, and hence disobey God. Thus, the focus of obedience here is God, not the husband.

82. AL-ZABIDI, *supra* note 81, at 417.

83. *Id.* at 250.

84. AZIZAH AL-HIBRI, *THE NATURE OF THE ISLAMIC MARRIAGE: SACRAMENTAL, COVENANTAL, OR CONTRACTUAL.* (forthcoming).

85. 3 AL-BUKHARI, *supra* note 35, at 252; QUR’AN 4:20.

86. ZIRAR, *supra* note 58, at 674-75.

The husband of course has the standing (as does the wife) to remind his wife; even admonish her, about keeping her marriage covenant. It is for this reason and this reason only, that the last part of the "Chastisement Passage" mentions obedience to the husband. But this obedience should not be understood as obedience to the husband's arbitrary will, but to his reminder of God's laws. To emphasize the fact that this scenario is not about the man's show of power and subjugation of the woman, the verse states that, if husbands reach the hitting stage, and their wives obey them (by obeying God's laws), then the husbands must "seek not against them means (of annoyance or harm), for God is most high, and Great (above you all)." In other words, as soon as the woman stops her *nushuz*, the husband must stop his actions. This interpretation again relies heavily on the interpretation of *nushuz*. So I turn again to this word.

In light of the interpretation of *qanitat* and *hafithat l'il gaib* provided above, the word *nushuz* is now revealed in the context of the verse as describing a woman who does not honor her marital covenant. She is in fact someone who "rises above, and acts superior" to God's law and injunctions. Again, the disagreement between my interpretation and the traditional one is one of scope and kind. Is the disobedience of the *nashiz* wife directed at God or her husband?

Some jurists have found an easy answer to this question by arguing that any woman who disobeys her husband angers God.<sup>87</sup> Thus, obedience to the husband is subsumed under obedience to God, an approach that borders on *shirk*. This approach is also very similar to that of later Muslim *khalifahs* who argued that obedience to the ruler is part of the obedience to God.<sup>88</sup> *Khalifas* even found jurists who developed the jurisprudence in support of this view. To blunt the *shirk* edge of these arguments, jurists added that "there is no duty to obey when what is required is against God's injunctions."<sup>89</sup> As Islamic political history shows, such addition permits an oppressive relation-

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87. See, e.g., AL-RAZI, *supra* note 51, at 91; AL-TABARI, *supra* note 32, at 38.

88. See, e.g., 5 AL-TABARI, *supra* note 32, at 93; 5 AL-QURTUBI, *supra* note 32, at 259-60.

89. 5 AL-QURTUBI, *supra* note 32, at 259-60; see also WIZARAT AL-AWQAF WA AL-SHU'UN AL-ISLAMIYAH (Kuwait 1983); 28 AL-MAWSU'AH AL-FIQHIYAH 323-24 (Egypt: Dar Al-Sufwah 1993).

ship which is arbitrary and willful, but makes no prohibited demand.

The Qur'an states that if Muslims disagree, then they have to resolve their disagreement by resorting to the Qur'an and the Prophet.<sup>90</sup> So, I turn now to the Qur'an and the *hadith* for further guidance on this matter.

In his famous *Khutbat Al-Wadaa'*, the Prophet interpreted the word "*nushuz*." According to various reports, the Prophet stated in that address, "You [men] have rights against women, and they have rights against you. It is your right that they do not bring someone you dislike into your bed, or that they commit *fahishah* (an act of adultery) *mubayyinah* (which is clear and evident to all). If they do, then God has permitted you to desert them in bed, and [then] hit them lightly. If they stop, you are obliged to maintain them."<sup>91</sup> Thus, the Prophet appears to have interpreted the word "*nushuz*" in the Qur'anic verse to mean two things: bringing someone the husband dislikes into his bed, or committing *fahishah mubayyinah*. To understand the scope of this Prophetic statement, we need to explore further the meaning of *fahishah mubayyinah*.

As expected, many jurists interpreted the term "*fahishah mubayyinah*" broadly to include disobeying one's husband even in matters such as leaving the marital home without permission. Others, however, disagreed, stating that "*fahishah*" means simply adultery.<sup>92</sup> To resolve this interpretive disagreement, I follow the Qur'anic injunction to refer to the Qur'an, now that I have

90. QUR'AN 4:59.

91. 5 AL HAFIDH IBN KATHIR, *AL-BIDAYA WA AL-NIHAYA*, 202 (Beirut: Maktabat al Ma'arif 1979); 2 MUHAMMAD IBN JAREER AL-TABARI, *TARIKH AL-TABARI*, 206 (Beirut: Dar Al-Kutub Al-Ilmiyyah 1988). Other reports, even by Al-Tabari and Ibn Kathir themselves elsewhere, add the element of "disobedience" to the concept of *nushuz*, as presented by the Prophet in his last address. See 5 ABU ZAKARIYYA AL-NAWAWI, *RAWDAT AL-TALIBIN* 177 (Beirut: Dar Al-Kutub Al-Ilmiyya, 13th century reprint 1992) [hereinafter AL-NAWAWI] (arguing that *nushuz* includes leaving the marital home without permission, abstaining from sexual enjoyment, and refusal to cohabit, but does not include verbal abuse).

92. See, e.g., 10 IBN MANTHUR, *LISAN AL-'ARAB* 192 (Beirut: Dar Ihya' Al-Turath Al-'Arabi, 2nd printing of a 13th century reprint 1992) (quoting Ibn Al-Athir as defining *fahisha mubayyinah*, occurring in the Prophet's last address, as adultery; also stating that others define it as extreme sin, and as leaving the marital home without permission); AL-ZABIDI, *supra* note 81, at 331 (quoting Al-Jawhari and Ibn Al-Athir as defining *fahisha mubayyinah* as adultery). It also notes that others defined it as extreme sin, and that Al-Shafi'i defined it as verbal abuse towards the wife's in-laws. *Id.*

referred to the Prophet. I would like to focus below on a couple of *ayahs* neighboring the “Chastisement Passage,” which use the terms “*fahishah*” and “*fahishah mubayyinah*.” This will help us better understand the Qur’anic meaning of these terms because passages of the Qur’an explain each other.<sup>93</sup>

In the same *surah* of the Qur’an, the expression “*fahishah mubayyinah*” is used only a few verses earlier. *Ayah* 4:19 states:

O you who believe, you are forbidden to inherit women against their will. Nor should you *ta’dhiluhunna* (tighten your grip around them) that you may take away part of what you have given them — unless they have been guilty of *fahishah mubayyinah*; [otherwise] live with them in kindness and equity.

This is a reference to two matters: the *Jahiliyyah* practice which permitted men to inherit women as chattel, and the patriarchal practice of oppressing women until they give up their rights. The Qur’an ends the *Jahiliyyah* practice. In this *ayah*, the Qur’an also prohibits men from engaging in the *Jahilliah* practice of making life extremely difficult for women so as to force them to part with their property in return for their freedom.<sup>94</sup> In another passage, women are further given the right to inherit.<sup>95</sup>

This *ayah* permits husbands to take back part of what they have given their wives, if the wives engage in a *fahishah mubayyinah*. Otherwise, women are entitled to be treated in kindness and equity in marital life. So what is “*fahishah mubayyinah*”? As stated earlier, many jurists said that it was adultery.<sup>96</sup> These jurists then interpreted the verse to say that if a woman committed adultery, then the husband was permitted to cease maintaining her until she returned to him the *mahr* he gave her, and left him under the *khul’* form of divorce (initiated by the wife).<sup>97</sup> Some argued, however, that “*fahishah mubayyinah*” includes *nushuz*, which they defined as disobedience of the husband. But since the concept of “*nushuz*” includes that of “*fahishah mubayyinah*” (according to the Prophetic *hadith*

93. See, e.g., 2 AL-ZARKASHI, *supra* note 30, at 175.

94. 4 AL-TABARI, *supra* note 32, at 209-10.

95. QUR’AN 4:7.

96. 4 AL-TABARI, *supra* note 32, at 211-12.

97. *Id.* at 212-13.

cited above), then this interpretation renders the two concepts equivalent. This result is linguistically and Qur'anically questionable.

In yet an earlier *ayah* of the same chapter, the word "*fahishah*" is used again, this time without the term "*mubayyinah*." As stated earlier, "*mubayyinah*" simply means clear and evident to all; so "*fahishah mubayyinah*" means *fahishah* which is clear and evident to all. The issue in that *ayah* is how to handle a *fahishah* that is not *mubayyinah*. The first part of *ayah* 4:15 says: "If any of your women are guilty of *fahishah*, then find four witnesses who testify against them."

This testimony would be one way to establish the *fahishah* and thus make it *mubayyinah* [evident and clear to all]. Another would be for the woman to state freely that she has committed a *fahishah*. But, as any good Muslim knows, the four witnesses requirement is a specific requirement for adultery.<sup>98</sup> It is levied on society to put an end to idle gossip about the chastity of women. One who accuses a woman of adultery, but cannot establish it through four witnesses (and other due process requirements articulated by jurists) will be subject to severe punishment. If the husband accuses his wife of *fahishah*, and if the wife persists in denying it, they are automatically divorced, and God will curse the aggressor between them, for God knows the truth.<sup>99</sup>

### C. Interpreting the Chastisement Passage

Looking at these three *ayahs* using the word "*fahishah*" in the same *surah* of the Qur'an, each within no more than fifteen verses from the others, along with the Prophetic *hadith*, I conclude, that the meaning of *fahishah*, as enlightened by *ayah* 4:15, is simply "adultery." Given this conclusion, then, the Prophetic *hadith* which interprets *nushuz* to be in part *fahishah mubayyinah*, is referring to clear and evident adultery. This is the conclusion reached by many interpreters regarding the meaning of *fahishah mubayyinah*.<sup>100</sup> It also means that, while the notion of "*nushuz*" includes the concept of "*fahishah mubayyinah*," it is not

98. I ARABI, *supra* note 46, at 356 (stating God's wisdom is to require four witnesses for increased *sitr* [protection of privacy], even though only two are required for murder).

99. QUR'AN 24:6-10.

100. 4 AL-TABARI, *supra* note 32, at 211.



equivalent to it because adultery is only one component of the two actions described by the Prophet in his speech.

Furthermore, even if the Prophet was not providing the meaning of the “Chastisement Passage” in his *hadith*, he must have been providing examples. But an instructive example must be adequately illustrative of the meaning. The examples given by the Prophet referred to two types of possible actions: (a) actions for which God has decreed *hudud* [specific punishments], and (b) actions that are a proximate cause of type (a) actions (such as bringing someone into one’s husband’s bed — a proximate cause for adultery). Had the *ayah* intended to cover less egregious actions, such as violations of the husband’s whims and wishes, the Prophet would have indicated so and given men a more accurate idea about the scope of their rights. He did not do so.

The notion of “proximate cause” is important in the discussion. Without it, one could imagine a number of scenarios where an innocent action, such as getting a job, would ultimately lead to adultery. Indeed, some jurists have argued against women’s work, even against women leaving their homes, to protect them from such attenuated and imaginative causal scenarios.<sup>101</sup> The logic of these jurists suffers from many shortcomings; not least among them is the fact that it is overbroad. It applies equally to men who are prohibited by the Qur’an from committing adultery. If Muslims follow this logic to its unfortunate conclusion, we will end up with an idle *ummah* [people] whose members sit at home (in isolation) to avoid temptation.

One more observation about the “Chastisement Passage”: it does not appear to require the husband’s actual knowledge of the actions described above, but rather a “fear” or “suspicion” of their occurrence. Jurists have puzzled over this fact, and some have concluded that actual knowledge is indeed required.<sup>102</sup> I disagree, but would argue for the need of a well-grounded and not a whimsical “fear” or “suspicion,” so that paranoid husbands do not make their wives miserable. I believe it is unreasonable to expect that the husband may not react to well-grounded suspi-

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101. See, e.g., ABU AL A’LA AL-MAWDUDI, *MABADI’ AL-ISLAM* 143 (1977); see also 22 SAYID QUTB, *FI DHILAL AL-QUR’AN* 2859 (1979); ABU BAKR JABIR AL-JAZAIRI, *AL-MAR’AH AL-MUSLIMAH* 84 (n.d.).

102. 5 AL-TABARI, *supra* note 32, at 39-40.

cions about his wife until he has actual proof. For one, he may save her from committing *fahishah mubayyinah*, which would ruin their family relations and her spiritual well-being. The various methods listed in the *ayah*, such as admonishment and abandonment in bed, are designed to make her reflect upon her actions. Even the ultimate stage described in the next *ayah*, but not discussed here, namely seeking reconciliation through *hakams* [arbitrators who are friends of the family], or even marriage counseling in our society, would be too late. Thus, it makes sense to start the process of communication early. The problem occurs when such communication enters the "hitting" stage, a matter which will be addressed below.

Interpretations of "nushuz" which force the wife to give up her independent will in favor of her husband's do not reflect the lives and example of female Islamic role models, including the wives of the Prophet who amazed Muslims by constantly arguing with him.<sup>103</sup> For them to have behaved otherwise would have made a mockery out of the basic concepts of *bay'ah* and *shura*. In the familial model, the bride's free consent to the marriage represents her *bay'ah* to the husband to take care of their family.<sup>104</sup> Disagreements and discussions are the essence of *shura* in an Islamic marriage. To corrupt this process by claiming that the wife owes her husband full obedience is no less oppressive than arguing that Muslims owe their rulers full obedience. The devastating results of such authoritarian logic continue to haunt Muslims to this day.

I conclude the analysis of the "Chastisement Passage" by focusing on the concept of "hitting" in it. Broadening the definition of *fahishah mubayyinah* broadens the scope of instances in which the husband may resort to "hitting." This is against the injunction in *ayah* 4:19, and against the letter and spirit of the Qur'an as a whole, which states that husbands should live with their wives in kindness or leave them charitably.<sup>105</sup> Nevertheless, scholars agree that even if we were to accept the broader definition of *fahisha mubayyina*, the man still cannot "hit" his wife as a first resort.<sup>106</sup> He is required to take several steps before resort-

103. 3 AL-BUKHARI, *supra* note 35, at 258-59; ZIRAR, *supra* note 58, at 664.

104. For a discussion of the meanings of the word *qawwamun*, see 5 AL-RAZI, *supra* note 51, at 37; 5 RIDHA, *supra* note 47, at 67; see also AL-HIBRI, *supra* note 29, at 28.

105. QUR'AN 2:229.

106. See, e.g., AL-KASANI, *supra* note 49, at 334 (noting that the conjunction "and"

ing to “hitting.”<sup>107</sup> If all these steps fail, then the husband may “hit” his wife. But what does “hitting” mean in this case?

#### D. *The Qur’anic Concept Of “Hitting”*

Many scholars have pondered over the Qur’anic permission to “hit,” and its attendant circumstances. Given their deep belief in Islamic justice, they realized that they must look deeper into the Qur’an for a better understanding of this verse. Thus, they interpreted this passage, as they should, in light of the basic principles governing marital relations as articulated by the Qur’an and the Prophet.<sup>108</sup> That approach forced them to modify their common understanding of the act of marital “hitting.” As a result, the jurists issued a series of limitations redefining the act of hitting itself.<sup>109</sup> For example, the man may not hit his wife on the face.<sup>110</sup> Furthermore, any “hitting” which is injurious or leaves a mark on the woman’s body is actionable as a criminal offense.<sup>111</sup> Also, if the husband reaches that unfortunate stage

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in the revelation requires a sequence of actions: first admonishing the wife, then deserting her in bed, and finally “hitting” her); 9 WIHBA AL-ZUHAILI, *AL-FIQH AL-ISLAMI WA ADILLATUH* 6855-57 [hereinafter AL-ZUHAILI]; cf. AL-NAWAWI, *supra* note 91, at 177 (quoting Al-Hinati, who argues that the sequential interpretation is only one of three possible ones).

107. The majority of scholars take the sequential approach. According to them, the husband must first admonish, then desert his wife’s bed, and finally resort to hitting, although some argue that it is better not to reach the third stage at all. See *supra* note 106 and accompanying text (discussing the sequential approach). See *id.* at 6857 (arguing that it is better to threaten without actually “hitting”). He bases his view on the fact that the Prophet never hit a woman. *Id.* See, e.g., SAHIH AL-BUKHARI, *supra* note 35, at 57 (quoting the Prophet as asking: “How can one of you hit his wife like an animal, then he may embrace her?”); 1 IBN MAJAH, *supra* note 53, at 638 (quoting the Prophet as asking: “How can one of you whip his wife like a slave, and sleep with her at the end of the day?”).

108. Major among these is the Qur’anic verse which orders husbands to live with their wives in kindness, or leave them charitably. See QUR’AN 2:229.

109. Among these is the sequential interpretation of the Qur’anic verse 4:34. See *supra* note 106 and accompanying text. Other limitations are mentioned in 5 AL-TABARI, *supra* note 32, at 43-45 (noting that the man may not hit the woman *dharb ghayr mubrah wala mu’ath.thir* [in the face, or hit so as to cause pain or harm]); 5 AL-NAWAWI, *supra* note 91, at 676-77 (hitting may not cause harm or be heavy, cannot be on the face or other vulnerable areas. If it causes harm, the woman is entitled to damages). See *id.* at 7856-57 (citing medieval jurists as requiring that the “hitting” does not cause fear in the wife, is not directed against the face or abdomen, and other places that could result in serious harm).

110. *Id.*

111. 2 ABU AL-BARAKAT AHMAD AL-DARDIR, *AL-SHARH AL-SAGHIR* 512 (Dar Al-Ma’aref, 18th century reprint 1972) (noting that the hitting may not affect the wife’s

of "hitting," he may hit the wife only with something as gentle as a *miswak* or handkerchief.<sup>112</sup> Finally, given the Qur'anic ideal of marital relations, the majority of Muslim scholars concluded that while the act of "hitting" is permissible in Islam, abandoning it is preferable and more graceful [*ajmal*].<sup>113</sup> They also concluded that a woman abused physically or verbally is entitled to divorce from her husband.<sup>114</sup> They lowered the bar significantly on what counts as abuse, so as to make it include verbal abuse. This interpretation is still reflected in the laws of some Muslim countries today.<sup>115</sup>

It is important to note that despite their strong commitment to the marriage institution, jurists did not regard marriage as an absolute right. They prohibited men who were likely to harm or oppress their prospective wives from getting married.<sup>116</sup> On the other hand, for those bachelors who may commit adultery, marriage was considered a duty.<sup>117</sup> Even if a man needed to marry to avoid adultery, but was likely to harm or oppress his prospective wife, he would be prohibited from doing so.<sup>118</sup> One line of reasoning notes that adultery is a matter that relates to the rights of God over us, while marriage relates to the rights of the creatures among each other (the husband and wife in this case). But God is in a better position to deal with a violation of his right than an abused woman. Thus, even if the fear of adultery ex-

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bones or flesh. The husband may not resort to hitting his wife if he knows that it would be useless. If the husband hits his wife despite this knowledge, she is entitled to divorce and retribution). See also 5 AL-Nawawi, *supra* note 91, at 676-77 (stating that hitting may not cause harm or be heavy, cannot be on the face or other vulnerable areas, and if it causes harm, the woman is entitled to damages); AL-ZUHAILI, *supra* note 106, at 7856-57 (noting that the Hanafi and Shafi'i schools of thought would find the husband liable if he harmed his wife but Hanbalis would not).

112. See AL-TABARI, *supra* note 32, at 44; 5 AL-NAWAWI, *supra* note 91, at 676-77 (hitting may not cause harm or be heavy and cannot be on the face or other vulnerable areas and if it causes harm, the woman is entitled to damages); AL-ZUHAILI, *supra* note 106, at 7856.

113. 7 ABD AL-KARIM ZAYDAN, AL-MUFASSAL FI AHKAM AL-MAR'AH WA AL-BAYT AL-MUSLI 318 (1994); 5 AL-RAZI, *supra* note 51, at 93.

114. This view has been adopted by some personal status codes such as Jordanian Code, Personal Status Code, Provisional Law No. 61 (1976), ch. 12, art. 132; Kuwaiti Code, Personal Status, pt. 1, bk. 1, tit. 3, ch. 1, art. 126.

115. Certain Codes explicitly specify that verbal abuse is grounds for granting the wife the judicial divorce. See Jordanian Code, *supra* note 114, ch. 10, art. 132; Kuwaiti Code, *supra* note 114, pt. 1, bk. 2, tit. 3, art. 126.

116. AL-ZUHAILI, *supra* note 106, at 6516.

117. *Id.*

118. *Id.*

isted, some jurists argued, a man who may harm his wife is prohibited from getting married.<sup>119</sup>

An important Qur'anic precedent on the issue of domestic violence is found in the story of Job.<sup>120</sup> When Job was being tested, his wife lost her faith and blasphemed.<sup>121</sup> As a result, he took an oath to hit her as punishment.<sup>122</sup> A dilemma was thus created: a prophet should not engage in violent and unworthy behavior towards his wife. On the other hand, a prophet may not violate his oath. The divine solution to this dilemma is expressed in a Qur'anic verse, which instructs Job to satisfy his oath to hit his wife by "hitting" her with a handful of fragrant grass (or basil).<sup>123</sup> The intent was to satisfy the promise without harming the wife. In this way, Prophet Job resolved his dilemma.

### CONCLUSION

The Qur'an offers Muslim men who are justifiably upset with their wives' conduct (as defined above), a graduated solution to deal with their frustrations and anger. At its final stage, the solution is similar to that which Job was shown to release him from his oath. However, the Qur'an also shows Muslims the way to become better Muslims and human beings by living in accordance with the ideal of marital relations, or ending the relationship amicably. The Qur'an states very clearly: "The parties should either hold together on equitable terms or separate with kindness."<sup>124</sup> Thus, the Qur'anic approach to the problem of husbands hitting their wives aims at eliminating such behavior altogether, but it takes into account the very nature of human beings, the complexity of their emotions, and the need for "a gestation period" for them to achieve a higher stage of develop-

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119. See, e.g., ABU ZAHRAH, *supra* note 18, at 24-25.

120. QUR'AN 38:44. I would like to thank Sana' Afandi, director of Karamah: Muslim Women Lawyers for Human Rights, for pointing out the significance of this story in understanding the Qur'anic verse 4:34.

121. *Id.* at 38:44.

122. *Id.*

123. The word *dighth* in Qur'anic verse 38:44 means a handful of grass or even basil. See 5 IBN 'ABDIN, RADD AL-MUHTAR 659 (Dar Al-Kutub Al-'Ilmiyya, 19th century reprint 1994) (explaining the meaning of *dighth* as a handful of basil, also noting that others stated that it meant "a handful of grass or thin branches"). Cf. Ibn 'Abdin argues that the use of basil by Job is a special case, reflecting God's mercy, and cannot be generalized to other women. Yet major medieval scholars appear to implicitly disagree. They limited the husband to the use of a *miswak* or what is similar to it.

124. *Id.* at 2:229.

ment. It also helps them reach that higher stage through a series of prescribed behavior aimed at self-control and anger management, and by describing and exhorting by words and the example of the Prophet the blissful higher stage of marital life.

The Qur'anic verses were revealed in ancient Arabia, over fourteen hundred years ago when the world viewed beating one's wife as a right. Today, our society has moved decidedly beyond that stage, and views wife abuse as the crime it really is. Earlier Muslim jurists agree. It is now time for the rest of the Muslim community to catch up with this vision, and help the troubled men within it to move to the higher stages of consciousness described in the Qur'an and implemented by the Prophet. This way, we can either achieve the Qur'anic marital ideal of tranquility, affection, and mercy, or gracefully follow God's injunction of parting ways in kindness.