HER HONOR: AN ISLAMIC CRITIQUE
OF THE RAPE LAWS OF PAKISTAN FROM
A WOMAN-SENSITIVE PERSPECTIVE

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INTRODUCTION

I remember as a child having to describe Pakistan as that small country next to India. I haven’t used that description in a long time. By now, Americans have heard of Pakistan, and the reference is no longer exotic. Instead, the name conjures up confused images of women and non-Muslims in a third world country struggling to battle Islamic fundamentalism. Recent reports of the unjust application of Pakistan’s rape

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laws, enacted as part of the “Islamization” of Pakistani law, further cement the impression that Islam is bad for women. These reports, unfortunately, are true. The impression is not.

This article critiques the rape laws of Pakistan from an Islamic point of view which is careful to include women’s perspectives in its analysis. Unlike much of what is popularly presented as traditional Islamic law, this woman-affirming Islamic approach will reveal the inherent gender-equalitarian nature of Islam, which is too often ignored by its academics, courts, and legislatures. This article will demonstrate how cultural patriarchy has instead colored the application of certain Islamic laws in places like Pakistan, resulting in the very injustice which the Quran so forcefully condemns.

I. CRITIQUE OF THE ZINA ORDINANCE

A. Power of Law: The Zina Ordinance and Its Application in Pakistan

In 1977, under President Zia-ul-Haq, Pakistan enacted a set of “Hudood” ordinances, ostensibly to bring the laws of Pakistan into “conformity with the injunctions of Islam.” These ordinances, setting forth crimes such as theft, adultery, slander, and alcohol consumption, became effective in February, 1979. The “Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979” (Zina Ordinance) criminalizes “zina,” or “extramarital sexual relations” (also a crime under Islamic law). The Zina Ordinance states:

A man and a woman are said to commit ‘zina’ if they wilfully have sexual intercourse without being validly married to each other.

1. The word “Hudood” is the plural of “hadd,” a term denoting the Islamic legal categorization of crimes for which the definition and punishment is set by God. See ‘Abdur Rahman I. Dastgir, Sharf ‘A’I: The Islamic Law 221 (1984).


3. See Zina Ordinance § 1 (stating commencement date); P.L.D. 1979 Cent. Statutes at 51; Bokhari, supra note 2, at 164; MAJOR ACTS, supra note 2, at 10.

4. This article will not address the rationale or propriety of criminalizing consensual sexual relations, whether under Islamic law or under the many other penal codes of the world which criminalize such behavior. Rather, the focus of the present study is the law of nonconsensual sexual relations laid out in the Zina Ordinance in Pakistan and as addressed in Islamic jurisprudence.

5. Zina is liable to hadd [punishment] if—

(a) it is committed by a man who is an adult and is not insane with a woman to whom he is not, and does not suspect himself to be married; or

(b) it is committed by a woman who is an adult and is not insane with a man to whom she is not, and does not suspect herself to be married.

Under its heading of zina, the Zina Ordinance includes the category “zina-bil-jabr” (zina by force) which lays out the definition and punishment for sexual intercourse against the will or without the consent of one of the parties. The section articulating the crime of rape, as zina-bil-jabr, states:

A person is said to commit zina-bil-jabr if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely:

(a) against the will of the victim,

(b) without the consent of the victim,

(c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt, or

(d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of zina-bil-jabr.

Zina-bil-jabr is zina-bil-jabr liable to hadd if it is committed in the circumstances specified [above].

5. Zina Ordinance §§ 4, 5; P.L.D. 1979 Cent. Statutes at 52; Bokhari, supra note 2, at 176 (with comment and annotations); MAJOR ACTS, supra note 2, at 11.

6. Zina Ordinance § 6; P.L.D. 1979 Cent. Statutes at 52; Bokhari, supra note 2, at 182 (with comment and annotations); MAJOR ACTS, supra note 2, at 11-12.
Finally, the Zina Ordinance then specifies the evidence required to prove both zina and zina-bil-jabr:

Proof of zina or zina-bil-jabr liable to hadd shall be in one of the following forms, namely:—

(a) the accused makes before a Court of competent jurisdiction a confession of the commission of the offence; or

(b) at least four Muslim adult male witnesses, about whom the Court is satisfied, having regard to the requirements of tashiyah al-shuhood [credibility of witnesses], that they are truthful persons and abstain from major sins (kabair), give evidence as eyewitnesses of the act of penetration necessary to the offence.[7]

When this law was enacted in 1977, proponents argued that it codified the Islamic law of illegal sexual relations. The accuracy of that claim is addressed in detail later. First, it is important to note that the application of the Zina Ordinance in Pakistan has placed a new twist and a renewed urgency on the question of its validity. The twist is this: when a zina-bil-jabr case fails for lack of four witnesses, the Pakistani legal system has more than once concluded that the intercourse was therefore consensual, and consequently has charged rape victims with zina.

A few disturbing cases will illustrate the concern. In 1982, fifteen-year-old Jehan Mina became pregnant as a result of a reported rape. Lacking the testimony of four eyewitnesses that the intercourse was in fact rape, Jehan was convicted of zina on the evidence of her illegitimate pregnancy. Her child was born in prison. Later, a similar case caused public outcry and drew public attention to the new law. In 1983, Safia Bibi, a sixteen-year-old nearly blind domestic servant reported that she was repeatedly raped by her landlord/employer and his son, and became pregnant as a result. When she charged the men with rape, the case was dismissed for lack of evidence, as she was the only witness against them. Safia, however, being unmarried and pregnant, was charged with zina and convicted on this evidence.[11]

Short of conviction, women have also been held for extended periods of time on charges of zina when they allege rape. For example, in July, 1992, Shamim, a twenty-one-year-old mother of two, charged that she was kidnapped and raped by three men in Karachi. When a rape complaint was lodged against the perpetrators, the police instead arrested Shamim, and charged her with zina when her family could not post the fee set for her release. The police held her in custody for six days, during which she reports that she was repeatedly raped by two police officers and a third unnamed person. Numerous women have reported similar custodial rapes in Pakistan.[14]

Police action and inaction in rape cases in Pakistan have in fact been widely reported as instrumental elements to the injustice. There is evidence that police have deliberately failed to file charges against men accused of rape, often using the threat of converting the rape charge into a zina prosecution against the female complainant to discourage women from reporting. And when the perpetrator is a police officer himself,

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12. See Asia Watch & Women’s Rights Project, HUMAN RIGHTS WATCH, DOUBLE JEOPARDY: PUNISHMENT OF WOMEN IN PAKISTAN 41-60 (1992) [hereinafter DOUBLE JEOPARDY].


15. See, e.g., Amnesty Int’l, PAKISTAN: THE PATTERN PERSPECTIVES: DEATHS IN CUSTODY, EXTRAJUDICIAL EXECUTIONS, AND “DISAPPEARANCES” UNDER THE PFP GOVERNMENT 35 (1995) [hereinafter PATTERN PERSPECTIVES] (reporting January 17, 1994, gang rape of five women, stating that police pressured women to report only robbery, and conceal rape); TORTURE, supra note 13, at 11-12 (citing Shamim case, and similar Imran Khatoon case). In 1992, more than 2,000 women were in jail awaiting trial for zina. See DOUBLE JEOPARDY, supra note 12, at 69. Many women are eventually acquitted after enduring long trials. See Patel, supra note 11, at 28.
the chances of pursuing a case against him are nearly nonexistent. Shahida Parveen faced this very situation when she reported that in July, 1994, two police officers broke into her house and locked her children in a room while they raped her at gunpoint. A medical examination confirmed that she was raped by more than one person, but the police refused to register her complaint.16

Political rivals have further exploited women by using rape as a weapon against each other. In November, 1992, Khursheed Begum, the wife of an arrested member of the Pakistan People’s Party was abducted on her way home from attending her husband’s court hearing. She states that she was blindfolded, driven to a police station, and repeatedly raped there by police officers, who asserted political motives for the attack.17

Later that same month, forty-year-old Veena Hayat, a member of one of Pakistan’s elite families and daughter of a prominent politician, stated that she was gang raped for twelve hours in every room of her house by five armed men. Despite her father taking the unusual social risk of publicly reporting the attack, a judicial investigation concluded that there was insufficient evidence to convict the alleged perpetrators.18

Cases such as these, resulting from the unfortunate application of the Zina Ordinance, are reported widely in the Western media.19 The issue is now a primary topic in women’s and human rights discussions globally.20

and stirs up an expected share of frustration, anger, defensiveness, and arrogance from all sides. The debate, however, begs the question: What is the Islamic law of rape? Any real substantive analysis of the zina-biljabar law and its application must first be approached from this framework—the same framework upon which the law purports to base itself. I will therefore ask the critical question: does Pakistan’s Zina Ordinance accurately articulate the Islamic law of rape?

B. Law of God: the Quran on Zina

The Pakistani Zina Ordinance subsumes rape—as zina-biljabar—under the general zina law of unlawful sexual relations. To analyze the appropriateness of this categorization, we must first analyze the Islamic law of zina itself. The preamble of the Pakistani Zina Ordinance states that it is enacted “to modify the existing law relating to zina so as to bring it in conformity with the Injunctions of the Holy Quran and Sunnah.”21

Indeed, the term zina itself appears in the Quran. In warning generally against the dangers of adultery, the Quran states:

And do not go near fornication [zina] as it is immoral and an evil way.22

Later, the Quran more specifically sets out actual legal prescriptions criminalizing illegal sexual relations:

The adulteress and adulterer should be flogged a hundred lashes each, and no pity for them should deter you from the law of God,
if you believe in God and the Last Day; and the punishment should be witnessed by a body of believers.33

Following this definition of the offense are extremely strict evidentiary rules for the proof of such a crime:

Those who defame chaste women and do not bring four witnesses should be punished with eighty lashes, and their testimony should not be accepted afterwards, for they are profligates.34

Thus, after criminalizing extramarital sexual relations,35 the Quran simultaneously attaches to the prosecution of this crime nearly insurmountable evidentiary restrictions: four eyewitnesses are required to prove a charge of sexual misconduct.36

23. Id. at 24:2.
24. Id. at 24:4. The verse goes on to specify a relaxed evidentiary standard between spouses, understandable given the personal nature such an accusation would have on the marital relationship:

Those who accuse their wives and do not have any witnesses except themselves, should swear four times in the name of God, the testimony of each such person being that he is speaking the truth.

And (swears) a fifth time that if he tell a lie, the curse of God be on him.

The woman’s punishment can be averted if she swears four times by God as testimony that her husband is a liar.

Her fifth oath being that the curse of God be on her if her husband should speak the truth.

Id. at 24:6–9. For further discussion of this spousal zina situation, see 'Abdur Rahman I. Doi, Women in Shari'ah (Islamic Law) 126–28 (1989); Kamali, supra note 21, at 155; Al-Imam Muhammad ibn Idris al-Shafi'i, Al-Risala (TREATISE ON THEFOUNDATIONS OF ISLAMIC JURISPRUDENCE) 146–47 (Majid Khadduri trans., 2d ed. 1987). Notably, there is no discrepancy in weight of testimony based on the gender of the party, because in a charge of adultery between spouses, a woman’s word is equal to that of a man.

25. As noted earlier, this article does not address the punishments prescribed for the crime of zina. See supra note 7. Interestingly, the answer is not as concrete as these verses might imply. Traditions of the Prophet Muhammad involving the stoning of adulterers have created much debate among Islamic jurists regarding the role of the death penalty and corporal punishment in zina sentencing. See, e.g., Sayed Hassan Amin, ISLAMIC LAW IN THE CONTEMPORARY WORLD 27–38 (1983) (citing a 1981 Pakistani Shari'ah Islamic law) Court ruling that stoning for adultery is not correct Islamic practice); Bokhari, supra note 2, at 181 (citing legal debate in Pakistan over propriety of stoning as punishment for adultery). The focus of this study, however, is limited to the definition of the crime itself, and the categorization of rape as zina. The topic of what punishment the state should inflict upon those convicted of such a crime must wait for another day.

26. See DOi, supra note 1, at 236–40 (summarizing crime of zina); DOi, supra note 24, at 117–28 (summarizing crime of zina); Mohamed S. El-Awa, PUNISHMENT IN ISLAMIC LAW 13–13 (1982) (general discussion of zina law as laid down in Quranic verses). The "proof of zina" section of the Zina Ordinance, which also requires four witnesses, comes to mind. Thus, in setting zina as a crime in Pakistani law, and requiring four witnesses as necessary proof of such a crime, the Ordinance does in fact appear to be based, at least in structure, on Islamic law. However, as discussed in the following sections, the details of the Zina Ordinance, and especially its subcategorization of rape as a type of zina is not Islamic law.

27. See NOEL J. Coulson, A HISTORY OF ISLAMIC LAW 127 (1994); DOi, supra note 24, at 122; MUHAMMAD Iqbal Siddiqi, THE PENAL LAW OF ISLAM 69 (2d ed. 1983); M. Chishty Bokhara, Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 5 (M. Chishty Bokhara ed., 1982) (citing the rule of thumb that a hypothetical thread must not have been able to pass through the two bodies); Seminar, supra note 14, at 27.

28. See S SASHI AL-BUKHARI, BK. 82, Nos. 806, 810, 812–814, at 528–25 (Muhammad Musli Khan trns., 1985) (hereinafter AL-BUKHARI); 3 SUHAIN ABU DAMUD, Nos. 4413–4414 (Ahmed Hasaan trns., 2d ed. 1990) (hereinafter ABU DAMUD). It is interesting to note that although the man was punished based on his confession, the woman was apparently never prosecuted or even investigated. The significance of this point will be apparent later, in the discussion of the context of the Quranic verses on zina, and their impact on women's privacy. See infra notes 39–51 and accompanying text.

29. See Ma'amoun M. Salama, General Principles of Criminal Evidence In Islamic Jurisprudence, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM, supra note 27, at 159, 116–20. See also EL-AWA, supra note 26, at 125–27; Siddiqi, supra note 27, at 43–49.

30. See Oman Abd-el-Malek al-Salih, The Right of the Individual to Personal Security in Islam, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM, supra note 27, at 55, 69–70 (citing an incident where the Caliph Omar ibn al-Khattab and a companion passed a party in which, behind locked doors, individuals were drinking alcohol; because of Islamic injunctions against sipping, the two disregarded the private party and returned home). See also Siddiqi, supra note 27, at 19–20 (citing requirement to knock before entering a residence, even of family). But see THE HEDAYA OR GUIDE: A COMMENTARY ON THE MUSLIM LAW, BK. VII, CH. III, at 194 (Charles Hamilton trns., 1982) (allowing evidence unlawfully obtained) (hereinafter HEDAYA).

31. See infra note 53 for an explanation of the Islamic schools of law.

32. See SOPHIE MARMASSI, FALSAPAT AL-TADIIRFI AL-ILM (THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM) 23, 49 (Farhat I. Jiddis trns., 1987), for history and significance of the HEDAYA.

33. HEDAYA, supra note 30, BK. VII, CH. II, at 188. This statute of limitations, significantly, does not apply to a charge of slander. Id. In addition to the above restrictions, where a zina conviction is a result of confession rather than testimony, the confession may be retracted at any time (including during execution of the sentence). See Salama, supra note 30, at 120.
Why so many evidentiary restrictions on a criminal offense prescribed by God? Islamic scholars posit that it is precisely to prevent carrying out punishment for this offense. By limiting conviction to only those cases where four individuals actually saw sexual penetration take place, the crime will realistically only be punishable if the two parties are committing the act in public, in the nude. The crime is therefore really one of public indecency rather than private sexual conduct. That is, even if four witnesses saw a couple having sex, but under a coverlet, for example, this testimony would not only fail to support a zina charge, but these witnesses would also be liable for slander. Thus, while the Quran condemns extramarital sex as an evil, it authorizes the Muslim legal system to prosecute someone for committing this crime only when the act is performed so openly that four people see them without invading their privacy. As Cherif Bassioumi states, "[T]he requirement of proof and its exigencies lead to the conclusion that the policy of the harsh penalty is to deter public aspects of this form of sexual practice."

This analysis is consistent with the tone of the Quranic verses which immediately follow the above verses regarding zina. After the verses establishing the crime and the attendant standard of proof, the Quran states:

Those who spread lies were a clique among you. Do not think it was bad for you: In fact it has been good for you. Each of them will pay for the sin he has committed, and he who had greater share (of guilt) will suffer grievous punishment.

Why did the faithful men and women not think well of their people when they heard this, and [say] "This is a clear lie?"

Why did they not bring four witnesses (in support of their charge)? And since they did not bring the four witnesses, they are themselves liars in the sight of God.

34. See Salama, supra note 29, at 118, n. 9 ("The nature of such rigorous proof makes it a crime of public indecency rather than adultery.").
35. See Quran 24:4 (stating that those who charge women with zina and do not have four witnesses should be given eighty lashes and their testimony should not be accepted thereafter. See also 13 The History of Al-Tabari 110-14 (Gazirik H. A. Jaysholli trans., 1989) (describing incident where Caliph Umar punished witnesses supporting zina charge against al-Mughirah b. Shu'ab, Governor of Basra, because of conflicting details in their testimony of eyewitnessed act)."
36. Bassioumi, supra note 27, at 6. See also El-Awa, supra note 26, at 17 ("The desire to protect public morality and to safeguard it against corruption by publicizing the offense, is the reason for limiting the methods of proof."); EL-AWA, supra note 26, at 20 ("This punishment is prescribed in fact for those who committed the crime openly . . . with no consideration for the law or for the feeling of the community," quoting Muhammad Mustafa Shalabi, Al-Fish al-Islami Bayn al-Matubiyah al-Waqi'ya 201 (1960)).

Were it not for the grace of God and His mercy upon you in this world and the next, you would have suffered a great affliction for the false accusation.

When you talked about it and said what you did not know, and took it lightly—though in the sight of God it was serious—

Why did you not say when you heard it: "It is not for us to speak of it? God preserve us, it is a great calumny!"

God counsels you not to do a thing like this, if you are believers.

The Quran's call to respond to charges of sexual misconduct with "it is not for us to speak of it" echoes the hadith in which the Prophet Muhammad was reluctant to take even a man's confession of adultery. The Quran contemplates a society in which one does not engage in publicizing others' sexual indiscretions. Quranic principles honor privacy and dignity over the violation of law, except when a violation becomes a matter of public indecency.

Placing these Quranic verses into context will further emphasize the importance of this concept in Islamic law, and in particular, its close connection to the dignity of women. The verses setting forth the crime of zina and the accompanying verses denouncing public discussion of the matter were revealed just after the famous "Affair of the Necklace," in which the Prophet Muhammad's wife, Aisha, was mistakenly left behind by a caravan in the desert when she went looking for a lost necklace. She returned home with a young single man who had happened upon her and given her a ride home. Rumors of Aisha's time alone with this man spread quickly throughout the small town of Medina, until the above verses finally ended the gossip. Thus, the very revelation of these verses was prompted by an incident involving attacks on a woman's dignity—Aisha's honor. Indeed, the verse setting forth severe punishment for slander is directed specifically against charges impugning a woman's chastity: "Those who defame chaste women, and do not bring four
witnesses, should be punished with eighty lashes, and their testimony should not be accepted afterwards . . . .”40 Men do not seem to be of particular concern here.

Why the focus on women? Looking at the issue from a cultural perspective, this focus is not surprising. In nearly every culture of the world, women’s sexual morality appears to be a particularly favorite subject for slander, gossip, and insult.41 The tendency of patriarchal societies, in fact, is to view a woman’s chastity as central to the honor of her family, especially the men in her family. For example, under British common law (the law in Pakistan before the Hudood Ordinance), rape was a crime punishable against men, to be lodged by the husband of the woman raped against the man who violated her.42 The woman’s place was apparently on the sidelines of a prosecution by her husband against her rapist.

This cultural phenomenon—that a family’s honor lies in the virtue of its women—exists in many countries today; Pakistan is one of them. Studies indicate that in Pakistan, when women are raped for long periods of time on charges of zina, their families and friends are reluctant to help or even visit them, “as accusation of zina is a serious dishonour.”43 Even more disturbing, suicide is perceived as the honorable solution to the humiliation, especially when sexual violation is involved. For example, when Khursheed Begum was raped in 1992,44 her husband and son “wish[ed] she had committed suicide,” even after human rights activists explained to them that the rape was not her fault.45 This attitude lends

40. Quran 24:4 (emphasis added).
41. See, e.g., DALE SPENDER, MAN MADE LANGUAGE (1980) (discussing the asymmetry of language, and insults that tend to be based on women’s sexuality).
42. See MATTHEW HALE, HISTORY OF THE PLEASE OF THE CROWN G57–39 (1778). See also RUBAYA MIRZA, THE ISLAMIZATION OF THE LAW IN PAKISTAN 116, § 3.3.1 (1994) (stating that before the Hudood ordinances, the penal law of Pakistan included adultery as an offense, but defined it as intercourse by a man with the wife of another without his permission; women were not punished even as abductors); ZIA, supra note 18, at 25–26 (stating that under the pre-Hudood criminal legal system inherited from the British, a complaint of adultery could only be lodged by the husband); Donald A. Dripps, Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent, 92 Colum. L. Rev. 1780, 1782 (1992) (“Until the twentieth century, . . . female sexual autonomy had little to do with the law of rape. The law instead struck a balance between the interests of males-in-possession and their predatory counterparts.”). The Pakistani Penal Code prior to 1979 borrowed from this English common law of rape. See PAK. PENAL CODE § 375 (1860) (repealed 1979), reprinted in R.A. NELSON, THE PAKISTAN PENAL CODE 2109–10 (1975) (discussing and elaborating on rape defined as “the ravishment of a woman without her consent, by force, fear, or fraud,” citing English common law precedent).
43. PATEL, supra note 11, at 27.
44. See supra note 17 and accompanying text.
45. SCROGGINS, supra note 17.

itself easily to manipulation and the development of a tribal attitude where women’s bodies become tools for revenge by men against men. Indeed, increasingly in Pakistan, “[i]n cases of revenge against the male members of [a] family, instances have come to light where their women are violated.”46 Even within a family, physically harming (even killing) women for alleged infidelity or some other embarrassment to the family—often by some sort of burning—is an unfortunate tradition in the Indo-Pakistani subcontinent.47 And, as world human rights organizations have documented, “honor killings” of women suspected of sexual indiscretion, carried out by a male family member, are unfortunately not limited to this part of the world.48 The Quran, however, has harsh words for the exploitation of women’s dignity in this way. As if anticipating the misogynistic tendency of society, the Quran first establishes that there is to be no speculation about a woman’s sexual conduct. No one may cast any doubt upon the character of a woman except by formal charges, with very specific, secure evidence (i.e. four eyewitnesses to actual intercourse) that the woman is disrupting public decency with her behavior.49 If such direct proof does not materialize, then anyone engaging in such a charge is subject to physical punishment for slander. (For even if the information is true, any witness who is not accompanied by another three will be punished for slander.)50 As for the public at large, they must leave her alone, regardless of the outcome. Where the public refuses to perpetuate rumors, responding instead that: “it is not for us to speak of,”51 the patriarchal tendency to invest the honor of society in women’s sexuality loses force. In the face of any hint of a woman’s sexual impropriety, the Quranic response is: walk away. Leave her alone. Leave her dignity intact. The honor of a woman is not a tool, it is her fundamantal right.

46. PATEL, supra note 11, at 36. See also ZIA, supra note 18, at 30 (“The motivation of feudal enmity, revenge for honor via the sexuality of the woman, collusion of male authorities in attributing all blame on the woman, and State sanctioning of control over women even in the extreme form of murder, are all feeding impulses in most sex crimes [in Pakistan].”); Shaida Hasii, The Politics of Dishonor: Rape and Power in Pakistan, in FAITH AND FREEDOM: WOMEN’S HUMAN RIGHTS IN THE MUSLIM WORLD 161 (Mahaz Afkhami ed., 1995) (arguing that “political rape” is a modern version of “feudal” “honor rape”). SARWAR, supra note 20 (“Women are also considered property, and the repositories of male honor. If a man wants revenge from someone, the sweetest way is to stikle at him through his ‘honor’—his wife or daughter.”).
47. DISADVANTAGED, supra note 20, at 3 (reporting burnings); SARWAR, supra note 20 (“In addition, Pakistani society tacitly condemns ‘honor killings’—the murder of a female relative on suspicion of illicit relations.”).
49. See supra notes 36–42 and accompanying text.
50. See supra note 37.
51. See Quran 24:16–17; supra note 39 and accompanying text.
1. Pregnancy as Proof of Zina?

Given the Quran's strict standard of proof for a zina case, one might now wonder whether the conviction of women like Jehan Mina and Safia Bibi for zina on the evidence of their pregnancy alone could be justified by Islamic law. In traditional Islamic jurisprudence, the majority opinion is that pregnancy alone is not sufficient evidence to prove zina, since the Quran specifies nothing less than four eyewitnesses, and a fundamental principle of Islamic criminal procedure is that the benefit of the doubt lies with the accused. Other Muslim scholars, however, have held that pregnancy does amount to proof of illegal sexual relations, where the woman is unmarried and has not claimed rape. Imam Malik, and reportedly Ahmad ibn Hanbal, for example, considered unmarried pregnancy prima facie evidence of zina. This opinion is based in large part upon the reported positions of the three famous caliphs, Umar ibn al-Khattab, 'Uthman ibn 'Affan, and 'Ali ibn Abi Talib, that "adultery is public when pregnancy appears or confession is made." The difference of opinion is also due to differing interpretations of the role of circumstantial evidence in hudood cases.

52. See supra notes 9, 11, and accompanying text.
53. Islamic jurisprudence was developed by jurists whose approaches to and interpretations of the Quran and Sunnah became varying schools of Islamic law. See MAHMAD, supra note 34, at 15-17. Today, five schools are commonly discussed: the four Sunni schools (Hanafi, Malik, Shafii, and Hanbali) and the Shii school (Ja'fari). For more information and background, see id. at 15-59.
54. See 8 MUHAMMAD IBN QUDAMAH AL-MAQDISI, AL-MUGHNI 'ALA MUKHTASAR AL-KHAJAR 120, 145 (Dar al-Kutub al-'Imamiyyah 1994) (1994) (stating Hanafi and Shafi'i schools of thought hold that pregnancy alone does not constitute sufficient evidence for punishment of zina, but noting that the Maliki school of thought presumes punishment unless there are signs of coercion) [hereinafter AL-MUGHNI]; SIDDIQI, supra note 27, at 71 (but citing Umar's report that pregnancy furnishes sufficient proof of zina against unmarried woman); SEMINAR, supra note 14, at 271 (stating that majority of jurists hold that pregnancy is not prima facie evidence of zina).
55. See IMAM MALIK, AL-MUWATTA, § 41.4, at 392 (‘Aisha ‘Abd Charmah at-Tarjuma‘a & Ya‘qub Johnson trans., 1982) (stating that an unmarried pregnant woman who claims that she was forced to have sex is liable for punishment unless she can prove her claim); SALAMA, supra note 29, at 121. See also COULSON, supra note 27, at 174–75 (stating that Malikis hold pregnancy as prima facie evidence of zina); EL-AWN, supra note 26, at 130–31 ("If the woman is on the evidence of zina says that pregnancy alone is not sufficient for the woman is not pregnant.
56. SALAMA, supra note 29, at 121. See also 3 ABU DAWUD, supra note 28, No. 4404 (quoting Umar ibn al-Khattab's statement that fornication exists "when proof is established or if there is pregnancy, or a confession"). 8 AL-BUKHARI, supra note 28, BK. 82, No. 816, at 536–37.
57. SALAMA, supra note 29, at 120-21 (summarizing role of qara'm (presumptions, or circumstantial evidence) in hudood jurisprudence).

58. See supra Part I.B.
59. See supra notes 35–41 and accompanying text.
60. See supra note 23 and accompanying text.
C. Drafting Problems in the Zina Ordinance

1. The Same Brush: Why Rape as a Form of Zina?

As we have seen, the Quranic verses regarding zina do not address the concept of nonconsensual sex. This omission is a logical one. The zina verses establish a crime of public sexual indecency. Rape, on the other hand, is a very different crime. Rape is an inherently reprehensible act which society has an interest in preventing, whether or not it is committed in public. Therefore, rape does not logically belong as a subset of the public indecency crime of zina. Unfortunately, however, the Zina Ordinance is written exactly counter to this Quranic omission and it includes zina-bil-jabr (zina by force) as a subcategory of the crime of zina.61

Where did the zina-bil-jabr section in the Ordinance come from then, if it is not part of the Quranic law of zina? We will see later that in Islamic jurisprudence addressing zina, there is significant discussion of whether there is liability for zina under duress.62 But the language of the zina-bil-jabr section in the Pakistani Ordinance does not appear to be drawn from these discussions. (That is, it is not presented as an exception to zina in the case of duress). Rather, the zina-bil-jabr language is nearly identical to the old common law of rape in Pakistan, the borrowed British criminal law in force in Pakistan before the Hudoor ordinances. The old common law Pakistani rape statute read:

A man is said to commit "rape" who, except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:—

First.—Against her will.
Secondly.—Without her consent.
Thirdly.—With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.
Fourthly.—With her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she or believes herself to be lawfully married.
Fifthly.—With or without her consent, when she is under [fourteen] years of age.

61. See supra note 5–6 and accompanying text.
62. See infra Part II.A.
the convoluted placement of rape as part of the Zina Ordinance encourages the use of a woman’s unsuccessful claim of rape as some sort of default evidence of zina. Thus, there is a strong tendency to suspect any charge of rape to be a “loose woman’s” attempt to escape punishment for zina. Female sexual stereotypes dangerously fuel these cases. For example, on appeal of one rape conviction, the Pakistani Federal Shariat Court stated:

[W]herever resort to courts is unavoidable for any reason, a general possibility that even though the girl was a willing party to the occurrence, it would hardly be admitted or conceded. In fact it is not uncommon that a woman, who was a willing party, acts as a ravished woman, if she is surprised when in amorous courtship, love-making or in the embrace of a man she has not repulsed. 65

Such biased and derogatory observations against women by the Islamic court in Pakistan reveal a basic cultural male bias in the perception of women and female sexuality.

This bias also manifests itself in conclusions that a given sexual encounter must have been consensual if there is no physical evidence of resistance by the woman (another issue familiar to rape law reformers in the West). Many Pakistani judgments of rape have been converted into zina cases because of the absence of evidence of such resistance. 66 This stereotypical concept of women supposes that if a woman does not struggle against a sexual assault, then she must be a sexually loose woman—justifying a conversion of the charge to zina. This attitude unfairly generalizes human reaction to force and the threat of violence. And, this generalization works to the detriment of women who have been subjected to a rapist’s attack and survived only by submitting without physical resistance.

Ironically, this is the exact type of speculation regarding women’s sexual activity which the Quran explicitly condemns in the very verses establishing the crime of zina. 67 Judicial and societal speculation about women’s sexual looseness clearly does not correspond with the Quranic admonition that “it is not for us to speak of.” The intertwining of rape

with zina in Pakistan’s Zina Ordinance, however, encourages such speculation. Rather than constituting a separate violent crime against women, rape—under the title zina-bil-jabr—is perceived more as a woman’s expected defense to a zina charge, and thus subject to judicial speculation. 68

3. Bearing Witness: Exclusively Male Testimony

We have reviewed the strict Quranic quadruple testimony standard of proof for zina cases, and Islamic evidence law regarding the nature of the testimony requiring upright, sane witnesses, and testimony obtained without violation of privacy. 69 The Zina Ordinance of Pakistan, however, adds a limitation on the admissibility of evidence which we have not yet addressed: the witnesses must all be men. 70 That is, the standard of proof in the Zina Ordinance for zina or zina-bil-jabr is either confession or testimony by “at least four Muslim adult male witnesses.”

However, the Quranic zina verse setting forth the original four-witness requirement is not exclusive to men. 72 This verse refers to these four witnesses with the Arabic masculine plural, “shuhada” (witnesses), which grammatically includes both men and women, unless otherwise indicated. 73 The inclusion of the word “male” in the Zina Ordinance thus prompts the question: was this interpretation taken from Islamic law or is it a Pakistani cultural gloss on the rule?

Despite the Quranic use of the plural noun inclusive to both men and women, many Islamic jurists and scholars have traditionally limited the four witnesses in a zina case to men. 74 In fact, all major schools of thought have adopted restrictive interpretations of women’s ability to testify as witnesses in general, although some (significantly including the

65. See Zia, supra note 18, at 29 (quoting Federal Shariat Court); Naseem Ahmad, The Other Viewpoint, Dawn (Karachi, Pak.), Nov. 14–20, 1995, at 8 (weekly Tuesday Review supplement) (citing case of alleged rape of fifteen-year-old girl where defendant was acquitted and court described victim as girl of “loose character” who “has a habitual case of enjoying sexual intercourse,” reported at P.L.D. 1982 Fed. Shariat Ct. 241 (Pak.).
67. See supra note 26 and accompanying text.
68. See Ijani, supra note 65, at 71 (“The offense of rape (zina-bil-jabr) is also dealt with by the same law (of zina). The effect of this is that rape has become more of a defense against prosecution for adultery or fornication, rather than being considered as an independent crime.”).
69. See supra Part I.B.
70. Apparently, the exclusion of female evidence was challenged through a petition in the Federal Shariat Court, but the male only witness requirement still exists in the Ordinance. See Mina, supra note 12, at 118.
71. See supra note 7 and accompanying text.
72. See supra text accompanying note 24 (Quran 24:4 “Those who defame chast women and do not bring four witnesses (shuhada) should be punished . . . “).
73. See AMINA WADUD-MUJEEZ, QURAN AND WOMAN, Ch. 1 (1992) (discussing Quranic grammar and its emphasis on the duality of men and women).
74. A.D. ARIOLA, INTRODUCTION TO ISLAMIC LAW 134 (2d ed. 1981); El-Awale, supra note 26, at 17, 124–26 (defining zina witnesses as four adult men).
famous jurists, al-Tabari, Ibn Taymiyya, and Ibn al-Qayyim) have disagreed.\textsuperscript{75} The rationales accompanying this rule are interesting, however. For example, the \textit{Hedaya} states:

Evidence is of several kinds, that of four men, as has been ordained in the Quran; and the testimony of a woman in such a case is not admitted; because \ldots in the time of the Prophet and his two immediate successors it was an invariable rule to exclude the evidence of women in all cases inducing punishment or retaliation; and also because the testimony of women involves a degree of doubt, as it is merely a substitute for evidence, being accepted only where the testimony of men cannot be had; and therefore it is not admitted in any matter liable to drop from the existence of doubt.\textsuperscript{76}

Although the principle that reasonable doubt should negate convictions of violent crimes is a laudable one, the reasoning leading to it appears to stem from a condescending patriarchal view of women.\textsuperscript{77} This attitude continues even in more modern texts on Islamic law:

In the case of [zina] the testimony of four male witnesses is required as a female is weak in character.\textsuperscript{78}

[The concern of Islamic law for complete truthfulness of evidence and certainty of proof is abundantly clear from its rules of evidence. Avoiding conviction only on a single witness testimony and reluctance to act upon the evidence of women only are indications of the fool-proof system of guilt-determination prescribed by the Qur'an and Sunna.\textsuperscript{79}]

\textsuperscript{75} See Mohammad Fadel, \textit{Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought}, 29 Int'l. J. Middle E. Stud. (forthcoming May 1997) (discussing Islamic jurisprudence on women as witnesses, addressing sociological influences on the restrictions on women's testimony, noting alternative interpretations among jurists); Mosul, supra note 29, at 118 ("All jurists reject the testimony of women," but citing some scholars who accept testimony of women in zina cases if there are two women for each man). See also COULSON, supra note 27, at 127; EL-AWA, supra note 26, at 17; 124-26 (defining zina witnesses as four adult men).

\textsuperscript{76} \textit{Hedaya}, supra note 30, Bk. XXI, Ch. I, at 353-54.

\textsuperscript{77} Traditional Muslim jurists have used similar biased reasoning to justify the requirement of two women witnesses for one man in general non-zina evidence law. These include: sliding male pride, since the losing party's resentment will be greater if losing to a woman, and protection of society, as the practice of women leaving the home will lead to social disorder and corruption. See Fadel, supra note 75.

\textsuperscript{78} AYOOLA, supra note 74, at 134.


\textsuperscript{80} See supra note 27, at 119.

\textsuperscript{81} See WADUD-MUHSIN, supra note 73, at 87, for an alternative analysis of Quranic requirement of two women witnesses for one man, in two-witness-minimum cases.

\textsuperscript{82} See supra note 27, at 45.

\textsuperscript{83} See supra note 30, Bk. XXI, Ch. I, at 354. Similar patriarchal attitudes towards women manifest themselves even outside discussions of competent witnesses. One modern commentator rationalizes the disparity between husband and wife in case of obtaining a divorce by saying that, because of emotional instability due to the menstrual cycle, "[i]f women were given the power of unilateral divorce, it is probable that millions of women would divorce their husbands and it is probable that millions of divorces would have ensued and there would be chaos in society." DIT, supra note 24, at 95. See also WADUD-MUHSIN, supra note 73, at 35 (citing Zamakhshari's statement that men are preferred by God over women in terms of "intelligence, physical constitution, determination and physical strength").

\textsuperscript{84} See WADUD-MUHSIN, supra note 73, at 34-38, 64-66 (describing equality of women and men laid out in the Quran; distinctions between humans are only on the basis of character, and women are not defined by biology alone).
into the analysis and application of Islamic law in such societies and places in history.

Educated Muslims today, however, would quickly dismiss as simple ignorance any claims that women are inferior in intellectual capacity, memory, or character. As for the societal harmony arguments that women do not venture out into public space, Muslim women today do not necessarily fit into the mold described in these quotes. Nor, indeed, did all women of Muslim history. To reason that women should not be witnesses to a zina or zina-bil-jabr case because this would encourage their going out in public is pointless in a society where, for example, the medical evidence in a zina prosecution might easily be submitted by a woman doctor, the prosecuting or defense attorney could be a female litigator, and the presiding judge a woman jurist. The caution against women entering public space has long been dropped in most parts of Pakistan, and in other countries of the modern world.

The limitation of testimony exclusively to men appears to be an incorporation into Islamic law of an antiquated custom which has now changed, and in Islamic law, "all rules in the shari'ah [Islamic law] that are based upon customs change when customs change." Modern Islamist writings, in fact, have been instrumental in establishing that such exclusion of women from public space is an unfair cultural practice that is not an inherent part of Islam:

In the 1970s, some Islamist began a serious reexamination of the dominant conservative position. They concluded that the inclusion of women in all facets of the political process was entirely consistent with Islam, that Islam does not require strict segregation of the sexes, and that much of the conservative position was based on custom rather than on the absolute principles of Islam.86

85. See Ibn Hazar al-Ishqalabi, Al Isaba fi Tamyiz al-Sahaba 341-42 (1907) (discussing Laila al-Shifa bint Abdullah, who was appointed by Caliph Umar to oversee the Medina marketplace); Z. Mohammad, Al-Bayyina al-Mu'mina 300-01 (10th ed. 1991) (also discussing al-Shifa bint Abdullah); Khatimah, supra at 5:67-70 (summarizing biographies of prominent Muslim women, including story of Baghada miler Umm al-Mugaddir bihla, who set up a female courtier as judge to hear disputes in the public square, citing Tabari, Ibn Athir, Ibn al-Jawzi, Ibn Miskawayh). See also Abu Al-Hasan Ahmad Qadi, Justice in Historical Islam 57-58 (1988) (describing cases involving women litigants before a male judge); WAFA FRONTIER WOMEN IN ISLAM (1995) (describing prominent women throughout Muslim history, including Umm al-Mugaddir bihla).

86. MAHMAHAN, supra note 32, at 116. See also KAMALI, supra note 21, at 285 (summarizing changeability of rules where "urf (custom) has changed, citing al-Shafi'i's different rules in Iraq versus Egypt).


Among the many respected leaders of the modern Islamist movement who follow this attitude are Hasan al-Turabi of Sudan, Rachid al-Ghanouchi of Tunisia, and Muhammad al-Ghazali and Yusuf al-Qaradawi of Egypt.88

The exclusivity of male testimony as an application of cultural male bias to the Islamic law of zina is unfair. But the exclusion of female testimony becomes appalling when expanded to apply to zina-bil-jabr as well. It is a clear travesty of justice to deny a victim of rape the right to testify to this violent attack merely because she is a woman. In applying the exclusively male evidence rule of traditional zina law to the crime of zina-bil-jabr, Pakistan has transformed what was merely an antiquated male bias into a direct violation of the human rights of women. The direct contradiction to the Quranic injunctions to stand up firmly for justice is obvious.

Moreover, depriving women as an entire gender of the right to testify in a zina or zina-bil-jabr case—where a woman's honor is generally at issue—has serious societal ramifications. First, it prevents women from fulfilling the Islamic duty to bear witness to the truth, repeated emphasized in the Quran. But even more significant is the fact that the permanent rejection of testimony is itself a Quranic hadd penalty. That is, in its verse prohibiting slander, the Quran establishes that deprivation of the right to testify is a severe punishment—one of the two consequences of falsely accusing a woman:

Those who defame chaste women, and do not bring four witnesses, should be punished with eighty lashes, and their testimony should not be accepted afterwards, for they are profligates.89

88. See id. at 30, 53 (citing Hasen al-Turabi's paper, "Women in Islam and Muslim Society," which "laid down the theoretical basis of the reformist approach to gender relations, endorsed unequivocally a fully participatory role for women in politics and in every other sphere of society and declared that traditional restrictions on women's freedoms had nothing to do with Islam."); id. (quoting al-Ghanouchi's statement: "We began to ask ourselves sheepishly, to what extent does our current express Islam's approach to women, and to what extent have we freed ourselves from the residue of the era of decline and from our reactions against the Bourghian degeneracy?"); id. at 28 (citing al-Ghazali's book, Al-Sunna wa Al-Nabawiyyah Bayah A'al al-Fiqh wa A'al al-Hadith, which focuses on verses and hadith which conserva interpret as excluding women from positions of authority, and asserting that "some authentic juristic interpretations of Islamic law allow women to serve in any public capacity—as judges, ambassadors, cabinet members, and rulers"); id. (citing 1990 fatwa (ruling) of Yusuf al-Qaradawi that women can seek parliamentary and judicial positions, and issue fatwas with the same authority as men).

89. See, e.g., Quran 4:135 ("O you who believe, be custodians of justice (and) witnesses for God, even though against yourselves, or your parents or your relatives . . . and if you prevaricate or avoid (giving evidence), God is cognizant of all that you do.").

90. Quran 24:4 (emphasis added).
A law which disallows women's testimony in *zina* cases, then, is tantamount to sentencing all women to one of the Quranic punishments for slander. This is ironic given the fact that the slander verse is specifically addressed to the preservation of women's honor—something that is stripped when one's testimony is not accepted. As one commentator puts it, "in a Muslim society the rejection of an individual's testimony is tantamount to outlawing him, [and thus] the rejection of the testimony of one who has committed a *hadd* offence is a deterrent measure." Elimination of all female testimony in *zina* cases thus subjects women to part of the same punishment as if they had committed a *hadd* crime, the most serious type of offense in Islamic law. Quite different from honoring women, as the Quran dictates, this practice dishonors all women by insinuating incompetence and weakness of character—the same qualities attributed to a slanderous witness.

Finally, this rule creates a practical problem. If the rationale for rejecting a slanderer's testimony is deterrence, then why not also apply this deterrence to stop women from slandering each other? That is, if women's testimony is automatically inadmissible, then a woman will naturally not be deterred by the injunction that a slanderer's testimony will no longer be admitted. Hence, the Quranic *hadd* punishment for the offense of slander (that the slanderer's testimony is rejected ever after) becomes meaningless to women. Certainly the punishment of flogging may yet be a deterrent, but why, then, is there the additional punishment of rejecting future testimony? And why would it apply only to men? The Quran gives no indication that it means to deter women any less than men in its injunctions against slander. To simply nullify part of the Quranic punishment for slander, then, seems quite a radical result to be based merely on outdated cultural attitudes regarding women's competence and societal place.

4. Problems with *Zina* as *Ta’zir*

Islamic criminal law acknowledges two categories of crime and punishment. The first, known as *hadd*, encompasses crimes specifically articulated by God in the Quran and through the *hadith*. Islamic jurisprudence acknowledges, however, that society may legislate additional crimes and punishments as needed. These societally legislated crimes and punishments are called "*ta’zir*." *Ta’zir* crimes can sometimes carry much lighter evidentiary or sentencing schemes than Quranic *hadd* crimes. In Pakistan, when the strict quadruple witness standard of proof is difficult to meet, it has become increasingly common for *zina* cases to be prosecuted as *ta’zir* crimes, as opposed to *hadd* crimes. The *Zina* Ordinance includes a clause providing for *ta’zir* prosecutions of *zina* where there is less evidence:

- Zina or zina-bil-jabr liable to *ta’zir*.
- [W]hoever commits zina or zina-bil-jabr which is not liable to *hadd*, or for which proof in either of the forms mentioned... [i.e. confession or four witnesses] is not available and the punishment of qazafl (slander) liable to *hadd* has not been awarded to the complainant, or for which *hadd* may not be enforced under this Ordinance, shall be liable to *ta’zir*.
ment of four male witnesses] that they find themselves open to the possibility of prosecution for zina [under the relaxed ta'zir evidentiary rules]; (2) men accused of zina-bil-jabr being subject to diminished charges [because the hudosd evidence is not proved]; and (3) women who are wrongfully prosecuted and who are afforded restricted protection against such prosecution.96

Thus, the relaxed evidentiary rules of ta'zir (corresponding to its lesser punishment) open the zina law to further manipulation by authorities, who may threaten a woman with prosecution for zina under ta'zir evidence if there is not enough proof to convict under hudosd. If the woman is charging rape, this exacerbates the potential injustice of the situation. A woman might watch her rapist be acquitted for lack of four witnesses, but herself be subject to prosecution for zina under the looser evidentiary rules of ta'zir.

This phenomenon should sound familiar:

Those who defame chaste women, and do not bring four witnesses, should be punished with eighty lashes, and their testimony should not be accepted afterwards, for they are profligates.97

This is the Quranic verse which started our zina discussion. It contemplates the possibility of adultery charges being brought against women upon less evidence than four witnesses, and condemns it as a grievous slander. By allowing prosecution for zina as a ta'zir punishment, and thereby loosening the evidentiary rules, the Pakistani Zina Ordinance has succeeded in contravening the very Quranic verse upon which it is based.98 In fact, zina is the only hadd crime for which the Quran sets out a specific punishment for not meeting its strict evidentiary rules.99 The Quran thus indicates that, unlike other hadd crimes, there can be no ta'zir punishment for zina. That is, for this one crime, if four eyewitnesses are not produced, the state and society must walk away and not speak of it again.100

But the Zina Ordinance goes even further in ignoring the Quranic injunction of all-or-nothing proof of zina. It includes a provision for

“attempt” of zina; setting forth punishment of imprisonment, whipping, and a fine.101 Again, this directly contradicts the spirit of the Islamic law of zina. Both the Quranic verses quoted above and the hadith of Prophet Muhammad establish that unless the act was actual penetration, it is not punishable by the state.102

There is a compelling Quranic spirit against either a ta'zir or an attempt version of zina. Unfortunately, the Pakistani Zina Ordinance has lost sight of the unique status of zina as a hadd crime of public indecency and expanded it to areas which inevitably result in injustice and discrimination against women—the focus of the Quranic verses on the subject in the first place.

II. RAPE IN ISLAMIC JURISPRUDENCE

In this critique of the Pakistani Zina Ordinance, I have demonstrated that the crime of zina set forth in the Quran is primarily a societal crime of public indecency, and for that reason strict evidentiary standards of proof are attached to its prosecution. We have also seen that some of the application of the Quranic evidentiary standard for zina has been skewed by patriarchal culture to the detriment of women’s rights. The inadmissibility of women’s testimony in zina cases, including rape prosecutions, is one such example. The creation of a ta’zir version of zina, and the subcategorization of rape under zina in the first place are other examples of aspects of Pakistan’s zina law which unfairly dishonors its women.

So far, we have seen that the rationale for the strict evidentiary requirements for zina is an affirmation and protection of both female and male honor: unlawful sexual intercourse will be prosecuted by the state only when it is publicly indecent. Within the privacy of one’s home, the immorality of the act is something left between the individual and God. The same rationale would not, however, apply to the crime of rape. In rape, public display is not the crucial element to the criminality of the act. Rather, the attack itself is a crime of violence, whether committed in public or in private. Rape is not consensual sexual intercourse, but a violent assault against a victim, man or woman, boy or girl, where the perpetrator uses sex as a weapon. Consistent with our analysis thus far, the Quran does not include any direct mention of rape under the general crime of zina. How, then, has Islamic law addressed the crime of rape?

96. Rahman, supra note 94, at 1000.
98. See also Patel, supra note 11, at 30–31 (making same argument that there can be no ta'zir punishment for zina). This argument, in fact, was the basis of a challenge to the ta'zir punishment implemented in zina cases in Pakistan. Id. (citing 1993 petition challenging §§ 9(a) and 10 of the Zina Ordinance on this ground).
99. See al-STARI, supra note 24, at 247 (“[o]nly the witnesses in the case of adultery should be scourged.”).
100. See supra Part I.B.
102. See supra note 27 and accompanying text.
A. Duress: Rape as a Negation of Intent for Zina

In their chapters on zina, Islamic legal scholars have acknowledged that where one or more parties engaged in zina under duress, they are not liable for zina.103 A hadith of the Prophet Muhammad establishes this principle: upon a woman’s reporting to him that she was forced to commit adultery, he did not punish her, and he did punish the perpetrator.104 Similar rulings by the Caliph Umar ibn Al-Khattab105 and Imam Malik106 further cement this principle in Islamic law. Islamic jurisprudence, in fact, devotes much attention to the concept of duress as a negation of intent, thus eliminating liability for an offense.107 The application of the law of duress to zina has led to a thorough analysis of liability in possible permutations of forced zina. For example, the Hedaya devotes several paragraphs to resolving conflicting stories regarding a sexual encounter where one party claims it was consensual, and the other claims it was not.108 Matters become more complicated where the witnesses to the encounter are of different genders.109 There is also discussion and difference of opinion as to whether a man can be forced to commit zina and thus not be liable for hadd punishment.110

Thus, the discussions of forced sex in jurisprudential writings on zina exhaustively discuss nonconsensual sex as a negation of the requisite mental state for zina, but does Islamic law address rape as an independent crime? As it turns out, contrary to what the Pakistani legislation would suggest, Islamic jurisprudence has in fact not only categorized rape as a separate criminal offense (under hiraba), but has also allowed civil compensation to rape survivors (under jirah). These two remedies are addressed in turn.

103. See Hedaya, supra note 30, Bk. VII, Ch. II, at 187 (defining composition generally); 8 Al-Muqni, supra note 54, at 129, 145 (including discussion of exemption from zina liability for male forced to commit zina); Semnan, supra note 14, at 269 ("[i]t is an agreed position that females subjected to rape against their consent and without their will would be exonerated from any liability under Islamic law.").
104. See 9 Al-Bukhari, supra note 28, Bk. 82, Ch. 7; 1 Mishkat Al-Masabih 762 (James Robert trans., 2d ed. 1990) (citing hadith transmitted by Tirmidhi and Abu Dawud).
105. See Maliki, supra note 55, 41, 392 (citing case where Caliph Umar prosecuted rapist of slave girl and did not prosecute her); 8 Al-Muqni, supra note 54, at 129 (citing case where Caliph Umar released woman who asserted rape).
106. See Maliki, supra note 55, § 413, 392.
108. Hedaya, supra note 30, Bk. VII, XXI, at 189-95, 353-54.
109. Id.
110. Id. at 187. See also 8 Al-Muqni, supra note 54, at 129.

B. Hiraba: Rape as a Violent Taking

Hiraba is another hadd crime defined in the Quran. It is variously translated as “forcible taking,” “highway robbery,” “terrorism,” or “waging war against the state.” The crime of hiraba is based on the following Quranic verse:

The punishment for those who wage war [niharibun] against God and His Prophet, and perpetrate disorders in the land is: kill or hang them, or have a hand on one side and a foot on the other cut off or banish them from the land.111

Islamic legal scholars have interpreted this crime to be any type of forcible assault upon the people involving some sort of taking of property.112 It differs from ordinary theft in that the Quranic crime of theft (karghat) is a taking by stealth whereas hiraba is a taking by force.113 (Thus, the popular translation as “armed robbery.”) Although it is generally assumed to be violent public harassment, many scholars have held that it is not limited to acts committed in public places.114

It is in the discussions of the crime of hiraba where the crime of rape appears. A brief review of the traditional descriptions of hiraba reveals that rape is specifically included among its various forms. In Fiqh-us-Sunnah, a modern summary of the primary traditional schools of thought on Islamic law, hiraba is described as: a single person or group of people causing public disruption, killing, forcibly taking property or money, attacking or raping women ("hath al-'arad"), killing cattle, or disrupting agriculture.115 Reports of individual scholars on the subject further confirm the hiraba classification of rape.116 Al-Dasuqi, for example, a

111. Quran 5:33.
112. See El-Aw, supra note 26, 7-10; 5 Abdur Rahman Al-Harimi, Kitab Al-Fiqh ‘Ala Al-Mathahib Al-‘Arba‘a 409-11 (1986) (hereinafter Fiqh al-Mathahib); 2 Sayed Sabiq, Fiqh-us-Sunnah 446 (10th ed. 1993) (chapter on harsad, describing hiraba) [hereinafter Fiqh-us-Sunnah]; Sedeqi, supra note 27, at 129-34. See also Dho, supra note 1, at 250 (explaining context of verse revelation: some people came to Muhammed under the auspices of new converts, complained that the weather in Medina was disagreeable to them, and Muhammad sent them to live outside the city with cattle belonging to the state; they subsequently killed the cattle and stole the cattle and this verse was revealed shortly thereafter).
113. See Dho, supra note 1, at 250, 254; El-Aw, supra note 26, 7.
114. 2 Fiqh-us-Sunnah, supra note 112, at 447.
115. Id. at 450.
116. 5 Fiqh al-Mathahib, supra note 112, at 410-11 (summarizing Maliki school definition of hiraba offender as someone who “obstructs the road, even without intending to take money, intending to harm someone, or intending to rape a woman (‘hath al-harim’).”)
Maliki jurist, held that if a person forced a woman to have sex, their actions would be deemed as committing *hiraba*. In addition, the Maliki judge Ibn 'Arabi, relates a story in which a group was attacked and a woman in their party raped. Responding to the argument that the crime did not constitute *hiraba* because no money was taken and no weapons used, Ibn 'Arabi replied indignantly that "*hiraba* with the private parts" is much worse than a *hiraba* involving the taking of money, and that anyone would rather be subjected to the latter than the former. The famous Spanish Muslim jurist, Ibn Hazm, a follower of the Zahiri school, reportedly had the widest definition of *hiraba*, defining a *hiraba* offender as:

[O]ne who puts people in fear on the road, whether or not with a weapon, at night or day, in urban areas or in open spaces, in the palace of a caliph or a mosque, with or without accomplices, in the desert or in the village, in a large or small city, with one or more people ... making people fear that they’ll be killed, or have money taken, or be raped ("*hath al ’arad") ... whether the attackers are one or many."

Thus, even this cursory review of traditional Islamic jurisprudence shows that the crime of rape is classified not as a subcategory of *zina*, but rather as a separate crime of violence under *hiraba*. In Islam, sexual autonomy and pleasure is a fundamental right for women as well as men, taking by force someone’s right to control the sexual activity of one’s body is thus logically classified as a form of *hiraba*.

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117. Id., supra note 1, at 253.
118. See 2 FIOH-US-SUNNAH, supra note 112, at 450.
119. Id.
121. It is interesting to note that the concept of a woman’s sexuality as her property is in fact not a new one to the crime of rape. The western crime of rape evolved from the early Roman law of "raptus" which was defined as "a form of violent theft that could apply to both property and person." DOLLY F. ALEXANDER, Comment, Twenty Years of Morgan: A Criticism of the Subjectivist View of Mens Rea and Rape in Great Britain, 7 Pace Int'l L. Rev. 207, 212 (1995). See also Dripps, supra note 42, at 1781. Note that this principle could also be applied to expand the Islamic law of rape to include the rape of men as another instance of the violent taking of an individual’s sexual autonomy.
122. See supra Part I.C.2.
123. See supra Part I.C.2.
124. Id. at 36. Note that the law of *jirah* (in addition to other principles of Islamic law) providing for compensation for physical harm even between spouses would support modern Islamic legislation against domestic abuse.
125. Id. (discussing varying applications of *jirah* under four Sunni schools of thought);
BORHANY, supra note 2, at 219 (stating where someone is forced to commit *zina*, she is not punished for *zina*, but rather entitled to compensation).
also makes logical sense. This categorization would provide financial compensation to every victim of rape for any harm done to their body as a result of the attack. Taking the analysis further, because the right to control one’s own sexual activity is a fundamental Islamic and human right, it could be argued that invasion of one’s sexual organs against one’s will constitutes harm, even where there is no physical bruising or tearing. Modern Islamic jurisprudence and legislation could therefore choose to provide that either instead of, or in addition to hiraba punishment against the rapist, a woman might also claim compensation for her ordeal under the principle of jirah.

Interestingly, Western legal discourse has just recently begun to reevaluate the crime of rape, and is still struggling to overcome its male-oriented articulation of the crime. If Islamic jurisprudence were to continue its development in the direction outlined above, jirah principles provide an interesting alternative remedy. Islamic law has the unique resource of a jirah system of established bodily compensation law to apply as one response to the crime of nonconsensual intercourse, if it were recognized in modern Islamic legislation. In Western history, the Roman law also recognized compensation as a means of resolving a rape dispute, but it took a more patriarchal approach: it found that the father (or other male authority) of the rape victim was owed damages because rape impaired his inability to protect the woman. Islamic law, with its radical introduction of a woman’s right to own property as a fundamental right, already employs a gender-egalitarian attitude in this area of jurisprudence. In fact, there is a hadith specifically directed to transforming the early Muslim population out of this patriarchal attitude of male financial compensation for female sexual activity. During the time of Prophet Muhammad, a young man committed zina with his employer’s wife. The father of the young man gave one hundred goats and a maid as compensation to the employer, who accepted it. When the case was reported to the Prophet, he ordered the return of the goats and the maid to the young man’s father and prosecuted the adulterer for zina. Early Islamic law thus established that there should be no toleration of the attitude that a woman’s sexual activity is something to be bartered, pawned, or owned by the men in her life. Personal responsibility of every human being for his or her own actions is a fundamental principle in Islamic thought.

126. See supra note 120.
127. Again, this analysis would also provide for male rape victims.
128. See Dripps, supra note 42, at 1780–81.
129. 3 Abu Dawud, supra note 28, Bk. 33, No. 4430; 8 Al-Bukhari, supra note 28, Bk. 81, Nos. 815, 821, 826.
131. Notably, the Pakistani Zina Ordinance categorically eliminates this possibility, by defining zina-bil-jahr as unconsensual intercourse with someone “to whom he or she is not validly married.” See supra note 7 and accompanying text (a description also popular in old common law definitions of rape).
132. See supra note 124 and accompanying text.
133. See 8 Al-Muqtari, supra note 54, at 36. See also Jilani, supra note 56, at 73 (citig case where medical evidence revealed marks of violence on woman’s body, but found no rape due to existence of marriage certificate: “[a]t best, it can be said to be misuse of the wife,” said the court).
jurisprudence on rape shows that it is more than feasible for modern Muslim legislators to take the tools offered in Islamic jurisprudence on *hiraba* and *jirah* to form a comprehensive gender-egalitarian law of rape, one which does not counteract the positive honoring of women which is inherent in the Quranic verses on *zina*. Rape should be specified as a form of *hiraba* in the *hiraba* section of modern *hudood* statutes, thus identifying it as a violent crime for which the perpetrator is subject to serious punishment. In fact, Pakistan already has a *hiraba* chapter in its *Hudood Ordinance*.\(^{134}\) Modern Islamic legislation might also designate rape as a harm under *jirah*, thus creating grounds for rape victims to receive some compensation for the harm caused to their bodies and sexual autonomy.

Modern Islamic jurists, legislatures, members of the judiciary and the bar must work out the logistical details of these laws, and what combination of *hiraba* and *jirah* should apply in a given situation and society. A greater challenge, perhaps, is changing the cultural attitudes towards women which helped to create the existing laws in the first place. That ongoing effort must be undertaken simultaneously with any official legislative changes, in order to give real effect to such legislation, and to give life to the Quranic verses honoring women.

\(^{134}\) See *Major Acts*, supra note 2, at 7.