A Decolonial Critique of the *Maqāṣid*-Based Approach to *Sharīʿa*: The Call for a Moratorium on the *Ḥudūd*

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Abstract

A polarizing symbol, the ḥudūd punishments have come to be conflated with the very essence of the sharīʿa *by advocates and detractors alike. This article applies a decolonial critique to reform projects that call for the suspension of the* ḥudūd*, particularly those appealing to* maqāṣid al-sharīʿa *for internal legitimacy. Focusing on one such prominent call, I argue that the fixation on ḥudūd as divinely mandated punishments, in lieu of political punishment (*taʿzīr*) or the law of talion (*qiṣāṣ*), reflects a misplaced critique, revealing a colonial lens and the enduring coloniality of power. By analyzing* ḥudūd *enforcement in Saudi Arabia and Iran, I show their statistical rarity, theoretical inapplicability, and ethical dissonance with liberal sensibilities. I incorporate perspectives from contemporary and premodern scholars—including Ali Gomaa, ʿIzz al-Dīn b. ʿAbd al-Salām, and Abū al-Qāsim al-Burzulī—highlighting historical critiques and alternatives to* ḥudūd*. Additionally, I examine the broader implications of reform, particularly its implicit reliance on the carceral system, which remains unchallenged by reformist discourse. Engagement with critical theorists Michel Foucault, Angela Davis, and Michelle Alexander reveals the reformist concern with regulating the visibility of violence, rather than its elimination, as a hegemonic function of human rights discourse in defining the boundaries of legitimate debate.*

يَمِيـنِي أَمِـيرَ ٱلْمُؤْمِنِـينَ أُعِيـذُهَا بِعَفْوِكَ أَنْ تَلْقَى مَكَانًا يَشِينُهَـا
يَدَيَّ كَانَتِ ٱلْحُسْنَاءُ لَوْ تَمَّ سَبْرُهَا وَلَنْ تَعْدَمَ ٱلْحُسْنَاءُ عَابًا يَشِينُهَـا
فَلَا خَيْرَ فِي ٱلدُّنْيَا وَكَانَتْ حَبِيبَةً إِذَا مَا شِمَـالِي فَارَقَتْهَا يَمِينُهَـا

I entrust my right hand, O Commander of the Faithful, to your pardon,
lest it meet a fate that would disgrace it.
My hands had been fair and beautiful, had they been fully examined,
but even the fairest beauty is not free from a flaw that mars it.
There is no good left in this world, even if it were once beloved,
if my right hand must part ways from my left.

So pleaded the last thief facing amputation before the caliph Muʿāwiya. Moved, the caliph remarked, "What am I to do with you, when I have already severed your companions?" The thief's mother intervened, imploring, "O Commander of the Faithful, make it one of the sins from which you repent." Muʿāwiya, struck by the humanity of the moment, relented and the thief was released, an act remembered as the first deliberate abandonment of a prescribed ḥadd.

Introduction

Scenes such as this, recorded in the early Islamic legal tradition, disrupt modern portrayals of the *ḥudūd*[1] as unthinking relics of brutality.[2] They reflect a historical legal culture where divine penalties operated within a broader ethical framework, attuned to repentance, mercy, and the complexities of human character. Yet, contemporary interlocutors often erase this textured reality. A polarizing symbol, the *ḥudūd* punishments have come to be conflated with the very essence of the *sharīʿa* by advocates and detractors alike. On one hand, they command popular support among Muslims who often perceive them as emblematic of

1 The *ḥudūd* (sing. *ḥadd*) are offences or prohibitions whose punishments are prescribed in the Qurʾān and the Sunna. *See* Wael B. Hallaq, An Introduction to Islamic Law 155–56 (2009).

2 The poem and narrative are reported in Abū al-Ḥasan ʿAlī al-Māwardī, al-Ḥāwī al-kabīr 13:269 (ʿAlī Muʿawwaḍ & ʿĀdil ʿAbd al-Mawjūd eds., 1999).

an authentically Islamic society. On the other, they have become a focal point for Islamophobes and for criticism from human rights organizations. In response, contemporary Muslim reformers, who are worried about the tradition's public perception, as well as finding its application to affect women and the poor disproportionately, call for a moratorium on the *ḥudūd* in Muslim majority countries. What makes such proposals ever the more contentious, is the belief that the *ḥudūd* are divinely ordained, derived from definitive texts and therefore immutable.

This article applies a decolonial critique to contemporary calls for the suspension of the *ḥudūd*, specifically, reform projects that appeal to *maqāṣid al-sharīʿa* (the objectives of Islamic law) for internal legitimacy.[3] In examining one such prominent call, I argue that a fixation on *ḥudūd* as divinely mandated punishments, in lieu of political punishment (*taʿzīr*) or the law of talion (*qiṣāṣ*), is not only a misplaced critique (a misreading of the context so vital to modern reform projects) but indicative of the coloniality of power at play and ultimately undertaken with a colonial lens. By analyzing the application of *ḥudūd* in Saudi Arabia and Iran, I show them to be statistically negligible, theoretically well-nigh impossible to implement and their role in ethical-subject formation to often be at odds with liberal sensibilities.

Furthermore, I bring both contemporary and pre-modern traditional scholarship into the conversation. Ali Gomaa (b. 1952), Grand Mufti emeritus of Egypt, as well as ʿIzz al-Dīn ibn ʿAbd al-Salām (d. 660/1262), one of the foundational contributors to *maqāṣid* theory, both engage the *ḥudūd* via *maqāṣid*. Abū al-Qāsim al-Burzulī (d. 844/1440) is a notable pre-modern scholar who advocated for whole-sale replacement of *ḥudūd* with property-based penalties. Ultimately, I find the *maqāṣid*-based approach as utilized by progressives tends to bypass the procedure or methodological rigor of Islamic law, even if coming to the same substantive conclusions as that of the traditionalists. This suggests that the opposition to *ḥudūd* reform is rooted primarily in procedural concerns, and represents a resistance towards attempts to hegemonize Eurocentric modes of reasoning as normative or superior.

3 Hereafter, I will refer to *maqāṣid al-sharīʿa* simply as the *maqāṣid*.

Finally, among the broader implications of a moratorium would be a turn to the carceral system, for which there is lack of consideration or critique from the reformist project. By engaging the context surrounding the birth of the modern prison, Michel Foucault concludes that prison reformers were not moved by humanitarian ideals, but by a desire to optimize power and economize punishment.[4] Critical scholarship such as that of Angela Davis and Michelle Alexander further critique what they term the prison-industrial complex built upon mass-incarceration and institutionalized racism.[5] This reveals the *ḥudūd* reform project to be more concerned with the public visibility of violence, i.e., the regulation, rather than elimination of violence. I argue this diversion of the gaze is a hegemonic function of human rights discourse in defining the parameters of legitimate debate.

Decoloniality: A New Framework for *Ḥudūd* Analysis

This article seeks to begin a conversation on the inattentiveness to decolonial concerns because the discourse on *ḥudūd* remains entangled in colonial epistemologies that have shaped both the critiques and defenses of Islamic penal law. By foregrounding decolonial thought, this study seeks to interrogate the ways in which coloniality has influenced the framing of *ḥudūd*, challenging the hegemony of Eurocentric legal and moral paradigms and opening space for alternative epistemic possibilities rooted in indigenous and Islamic traditions and, therefore, an introduction to this framework is due.

Decoloniality is an epistemic-political project aimed at resisting, undermining and eventually replacing the contemporary Eurocentric world order.[6] Quijano describes the Eurocentric world order as: "The idea that the history of human civilization has been a trajectory that departed from nature and

4 Michel Foucault, Discipline and Punish: The Birth of the Prison 7 (1995).

5 Angela Davis, Are Prisons Obsolete? (2003); Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2012).

6 Syed Ali, *Further Towards an Islamic Decoloniality*, Academia.edu (Dec. 23–24, 2015), https://www.academia.edu/23133969/Further_Towards_an_Islamic_Decoloniality.

culminated in Europe, also that differences between Europe and non-Europe are due to biological differences between races, not to histories of power."[7]

While independence movements circa 1960 saw the end of the boots on the ground approach of the Western colonizers, their legacy would continue to be manifest in the use of economic, political and cultural pressures to exert control over former colonies.[8] This is encompassed in what has been termed the coloniality of power, the concept describing the structures and hierarchal orders of power imposed and that have lived beyond European colonialism.[9] According to Quijano, coloniality of power is premised on the "calculated" creation of race, in which inferiority and superiority was deemed, by the colonialists, to be biological and attributed by skin pigmentation and phenotypical differences. He adds that this not only reinforced European domination but held economic value, as a division of labor was formed around these hierarchies.[10] Secondly, coloniality of power was also manifest in the assigning of knowledge production exclusively to Europeans while repressing indigenous and traditional forms of knowledge production. This Eurocentric system of knowledge had the added effect of fossilizing race as the "naturalization of colonial relations between Europeans and non-Europeans."[11] Finally, the third form of the coloniality of power was in the creation of a hegemonic cultural system revolving around and enforcing Eurocentric economic and knowledge productions based on the fiction of race.[12]

Delinking from the colonial matrix of power mentioned above is precisely the purview of the decolonial project.[13] This

7 Anibal Quijano, *Coloniality of Power, Eurocentrism, and Latin America*, 1 Nepantla: Views from South 542 (2000).

8 Ramón Grosfoguel, *Decolonizing Post-Colonial Studies and Paradigms of Political-Economy: Transmodernity, Decolonial Thinking, and Global Coloniality*, 1 Transmodernity: J. Peripheral Cultural Production of the Luso-Hispanic World (2011).

9 Walter Mignolo, The Darker Side of Western Modernity: Global Futures, Decolonial Options 153 (2011); Quijano, *supra* note 7, at 540.

10 Quijano, *supra* note 7, at 168.

11 *Id.* at 534–35.

12 *Id.* at 540–50.

13 Mignolo, *supra* note 9, at 5.

requires attention to the twin decolonial concerns of external co-option and epistemic delinking. External co-option being the concern of appropriation by dominant ideologies and epistemic delinking being the decentering of Western knowledge and ways of thinking as superior or the standard. It is the delinking from liberalism and post-colonialism. While post-colonialism affirms pluralism within the academy, decoloniality goes further, insisting that thinking must come from the global South and that they have a right to overthrow the hegemonic order.[14] Decolonial scholars reject what they see as the tyrannical abstract universal, an all-encompassing concept.[15] Instead, decolonial scholarship proposes pluriversalism, a conception of the world in which there isn't "one sole epistemic tradition to draw from" and which has space for "multiple and diverse ethico-political projects."[16] Ramón Grosfoguel and Eric Mielants clarify that the decolonial project opposes third-world fundamentalism and the idea that Truth can only be derived from one epistemological tradition. Therefore, while decoloniality privileges the global South and by extension the Islamic epistemic tradition; this would be considered *a* viable epistemic tradition to draw from, not the *only* one to draw from. This pluriversal nature of decoloniality differentiates it from third-world fundamentalism which draws from one epistemic tradition, believing it to be the *only* viable one.[17] Additionally, decoloniality foregrounds the issue of race as essential to its project, conscience of both geo-politics and body-politics.[18] This is antithetical to liberalism, as pointed out by Alexander, which hides behind color neutral

14 Post-colonial pluralism maintains and privileges thinking from the global North. It merely gives space for the introduction of non-White epistemologies and academics, without a process of delinking or deconstructing hegemonic Eurocentric epistemology.

15 Ali, *supra* note 6.

16 Ramón Grosfoguel & Eric Mielants, *The Long-Durée Entanglement between Islamophobia and Racism in the Modern/Colonial Capitalist/Patriarchal World-System: An Introduction*, 5 Human Architecture: Journal of the Sociology of Self-Knowledge 28 (2006).

17 *Id.* at 28. By this same definition, they classify Eurocentrism as a type of fundamentalism.

18 Ali, *supra* note 6. Geo-politics accounts for the geographical location of the subject, whether from the global North or South, Westerner, non-Westerner and the power implications associated with that position. Similarly, body-politics identi-

language.[19] Finally, a point to note, decoloniality is not a rejection of the Western epistemic tradition, as it is often reductively understood. Armed with critical awareness of the coloniality of power and the potentiality of external co-option, the decolonial project instrumentalizes border thinking, an epistemic response wherein concepts such as citizenship, democracy, economics, human rights and the emancipatory rhetoric of modernity are subsumed, redefined beyond definitions imposed by Europeans, and informed by subaltern epistemologies.[20]

Rethinking the *Maqāṣid*: Reform and the Modern Impulse

Decolonial thought challenges the ways in which Islamic legal discourse has been shaped by coloniality. This is particularly relevant to contemporary discussions on *ḥudūd*, where reformist approaches often operate within frameworks that remain embedded in colonial epistemologies. As debates over *ḥudūd* unfold, reform efforts take shape in divergent ways, reflecting different assumptions about the role of Islamic law in modernity. Reformers who adopt a human rights framework tend to view *ḥudūd* punishments as inherently problematic, advocating for their complete abolition. They argue that such severe penalties are fundamentally inhumane and incompatible with contemporary human rights standards.[21] Others, including Amnesty International, extend this critique beyond the severity of punishments to question the legitimacy of criminalizing certain behaviors altogether. They contend that laws prohibiting same-sex relations, extramarital intimacy, and alcohol consumption unjustly penalize peaceful activities and rights that should never be criminalized.[22]

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fies the positionality of the speaker—their socio-economic background, gender, race, etc., in accounting for power.

19 Alexander, *supra* note 5, at 48–49.

20 Grosfoguel & Mielants, *supra* note 16, at 28.

21 World Organization Against Torture (OMCT), *OMCT's Position on Flogging, Stoning and Amputation*, OMCT (Aug. 20, 2002), https://www.omct.org/en/resources/statements/omcts-position-on-flogging-stoning-and-amputation.

22 Amnesty International, *Iran: Wave of floggings, amputations and other vicious punishments*, Amnesty Int'l (Jan. 18, 2017), https://www.amnesty.org/en/latest/press-release/2017/01/iran-wave-of-floggings-amputations-and-other-vicious-punishments/.

While some reform efforts stem from external discourses, others emerge from within Islamic legal traditions. In the context of Iranian *ḥudūd* reform, Bahman Khodadadi observes that certain Shīʿa jurists justify the suspension of *ḥudūd* in response to perceived reputational harm, framing it as a necessary measure to safeguard the theocratic state and, by extension, Islam itself.[23] These jurists argue that suspending such punishments alleviates external scrutiny and internal dissent, which might otherwise erode public support for the regime. Khodadadi further identifies a group he describes as Shīʿa apologists, who, despite dismissing Western critiques as politically motivated, nonetheless invoke the same rationale—protecting Islam's image—as grounds for suspending *ḥudūd*.[24]

Moving beyond state-centered reforms driven by reputational concerns, progressive Muslim scholars, mindful of Eurocentric hegemony, situate their reform efforts internally.[25] At the same time, their contemporary reform project is marked by the imperative and urgency to contextualize Islam. One of the most in-vogue avenues for accomplishing these goals in the legal domain has been *maqāṣid al-sharīʿa*, the locale of *ḥudūd* reform efforts this article examines.

As a precedent, reformers often reference the legislative actions of the second caliph, ʿUmar ibn al-Khaṭṭāb (d. 23/644). During a famine that plagued Medina amidst his reign, he suspended (*asqaṭa*) the *ḥadd* for theft. However, the Qurʾān maintains that, "As for male and female thieves, cut off their hands for what they have done—a deterrent from Allah. And Allah is Almighty and All-Wise."[26] ʿUmar argued that the *ḥadd* in this instance, despite the clear Qurʾānic injunction, would have been an unfair castigation of the underprivileged, whose basic instinct for survival during a famine, would have driven them to

23 Bahman Khodadadi, On Theocratic Criminal Law: The Rule of Religion and Punishment in Iran 123 (2024).

24 *Id.*

25 Tariq Ramadan, Radical Reform: Islamic Ethics and Liberation 81 (2008).

26 Qurʾān 5:38.

theft.[27] Progressive reformers read this incident as ʿUmar taking recourse to the overarching objectives (*maqāṣid*) of the law, in essence suggesting that there can be a dissonance between the letter of the law and the objective of the law in certain situations. In this particular case, while the amputation of the hands (the *ḥadd*) would have been a literal application of the law, it would not have served the ends of justice, which is purportedly the objective of the *ḥudūd*. This field of inquiring into the objectives of the law is known as *maqāṣid al-sharīʿa*.

The *maqāṣid* are the objectives, goals or intents underlying Islamic prescriptions and prohibitions.[28] Jasser Auda equates the *maqāṣid* with the question "why," i.e., the inquiry into the wisdom behind rulings.[29] Both the Qurʾān and the Sunna have been described as characteristically goal-oriented due to the extent that they are expressive of the rationale and benefits of their laws, both the ones pertaining to devotional matters (*ʿibādāt*) and civil matters (*muʿāmalāt*). Scholars have agreed that the underlying theme in all Islamic injunctions (*aḥkām*) is the realization of benefit (*maṣlaḥa*, pl. *maṣāliḥ*).[30] This principle is closely tied to *maqāṣid*, as a *maṣlaḥa* is any measure that upholds these objectives by either advancing their realization or preventing what threatens them.[31] Scholars such as Shihāb al-Dīn al-Qarāfī (d. 684/1285) and ibn ʿAbd al-Salām linked the two by conditioning the validity of *maqāṣid* on their fulfillment of a benefit (*maṣlaḥa*) or the avoidance of a harm (*mafsada*).[32] The belief that Islamic law is in and for the interest of humanity can therefore be said to lie at the crux of the *maqāṣid* theory.

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27 Muḥammad Bultājī, Manhaj ʿUmar ibn al-Khaṭṭāb fī al-tashrīʿ 190 (2002).

28 Ibrāhīm al-Shāṭibī, Taḥthīb Kitāb al-Muwāfaqāt 147 (Aḥmad al-Ṭayyār ed., 2017).

29 Jasser Auda, Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach 2 (2008).

30 Mohammad H. Kamali, Maqāṣid al-Sharīʿah Made Simple 2–3 (2008).

31 Abū Ḥāmid al-Ghazālī, 1 al-Muṣtaṣfā min ʿilm al-uṣūl 416 (Muḥammad al-Ashqar ed., 2012).

32 ʿIzz al-Dīn Ibn ʿAbd al-Salām, 2 al-Qawāʿid al-kubrā al-mawsūm bī-Qawāʿid al-aḥkām fī iṣlāḥ al-anām 314 (Nazīh Ḥammād & ʿUthmān Ḍumayriyya eds., 2000); Jasser Auda, Maqāṣid al-Sharīʿah: A Beginner's Guide 4 (2008).

Islamic legal theorists developed distinct models for integrating *maṣlaḥa* into legal reasoning, reflecting varying degrees of flexibility in adapting Islamic law. Abū Ḥāmid al-Ghazālī (d. 505/1111) and Fakhr al-Dīn al-Rāzī (d. 606/1209) confined *maṣlaḥa* within the framework of legal analogy (*qiyās*), permitting its use only when it aligned with the core objectives of Islamic law.[33] Al-Qarāfī expanded this approach by incorporating *maṣlaḥa* into legal maxims (*qawāʿid*), allowing it to influence broader jurisprudential principles beyond analogy, thereby enhancing legal adaptability. Najm al-Dīn al-Ṭūfī (d. 716/1316) took a more radical stance, asserting that *maṣlaḥa* should take precedence over scriptural rulings in all matters except devotional acts (*ʿibādāt*), positioning *maṣlaḥa* as the highest legal determinant. Abū Isḥāq al-Shāṭibī (d. 790/1388), while also emphasizing *maṣlaḥa*, framed it within a structured system where universal principles (drawn from Meccan chapters of the Qurʾān) could override particular scriptural injunctions (Medinan chapters and the Sunna) if they conflicted with the broader aims of Islamic law.[34] Felicitas Opwis argues that these four models illustrate a continuing debate, wherein the model employed determines the extent to which *maṣlaḥa* can be utilized to broaden and adjust the law in response to evolving circumstances.[35]

The extent to which *maṣlaḥa* can shape legal rulings also depends on whether a given issue falls within the domain of civil matters or devotional ones. Scholars echo Al-Shāṭibī's assertion that, "literal compliance is the default methodology in the areas of *ʿibādāt*, while the consideration of purposes is the default methodology in the area of *muʿāmalāt.*"[36] As a result of this

33 Felicitas Opwis, *Islamic Law and Legal Change: The Concept of Maṣlaḥa in Classical and Contemporary Islamic Legal Theory*, *in* Shari'a: Islamic Law in the Contemporary Context 67 (Abbas Amanat & Frank Griffel eds., 2007).

34 *Id.* at 68–70.

35 Felicitas Opwis, *Maṣlaḥa in Contemporary Islamic Legal Theory*, 12 Islamic L. & Soc'y 197 (2005).

36 Al-Shāṭibī, *supra* note 28, at 6. The distinction between ritual and civil acts is reflected in the Caliph ʿUmar's explanation of *ramal* during pilgrimage: though its original purpose (circumambulating the Kaaba at a brisk pace to display strength to a pagan Mecca) was no longer relevant, ʿUmar maintained its practice, thus establishing the modus operandi regarding *ʿibādāt*. *See* Muḥammad al-Bukhārī, Ṣaḥīḥ al-Bukhārī 1605 (2002).

distinction, scholars only discuss the purported wisdom (*ḥikma*) behind rituals and are careful not speak of their *maqāṣid*. However, there is a fine line between what constitutes a devotional or ritual act and what constitutes a civil or social act, a grey area that has been cause for debate.[37]

Another point of juristic divergence centers on the identification of the *maqāṣid*, raising concerns of potential arbitrariness. Mohammad Kamali explains that scholars were well aware that deducing the *maqāṣid* would involve speculative reasoning and were cognizant of the "elements of projection and prognostication that such an exercise was likely to involve."[38] It is for this reason that scholars such al-Ghazālī refrained from granting the *maqāṣid* independent authority, i.e., the capacity to derive rulings directly from them.[39]

Al-Ghazālī demarcates five necessities or overarching objectives of the *sharīʿa* as the preservation of one's religion (*dīn*), soul (*nafs*), intellect (*ʿaql*), progeny (*nasl*), and property (*amwāl*).[40] Jurists such as al-Qarāfī and al-Ṭūfī added preservation of honor (*ʿirḍ*) as the sixth objective.[41] These five or six have come to be generally agreed upon.[42] Kamali explains that these were deduced from the *ḥudūd*, noting that, "the value

37 Adīb Fāyiz al-Ḍamūr, *Taqsīm Mawḍūʿāt al-Fiqh wa-Tartībihā fī Kutub al-Madhāhib al-Fiqhiyya al-Arbaʿa [The Division and Arrangement of Jurisprudential Subjects in the Books of the Four Schools of Law]*, 5 Majallat al-ʿUlūm al-Sharʿiyya wa-l-Lugha al-ʿArabiyya bi-Jāmiʿat al-Amīr Saṭṭām ibn ʿAbd al-ʿAzīz 183–84 (2018).

38 Kamali, *supra* note 30, at 10.

39 Al-Ghazālī, *supra* note 31, at 1:414–32. Al-Ghazālī does not recognize *maṣlaḥa* as a definitive source of law. He rejects legislation based solely on *maṣlaḥa*, as it constitutes an unlawful usurpation of divine authority and amounts to legislating independently of God (*man istaṣlaḥa fa-qad sharraʿ*). For legislation in the public interest (*maṣlaḥa*) to be valid, those interests must be subordinated to the *maqāṣid*, which al-Ghazālī distinguishes into tiers. If a ruling aligns with the *ḍarūrāt* (necessary tier), it is accepted even without explicit textual backing, since this tier is reflective of the Qurʾān and Sunna (definitive sources). However, legislating based on the lower two tiers, the *ḥājāt* (needs) and *taḥsīnāt* (enhancements), is unlawful unless corroborated by an established primary source, in which case the ruling is rooted in *qiyās* (analogical reasoning), rather than the *maqāṣid* as an independent source.

40 *Id.* at 1:417.

41 Tariq Ramadan, What I Believe 63 (2009).

42 Ahmad Al-Raysuni, Imam al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law 3 (2005).

that each of these penalties sought to vindicate and defend was consequently identified as an essential value."[43] While a full exploration of this issue lies beyond the decolonial lens of this article, it raises a critical question: How rational is it to employ a framework (*maqāṣid*) derived inversely from the *ḥudūd* to justify a moratorium on the *ḥudūd*? If the source (*ḥudūd*) is negated, does this not also undermine the legitimacy of the tool (*maqāṣid*) derived from it?

Whereas conventionally the *maqāṣid* were a fixed amount, Taqī al-Dīn ibn Taymiyya (d. 728/1328) set a precedent by splitting from this convention, and expanding its scope considerably by suggesting an open-ended list.[44] This is also the approach recognized by modern commentators who have surveyed the original sources coming up with new *maqāṣid*. Rashid Rida (d. 1935) suggested the addition of reason, critical thinking, knowledge, wisdom, rational inquiry, conscientiousness, independence, empathy, social reform, political reform and women's rights.[45] Muḥammad ibn ʿĀshūr (d. 1973) advocated for unity, equality, freedom, moderation, ensuring rights, and tolerance to be added.[46] Kamali proposes the addition of economic development, strengthening of research and development and, one of the more recent propositions, the protection of biodiversity (*al-bīʾa*).[47] Auda has called for the addition of liberty, justice and the protection of human rights as part of these necessities.[48]

Accordingly, the concern about projection that al-Ghazālī was wary about, still remains a pertinent critique. To take one example, a review of Auda's work, a contemporary *maqāṣid* scholar, reveals a tendency in his analysis to anachronistically project Western constructs onto pre-modern Islamic frameworks. For instance, he affirms al-Shāṭibī's 14th century tri-leveled hierarchy of *maqāṣid* with 20th century American psychologist Abraham Maslow's (d. 1970) hierarchy of needs.

43 Kamali, *supra* note 30, at 11.

44 *Id.* at 12.

45 Rashid Rida, al-Waḥy al-Muḥammadī 191–361 (1985).

46 Muḥammad ibn ʿĀshūr, Uṣūl al-niẓām al-ijtimāʿī fī al-Islām 103 (1985).

47 Kamali, *supra* note 30, at 12.

48 Auda, *supra* note 29, at 248.

Similarly, Auda describes *maqāṣid* as representing "the link between Islamic law and today's notions of human rights, development, and civility."[49] Unpacked decolonially, this framing overlooks the power relationship between "today's notions" and the hegemonic American dominated culture which sets those norms.[50] Auda's adoption of these terms and concepts appears to presuppose the neutrality of universalism, without critically considering its power implications. Ultimately, his reference to *maqāṣid* as a "link" risks privileging the Western epistemic tradition as the gold standard, while reducing the Islamic tradition to a mere tool for validating what Western discourse has normalized.[51] This observation is not intended as a dismissal of Auda's work. Rather, it as an invitation to begin a conversation on the implications of epistemic dominance in shaping subjectivity and consequently analysis, as it pertains to contemporary *maqāṣid* based reform efforts.

The Case for a Moratorium: Controversy and Debate

The article now turns to a case study of one of the most prominent attempts at *ḥudūd* reform in recent history, an argument constructed on the concept of *maqaṣid*. In 2003, the Swiss academic Tariq Ramadan, who was then one of the world's most prominent Islamic scholars, featured in a series of debates with soon to be French president Nicolas Sarkozy.[52] Sarkozy demanded that Ramadan renounce *rajm* (stoning adulterers), a punishment prescribed under the *ḥudūd*.[53] Ramadan maintained that a moratorium on corporal punishment would be more conducive to reform because it would open the issue to dialogue amongst Islamic scholars in Muslim majority countries. Merely condemning issues derived from sacred sources or imposing

49 *Id.* at 3–6.

50 Quijano, *supra* note 7, at 178.

51 Walter Mignolo, The Darker Side of Western Modernity: Global Futures, Decolonial Options, 450 (2011).

52 While Ramadan has been a source of public and legal controversy in recent years, this article limits its scope to his proposal as an attempt at internal reform, which sparked wide scholarly debate and generated relevant discourse.

53 Ramadan, *supra* note 25, at 354.

them upon Muslims, Ramadan argued, would be fruitless and result in opposition. Ramadan espoused that change must come from within Muslim ranks, and as a result of engagement and contextualization by Muslim scholars themselves.

Two years after his debate with Sarkozy, in April of 2005 Ramadan published an official call for a moratorium (henceforth *The Call*) on the *ḥudūd* in Muslim majority countries.[54] *The Call* evoked widespread comment and controversy throughout the Muslim world. For Ramadan, the question of implementing the penalties (*ḥudūd*) found in the Islamic penal code is essentially a question of how to be faithful to scripture in the contemporary era.[55] Context (*al-wāqiʿ*), which holds an important role in Ramadan's methodology, was, he asserts, central to the development of *The Call*. Ramadan argued that, "[w]hile serious debate is virtually non-existent, while positions remain vague and even nebulous, and consensus among Muslims is lacking—women and men are being subjected to the application of these penalties."[56] He also highlights the disproportionate targeting of women and the poor whom he refers to as the "doubly victimized."[57] Additionally, he points to the practically non-existent defense counsel for those accused, which he claims is demonstrative of how Muslim-majority countries, in general, do not guarantee just treatment before the law.[58]

Conversely, Ramadan also problematizes the international community which is quick to denounce poor African and Asian nations who implement the *ḥudūd*, but is silent when it comes to "petro-monarchies" which are a source of geostrategic and economic interests.[59] In locating *The Call* within a traditional Islamic legal framework Ramadan privileges the *maqāṣid* methodology which he summarizes as "how, at a given time and/or in a given context, one can remain faithful to the objectives of scriptural

54 Tariq Ramadan, *An International Call for Moratorium on Corporal Punishment, Stoning and the Death Penalty in the Islamic World*, TariqRamadan.com (Apr. 5, 2005), https://tariqramadan.com/an-international-call-for-moratorium-on-corporal-punishment-stoning-and-the-death-penalty-in-the-islamic-world/.

55 Ramadan, *supra* note 41, at 274–75.

56 Ramadan, *supra* note 54.

57 *Id.*

58 *Id.*

59 *Id.*

sources when implementing legal rulings (*fiqh*) in the field of social affairs and interpersonal relations (*muʿāmalāt*)."[60] Specifically, he appeals to the *maqāṣid* of "protection of integrity of the person (*ḥifḍ al-nafs*) and the promotion of justice (*al-ʿadl*)."[61]

Moreover, Ramadan argues that Muslim majority countries are in a state of "legal chaos."[62] He observes that opinions of Muslim scholars and jurists are far from unanimous on the applicability of these penalties in current society. Ramadan mentions that though many scholars from Morocco and Mauritania agree with his stance behind closed doors, they feel unable to maintain such a stance publicly.[63] He decries this lack of courage on the part of scholars as appeasing to populism.[64] The *ḥudūd* retain popular support, according to Ramadan, because in a closed and repressive political system, their harshness represents a fidelity to the Qurʾān in the public psyche.[65] He also attributes their popularity to a rationale in which Western disapproval of the *ḥudūd* is proof of their authenticity.[66] Ramadan criticizes the response of the scholars (*ʿulamāʾ*):

> Faced with this passion, many *ʿulamāʾ* remain prudent for the fear of losing their credibility with the masses. One can observe a psychological pressure exercised by this popular sentiment towards the judicial process of the *ʿulamāʾ*, which normally should be independent so as to educate the population and propose alternatives. Today, an inverse phenomenon is revealing itself. The majority of the *ʿulamāʾ* are afraid to confront these popular and simplistic claims which lack knowledge, are passionate and binary, for fear of losing their status and being defined as having compromised too much, not being strict enough, too westernized or not Islamic enough.[67]

60 Ramadan, *supra* note 41, at 63.
61 Ramadan, *supra* note 54.
62 *Id.*
63 *Id.*
64 *See id.*
65 *See id.*
66 *See id.*
67 *Id.*

Given the context described above, Ramadan asserts that silence on the part of the scholars makes them accomplices to those killed via the *hudūd* laws.[68] He does not spare Western Muslims either, criticizing their silence because, as a minority, they consider themselves exempt from the *ḥudūd* and conversations about it.[69] *The Call* is therefore an effort to bring the question of *ḥudūd* to the fore.

Ramadan's proposal was twofold: 1) an immediate moratorium, during which religious leadership would work to reach a consensus on a course of action, and 2) deliberation during that moratorium between three different positions regarding the long-term status of *ḥudūd*. These three positions, which constitute the focus of the second component of Ramadan's proposal, are as follows. The first position advocates an "immediate and strict" application of the *ḥudūd*.[70] The second contends that *ḥudūd* application should be conditional on the "state of the society."[71] The third position concedes that while the *ḥudūd* may have been appropriate during the Prophet Muḥammad's era, they are now obsolete in the contemporary era.[72] Aligning with the second position, Ramadan argues for an indefinite moratorium, emphasizing that efforts should instead be directed toward achieving social justice and creating a society that meets the "ideal" standard necessary for the implementation of *ḥudūd*. According to Ramadan, if such a society were to materialize, the reinstatement of *ḥudūd* would be justifiable.[73] Based on an initial review of scholarly opinion, Ramadan expressed optimism that serious deliberation during the temporary moratorium would ultimately result in its indefinite continuation.[74]

The Call was met with waves of criticism from intellectuals and institutions alike, and while disdain was expected from "puritanical Salafi" orientations, it was the dismissiveness from

68 *Id.*
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.*
74 Ramadan, *supra* note 41, at 276.

well-known moderates such as Taha Jabir al-ʿAlwani[75] (d. 2016) which was surprising.[76] Muzammil H. Siddiqi[77] responded, "When this call comes from a respectable scholar like Dr. Tariq Ramadan, it may encourage others to disrespect the laws of Allah."[78] Tariq al-Bishri[79] described *The Call* as "juristically baseless."[80] Mustafa al-Shukʿa[81] and his committee rejoined that whoever requests that *ḥudūd* be suspended or canceled "despite indisputable evidence" has forsaken an element forming the basis of the religion. Khalid Abou El Fadl found that the majority of negative responses to *The Call* hinged on one of two concerns. The first, championed by the likes of Gomaa, claimed that this was not the opportune time for such a moratorium because it is hardly applied and would be a cause of confusion and divisiveness. The second concern was the unlawfulness of calling for a suspension of the *ḥudūd*, a move which was seen to be an appeasement to the West.[82]

Gomaa penned a response to Ramadan, defining the *ḥudūd* as "[a code which] by its very nature necessitates its application in a restrictive manner," therefore a moratorium is not needed.[83] In a reply back to Gomaa, Ramadan broadens the scope of his argument by asserting that, although only 2 out of 56 predominantly Muslim countries retain the *ḥudūd*, 50 of these nations apply the death penalty:

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75 Al-ʿAlwani was the founder of the Fiqh Council of North America. The idea of *fiqh al-aqalliyyāt* (minority jurisprudence) is widely attributed to him. *See* International Institute of Islamic Thought, *Dr. Taha Jabir Alalwani*, https://iiit.org/en/dr-taha-jabir-alalwani/ (last accessed June 1, 2025).

76 Khaled Abou El Fadl, Reasoning with God: Reclaiming Shari'ah in the Modern Age 292 (2014).

77 Siddiqi is chairman of the Fiqh Council of North America and previous head of the Islamic Society of North America (ISNA).

78 Eric B. Brown, *After the Ramadan Affair: New Trends in Islamism in the West*, Hudson Institute (May 2, 2025), https://www.hudson.org/human-rights/after-the-ramadan-affair-new-trends-in-islamism-in-the-west.

79 Al-Bishri is a judge, past leader of Egypt's State Legislative Body and considered one of the country's top legal minds.

80 Abou El Fadl, *supra* note 76, at 291.

81 Shukʿa is the head of al-Azhar's Legal Research Committee.

82 Abou El Fadl, *supra* note 76, at 291.

83 Tariq Ramadan, *A Response to Shaykh Dr. Ali Jum'a, Mufti of Egypt*, TariqRamadan.com (May 2005), https://tariqramadan.com/arabic/2005/05/10/a-response-to-shaykh-dr-ali-juma-mufti-of-egypt/.

> If the absence of conditions for the application of a penalty [*ḥadd*] is to be considered "a transgression of the *sharīʿa*," it must be accepted that this same principle applies to the death penalty in Muslim countries, whether or not such penalties are instituted, directly or indirectly, in the name of Islam.[84]

In response to allegations that he was advocating a Western Islam or that this cannot be considered an internal change if an external agent is advocating it, Ramadan argued that it was the responsibility of Muslims living in states protecting freedom of expression to speak up and force their governments into taking a stance against the petro-monarchies. He also suggested that a similar stance must be taken by Muslim Americans in relation to the death penalty as it is affecting Black Americans disproportionately in the United States:

> In the United States, where an African-American is six or seven times more 'likely' to be executed than a White, opposition to the death penalty appears to me to be the only position in conformity with the message of Islam.[85]

Ramadan emphasized that he is not questioning the status of *ḥudūd* as an essential component of the faith. Instead, he positions his argument within traditional Islamic legal frameworks, challenging what he acknowledges as a *qatʿī* (definitive) source through the lens of the *maqāṣid*. He draws on the precedent of ʿUmar, who sets aside a direct Qurʾānic injunction to uphold the broader objectives of the *sharīʿa*. In this way, Ramadan views *The Call* as remaining loyal to the text.[86]

Abou El Fadl concludes that there is no substantive disagreement as all parties concur on both the legitimacy of *ḥudūd* and their prerequisite conditions.[87] Moreover, nearly all who condemned Ramadan acknowledged that the *ḥudūd* have remained

84 *Id.*
85 *Id.*
86 Ramadan, *supra* note 54.
87 Abou El Fadl, *supra* note 76, at 293.

largely unenforced in the majority of Muslim countries due to these conditions being "near utopian" and practically impossible to implement. Abou El Fadl characterizes these responses as representative of "schizophrenic attitudes."[88] This prompts the question: why, then, the significant controversy?

While Ramadan's observation about the role of scholarly appeasement to popular sentiment carries some merit, and Abou El Fadl's perplexity regarding what he accurately identifies as substantive agreement is understandable, I contend that their analyses overlook a critical decolonial dimension. Incorporating this perspective, I argue, provides a more comprehensive explanation for the resistance to *The Call*. To introduce this dimension, it is essential to first situate the *ḥudūd* within the Islamic penal code, explore their function in subject-formation, and examine their historical application.

The Role of *Ḥudūd*: Historical Application and Global Parallels

The *ḥudūd* are only one of three categories of punishment that fall under the umbrella of the Islamic penal code (*fiqh al-ʿuqūbāt*).[89] The other two are *qiṣāṣ*, crimes mentioned in the Qurʾān and Sunna which are punishable by equal retaliation, and *taʿzīr*, which pertains to the reprimanding of sins for which no fixed penalty (*ḥudūd*, *qiṣāṣ*, *or kaffāra*) has been prescribed,[90] thus leaving the punishment to the discretion of the judge.[91] This dis-

88 *Id.* at 292.

89 The crimes classified as *ḥudūd* offenses are listed at six by most Islamic legal schools: theft (*sariqa*), banditry (*qaṭʿ al-ṭarīq/ḥirāba*), illicit sex (*zinā*), false accusation of fornication (*qadhf*), consumption of alcohol (*shurb al-khamr*) and apostasy (*ridda*). Apostasy, though, is not considered a *ḥadd* offense in Ḥanafī and Shīʿa jurisprudence. *See* Rudolph Peters, Crime and Punishment in Islamic Law 65 (2005). Consumption of alcohol is similarly debated. *See* Aḥmad Ibn Ḥajar al-ʿAsqalānī, Fatḥ al-Bārī sharḥ Ṣaḥīḥ al-Bukhārī 88 (2000) (*Kitāb al-Ḥudūd*, *bāb* 4).

90 A *kaffāra* is a compensation made as an expiation for a sin, usually by feeding meals to the poor or fasting.

91 Peters, *supra* note 89, at 7; ʿAlī al-Māwardī, al-Aḥkām al-ṣulṭāniyya 344 (2006). Technically, acts deemed in violation of public order that have no basis in *sharīʿa* are known as *siyāsa*, but are usually grouped with *taʿzīr* when discussed. *See* Peters, *supra* note 89, at 68.

tinction is significant: whereas the *ḥudūd* are divinely prescribed in relation to specific crimes and punishments, *taʿzīr* crimes and penalties are primarily politically mandated.

One of the defining factors of *ḥudūd* is that they are rights pertaining to God (*ḥuqūq Allāh*) and therefore their prosecution contrasts greatly with rights pertaining to humans. The Prophet Muḥammad is attributed to have said:

> Avoid these filthy acts which Allah has forbidden. Whoever falls into them should conceal themselves with Allah's veil, and should turn to Allah in repentance. For if anyone uncovers their hidden sins to us, we shall inflict upon them the punishment prescribed by Allah.[92]

An ethos of prosecution has been derived from this such that Islamic law prohibits surveillance and investigation aimed at scrutinizing individuals' private lives.[93] In fact, eyewitnesses are not required to come forward. When they do, they have to be very specific in their wording by mentioning "*zinā*" and "*sariqa*" and not any other words that imply sex or taking away of an item.[94] Other strict requirements mandate that only in-court confessions are accepted, where the judge (*qāḍī*) must ascertain that the confessor is of sound mind and under no coercion. Additionally, circumstantial evidence is not admitted in trial (Ḥanafī jurists exclude pregnancy as proof in *zinā* cases). In one illustrative incident, al-Nuʿmān Abū Ḥanīfa (d. 699/767), eponym of the Ḥanafī school of jurisprudence, dismissed a crowd seeking to punish a man for wine-drinking by wryly observing that if mere possession of incriminating objects sufficed as proof, the man should equally be stoned for *zinā*, as he also possessed the "instrument" of fornication. The crowd, grasping the jurist's *reductio ad absurdum*, dispersed without executing the *ḥadd*.[95] Such traditions underscore that the *ḥudūd* were nev-

92 Aḥmad Ibn Ḥajar al-ʿAsqalānī, Bulūgh al-marām min adillat al-aḥkām 461 (Māhir al-Faḥl ed., 2014) (*Kitāb al-Ḥudūd*, *bāb ḥadd al-zinā*) (author's translation).

93 Ramadan, *supra* note 54.

94 Peters, *supra* note 89, at 14.

95 *Id.* at 8.

er intended to be maximally executed; rather, they set a moral horizon which the law deliberately makes difficult to reach in practice.

To exemplify the stringent burden of proof requirements, I will briefly survey the *ḥadd* crime of burglary (*sariqa*) which jurists distinguish from other forms of theft.[96] To have the term *sariqa* applied, the act must have been surreptitious, i.e., stealing something in broad daylight or in plain sight would not qualify.[97] The *ḥadd* cannot be applied if the stolen items were not secured or guarded adequately (*ḥirz*). Furthermore, the item stolen must also meet a minimum value (*niṣāb*) to qualify. In addition, the item cannot be partially owned or have been entrusted to the perpetrator. For example, a person stealing from the state treasury (*bayt al-māl*) is stealing from money that technically belongs to everyone in the state, including one's self, and therefore is not punishable under *sariqa*. This rule is so lenient that stealing from an immediate relative such as one's kids, spouse or even debtor cannot be prosecuted under this *ḥadd*.[98] The same applies for stealing items forbidden to Muslims to own such as pigs and wine or stealing perishable food items. Finally, the victim can demand either the return of the items or amputation, but not both.[99] Of course, just because a thief cannot be prosecuted for the *ḥadd* crime of *sariqa*, they can still be prosecuted under *taʿzīr*, which requires a lower burden of proof.[100]

96 Islamic legal discourse distinguishes theft by method and gravity. *Ikhtilās* is stealthy and opportunistic theft (pickpocketing); *nahb* is open grabbing of unsecured property (snatch theft); *khiyāna* is deceitful taking (fraud or embezzlement); *ghasb* is taking by coercion (extortion). *See* al-Māwardī, *supra* note 2, at 13:280.

97 Peters, *supra* note 89, at 56.

98 Jurists agree that if one spouse steals from property not guarded from the other spouse, no *ḥadd* applies. However, they differ when the property is safeguarded (*muḥraz*). The Ḥanafīs and the authoritative (*muʿtamad*) view among Ḥanbalīs hold that the *ḥadd* does not apply, citing the presence of doubt (*shubha*) due to shared access, inheritance rights, and customary use. Mālik, by contrast, holds that the *ḥadd* is enforceable if the property is fully guarded and owned. Al-Shāfiʿī reports a third opinion: that the husband is liable to *ḥadd* for stealing from his wife, as he has no legal claim to her property, but the wife is exempt due to her right to maintenance. *See* ʿAbd Allāh Ibn Qudāma, 14 al-Mughnī 408–9 (Yūsuf al-Sharʿabī ed., 2020).

99 Peters, *supra* note 89, at 56–57.

100 *Id.* at 16.

Counterintuitively, instead of asking questions that may demonstrate guilt, the judge in an Islamic court has the active role of warding off the *ḥudūd* as much as possible, including counselling defendants that their confession can be retracted up until the moment of execution.[101] A key method for achieving this is through *shubha* (doubt), which Intisar Rabb defines as a legal term covering a range of potentially mitigating circumstances.[102] This is derived from the Prophetic maxim, "Ward of the fixed punishments (*ḥudūd*) in cases of doubt (*shubha*).[103] Ignorance of essential laws (stealing, drinking, fornication, etc.) are excused if the perpetrator converted recently or just arrived from distant lands. However, in cases involving obscure (very generously defined) laws, ignorance is recognized as a valid defense even for those who are Muslim by birth. Another form of defense is duress (*ikrāh*), in which an offender is not liable if they acted under threat of death, severe injury, or even threats against their children or parents. Included under the category of duress are illegal commands stemming from any state official, such as a military general, even if without threats.[104] A defense not traditionally addressed in Western theories of criminal law, is repentance (*tawba*). Because, in the case of the *ḥudūd*, the offense infringes upon the rights of God, not another individual, repentance is accepted as evidence of the perpetrator's reformation, and absolves them of punishment entirely.[105]

This examination of the stringent requirements of the *ḥudūd*, their near utopian burden of proof, and the mandate that these punishments are carried out publicly, underscores the primary role of the *ḥudūd* as a deterrent (*zajr*).[106] Qurʾān 5:38 reemphasizes this, describing the *ḥudūd* as an exemplary punishment (*nakāl*). Gomaa further elucidates this point:

101 *Id.* at 14.

102 Intisar A. Rabb, Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law 4 (2015).

103 Ibn Ḥajar, *supra* note 92 (*Kitāb al-Ḥudūd*, *bāb ḥadd al-zinā*) (author's translation).

104 Peters, *supra* note 89, at 22–23.

105 *Id.* at 27.

106 Abou El Fadl, *supra* note 76, at 292; Peters, *supra* note 89, at 30.

> In this regard, the *ḥadd* stands to buttress social control, itself a product of the surrounding culture, to reinforce the gravity of such sins, relegating to the margins [of society] him or her who commits them in public or boasts of having committed them.[107]

Ramadan affirms this objective of *ḥudūd* "to stir the conscience of the believer to the gravity of an action warranting such a punishment."[108] Consequently, the *ḥudūd* can be understood as a mechanism of subject-formation, aiming to establish moral normativity by using the rhetorical-legal device of equating the severity of the punishment with the seriousness of the moral transgression. If, however, their unenforceability is an intentional aspect of their application, and their *telos* is subject formation, then suspending them substantially undermines this moral function. While the *ḥudūd*'s normative power is not entirely erased by their suspension or abolishment—as Muslims still encounter these penalties in scripture—their public utility is diminished. It is the real threat of enforcement for public crimes that actualizes their social and moral significance. Without this, *ḥudūd* lose their deterrent force in shaping public conduct and fail to maintain the distinction between tolerable private lapse and dangerous public transgression.

I turn now to an examination of the historical and contemporary application of the *ḥudūd* to assess whether their theoretical unenforceability aligns with real-life practices. In the entire history of the Ottoman Empire (c. 1299–1923), there is only one record of stoning.[109] Similarly, no instances of stoning are documented during Muslim rule of Syria, and Gomaa notes that none of the *ḥudūd* have been applied in Egypt for over 1000 years.[110] Since *The Call* references petro-monarchies, a not-so-subtle nod to Saudi Arabia, I give particular attention to the application of *ḥudūd* in that context.

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107 Ramadan, *supra* note 83.

108 Ramadan, *supra* note 54.

109 Sadakat Kadri, Heaven on Earth: A Journey through Shariʿa Law from the Deserts of Ancient Arabia to the Streets of the Modern Muslim World 217 (2012).

110 Ramadan, *supra* note 83.

Statistics released by the Saudi Ministry of Justice show that between 1982 and 1983, 4,925 people were tried for theft, but only 2 cases met the requirements for the *ḥadd* punishment.[111] In the same period, of the 659 individuals tried for *zinā*, none received the *ḥadd* punishment.[112] Frank Vogel, who had special access to Saudi court records, documented that over an eleven-year span, between 1981 and 1992, the *ḥadd* punishment was applied 49 times, only 4 cases of which (for *zinā*) resulted in executions.[113] Vogel notes that, "only an extremely small proportion of all criminal cases meet the onerous requirements for *ḥadd* conviction; most are dealt with under the category of *taʿzīr*," an observation that has remained consistent over the years.[114]

More recently, in 2023, out of 172 total executions, *taʿzīr* accounted for 54 (31%), *qiṣāṣ* for 66 (38%) and *ḥudūd* for 50 (29%) of them.[115] In 2024, the total executions rose to 345, with *taʿzīr* accounting for 180 (52%), *qiṣāṣ* for 128 (37%) and *ḥudūd* for only 37 (11%).[116] While *qiṣāṣ* constitutes a sizable portion of the executions, it differs from *ḥudūd* as it is not a crime prosecuted by the state, but a civil claim wherein claimants may forgo retaliation for monetary compensation (*diya*) or even choose to forgive the offender. The most striking observation is that the overwhelming majority of executions, both historically and currently, fall under *taʿzīr*. These are not divinely ordained but rather politically regulated, primarily involving terrorism and drug-related charges.[117] This data underscores that *ḥudūd* punishments have always been statistically rare.

Given the examination of *ḥudūd* and *taʿzīr* implementation in Saudi Arabia, it is also instructive to consider Iran, where notably high rates of corporal and capital punishment provide further insight into broader patterns of punitive enforcement in

111 Frank Vogel, Islamic Law and Legal System: Studies of Saudi Arabia 246–47 (2000).

112 *Id.* at 246–47.

113 *Id.* at 246–47.

114 *Id.* at 246–47.

115 European Saudi Organization for Human Rights, *Blood Era: A Historic Record of Executions in Saudi Arabia 2024*, ESOHR (Jan. 5, 2025), https://www.esohr.org/en/عهد-الدم-رقم-تاريخي-للإعدام-في-السعودي/.

116 *Id.*

117 *Id.*

contemporary Muslim states. In 2023, during which 834 individuals were executed, *taʿzīr* punishments accounted for 56% of cases, primarily for drug-related offenses, while 34% involved *qiṣāṣ* for homicide.[118] The remaining 10% represent the application of *ḥudūd*, with only one execution recorded for *zinā*.[119] The majority of the remaining cases involved 39 executions for security and dissent-related offenses (*muḥāraba* or *ifsād fī al-arḍ*), while 20 were for rape and two for blasphemy—likely classified as *ḥadd* offenses, though I was unable to verify.[120] A critical point for this article's argument is that *ḥudūd* punishments are explicitly required to be carried out publicly as a means of deterrence (*nakāl*).[121] However, the *taʿzīr* executions in Iran were conducted under the jurisdiction of the Revolutionary Courts, which handle state security offenses and were purportedly created to guard against potential counter revolution in the post-shah era. Notably, these trials are held in secrecy, and executions are typically not publicized. This lack of transparency indicates that such executions fail to meet the stringent evidentiary and procedural requirements of *ḥudūd* punishments, and are not tried as such. Furthermore, there is a correlation between the number of executions and political events, with executions increasing following protests, while decreasing prior to elections.[122] Commenting on these figures, Mahmood Amiry-Moghaddam, director of Iran Human Rights, has suggested that the high number of executions is politically motivated.[123] These trends parallel those observed in Saudi Arabia, illustrating that the vast majority of state-sanctioned bloodshed is carried out under *taʿzīr* rather than *ḥudūd*. A decolonial critique urges us to ask why *ḥudūd* punishments draw so much attention, in lieu of the *taʿzīr* punishments that modern states regularly deploy.

118 Iran Human Rights, *Annual Report on the Death Penalty in Iran 2023*, Ensemble contre la peine de mort, https://www.ecpm.org/app/uploads/2024/03/Full-Report-The-death-penalty-in-Iran-2023.pdf (last visited June 12, 2025).

119 *See id.* at 11.

120 *See id.*

121 Qurʾān 5:38; 24:2.

122 Iran Human Rights, *supra* note 118, at 17.

123 *Id.* at 12.

While much of the debate on *ḥudūd* focuses on capital punishment, corporal punishment, particularly flogging, is also a significant concern. Obtaining precise statistics on flogging in Saudi Arabia is challenging; however, between 2013 and 2014, 16 cases of flogging were recorded. Of these, 15 were administered as *taʿzīr* punishments, while only one was classified as a *ḥadd* punishment (for a drug-related offense).[124] This distribution suggests that flogging has been primarily employed under *taʿzīr*, frequently targeting activists, bloggers, and outspoken scholars under broadly defined offenses such as "disturb[ing] public order" and "destabiliz[ing] . . . the state."[125] However, as of 2020, Saudi Arabia abolished flogging as a punishment for all *taʿzīr* crimes while retaining it for *ḥadd* offenses, including fornication, slander, and alcohol consumption.[126] This development aligns with the argument advanced in this article: Islamic law, engaged on its own terms, proves more amenable to reform, as evidenced by the relatively uncontroversial elimination of flogging within the *taʿzīr* framework, even among more conservative circles. Of course, this shift does not signify unqualified progress, as the interpretation of *ḥudūd* has been expanded to encompass floggable drug-related offenses.[127]

Moreover, the distinction between a focus on visible manifestations of violence and a commitment to addressing its systemic causes becomes evident in the context of *taʿzīr* reform. The overwhelming majority of floggings in Saudi Arabia were *taʿzīr*-based, and with the 2020 reform, these punishments were effectively abolished. High-profile cases, such as that of Raif Badawi, illustrate this shift—his sentence of 1,000 lashes was effectively nullified, sparing him from the remaining 950 lashes.[128] Although flogging sentences in Saudi Arabia are not

124 Hind Sebar & Shahrul Mizan Ismail, *The Use of Flogging as a Punishment in Saudi Arabia from the Perspective of International Human Rights Law* 29 IIUM L.J. 98–99 (2021).

125 Amnesty International, Manifesto for Repression 16 (2024), *available at* https://www.amnesty.org/en/wp-content/uploads/2024/03/MDE2377832024ENGLISH.pdf.

126 *Id.* at 29.

127 *Id.*

128 Reporters Without Borders, *Raif Badawi Spared 950 Lashes after Saudi Decision to Abolish Flogging*, RSF (Apr. 29, 2020), https://rsf.org/en/raif-bada-

exceedingly common, the scale of *taʿzīr* lashings has, at times, reached extreme levels, ranging from 10,000 to 40,000 lashes in certain cases. This disparity has sparked internal debate, particularly regarding why *taʿzīr* punishments have exceeded the maximum of 100 lashes prescribed for *ḥadd* offenses.[129] In sum, the reform of *taʿzīr* in Saudi Arabia has effectively removed flogging as a punishment, leaving it only within the four remaining *ḥadd* offenses, where it remains strictly capped at 100 lashes due to the rigid evidentiary and procedural constraints governing *ḥudūd*.

Similarly, in Iran, available statistics indicate that of the 149 offenses punishable by flogging, approximately 90–95% fall under *taʿzīr*, whereas only 5–10% are classified as *ḥudūd*.[130] The implementation of flogging is estimated to affect between 100 and 200 individuals annually.[131] Flogging is primarily imposed for charges such as "disturbing public order" and "publishing falsehoods with the intent of disrupting public opinion."[132] These penalties are frequently directed at political dissidents, be they activists, journalists, or bloggers, with their occurrence significantly increasing during periods of political unrest, such as the Mahsa Amini protests.[133] These patterns underscore the central argument of this article: that

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wi-spared-950-lashes-after-saudi-decision-abolish-flogging.

129 Sebar & Ismail, *supra* note 124, at 96.

130 Abdorrahman Boroumand Center, *The Use of Flogging in Iranian Law: A List of Offenses*, Abdorrahman Boroumand Ctr. (Nov. 18, 2019), https://www.iranrights.org/library/document/3643.

131 *Id. See also* Abdorrahman Boroumand Center, *Flogging*, Abdorrahman Boroumand Ctr. (Nov. 18, 2019), https://www.iranrights.org/projects/flogging (last accessed June 1, 2025). The recorded number of flogging sentences in Iran reflects sentencing figures rather than actual implementations, as not all issued punishments are ultimately carried out. In some cases, flogging sentences are substituted with fines, waived entirely, or retained as a conditional threat, with the possibility of enforcement at a later stage. Alternatively, there are cases where flogging is carried out but remains unreported, contributing to gaps in statistical documentation.

132 Iran International, *Iran Sharply Increases Lashing Against Activists*, Iran Int'l (Aug. 5, 2023), https://www.iranintl.com/en/202308056500.

133 Amnesty International, *supra* note 22; Iran International, *supra* note 132; Stephanie Nebehay, *U.N. Rights Investigator Decries Iran Clampdown, Torture, Floggings*, Reuters (Mar. 5, 2018), https://www.reuters.com/article/us-iran-rights-un/un-rights-investigator-decries-iran-clampdown-torture-floggings-idUSKBN1GH2CA/.

state-sanctioned violence is primarily enacted through *taʿzīr* for political offenses, rather than the *ḥudūd* system that reformist discourse so often fixates upon.

To provide more perspective, placing the implementation of *ḥudūd* alongside global capital punishment statistics further contextualizes its relative infrequency, challenging perceptions of its centrality in Islamic criminal justice. Currently, 70% of nations worldwide have abolished capital punishment, while 55 countries still retain it.[134] In December 2024, the United Nations General Assembly adopted a resolution advocating a global moratorium on the death penalty, which garnered support from 130 countries. However, the United States and China voted against it.[135] China leads the world in executions, and while the number is considered a state secret, it is estimated to be in the thousands annually.[136] In the United States, 27 states still retain the death penalty, primarily using lethal injection.[137] This practice has faced challenges due to the European Union's ban on the sale of drugs used in executions to the United States, leading some states to rely on unregulated compounding pharmacies to produce lethal chemicals.[138] Alternative methods such as hanging, firing squads, gas chambers and electrocution remain legal in several states. Between 1981 and 1992, whereas Saudi Arabia executed only 4 individuals via *ḥadd* punishment, the United States executed 185 individuals.[139] More comparably, in 2024, Saudi Arabia executed 37 people for *ḥadd* infractions, whereas

134 Amnesty International, Global Report: Death Sentences and Executions 2023 (2024), *available at* https://www.amnesty.org/en/wp-content/uploads/2024/05/ACT5079522024ENGLISH.pdf.

135 United Nations Digital Library, *Moratorium on the use of the death penalty*, U.N. Digital Lib. (2024), https://digitallibrary.un.org/record/4069732?ln=en.

136 Amnesty International, *supra* note 134.

137 Death Penalty Information Center, *States with and without the Death Penalty – 2025*, Death Penalty Info., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last accessed June 1, 2025).

138 Death Penalty Information Center, *Some Medical Supply Manufacturers Ban Use of IV Equipment in Lethal Injection Executions*, Death Penalty Info (Sept. 15, 2023, updated Mar 14, 2025), https://deathpenaltyinfo.org/some-medical-supply-manufacturers-ban-use-of-iv-equipment-in-lethal-injection-executions.

139 Death Penalty Information Center, *Facts about the Death Penalty*, Death Penalty Info (updated May 21, 2025), https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf?dm=1736463595.

the United States executed 25.[140] This comparison highlights that, contrary to perceptions of the frequent and severe enforcement of *ḥudūd* punishments in Islamic law, their application has historically been significantly more limited than capital punishment practices in countries like the United States and China, raising questions about how justice is prioritized and perceived globally. Does the impetus for reform come from indigenous ethical commitments or from the need to satisfy the liberal gaze? This question is central to a decolonial critique. In both the Saudi and Iranian contexts, it was noted that reformist rhetoric tends to be surface level, focusing on *ḥudūd* punishments (which have been shown to be near non-occurrent), while extensive use of *taʿzīr* executions continues unabated. This imbalance in reform priorities which targets the "Islamic" aspect of law (i.e., the *ḥudūd*) but ignores the authoritarian apparatus (*taʿzīr*) may achieve cosmetic change but leaves underlying injustices untouched.

From Punishment to Control: The Birth of the Modern Prison

The debate surrounding *ḥudūd* reform intersects with a larger question about the nature of punishment itself, particularly the assumed superiority of incarceration over corporal penalties. Opponents of *ḥudūd* often assume that eliminating flogging, amputations, and stoning is *ipso facto* a move toward a more humane, just system—which presumably would rely on incarceration or other non-corporeal penalties. But a decolonial critique problematizes the notion that the modern carceral state is a benign

140 *Id.* The 2024 execution figures are included not to confirm a thesis but to engage potentially complicating data. In light of historical trends, however, the comparison still supports the argument: the United States has long far outpaced Saudi Arabia in executions, and while that gap has narrowed, the current figures remain broadly comparable—even with Saudi Arabia slightly ahead. This does not represent a reversal, particularly given the rarity of *ḥudūd*-based executions in Saudi Arabia. This also informs my decision not to use population-adjusted metrics. My use of statistics is descriptive, not prescriptive. While proportional analysis has its uses, it can obscure what is morally at stake—the absolute number of lives lost. If Nauru executed 3 people (0.03%) and China 200,000 (0.01%), the sheer loss of life in the latter would remain the more pressing moral concern. In this light, population ratio is not always the most meaningful measure of justice.

or preferable default. Indeed, the modern prison-industrial complex and systemic racism in criminal justice are phenomena as real and urgent as any *ḥadd* punishment. The United States imprisons around two million people, disproportionately Black, in a carceral system born from a history of slavery and economic exploitation.[141] Many scholars (e.g., Alexander, Davis) have argued that this system functions as a form of social control and economic profiteering—a "New Jim Crow" or a continuation of colonial domination by other means.[142] This invites deeper examination of the carceral system and, accordingly, in this section I consider the history of the modern prison. Particularly, I analyze the underlying ideological and economic philosophies through which it developed, which will inform the decolonial critique of *The Call*.

Foucault's seminal work *Discipline and Punish* provides a starting point for this inquiry. He traces how in Europe the locus of punishment shifted from the body to the "soul" (or mind) between the 18th and 19th centuries.[143] Public spectacles of torture and execution were gradually replaced by the regimented, hidden world of prisons. At face value, this was celebrated as progress, punishment was now purportedly more rational, proportionate, and rehabilitative rather than vengeful and barbaric. However, Foucault argues that this transformation was not purely driven by humanitarian concern: instead, it was motivated by a need to make power function more efficiently and subtly in society.[144]

Historically, premodern prisons served merely as temporary holding facilities, allowing for social interactions and economic activity.[145] In contrast, the modern prison, influenced by Jeremy Bentham's (d. 1832) panopticon, is designed for constant surveillance and internalized discipline, shaping inmates into docile bodies suited for industrial labor.[146] Foucault highlights

141 The Sentencing Project, *50 Years and a Wake Up*, The Sentencing Project, https://www.sentencingproject.org/advocacy/50-years-and-a-wake-up-ending-the-mass-incarceration-crisis-in-america/ (last accessed June 1, 2025).

142 Alexander, *supra* note 5.

143 Foucault, *supra* note 4.

144 *Id.*

145 Guy Geltner, The Medieval Prison 106 (2008).

146 William Sweet, *Jeremy Bentham (1748–832)*, Internet Encyclopedia of Philosophy, http://www.iep.utm.edu/bentham/ (last accessed June 1, 2025). Ben-

two key "advantages" the modern prison had from the state's perspective: 1) it moved punishment out of sight, into the shadowy realm where the public would no longer directly witness the violence of the sovereign, thereby making power appear more humane; and 2) it allowed punishment to be an ongoing process (years of imprisonment, parole, criminal records) rather than a finite physical event like a flogging.[147] Physical punishment may have been reduced, but it was replaced by an arguably more potent form of coercion, a subtle but pervasive disciplinary power, what Bentham describes as "a new mode of obtaining power of mind over mind, in a quantity hitherto without example."[148] Charles Dickens (d. 1870), during a visit to a penitentiary depicts its condition:

> In its intention I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this system of prison discipline, and those benevolent gentlemen who carry it into execution, do not know what it is that they are doing. I believe that very few men are capable of estimating the immense amount of torture and agony that this dreadful punishment, prolonged for years, inflicts upon the sufferers [. . .] I am only the more convinced that there is a depth of terrible endurance in it which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow-creature. I hold this slow and daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body because its wounds are not upon the surface, and it extorts few cries that human ears can hear; therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay.[149]

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tham was a philosopher credited with the theory of utilitarianism. His work around the philosophy of law culminated in the architectural design of the Panopticon.

147 Foucault, *supra* note 4.

148 Jeremy Bentham, The Panopticon Writings 39 (Miran Božovic ed., 1995).

149 Charles Dickens, American Notes for General Circulation 119–20 (Cambridge Uni. Press 2009) (1842).

Furthermore, Bentham claimed that such internalization would lead to productive labor habits.[150] Building on this, scholars like Davis and Alexander extend Foucault's critique by examining how these ostensibly modern, rational systems of punishment have been co-constructed with racism, economic exploitation, and colonial domination.[151]

Davis contextualizes these developments by anchoring them in the historical developments of that period. She illustrates the utility in terms of labor that this new form of punishment provides, and how the penitentiary's goal of discipline achieved through internalization of surveillance was directly implicated by that era's needs for a self-disciplined working-class labor force to fuel an emergent capitalist system.[152] The modern prison's inextricable ties with profit and creation of laborers was the perfect work around for the abolition of slavery. In the United States, after the formal abolition of slavery, prisons (through convict leasing, chain gangs, etc.) became a way to perpetuate the subjugation of Black Americans—what Alexander calls the "New Jim Crow."[153] Prisoners were sold and loaned to the highest bidder, be it plantations or corporations.[154] Convicts were legally slaves of the state:

> For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State. He is *civiliter mortus*; and his estate, if he has any, is administered like that of a dead man.[155]

150 Scott Christianson, With Liberty for Some 115 (1998).

151 Alexander, *supra* note 5, at 26.

152 Davis, *supra* note 5, at 46.

153 One such vagrancy law stated that "all free Negros and mulattoes over the age of eighteen must have written proof of a job at the beginning of every year. Those found with no lawful employment will be deemed vagrants and convicted." Alexander, *supra* note 5, at 26.

154 *Id.* at 31.

155 Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

The Civil Rights Act of 1964 dismantled Jim Crow laws, but integration threatened White economic and social dominance. In response, a new racial hierarchy emerged through the race-neutral rhetoric of "law and order," which criminalized the Civil Rights movement and laid the foundation for modern police brutality against Black Americans.[156] Echoing the frustration of Whites in race neutral and color-blind rhetoric, Ronald Reagan's (d. 2004) War on Drugs, launched amid declining drug use, disproportionately targeted people of color, causing incarceration rates to surge.[157] Despite studies showing higher drug crime participation among Whites, nearly half of the incarcerated population is Black.[158] Harsh policies like the 1994 three-strikes law led to life sentences for repeat drug offenses, as a result of which, the majority of inmates incarcerated today are for drug related offenses.[159] After release, in addition to voting disenfranchisement, employers, banks and landlords are legally allowed to discriminate against felons.[160] In effect, their sentence seems to continue long after they are done serving their time, resulting in the United States having the highest recidivism rates globally—66% of persons released from prison were re-arrested within three years, and 82% rearrested within ten years.[161]

While the United States makes up approximately 4% of the world's population, it holds 16% of the world's prison population, the highest incarceration rate in the world.[162] Another way to frame this is that, while China has over one billion more people than the United States, the United States prison

156 Alexander, *supra* note 5, at 40–42.

157 *Id.* at 49. Alexander describes Reagan's rhetoric as "not-so-subtle code for lazy, greedy, black ghetto mother."

158 *Id.* at 6–7.

159 *Id.* at 56; John McWhorter, *How the War on Drugs is Destroying Black America*, 9 Cato's Letter 1, 1–5 (2011).

160 Alexander, *supra* note 5, at 53.

161 U.S. Department of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period (2008–2018)*, Dep't Justice (Sept. 2021), https://bjs.ojp.gov/BJS_PUB/rpr24s0810yfup0818/Web%20content/508%20compliant%20PDFs.

162 Vera, *Ending Mass Incarceration*, Vera.org, https://www.vera.org/ending-mass-incarceration (last accessed June 1, 2025).

population (1.8 million) is still greater than China's.[163] Davis refers to this phenomenon not simply as mass incarceration, but as the "prison-industrial complex," a term that challenges the prevalent belief that crime is the primary driver of the mounting prison population and prison infrastructure.[164] The prison-industrial complex denotes a system wherein political, economic, and institutional interests converge to incentivize carceral expansion through policy trends, discretionary enforcement, and institutional investments.[165] At the heart of this dynamic is the profit motive of private prison corporations, whose financial viability depends on maintaining and increasing prison occupancy.[166] This system is further entrenched by the exploitation of prison labor by private corporations who benefit from the carceral economy as a source of profit or cost-saving—which Davis identifies as a contemporary form of convict leasing whose primary subjects are people of color.[167]

The boom in prison construction, the privatization thereof and the ensuing drive to fill them is motivated by ideologies of profit and racism. Davis notes that this is "reminiscent of the historical efforts to create a profitable punishment industry based on the new supply of free black male laborers."[168] Criminologist Nils Christie (d. 2015) formulates this into an equation in which the prison market has a demand for raw material (prisoners) and the industry guarantees a steady supply achieved by adjusting criminal justice policies.[169] The scale and

163 Helen Fair & Roy Walmsley, *World Prison Population List*, World Prison Brief, https://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_14th_edition.pdf (last accessed June 1, 2025).

164 Davis, *supra* note 5, at 12.

165 In certain cases, there has been explicit collusion between judicial actors and private prison interests, as exemplified by the "Kids for Cash" scandal. *See* William Ecenbarger, Kids for Cash: Two Judges, Thousands of Children, and a $2.8 Million Kickback Scheme (2012).

166 Justice Policy Institute, Gaming the System: How the Political Strategies of Private Prison Companies Promote Ineffective Incarceration Policies 2–3, 12, 30 (2011), available at https://justicepolicy.org/wp-content/uploads/2022/02/gaming_the_system.pdf.

167 Davis, *supra* note 5, at 85.

168 *Id.* at 85–94. Various industries, such as catering, cleaning, security, etc., rely on a growing prison economy.

169 Nils Christie, quoted in Steve Danziger, The Real War on Crime: Report of the National Criminal Justice Commission 87 (1996). For examples

structure of the United States' $81 billion prison industry lends empirical support to his formulation.[170] Of that, the for-profit carceral sector generates approximately $7.4 billion annually through contracts with federal and state agencies.[171] A recent notable growth area has been immigration detention under Immigration and Customs Enforcement (ICE), which alone has accounted for as much as 30–40% of total private prison revenue.[172] These arrangements often include occupancy guarantees, ensuring that a minimum number of detainees are supplied to fulfill contractual thresholds.[173] The prison-industrial complex is bolstered through its symbiotic relationship with the military-industrial complex through arms and technology sales from the military to the prison industry.[174]

Beyond the American context, the world prison economy is undeniably influenced by the U.S., which serves as the model in this sector, and therefore practices of mass incarceration and institutionalized racism are exported along with it. Davis describes the globalization of the United States prison economy:

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of private prison corporations influencing or drafting punitive legislation—such as "three-strikes" laws, "truth-in-sentencing" provisions, and Arizona's SB 1070—see Justice Policy Institute, *supra* note 166, at 3, 30.

170 Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, Prison Pol'y Initiative (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html.

171 Michaela Ross, Madi Alexander & Paul Murphy, *Immigration Spending Surges as White House Calls for More Funds*, Bloomberg Gov't (Jan. 25, 2019), https://about.bgov.com/insights/news/immigration-spending-surges/.

172 Meg Anderson, *Trump's Challenge: Where to House Millions of Immigrant Detainees*, NPR (Jan. 16, 2025), https://www.npr.org/2025/01/16/nx-s1-5218641/immigrant-detention-trump-deportation-plans.

173 *How Lockup Quotas and "Low-Crime Taxes" Guarantee Profits for Private Prison Corporations*, In the Public Interest (Sept. 2013), https://www.documentcloud.org/documents/798018-in-the-public-interest-report-on-private-prison/.

174 The following excerpt from a *Wall Street Journal* article is one such testament to the relationship between the two industries: "Parts of the defense establishment are cashing in, too, sensing a logical new line of business to help them offset military cutbacks. Westinghouse Electric Corp., Minnesota Mining and Manufacturing Co, GDE Systems (a division of the old General Dynamics) and Alliant Techsystems Inc., for instance, are pushing crime fighting equipment and have created special divisions to retool their defense technology for America's streets." Paulette Thomas, *Making Crime Pay: Triangle of Interests Creates Infrastructure to Fight Lawlessness*, Wall Street J. (May 12, 1994), https://www.proquest.com/newspapers/making-crime-pay-triangle-interests-creates/docview/398388330/se-2.

> This economy not only consists of the products, services, and ideas that are directly marketed to other governments, but it also exercises an enormous influence over the development of the style of state punishment throughout the world.[175]

Racialization and the prison-industrial complex are not unique to the United States. Due to the global market of these multinational corporations, their profits are tied to prison systems worldwide, which can be seen via the racialization of the prison populations across Europe, South America and Australia.[176] Turkey and South Africa underscore this trend. Turkey has left behind its communal style prisons for the American "supermax" prison model which places inmates in permanent solitary confinement, more conducive to torture and maltreatment.[177] Immediately after the post-apartheid abolishment of the death penalty, Davis points to the relative effortlessness with which the most oppressive form of the United States prison (the supermax) was adopted in South Africa.[178] More recently, the United States has entered into a contract with El Salvador's CECOT mega-prison under President Nayib Bukele, paying $20,000 per inmate—totaling $6 million annually.[179] This arrangement reflects an expansion of cross-border carceral outsourcing and signals the global economic traction of this industry. Bukele's *Plan Cero Ocio* (Zero Leisure Plan) mandates inmate labor to offset operational costs, compelling prisoners to work across agricultural, manufacturing, and construction sectors.[180]

175 Davis, *supra* note 5, at 100.

176 *Id.* at 85.

177 *Id.* at 101.

178 *Id.* at 101–102.

179 James FitzGerald, *El Salvador's Leader Will Not Return Man Deported from the US in Error*, BBC News (Apr. 14, 2025), https://www.bbc.com/news/articles/c9vedkm7w2do.

180 *The Zero Leisure Plan Promotes Self-Sustainability in Prisons*, El Salvador in English (Aug. 17, 2022), https://elsalvadorinenglish.com/2022/08/17/the-zero-leisure-plan-promotes-self-sustainability-in-prisons; *Zero Leisure Plan Leaves 96 Schools, 84 Police Headquarters and 162 Health Centers Renovated by Inmates*, El Salvador in English (Dec. 20, 2021), https://elsalvadorinenglish.com/2021/12/20/zero-leisure-plan-leaves-96-schools-84-police-headquarters-and-162-health-centers-renovated-by-inmates.

In China, where all prisons are state-run, the economic function of incarceration is no less entrenched. Penal institutions often operate under dual identities, simultaneously functioning as detention centers and commercial enterprises under separate names. Inmates are required to labor in agricultural and manufacturing sectors, and prisons are encouraged to generate revenue and achieve fiscal self-sufficiency through inmate labor.[181] The commodification of incarcerated people, whether in explicitly privatized markets or state-run systems, thus reflects the extent to which incarceration has become structurally embedded in modern political economies.

In sum, the prison is hardly a neutral or necessarily humane institution; it can be an instrument of immense cruelty and social destruction which *ḥudūd*-reformists do not account for. Thus far, this article has demonstrated that capital punishment has historically been deployed at significantly higher rates in the judicial systems of both the United States and China, two global powers, than *ḥudūd* punishments within Islamic law. Even as the gap has narrowed in recent decades—at least in the United States—the rates remain sufficiently comparable to challenge the presumption that Islamic legal systems are uniquely severe in their use of capital punishment.[182] Building on this, as well as the preceding exploration of *ḥudūd*, and the critique of the carceral system, the final section employs these insights to unpack *The Call* decolonially.

Decolonizing *The Call*: Power, Epistemology and Reform

Turning now to *The Call*, from a decolonial perspective, the gaze being focused on Muslim majority countries must be questioned. China, as was illustrated previously, dwarfs Muslim majority

181 John Dotson & Teresa Vanfleet, *Prison Labor Exports from China and Implications for U.S. Policy*, U.S.-China Econ. & Sec. Rev. Comm'n (July 9, 2014), https://www.uscc.gov/sites/default/files/Research/Staff%20Report_Prison%20Labor%20Exports%20from%20China_Final%20Report%20070914.pdf.

182 This comparison excludes capital punishment in Muslim-majority countries by way of *taʿzīr* because both external and internal reform efforts, including *The Call*, are fixated on the *ḥudūd*.

countries in its execution of thousands of people yearly.[183] The United States has executed on average 35 people yearly for the past 20 years while allowing for multiple execution methods.[184] Ramadan rejoins that he has focused on Muslim majority countries because they carry out the *ḥadd* punishments in the name of Islam and *sharīʿa*, and as both a scholar of Islam and a practicing Muslim, he is obliged to direct his attention to this internal matter.[185] However, Ramadan himself acknowledges that both historically and contemporarily, those convicted of *ḥadd* crimes are few; most corporal punishment and death penalties are handed down in the form of *taʿzīr*.[186] Moreover, most death sentences in Muslim majority countries prosecuted under *taʿzīr* were doled out to political dissidents and drug-related charges, not for *ḥadd* infractions.[187] *The Call*—and similar reformist appeals—by focusing on the *ḥudūd* which are designed to be nearly impossible to enforce and moral in nature, instead of problematizing *taʿzīr*, are guilty of misplaced critique. Interestingly, in Muslim majority countries where Islamic law wasn't altogether abolished through colonization, it was *taʿzīr* that bore the full force of reformation and codification more akin to Western standards of law.[188]

Gomaa sums up *The Call* as substantively correct but procedurally wrong. He begins by problematizing the idea of a utopian implementation of *sharīʿa*:

> One cannot justifiably affirm that the *sharīʿa* is not being applied in a given environment merely because the lived daily reality does not conform to some of its prescriptions. Such differences, after all, have been observed in varying degrees and types throughout Islamic history and in all Muslim lands and countries without a single Muslim scholar ever arguing that these lands are outside

183 Amnesty International, *supra* note 134.

184 Death Penalty Information Center, *Facts about the Death Penalty*, Death Penalty Info (updated May 21, 2025), https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf?dm=1736463595.

185 Ramadan, *supra* note 83.

186 *Id.*

187 European Saudi Organization for Human Rights, *supra* note 115; Vogel, *supra* note 111, at 246–47.

188 Peters, *supra* note 89, at 104–105.

> the purview of Islam as a result, or that they do not apply the *sharīʿa*. Indeed, it would not be an exaggeration to argue that the expression "application of *sharīʿa*" is a recent coinage.[189]

Gomaa then proceeds to agree with *The Call* that the role of *ḥudūd* is socio-moral in ensuring that sins, due to their association with certain penalties, are repulsed by the human psyche. He then focuses the majority of his response on the conditions of *ḥudūd* implementation, stating categorically that application of the *ḥudūd* without the requisite conditions is a transgression of *sharīʿa*.[190]

Examining the requirements for *ḥudūd* application through a *maqāṣid* lens, Gomaa cites context (*al-wāqiʿ*) as vital in determining whether their objectives are being fulfilled.[191] He then references al-Qarāfī's four criteria for understanding context: 1) time 2) space 3) persons 4) situations.[192] The consideration of these allows the jurist to classify the circumstances as those of necessity (*ḍarūra*), ambiguity (*shubha*), civil disorder (*fitna*) or ignorance (*jahāla*). In turn these circumstances, if established, can permit what is forbidden or allow for suspension of sanctions. Gomaa alludes to Egypt as an example where the *ḥudūd* haven't been applied in over one thousand years, not due to a blanket suspension of the *ḥudūd*, but on the contrary, because of their implementation, i.e., their procedural design of evading prosecution is fulfilling its objective (*maqṣid*).[193] Thus, substantively, both Gomaa and Ramadan agree that the *ḥudūd* should not be applied, but procedurally they come to their conclusions differently, with Gomaa allowing the *maqāṣid* methodology to inform his assessment of the conditions required for *ḥadd* implementation. Revisiting the account of ʿUmar during the year of famine, reformers often interpret his actions as a suspension of the *ḥadd* for theft via recourse to the *maqāṣid*. However, many jurists, whose reasoning Gomaa is following, contend that ʿUmar did not suspend or halt the *ḥudūd*. Instead, he applied the doctrine

189 Ramadan, *supra* note 83.
190 *Id.*
191 *Id.*
192 *Id.*
193 *Id.*

of doubt (*shubha*) inherent in the *ḥudūd*, determining that the requisite conditions for their enforcement could not be met due to the exceptional circumstances, thus rendering the punishment inapplicable.[194] Accordingly, Gomaa's approach can be seen as an epistemic one, in which he foregrounds the Islamic legal framework. In light of this, the resistance to the moratorium on *ḥudūd*, analyzed from a decolonial angle, is resistance to a top-down approach that forgoes procedure, insinuated by the very word "moratorium," which suggests that the institute of *ḥudūd* must be frozen or rendered idle by those in power.

From a decolonial angle, this substantive versus procedural argument is implicated by the coloniality of power in reshaping religion, "the form it takes, the subjectivities it endorses, and the epistemological claims it makes."[195] Saba Mahmood (d. 2018) is wary of the U.S. State Department's identification of indigenous allies, i.e., the decolonial concern for external co-option.[196] Particularly troubling is the confluence of U.S. imperial interests with certain reformist approaches to scriptural hermeneutics.[197] Mahmood argues that this has resulted in theological prescriptions by the State Department on particular interpretations, and a peculiar amount of effort by think tanks such as the National Security Research Division of the Rand Corporation (Rand) in analyzing theological flaws and what they believe to be interpretive errors.[198] The report argues that, "it is not so much the substantive positions of the traditionalists that are intolerable as their beliefs, attitudes, and modes of reasoning."[199] It then criticizes traditional Muslims opposing polygyny, not on substantive grounds, but because they come to their conclusion by

194 Bultājī, *supra* note 27, at 190. Stealing due to hunger, as is the case during a famine, is a *shubha* that drops the *ḥadd* charge of theft.

195 Saba Mahmood, *Secularism, Hermeneutics, and Empire: The Politics of Islamic Reformation*, 18 Public Culture 323, 326–27 (2006).

196 *Id.* at 323.

197 *Id.* at 329.

198 The Rand report points to three beliefs of traditional Islam which are "intolerable" and therefore make it dangerous: 1) the belief that the Qurʾān is divine as opposed to a historical document 2) the failure to recognize that Muhammad was embedded in his time and therefore holds minimal practicable value to the realities of modernity 3) the failure to censure the traditional jurisprudence for its deficiency and practicality. *See id.* at 334.

199 *Id.*

engaging with traditional Islamic legal frameworks and juristic positions.[200] Their position is faulted on procedural grounds for not rejecting canonical sources outright due to their "incompatibility with modern liberal values."[201] Pertaining more directly to *maqāṣid*-based reform, in 2017, the U.S. Helsinki Commission which promotes "human rights, military security and economic cooperation" reported on the "Moroccan Approach" to countering violent extremism (CVE) which consisted of:

> Promoting maqasid in scriptural explication, an approach that emphasizes the spiritual, moral, ethical, and social goals of religious belief and practice above literalist interpretation and formalistic piety. The delegation visited the Muhammad VI Institute for the Training of Imams where hundreds of Imams and male and female religious guides—murshidin and murshidat—from across Morocco and Western and sub-Saharan Africa are brought on full-scholarship to deepen their understanding of this interpretation of the Islamic faith.[202]

Mahmood therefore situates the aversion to "Western values,, a euphemism for U.S geo-political strategic interests, within this broader context of the United States' theological campaign to discipline Muslims.[203] This perspective underscores the pertinence of al-Ghazālī's hesitation and qualification of the *maqāṣid* as an uncertain source of law, refusing to give them independent authority. Such a conscious approach could prove fruitful by allowing the *maqāṣid* to serve as a standard, encapsulating

200 *Id.* at 334 n.27.

201 *Id.* at 334.

202 U.S. Helsinki Commission, *OSCE Parliamentary Delegation to Rabat Examines Morocco's Strategy to Counter Violent Extremism*, CSCE (Nov. 6, 2017), https://www.csce.gov/articles/osce-parliamentary-delegation-rabat-examines-morocco-s-strategy-counter-violent/.

203 The Muslim World Outreach program has a 1.3-billion-dollar budget allocated towards "transforming Islam from within" which amounts to training preachers, establishing seminaries, and shaping religious debate within existing media forums. Furthermore, the International Religious Freedom Act (IRFA) passed by the U.S. Congress allots them unprecedented powers in regulating religious life globally under the guise of safeguarding religious freedom. *See* Mahmood, *supra* note 195, at 328–31.

the *élan* or thrust of *sharīʿa*, against which laws can be measured and ultimately inviting re-evaluation. At the same time, the re-evaluation itself, i.e., the legislation or reformulation of laws, would remain subservient to the procedural framework of Islamic law, through which usage of the *maqāṣid* is qualified. This internal system of checks and balances, at once allows for critical reconsideration, while frustrating imperialism and protecting against external co-option.

Additionally, while Ramadan advocates for internal reform, geo-politically speaking, not only is he a self-avowed Westerner, but his research and work comes from the global North, a positionality that is not without implication.[204] If the reader recalls, *The Call* was sparked during a debate in which former French President Sarkozy insisted that Ramadan renounce the *ḥadd* punishment of stoning adulterers. Jonathan Brown mentions that it is not so much the corporal punishment aspect of *ḥudūd* that disturbs modern liberal sensibilities, but more so that acts like fornication and drinking are deemed immoral in the first place.[205] The suspicious fixation on the rarely applied *ḥudūd* crimes, at the expense of *taʿzīr* executions for the more frequent but familiar crimes of treason and drug trafficking, lends credence to Brown's argument. This is spelled out in the Rand Report's reference to canonical Islamic texts as being incompatible with modern liberal sensibilities.[206] This is especially pertinent if the *telos* of *ḥudūd* is understood to be ethical subject formation. This angle is generally absent from reformist discourse surrounding *ḥudūd*, and is problematic from a decolonial critique calling for pluriversalism to replace universalism, a term used to obscure the hegemony of Western values.

A second consequential oversight concerns the failure to engage the carceral system as the global default punishment. *The Call*, which centers context (*al-wāqiʿ*) in its *ḥudūd* reform project, lacks a critique of the carceral system, which

204 Ramadan, *supra* note 54.

205 Jonathan Brown, *Stoning and Hand Cutting—Understanding the Hudud and the Shariah in Islam*, Yaqeen Institute (Jan. 12, 2017, updated July 22, 2024), https://yaqeeninstitute.org/read/paper/stoning-and-hand-cutting-understanding-the-hudud-and-the-shariah-in-islam.

206 *See* Mahmood, *supra* note 195, at 334 n.27.

would be the most likely alternative given its global prevalence and growth rate. It is useful here to engage Foucault as scholar who similarly engages context surrounding the transition from corporal punishment to the birth of the modern prison. He concludes that reformers were not moved by altruistic ideals, but by a desire to optimize power and economize punishment.[207] As a result, the modern prison does not simply punish through confinement, it imposes strict regimentation and surveillance measures that ensure inmates internalize authority, i.e., it seeks to reformulate its subjects in a quest for docile bodies to constitute a working-class labor force.[208] This transformation was achieved through the invisibilization of punishment, transitioning its locus from the body to the soul.[209] This alleviated political complications caused by the visibility and corporality of state violence.[210] Notably, this aspect of the public utility of *ḥudūd* is absent from contemporary discussions. If *The Call* were to be fully realized—leading to a moratorium not only on the *ḥudūd* but, for argument's sake, on *taʿzīr* as well—Muslim-majority countries would end up with the hegemonic carceral model in the United States.[211] This, in turn, risks evolving into the kind of industrial complex described by Davis and Alexander, wherein authoritarian governments benefit from a penal system concealed from public scrutiny, and consequently, punishment of body, would transfer to punishment of soul.

By virtue of calling for a moratorium in which the carceral system would, in practice, serve as a locum for *ḥudūd*, *The Call* is concerned primarily with the public visibility of violence. Evaluated decolonially, this is indicative of a desire to regulate rather than eliminate violence. *The Call*'s passive privileging of the Eurocentric theory of criminal justice as more humane is representative of the coloniality of power at work. This

207 Foucault, *supra* note 4, at 7.

208 *Id.* at 135. The timetable was a method of regulating the prisoner's activities to eliminate time waste, which was viewed as economic dishonesty

209 *Id.* at 42, 249.

210 *Id.* at 59–61.

211 Previously, the examples of Turkey, South Africa and Australia illustrated how the U.S. supermax prison models are being adopted globally and run by U.S. companies.

runs against the grain of trenchant critiques by Foucault, Davis, and Alexander vis-à-vis the carceral system. The Islamic legal system, inclusive of *ḥudūd*, *qiṣāṣ*, and *taʿzīr*, by virtue of being public and not monetized, lends itself more to reform. Without Eurocentric penology's systemic hurdles, the Islamic epistemic tradition has the breadth to tackle the problematic implementation of *taʿzīr*, which is impeded by visible authoritarian power, rather than hidden power.[212] In trying to come to terms with the failure of the carceral system, and find alternatives, Moskos proposes a return to corporal punishment in which the guilty party is offered the choice between flogging and prison time.[213] More thoroughly, Davis demands the overhaul of the entire system, in which adjudication of the most heinous crimes would come back to the victims or their family, who could choose to pardon the transgressor.[214] This idea finds arable land in the Islamic epistemic tradition, which has the theoretical scope to take it on via *qiṣāṣ* where, for example, in Iran in 2023, 857 or 75% of the individuals convicted for homicide were forgiven by the families of the deceased.[215]

Finally, in light of epistemic delinking, I highlight two examples of pre-modern Islamic jurists of repute, who engage the *ḥudūd*. The first, Ibn ʿAbd al-Salām, an Imam of the Umayyad Mosque, rose to such prominence that despite banishment from Damascus, he was named chief judge upon emigrating to Cairo.[216] He is also one the foundational contributor to the development of *maqāṣid*. A section of his book, *Qawāʿid al-aḥkām* (The Basis of Rulings), is dedicated to reviewing the objectives and purposes of various *ḥudūd* in relation to their crime.[217] What is of inter-

212 As Abou El Fadl observed, even those scholars who vehemently opposed Ramadan's *Call*, find Saudi Arabia's and Iran's implementation of *taʿzīr* problematic. *See* Abou El Fadl, *supra* note 76, at 291–93.

213 Peter Moskos, In Defense of Flogging 100 (2011).

214 Davis, *supra* note 5, at 114–15.

215 Iran Human Rights, *supra* note 118, at 67–68.

216 Sherman Jackson, Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi 9–10 (1996). Ibn ʿAbd al-Salām, renowned by the honorifics Sultan of Scholars and Shaykh al-Islām, was jailed and subsequently exiled from Damascus for the pulpit condemnation of then ruler al-Sāliḥ Ismāʿīl for making concessions to the crusaders.

217 Ibn ʿAbd al-Salām, *supra* note 32, at 1:291.

est is Ibn Abd al-Salām's use of internal logic in his application of *maqāṣid*. After establishing that the purpose of the *ḥudūd* is deterrence, he analyzes the *ḥadd* of theft (*sariqa*).[218] He finds that the amputation of the arm is a commensurate penalty since it is directly related to what the culprit used to commit the crime.[219] He then poses the hypothetical question of why someone guilty of stealing a small amount and someone guilty of stealing a large amount receive the same penalty.[220] Ibn ʿAbd al-Salām replies to this question drawing, ontologically, on a time-space continuum in which life does not end with earthly death, but continues on eternally into the hereafter.[221] Therefore, he answers this question by stating that the *ḥadd* in these instances serves as an expiation (*kaffāra*) of sins, but that the expiation is not limitless.[222] Whatever sins are left over will be dealt with in the court of God, citing Qurʾān 99:7.[223] He then goes on to examine *zinā*, which he states is penalized due to the "harms of mixing fluids resulting in the uncertainty of lineage."[224] However, after explaining why *zinā* is a crime worthy of punishment and accepting flogging as a commensurate punishment for an act in which the entire body feels pleasure, he remarks, "I have not come across the harm warranting the stoning of a widowed fornicator, and what has been postulated about it does not convince me."[225] This represents a notably bold, bottom-up approach to *maqāṣid* in which Ibn ʿAbd al-Salām does not question the *ḥudūd* in principle, but raises doubts about what he perceives as a punishment disproportionate to its crime—a *ḥadd* which fails vis-à-vis its own purported objective of commensurability. Of particular interest is that Ibn ʿAbd al-Salām lived during a historical period (1181–1262) in which there is no recorded implementation of the *ḥudūd* in either Syria or Egypt, and what would appear to be no external pressure

218 *Id.* at 23.
219 *Id.* at 291.
220 *Id.* at 56.
221 *Id.*
222 *Id.*
223 *Id.* at 56–57.
224 *Id.* at 291.
225 *Id.* at 292. To be eligible for stoning, a person must be *muḥṣan*, i.e., someone who has at one point enjoyed sexual relations in a licit relationship. Thus, both a widower and widow fall under this category. *See* Peters, *supra* note 89, at 61.

to reevaluate the *ḥudūd*.[226] Ultimately, he concedes, "this *ḥadd* . . . is problematic; may Allah facilitate its resolution."[227] While ostensibly accepting the punishment of stoning, he applies logic intrinsic to the *maqāṣid* tradition to critically question it.[228] Procedurally, Ibn ʿAbd al-Salām's critique emerges from an uncolonized epistemic space, employing a framework entirely internal to the Islamic legal tradition. This stands in contrast to *The Call*, which, although explicitly framing itself as an internal reform effort, remains insufficiently attentive to the coloniality of power shaping its assumptions. These assumptions are not problematic in their foreignness, but in the influence, they exert in directing the reformer's gaze and privileging the Western canon of thought.

I end with one of the leading Mālikī jurists of his era, Abū al-Qāsim al-Burzulī (d. 844/1440), who ruled that *ḥudūd* punishments could be replaced by the taking of property (*al-ʿuqūba bi-l-māl*):

> Al-Burzulī issued a *fatwā* that was supported by Ibn Khajū and Ibn ʿUqda. He sent it to the Sultan Mawlāy Muḥammad bin Muḥammad al-Sharīf al-Sūsī while he was stationed at Sebou Valley before his conquest of Fez. He [the Sultan] spoke at length, ultimately expressing agreement with al-Burzulī's *fatwā*. It was mentioned that al-Burzulī engaged in a debate with a contemporary scholar in the presence of the Emir of his time. Their argument grew lengthy until the scholar debating him said, "If you follow this errant individual, your fate will be the same as his—in the abode of ruin," or words to that effect. The Emir acted on his [al-Burzulī's interlocuter] advice and began implementing corporal punishments (*ḥudūd*). However, this led to an outcry among the

226 Kadri, *supra* note 109, at 217; Ramadan, *supra* note 83.

227 Ibn ʿAbd al-Salām, *supra* note 32, at 1:57.

228 Ibn ʿAbd al-Salām states that one of the aims of his book is to identify the objectives behind prohibitions. In doing so, he distinguishes between the means (*al-wasīla*) and the ends (*maqāṣid*). The principal of proportionality (*al-muwāzana*), in the case of *ḥudūd*, necessitates commensurability between the punishment and the harm caused, so that the means (*ḥadd* punishment) achieves its end. *See id*. at 36–39.

> people, as shock and disorder increased. Consequently, the Emir reverted to al-Burzulī's opinion.[229]

Fellow North African scholars Abū al-Qāsim ibn Khajjū (d. 956/1549) and Mūsā ibn al-ʿUqda (d. 911/1504) also aligned with al-Burzulī's position. Notably, more than the concern for immutability of the *ḥudūd*, the discourse surrounding this issue predominantly focused on the inviolability of property and the legitimacy of its confiscation, particularly in cases where the property bore no direct relation to the crime.[230] I present these examples to demonstrate how premodern scholars, uncoerced by foreign hegemonic epistemic traditions, critically engaged with and, in one case, had the *ḥudūd* replaced. This illustrates the viability of significant reform undertaken in a non-Western epistemic space.

The breadth of Islamic law is accounted for by what has been described as jurists' strategic negotiation of multiple normative discourses.[231] The latitude afforded in this negotiation, while firmly anchored in legal procedures and interpretive mechanisms that safeguard against external co-option and ensure epistemic independence, is the key to the interpretive possibilities and the liberative potential of the Islamic legal tradition. Moreover, these examples complicate reductive binaries between progressive reform and traditionalist resistance. As demonstrated, the *ḥudūd* were not only problematized but, in some cases, reformed by premodern scholars often labeled as traditionalists. Conversely, some progressives—broadly applied, as in the case of this decolonial critique—can resist *ḥudūd* reform, revealing a more complex and dynamic landscape of legal thought.

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229 Abū ʿĪsā al-Wazzānī, 10 al-Nawāzil al-jadīda al-kubrā 210 (Muḥammad al-Sayyid ʿUthmān ed., 2014).

230 *Id.* at 206–29.

231 Juliane Hammer, American Muslim Women, Religious Authority, and Activism: More Than a Prayer 77 (2012); Marion Holmes Katz, Wives and Work: Islamic Law and Ethics Before Modernity 14 (2022).

Conclusion

I recognize the impulse of *The Call* to stand with the marginalized and affirm the justice goals of reform initiatives, a commitment that is both necessary and commendable. Beyond this, *The Call* also holds the important merit of fostering intra-Muslim dialogue, encouraging critical engagement with Islamic legal traditions. In line with this, the argument presented in this article does not dispute the moral urgency of alleviating suffering but rather seeks to question the assumptions underlying certain reform approaches. By introducing a decolonial critique to calls for *ḥudūd* suspension, the aim has been to reframe the terms of debate and tease out the broader structure at play viz., the legacy of colonial epistemology in defining what is objectionable about Islamic law and directing the gaze toward the *ḥudūd*.

Several key insights emerge from this article's attempted decolonial analysis. First, it was demonstrated, both theoretically and historically, that enforcement of *ḥudūd* punishments was not the main engine of social order. In essence, the *ḥudūd* functioned as symbolic archetypes of justice and moral transgression. Their primary impact was to shape attitudes and behaviors (e.g., emphasizing the sanctity of marriage and property, the seriousness of slander, the gravity of intoxication), what anthropologist Talal Asad might describe as part of the Islamicate ritual and disciplinary practices that form the Muslim subject.[232] Crucially, the *ḥudūd* are not designed to police the private sphere. They are inherently public in orientation.[233] While Western liberal legal systems center individual autonomy and often draw sharp lines between public law and private morality, Islamic law prioritizes communal harmony and moral ecology.[234]

232 Talal Asad, Formations of the Secular: Christianity, Islam, Modernity (2003).

233 All four agreed-upon *ḥudūd* crimes possess inherent public dimensions: *zinā* deters public sexual immorality; *qadhf* safeguards reputational trust; *sariqa* addresses socially destabilizing thefts rather than petty or recoverable offenses; and *ḥirāba* protects public safety from violent disruption.

234 The liberal legal tradition attempts to maintain a clear, rational boundary between public law and private morality—often framed through the ideal of the "separation of church and state." Yet, this boundary is less a neutral demarcation than a normative judgment about what constitutes legitimate public concern. The very act

Second, in many Muslim contexts, the primary mechanism of oppression was identified as the misuse of *taʿzīr* powers. State violence, from Iran's gallows to Saudi Arabia's discretionary executions, often operate outside the *ḥudūd* framework. Any reform that ignores this will have limited impact. It is telling that even if tomorrow every *ḥadd* punishment were formally repealed, the prisons in the Muslim world would remain filled, and the executioners busy.

Third, this article examined the modern prison as the presumed "humane" alternative to corporal punishment. Drawing on the insights of Foucault, the rise of the carceral system in Europe was revealed to be motivated not by pure humanitarian concern, but by a shift in the technologies of power, a move to discipline the soul and regulate populations more efficiently, rather than simply brutalize the body. Thinkers like Davis and Alexander further reveal how the modern penitentiary system is driven by profit and has perpetuated systemic racism and new forms of social death. Placed in this light, calls to replace *ḥudūd* with Western-style incarceration risk swapping one modality of violence for another. This article has sought to foreground the vital distinction between regulating violence and eliminating it.

In sum, from a decolonial perspective, however well-intentioned, current *maqāṣid*-based reform approaches to the *ḥudūd* raise significant concerns. This article argues that the exclusive focus on *ḥudūd* penalties, and the assumption that they are the core problem needing "fixing" or suspension, reveals a form of epistemological capture by colonial narratives of Islamic law. In other words, calls for reform, despite being framed in Islamic terms, implicitly center a Western gaze that has long sensationalized *ḥudūd* while obscuring far more pervasive forms of violence in Muslim societies. These reform efforts inadvertently adopt a colonial lens by accepting the modern nation-state's terms of debate and its punitive logic. In doing so, they miss the deeper critique: that Islamic criminal justice, once situated in a very different societal and ethical

of designating a domain as "private" is itself a moral and political decision, shaped by the epistemology it claims to transcend.

matrix, has been distorted under the modern state's logic. This critique reframes *ḥudūd* not as outdated laws to be temporarily halted or modernized to appease liberal sensibilities, but as part of a legal-ethical canon whose operation and purpose (*telos*) historically centered on ethical subject formation rather than routine implementation. By contrast, it is the modern state's *taʿzīr* apparatus—expansive discretionary criminal codes, prisons, and police powers often inherited from colonial regimes—that functions as the primary site of systematic violence and repression in today's Muslim-majority contexts. In short, what needs urgent scrutiny and reform are not *ḥudūd* as isolated divine laws, but the modern political economy of punishment that has co-opted *taʿzīr* to perpetuate injustice.

Yet, my argument extends beyond the observation that the majority of state violence is enacted through *taʿzīr*, making the focus on *ḥudūd* an inefficient reform priority. While this is true, my critique is more fundamental: why the fixation on *ḥudūd* in the first place? Some readers may find this analysis unsettling, particularly those for whom corporal punishment is assumed to be inherently immoral. My argument challenges this epistemic certainty. The moral rejection of physical punishment is often presented not as a culturally contingent stance, but as an epistemic truth. Yet this view is undergirded by a liberal-secular moral epistemology, one that remains largely unacknowledged by its own adherents. It privileges a particular understanding of violence—one that assumes the primacy of bodily integrity in this world and sees little value in metaphysical accountability beyond it.[235]

Islamic law, by contrast, proceeds from fundamentally different ontological and epistemic premises. It does not treat earthly life as the ultimate horizon of meaning, but rather views it as part of a larger eschatological arc. In this framework, the preservation of public morality is not a form of authoritarian intrusion but a means of safeguarding the eternal well-being of individuals and communities. Public immorality—such as brazen

235 *See* Talal Asad, Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam 83 (1993), who notes the modern severance of bodily suffering from spiritual truth, a shift I extend to explain liberalism's restriction of violence to immediate bodily harm.

acts of *zinā* or intoxication—is thus not a morally neutral matter of private freedom; it is a form of violence, a potential site of spiritual and social destruction. Therefore, it is not a tolerated deviation but an impending soteriological harm whose full consequences, while potentially deferred to the hereafter, will take on a corporal and enduring form and the Islamic legal response to it is framed as a public ethical duty.

This leads to an important clarification, the *telos* of *ḥudūd* is not merely punitive but formational: they structure the moral grammar of the community by drawing sharp, sacred lines between tolerated private failing and corrosive public harm. Their application is intentionally rigorous and procedurally difficult, which creates a space for repentance and concealment of sin in the private sphere, while still preserving the law's disciplinary capacity when immorality becomes public, normalized, or defiant. The critique that *ḥudūd* are rendered toothless because they are structured with evidentiary thresholds that render their actual implementation exceedingly rare misses this point.

The *ḥudūd* reflect a principled and theologically coherent vision of law—one that sees public moral life as a site of ethical subject formation and communal responsibility. To critique them without accounting for their ontological and eschatological underpinnings is to misunderstand both their function and their philosophical foundations. Thus, the persistent emphasis on *ḥudūd* reveals an underlying frustration with the ethical framework they cultivate within the Muslim subject. Consequently, if the concern is humanitarian, then *ḥudūd* reform is pragmatically flawed. Structurally, this article demonstrates how current *ḥudūd* reform operates within a broader colonial logic, one that imposes modern liberal hegemonic values onto Muslim societies. These reformist projects are discursively framed through registers of progress, human rights, and modernity, positioning themselves as emancipatory while nonetheless reproducing the epistemic assumptions of neoliberal legality. In doing so, they participate in the production of a "good Muslim" subject—one aligned with neoliberal legal paradigms conducive to global capital, and governed through accountability to the modern nation-state rather than the divine.