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Greetings and Grievances: A Letter from Afghan Professors

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On that first day, all of us were wary. Although I had taught in Afghanistan on two prior occasions, this was the first time some of my “students” were professors who taught Shariah law at the country’s two most conservative universities: the University of Nangarhar, which is in the eastern part of Afghanistan, and the University of Kandahar, which is in the south. Wearing traditional clothing and beards, the professors who sat in front of me looked very much like the “insurgents” so often featured on my evening newscasts. I, on the other hand was a woman, albeit an older woman, from the United States.

All went well in that first class, and the professors and I spent the next three weeks together, me helping them improve their English by teaching short courses in U.S. Criminal Law, Contract Law, and Family Law and them teaching me about Shariah law and Afghan culture. While language and cultural barriers kept us from doing some of the things that I might do with U.S. professors, for example, going out for dinner, we became comfortable enough with each other

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1 Laurel Currie Oates is a Professor of Law at Seattle University School of Law. I would like to thank Patti McLaughlin, Mark Hough, Michael Oates, Anne Enquist, and Mimi Samuel for reading earlier drafts of this article. In addition, I would like to thank my research assistant, Lorie Hahn, for her valuable assistance. Finally, I would like to thank Jonathan Eddy and Alice Stokke for hiring me to teach in the University of Washington’s Afghanistan Legal English (ALE) program. It goes without saying that the opinions expressed in this article are my own and not those of the University of Washington or those associated with its programs.

2 Many of the words used in this article can be spelled in more than one way. For example, “Sharia” is also sometimes spelled “Sharia.”

2 The University of Nangarhar, which is located in Jalalabad, was established in 1962 and is the second largest university in Afghanistan. The Shariah faculty (department) was established in 1992; it currently has 686 students, 625 of whom are men and 61 of whom are women. See http://nu.edu.af/en/page/5097. The men and women are taught in separate classes. The University of Kandahar, which is located in Kandahar City, was established in 1990. The Shariah faculty was established in 2008. See http://kandahar-university.af/

4 When I am in Afghanistan, I dress conservatively, wearing a long skirt or pants and a tunic. In addition, I wear a scarf. In the summer months, sandals seem to be just fine.

5 The professors who drafted the letter had studied English for several years and had reasonably good conversational skills. While a few of the professors were younger, my best guess is that most of them were in their forties of fifties, which means that they were adults during the Soviet occupation.
that we could have lively conversations, both inside and outside of the classroom, about education, families, religion, and politics.

Consequently, on that last day it seemed natural for me to ask the professors what they would like me to tell my students and the other members of my faculty about Afghanistan. After a short conversation among themselves, most of it in English but some of it in Pashto, the professors announced that they wanted to draft a letter to U.S. law professors. The following letter is the product of the work session that followed in which the professors dictated and I typed. When I was not sure that I understood the point that the professors were making, I asked for clarification and, at the end, we edited the letter, correcting most of the problems with sentence construction, grammar and punctuation, and usage. The contents of that letter are set out below.

Greetings to the professors in America:

1. We hope that the professors in America will take an active role in making suggestions that will help solve the world’s problems.

2. We are all humans, no matter whether we are Muslim or Christian.

3. All American law professors should learn Islamic law, and they should learn about it from Islamic scholars.

4. America wants democracy all over the world. However, America does not honor the votes of the people and supports governments that are not the governments the voters want. For example, America supported Mubarak in Egypt.

5. Most of the problems are created by the fact that America treats people differently, applying one policy to one group and a different policy to

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another group. For example, America has helped the South Sudan where most of the people are Christian. However, America does not support the Palestinian people.

6. Sometimes American soldiers in Afghanistan treat the people not as humans but as animals. For example, they enter homes without permission, and they capture people and keep them in jail without any court proceedings. Although they say that they believe in the rule of law, they do not follow their own laws or Afghan law.

7. We don’t know who the terrorists are. Are the terrorists the Americans or the Taliban?

8. The American government wants to solve problems in Islamic regions through military means, which is not appropriate. Islamic law is from God and there are specific rules. We do not understand why America does not want us to apply Islamic law. Western law is for rich countries. Poor countries cannot apply Western law but they can apply Islamic law.

9. There would be no need for fighting if areas could establish their own Islamic governments.

10. Americans dismiss Afghanistan’s family law. They broadcast TV programs that show families living in ways that are not the way that we live in Afghanistan.

11. If an Israeli is killed, the killing receives lots of international attention. If a Palestinian is killed, there is only silence.

12. It is good that the American troops will be leaving.

13. Like many Afghans, some Americans are corrupt. They send aid, but they demand money before they will help your district with its projects.

14. Many of Afghanistan’s government ministers work for (on behalf of) foreign countries and not on behalf of the Afghan people.

15. America has put lots of money into Afghanistan but not enough into infrastructure. Aid money should be used to build dams that create electric power, to help build factories, and to support local businesses.

We hope that American law professors will share our concerns with those in the American government.
Over the last couple of months, I have asked myself why I feel such a strong desire to publish this letter. The easy answer is that I told the professors that I would share it. I could, however, have accomplished that goal by attaching the letter to an email addressed to my own faculty. It seems, however, that the letter deserves a wider distribution and an ever broader critique.

The letter deserves a wider distribution because, although stories about Afghanistan often dominate the news, we almost never hear from those in Afghanistan whom I would label as among the most conservative. We hear about them but not from them. This group has, however, tremendous influence, and there is a good chance that their influence will determine what happens in Afghanistan in the next decade.

The letter also provides an opportunity to critique the United States’ role in Afghanistan. No one would disagree that the costs have been high. Between 2001 and 2011, more than two million Americans have served in Iraq or Afghanistan, with almost half of those individuals serving more than one tour of duty. In addition, since the United States invaded Afghanistan in late 2001, more than 2,200 Americans have lost their lives and more than 18,000 have been injured in hostile actions. The financial costs have also been high. Between 2001 and 2011 the United States spent $444 billion on military-related expenses and 89 billion in aid. And these numbers do not take into account the costs to Afghans. While it difficult to find accurate numbers,

7 http://abcnews.go.com/Politics/us-veterans-numbers/story?id=14928136#1
8 http://abcnews.go.com/Politics/wireStory/us-military-deaths-afghanistan-2043-18230448
sources indicate that in the last eleven years between 15,500 and 17,400 Afghan civilians were killed.\textsuperscript{10}

The benefits are much harder to measure. On the one hand, much of Kabul has been rebuilt, many who fled Afghanistan have returned, and more boys--and girls--are in school. On the other hand, Afghanistan is still not a safe place. Thus, while I do not share many of the professors’ beliefs, I am not comfortable with just dismissing their concerns. During our classes, the professors listened to me with respect and curiosity; they seemed genuinely interested in learning about the United States and, in particular, about our system of law. As a result, I left Afghanistan believing that I owed it to the professors to learn more about their history, their religion, and their legal system.

This article describes some of what I have learned. Because history tends to repeat itself, Part I of this article summarizes Afghanistan’s more recent history. Part II then looks at Afghanistan since 2001: In this part, I discuss man the United States went into Afghanistan to kill, Osama bin Laden; the Bonn Agreement; Afghanistan’s 2004 Constitution; Afghanistan’s judicial systems; and some of the rule of law projects. Then, in Part III, I move to a discussion of the Ulema, or clergy, and in particular the National Ulema Council and its recent declarations. In the last part, Part IV, I reflect on what I said in response to some of the professors’ statements and talk about what I might have said. I end with some predictions.

\textsuperscript{10} \url{http://costofwar.org/article/afghan-civilians}. 
I. A short history

Because Afghanistan’s history is long, I begin with modern events and, out of necessity, describe those events in a way that is both selective and very general. I start with two points that the professors made: first, that Afghanistan was never colonized and, second, that Afghanistan has always defeated those who have tried to control it.¹¹

The first decades of the 1800s were marked by both internal and external conflicts. Internally, different families, and different members of those families, fought for control of the country.¹² Externally, the Afghanistan state was targeted by the Sikhs, who had taken the last of Afghanistan’s Indian provinces and appeared ready to move west; by the Russians, who had reached Afghanistan’s western border and supported the Persian campaign to take Herat; and by the British, who had sent envoys to establish relationships that would allow it to use Afghanistan as a buffer between India, over which it had established control, and Russia.¹³

The First Anglo-Afghan War lasted from 1839 until 1841.¹⁴ In 1838, Lord Auckland, India’s governor general, issued the Simla Manifesto, in which he set out the reasons why the British needed a trustworthy ally in Afghanistan to protect the British interests in India from Russia.¹⁵ Although many in Britain and India thought that the decision to invade Afghanistan was rash and

¹¹ For a more complete history of Afghanistan, see THOMAS PARFIELD, A CULTURAL AND POLITICAL HISTORY (Princeton Univ. Press 2011); SHAISTA WAHAB & BARRY YOUNGERMAN, A BRIEF HISTORY OF AFGHANISTAN (Infobase Pub. 2007).
¹² Power was held by a few elite families: Members of Sadozai family ruled from 1747 until 1823; members of the Barakzai family then ruled much of the next 100 years. SHAISTA WAHAB & BARRY YOUNGERMAN, A BRIEF HISTORY OF AFGHANISTAN 71-82 (Infobase Pub. 2007); see also THOMAS BARFIELD, AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY 110-14 (Princeton University Press 2011).
¹⁵ SHAISTA WAHAB & BARRY YOUNGERMAN, A BRIEF HISTORY OF AFGHANISTAN 82-83 (Infobase Pub. 2007); see also http://www.afghanland.com/history/anglo1.html.
unnecessary,\textsuperscript{16} in 1839 the Army of the Indus, which was made up of both British and Indian units, attacked Afghanistan and, after Dost Muhammad Khan, a member of the Barakzai family surrendered, the British named Shah Shuja, a member of the Sadozai family as the head of the country.\textsuperscript{17}

Shah Shuja did not, though, enjoy as much popular support as the British had hoped, and it soon became apparent that, if it wanted to maintain control, the British would need to keep a force in Afghanistan.\textsuperscript{18} Afghan resistance, and attacks, increased when the families of British and Indian soldiers were allowed to move to Afghanistan: Afghans objected to the presence of “infidels” (Christians and Hindus) in their country and bloody uprisings became common.\textsuperscript{19} What followed has become part of Afghan’s folklore. Unwilling to wait for an armed escort out of the country, in January 1842, General Elphinstone led 4,500 troops and 12,000 civilians and camp followers east and into the mountains.\textsuperscript{20} Almost 14,000 died of hunger or cold or were killed.\textsuperscript{21}

The Second Anglo-Afghan War lasted from 1878 until 1880.\textsuperscript{22} Once again, the British, worried about Russia, invaded Afghanistan and installed a leader of their choice.\textsuperscript{23} The first phase of the war ended with the signing of the Treaty of Gandamak, which permitted the Afghanistan to retain sovereignty over its internal affairs but gave the British control of Afghanistan's foreign policy.\textsuperscript{24} However, when Afghani forces did not get paid, riots broke out and the head of the

\textsuperscript{16} Some labeled the war “Auckland’s Folly.” http://www.afghanland.com/history/anglo1.html
\textsuperscript{17} SHAISTA WAHAB & BARRY YOUNGERMAN, A BRIEF HISTORY OF AFGHANISTAN 74-84 (Infobase Pub. 2007).
\textsuperscript{18} *Id.* at 84.
\textsuperscript{19} *Id.*
\textsuperscript{20} Wahab and Youngerman suggest that General Elphinstone may have been senile. *Id.* at 84-85.
\textsuperscript{21} *Id.*
\textsuperscript{22} *Id.* at 89-97.
\textsuperscript{23} *Id.* at 89-93.
\textsuperscript{24} *Id.* at 90; THOMAS BARFIELD, AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY 141 (Princeton Univ. Press 2011).
newly established British mission, Sir Louis Cavagnari and his guards were killed. The British retaliated, killing those thought to be involved and imposing direct rule. A large number of Afghans from a variety of tribes and ethnic groups responded. Although the Afghans did not beat the British in open battle, they were enough of a threat that the British, remembering what had happened at the end of the First Anglo-Afghan War, looked for an Afghan leader who could guarantee them safe passage out of the country. They found that leader in Abdur Rahman. Having been placed in power, Rahman was able to maintain that power for more than two decades, during which time he squelched more than 40 uprisings and created a powerful police state that left the country isolated and economically impoverished. Rahman claimed that his rule was divinely sanctioned and declared that he was imam, or spiritual leader, of the country. He thus established his own court system that applied Shariah law as he, the imam, interpreted it. When Rahman died, no one contested his son’s right to succeed him.

The last King of Afghanistan was Mohammed Zahir Shah, who ruled from 1933 until he was ousted by a coup in 1973. While during the first three decades of his rule Zahir Shah was king in name only, in 1963 Zahir Shah dismissed his cousin Mohammed Daoud, who had been ruling the country from his position as prime minister. Almost immediately, Zahir Shah initiated a

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26 Id.
27 SHAISTA WAHAB & BARRY YOUNGERMAN, A BRIEF HISTORY OF AFGHANISTAN 91 (Infobase Pub. 2007).
29 Id. at 147.
30 SHAISTA WAHAB & BARRY YOUNGERMAN, A BRIEF HISTORY OF AFGHANISTAN 94-95 (Infobase Pub. 2007).
31 Id.
number of reforms, including social and economic reforms. His most significant contribution was, though, a new constitution, the 1964 Constitution, which established a constitutional monarchy and barred royal relatives from all high-level government offices. The new constitution also established a two-house parliament, made provisions for free elections, gave political parties and media unprecedented freedom of speech, and gave women the right to vote. Pictures from the late sixties and early seventies show women in western-style dresses and scarves studying and working with men.

Not all appreciated Zahir Shah’s reforms, however, and when he went to Europe for medical treatment, his cousin Daoud, retook control in a bloodless coup and created a republic. The republic did not, though, last long: Five years later, Daoud was killed by his former socialist allies, who established a socialist government. However, that government lacked popular support and, in 1979, the Soviet Union invaded Afghanistan, starting a 10-year war between the Afghanistan mujahedeen and the Soviet Union that took the lives of about one million Afghans and created more than three million refugees.

According to a number of commentators, Afghanistan was the battleground in which the United States and the Soviet Union fought the Cold War. Although the United States did not send troops to Afghanistan, the CIA operated in the country and, along with Pakistan and Saudi

34 Id.
35 Id.
36 http://www.pbase.com/qleap/image/120404891
38 Id. at 170.
39 Id.
40 “Mujahedeen” means “holy warriors.” Id. at ix.
41 Id. at 170-71.
Arabia, the United States provided financial support to the mujahedeen, which was made up of a number of different groups, many of which operated out of Pakistan. The most radical of these groups was Hezb-i-Islami (Islamic Party) led by Gulbuddin Hekmatyar, a Ghilzai Pashtun. Some sources believe that, because of his fierce determination and organizational skills, Hekmatyar, received many of the arms and much of the financial aid send to help the mujahedeen. For example, it is reported that he received about one-third of all of the CIA’s assistance and the first anti-aircraft Stingers. A second, more moderate group, the Jamiat-i-Islami (Society of Islam), was led by Burhanuddin Rabbani, a Tajik, and was supported by Tajiks and other non-Pashtuns. A third group was led by the charismatic Ahmad Shah Massoud, a Tajik who operated out of the Panjhir Valley, which is located just north of Kabul. Massoud was a brilliant tactician and was able to disrupt the Soviet supply line.

During the almost ten years of war, most of the international community condemned the Soviet Union’s invasion of Afghanistan, with General Assembly of the United Nations passing a resolution year after year calling for the withdrawal of Soviet troops from Afghanistan. With the war taking the toll not only on Afghanistan but also the Soviet Union, in 1985 Gorbachev sought a diplomatic solution. The process, though, took several years and did not end until

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43 Id. at 173
44 Id.
45 Id. at 175.
46 While in Afghanistan, I had the opportunity to visit the Panjshir Valley and Massoud’s tomb. In the valley there are hundreds, if not thousands, of Soviet tanks and vehicles, which the Soviets abandoned when they retreated. While initially some of the professors and students, who were Pashtuns, were reluctant to visit the valley and Massoud’s tomb, it appeared that they enjoyed climbing in and out of the tanks and a picnic along the river followed by lively games of soccer, badminton, and a traditional Pashtun game.
47 SHAISTA WAHAB & BARRY YOUNGERMAN, A BRIEF HISTORY OF AFGHANISTAN 175 (Infobase Pub. 2007).
48 Id. at 159.
49 Id. at 169-70.
1988 when the Geneva Accords were signed.\textsuperscript{50} The Accords guaranteed the complete withdrawal of Soviet troops by February 15, 1989, Afghanistan’s right to self-determination, and the right of refugees to return to Afghanistan without fear of persecution or harassment.\textsuperscript{51} The mujahedeen were not, however, included in the negotiations and refused to accept the terms of the Accords.\textsuperscript{52}

Unfortunately, the withdrawal of the Soviets did not result in peace.\textsuperscript{53} Although Najibullah, who had served as President during the Soviet occupation, offered to negotiate a coalition government, the mujahedeen did not accept the offer, believing that they could easily displace him.\textsuperscript{54} That did not happen, and Najibullah was able to stay in power for the next three years.\textsuperscript{55} However, when, in 1992, the United Nations special envoy announced that he had brokered an agreement to hand over power, Najibullah fled, leaving no one in charge.\textsuperscript{56}

In the vacuum, two groups battled for control.\textsuperscript{57} Although Massoud asked the Afghanistan Interim Government (AIG), sitting as the Islamic Jihad Council, to provide a political framework for the post-Najibullah government, before the Council could meet, Hekmatyar, the Pashtun mujahedeen leader, attacked Kabul from the south.\textsuperscript{58} Massoud, with the help of Dostom, won the battle, and established a Tajik/Usbek coalition that controlled Kabul.\textsuperscript{59} When Ismail Kahn, a Tajik warlord who ruled the western part of Afghanistan from Herat, joined the coalition, the Pashtuns agreed to a power-sharing agreement brokered by Pakistan’s new prime minister.
Nawaz Sharif. Under the Peshawar Agreement, which was signed in 1992, a moderate, Sebghatullah Mujadidi, was named as temporary president and, on April 28, 1992, he and 30 delegates established the Republic of Afghanistan. Rabbani was selected to become president, Massoud was named as defense minister, and Hekmatyar was named as prime minister. Hekmatyar, however, refused to join the government.

During the next four years, Hekmatyar continued to challenge the mujahedeen government: In the first year after Rabbani became president, 30,000 civilians were killed and 100,000 injured. By 1996, almost 70% of Kabul’s buildings had been destroyed, at least 50,000 had been killed, and the streets were controlled by criminals and undisciplined soldiers. In other cities, for example, Kandahar, there was near anarchy.

It is into this environment that the Taliban, led by a mullah, Mohammed Omar, took control. According to legend, the Taliban’s first operation involved rescuing two girls who had been kidnapped and raped by a guerilla leader; the group then moved on to assisting Pakistan secure trade routes. Within a year, the Taliban had taken control of 12 of southern Pashtun

60 Id.
61 Id.
62 Id.
63 Id.
64 Id. at 202-03.
65 Id.
66 Id.
67 In Persian and Pashtu, the word “Taliban” is used to describe lower level students of Islam. As a general rule, these students, all of whom are male, come from poor rural families. Id. at 205.
69 SHAISTA WAHAB & BARRY YOUNGERMAN, A BRIEF HISTORY OF AFGHANISTAN 206 (Infobase Pub. 2007).
Although initially defeated, the Taliban ultimately took control of Kabul and, by 1999, controlled about 90% of Afghanistan.\textsuperscript{71}

Many observers believe that Pakistan was instrumental in the rapid rise of the Taliban, citing the fact that, from the very beginning, the Taliban, most of whom were poorly educated, demonstrated the ability to plan, coordinate, and execute sophisticated military operations.\textsuperscript{72} What the Taliban did not possess, though, was the ability, or maybe even an interest, in actually governing. Mullah Omar, who had taken the title of emir al-muminin (commander of the faithful) was the ultimate authority for all religious and civil matters.\textsuperscript{73}

Although originally some Afghans welcomed the fact that the Taliban restored order, it did not take long for many, including Massoud, to challenge the Taliban and its repressive policies, which included bans on playing or listening to music, dancing, and watching TV; a requirement that women be covered from head to toe; a prohibition against women leaving their homes without a male relative; a requirement for men that their beards be of a minimum length; and a general ban on photographs of people or things.\textsuperscript{74}

\begin{itemize}
\item \textsuperscript{70} Id. at 207.
\item \textsuperscript{71} Id.
\item \textsuperscript{72} Id. at 210.
\item \textsuperscript{73} Id. at 214.
\item \textsuperscript{74} Id. at 218.
\end{itemize}
II. Post-2001 Afghanistan

A. Osama bin Laden

Osama bin Laden was born into a wealthy Saudi family and lived in Saudi Arabia until 1979, when he went to Pakistan to support the Afghan mujahedeen in their fight against the Russians by funneling arms, money and fighters from the Arab world into Afghanistan.\textsuperscript{75} After the Russians withdrew from Afghanistan, bin Laden returned to Saudi Arabia, where he worked in his family’s construction business and helped establish an organization to aid veterans of the Afghan war.\textsuperscript{76} However, when, in 1990, Saudi Arabia allowed the United States to station troops in Saudi Arabia, bin Laden became an activist, protesting against the presence of Americans in the birthplace of Islam.\textsuperscript{77} As a result, in 1991, Saudi Arabia expelled bin Laden.\textsuperscript{78}

Between 1991 and 1994, bin Laden operated out of Sudan: During that time, bin Laden was credited with the trying to bomb United States soldiers in Yemen and attacking United States soldiers in Somalia.\textsuperscript{79} In 1996, Sudan, acting under pressure from the United States and Saudi Arabia, expelled bin Laden and bin Laden moved to Afghanistan. Between 1996 and 2001, bin Laden used his bases in Afghanistan to train almost 11,000 recruits.\textsuperscript{80} In exchange for being

\textsuperscript{75} See Lawrence Wright, The Looming Tower 71, 94, 97 (Alfred A. Knopf 2006).
\textsuperscript{76} Id. at 145.
\textsuperscript{77} Id. at 157-59.
\textsuperscript{78} Id. at 154, 161, 194-95.
\textsuperscript{79} Id. at 165, 174, 178.
\textsuperscript{80} Shaista Wahab & Barry Youngerman, A Brief History of Afghanistan 220 (Infobase Pub. 2007); see also Lawrence Wright, The Looming Tower 302-02 (Alfred A. Knopf 2006).
allowed to operate out of Afghanistan, bin Laden provided Mullah Omar with money and special favors, including, reportedly, killing Massoud on September 9, 2011.\textsuperscript{81}

Following the attacks on September 11, 2001, the United States demanded that the Taliban extradite bin Laden.\textsuperscript{82} Omar Mullah refused and, on October 7, 2001, the United States began bombing Afghanistan.\textsuperscript{83} With the help of the Northern Alliance, the Taliban was quickly defeated and, on December 6, 2011, Mullah Omar, along with bin Laden, slipped into Pakistan.\textsuperscript{84}

B. The Bonn Agreement

Because the United States had invaded Afghanistan without having a plan for replacing the Taliban, when the Taliban fell the United States asked the United Nations to broker a deal for a new government.\textsuperscript{85} In accordance with this request, in December 2001 international leaders and a number of prominent Afghans met in Bonn, Germany, where they established the framework for a provisional government and distributed leadership roles within that provisional government.\textsuperscript{86} Because the Pashtuns had ties to the Taliban, they were underrepresented during the talks.\textsuperscript{87} None-the-less, a Pashtun, Hamid Karzai, was selected to head the provisional

\textsuperscript{82} SHAISTA WAHAB & BARRY YOUNGERMAN, A BRIEF HISTORY OF AFGHANISTAN 224 (Infobase Pub. 2007).
\textsuperscript{83} Id. at 225-26.
\textsuperscript{84} It is not clear whether Mullah Omar is alive or dead. http://www.cbsnews.com/8301-503543_162-20065811-503543.html
\textsuperscript{86} Id.
\textsuperscript{87} Id.
government.\textsuperscript{88} Members of the non-Pashtun United Front, which had fought the Taliban, were given control of most of the ministries, and the former king was given an honorary role.\textsuperscript{89}

C. The 2004 Constitution

In 2002, a Loya Jirja, or grand assembly or council, approved the Bonn Agreement and Hamid Karzai as the interim president.\textsuperscript{90} The next step was the drafting of the constitution. After the first nine-member drafting commission was unable to produce a draft, a second, larger and more representative commission was appointed.\textsuperscript{91} While this commission did prepare a draft, Karzai was unhappy with the draft, and the draft was not made public until five weeks before the 2003 Constitutional Loya Jirja, which was finally convened in December 2003.\textsuperscript{92} The 503 individuals who attended the Jirja represented various ethnic and political groups, with the exception of the Taliban, and included 89 women.\textsuperscript{93} After heated battles, the Jirja approved the constitution, the preamble to which, as translated into English, reads as follows:

We the people of Afghanistan:

- Believing firmly in Almighty God, relying on His divine will and adhering to the Holy religion of Islam;

\textsuperscript{88} Id. at 284.
\textsuperscript{89} Id. If Massoud had not been assassinated, there is a strong possibility that, as the non-Pashtun national hero, he would have been named as President.
\textsuperscript{90} As Barfield notes, the international community was concerned about process and incorrectly believed that the Loya Jirja was the way that Afghans selected their leaders. \textsc{Thomas Barfield}, \textit{Afghanistan: A Cultural and Political History} 294-95 (Princeton Univ. Press 2011). Although Loya Jirja were not often used, they have their roots in the Qur’an, which commands Muslims to shura, or consultation. \url{http://jirga.gov.af/en}.
\textsuperscript{92} Id. at 568.
\textsuperscript{93} \textsc{Thomas Barfield}, \textit{Afghanistan: A Cultural and Political History} 297-98 (Princeton Univ. Press 2011).
• Realizing the previous injustices, miseries and innumerable disasters which have befallen our country;
• Appreciating the sacrifices, historical struggles, jihad and just resistance of all the peoples of Afghanistan, admiring the supreme position of the martyrs of the country's freedom;
• Comprehending that a united, indivisible Afghanistan belongs to all its tribes and peoples;
• Observing the United Nations Charter as well as the Universal Declaration of Human Rights;

And in order to:
• Strengthen national unity, safeguard independence, national sovereignty and territorial integrity of the country;
• Establish an order based on the peoples' will and democracy;
• Form a civil society void of oppression, atrocity, discrimination as well as violence, based on rule of law, social justice, protecting integrity and human rights, and attaining peoples' freedoms and fundamental rights;
• Strengthen political, social, economic as well as defense institutions;
• Attain a prosperous life and sound living environment for all inhabitants of this land;
• And, eventually, regain Afghanistan's appropriate place in the international family;

Have, herein, approved this constitution in accordance with the historical, cultural and social realities as well as requirements of time through our elected representatives in the
Loya Jirga, dated January 3, 2004, held in the city of Kabul.94

Although one of Afghanistan’s early constitutions, the 1923 Constitution, relied on the principle of complementarity, that is, that all cases should be decided in accordance with the principles of Shariah and the general civil and criminal laws,95 the 2004 Constitution is based on the principle of repugnancy: No law can be contrary to sacred religion of Islam.96 The first three articles read as follows.

Chapter 1: The State

Article 1: Afghanistan shall be an Islamic Republic, independent, unitary and indivisible state.

Article 2: The sacred religion of Islam is the religion of the Islamic Republic of Afghanistan. Followers of other faiths shall be free within the bounds of law in the exercise and performance of their religious rituals.

Article 3: No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.

96 Id. at 221.
Chapter 7 is the chapter of the 2004 Constitution that creates the Judicial Branch of the government.\textsuperscript{97} Within that chapter, Article 116 states that “[t]he judiciary shall be an independent organ of the state of the Islamic Republic of Afghanistan.” It then goes on to create a “Supreme Court, Courts of Appeal as well as Primary Courts whose organization and authority shall be regulated by law.”\textsuperscript{98} Article 117 states that the Supreme Court will have “nine members who are appointed by the president for a period of ten years with the approval of the Wolesi Jirga [House of the People] with observance of the provisions of last paragraph of the Article 50 and Article 118 of this Constitution.”\textsuperscript{99}

The draft of constitution submitted to President Karzai contained a provision that would have created a separate constitutional court.\textsuperscript{100} Like the constitutional courts in other countries, this court would have been independent and would have had jurisdiction to resolve all constitutional disputes, for example, whether there is a conflict between the statement in the Preamble that states that Afghanistan observes the United Nations Charter and the Universal Declaration of Human Rights and the tenets of Islam.\textsuperscript{101} This provision was, however, removed before the draft was submitted to the Loya Jirga, in part because of fears that the court would assume power similar to those exercised by Iran’s Guardian Council, which must approve all proposed legislation and, since 1991, has been empowered to reject or accept all candidates for parliament and the presidency.\textsuperscript{102} Instead, Article 121 gives some of the powers usually given to a


\textsuperscript{98} Id.


\textsuperscript{100} http://www.usip.org/files/resources/USIP_0309_2.PDF

\textsuperscript{101} John Dempsey & J. Alexander Their, Resolving the Crisis over Constitutional Interpretation in Afghanistan, available at http://www.usip.org/files/resources/USIP_0309_2.PDF.

\textsuperscript{102} Id.
constitutional court to the Supreme Court: "At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their accordance with the law."103 However, Article 157, which is in the chapter that sets out miscellaneous provisions, states that “[t]he Independent Commission for supervision of the implementation of the Constitution shall be established in accordance with the provisions of the law. Members of this Commission shall be appointed by the President with the endorsement of the House of People.”104

Initially, it appeared as if there was agreement that the Supreme Court had the power to interpret the constitution: Between 2004 and 2007, the Supreme Court decided several cases in which it interpreted the Constitution.105 However, after a dispute in 2007, the National Assembly invoked Article 157 and passed a law creating the Independent Commission for the Supervision of the Implementation of the Constitution (ICSIC).106 Although President Karzai vetoed the law, the National Assembly overrode that veto and, despite a decision from the Supreme Court that the law was unconstitutional, passed the law.107 Under the law, the ICSIC would be made of up of seven commissioners who would have the power to interpret the constitution “on the request

106 Id.
107 Id. For an English translation of the law, see http://www.mpil.de/shared/data/pdf/law_on_art_157_commission_english.pdf.
of the President, the National Assembly, the Supreme Court, and the Executive.”

In 2010, the National Assembly approved five commissioners; it has not, however, approved the last two, and, as a result, it is not clear whether the ICSIC has been legally constituted. So far, the ISCIS has published only two advisory opinions, one pertaining to the U.S.-run prison at Bagram and a second condemning the burning of copies of the Qur’an at the prison.

Thus, as of this date, the conflict between the Afghanistan Supreme Court and the ICSIC has not been resolved. In addition, two of the nine positions on the Supreme Court are held by judges whose terms have expired, and the terms of three other judges expire in 2013.

D. The State System, the Informal System, and the Taliban System

While the Afghanistan constitution mentions only one legal system, three legal systems operate in Afghanistan: a state system, an informal system and, in the areas controlled by the Taliban, a Taliban system.

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111 Id.

110 Id.

1. The State System

The 2004 Constitution created a state system that is very similar to the state systems used in western countries: The system is made up of the police, courts, judges, prosecutors, and the prison service.\textsuperscript{113} Although these actors are supposed to be interconnected, to date they are not.\textsuperscript{114} While this lack of coordination is a problem, an even bigger problem is corruption.\textsuperscript{115}

In working with the professors and students in mock trial exercises, I was, at least first, amused by their comments about how they would bribe the prosecutor, the judge, or one of the jurors. I thought that they were just having fun with the exercises. However, during subsequent conversations, I learned that most Afghans believe that, at least at the level of the primary courts, which is the Afghan court of original jurisdiction, there is widespread corruption. They are right. A 2010 study by the United Nations Office on Drugs and Crime found that, in 2009, Afghans paid the equivalent of $2.5 billion U.S. dollars, which is 23\% of the Afghan gross national product, in bribes.\textsuperscript{116} In urban areas, Afghan citizens report that most of the bribes are paid to police officers, custom officers, judges, and municipal officers, in that order.\textsuperscript{117} In rural areas, citizens report that the most bribes are paid to prosecutors, judges, custom officers, and police officers.\textsuperscript{118}

\textsuperscript{114} \textit{Id}.
\textsuperscript{115} \textit{Id.} at 415.
\textsuperscript{118} \textit{Id.}
Because of the corruption and other obstacles, for example, the time that it takes to resolve a dispute and the cost of travel, most Afghans do not use the State’s judicial system. Instead, they rely on the village-based dispute resolution processes that are part of Afghanistan’s long history or, in areas in which the Taliban has a strong presence, the Taliban’s legal system.

2. The Informal System

Until you have been there, it is hard to appreciate the impact that geography has on Afghanistan. Although Afghanistan is often thought of as an important stop on the Silk Road, today there are relatively few roads. In fact, few would think about trying to drive from Kabul, which is in the center of the country, to Herat, which is in the west. A flight over the country reveals that the center of the country is mountainous, with only a few small villages in isolated valleys. Each region is dominated by different tribal groups: Most of the people in the south and the east are Pashtuns, and most of the people in the north and the west are Tajiks. Other groups include

\[119\] _Id._ at 418.

\[120\] _Id._


\[124\] It is estimated that 42% of Afghans are Pashtun. Most of the Pashtun people speak Pashtu. [https://www.cia.gov/library/publications/the-world-factbook/geos/af.html](https://www.cia.gov/library/publications/the-world-factbook/geos/af.html).

\[125\] It is estimated that 27% of the Afghans are Tajik. Most Tajiks speak Dari. [https://www.cia.gov/library/publications/the-world-factbook/geos/af.html](https://www.cia.gov/library/publications/the-world-factbook/geos/af.html).
the Hazara, who are mostly in the central part of Afghanistan, and the Uzbek (9%), Aimak (4%), and Turkmen (3%).¹²⁶

Given Afghanistan’s geography and different tribal and ethnic groups, it is not surprising that, historically, most disputes were resolved locally and that practices, and decisions, would vary from village to village and even from district to district.¹²⁷ Almost all of these systems, however, rely on Jirgas (Pashtun) or shuras (Tazik), which are made up of respected members of the community and which base their decisions on the customary law of the area in which they operate.¹²⁸ Perhaps out of necessity, most of these Jirgas and shuras, place an emphasis on reconciliation, on keeping the peace in their communities.¹²⁹ As Wardak notes, while the State system relies of retributive justice, the jirgas and shuras rely on restorative justice.¹³⁰

Those serving on Jirgas and shuras do not receive any compensation and are considered to be the impartial representatives of those involved in the dispute: Those involved in the dispute place their trust in the members of the Jirgas and shuras to resolve the dispute in a way that is in the

best interests of the those involved and the larger community. The effectiveness of a particular Jirga or shura rests on the reputations of those that serve on it.

Although most Afghans give higher marks to the informal justice systems than they do to the State system, the informal justice systems are not without problems, both from the Western and Afghan perspectives. From the Western perspective, Jirgas and shuras are problematic because those who serve on them often lack knowledge about the provisions set out in the Constitution and other positive law. In most instances, Jirgas or shuras apply customary law, which is often synonymous with Shariah law as practiced in that community. As a consequence, the Jirgas or shuras may order the marriage of a woman (baad) as a way of remedying a dispute. In addition, while occasionally women serve on a Jirga or shura, most of the time they do not. Some Afghans have stated that local commanders, warlords, and other powerful government officials sometimes interfere with a Jirga or shura and that community institutions, such as the jirga and shura, had been weakened by decades of war and economic conditions worsened by droughts.

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132 Id.
133 Id.
134 Id.
136 Id. However, as Wardak notes, “the exclusion of women from participation in jirgas and shuras are not inherent characteristics of these non-state justice institutions; they are the characteristics of Afghan patriarchal society.”
137 Id. at 421.
3. The Taliban

In the absence of a working formal or informal justice system, it appears that the Taliban is, once again, filling the void. Although most Afghans still fear the Taliban, in some areas they still turn to it to settle grievances. In one of the few stories about “Taliban judges,” Afghans told a NPR reporter that “the militants — unlike the country's official court system — get things done quickly and without asking for bribes.” The NPR reporter then quotes one of the judges, Mullah Nasrat Ramani, who graduated from Kabul University:

"We are mobile judges," Ramani says. "Sometimes we go to the people, and sometimes they come to us. We don't have a courtroom, and we're not official. But we are sanctioned by the Taliban leadership to carry out justice using Islamic law."

E. Rule of Law Projects

I am not sure that anyone knows for sure how many initiatives have been undertaken in Afghanistan with the goal of “promoting the rule of law.” While after the fall of the Taliban

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140 Id.

141 Id.
Italy took the lead in providing assistance to the justice sector, a number of other countries, including the United States, also initiated projects. However, despite 10 years of aid, most agree that the judicial system is still not working. As the International Crisis Group wrote in 2010, “Afghanistan’s justice system is in a catastrophic state of disrepair. The majority of Afghans still have little or no access to judicial institutions.”

There are several reasons for this failure. First, at least in 2004, there were relatively few judges trained in secular law or Islamic law. For example, the first Chief Justice of the Supreme Court of Afghanistan, Faisal Ahmad Shinwari, had no experience as a judge and had not studied secular law. While most of the members of the current Supreme Court are well educated, there are still many primary court judges who do not have training in secular law.

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145 See Afghanistan: Judicial Reform and Transitional Justice, Asia Report N°4528 Jan 2003 available at http://www.crisisgroup.org/en/regions/asia/south-asia/afghanistan/045-afghanistan-judicial-reform-and-transitional-justice.aspx http://www.nytimes.com/2006/05/17/world/asia/17afghan.html?_r=0 Not surprisingly, the decisions of this court reflected the backgrounds of those making them. During Shinwari’s term, the Supreme Court sought to ban a candidate who questioned whether polygamy was in keeping with the spirit of Islam; called for an end to cable television service in the country; upheld the death penalty for two journalists convicted of blasphemy for saying the Islam being practiced in the country was reactionary; banned women from singing on television; and ruled that a girl, given as a bride when 9 years old, could not get a divorce from her abusive husband, notwithstanding a law that makes it illegal for girls under 16 to marry.  
Second, western donors focused on exporting their own systems of justice.\textsuperscript{148} They introduced laws based on western laws,\textsuperscript{149} they helped build and furnish courthouses, and they offered training to judges and prosecutors.\textsuperscript{150} What they did not do is try to work within the frameworks established by Islamic law and Afghan culture\textsuperscript{151} or confront the issues raised by the fact that Afghanistan is an Islamic republic. In addition, the donor countries did not seek out experts from other Muslim countries, for example, Turkey or Egypt, or even consult with each other.\textsuperscript{152}

Third, those in the West underestimated the influence of the ulema, or clergy.

\textsuperscript{148} As Suhreke and Borchgrevink note, “The inclination of Western donors to fasten onto its own legal tradition with the texture of Afghan law was hardly surprising. It reflected the ideological division between Islam and the West that had justified the US-led intervention in the first place.” Astri Suhreke & Kaja Borchgrevink, \textit{Negotiating Justice Sector Reform in Afghanistan}, 51 Crime Law Soc. Change, 211, 214 (2009) available at \url{http://www.cmi.no/publications/publication/?3141=negotiating-justice-sector-reform-in-afghanistan}.

\textsuperscript{149} While Italy has help build or rebuild a number of court facilities, some of its projects have been controversial. A prime example is a project in which an Italian magistrate (with the help of consultants from the United States) drafted a code of criminal procedure for Afghanistan that was based on the Italian code. Because the Italian magistrate did not consult with Afghan officials, those officials asked President Karzai to reject the draft. The Italian government, however, threatened to withdraw funding for related projects unless the draft was approved. Astri Suhrke & Kaja Borchgrevink, Negotiating Justice Sector Reform in Afghanistan, 51 Crime Law Soc. Change, 211, 213 (2009).


\textsuperscript{151} To be fair, it should be noted that The Bonn Agreement established a Judicial Reform Commission, an independent made up of prominent Afghans that was given the task of creating a plan to rebuild Afghanistan’s judicial system. However, that Commission, and another one that was set up, was dissolved when the members could not agree. Astri Suhrke & Kaja Borchgrevink, \textit{Negotiating Justice Sector Reform in Afghanistan}, 51 Crime Law Soc. Change, 211, 219 (2009).

III. The Ulema

While Afghanistan’s Muslims do act as a single body with a set structure or hierarchy, there are shura e ulema, or religious councils, that operate at the national, provincial, and district levels. At the national level, there are instances in which the National Ulema Council has supported one of Karzai’s policies, for example, the Karzai government’s policy that growing poppies is un-Islamic, and there are times when Karzai has supported a declaration made by the Council.

A prime example of the latter involves a declaration made by the National Ulema Council in March 2012. Some of the statements made at the beginning of that declaration are consistent with the 2004 Constitution’s granting of equal rights to men and women. The following is one English translation of that part of the declaration.

5. Unlike other civilizations and societies of the present and the past, the sacred religion of Islam – in recognition of the fundamental role of women in

153 “Ulema” is sometimes spelled “ulama.”
154 80% are Sunni Muslim and 19% are Shia Muslim. https://www.cia.gov/library/publications/the-world-factbook/geos/af.html
156 The National Ulema Council is funded by the government. The head of the Council is the former Chief Justice of the Afghanistan Supreme Court, Fazl Hadi Shinwari. http://larc.sdsu.edu/alcp/resources/afghanistan/government/judicial-power-and-branches/
159 https://afghanistananalysis.wordpress.com/2012/03/04/english-translation-of-ulema-councils-declaration-about-women/
nurturing the society – offers women many civil and social rights, and human
dignity and honor.

In the centuries before Islam, and among human civilizations and nations, women
were deprived of any kind of human and social rights. They were treated as cheap
property and were even buried alive. But by the advent of the globe-illuminating
sun [that was] the sacred religion of Islam, many rights were given to women
according to nature, such as:

A. The right to property, ownership and commerce

B. The right to inheritance according to the principles of the sacred Shariah
   of Islam

C. The right to mehr (very roughly, dower), which is exclusively the woman’s
   [property] and no one has the right to take it without her consent. All other
   practices known as toyana, shareeb, etc. do not have a basis in the Shariah.

D. The right to choose a spouse according to her own will. Forcibly marrying an
   adult woman is not allowed, although consultation with the guardians –
   which is a religious rule – is practiced

E. Women, like men, have dignity and are beings with freedom; therefore,
exchanging a woman for someone’s blood (badal), or for [establishing] peace,
or exchanging a woman for another’s dower are haram (forbidden under
Islamic law) and prohibited under the Shariah.

F. Women cannot be inherited. Similarly, there are many other rights, granted
to a woman under the religion of Islam, which are observed. But, where a
Muslim woman has many rights, [she also] has duties and obligations, such
as:

A. Adherence, in faith and action, to the orders and prohibitions of
   Islam’s sacred Shariah

B. Complete adherence and observance of the hijab [according to the
   Shariah], which protects the dignity and personality of the woman

C. Avoiding mingling with stranger men in various social situations,
such
   as education, shopping, the office and other affairs of life

D. In consideration of the clarity of verses 1 and 34 of Surah an-Nisa’ [of
   the Qur’an], men are fundamental and women are secondary; also,
   lineage is derived from the man. Therefore, the use of words and
   expressions that contradict the sacred verses must be strictly
   avoided.

E. Respecting [the orders] about the multiplicity of wives (polygamy),
   which are in accordance with clear orders of the Qur’an
F. Avoiding travel without a [Shariah-sanctioned] mahram (male companion)

G. Adherence to the clear orders of Muhammad’s Shariah in case of divorce

It needs to be said that teasing, harassment and beating of women without a Shariah-compliant reason, as set forth clearly in the Glorious Qur’an, is prohibited. Afghanistan’s Ulema Council requests the judicial and law-enforcement organs of the country to punish, in accordance with Muhammad’s Shariah and national laws, the perpetrators of any kind of assault from persons against women.

While the declaration does not have the force of law, President Karzai endorsed it, stating "The clerics’ council of Afghanistan did not put any limitations on women... It is the Shariah law of all Muslims and all Afghans."160 A few days later, Karzai, in his speech for International Women’s Day, stated that the Western media had misinterpreted his earlier statement: Karzai then stated that Afghan women enjoy their Constitutional rights.161

Not surprisingly, many, both inside and outside of Afghanistan, have criticized Karzai for his support of the declaration, stating that Karzai is giving up rights that women have gained in the

last 10 years in an attempt to appease the Taliban so that it will agree to some type of peace agreement.\textsuperscript{162} In addition, activists have criticized the international community for its failure to condemn the declaration, noting that “[n]one of the key international actors – the United States, the United Nations or the European Union – made direct references to the National Ulema Council’s statement in their International Women’s Day messages.\textsuperscript{163}

Equally troubling is the Ulema Council’s November 28, 2012, request to President Karzai to create a new Dar al-Ifta, or institute made up of Islamic scholars that would have the power to issue fatwas that are legally binding.\textsuperscript{164} To date, Karzai has not publically responded to the request. According to Siamak Heravi, a spokesperson, Karzai must first consider the constitutional implications of the request: "[The request] needs consideration because the work of a Dar al-Ifta and the Afghan Supreme Court may overlap. The clerics know this, so they left it for the president to consider. This issue will be discussed more in the future. But as for now, no decision has been made."

\textbf{Part IV. What I said anf what I wish I had said}

I need to begin this section by emphasizing that the professors who drafted the letter set out at the beginning of this article are Pashtuns who teach Shariah law at two of Afghanistan’s most

\textsuperscript{162}http://www.aan-afghanistan.org/index.asp?id=2642; see also http://www.npr.org/2013/02/20/172491435/the-afghan-battle-over-a-law-to-protect-women.
\textsuperscript{165}http://www.rferl.org/content/afghanistan-ulema-council-fatwas-clerics-constitution/24783981.html#hash=relatedInfoContainer.
conservative universities. Other professors, and particularly professors who teach secular law at some of the country’s more liberal universities, would disagree with many of the statements that are set out in the letter. For example, while the professors from Shariah faculties want the United States to leave Afghanistan, other professors want the United States to stay. In particular, women who study and teach law are worried that, once the United States leaves, they will not be allowed to finish their degrees or that they will be forced out of their teaching positions.

**Should all Westerners study Shariah law?**

One of the points that came up regularly in my conversations with the professors was that Westerners need to study Shariah law. Thus, one of professors first statements, “that all American law professors should study Islamic, or Shariah, law and that they should learn about Islamic law from Islamic scholars” did not take me by surprise. Although not all U.S. law professors need to learn about Shariah law, I agree that more of us should.

There are good reasons for doing so. First, according to a 2009 study, Islam is the second largest religion in the world with 1.57 billion adherents. Second, much of the United States’ foreign policy decisions relate to or affect countries in which the majority of the population is Muslim. As a consequence, at least some of us need to know enough about Islam and Shariah

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166 When Muhammad first used the term in the 620s, shariah (also spelled Sharia and Shari’a) “conveyed the idea of a direct path to water – a route of considerable importance to a desert people –and at a time when no one systematically differentiated between the world that was and the world that out to be. . . .” Sadakat Kadri, HEAVEN ON EARTH: A JOURNEY THROUGH SHARI’A LAW FROM THE DESERTS OF ANCIENT ARABIA TO THE STREETS OF THE MODERN MUSLIM WORLD 12 (Farrar, Straus and Giroux 2012).
167 http://www.pewforum.org/uploadedfiles/Topics/Demographics/Muslimpopulation.pdf
law that we can distinguish facts from fabrications and mainstream beliefs from those on the fringe. If we are going to do what the professors ask and take an active role in making suggestions that will help solve the world’s problems, we need to understand the histories, the religions, and the legal systems of the countries that our policies impact.

Why does the West object to Afghanistan applying Islamic law?

A more difficult conversation was the conversation related to professors’ fifth point: the question about why those of us in the West do not want Afghanistan to apply Islamic law.

Although I probably should have expected the question, I was taken by surprise, both by the question and by the sincerity with which it was asked. My first response was that I could only speak for myself. Then, instead of answering the question, I asked about the National Ulema Council’s March 2012 declaration. Did the professors think that some of the statements about women violated the Afghanistan constitution? When one of the professors answered that the constitution needed to be read in light of the provisions of the Holy Qur’an, the others nodded their approval. I then asked if that meant that women did not have the same rights as men. While I understood the answer to be yes, that answer was framed in terms of the individual’s path to Allah. According to the professors, the path to Allah, or the Shariah, was different for men and women. The Council’s statements should be read as providing guidance to women about how to comply with the Qur’an.
Since returning from Afghanistan, I have asked a number of people the professors’ question. Some have answered that the issue is not whether Afghanistan is an Islamic state; instead, the issue is whether Afghanistan harbors terrorists. Others, mostly women, raised my concerns, concerns over the fact that some of the tenets of Islam, at least as interpreted by some Muslims, violate the human rights of women and children and, maybe, men. Only a few have talked about what has been labeled Islamophobia, the fear of Muslims or their politics or culture. In addition, only a few talked about the separation of church and state.

Had I been less cautious, I would have made all four points, and I probably would have started with the last one. As someone who was born, raised, and educated in the United States, I have internalized the value that individuals should have the freedom to choose their religion, or to choose not practice a religion. In addition, or as a consequence, I believe that government and religion should operate in different spheres. To be honest, until I talked to the professors, I did not understand the extent to which some viewed government as simply a tool for helping individuals navigate the path to Allah or to God. For me, this shift in perspective explains why I am uncomfortable with Afghanistan applying Islamic law.

In talking about the second point, that the way some individuals interpret the Qur’an violates women’s and children’s human rights, I wish that I had more blunt. However, as a practical matter, I was a guest in the professors’ country, and the professors always treated me with respect. For instance, instead of expressing any kind of disapproval when I told them that I had

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169 http://dictionary.reference.com/browse/islamophobia. In its August 30, 2010, issue, Time Magazine’s cover story was titled “Islamophobia: Does America Have a Muslim Problem?” According to the article, the intolerance against Muslims has deepened in the last few years: “Although the American strain of Islamophobia lacks some of the traditional elements of religious persecution — there’s no sign that violence against Muslims is on the rise, for instance — there’s plenty of anecdotal evidence that hate speech against Muslims and Islam is growing both more widespread and more heated. http://www.time.com/time/magazine/article/0,9171,2011936-1,00.html.
walked to the market and to my guesthouse by myself, they asked whether I had purchased anything and, if I had, whether I had paid a fair price. There was, though, no doubt that there was a separate set of rules for Afghan women and western women.

I am, though, horrified by the stories and reports I have read describing violence against women, about the practice of giving young girls as payment for a debt, and about the way women are treated if they report a rape. In addition, it does more than bother me that some men use the Qur’an to justify violence against women. I should have said more.

However, even if I had spoken more bluntly, I doubt that my words would have changed any minds. As we know from our own experiences, religious beliefs are often deeply held, and when reinforced by culture, almost impossible to change.¹⁷⁰ I do hope, though, that my presence demonstrated that women can teach, can practice law, and can travel alone without disgracing either themselves or those with whom they interact.

Although the professors object to TV programs that show families living in ways that are different from the way most Afghan families live, I believe that it is such shows, and access to the Internet, that is likely to prompt change. While I am not a fan of the Indian soap operas that seem to dominate Afghan television, I do believe that other programs, for example programs that show men and women working together in a way that respects both their human rights and their religious beliefs, will open the door to change. In addition, I am a strong advocate of “study visits” to the United States or Europe. Just as my views of Afghanistan have been

¹⁷⁰ In 2009, President Karzai issued a decree banning violence against women. To date, however, the male-dominated Parliament has not made that decree permanent. http://www.npr.org/2013/02/20/172491435/the-afghan-battle-over-a-law-to-protect-women.
changed by spending time there, most of the Afghans who have had the opportunity to go to the West have been changed by that experience.\(^{171}\)

My third and fourth points are related. Some do not want Afghanistan to apply Islamic law because they reject or fear any religion other than their own. I suspect, though, that the more common concern is one based on the perceived connection between Islam and terrorism. They worry that, as an Islamic state, Afghanistan will do what Mullah Omar did and harbor al-Qaida leaders, allowing them to use Afghanistan as a base for planning terrorist attacks against the United States. That could happen, particularly given how angry some Afghans are over the night raids and the United States’ continued presence in Afghanistan. However, at this point, it seems unlikely. In January 2013, U.S. officials estimated that there were fewer than 100 al-Qaida fighters in Afghanistan.\(^{172}\)

While I am by no means an expert, I know enough to know that not all countries in which Islam is the official religion present a threat to the United States. For example, Islam is the official religion in Saudi Arabia, and Saudi Arabia is a long-time friend of the United States,\(^ {173} \) despite the fact that Saudi Arabia denies its citizens, and in particular women, many basic rights.\(^ {174} \) Saudi Arabia has also been aggressive in punishing those associated with al-Qaida.\(^ {175} \) I also know, though, that, in 2011, the United States government estimated that there were al-Qaida

\(^{171}\) Unfortunately, two-thirds of Afghans do not have access to electricity and therefore do not have easy access to T.V. or the Internet. See http://www.worldbank.org/en/country/afghanistan/overview. In addition, at this point it is only the well-educated who are being given the opportunities to travel outside the United States. 


\(^{175}\) http://www.bbc.co.uk/news/world-middle-east-19517476.
affiliates in more than 70 countries,\textsuperscript{176} and recent events illustrate the demonstrate the influence of these groups in Yemen, Sudan, and parts of northern Africa.

The bottom line is that Afghanistan is an Islamic state and will be for the foreseeable future. As United States citizens, we need to accept that fact. This does not mean, though, that we should not speak out against violence and particularly violence against women and children. We need to use our influence, both as individuals and as a nation, to promote peace, which in turn should help improve economic conditions, which might provide more opportunities for all citizens. However, when, violence against women or children occurs, we need to focus the spotlight on it.

3. Does the U.S. practice what it preaches?

Of the statements that the professors made in their letter, the ones that I found most troubling were the ones about the United States’ failure to practice what it preaches. It was hard for me to hear the statements that suggested that the United States makes decisions not based on principles of democracy but on the basis of religion and that, as individuals living in the southern and eastern parts of Afghanistan, the professors did not know who the terrorists were: the Taliban or the United States and NATO forces. It was also hard for me to read statements like the following one, from the International Crisis Group, an independent NGO funded by a variety of governments and non-governmental groups:

Extrajudicial actions by the U.S. and its coalition partners against Afghan citizens have also distorted the justice system and are fuelling the insurgency. U.S. and NATO actions must conform to national and international laws, including an end to arbitrary detentions. There should be no expectation that Afghan officials and

\textsuperscript{176} \url{http://fpc.state.gov/documents/organization/156542.pdf}.
Institutions will realign the justice system to conform to international norms until U.S. and NATO allies adjust their own policies and practices.\textsuperscript{177}

In the classes I taught on U.S. criminal law, we talked about a number of principles, including constitutional provisions related to unlawful searches and seizures, the right to a speedy trial, and the right to counsel. At the time, the professors listened and asked questions but did raise the issue of the United States’ practices in Afghanistan. It was not until they began drafting the letter that the professors talked to me about why, if the U.S. wanted to promote the rule of law, it did not practice the rule of law.

In the discussion that accompanied the drafting of the letter, the professors focused on two points. The first, and most emotional topic, was the practice of United States and NATO forces soldiers entering their homes at night. The second was the practice of arresting individuals and holding them, they stated, indefinitely, without the filing of charges or a trial.

It is no secret that United States and NATO forces conduct night raids. What I did not fully understand is how these raids violate religious and cultural beliefs and practices. Even in fairly liberal families living in Kabul, a man who is not a close family member cannot enter a room in which there are Afghan women. For example, during evenings at an Afghanistan home, I could be in a room with both the men and women, but my male counterpart could not. He stayed in the garden while I socialized with men, women, and children in the house. Having an American male enter a house in which there are women is deeply offensive.\textsuperscript{178}


http://www.isaf.nato.int/article/isaf-releases/isaf-issues-guidance-on-night-raids-in-afghanistan.html;
Because such raids are so offensive, they quickly became a source of conflict between President Karzai and the United States, particularly once General Petraeus took control and increased the number of raids.\(^{179}\) While on April 8, 2012, the Afghanistan and United States signed a memorandum of understanding that specified that special operations, including night raids, had to be approved by Afghanistan and conducted according to Afghan law,\(^{180}\) there are reports that such raids continue,\(^{181}\) and in December 2012 individuals in Herat demonstrated against such raids.\(^{182}\)

The second involves allegations that the U.S. detainees Afghans without trial for indefinite periods. In response to such allegations, on March 9, 2012, the United States and Afghanistan signed an agreement, that while giving the U.S. the power veto the transfer of some detainees, provided that the U.S. would transfer control of its main detention facility, which is Bagram, within six months.\(^{183}\) The transfer occurred on September 10, 2012.\(^{184}\) However, on November 18, 2012, President Karzai issued a statement in which he alleged that U.S. forces had captured and were holding Afghans in violation of the March pact.\(^{185}\) His statement was, apparently, based on a September 17, 2012, decision by an Afghani judicial panel that ruled that there was no basis in Afghan law for holding Afghan citizens without a court trial.\(^{186}\) In response, the

\(^{182}\) http://www.presstv.ir/detail/2012/12/26/280219/afghans-protest-us-night-raids/
\(^{183}\) http://www.reuters.com/article/2012/03/10/us-afghanistan-usa-prisoners-idUSBRE8280BU20120310
\(^{184}\) http://www.voanews.com/content/us-afghanistan-prison/1504726.html
United States has argued it cannot risk the release of some high-value detainees to the notoriously corrupt Afghan court system.\(^\text{187}\)

At the time that I worked with the professors, I knew about the agreement between the United States and Afghanistan relating to night raids and about the agreement to transfer control of the detainee facility at Bagram to Afghans. I also knew that the “rules of war” are different from rules of law. None-the-less, the conversation left me deeply troubled. As I write this, I continue to see myself in the dark of an Afghani home when NATO or United States troops, come in, in the middle of the night, with guns raised. In addition, I wonder why, during our classes on the U.S. criminal system, the professors did challenge me on the fact that a country that believes in the rule of law holds individuals indefinitely without trial.

As someone trained to make arguments, I can make both sides’ arguments. On the one hand, having been attacked, the United States had an interest in finding those who planned, financed, and committed that attack. When the Taliban refused the United States’ request to expel bin Laden, the United States had a “right” to go after him. Plus, only three countries—Pakistan, Saudi Arabia, and the UAR—recognized the Taliban as Afghanistan's legitimate government.\(^\text{188}\)

In attacking the Taliban, the United States was acting not only to protect its interests but the interests of the Afghan people. Unfortunately, in military actions, it is not always possible to apply the rule of law.


On the other hand, even if the initial attack was justified, once Afghanistan had an interim government, the West should have withdrawn militarily, providing only economic assistance. In addition, in providing that assistance, the West should have led by example, respecting the right of Afghans to choose their own form of government and respecting the right of Afghans to practice their religion.

What makes such arguments so hard is that I now know people on both sides. I know members of the United States military who have served multiple tours of duty in Afghanistan, at a high cost not only to themselves but also to their families and friends, and I know Afghans whose family members have had their homes raided. While I would like to find someone to blame, at this point, all I can do is apologize. I should have done what the professor urge and taken a more active role.

4. Should the U.S. leave Afghanistan?

Not all Afghans view the American presence in Afghanistan in the same way. Some welcomed the United States’ attack and are worried about what will happen when the United States leaves. Among those in this group are individuals who fled Afghanistan during the Taliban rule, seeking refuge in Iran or Pakistan: Between 2002 and 2005, more than 2.5 million Afghanis left Iran and Pakistan and returned to Afghanistan. Others criticize the United States both for the way in which it attacked Afghanistan and for its decision to stay in Afghanistan. First, they argue that punishing an entire country for Mullah Omar’s decision to allow Osama bin Laden to stay in Afghanistan was a disproportionate response. Second, they criticize the methods that the U.S.

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189 http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?id=42dfb0f44
used in its attacks. While the U.S. did not keep “body counts,” those who have researched the issue estimate that between 1,000 and 1,300 Afghan civilians were killed between October 7, 2001, and January 1, 2002.

Third, as a practical matter, the longer that the United States is in Afghanistan, the more that we are seen as “the enemy.” As one American official has stated, insider attacks, by Afghan security forces on their Western allies, became “the signature violence of 2012.” The increase in the number of insider attacks “has provided the clearest sign yet that Afghan resentment of foreigners is becoming unmanageable . . . .” While the professors still welcome economic aid, and in particular assistance in developing Afghanistan’s infrastructure, they want the military out. As they told me, the longer the Americans stay, the more powerful the Taliban becomes.

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I went to Afghanistan so that I could see at least a little of the country that so dominates the news. I want to thank the professors and staff who showed me their cities and invited me into their homes and the U.S. administrators who arranged the trips to the Panjshir Valley, to a military base (Camp Phoenix), and to the United States Embassy in Kabul.

Despite the adrenaline rush that such trips produce, now that I am home my thoughts keep going back to the letter, to the reports chronicling the killing NATO and U.S. troops and innocent Afghans, to the wars that the Afghani people have endured during the last 35 years, and to

190 http://costofwar.org/sites/default/files/articles/14/attachments/Crawford%20Afghanistan%20Casualties.pdf
191 http://pubpages.unh.edu/~mwherold/dossier
thoughts about what might happen to the people I have come to know once the U.S. and NATO forces leave.

While I am deeply troubled by the fact that many Afghani women cannot leave their homes without a male relative and that, they when they do, they must wear a hijab, I also spent time with families in which it was clear that husbands and wives and brothers and sisters loved and respected each other. While corruption has made a few Afghans rich, for most Afghans, even without war, Afghanistan is a hard place to live, both for men and for women.

Thus, my predictions for the future of Afghanistan are bleak.

First, it seems that history is repeating itself. As the professors told me “Afghanistan has always defeated those that have tried to control it.” After invading Afghanistan, both the British and the Russians had to negotiate “safe passage” out of the country. Our current situation may not be all that different. I also fear that what happened after the Russians left will happen again: Following the Russian withdrawal, there were seven years of internal fighting, which destroyed much of Kabul and only ended when the Taliban took control. Given the sharp divisions among the various ethnic and tribal groups, it seems unlikely that the elections scheduled for 2014 will happen or that, if they happen, they will result in a lasting coalition government.

Second, as the U.S. and NATO forces leave, so too will much of the money that fuels the Afghan economy. In addition, if security worsens, NGOs are likely to leave and there will be less foreign aid and investment. In the short term, this means that things are likely to get much harder for the typical Afghan. While Afghanistan does have vast mineral deposits, I worry

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about the competition for those deposits from both the East and the West and that, because of corruption, the Afghan people will not benefit from the wealth taken from their lands.

Third, many of Afghanistan’s well-educated and more liberal individuals are already leaving the country or making plans to leave.\textsuperscript{195} Depending on whom you ask, this is either good or bad. From a “western” perspective, it is bad: It makes it less likely that Afghanistan will develop economically, and it makes it less likely that the Afghan government will protect the rights of women and children. From the point of view of the many of the ulema, it is good in that it reduces challenges to true Islam.

I hope that I am wrong. I also hope that I, and other law professors in the United States, will do what the Afghan professors have urged us to do, which is take a more active role in making suggestions that will help promote world peace. While I suspect that our suggestions will not always be those that that the professors would want us to make, we can urge our government to develop a better understanding of Islamic law and the impact of our government’s policies on those who not share our core beliefs. I also hope that, even when it is hard, that we practice what we teach.

\textsuperscript{195} \url{http://abidamiri.wordpress.com/2012/02/14/719/}; \url{http://iwpr.net/report-news/young-afghans-leaving-droves}