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Codifying Shari'a: International Norms, Legality & the Freedom to Invent New Forms

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**CODIFYING SHARI'A:
INTERNATIONAL NORMS, LEGALITY & THE FREEDOM TO INVENT NEW FORMS**

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Elizabeth A. Gerlach, Adam L. Pollock, Thomas M. O'Brien, John C. Lin, Tom Stenson,
Negar Katirai, J. John Lee, and Marc Aaron Melzer*

Abstract

The United Nations Development Program and the Republic of the Maldives, a small Muslim country with a constitutional democracy, commissioned this project to craft the country's first system of codified penal law and sentencing guidelines. This Article describes the special challenges and opportunities encountered while drafting a penal code based on Shari'a (Islamic law). On the one hand, such comprehensive codification is more important and more likely to bring dramatic improvements in the quality of justice than in many other societies, due in large part to the problems of assuring fair notice and fair adjudication in the uncodified Shari'a-based system in present use. On the other hand, the challenges of such a project are greater, due in part to special needs for clarity and simplicity that arise from the relative lack of codification experience and training. But there turned out to be perhaps unexpected advantages to undertaking a comprehensive codification project in the Maldives. While the lack of a codification tradition created difficulties, it also gave drafters the freedom to invent new codification forms that would be difficult to adopt in a society with an entrenched codification history.

While it was a concern that any Shari'a-based code could conflict with international norms, in practice it became apparent that the conflict was not as great as many would expect. Opportunities for accommodation were available, sometimes through interesting approaches by which the spirit of the Shari'a rule could be maintained without violating international norms. In the end, this Shari'a-based penal code drafting project yielded a Draft Code that can bring greater justice to Maldivians and also provide a useful starting point for modern penal code drafting in other Muslim countries.

However, the code drafting project also may have much to offer penal code reform in non-Muslim countries, for the structure and drafting forms invented here often solve problems that plague most penal codes, even codes of modern format such as those based upon the American Law Institute's Model Penal Code, which served as the model for most American penal codes. The challenges of accessible language and format, troublesome ambiguous acquittals, overlapping offenses, combination offenses, and penal code-integrated sentencing guidelines have all been addressed.

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PREFACE

In the Summer of 2004, a death in correctional custody and popular dissatisfaction with many aspects of the criminal justice system sparked large public demonstrations in the Maldives, a small Islamic constitutional democracy in the Indian Ocean.¹ The public unrest, which was part of a larger movement in support of greater political and human rights in the country,² prompted the Maldivian government and the United Nations Development Programme (UNDP) to approach an American law professor with a request that he study and critique all aspects of the Maldivian criminal justice system and suggest how it might be improved. The Maldives has some penal laws, originally enacted in 1960, but they do not amount to a code. Robinson's final report to the government urges many specific reforms, including the drafting of a comprehensive penal code.

In February, 2005, the Maldivian government produced guidelines for reform of the criminal justice system outlined in the National Criminal Justice Action Plan (NCJA).³ With regard to the penal code specifically, the NCJA Plan notes the goal of enacting “a Penal Code that delivers justice fairly and effectively, in conformity with the principles of Shariah as well as internationally accepted norms and standards.”⁴ In addition, the government publicly committed itself to a series of broader democratic reforms, including the drafting of a new constitution.⁵

Drafting a new penal code is always a difficult task, but this project promised special challenges. It would require a synthesis of Islamic law, Maldivian values, and internationally-accepted norms and standards -- all brought together in a modern penal code format. Before drafting could begin, the drafters would need to collect, organize, and master all existing Maldivian statutes touching on criminal law, gain proficiency with relevant principles of Shari'a, and understand the local values that inform Maldivian norms for criminal liability and punishment.

Robinson, who has done consulting on criminal code drafting for a number of American states and countries in many parts of the world, often relies on local staff for the heavy research required. But, in this instance, because local resources were insufficient to take on the work, Robinson assembled a research team at the University of Pennsylvania Law School, the Criminal Law Research Group (CLRG), comprised of upper-level law and Ph.D. students chosen for their exceptional academic performance, with preference given to those with academic backgrounds in criminal law or Islamic law. The students came from a variety educational, ethnic, and religious backgrounds. In addition, although the Shari'a component of the project would primarily rely on expertise in the Maldives, the CLRG supplemented its Islamic law research with aid from Islamic legal experts in American academia.

The CLRG worked directly with the Attorney General's office in the Maldives. In addition, the Maldivian government created two advisory bodies – the Core Group and the larger

¹ MALDIVES CONST. ch. 1 § 7.

² <http://web.amnesty.org/library/index/engasa290012005>

³ <http://www.presidencymaldives.gov.mv/publications/NCJAP.pdf>

⁴ <http://www.presidencymaldives.gov.mv/publications/NCJAP.pdf>, at 8.

⁵ <http://www.minivannews.com/news/news.php?id=1477>.

Advisory Group – to guide the drafting process, with the Attorney General’s office serving as the liaison. The two bodies were comprised of members of the Maldivian legal community (including judges and defense lawyers), government ministers, and members of the *ulama* (community of religious scholars).

The code drafting process involved a number of discrete steps. Upon receiving the current Maldivian laws and court decisions from the "Core Group," the CLRG compiled and categorized all pertaining to crime and punishment into a scheme typical of modern penal codes, such as the American Law Institute's Model Penal Code. All Maldivian statutes were taken into account in the drafting. Since much if not most of current Maldivian penal law derives from the Shari'a, the CLRG also researched the writings of respected Muslim jurists, both classical and contemporary. The authorities relied upon most heavily were approved by the Maldivian advisory bodies as, in their view, authoritative sources for Islamic legal rulings on penal law. Four main Islamic legal treatises supplemented the Islamic rulings already present in the current Maldivian penal code and the legal opinions of the Maldivian *ulama*.⁶ Although, special attention was given to the Shafi'i school, which is dominant in the Maldives, other schools were not ignored.⁷ Priority was given to Maldivian interpretations of Islamic law, as embodied in the current penal law and judicial practice. Current judicial practice was identified through consultation with members of the Maldivian legal community and the Attorney General's Office. In addition, the CLRG consulted the criminal codes of other Muslim countries, in particular the codes of Malaysia and Pakistan, for ideas on how other Muslim countries had addressed these issues in their codes.

The actual drafting of the Draft Maldivian Penal Code (DMPC) proceeded in stages. After discussions with members of the Core Group, the CLRG would produce an initial draft, which would then be reviewed by the Core Group and revised further. Some of the consultation was done on long-distance conference calls but most of it was done in person, as Robinson and two members of the Research Group -- usually two different members each time -- would travel to the Maldives approximately every two months to spend a week meeting with officials and interested groups, as well as working through ideas and drafts with the Core Group.

Once a draft gained the approval of the Core Group, it was distributed, for comment and further revision, to members of the Advisory Group. Although English is taught to all

⁶ These four treatises were: Ahmad Ibn Naqib Al-Misri, *Umdat al-Salik* (Reliance of the Traveler) (Nuh Ha Mim Keller trans., Amana Publications 1994); Ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid* (The Distinguished Jurist’s Primer) I & II (Imran Ahsan Khan Nyazee trans., Garnet Publishing 1994); Mohamed S. El-Awa, *Punishment in Islamic Law: A Comparative Study* (American Trust Publications 2000); and Ibrahim Ibn Muhammad Ibn Salim Ibn Duyan, *Crime and Punishment Under Hanbali Law* (George M. Baroody, trans. Dar al-Salam 1958). The first two sources are medieval legal scholarship, while the latter two are modern. Each author represents a different legal/ideological school of thought.

⁷ The Shafi'i school is the dominant school in many of the areas around the Indian Ocean, including, the Malabar coast of India, Malaysia, Indonesia, the Horn of Africa, and Yemen. The other jurists we most benefitted from, medieval and modern, included Muhammad Ibn Rushd (Maliki), Ahmad Ibn Naqib Al-Misri (Shafi'i), Yahya al-Nawawi (Shafi'i), Abu'l Hasan Al-Mawardi (Shafi'i), Mohamed El-Awa, Javed Ahmad Ghamidi, and Yusuf Qaradawi.

Maldivians, the Draft Code was translated into Dhivehi before its broader circulation. The larger Advisory Group was comprised of a broad cross-section of Maldivians who had a special interest in the code project or a role in the criminal justice system, including not only high-ranking members of the government, but also opposition ministers, religious scholars and judges, one of whom was the Chief Justice and Chairman of the Supreme Council of Islamic Affairs.⁸ The work continued for approximately a year and a half.

The resulting product included the text of the Draft Penal Code and a detailed Official Commentary on the text. The Commentary serves to explain how each proposed provision would function, discusses its corresponding rule in current Maldivian law, if any, and, when necessary, provides the Shari'a justification for the provision. Also included are tables that list for each Draft Code provision any corresponding existing Maldivian statute, tables that do the reverse, giving the Draft Code provision, relevant to each current law provision. Finally, the project's Final Report also includes "summary grading tables," which collect all offenses and suboffenses in the Draft Code and arrange them by offense grade so that the Advisory Committee and legislature can more easily review the judgements of relative seriousness embodied in the Draft Code's grading judgements.

Even before the project began, the CLRG faced some interesting questions. Should a non-Muslim professor who is a criminal law codification specialist, not a Shari'a expert, be the primary organizer of the project? The issue was raised with the Maldivian government, which felt that it was the modern penal code drafting expertise that they most needed. The Shari'a expertise of the Maldivians, both in the Core Group and in the Advisory Group, would insure that the Draft Code remained fully informed by the principles of Shari'a.

A related question was whether Westerners should take such a prominent role in drafting the penal code of a Muslim country? This was particularly pertinent given the potentially neo-colonial undertones of such an endeavor in the current global environment. Our conclusion was that the Maldivians were capable of deciding what assistance they needed or did not need and how best it might be provided.

One final question, from the other direction, was whether Westerners committed to liberal values should involve themselves in drafting a penal code based upon Shari'a, given that Shari'a can conflict with those values? Some Westerners felt the project would legitimize the most extreme and, to many Western eyes, the most unjust aspects of Islam. Daniel Pipes, for example, objected to the project with an "appeal to Professor Robinson to reject the Maldivian commission. . . . The Shari'a needs to be rejected as a state law code, not made prettier."⁹ Our view was that the project was worth pursuing because it could bring greater justice to Maldivians. Robinson's public response to Pipes is reproduced here in the Appendix.

⁸ In our private and public interactions with him, the Chairman of the Supreme Council of Islamic Affairs has indicated his continuing support for the DMPC. He has communicated this support to others as well, including the Attorney General's office. See email of October 16, 2006 from Attorney General Hasan Saeed to Professor Paul H. Robinson (on file with the JCL).

⁹ See Daniel Pipes, "U Penn Prof for Shari'a," *Front Page Magazine*, July 26, 2004, and Robinson's public response, at <http://www.frontpagemagazine.com/articles/ReadArticle.asp?ID=14372>, which is reproduced in the Appendix to this Article.

In this Article, we -- the members of the Criminal Law Research Group primarily responsible for work on the Draft Maldivian Penal Code (DMPC) -- report our experiences in drafting a penal code for a Muslim nation. Our objective here is not a scholarly exposition on Shari'a or code drafting, but rather an account of the challenges we faced as draft persons in helping a Muslim country to enshrine the principles of Shari'a in their modern institutions. We think there are useful lessons in understanding their struggle to balance, on the one hand, strict adherence to Shari'a's traditional requirements and, on the other, Shari'a as it has come to govern their modern lives, shaped as it is by modern interpretations and their own cultural, social, and political preferences, including their interest in accommodating some international norms. But beyond Shari'a issues, we think the special challenges of the project are important, because they required the invention of penal code drafting forms that can be useful to any country, Muslim and non-Muslim, that seeks to advance justice in a modern world.

I. BRIEF BACKGROUND ON THE MALDIVES AND SHARI'A

Understanding the special challenges and opportunities of the project requires a brief background on both the Maldives and Shari'a.

A. THE REPUBLIC OF THE MALDIVES

The Republic of the Maldives, a former Sultanate in the Indian Ocean, derives its name from the Sanskrit term meaning "garland of islands."¹⁰ Geographically, the country consists of 1190 islands, grouped into 26 natural atolls, which have been divided into 20 administrative regions.¹¹ Approximately 200 of the islands are inhabited by a total population of close to 300,000 people. It is estimated that 77% of this population resides in the capital city of Male'.¹² The country primarily relies on fishing and tourism for revenue. The main language is Dhivehi, but English is also spoken in commerce and is the medium of instruction in government schools.

The first wave of settlers in the Maldives are thought to have been Sinhalese who arrived around the 5th century B.C., although there is some indication that earlier Veddoid and Tamil populations existed on the islands.¹³ There is scant knowledge about the Maldives prior to Islam, but it seems that by the 10th century Theravada Buddhism was the dominant religion on the islands, with nominal influence of Hinduism in the northern atolls. According to the Maldivian *Ta'rikh*, a historical chronicle dating back to the 18th century, in 1153, the Maldivian king became a Muslim and took the name Sultan Muhammad al-'Adil. There are different accounts as to how this Buddhist king came to be Muslim. According to the Maldivian *Ta'rikh*, a Persian

¹⁰ A.D.W. Forbes, *Maldives*, in 6 ENCYCLOPAEDIA OF ISLAM 245-246 (1991);

¹¹ *See generally* A.D.W. Forbes, *Maldives*, in 6 ENCYCLOPAEDIA OF ISLAM 245-246 (1991); THE CAMBRIDGE ENCYCLOPEDIA OF INDIA, PAKISTAN, BANGLADESH, SRI LANKA, NEPAL, BHUTAN AND THE MALDIVES (Francis Robinson, ed., Cambridge University Press, 1989).

¹² National Criminal Justice Action Plan 2004-2008, p. 2 (Republic of the Maldives, 2004), available at <http://www.presidencymaldives.gov.mv/publications/NCJAP.pdf>

¹³ A.D.W. Forbes, *Maldives*, in 6 ENCYCLOPAEDIA OF ISLAM 245-246 (1991);

(or Turkish) scholar named Yusuf Shams al-Din Tabrizi was responsible.¹⁴ Another account by the famous Moroccan traveler Ibn Battuta (who visited the islands in 1343) suggests that it was a Maliki scholar, Abu 'l-Barakat al-Barbari who impressed upon the king the powers of the Qur'an.¹⁵ This may account for the early influence of the Maliki school of law in the Maldives. In either case, all accounts suggest that the Maldives rapidly became Muslim so that by the 13th century the entire set of islands was Muslim and is now officially 100% Sunni Muslim by constitutional mandate.

The Islamic legal school of thought followed prior to 1573 was the Maliki school, which predominates in North Africa. However, between 1558 and 1573, the Maldives were subjected to Portuguese occupation which resulted in, among other things, a decimation of the prominent Maliki scholars in the country. Around this time, Muhammad Jamal Din Huvadu, a scholar trained in Shafi'i law at the learning centers of Yemen, was appointed *qadi* (judge) by the Sultan. Eventually, Shafi'i law gained prominence over Maliki law throughout the country and it now dominates the orthodoxy. In addition to orthodox religious practice, there is still widespread belief in a religio-magical science known as *fandita*, which retains a belief in spirits and all manners of djinns.¹⁶

Despite remaining relatively independent since 1573, the Maldives' legal tradition has been nominally influenced by three Western colonial powers: the Portuguese (1558), Dutch (1654) and the British (1796). In 1887, the Maldivian sultan, Ibrahim Nur Din signed an agreement with the British that made the Maldives a protectorate. The first constitution of the Maldives was instituted in 1932 and with it the first Republic under Muhammad Amin Didi (although the Sultanate remained in place for the next twenty-one years).¹⁷ In 1965, the Maldives became independent from their status as a British protectorate and in 1968 the Sultanate was abolished and a Second Republic formed under the presidency of Ibrahim Nasir. The current president, Maumoon Abdul Gayoom, a graduate of Egypt's renowned Islamic university Al-Azhar, came to power in 1978.¹⁸

Today, many judges in the Maldives receive their training at traditional schools in Egypt and Saudi Arabia, in particular Al-Azhar and Medina University, respectively. The Chief Justice of the Maldives, who also serves as Chairman of the Supreme Council of Islamic Affairs, is Mohamed Rasheed Ibrahim, whose legal education is primarily from Egypt and Saudi Arabia where he spent a total of 17 years. Other judges have received training in Western countries, Pakistan, and Malaysia.

¹⁴ *Id.*

¹⁵ Official Website of the Republic of the Maldives, *see* <http://www.presidencymaldives.gov.mv>

¹⁶ A.D.W. Forbes, *Maldives*, in 6 ENCYCLOPAEDIA OF ISLAM 245 (1991);

¹⁷ *Id.*

¹⁸ Official Website of the Republic of the Maldives, *see* <http://www.presidencymaldives.gov.mv>

B. THE SOURCE AND NATURE OF SHARI'A

For many non-Muslims today, their primary source of information about Islam and Shari'a is the news media. But the picture painted there, of Shari'a as a series of fixed, often brutal rules, differs substantially from the reality. For non-specialists, then, we offer a very brief background, one that necessarily generalizes and therefore omits nuance and qualification but one that hopefully will at least improve upon the standard news media account.

Classically, Shari'a refers collectively to the Islamic scripture, the Qur'an, and to the Traditions of the Prophet Muhammad, the *Sunna*. In its broader and "popular" sense, Shari'a has come to also encompass juristic interpretations (*Fiqh*) by scholars of the Qur'an and *Sunna*.¹⁹ Muslims believe the Qur'an to be divine revelation bestowed upon the Prophet Muhammad between the years 610 to 632 CE. Muhammad received the Qur'an in fragments over the course of this period and is thought to have arranged them according to a divine plan, which is *not* chronological. Muslim tradition believes that the canonization of the Qur'an took place soon after the Prophet Muhammad's death. The Qur'an consists primarily of stories, historical narratives, moral guidance, spiritual wisdom, character education, and legal principles and rules. The stories are similar to many contained in the Bible, dealing with the lives of various prophets and peoples. Many parts of the Qur'an require familiarity with the Hebrew Bible as the Qur'an considers itself the last in the line of Abrahamic revelations. Most of the Qur'an is not strictly legal and, in fact, law comprises a small portion of the overall text. It consists of many chapters, varying in length and dealing with a diverse range of themes. The Qur'an may comment on a topic at one point and then revisit it several chapters later. In fact, the Qur'an is one long discourse with interconnected parts that give it an overall coherent structure.²⁰

Strictly speaking, the Qur'an contains only four express crimes: unlawful sexual intercourse, accusation of unlawful sexual intercourse, theft, and brigandage.²¹ Even murder is technically not a crime in the Qur'an, but a tort. The Qur'an does lay out principles that serve as guides for rule-making. For instance, when it comes to governance, the Qur'an gives no specifics on what the structure of a government should be, but comments that all decisions should be made on the basis of "consultation." In another instance, the Qur'an notes that "oppression is worse

¹⁹ For a discussion of the sources and methodology of Islamic law, see generally KAMALI, *supra* note 26; THE ISLAMIC CRIMINAL JUSTICE SYSTEM, at xiii (M. CHERIF BASSIOUNI, ED. 1982); MAJID KHADDURI & HERBERT J. LIEBESNY, ORIGIN & DEVELOPMENT OF ISLAMIC LAW (1955); Knut S. Vikør, *Between God and the Sultan. A History of Islamic Law* (Oxford: Oxford University Press, 2006).

²⁰ For further reading on the Qur'an, see generally, Fazlur Rahman, *Major Themes of the Qur'an* (Minneapolis, Bibliotheca Islamica, 1989); Mustansir Mir, *The Coherence of the Qur'an* (Indianapolis: American Trust Publications, 1986); Farid Esack, *The Qur'an: A Short Introduction* (Oxford: Oneworld Publications, 2002); W.M. Watt, *Introduction to the Qur'an* (Edinburgh: Edinburgh University Press, 1970).

²¹ See, Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge: Cambridge University Press, 2005), p. 53. Peters mentions two other crimes, apostasy and drinking of alcohol, but, as he notes, their specific punishments arise out of the Prophetic tradition, not the Qur'an.

than murder” or that if you are “driven by necessity” then there is “no sin for you.” Jurists relied on these principles to derive further principles and rules to help guide the rule-making process.

The *Sunna*, or Prophetic Tradition, is made up of two items: written records of Prophetic action or sayings (*Hadith*) and perpetual communal practice since the time of Muhammad. After the first revelation of the Qur'an and towards the end of the Prophetic lifetime, individuals in the Muslim community began recounting their interactions with the Prophet, particularly those instances that contained religious instruction. The Prophet after all was considered the model for Muslims and manifested the Qur'anic commands in practice. Subsequent to the Prophet's death, this practice grew with some evidence of *hadith* collections appearing in the early-8th century and fully emerging in the late 9th century. Many of these sayings are particularly useful as sources of legal instruction.²² They generally contain answers to questions raised with the Prophet on a host of different matters. Some of the sayings are also explanations on particular verses of the Qur'an. These collections record actions that the Prophet undertook to teach a particular lesson, as well as expressions of approval or disapproval for an action the Prophet witnessed.²³

Fiqh, or scholarly juristic interpretations, comprise the bulk of Shari'a in its broad popular form. They consist of legal opinions from juristic scholars on a variety of matters, many of which may not have been elaborated in the Qur'an. This body of literature developed after the Qur'an and Prophetic Tradition, and its primary function was to interpret these earlier elements. Only the Qur'an and the Prophetic Tradition are seen as being of a divine source; the *fiqh* is not.

In formulating these scholarly juristic interpretations, four sources of authority were, and continue to be, used. The first is the Qur'an itself, which is generally considered the most important. Every scholarly juristic opinion must either be derived from the Qur'an, or at the very least, not contradict it. The second source is the Prophetic Tradition, which serves as the principal supplement to the Qur'an. The third is known as *ijma'* or consensus of the scholars. A scholar will give significant weight to the consensus opinion that groups of scholars may have held on an issue, generally considering older consensus to carry more weight. Of course, there are different conceptions of “whose” consensus is being spoken of, but it is generally restricted to individuals within the scholarly class.²⁴ The last source is *qiyas*, or reasoning by analogy. Here legal scholars will analogize a situation, which has no clear rule from any of the three above sources, with another similar situation, for which there is a clear rule, in order to arrive at a conclusion and hence maintain internal consistency. Other factors considered are ideas like societal welfare (*maslaha*), juristic preference (*istihsan*), and custom (*'urf*), but their use is more

²² *Id.* at 9.

²³ For further reading on the Prophetic Tradition, see *generally*, Muhammad Zubayr Siddiqi, *Hadith Literature: Its Origins, Development and Special Features* (Oxford: Islamic Texts Society, 1993);

²⁴ For an overview of *ijma'*, see, Ahmad Hasan, *The Doctrine of Ijma' in Islam: A Study of the Juridical Principle of Consensus* (New Delhi: Kitab Bhavan 2003), pp. 72-81. More restrictive views on *ijma'* can be found in: Ibn Hazm, *Kitab Al-Muhalla (Sharh al-Mujalla)* (Beirut: Dar Ihya' al-Turath al-Arabi, 2001), p. 120; Javed Ahmed Ghamidi, *Mizan* (Lahore: Dar al-Ishraq, 2001).

restricted and controversial.²⁵ Historically, and to some extent in modern times, legal scholars functioned in a way similar to the American Legal Institute in that they had no binding authority, but their opinions were seriously considered as persuasive precedent by government judges. However, lay Muslims consider these scholarly opinions as fundamental to providing legal details of the faith and often elevate them to a position of mandatory law in their personal lives.

To summarize, Shari'a is not simply a collection of fixed rules, but rather a narrative to be interpreted in a way that draws from it God's meaning. Indeed, it is not a series of fixed rules at all but more a body of principles and a variety of juristic interpretations that can be remarkably accommodating when engaged by a code-drafter attuned to modern forms and sensibilities. In some respects, Shari'a is akin to the Anglo-American common law system in which judges derived rules from principles developed in and expressed by earlier case decisions.²⁶ That is, the application of law requires an interpretive act: from a variety of specific rules or principles -- case decisions at common law, Qur'anic passages in Shari'a -- a more general principle is derived, from which in turn can be derived a specific rule not explicitly provided in the Qur'an.

The fixed rules of Shari'a commonly reported in the media are the special *hudud* offenses, which have been categorized together under this title by Muslim jurists because of their specific mention in the Qur'an. But Shari'a scholars argue over the proper meaning of even these passages – in a debate parallel to the American debate over Constitutional interpretation. Should the interpretation be based on an application today of the literal language written or spoken fourteen centuries ago?²⁷ Or, are the Qur'anic passages to be applied in a way that brings the spirit and principle of the passages to the realities of modernity?²⁸

II. CHALLENGES AND OPPORTUNITIES

The nature of the Shari'a, as described above, is the root of many of the special challenges and opportunities the project offered. The fact that much of Shari'a is, in essence, a set of guiding principles, rather than unbending rules, has dramatic implications for the drafting of a

²⁵ For an overview of this subject, *see generally*, Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Oxford: Islamic Texts Society, 3rd ed. 2005); Imran Ahsan Khan Nyazee, *Islamic Jurisprudence (Usul al-Fiqh)*(Islamabad: Islamic Research Institute Press, 2000); and, Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni usul al-fiqh* (Cambridge: Cambridge University Press, 1997).

²⁶ It is unlike the common law system, of course, in that case decisions cannot be used as mandatory precedent, but can be used as persuasive precedent. MOHAMMAD HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 196-97 (1991).

²⁷ *See generally* MUHAMMAD TAQI USMANI, *THE AUTHORITY OF THE SUNNAH* (1998); YUSUF AL-QARADAWI, *THE LAWFUL AND THE PROHIBITED IN ISLAM* (1982). (There are not two mutually exclusive camps. Most scholars, including the two just mentioned, fall somewhere between the two extremes, embracing both the literal word and the realities of modernity.)

²⁸ *See generally* FARID ESACK, *QUR'AN, LIBERATION AND PLURALISM* (1997); FAZLUR RAHMAN, *ISLAM* (1979); MOHAMMAD ARKOUN, *RETHINKING ISLAM: COMMON QUESTIONS, UNCOMMON ANSWERS* (1994).

Shari'a-based modern penal code.²⁹ It gives code drafters and religious scholars elbow room when translating those principles into modern penal code provisions. Further, the Islamic tradition is not monolithic and thus contains a variety of interpretations. This flexibility was central, as Part III of this Article demonstrates, when the drafting sought to deal with the potential conflicts between Shari'a and international norms, sometimes having to find creative ways to accommodate the two. The resulting Draft Code may not be one that other nations would adopt as it is -- even the Maldivians no doubt will make further adjustments as they debate the Draft Code in the Majlis (Parliament). What the Draft Code seeks to do is to embody Maldivian values, not the values of any other nation. And of course, in a working democracy that is as it should be: it is a code by which the Maldivians bind themselves, not us. Ultimately, some people will have pause about some of the provisions, but we think the nature and extent of the departures from Western sensibilities will be less than most assume.

The single most significant advance made was with the initial Maldivian decision to codify. Codification in itself insures a marked improvement in the availability of justice and, specifically, in adherence to the legality principle.³⁰ Indeed, the reader will see that the Draft Maldivian Penal Code surpasses all existing codes – Eastern or Western – in promoting key aspects of legality: giving fair notice of what is prohibited, limiting unfettered discretion, increasing uniformity in application to similar cases, and reserving criminalization authority to the more democratic legislative branch.³¹

We understood from the start the importance of the Maldivian decision to codify. However, we did not understand, until we were in the midst of the project, that it offered unexpected opportunities for improving criminal codes generally. The Maldives does not have, and Muslim countries as a group tend not to have, a strong codification tradition. As a result, we had the opportunity, indeed were sometimes required by necessity, to invent drafting forms quite different from what has been used before in modern criminal codes. Thus, the project provided greater opportunities for improving the criminal code's operation than would have been available if undertaken in the United States or in another country with a substantial codification tradition.

Generally speaking, Islamic law and its relation to the state have gone through five main stages. In the first stage, during the earliest days of Islam, one can argue that the Islamic state retained the ability to legislate according to Shari'a. Umar bin Khattab, the third ruler of the Muslim polity (from 634-644 CE) after the Prophet Muhammad and Abu Bakr, is known to have

²⁹ Any codification of Shari'a raises interesting conceptual issues of whether the doctrinal diversity and inductive style of traditional Shari'a is consistent with codification, with its implied deductive system, and whether any costs of the shift to codification are outweighed by the benefits of legality that it reaps. For a discussion of those benefits, see Part IV. Presumably, the context of Islamic law, which developed in pre-modern societies with weak governments, has changed in modern times with strong central governments. Although we do not discount the importance of these issues, they were issues that were decided by the Maldivians before they ever commissioned our project.

³⁰ See *infra* Part IV.

³¹ For a general discussion of the "legality principle" and its virtues, see Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 336-368 (2005).

instituted a significant number of “rules” during his reign. Some of these related to religious issues, while many seem to have focused on secular public policy.³²

The second stage, which has defined the majority of Islamic history, occurred around the beginning of the 8th Century, when legal expertise began to reside outside of official government authorities and non-binding Islamic legislation emerged from independent juristic scholars.³³ In fact, the “first signs” that judges should consult experts other than themselves with regard to the law emerged around the beginning of the 8th Century.³⁴ The third stage occurred with the emergence of Muslims states (above all the Ottoman, Safavid and Mughal Empires) that asserted control over aspects of the Islamic legal system that had previously been largely private or had at least escaped government control. During the late 19th Century, the Ottomans began to introduce elements of a European codification framework into their system, eventually formulating the *Majalla* or Ottoman Civil Code (1869-1876) whose content was based upon the Hanafi school of law.³⁵ The fourth stage occurred during the period of Islam’s encounter with Western nations. During this period, Islamic law was characterized by the French and British colonization of the Muslim world and the introduction of European codes, as well as, the codification of some Islamic rules.³⁶ In countries like Egypt, this involved administering codes of statutory law through a centralized court system.³⁷ Unfortunately, these codes often embodied European norms as opposed to Islamic norms, reflecting a process that did not involve consultation with leading Islamic jurists in the country.³⁸

The final stage came in the early 1970s with the increased Islamization of law in countries like Libya, Iran, Sudan and Pakistan as a means of countering the distinct European flavor of the legal systems in these nations.³⁹ Similar demands were also being made in Egypt, particularly in relation to preserving the place of Islamic law through the nation’s constitution.⁴⁰

³²W AEL HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* 32-33 (2005).

³³ *See id.* at 63 (“The locus of legal expertise, therefore, was not the *qādīs*, but rather a group of private individuals . . .”).

³⁴ *Id.* at 62.

³⁵ Aharon Layish, *The Transformation of the Shari'a from Jurists' Law to Statutory Law in the Contemporary Muslim World*, 44 *DIE WELT DES ISLAMIS* 1, 3 (2004); Chilbi Mallat, *From Islamic to Middle Eastern Law: A Restatement of the Field (Part II)*, 52 *AM. J. COMP. L.* 209, 277 (2004).

³⁶ Lama Abu-Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, 52 *AM. J. COMP. L.* 789, 800 n.27 (2004).

³⁷ Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to the Shari Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 *AM. U. INT'L L. REV.* 379, 388 (2006).

³⁸ *See id.* at 388 (discussing the reason for the failure of Egypt's attempt at comprehensive codification in 1882).

³⁹ Layish, *supra* 33, at 15.

⁴⁰ *See Lombardi & Brown, supra* 35, at 389.

The Draft Maldivian Penal Code project potentially represents a sixth stage in the relationship of Shari'a and the Muslim state.

Although codification has existed in the Muslim world, the Draft Maldivian Penal Code project is unique for several reasons. First, most codification in the Muslim world has taken place with civil codes, not criminal codes. Criminal codes have largely been modified or Islamicized through piece-meal introduction of certain Islamic punishments into pre-existing codes. The Draft Maldivian Penal Code, however, adopts a comprehensive approach to codifying criminal law.⁴¹ Second, some of the previous codifications in Muslim countries came as a result of modifying an already present European code. The Maldives have no European code in place, hence, this project began on a clean slate. As a result, Islamic norms guided the project, not European ones. Finally, unlike other codifications in the Muslim world, procedurally, ratification of the Draft Maldivian Penal Code, if it occurs, will be representative and not autocratic, involving public debate in the legislature.⁴²

Thus, the lack of a codification tradition had significant advantages for the drafting project because code structure and drafting forms in the Maldives were not set. The past half-century of worldwide penal code reform has taught a good deal about what does and does not work in penal code drafting. Yet jurisdictions that have previously existing codes are hesitant to deviate from the structure and drafting forms to which they have become accustomed, even when better structures have been developed. With little codification history, however, the Maldives and its Shari'a-based system presents no such barrier to drafters, who can look to whatever structures and forms work best or can invent new ones as the need arises.

On the other hand, the special opportunities presented by the lack of a codification tradition brought with it special challenges. The lack of codification experience meant that lawyers and judges were generally ill-prepared for a shift to a comprehensive code system, a problem exacerbated by a general lack of legal training. This lack of training among judges is particularly problematic in the courts located outside of the capital island of Male. In addition to the Criminal Court and other courts in Male, there are 204 Island Courts spread out among the 200 inhabited islands in the Maldives.⁴³ These courts are headed by magistrates and a 2003 study showed that only 2 of the 188 magistrates held their first degree in law. The vast majority of them hold only a local certificate.⁴⁴ This meant that one of the primary drafting principles was to

⁴¹ Some contemporary academics specializing in Islamic law have strong objections to its codification because they see it as inconsistent with the philosophical underpinnings of Shari'a. See, for example, Wael Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* 260 (1997). This was not, however, the view taken by the Maldivian government.

⁴² On February 23, 2006, President Gayoom placed the Draft Penal Code on the parliamentary agenda. See, <http://mirror.undp.org/maldives>.

⁴³ See Ministry of Justice (Maldives), *Justice Human Resource Development Plan, 2004-2008*, at 22.

⁴⁴ *Id.* at 22-23; see also *id.* ("Very few magistrates have a degree in law (In the 204 Island Courts, 3 persons has [sic] tertiary education, 2 in law and 1 in psychology) and most are locally trained up to a certain level. The training of magistrates in the legal field was strengthened recently [through increased local legal training] However it is preferable for even

(continued...)

keep the drafting forms simple and user-friendly. Furthermore, in the Maldives in particular, simplicity and accessibility was of special urgency because the country is comprised of hundreds of islands⁴⁵ and the communication facilities are not always good.⁴⁶ It is not uncommon for the ranking government official responsible for an island to have no legal training yet be called upon to apply the law's provisions.

Another special challenge arose from Shari'a's greater role in the social lives of the population, as compared to law in Western countries. This meant that the Draft Code required a broader range of offenses and needed to account for its greater social obligations. So, for example, there was a need for a verdict system that better communicates the grounds for an acquittal, indicating whether the acquittal is based upon a theory of justification, which announces the conduct in the case as "proper," or a theory of excuse, which condemns the conduct but excuses the actor. The distinction is key if law is to signal to the community what the case at hand means for future conduct and for reinforcing norms.⁴⁷

The specifics of these special challenges -- the need for a code that is at once more encompassing and yet simple and accessible -- and how we responded to those challenges are the subjects of Parts IV through IX. Specifically, Parts IV and V explain how we used past lessons or invented new forms to promote a clearer and more accessible penal code through plain language drafting and standardized drafting templates. Part VI describes the unique verdict system created for the Maldives, which unambiguously labels the different reasons for an acquittal, this labeling avoids the debilitating confusion regarding norms that can sometimes come with an acquittal, or that sometimes works to block an acquittal when it is deserved. Part VII explains the complicating problems that arise from overlapping offenses and how the freedom from old drafting forms allowed us to minimize the problem. Part VIII describes how we tackled the related problem of combination offenses, such as robbery and burglary, which are common in the Anglo-American system but which we were able to avoid in the Draft Code. Finally, Part IX describes our solution to the particularly challenging problem of creating a sentencing guideline system that would be both simple in its application but also could answer the special need for uniform application in a country of many islands. The full text and official commentary of the Draft Maldivian Penal Code are available online.⁴⁸

⁴⁴ (...continued)

magistrates to have a degree or diploma level qualification in law.").

⁴⁵ See generally C.H.B. Reynolds, *Maldives*, in 6 ENCYCLOPAEDIA OF ISLAM 245 (1991); THE CAMBRIDGE ENCYCLOPEDIA OF INDIA, PAKISTAN, BANGLADESH, SRI LANKA, NEPAL, BHUTAN AND THE MALDIVES (Francis Robinson, ed., Cambridge University Press, 1989).

⁴⁶ See Ministry of Justice (Maldives), *supra* note 43, at 23 ("The biggest challenges for the [Island] Courts are existence of limited or no proper communication facilities which is essential for contacting the Ministry who is ultimately responsible for management of Courts.").

⁴⁷ For a discussion of this distinction and its importance in announcing rules of conduct for future conduct, see PAUL H. ROBINSON, STRUCTURE & FUNCTION IN CRIMINAL LAW 145-146, 204-207 (1997). The proposed verdict system is discussed in Part VI *infra*.

⁴⁸ The Report containing the Draft Code and its Official Commentary, respectively, (continued...)

The problems and their solutions discussed in Parts IV through IX relate primarily to our expertise in criminal code drafting. But one of the contributions we were able to make to the project was of a different sort: using our understanding of both principles of Shari'a and international norms to bridge the gap between the two.

III. SHARI'A AND INTERNATIONAL NORMS: THEIR TENSION AND ITS RESOLUTION

While the popular Western view tends to focus on what seem to be significant differences between Western penal law and Shari'a, it is also true that there are many similarities.⁴⁹ The two are based on traditions with similar origins,⁵⁰ and contain many similar offenses and defenses.⁵¹ Nonetheless, there are important differences. Shari'a is more rooted in religion, while Western law's base is arguably more secular.⁵² Because Shari'a's *primary* source is understood to be

⁴⁸ (...continued)

appear at:

<http://www.mv.undp.org/projects/governance/Penal%20Code%20%20Final%20Report%20-%20Volume%201.pdf>

<http://www.mv.undp.org/projects/governance/Penal%20Code%20%20Final%20Report%20-%20Volume%202.pdf>

The Draft Code and Official Commentary can also be found at:

<http://www.law.upenn.edu/fac/phrobins/draftislamicpenalcode/>

⁴⁹ For a claim of convergence between Western norms and Islam generally, see Melanie D. Reed, *Western Democracy and Islamic Tradition: The Application of Shari'a in a Modern World*, 19 AM. U. INT'L L. REV. 485, 496 (2004) ("In fact, Islam shares several ideals with Western notions of justice, including human dignity, fundamental human rights, ideas of natural justice, and the rule of law.").

⁵⁰ As a member of the "Abrahamic" family of religions, Islamic tradition is not far removed from the Judeo-Christian tradition with which it maintains strong ties. F.E. PETERS, A READER ON CLASSICAL ISLAM 158-59 (1994).

⁵¹ For example, both systems provide justification defenses such as lesser evils, self defense, and defense of property. Compare PAUL H. ROBINSON, CRIMINAL LAW § 8.1 (1997) [hereinafter ROBINSON, CRIMINAL LAW] (describing justification defenses recognized under American law), with IMRAN AHSAN KHAN NYAZEE, GENERAL PRINCIPLES OF CRIMINAL LAW 143 (2000) (discussing justification defenses under Islamic law), and IMAM NAWAWI, MINHAJ-AT-TALIBIN: A MANUAL OF MOHAMMEDAN LAW ACCORDING TO THE SCHOOL OF SHAFI'I 453 (E.C. Howard trans., 1914).

⁵² The Qur'an is the primary source of Islamic law. The Prophetic tradition, *Sunna*, is seen as the main source after the Qur'an. The law is derived from these sources on the basis of the interpretative methodologies of various religious scholars. See *supra* Part II. Religion is not the ultimate authority in Western law, and while religious texts have influenced some Western law, for instance American law, they are not the principle basis for it. Some Muslim scholars

(continued...)

divine and unalterable,⁵³ its content is more resistant to change.⁵⁴ In Islam, law is "an integral aspect of religion" that prescribes "not only universal moral principles but details of how man should conduct his life."⁵⁵ Thus, Shari'a extends into spheres untouched by Western law.⁵⁶ Additionally, unlike some Western cultures, Shari'a tends to place a greater emphasis on the community over the individual.⁵⁷ Because individual action can have ramifications for the community as a whole, Islamic legal rules extend to the most personal and intimate matters, even while retaining a respect for privacy.

With regard to international norms, as opposed to Western norms, much of Shari'a is consistent with the standards of the international community.⁵⁸ However, there are also important points of conflict that had to be resolved in order to achieve the dual aims outlined in the Maldives' National Criminal Justice Action Plan: conformity with both Shari'a and "internationally accepted norms and standards." Hence, each point of conflict required attention.

The conflict, and its resolution, raised not only political but also practical considerations. To maintain its moral credibility with the population, a penal code cannot deviate too far from that community's shared notions of justice.⁵⁹ Clearly, many aspects of

⁵² (...continued)

consider the fundamental difference between Islamic law and Western law to be the fact that, in Western law, human reason is unrestricted in its ability to create law, whereas, in Islamic law, the "divine will" is the ultimate arbitrator. NYAZEE, *supra* note 51, at 31.

⁵³ Shari'a, in its narrow sense, has the "sanctifying authority of revelation" attached to it. SEYYED HOSSEIN NASR, IDEALS AND REALITIES OF ISLAM 95 (Mandala 1991) (1966). The Muslim juristic enterprise throughout its fourteen hundred years has primarily attempted to understand or build upon this legal foundation. RAHMAN, *supra* note 28, at 69.

⁵⁴ For example, complete removal of the *hudud* punishments outlined in the Qur'an and traditions of the Prophet meets exceedingly strong resistance. See MOHAMMED WAQAR UL-HAQ, ISLAMIC CRIMINAL LAWS: HUDOOD LAWS & RULES 23 (1994) (suggesting that although *hudud* punishments should be avoided, they cannot be completely removed in the Pakistani context); RUUD PETERS, ISLAMIC CRIMINAL LAW IN NIGERIA 14-15 (2003) (discussing the Islamicization process in Northern Nigeria). Imposition of *hudud* punishments often go hand in hand with the particular political climate at that time.

⁵⁵ NASR, *supra* note 53, at 95.

⁵⁶ Although Western and Islamic law both govern the relationships between individuals and communities, Islamic systems introduce two new elements into consideration: individual and communal relationships with God. See IMRAN AHSAN KHAN NYAZEE, OUTLINES OF ISLAMIC JURISPRUDENCE 23 (2000).

⁵⁷ Reed, *supra* note 48, at 493 ("Islam begins with the premise that individuals have obligations to each other, without which individual rights are unachievable.").

⁵⁸ By "international norms" we refer to the international human rights norms embodied in key international treaty law and articulated by the UN and major international human rights tribunals.

⁵⁹ See generally Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. (continued...)

Shari'a have been internalized by the Maldivian community, yet Maldivians also seem to be concerned with conforming to international norms. What can penal code drafters do to help resolve the points where the two conflict?

Some of the conflicts had already been resolved in the formulation of existing Maldivian penal law, where Maldivians adopted criminal law rules that depart from traditional interpretations of Shari'a. Other conflicts were resolved in the Draft Code by finding some device by which the conflicting views could be reconciled. In the end, however, there remain some important respects in which the Draft Code continues to deviate from international norms,⁶⁰ although those respects are probably less dramatic than most readers would expect in a Shari'a-based penal code.

A. PRE-EXISTING DEPARTURES FROM TRADITIONAL SHARI'A

The Maldives, like many other Muslim countries, has itself chosen to adopt less than traditional interpretations of Shari'a, long before this draft penal code project began. Here are three examples.

Amputation. Traditionally, the Shari'a penalty for theft is the cutting off of a hand or foot.⁶¹ A first offense is punished with amputation of the right hand; a second offense is punished with amputation of the left foot.⁶² Jurists disagree as to whether the remaining limbs should be cut off for subsequent offenses.⁶³ Cutting is only imposed if certain conditions are met.⁶⁴

⁵⁹ (...continued)

REV. 453 (1997) (summarizing evidence and arguments in support of claim that criminal law's adherence to community's shared intuitions of justice will increase the criminal law's moral credibility and, thereby, its crime control effectiveness).

⁶⁰ By "international norms," we generally mean international human rights norms embodied in key international treaty law and as articulated by the UN and major international human rights tribunals.

⁶¹ BN RUSHD, *supra* note 6, 43-44; MUHAMMAD IQBAL SIDDIQI, *THE PENAL LAW OF ISLAM* 26-27 (1979); IBRAHIM IBN MUHAMMAD IBN SALIM IBN DUYAN, *CRIME AND PUNISHMENT UNDER HANBALI LAW* 89 (George M. Baroody trans., 1958).

⁶² BN RUSHD, *supra* note 6, 544; AL-MISRI, *RELIANCE*, *supra* note 6, at § o14.1, 613-14.

⁶³ In the traditional view of the Shafi'i school and others, a third offense would be punished by cutting off the left hand, and a fourth offense would be punished by cutting off the right foot. IBN RUSHD, *supra* note 6, at 544-45; MOHAMED S. EL-AWA, *PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY* 5 (2000); AL-MISRI, *RELIANCE*, *supra* note 6, at § o14.1, 614. However, other views hold that the penalty for subsequent thefts should not be amputation, but rather compensation, IBN RUSHD, *supra* note 6, at 544-45, and possibly imprisonment as well, IBN DUYAN, *supra* note 61, at 102-03.

⁶⁴ For example, the stolen property must be of a certain value (*nisab*) and must be taken from a place of "safe custody" or safekeeping, meaning that it was adequately protected. IBN

(continued...)

The use of amputation as punishment conflicts with international norms. As perhaps the most severe form of corporal punishment, its prohibition is subsumed within the broader international norm against all forms of corporal punishment.⁶⁵ Current Maldivian penal law⁶⁶ and the penal codes of many other Muslim countries⁶⁷ do not authorize the cutting of limbs for any offense.⁶⁸ The Draft Code carries forward that position.

Death Penalty for Non-Homicide Offenses. Under Shari'a, death may be imposed as a penalty for adultery or apostasy,⁶⁹ although there is some disagreement as to apostasy.⁷⁰ There

⁶⁴ (...continued)

RUSHD, *supra* note 6, at 537-40. For other conditions, see EL-AWA, *supra* note 60, at 2-7; AL-MISRI, RELIANCE, *supra* note 6, at § 014.2, 614; IBN DUYAN, *supra* note 58, at 89-104.

⁶⁵ See RUDOLF PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY 175-76 (2005) (discussing the incompatibility of amputation and other forms of corporal punishment with various international treaties); Jacqueline M. Young, *Torture And Inhumane Punishment Of United States Citizens In Saudi Arabia And The United States Government's Failure To Act*, 16 HASTINGS INT'L & COMP. L. REV. 663 (1993) (“[B]oth amputations and floggings are forms of cruel, inhuman, and degrading punishment, and are thus prohibited under international law.”); Report of the Special Rapporteur, Commission on Human Rights, 53d sess., Item 8(a), U.N. Doc. E/CN.4/1997/7 (1997) (“Corporal punishment is inconsistent with the prohibition of torture and other cruel, inhuman, and degrading treatment or punishment enshrined, inter alia, in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.”).

⁶⁶ See Maldives Penal Code §§ 131-149 (authorizing imprisonment, exile, house detention, and restitution, but not amputation, as a punishment for various forms of theft).

⁶⁷ See, e.g., Penal Code §§ 379-382 (Malay.) (authorizing imprisonment, fines, and whipping, but not amputation, as punishment for theft); see also Sam S. Souryal et al., *The Penalty of Hand Amputation for Theft in Islamic Justice*, in COMPARATIVE CRIMINAL JUSTICE: TRADITIONAL AND NONTRADITIONAL SYSTEMS OF LAW AND CONTROL 397, 418 n.3 (Charles B. Fields & Richter H. Moore, Jr. eds., 2d ed., 2005) (identifying only five of more than fifty Muslim-majority nations that apply this penalty). But see Kent Benedict Gravelle, *Islamic Law in Sudan: a Comparative Analysis*, 5 ILSA J. INT'L & COMP. L. 1, 11 (1998) (“[A]lthough most Muslim states do not amputate limbs for theft, the list of states/areas that use the punishment is growing.”).

⁶⁸ See Draft Maldivian Penal Code [hereinafter DMPC] § 1005 (Punishment Method Equivalency Table); DMPC § 1202 (Application of Alternative Punishments); DMPC § 92 (Authorized Terms of Imprisonment); DMPC ch. 210 (Theft Offenses). These provisions authorize imprisonment, fines, and certain alternative punishments, but not amputation, as a penalty for theft.

⁶⁹ One of the traditional *hudud* punishments for a married person who commits adultery (continued...)

also is some disagreement over whether a woman can be executed for apostasy and whether the apostate must be given a chance to repent (and thereby avoid execution).⁷¹

Use of the death penalty in such situations conflicts with international norms. For example, Article 6 of the International Covenant on Civil and Political Rights provides that “[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes”⁷² The U.N. Human Rights Committee has stated its view that imposing the death penalty for unlawful sexual intercourse and apostasy violates this provision because these offenses do not constitute the most serious crimes.⁷³ Instead, use of this ultimate punishment should be limited to “intentional crimes, with lethal or other extremely grave consequences.”⁷⁴

Current Maldivian law does not impose the death penalty for adultery or apostasy.⁷⁵ Likewise, under the Draft Code, the death penalty is available only for purposeful killing.⁷⁶

Retaliation for Assault. Under Shari'a, assault is punishable with a retaliatory wound of equal nature (*qisas*) (or with the payment of blood money (*diya*)).⁷⁷ Such retaliatory wounding is

⁶⁹ (...continued)

(*zina*) is stoning to death. IBN RUSHD, *supra* note 6, at 523; AL-MISRI, RELIANCE, *supra* note 6, at § o12.2, 610; SIDDIQI, *supra* note 58, at 51. The traditional *hadd* punishment for apostasy (renouncing or abandoning Islam, known as *ridda*) is generally considered to be death. IBN RUSHD, *supra* note 6, at 552; AL-MISRI, RELIANCE, *supra* note 6, at § o68.1, 595; SIDDIQI, *supra* note 58, at 51, 109.

⁷⁰ For instance, Mohamed El-Awa argues that the relevant Qur'anic passages are not specifying a penalty for apostasy. He suggests that jurists began to support the death penalty as a punishment for apostasy for deterrent purposes. EL-AWA, *supra* note 58, at 50-53. Although a portion of the Shafi'i school holds this view, most schools view the death penalty as the *hadd* punishment for apostasy. *Id.*

⁷¹ IBN RUSHD, *supra* note 6, at 552.

⁷² International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1955 (*entry into force* Mar. 23, 1976), art. 6(2), 999 U.N.T.S. 171 [hereinafter ICCPR].

⁷³ See Concluding Observations of the Human Rights Committee: Sudan, U.N. Doc. CCPR/C/79/Add.85, para. 8 (Nov. 19, 1997).

⁷⁴ Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. Res. 1984/50, U.N. ESCOR, 1st Sess., Supp. No. 1, at 33, U.N. Doc. E/1984/84 (1984).

⁷⁵ The only offenses punishable by death under the current Maldivian Penal Code are “caus[ing] hurt to the life of the President in contravention of Law or Shar'ah,” § 36, and treason, § 37.

⁷⁶ See DMPC § 92 (Authorized Terms of Imprisonment), specifically subsection (k) (Death Penalty Available Only for Most Egregious Form of Killing). DMPC § 1204 (Death Penalty) further limits the imposition of the death penalty by adding proof/evidentiary requirements.

⁷⁷ IBN RUSHD, *supra* note 6, at 490; SIDDIQI, *supra* note 58, at 52.

inconsistent with international norms.⁷⁸ Current Maldivian law and the law of many Islamic countries⁷⁹ do not authorize retaliatory wounding as a punishment for assault,⁸⁰ a position followed in the Draft Code.

B. SEEKING ACCOMMODATIONS

During the drafting process, a number of devices were employed to ease the tensions between Shari'a and international norms. The choice of what accommodation approach would be used, if any, was, of course, a determination that only the Maldivians could make and a matter on which there existed political and legal limitations.⁸¹ Here are some examples of different approaches to accommodation:

1. Finding Principled Common Ground: Use of the Death Penalty

An attractive method of accommodation is to find principled common ground between Shari'a and international norms. The death penalty is a traditional form of *hadd* punishment for adultery, apostasy, and murder. Under certain circumstances, Shari'a makes death a mandatory punishment for these offenses. Many have argued that the use of the death penalty for any offense violates international norms.⁸²

As noted previously, the Maldivians and many other Muslim countries formally have dropped it as a penalty for adultery and apostasy.⁸³ It remains on the books as an authorized punishment (for assassination of the President or injuring the sovereignty or territorial integrity

⁷⁸ Assault as a punishment conflicts with the well-established international norm against state-ordered corporal punishment. *See supra* note 62.

⁷⁹ *See* Maldivian Penal Code § 126-130 (authorizing imprisonment, exile, fines, and (in some circumstances) the payment of blood money, but not retaliatory wounding, as punishments for assault); *see, e.g.*, Penal Code §§ 319-338 (Malay.) (authorizing imprisonment, fines, and lashes, but not retaliation, as punishment for assault).

⁸⁰ Assault offenses (Chapter 120) are subject to the normal grading scheme set forth in Chapter 90 of the DMPC. Retaliatory wounding is not one of the punishments permitted under § 92 (Authorized Terms of Imprisonment), DMPC § 93 (Authorized Fines), DMPC § 1005 (Punishment Method Equivalency Table), or DMPC § 1202 (Application of Alternative Punishments).

⁸¹ For example, the Maldivian Constitution requires that the Maldives be "based on the principles of Islam," MALDIVES CONST. 1, and that "nothing shall be done in violation of Shari'a or the Constitution," MALDIVES CONST. 43.

⁸² *See* Amnesty International, *International Standards on the Death Penalty*, <http://web.amnesty.org/library/Index/ENGACTION500012006?open&of=ENG-392>.

⁸³ *See supra* text accompanying note 75.

of the Maldives⁸⁴) but has not been used in the Maldives for more than fifty years, earning the country the categorization of "de facto abolition" by Amnesty International.⁸⁵

The Draft Code's approach is to keep the penalty legally available but under principled rules that make its application essentially impossible. Draft Code Section 92(a) authorizes the death penalty for Class A felonies (murder), but Section 92(k) limits its use to "the most egregious imaginable form of a purposeful killing of another person in the most cruel and heinous manner."⁸⁶ Other provisions impose additional limitations on its use.⁸⁷ What is particularly attractive about this resolution is its conceptual legitimacy. That is, there is broad agreement that more serious violations ought to be punished more severely than less serious violations.⁸⁸ If the death penalty holds the unique position as being the most serious sanction possible, it logically should be reserved for the most serious case. If one can imagine a more serious case than the one at hand, then the death penalty is not legally authorized.

2. Making Punishment Only Symbolic: Lashing as a Penalty

Another approach that often found some means of accommodation was to retain a formal rule but to remove its troubling effects. One example of this approach is seen in the treatment of flogging or lashes, a traditional form of *hudud* punishments. The Qur'an authorizes flogging as

⁸⁴ See Maldivian Penal Code §§ 36, 37.

⁸⁵ See Amnesty International, *Abolitionist and Retentionist Countries: Abolitionist in Practice* (May 15, 2006), <http://web.amnesty.org/pages/deathpenalty-abolitionist3-eng>

⁸⁶ The final report of the Maldivian codification project marks as an issue for discussion by the Majlis (the Maldivian parliament) whether the death penalty should be removed from the Penal Code altogether. See 1 Final Report of the Maldivian Penal Law & Sentencing Codification Project 63 n.4 (Jan. 2006).

⁸⁷ DMPC § 1204 (Death Penalty) of the sentencing guidelines further limits the imposition of the death penalty. DMPC § 1204(a) requires that the government prove to a practical certainty not only the elements of the offense but also that "the offense committed is worse and represents more culpable behavior than any other offense imaginable." DMPC § 1204(b) limits imposition of the death penalty on the basis of a defendant's confession (defendant must have advice of counsel, testify freely in open court, and confess to every element). DMPC § 1204(c) imposes evidentiary requirements (witnesses must be evaluated to establish capacity & competence, contradicted testimony cannot be used to satisfy the proof requirements in subsection (a)). DMPC § 1204(d) provides for an automatic appeal for complete review of all findings of fact and law.

⁸⁸ See, e.g., ROBINSON, CRIMINAL LAW, *supra* note 49, at § 3 (discussing punishment theory and noting the relevance of the seriousness of the violation).

punishment for a variety of *hudud* offenses,⁸⁹ and Islamic jurists also consider it to be one of the forms of discretionary (*ta'zir*) punishment.⁹⁰

Such punishments are generally seen as in conflict with international norms. The U.N. Universal Declaration of Human Rights provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁹¹ Lashes are generally held to be degrading treatment based on the United Nations Convention Against Torture and the International Covenant of Civil and Political Rights.⁹²

The Draft Code retains the sanction of lashes, but converts it to a primarily symbolic form of punishment. Draft Code Section 411(d)(2) defines lashes as “the symbolic punishment of striking an offender’s back with a short length of rope in a manner not designed to cause bodily injury” and requires that a single person use the rope by moving only his wrist.⁹³

⁸⁹ For example, the *hadd* punishment for the offense of *zina* (unlawful intercourse, encompassing both adultery and fornication) committed by unmarried persons is the administrations 100 lashes. IBN RUSHD, *supra* note 6, at 524. The *hadd* punishment for the offense of *qadhif* (false accusations of unlawful intercourse) is administration of 80 lashes. *Id.* at 531. The traditional *hadd* punishment for drinking intoxicating beverages is generally considered to be 40 lashes, at least in the Shafi'i school, although some views hold it to be 80 lashes, while others say 20 lashes. *Id.* at 535; SIDDIQI, *supra* note 58, at 116-18.

⁹⁰ See SIDDIQI, *supra* note 61, at 172-75; AL-MISRI, RELIANCE, *supra* note 6, at 619.

⁹¹ The Universal Declaration of Human Rights, art. 5, Dec. 10, 1948, U.N. G.A. Res. 217; see also ICCPR art. 7.

⁹² See, e.g., Jennifer Tyus, Note, *Going Too Far: Extending Shari'a Law in Nigeria from Personal to Public Law*, 3 WASH. U. GLOBAL STUD. L. REV. 199, 212-13 (2004) (noting that punishments such as flogging "are considered 'cruel, inhumane, and degrading'" and therefore conflict with international human rights standards and the United Nations Convention Against Torture); Pavani Thagirisa, Note, *A Historical Perspective of the Shari'a Project & A Cross-Cultural and Self-Determination Approach to Resolving the Shari'a Project in Nigeria*, 29 BROOK. J. INT'L L. 459, 496 (2003) (noting that flogging violates the International Covenant of Civil and Political Rights' prohibition of torture or cruel, inhumane, or degrading punishment); Richard Lillich, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. INT'L L. 1072, 1078 (1985) (including flogging as a form of cruel, inhuman, and degrading punishment).

⁹³ As a note to the proposed text explains:

This definition of lashes seeks to capture the practice of punishing *hudud* offenses with lashes as currently performed in the Maldives in accordance with Islamic law. The high level of detail [in the definition of 'lashes'] indicates the vital importance of the practice remaining in this form in order to comply with international norms regarding the humane punishment of offenders.

DMPC § 411 n.12. Lashes are not a part of the general grading scheme in Chapter 90, but instead are authorized (in specified amounts) only as additional punishment for specific offenses: DMPC § 411(c)(5) authorizes 100 lashes for Unlawful Sexual Intercourse; DMPC § 413(b)(3) (continued...)

3. Limiting Scope and Reducing Penalties

Another approach, which tends to minimize but not eliminate the practical effect of a conflict between Shari'a and international norms, is to seriously limit the scope of the traditional Shari'a offense and to reduce the penalties that follow from its violation. Two examples:

Criminalizing Criticizing Islam. Shari'a criminalizes apostasy (*ridda*) -- voluntarily renouncing one's faith. According to traditional views, a broad variety of conduct can be considered acts entailing apostasy.⁹⁴ Traditionally, "things that entail apostasy from Islam," include dozens of acts, such as "describ[ing] a Muslim or someone who wants to become a Muslim in terms of unbelief," and being "sarcastic about any ruling of the Sacred Law;" indeed, "the subject is nearly limitless."⁹⁵

An offense that covers this broad range of acts likely violates international norms of freedom of religion and freedom of expression.⁹⁶ In addition, when punishable by death, criminalizing apostasy conflicts with international norms against the use of capital punishment.⁹⁷

The Draft Code's approach is to recognize an offense, but to significantly minimize its reach and effect. The Draft Code does not criminalize converting from Islam,⁹⁸ but does include a provision that prohibits criticizing the fundamentals of Islam (Section 617. Criticizing Islam).

⁹³ (...continued)

authorizes 19 lashes for Incest; DMPC § 612(b)(2) authorizes 80 lashes for False Accusation of Unlawful Sexual Intercourse; DMPC § 616(b)(2) authorizes 40 lashes for a violation of § 616(a)(2)(B), which is public consumption of alcohol away from a place licensed to sell it.

⁹⁴ For a discussion of apostasy and acts which constitute apostasy, see AL-MISRI, RELIANCE, *supra* note 6, at § o8.7.

⁹⁵ *Id.* at § o8.7, 596-98.

⁹⁶ See, e.g., U.N. Universal Declaration of Human Rights, art 18 ("everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."); ICCPR, *supra* note 69, at art. 18.1 ("Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice"); PETERS, *supra* note 65, at 179; ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 163-64 (1991). Cf. The Universal Islamic Declaration of Human Rights, art. 12, Sept. 19, 1981 ("(a) Every person has the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the Law. No one, however, is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons. . . . (e) No one shall hold in contempt or ridicule the religious beliefs of others or incite public hostility against them; respect for the religious feelings of others is obligatory on all Muslims.").

⁹⁷ See *supra* notes 69-71 and accompanying text.

⁹⁸ There are no provisions criminalizing the abandonment of one's faith in the DMPC (see particularly Chapter 610 (Public Order and Safety Offenses)).

While acknowledging the need to avoid publicly insulting Islam, Section 617 substantially narrows the reach of the offense. First, Subsection (a) limits it to being “critical of [those] fundamentals of Islam as set out in the Constitution.”⁹⁹ This limits the prohibition to only that speech or those materials that insult the core tenets of Islam, which are understood to be the oneness of God, acceptance of Muhammad as His prophet, prayer, fasting, pilgrimage, and charity.¹⁰⁰ Second, the offense is defined to require public speech or distribution of materials. Third, the offense has a demanding culpability requirement: it must be shown that the defendant had the *purpose* to insult Islam. That is, it is not enough for liability that one knows one's words would be taken as insulting, but that it must have been one's purpose. Subsection (b) also provides an exception for conduct performed on behalf of the government or a scholarly institution or by an individual for scientific or religious study. Finally, even where the offense is committed, it is classed only as quasi-criminal, a "violation" rather than an offense (less serious than the lowest misdemeanor), for which no imprisonment is authorized.¹⁰¹

Criminalizing the Drinking of Alcohol, the Eating of Pork, or the Failure to Fast. Shari'a prohibits the drinking of intoxicating beverages.¹⁰² The traditional punishment for drinking intoxicating beverages is generally considered to be 40 lashes, at least in the Shafi'i school, although some views hold that the traditional punishment for this offense is 80 lashes, while some say 20 lashes. The modern view is that lesser punishments may be appropriate.¹⁰³ Consuming pork also is criminalized according to the Qur'an and *Hadith*.¹⁰⁴ Similarly, legal

⁹⁹ The Maldivian Constitution defines the tenets of Islam as the "faith, belief and doctrines of Islam." MALDIVES CONST., art. 156.

¹⁰⁰ See Caesar Farah, *Islam: Beliefs and Observances* 135-150 (2003) (describing the basic tenets of Islam); see also DMPC § 617 cmt.

¹⁰¹ Section 617(c) grades the offense as a "violation." Under Section 91(j), violations are not crimes and do not carry the collateral consequences of criminal conviction; under Section 92(i), neither imprisonment nor banishment are authorized as punishment for a violation.

¹⁰² BN RUSHD, *supra* note 6, at 534-35.

¹⁰³ BN RUSHD, *supra* note 6, at 535; see also SIDDIQI, *supra* note 61, at 116-18. El-Awa argues that the modern view is that *ta'zir* punishments are appropriate instead of *hadd* punishments and that the offense exists to protect the social order rather than being a *hadd* offense. See EL-AWA, *supra* note 63, at 61-63 (citing the Kuwaiti penal code as an example of applying *ta'zir* punishment for this offense).

¹⁰⁴ See, e.g., The Qur'an, verse 5:3 ("Forbidden unto you are carrion and blood and swine-flesh . . ."); AL-MISRI, RELIANCE, *supra* note 6, at § p30.2, 673 ("Whoever premeditatedly eats [unslaughtered meat, blood outpoured, or the flesh of swine] when not forced by necessity is a criminal"); *id.* § w52.1(177) (including consuming filth, such as pork, as an enormity, or sin). The requirement of fasting during Ramadan is also carried forward in the DMPC. Fasting during Ramadan is obligatory under certain circumstances. See AL-MISRI, RELIANCE, *supra* note 6, at § i1.1, 278-79. For more on fasting, see *id.* § i1.1-1.33; IBN RUSHD, *supra* note 6, at ch. 10.1.

jurists have found it to be an “enormity” for a Muslim not to fast in the month of Ramadan.¹⁰⁵ Some, although not all, classical Shari’a jurists explicitly prohibit the public consumption of pork and alcohol by non-Muslims as well.¹⁰⁶

The punishment for drinking alcoholic beverages, flogging, is in conflict with international norms against corporal punishment, as noted above.¹⁰⁷ To the extent that prohibitions on not fasting during Ramadan and the consumption of pork and alcohol apply to private conduct, they also would seem to conflict with international norms regarding privacy.¹⁰⁸ And to the extent that these prohibitions would be enforced as a criminalization of a failure to practice Islam, then they would violate international norms guaranteeing freedom of religion.¹⁰⁹

The Draft Code carries forward the existing Maldivian offenses as Section 616 (Failing to Fast During Ramadan; Consuming Pork or Alcohol). The Draft Code offenses are set at the lowest category, Class 3 misdemeanors (and an additional punishment of 40 lashes is authorized – recall that this is largely symbolic punishment under the Draft Code).¹¹⁰ More importantly, the offenses are limited in scope. They apply only to Muslims; non-Muslims may consume in licensed areas or in private. Even Muslims are exempt from private failures to fast.¹¹¹ The lack of public consumption reaffirms the society’s preference for adherence to Islamic scripture but

¹⁰⁵ A L-MISRI, RELIANCE, *supra* note 6, at 975. Under the Ottoman Criminal Code, eating publicly during the fast in the month of Ramadan was considered a criminal offense. PETERS, *supra* note 65, at 95.

¹⁰⁶ A L-MISRI, RELIANCE, *supra* note 6, at 608.

¹⁰⁷ See *supra* note 62.

¹⁰⁸ See ICCPR, *supra* note 69, at art 17 (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence”); Universal Declaration of Human Rights, *supra* note 94, art 12 (using almost identical text as the ICCPR); see also *infra* note 128 (on international privacy rights); cf. *infra* note 109 (on Shari’a’s recognition of privacy interests). But see Andrew R. Dennington, *We Are the World? Justifying the U.S. Supreme Court’s Use of Contemporary Foreign Legal Practice in Atkins, Lawrence, and Roper*, 29 B.C. Int’l & Comp. L. Rev. 269, 291 n.164 (2006) (“Privacy rights do not yet enjoy nearly enough recognition, particularly in non-Western courts, to be considered customary international norms, but some privacy rights may achieve that status in the foreseeable future.”).

¹⁰⁹ See ICCPR, *supra* note 69, at art 18 (“(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”).

¹¹⁰ See *supra* note 93.

¹¹¹ However, Section 616(a)(1)(B) does continue to criminalize the private consumption of pork or alcohol by Muslims.

the exclusion of private consumption reduces the intrusion on personal autonomy. Shari'a's recognition of privacy interests supports this limitation.¹¹²

4. Replacing a Shari'a Rule with an Evidentiary Rebuttable Presumption: Marriage Presuming Consent to Intercourse

Another useful technique for narrowing a gap between Shari'a and international norms is to drop the traditional Shari'a rule or offense but to carry forward the values underlying it in an evidentiary rebuttable presumption. For example, consider the traditional Shari'a view that a woman, by marrying, consents to sexual intercourse with her spouse and vice versa. A husband is then free to engage in sexual intercourse with his wife as he chooses as long as he does not physically harm her,¹¹³ and a wife is obligated to engage in sexual intercourse with her husband unless it would cause her harm.¹¹⁴

The failure to criminalize unwanted sexual intercourse likely conflicts with international norms respecting the equality and dignity of all individuals. Requiring a woman to consent to sexual intercourse because she is married detracts from "the inherent dignity and . . . the equal and inalienable rights of all members of the human family," as outlined in the preamble to the Universal Declaration of Human Rights.¹¹⁵

The Draft Code does not follow the traditional Shari'a principle but neither does it ignore the spirit behind it. Section 131(a) (Sexual Assault) criminalizes engaging in sexual intercourse without consent. Next Section 131(b) allows the trier of fact to presume the existence of consent if the person engages in sexual intercourse with his spouse, but the presumption is rebuttable. In other words, the husband does not at law have a right to unconsented intercourse; lack of consent by the wife makes intercourse criminal. But the existence of the rebuttable presumption recognizes the fact that in a marriage there commonly is an implicit consent to sexual intercourse, albeit one that may be withdrawn. The useful point here is that the relatively modest

¹¹² Michael Cook, *Forbidding Wrong in Islam* 58-63 (Cambridge: Cambridge University Press, 2003) (citing various classical authorities affirming this privacy interest including Ibn Taymiyya, Ibn Hanbal, Al-Mawardi, Said al-Musayyab and Ibn al-Rabi').

¹¹³ L-MISRI, *RELIANCE*, *supra* note 6, at § m5.4, 526 ("A husband possesses full right to enjoy his wife's person ([although sodomy] is absolutely unlawful) in what does not physically harm her.").

¹¹⁴ *Id.* at § m5.1, 525 ("It is obligatory for a woman to let her husband have sex with her immediately when . . . he asks her . . . at home . . . and she can physically endure it.").

¹¹⁵ The Universal Declaration of Human Rights, preamble, Dec. 10, 1948, U.N. G.A. Res. 217. *See also* Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"); Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/48/49 (Feb. 23, 1994); Lisa Hajjar, *Religion, State Power, and Domestic Violence in Muslim Societies: A Framework For Comparative Analysis*, 29 *LAW & SOC. INQUIRY* 1, 11-12 (2004)

and common sense rebuttable presumption can stand-in as a somewhat milder form of, but nonetheless a continuing symbol for, the Shari'a rule.¹¹⁶

5. Preserving Symbolic Value by Retaining Offenses of No Effect: Authorizing Polygamy

In some instances, a gap between traditional Shari'a and international norms may be ignored if it is clear that the Shari'a rule has no practical effect, as where existing social norms have already closed the gap. For example, Shari'a authorizes a man to have up to four wives.¹¹⁷ A woman may not have more than one husband.¹¹⁸

The international norm against polygamy is embodied in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which includes an article on equality in marriage; polygamy would violate that equality.¹¹⁹ According to a General Comment of the CEDAW Committee:

Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous

¹¹⁶ The final report of the Maldivian codification project discusses changing this rebuttable presumption to an absolute presumption or removing the presumption altogether. *See* Final Report, *supra* note 86, at 70 n.7.

¹¹⁷ BN RUSHD, *supra* note 6, at 47 (The Muslim jurists agreed about the permissibility of (a man) marrying four women at the same time. . . .); AL-MISRI, RELIANCE, *supra* note 6, at § m6.10, 530 ("It is unlawful for a free man to marry more than four women.").

¹¹⁸ AL-MISRI, RELIANCE, *supra* note 6, at 516.

¹¹⁹ *See* CEDAW, *supra* note 114, at art. 16(1) (“(a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) The same rights and responsibilities during marriage and at its dissolution”). The CEDAW Committee has condemned polygamy as a violation of human rights in many of its reports and concluding observations on States own reports. *See e.g.*, *Burkina Faso*, 31/01/2000, U.N. Doc. A/55/38, paras. 281–282; *Cameroon*, 26/06/2000, U.N. Doc. A/55/38, para. 54; *Democratic Republic of the Congo*, 01/02/2000, U.N. Doc. A/55/38, paras. 215–216; *Egypt*, 02/02/2001, U.N. Doc. A/56/38, paras. 352–353; *Guinea*, 31/07/2001, U.N. Doc. A/56/38, paras. 122–123; *Indonesia*, 14/05/98, U.N. Doc. A/53/38, para. 284(a) ; *Iraq*, 14/06/2000, U.N. Doc. A/55/38, para. 191; *Israel*, 12/08/97, U.N. Doc. A/52/38 Rev.1, Part II, para. 163; *Jordan*, 27/01/2000, U.N. Doc. A/55/38, para. 174–175; *Namibia*, 12/08/97, U.N. Doc. A/52/38/Rev.1, Part II, para. 110; *Nepal*, 01/07/99, U.N. Doc. A/54/38, para. 153; *Nigeria*, 07/07/98, U.N. Doc. A/53/38/Rev.1, para. 153; *Senegal*, 12/04/94, U.N. Doc. A/49/38, para. 721; *United Republic of Tanzania*, 06/07/98, U.N. Doc. A/53/38/Rev.1, para. 229; *Uzbekistan*, 02/02/2001, U.N. Doc. A/56/38, paras. 187–188.

marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5(a) of the Convention.¹²⁰

The Human Rights Committee (created by the International Covenant on Civil and Political Rights) has condemned polygamy in a number of its concluding observations.¹²¹ In its General Comments, the Human Rights Committee has observed:

It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.¹²²

The Committee on the International Covenant on Economic, Social, and Cultural Rights similarly has condemned Polygamy.¹²³

The Draft Code carries forward the traditional rule. Section 410(a) (Unlawful Marriage by a Man) allows a man to marry up to four wives (with the consent of current wives and the court). Section 410(b) (Unlawful Marriage by a Woman) prohibits a woman from marrying again once she is already married. But, in fact, the standard practice in the Maldives and in many Muslim countries is for men to marry only one woman.¹²⁴ Because there exists in the Maldives a strong social aversion to polygamy, the absence of a formal legal prohibition is likely to have little or no effect.¹²⁵ In other words, the situation is similar to some of the accommodations

¹²⁰ *General Recommendation 21, Equality in Marriage and Family Relations*, UN CEDAWOR, 13th Sess., UN Doc. A/47/38, (1994) at para. 14.

¹²¹ See, e.g., *Democratic Republic of the Congo*, 27/03/2000, U.N. Doc. CCPR/C/79/Add.118, para. 11; *Gabon*, 10/11/2000, U.N. Doc. CCPR/CO/70/G AB, para. 9; *Libyan Arab Jamahiriya*, 06/11/98, U.N. Doc. CCPR/C/79/Add.101, para. 17; *Nigeria*, 24/07/96, U.N. Doc. CCPR/C/79/Add.65, A/51/40, para. 291; *Senegal*, 19/11/97, U.N. Doc. CCPR/C/79/Add 82, para. 12.

¹²² General Comment No. 28: Equality of rights between men and women (article 3), UN HRCOR, 68th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) at para. 24.

¹²³ See e.g., *Cameroon*, 08/12/99, U.N. Doc. E/C.12/1/Add.40, paras. 14, 33; *Kyrgyzstan*, 01/09/2000, U.N. Doc. E/C.12/1/Add.49, paras. 16, 30; *Nepal*, 24/09/2001, U.N. Doc. E/C.12/1/Add.66, paras. 10, 13; *Nigeria*, 13/05/98, U.N. Doc. E/C.12/Add.23, para. 22; *Senegal*, 24/09/2001, U.N. Doc. E/C.12/1/Add.62, paras. 15, 39.

¹²⁴ See Heather Johnson, *There are Worse Things Than Being Alone: Polygamy in Islam, Past, Present, and Future*, 11 WM. & MARY J. WOMEN & L. 563, 591 (2005) (noting that polygamy is "already a very rare practice and will fall out of use" and that many Islamic countries have already abolished or limited polygamy); Rabia Mills, *Polygamy*, <http://muslim-canada.org/polygamy.pdf> ("Polygamy is not practiced much in the Muslim world today").

¹²⁵ Maldives: Kingdom of a Thousand Islands

(continued...)

discussed in the previous section: the formal legal rule tracks Shari'a while the actual practice is consistent with international norms. (In fact, some jurists have interpreted Shari'a as expressing a preference for one wife. For instance, Ahmad Ibn Naqib Al-Misri states that "it is fitter to confine oneself to just one (wife)."¹²⁶)

6. Retaining Symbolic Offenses with the Expectation of Non-Prosecution: Criminalizing Fornication, Adultery, and Same-Sex Intercourse

One last approach was to ignore a gap between Shari'a and international norms where the Shari'a-prohibited conduct did sometimes occur but generally was not prosecuted. For example, because sexual intercourse is lawful under Shari'a only between a husband and wife, both adultery and fornication are prohibited, as *zina*,¹²⁷ which can be punishable by death if the offender is married, and with lashes when the offender is unmarried.¹²⁸ Because persons of the same sex may not marry, same-sex intercourse is necessarily included in the prohibition.¹²⁹

Many human rights instruments stress rights to privacy in family and personal life, which would likely conflict with the criminalization of fornication, adultery, and safe-sex intercourse.¹³⁰

The Draft Code carries forward the criminalization, albeit with reduced penalties. Section 411(a) prohibits "sexual intercourse with a person of the opposite sex other than with a person to whom he is married." Instead of death or flogging, Subsection (c)(1) sets the

¹²⁵ (...continued)

http://www.cpamedia.com/history/maldives_thousand_islands, (noting that "[p]olygamy is rare" in the Maldives).

¹²⁶ See AL-MISRI, RELIANCE, *supra* note 6, at § m6.10

¹²⁷ See IBN RUSHD, *supra* note 6, at 521 (defining the offense of *zina* as "all sexual intercourse that occurs outside of a valid marriage").

¹²⁸ See *id.* at 521, 523.

¹²⁹ For treatment of same-sex relations in the Qur'an, see verses 2:188, 49:13, 53:45, 11:78, and 24:32. While jurists agreed that same-sex intercourse was forbidden, they differed on the doctrinal basis for its disapproval.

¹³⁰ See, e.g., ICCPR, *supra* note 69, at art. 17(1) ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."); see also European Convention on Human Rights, art 8(1), Nov. 4, 1950, 213 U.N.T.S. 221 ("Everyone has the right to respect for his private and family life, his home and his correspondence."); *Norris v. Ireland*, 142 Eur. Ct. H. R. (ser. A) (1998) (striking down Ireland's anti-sodomy statute as a violation of the privacy rights in the European Convention on Human Rights); *Lustig-Prean & Beckett v. The United Kingdom*, 29 Eur. H.R. Rep. 548 (1999) (finding that the discharge of homosexuals from the military violates article 8 of the European Convention on Human Rights); *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) (finding, by the UN Human Rights Committee, that the non-discrimination requirements of the International Covenant on Civil and Political Rights also apply to sexual orientation and, hence, laws prohibiting sodomy are impermissible).

punishment for unlawful sexual intercourse between two unmarried persons as that of a Class 2 misdemeanor,¹³¹ which has a maximum authorized term of imprisonment of six months,¹³² the maximum authorized fine is 12,500 MVR,¹³³ which is equivalent to approximately \$1,060. Section 411(c)(2) punishes same-sex intercourse as a Class 1 misdemeanor, which has a maximum term of imprisonment of one year,¹³⁴ and a fine not to exceed 25,000 MVR,¹³⁵ which is equivalent to approximately \$2,120.

But even these reduced penalties are not likely to be imposed because the offense generally is not prosecuted. However, this approach to dealing with conflicts between Shari'a and international norms is noticeably different from that discussed above. Ignoring a Shari'a prohibition that is *not prosecuted* is considerably more problematic than ignoring a Shari'a rule that has no effect because such conduct *does not occur* (as with polygamy). Keeping the offense upon an expectation of no prosecution leaves an unhealthy discretion in the government to prosecute the odd case, with no limitation on how that discretion might be exercised.

C. CONCLUSION

Here then are six ways of dealing with conflicts between traditional Shari'a and international norms. Where they do not avoid the conflict, they commonly dramatically reduce its practical effect. In some instances, the formal Shari'a rule conflicts with international norms while the practical reality is consistent with them.

One may wonder why the Maldivians do not simply drop a legal rule that conflicts with international norms if they are comfortable with an actual practice that does not conflict. For instance, one may wonder why the Maldivians do not completely remove the death penalty, given its "de facto abolition," or why they do not criminalize polygamy. Why not get "full credit," as it were, with the international community for practices that would be welcomed and approved?

The probably obvious answer is that there is more to the political and social situation in the Maldives, and other Muslim countries, than pleasing the international community. Muslims cherish their religion and its practice. To the extent that they have in some ways moved closer to international norms, it is commonly because their own social judgments have changed. In such a situation, it is no surprise that they would wish to honor traditional Islamic practices even as their society has altered how those practices are interpreted. Muslims have little reason to rush to change the legal formalities if those formalities show deference to a religion they cherish.

¹³¹ Section 411(c)(1) grades the offense differently depending on the marital status of the parties involved.

¹³² See DMPC § 92(g).

¹³³ See DMPC § 93(b)(7).

¹³⁴ See DMPC § 92(f).

¹³⁵ See DMPC § 93(b)(6).

IV. THE NEED FOR A COMPREHENSIVE CODE

The single most significant improvement to criminal law in the Maldives would be the adoption of a comprehensive penal code, one that provides in written form all of the rules that would be needed for adjudication of a criminal case.¹³⁶ The benefits of comprehensive codification are well known:¹³⁷ providing fair notice of what the penal law commands and fair adjudication of each purported violation.¹³⁸ In the criminal law's *ex ante* role, codification improves fair notice by abolishing or codifying unwritten crimes and by clarifying offense definitions. It also affirms one of the "bedrock principles of criminal law . . . that legislatures, not courts, should be the primary definers of crimes."¹³⁹ Through codification, the legislature exercises its authority over criminal law and avoids *de facto* delegation to the judiciary to create or define crimes. In the criminal law's *ex post* role, codification facilitates fair adjudication by increasing uniformity in application, by eliminating inconsistent and overlapping offense definitions, and by reducing the potential for arbitrary and discriminatory prosecutions.

The current Maldivian penal "code" is, in fact, not a code at all. The penal law is incomplete, scattered, and, where it does exist, is often technical and legalistic, a common feature of older codes. Some proscriptions are defined outside the penal code,¹⁴⁰ and other crimes are

¹³⁶ For a discussion of the dramatic effect of codification in the context of Islamic law, see Layish, *supra* note 33 (noting the resulting shift of authority from Islamic jurists to an often secular legislature).

¹³⁷ See generally ROBINSON, CRIMINAL LAW, *supra* note 49, at § 3 (1997); Ronald L. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 CRIM. L.F. 99 (1989); Frank J. Remington, *Criminal Law Revision Codification vs. Piecemeal Amendment*, 33 NEB. L. REV. 396 (1954); Albert J. Harno, *Rationale of a Criminal Code*, 85 U. PA. L. REV. 549 (1937); Note, *We Need a Criminal Code*, 7 AM. L. REV. 264 (1873).

¹³⁸ See ROBINSON, CRIMINAL LAW, *supra* note 49, at § 2.2; Robinson, *Fair Notice and Fair Adjudication*, *supra* note 31, at 337. Although fair notice and fair adjudication originated as Western ideas, they are arguably as relevant, if not more so, to an Islamic democracy such as the Maldives.

¹³⁹ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 576 (2001) ("The usual reason given is that judicial crime creation carries too big a risk of nonmajoritarian crimes, which in turn creates too much of a risk that ordinary people won't know what behavior can get them into trouble."); see also Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1294 (1998) ("Criminal law choices are controvertible, fundamentally political, and thus best left to the political departments.").

¹⁴⁰ For example, the Maldives previously criminalized sexual assault in a separate statute. See (Maldives) Book 6, § 173(10) and (12). (Sexual assault is Chapter 130 in the DMPC.) On this point, American codes did better than current Maldivian law. See Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 50-51 (2000) (faulting numerous American codes for failing to comprehensively codify excuse and justification defenses, recognizing by implication that these codes otherwise reached the most

(continued...)

subject to creation without legislative action. For example, under the current regime, the President may create penal offenses, which has occurred under Section 88¹⁴¹ and the Law on Narcotic Drugs and Psychotropic Substances.¹⁴² Most problematic is the reliance upon offenses that are written nowhere in Maldivian law, either legislation or regulations, but only derived ad hoc from the principles of Shari'a. This means that people, other than possibly Shari'a scholars, cannot know beforehand what rule will be applied in a case. Indeed, given the significant differences in the interpretation of Shari'a, often even scholars cannot know.

These difficulties with current Maldivian law are typical of the problems found in many countries, including many Western countries, without comprehensive codifications. But the unique culture, geography, and demographics of the Maldives make these statutory weaknesses even more problematic. There is a greater need for a comprehensive penal code in the Maldives than in many other countries because the country has a history of an overreaching executive that was not hesitant to take over criminal lawmaking authority; because its island structure means that there is greater need for a code that can be understood and applied uniformly by geographically distant officials who have limited legal training; and because historically the judiciary has been less than independent, raising fears that the adjudication of individual cases is influenced by improper factors.¹⁴³

At the same time, providing a comprehensive penal code to the Maldives is a task considerably more difficult than it would be for most Western countries, for that project essentially requires a codification for the first time of certain principles of Shari'a.

V. THE NEED FOR AN ACCESSIBLE CODE: PLAIN LANGUAGE AND STANDARDIZED DRAFTING FORMS

The benefits of codification are available only if the code's rules are drafted in a way that can be easily understood and applied. This is not always easy to do.¹⁴⁴ The existing Maldivian

¹⁴⁰ (...continued)
common forms of criminal conduct).

¹⁴¹ See, e.g., Maldives Penal Code, § 88 (giving the President the power to make substantive criminal law).

¹⁴² See (Maldives) Law on Narcotic Drugs and Psychotropic Substances, Act No: 17/77 (1977) (defining the offenses found in Chapter 720 of the DMPC).

¹⁴³ See *supra* Part I.

¹⁴⁴ It is an unmet challenge for the criminal codes of many American states. See Paul H. Robinson et al., *The Five Worst*, *supra* note 128, at 24-63 (providing examples of the failure of many state criminal codes to clearly articulate rules of conduct).

“code’s” failure manifests itself in such things as a highly verbose and technical drafting style,¹⁴⁵ poor organization,¹⁴⁶ and the presence of overlapping offenses.¹⁴⁷

But the task of an accessible penal law is all the more important for the Maldives due to the political reasons described above, as well as because of its heavy reliance upon the Shari'a. As noted earlier, in contrast to Western secular law, Shari'a is considered a sacred set of principles that guides every aspect of daily life.¹⁴⁸ Accordingly, any criminal code that makes the ambitious claim of “being” Shari'a-compliant must be both complete and accessible. Further, as noted above, accessibility of the penal law is particularly important in the Maldives because, as a nation of small islands where communication and transportation are limited, criminal proceedings commonly are conducted by local officials who lack the legal education and sense of judicial independence found in many other nations. Thus, any set of adjudication principles must be accessible to judges with limited training, yet still be complete and sufficiently detailed.

Two key aspects of the draft penal code that increase its accessibility are its organization and the drafting style of its provisions. Most importantly, this means the use of a structure that distinguishes the "general part" from the "special part" of a code and the use of plain language drafting and standardized drafting forms.

A. The General Part/Special Part Distinction

The overall layout of a code can contribute to its effectiveness. A useful convention drawn from modern codification work is to draft the substantive code in two parts, one containing the definitions of all specific offenses (the "Special Part") and the other containing all

¹⁴⁵ See, e.g., Maldives Penal Code, § 144:

Property in the possession of a person who commits theft, criminal breach of trust, cheating or extortion in respect of government property shall be forfeited where it is established that such person has built dwellings or obtained other property or created other property from money or property obtained through such theft, criminal breach of trust, cheating or extortion or where such reasons exist that the person has created his property through property or money obtained from the acts of theft, criminal breach of trust, cheating or extortion or where he is unable to provide the property that was the subject matter of the offences of theft, criminal breach of trust, cheating or extortion. Properties seized in this respect shall be sold and all its proceeds shall be utilized to regain the property that was the subject of theft, criminal breach of trust, cheating or extortion. Not regaining property but gaining the value of the property.

However, such poor drafting is not unique to the Maldives. See, e.g., R.I. Gen. Laws § 11-23-1 (2004) (defining murder); W. Va. Code § 61-1-8 (2004) (defining the offense of "desecration of flag").

¹⁴⁶ Compare current Maldivian law, table of contents, with DMPC, table of contents. Like Massachusetts' penal code, current Maldivian law lists offenses by category, but does not organize offenses within these categories in any discernable way. See Paul H. Robinson et al., *The Five Worst*, *supra* note 128, at 35.

¹⁴⁷ See *infra* Part VII.

¹⁴⁸ JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 1 (1964).

general principles of liability and other matters (the "General Part"), each of the General Part provisions having application to each offense in the Special Part.¹⁴⁹ This division allows for the dramatic simplification of offense definitions. By defining general liability rules separately, such as those governing complicity, culpability requirements, or inchoate offenses, these matters can be left out of the definitions of specific offenses. Thus, not only are the offense definitions made more readable but the general principles then apply to all offenses, not just a scattered few.

Culpability levels, for example, are complex concepts involving detailed examination of the offender's mental state in relation to the existing circumstances and likely consequences at the time the offense was conducted.¹⁵⁰ A single general set of culpability provisions can avoid cluttering each offense definition with the definition of the culpability terms used there, and can allow the single General Part definition to be as detailed and sophisticated a definition of culpability as needed.¹⁵¹ Other General Part provisions share the same advantages. Doctrines of imputation, inchoate liability, and general defenses also illustrate the advantages of separating generally applicable provisions. One can imagine the dramatic loss of verbal economy if each offense definition included all inchoate versions of the offense. For example, the murder definition would have to define the completed offense as well as attempted murder, complicity as to murder, and conspiracy as to murder. The situation would worsen if each offense definition then included all of the justifications, excuses, and other defenses applicable to that offense rather than, for example, separately defining a general self-defense provision that could apply to homicide, assault, and other related offenses. The General Part/Special Part division is not a novel invention, but rather a device common to all modern criminal codes.¹⁵²

B. Standardized, Plain Language Drafting

The nature of writing is such that there are many different ways in which one may express a thought. Differences in how an idea is expressed by different writers may simply reflect differences in vocabulary and style rather than an intended difference in meaning. But in the close-reading realm of statutory interpretation, differences between provisions often are taken by a reader to imply a difference in meaning, even if none is intended. A common principle of

¹⁴⁹ See MODEL PENAL CODE, tbl. of contents (1962) (denoting "Part I: General Provisions" and "Part II: Definition of Specific Crimes").

¹⁵⁰ See, e.g., DMPC § 24(e) (defining the culpability of "recklessness" in terms of a person grossly deviating from "acceptable standards of conduct" by "conscious[ly] disregard[ing]" a risk, also "considering nature and purpose of the person's conduct and the circumstances known to the person . . .").

¹⁵¹ See, e.g., DMPC § 220(a) (defining the offense of criminal property damage simply as "recklessly and without consent . . . damage[ing] property of another").

¹⁵² See, e.g., MODEL PENAL CODE, tbl. of contents (1962); Nat'l Commission of Reform of Federal Criminal Laws, Final Report, tbl. of contents (1971); 1 FINAL REPORT OF THE KENTUCKY PENAL CODE REVISION PROJECT OF THE CRIMINAL JUSTICE COUNCIL, tbl. of contents, at xiii (2003); 1 FINAL REPORT OF THE ILLINOIS CRIMINAL CODE REWRITE AND REFORM COMMISSION, tbl. of contents, at iii (2003); DMPC, tbl. of contents (2005).

statutory construction is that “different language implies a different meaning,”¹⁵³ yet recognizing a difference may make little sense in some instances.¹⁵⁴ Differences in language without intended differences in meaning can force a judge into the awkward position of either creating an illogical distinction or violating a basic rule of statutory construction. Even if the problem can be resolved rationally, it distracts the reader from a quick and clear understanding of the provision.

Unfortunately, it is common in the current Maldivian “code”,¹⁵⁵ as it is in many American codes,¹⁵⁶ that slightly different language and structure are used when no real difference is intended. These non-modern codes also commonly use dense and legalistic language,¹⁵⁷ a practice that similarly frustrates clear and effective rule articulation as well as uniform liability determination and grading.

Modern criminal codes avoid these problems by defining offenses using standardized language, in order to minimize confusion and errant interpretation and improve accessibility, usability, and uniformity. The Draft Code goes a step further and adopts a formal standard “template” that insures parallel provisions. For example, in the Special Part of the Code, each offense definition follows the same template:

Section XXX – [Offense Name]

(a) Offense Defined. A person commits an offense if: . . . [listing of the elements of the broadest form of the offense]

(b) Exception. A person does not commit an offense if he . . . [listing the conditions under which conduct that would otherwise be an offense under subsection (a) is not meant to be included within the prohibition – this kind of subsection is used only occasionally]

(c) Grading.

(1) [Name of Suboffense 1]. The offense is a Class X felony if: . . . [listing of the special conditions under which the offense will be of this highest grade]

¹⁵³ ROBINSON, CRIMINAL LAW, *supra* note 49, at §2.3.

¹⁵⁴ For example, it is illogical to assign different culpability levels to “dealing” in stolen property. *See, e.g., infra* note 156 and accompanying text.

¹⁵⁵ *See, e.g., supra* note 145.

¹⁵⁶ For example, Florida’s stolen property offenses are defined in three separate sections, and several additional sections define related provisions, such as exemptions and permissive inferences. *See Fla. Stat. Ann. §§ 812.019-.025* (2004) (defining offense involving “dealing” in stolen property). The language of these sections is not standardized or formulaic. For example, § 812.019 requires that the offender “knows or should know” the property was stolen while § 812.025 (the internet form) requires he “knows, or has reasonable cause to believe”

¹⁵⁷ A classic example of this can be found in the United States’ federal criminal statute for criminal organizations, the Racketeer Influenced and Corrupt Organizations (“RICO”) statute, which is notoriously difficult to navigate. *See, e.g., 18 U.S.C. § 1962(a)* (2005) (defining conduct prohibited under RICO).

(2) [Name of Suboffense 2]. The offense is a Class Y felony if: . . . [listing of the special conditions under which the offense will be of this next highest grade, etc.]

(3) [Name of Suboffense 3]. Otherwise the offense is a Class Z misdemeanor.

(d) Sentencing Factors. The baseline sentence provided in the Guideline Sentence Table of Section 1002 for any offense under this Section is [aggravated/mitigated] [one] level if: . . . [listing of the special conditions under which the offense will be aggravated, or mitigated, on the sentencing guideline grid]

(e) Rebuttable Presumption. The trier of fact shall presume, subject to rebuttal, that: . . . [defining the conditions under which an element in the offense definition or grading can be rebuttably presumed – this kind of subsection is used only occasionally]

(f) Definitions.

(1) “XX” means: . . . [defining a term used in this offense that requires definition, or citation to where the term is already defined elsewhere in the Code]

(2) “YY” means: . . .

A typical definition is found in Section 120, which defines Assault.¹⁵⁸ The first subsection lists every element of the offense, in this case either (1) touching or injuring another person without his or her consent or (2) putting another person in fear of imminent bodily injury, again without his or her consent. The next subsection divides assaults into three different grades: (1) Serious Assault, (2) Injurious Assault, and (3) Simple Assault, listing the requirements of each form. The next subsection sets out a sentencing factor, assaulting a person who is a resident or visitor in a home, which is followed in the next subsection by a set of definitions.¹⁵⁹

¹⁵⁸ DMPC § 120

¹⁵⁹ The provision reads:

Section 120 – Assault

(a) Offense Defined. A person commits an offense if he, without the consent of another person:

- (1) touches or injures such person, or
- (2) puts such person in fear of imminent bodily injury.

(b) Grading.

(1) Serious Assault. The offense is a Class D felony if the person:

- (A) causes serious bodily injury, or
- (B) commits the offense with a dangerous weapon.

(2) Injurious Assault. The offense is a Class 2 misdemeanor if the person causes bodily injury.

(3) Simple Assault. Otherwise the offense is a Class 3 misdemeanor.

(c) Sentencing Factor. The baseline sentence provided in the Guideline Sentence Table of Section 1002 for any offense under this Section is aggravated one level if the victim is assaulted in a home where he is a resident or guest.

(d) Definitions.

(continued...)

This general format is followed throughout the code; offense elements are always listed first, followed by provisions such as rebuttable presumptions, grading, sentencing factors, and definitions. Each subsection is divided into subparagraphs, creating either a checklist or set of alternatives. Subsections also each include a title, which facilitates navigation within the section. Finally, special attention is paid to definitions. A term is initially defined in the first section in which it appears. An alphabetical listing of all defined terms used in a given chapter, along with references to where they appear, then appears at the chapter's end,¹⁶⁰ and all defined terms are listed in alphabetical order in a General Part "dictionary."¹⁶¹ A term is defined only once in the code to avoid the problem of conflicting definitions if a definition is later amended.

VI. THE NEED FOR A COMMUNICATIVE VERDICT SYSTEM

We have already noted the central role that Shari'a plays in a Muslim society reaches areas untouched by Western law.¹⁶² It regulates both secular and religious life by providing a "framework of reference for all individual and collective behaviours."¹⁶³ In an Islamic legal system, then, there exists a special need for clear explanations of legal judgments; for those judgements not only affect the defendant at hand but, more clearly than in Western societies, play

¹⁵⁹ (...continued)

(1) "Dangerous weapon" means:

(A) anything readily capable of lethal use and possessed under circumstances not manifestly appropriate for any lawful use it may have, or

(B) any implement for the infliction of great bodily injury that serves no common lawful purpose.

(2) "Home" means any structure or vehicle serving as a person's place of residence.

¹⁶⁰ *See, e.g., id.*

¹⁶¹ *See* DMPC § 17.

¹⁶² *See supra* note 56 and accompanying text.

¹⁶³ Reed, *supra* note 48, at 504-05 (*quoting* BERNARD BOTIVEAU, CONTEMPORARY REINTERPRETATIONS OF ISLAMIC LAW: THE CASE OF EGYPT, IN ISLAM AND PUBLIC LAW: CLASSIC AND CONTEMPORARY STUDIES 261, 263 (Chibli Mallat ed., 1993)); *see also* M. Cherif Bassiouni, *Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice System*, in ISLAMIC CRIMINAL JUSTICE SYSTEM, *supra* note 19, at 3, 12 ("Law in Islam is that which answers the following query: What should the conduct of man be in his individual and collective life, in his relationship to God and to others and to himself in a universal community of mankind for the fulfillment of man's dual purpose: life on earth and life in the hereafter?") (footnote omitted); *cf. id.* at 6 ("[U]nlike any other legal-political-social system, Islam is an integrated concept of life in this world and in the hereafter. It regulates the conduct of the state and of the individual in all aspects of human concerns . . .").

a central role in shaping societal norms. Criminal law adjudications serve to help communicate and reinforce what behavior is acceptable and what behavior is condemnable.¹⁶⁴

But a judgment in a criminal case, especially the judgment of acquittal, may be based upon any number of different reasons, and different reasons may carry different messages. An acquittal may mean that a defendant is factually innocent of the offense. Or, it may mean that the defendant committed the offense but did so for justifiable reasons. In this case, the verdict means to tell others that they can engage in similar conduct under similar circumstances in the future. Or, an acquittal may mean that the defendant committed the offense but under conditions that render him blameless for it, such as the existence of conditions giving rise to an excuse defense or the lack of culpability. The message that this verdict means to convey is directly the opposite from the previous: the conduct remains condemnable, and persons in the future should not engage in such conduct under such circumstances; it is only because of the special excusing conditions that this defendant will not on this occasion be punished for what is admittedly condemnable conduct.

Yet, a traditional verdict system, with its general "not guilty" verdict, fails to signal these important differences when a defendant is acquitted. And this introduces dangerous ambiguity in the public meaning given to acquittals. An acquittal based upon an excuse may be mistakenly taken to approve the conduct, which is meant to be condemned. At the same time, an acquittal based upon a justification may be mistakenly taken to condemn the conduct, which is meant to be approved. Only a verdict system that distinguishes between the various reasons for acquittal can satisfy the obligations of the criminal law to use criminal adjudication to establish and reinforce societal norms.

Such a verdict system was created in the Proposed Maldivian Rules of Criminal Procedure (PMRCP) by use of special verdicts that would effectively communicate the criminal law's rules of conduct. The idea to separate verdicts by their functions is not new.¹⁶⁵ Most if not all jurisdictions have a special verdict of "not guilty by reason of insanity," which serves the purposes highlighted here: it allows an acquittal of someone who has violated the criminal law's rules of conduct without undermining the clarity of its prohibitions, by signaling that the acquittal

¹⁶⁴ See SIDDIQI, *supra* note 58, at 9 (describing "the purpose of punishment" as "the humiliation for the convict and *the lesson for the public*" (emphasis added)).

¹⁶⁵ See, e.g., Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1327-36 (2000) (advocating that a verdict of innocent be available with an increased burden of proof to mitigate the social stigma of an unambiguous "not guilty" verdict); Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289 (2003) (arguing for adoption of a Guilty But Partially Responsible verdict, that is, a "doctrinal mitigating excuse of partial responsibility that would apply to all crimes, and that would be determined by the trier of fact"); Paul H. Robinson & Michael T. Cahill, *LAW WITHOUT JUSTICE: WHY THE CRIMINAL LAW DOES NOT GIVE PEOPLE WHAT THEY DESERVE* 210-212 (2005) (advocating the adoption of a verdict system of no violation, justified violation, blameless violation, and unpunished violation). The framework of defenses underlying these verdict proposals is laid out in Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199 (1982) (providing a conceptual framework for distinguishing classes of criminal defenses).

arises from special excusing conditions and is allowed despite the fact that the conduct is condemnable. It is the actor, and not the act, that drives the acquittal. The verdict system we provide in the PMRCP and the Draft Code simply carries this reasoning to its full and logical conclusion. It is a system that provides, for all acquittals, the clarity that the "not guilty by reason of insanity" verdict provides for insanity acquittals.

Under the Draft Code and the PMRCP, four potential judgments are possible. A judgment of "guilty" is the only available judgment of conviction, but an acquittal may take the form of any of three verdicts: "no offense," "not guilty," and "not convictable."¹⁶⁶ A verdict of "no offense" is predicated on a finding that the defendant's conduct did not constitute an offense or, if it did, that it was justified,¹⁶⁷ In other words, what the defendant did is not in fact prohibited by the criminal law. The verdict reaffirms and clarifies the contours of the rules of conduct.¹⁶⁸

The "not guilty" verdict, in contrast, is entered where a defendant has unjustifiably brought about the harm or evil of the offense -- he satisfies the objective elements of the offense definition and does not have a justification defense -- but his violation of the rules of conduct is blameless, perhaps because he does not have the culpable state of mind required by the offense definition or because he has a general excuse defense.¹⁶⁹ The message of this verdict is to condemn the act as a violation of the rules of conduct but to exculpate the actor from criminal liability and punishment.

A judgment of "not convictable" is the most limited form of acquittal, applicable only upon a nonexculpatory defense.¹⁷⁰ Nonexculpatory defenses claim that the defendant cannot be convicted for the offense due to a reason apart from his own actions and capacities. That is, the verdict signals that what was done may well be a violation of the rules of conduct and the actor may well be blameworthy for it, but he is not to be punished because of some reason extrinsic to rules of conduct or blameworthiness, such as diplomatic immunity or a statute of limitations.¹⁷¹ The issue of whether a nonexculpatory defense applies is usually resolved prior to trial. If the

¹⁶⁶ See PMRCP §§ 4.2, 6.6.

¹⁶⁷ See PMRCP, Rule 6.6.

¹⁶⁸ The PMRCP direct the court to enter a judgment of "no offense" if:

[T]he defendant does not satisfy the requirements for liability in Section 20 of the Penal Code because of:

- (i) an absence of an objective element under Section 21(a)(1) of the Penal Code,
- (ii) a justification defense in Chapter 40 of the Penal Code, or
- (iii) any other exemption from liability vitiating the offense harm or wrong.

Id. at (a)(2).

¹⁶⁹ See PMRCP 6.6(a)(3) ("The court must enter a judgment of 'not guilty' if it finds that the defendant does not satisfy the requirements for liability in Section 20 of the Penal Code but is not entitled to a judgment of 'no offense.'").

¹⁷⁰ See PMRCP 4.2; see also DMPC § 15 (requiring that a defendant prove all elements of a general defense, including a nonexculpatory defense, by a preponderance of the evidence).

¹⁷¹ See ROBINSON, CRIMINAL LAW, *supra* note 49, at § 10.1; see also DMPC ch. 60 (listing and defining non-exculpatory defenses).

elements of the defense are satisfied, prosecution usually ceases immediately, leaving no definitive assessment of whether the defendant's conduct in fact violates the rules of conduct or whether his violation is blameworthy. But the verdict signals that one cannot assume that what was done in this case is something that the law normally authorizes, or that the defendant getting this kind of acquittal is necessarily blameless. The latter is important because one might well wish to attach collateral consequences to this verdict that one does not attach to other acquittals. For example, the defendant who gets this verdict in a child abuse case due to official immunity is not necessarily someone to whom the community will want to issue a teaching licence.

Of course, the communicative verdict system proposed here cannot be realized unless the penal code itself is drafted in a way that allows the adjudicator to make the important distinctions between the reasons an acquittal is given. The Draft Code was drafted in such a way. For example, the Draft Code distinguishes between objective elements and culpability requirements in Section 21. It distinguishes between the different types of general defenses, categorizing them into chapters of justification, excuse, and nonexculpatory defenses.¹⁷² Without these relevant distinctions explicitly recognized in the penal code, the drafters, and adjudicators, would be powerless to clarify the important differences between acquittals. (Such a verdict system would be impossible to implement in a majority of American jurisdictions because their codes fail to adequately distinguish between justification defenses and excuse defenses.¹⁷³)

By creating a verdict system that communicates the meaning behind an acquittal, each criminal adjudication can reinforce and refine the community's understanding of the criminal law's commands and, thereby, the community's norms instantiated therein. Such a verdict system can contribute to that important goal that Shari'a seemingly sets for itself: to be not just a fair adjudicator of the cases of individual defendants, but to be a mechanism by which the law helps to tell people how to live their lives.

VII. THE PROBLEM OF OVERLAPPING OFFENSES

It is not unusual for a legislature to define crimes as the apparent need arises. Especially when deviant conduct is well-publicized, lawmakers often enact new criminal legislation to show that they are responsive to popular concerns,¹⁷⁴ even if existing law already criminalizes the

¹⁷² See DMPC ch. 40 (Justification Defenses); DMPC ch. 50 (Excuse Defenses); DMPC ch. 60 (Nonexculpatory Defenses).

¹⁷³ See, for example, the Model Penal Code's combining of justification defenses and mistake as to a justification excuses in Article 3. For a discussion of this issue, see ROBINSON, *CRIMINAL LAW*, *supra* note 49, at §8.5.

¹⁷⁴ See, e.g., Ed Anderson, *Home Invasion Might be New Crime: House is Swayed to Single it Out*, NEW ORLEANS TIMES-PICAYUNE, June 8, 1999, at A4 (noting that the Louisiana House of Representatives passed a bill to criminalize home invasion, despite its recognition that the state already had laws proscribing burglary, aggravated burglary, and breaking and entering) See also Paul H. Robinson & Michael Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 644-45 (2005) (suggesting that frivolous criminal prohibitions often pass with little difficulty because legislators fear being labeled "soft on

(continued...)

conduct at hand.¹⁷⁵ Even without the distorting effects of publicity and politics, ad hoc legislation often produces overlapping offenses. In the U.S., Michigan has a general trespass prohibition,¹⁷⁶ but it also has a separate offense that criminalizes trespass on cranberry marshes¹⁷⁷ and another for trespass on huckleberry and blackberry marshes.¹⁷⁸ In addition to Illinois' general forgery offense,¹⁷⁹ the Illinois Criminal Code has at least ten separate offenses criminalizing forgery of particular kinds documents.¹⁸⁰ And although Maryland state law already criminalizes manslaughter generally,¹⁸¹ lawmakers enacted a second statute criminalizing manslaughter by automobile or vessel.¹⁸²

A. THE PROBLEMS CREATED BY OVERLAPPING OFFENSES

This kind of multiplying of offenses produces serious problems. It creates long and complex penal codes,¹⁸³ which make it more difficult to find relevant offenses and to promote uniform application.¹⁸⁴ This is a special problem in a society with little tradition and training in

¹⁷⁴ (...continued)

crime"); David A. Skeel, Jr. & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 U. PA. J. CONST. L. 809 (2006) ("The result is that criminal law proliferates. Legislatures regularly add crimes and rarely remove them. Criminal codes become ever broader and ever more cluttered with obscure, outmoded prohibitions just waiting for some entrepreneurial prosecutor to use them to extract a more favorable plea bargain.").

¹⁷⁵ See Stuntz, *supra* note 127, at 512 (discussing the breadth of the criminal law); Douglas Husak, *Twenty-Five Years of George P. Fletcher's Rethinking Criminal Law: Crimes Outside the Core*, 39 TULSA L. REV. 755, 770 (2004) ("More typically, the original conduct was already criminalized, and the new offense simply describes the proscribed behavior more specifically.").

¹⁷⁶ Mich. Comp. Laws. Ann. § 750.552 (West 2004). See also Paul H. Robinson et al., *The Five Worst*, *supra* note 128, at 37 (discussing Michigan's trespass overlap).

¹⁷⁷ MICH. COMP. LAWS. ANN. §§ 750.548 (West 2004).

¹⁷⁸ MICH. COMP. LAWS. ANN. §§ 750.549 (West 2004).

¹⁷⁹ 720 ILL. COMP. STAT. 5/17-3.

¹⁸⁰ See 1 FINAL REPORT (Illinois), *supra* note 140, at xl n.76-77 (identifying separate statutes criminalizing the forgery of corporate stock, UPC labels, food stamps, credit and debit cards, and other items).

¹⁸¹ See MD. ANN. CODE art. 27, 387 (1996).

¹⁸² See MD. ANN. CODE art. 27, 388 (1996).

¹⁸³ See Paul H. Robinson & Michael T. Cahill, *Model Penal Code Second: Good or Bad Idea? Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 172 n.16 (describing the dramatic increase in length of the Illinois penal code between 1961 and 2003).

¹⁸⁴ See, e.g., Robinson & Cahill, *The Accelerating Degradation*, *supra* note 162, at 636 (continued...)

the use of comprehensive penal codes. Yet, even more serious problems arise from the fact that offenses overlap with one another.

Overlapping offenses complicate the application and interpretation of both provisions.¹⁸⁵ According to standard interpretive canons, a code provision must be read so as not to render another code provision superfluous.¹⁸⁶ Where a newly added provision is in fact unnecessary, because the conduct is already criminalized by another provision, deference to this dictate requires a court to alter the interpretation of the previously existing provision so as to avoid making the new provision meaningless. This exercise, of course, only introduces confusion into the application of the code. Legislators see the political usefulness of showing their constituents that they are responsive but rarely see that the unneeded "solution" often serves only to create a problem.

Another problem with overlapping offenses is the difficulty it creates for rational grading of offenses. Basic fairness dictates that offenders who commit like offenses should receive similar punishments, all other things being equal, but overlapping offenses invite inconsistent punishments. For example, an Illinois "reckless conduct" statute sets the penalty for endangering bodily safety as a Class A misdemeanor.¹⁸⁷ Instead of relying on this provision or even appending separate subsections with greater punishment possibilities, Illinois enacted multiple overlapping offenses criminalizing subsets of reckless conduct. The penalties imposed by these statutes depart greatly from the simple Class A misdemeanor without an obvious link between increased harm (or risk of harm) and increased punishment.¹⁸⁸ As another example, the Illinois Code grades unsworn falsification to authorities as a petty offense in some cases and a Class 1 felony in others, with no apparent explanation.¹⁸⁹ The process of ad hoc legislation commonly operates without regard, or perhaps even knowledge, of what is already on the books.

Another danger in overlapping offenses lies in variations in the exercise of discretion that can exist between different prosecutors. For the same conduct, one prosecutor may charge the

¹⁸⁴ (...continued)

(noting that complexity and multiple prohibitions hamper the criminal law's notice function to the point where even attorneys find it difficult to decipher).

¹⁸⁵ *Id.* at 639.

¹⁸⁶ *See, e.g., Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) ("A statutory interpretation that renders another statute superfluous is of course to be avoided."); *Conn. Nat. Bank v. Germain*, 503 U.S. 249 (1992) ("[C]ourts should disfavor interpretations of statutes that render language superfluous").

¹⁸⁷ 20 ILL. COMP. STAT. 5/12-5 (West 2005).

¹⁸⁸ *See* Robinson & Cahill, *The Accelerating Degradation*, *supra* note 162, at 643 n.39 (finding eight risk creation offenses, ranging in penalty from Class A misdemeanors to Class 2 felonies); *see also* PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995) (suggesting shared intuitive notions of punishment distribution).

¹⁸⁹ *See* 1 FINAL REPORT (Illinois), *supra* note 140, at xlv n.85 (noting that a false statement related to obtaining a liquor license is a petty offense while a false statement in application for public assistance is a Class 1 felony).

more serious of the overlapping offenses, while another charges the less serious. As a result, the offender's punishment may depend not on what he did, but on his luck in the particular prosecutor assigned his case.

A related problem from overlapping offenses is that it gives individual prosecutors improper discretion to manipulate punishment by deciding under which statute to charge a defendant. The prosecutor's charging decision sets the maximum penalty to which the defendant may be subjected and can set a minimum as well. In Massachusetts, for example, a prosecutor's decision to bring a charge of "prize fighting" instead of "boxing" leads to a maximum sentence of ten years rather than three months.¹⁹⁰ In Illinois, a defendant accused of fraudulently obtaining public benefits can face a maximum of either five years or fifteen years in prison depending under which fraud statute the prosecutor charges the offender.¹⁹¹ When a prosecutor, rather than a judge or jury, determines an offender's penalty, he undercuts the adjudicative authority that is more appropriately vested in the more impartial judicial branch.

Where the same conduct is punishable under two or more statutes, the prosecutor can also double (or triple) the offender's punishment by charging under all statutes.¹⁹² In Pennsylvania, for example, buying a small amount of marijuana could bring charges for possession of a controlled substance,¹⁹³ purchase of a controlled substance,¹⁹⁴ marijuana possession,¹⁹⁵ and a drug paraphernalia charge stemming simply from a plastic sandwich bag containing the marijuana.¹⁹⁶

¹⁹⁰ Compare Mass. GEN. LAWS ANN. ch 265, § 9 (West 2000), with *id.* ch 265, § 12 (West 2000). See also Paul H. Robinson et al., *The Five Worst*, *supra* note 128, at 52 (identifying and discussing the disparity in sentences between boxing and prize fighting).

¹⁹¹ Compare 720 ILL. COMP. STAT. ANN. 5/17-6 (Michie 1993) (setting the maximum penalty for "State Benefits Fraud" at a Class 3 felony), and 305 ILL. COMP. STAT. ANN. 5/8A-6 (Lexis 1999) (setting the maximum penalty for public assistance fraud at a Class 1 felony), with 730 ILL. COMP. STAT. ANN. 5/5-8-1 (Michie 1993) (setting the maximum sentence for a Class 1 felony at fifteen years and the maximum sentence for a Class 3 felony at five years). See also *Ball v. United States*, 470 U.S. 856, 859 (1985) ("This Court has long acknowledge the Government's broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case.").

¹⁹² See, e.g., *Texas v. Cobb*, 532 U.S. 162, 182 (2001) (Breyer, J., dissenting) ("That is because criminal codes are lengthy and highly detailed, often proliferating 'overlapping and related statutory offenses' to the point where prosecutors can easily 'spin out a startlingly numerous series of offenses from a single ... criminal transaction.'") (quoting *Ashe v. Swenson*, 397 U.S. 436, 445, n. 10 (1970)). But see *Ball*, 470 U.S. at 861 ("Congress could not have intended to allow two convictions for the same conduct...").

¹⁹³ 35 PA. STAT. ANN. § 780-113(16) (West 2003).

¹⁹⁴ 5 PA. STAT. ANN. § 780-113(19) (West 2003).

¹⁹⁵ 5 PA. STAT. ANN. § 780-113(31) (West 2003).

¹⁹⁶ 5 PA. STAT. ANN. § 780-113(32) (West 2003). Since marijuana is generally transported in plastic bags, the paraphernalia offense *should* not be considered separately from
(continued...)

The resulting degree of prosecutorial choice makes it difficult to obtain uniform adjudication of similar violators or to be able to predict what punishment will follow a given offense.

Further, the use of overlapping offenses significantly alters the plea bargaining process to great prosecutorial advantage. The prosecutor can artificially add overlapping offenses and then remove them as part of a “deal” or “bargain.”¹⁹⁷ In such a deal, the offender receives no legitimate reduction in punishment for his plea. (“Real offense” sentencing has been implemented to minimize this problem, but its success has been questioned.¹⁹⁸) The use of overlapping offenses thus increases the percentage of guilty pleas.¹⁹⁹ Indeed, it also may increase the risk of convicting innocent defendants because an individual may choose to plead strategically, wrongfully admitting guilt to a single crime rather than risking a trial in the face of multiple overlapping charges.

To summarize, overlapping offenses can cause unfairness and irrationality in the adjudication of criminal cases. This is a concern not only for its own sake but also because such injustices can undercut the moral credibility of the criminal law and, thereby, its crime control effectiveness. The law depends upon its moral authority in a variety of ways: to avoid resistance and subversion, to gain the efficiency and power of stigmatization, to earn influence over the shaping of societal norms, and to gain compliance in offenses that are not obviously condemnable on their face.²⁰⁰ Yet, lawmakers have in the past shown little concern for limiting

¹⁹⁶ (...continued)

the possession or purchase activity.

¹⁹⁷ The discretion of prosecutors to set punishment levels can be mitigated by a statutory provision (“multiple-offense limitation provision”) that attempts to limit prosecution for fully overlapping offenses. *See, e.g.*, MODEL PENAL CODE § 1.07; DMPC § 94. But there is a limit to how much such provisions can be relied upon, for their effective operation in turn depends upon the proper exercise of discretion by judges. Further, the provisions typically resolve only the problem of an offense wholly included within a second offense, not the problem of two offenses that have significant overlap but where each contains some minor difference from the other.

¹⁹⁸ *See, e.g.*, Julie R. O’Sullivan, *In Defense of the U.S. Sentencing Guidelines’ Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1349 (1997) (noting that the U.S. Sentencing Guidelines’ “modified real-offense system has been vigorously and nearly universally criticized” despite the fact that real-offense sentencing somewhat limits prosecutorial discretion). Under a real-offense sentencing system, an offender’s sentence depends more on the “real” circumstances of the offense than the particular charge or charges that the prosecutor chooses to bring. *Id.* at 1347.

¹⁹⁹ *See* Stuntz, *supra* note 127, at 520 (“Charge-stacking, the process of charging defendants with several crimes for a single criminal episode, likewise induces guilty pleas, not by raising the odds of conviction at trial but by raising the threatened sentence.”); *see also* BUREAU OF J. STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 416 (Kathleen Maguire & Ann L. Pastore, eds. 2002) (reporting that 94.7% of federal convictions were obtained by guilty pleas in 2000).

²⁰⁰ *See* Robinson & Darley, *supra* note 176, at 457 (“If [the criminal law] earns a

(continued...)

the creation of new, overlapping offenses or for tailoring their legislation to cover only the gaps they see in the existing code,²⁰¹ in part because the dangers from overlaps have never been made clear.

B. SOLUTIONS

In many countries, the problem of overlapping offenses is difficult to deal with. Legislatures don't like to undo what they have done. The reasons that prompted legislators to initially pass legislation may still exist, such as the need to show a valued constituent group that action has been taken. And it often is difficult to get legislatures to think about the larger picture, to think beyond the immediate problem at hand. Finally, the large "housecleaning" project that is required to convert an ad hoc accumulation of specific crime-de-jour offenses into a code of nonoverlapping offenses is not the sort of project that is likely to energize political support.

But, interestingly, the problem of overlapping offenses is more easily solved in Muslim countries, like the Maldives. Because the Maldives has little tradition of comprehensive criminal law codification, the drafters of the proposed code were free to construct a code that from its start aimed to avoid overlap between offenses. Further, the Maldives has no tradition of large and complicated penal codes, thus there is not the same constituent expectations that the crime du jour problem should be solved by criminal code legislation.

The best way to minimize the problem of overlapping offenses is to minimize overlap in the initial drafting of the offenses.²⁰² This was the approach taken in drafting the Draft Code, by

²⁰⁰ (...continued)

reputation as a reliable statement of what the community . . . would perceive as condemnable, people are more likely to defer to its commands as morally authoritative and as appropriate to follow in . . . borderline cases.").

²⁰¹ See Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 288 (1998) ("[N]o incentive operates to induce Congress to write more carefully.").

²⁰² See Paul H. Robinson, *A Sentencing System for the 21st Century*, 66 TEX. L. REV. 1, 32 ("The system should define each component of criminal conduct in its generic form."). A different approach is found in MODEL PENAL CODE § 1.07, cmt. at 104 (1985). Section 1.07 is designed to "limit the multiplicity of prosecutions and convictions for what is essentially the same conduct." Thus Section 1.07 recognizes that overlapping offenses may be troublesome, but seeks to control their effect rather than to eliminate them from the code. But many states, even those that have largely adopted the Model Penal Code, have not even incorporated Section 1.07. See Michael T. Cahill, *Offense Grading and Multiple Liability: New Challenges for a Model Penal Code Second*, 1 OHIO ST. J. CRIM. L. 599, 604-09 (2004) (discussing the challenges in addressing the problem of multiple offense liability). The DMPC has a multiple-offense limitation provision, albeit one that has fewer overlapping offenses to worry about. DMPC § 94 cmt. (Prosecution for Multiple Offenses) ("[M]ultiple convictions are generally limited to those situations in which there are genuinely two separate crimes, whether arising out of the same act or arising out of separate acts. . . . Section 94(b)(1)(C) prevents conviction of multiple offenses (continued...)

defining each offense to address a discrete harm or evil, not included in any other offense. Part of the drafting approach was to incorporate into a single offense all conduct of a similar nature, then using grading distinctions, or sentencing factor distinctions, to break the base offense into distinct parts. For example, the Draft Code defines assault broadly,²⁰³ then specifies three distinct offense grades.²⁰⁴ A sentencing factor increase for assaults that occur within the home allowed us to avoid creating a redundant offense of home invasion.²⁰⁵ Were each of the separate grading provisions defined as a separate offense, as many modern codes do, a prosecutor could charge multiple offenses. But by including all such related conduct into one offense, the structure of the provisions themselves makes clear that the prosecutor can only charge one offense, and that the different subspecies of the offense are only alternative grading choices, not separate harms.

This move toward defining a base offense broadly, before breaking it into different grading categories, has the added advantage of focusing directly on protecting the interest at stake rather than trying to anticipate the ways in which persons might harm the interest. It is commonly the case that one can violate a societal interest in a very wide variety of ways. For example, before the promulgation of the Model Penal Code, state legislatures attempted to anticipate every way in which a person might disrespect a dead body, defining an offense that enumerated the various ways anticipated.²⁰⁶ Such attempts at enumeration proved futile when a clearly disrespectful action did not fit into any of the statutorily provided categories. Modern codes, however, shift the formulation of the offense to a general standard that focuses on the real harm or evil, rather than the manner of causing it, such as prohibiting conduct that the actor knows would “outrage ordinary family sensibilities.”²⁰⁷

This move toward more general criminal prohibitions may prompt two legality-based objections. The first is that general standards can, in addition to criminalizing undesirable conduct, cover behavior that is perfectly benign. This is a valid concern, as statutes that are too vague can tend to over-criminalize. But vagueness is not inevitable with breadth. The concept of “outrage ordinary family sensibilities” has an understandable meaning. It is perhaps a

²⁰² (...continued)

where each offense is defined as a continuous course of conduct and the offender is accused based on the same uninterrupted conduct.”).

²⁰³ *See, e.g.*, DMPC § 120 (a) (1)-(2) (2005) (defining assault: “A person commits an offense if he, without the consent of another person, touches or injures such person, or put such person in fear of imminent bodily injury.”)

²⁰⁴ *See, e.g.*, DMPC § 120 (b) (2005) (distinguishing assaults into three grades: serious assault, injurious assault, and simple assault).

²⁰⁵ *See, e.g.*, DMPC § 120 (c) (2005) (increasing baseline sentence if assault takes place in a residence).

²⁰⁶ *See, e.g.*, GA. CODE ANN. § 31-21-44.1 (2002) (enumerating possible abuses of a dead body).

²⁰⁷ *See, e.g.*, MODEL PENAL CODE § 250.10 (Proposed Official Draft 1962) (“Except as authorized by law, a person who treats a corpse in a way that he knows would outrage ordinary family sensibilities commits a misdemeanor.”).

complex meaning, but that only reflects the fact that our intuitions in this respect are complex. One would expect that there would be some agreement among persons as to what conduct did and did not meet this standard. In any case, the danger of reasonable disagreement is minimized by including, as the Draft Code always does, a culpability requirement. That is, typically the *defendant* must be shown to have been aware that the conduct would cause the prohibited result. In each instance, a balance is struck between vagueness and specificity that attempts to minimize over- and under-inclusiveness.²⁰⁸

Some also may object that the use of general prohibitions rather than more specific conduct violate the spirit if not the terms of the legality principle in failing to give fair notice.²⁰⁹ But broad statutes, while perhaps less effective at giving constructive notice of the law, are often more effective at giving actual notice, because they are more easily understood and remembered than the detailed, complex provisions that are required if the definition is purely conduct based.

For these reasons, the Draft Code seeks to minimize overlapping offense, using careful drafting and sometimes a shift to more general criminalization standard. The approach improves the Code's effectiveness in communicating its rules of conduct and, at the same time, improves its fairness by minimizing the opportunities for prosecutorial abuse.

VIII. THE PROBLEM OF COMBINATION OFFENSES

Combination offenses are conceptually related to overlapping offenses but differ in important theoretical and practical ways. Overlapping offenses exist when a code contains multiple provisions that criminalize the same behavior. A combination offense is a single offense consummated when an offender's single line of conduct constitutes two or more separate, independently-defined offenses. For example, robbery "simply prohibits a combination of theft and assault."²¹⁰ Other examples of combination offenses, which are common in American and foreign penal codes,²¹¹ include burglary,²¹² arson,²¹³ and kidnapping.²¹⁴

²⁰⁸ See, e.g., MODEL PENAL CODE § 211.2 ("A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury."). Such a prohibition can replace numerous other rules of conduct while only overlapping in minimal ways with the remainder of a code.

²⁰⁹ See *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001) ("[T]his Court has often recognized the 'basic principle that a criminal statute must give fair warning of the conduct that it makes a crime.'").

²¹⁰ Paul H. Robinson et al., *Making Criminal Codes Functional: A Code of Conduct and a Code of Adjudication*, 86 J. CRIM. L. & CRIMINOLOGY 304, 309 (1996).

²¹¹ See, e.g., 18 PA. CONS. STAT. ANN. § 3502(a) (2005) ("A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter."); CAL. PENAL CODE § 211 (2005) ("Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."); INDIA PEN. CODE § 391 (defining the commission of a robbery by five or more persons as dacoity); SWEDISH PENAL

(continued...)

A combination offense typically creates overlapping offenses. For example, robbery, which combines theft and assault, necessarily creates overlapping offenses because a person who commits robbery also necessarily commits theft and commits assault. Accordingly, combination offenses are superfluous in the sense that they add no new definition of criminality. They often do introduce a grading that did not previously exist, specifying a single, higher grade than either of the two separate offenses. But the combination offense's performance of this grading function is seriously problematic. As explained below, combination offenses in fact hamper rather than help proper grading because use of the combination offense has the effect of reducing the ability of the code to assign different grades to importantly different courses of conduct.

Combination offenses sometimes arise because of the same political dynamic that creates unnecessary overlapping offenses. For example, a high-profile kidnapping led to the recognition of a federal kidnapping offense,²¹⁵ even though kidnapping is simply a combination of unlawful detention and a criminal threat, both of which were already criminalized. More recently, a wave of well-publicized robberies in Florida in which the victim's motor vehicle was taken prompted that state to define a new offense of carjacking.²¹⁶

But the use of combination offenses is something of historic origin. Because certain combinations of offenses commonly appeared together before Common Law judges,²¹⁷ it was

²¹¹ (...continued)

CODE ch. 8, § 5 (2004) ("If a person steals from another by means of violence or by a threat implying or appearing to the threatened person to imply an imminent danger . . . imprisonment for at least one and at most six years shall be imposed for robbery."), *available at* <http://www.sweden.gov.se/sb/d/574/a/27777>

²¹² Burglary "combines trespass and attempt to commit another substantive offense, such as theft." Robinson et al., *Making Criminal Codes*, *supra* note 210, at 310.

²¹³ Arson is a combination of property damage or destruction and endangerment. *See* MODEL PENAL CODE & COMMENTARIES § 220.1 cmt. 1, at 34-37 (Tent. Draft No. 11 1960) (discussing the development of arson as an offense, arson statutes in different states, and the formulation of arson combining property destruction and endangerment adopted in the Model Penal Code).

²¹⁴ Kidnapping is a combination of unlawful restraint or false imprisonment and an attempt to commit a secondary offense, such as robbery or rape. *See* MODEL PENAL CODE & COMMENTARIES § 212.1 cmt. 1, at 11-13 (Tent. Draft No. 11 1960) (discussing the relation of kidnapping to false imprisonment and describing the primary significance of kidnapping as an attempt to commit other offenses).

²¹⁵ *See, e.g.*, MODEL PENAL CODE & COMMENTARIES § 212.1 cmt. 1, at 215 (Official Draft and Revised Comments 1980) (discussing the impact of the much publicized Lindbergh kidnapping and other notorious cases on the proliferation of kidnapping statutes).

²¹⁶ *See* Lucy Morgan, *Measure Stiffens Carjacking Penalty*, ST. PETERSBURG TIMES (Florida), Feb. 18, 1993, at 4B (noting the origins of Florida's carjacking law); FLA. STAT. ANN. § 812.133 (2005) (defining carjacking).

²¹⁷ *See, e.g.*, WILLIAM BLACKSTONE, 4 COMMENTARIES ch. 16 (discussing arson and
(continued...))

these repeating factual patterns, rather than logical or conceptual categories, that shaped Common Law offense definitions.²¹⁸ Takings alone were theft; but a common variation, takings by force (theft and assault), was defined to be the offense of robbery. Takings from a person's house (theft and trespass) was defined as burglary. Each of these common combinations, with its own name, became deeply ingrained in the Anglo-American legal tradition, to the point that they became not only accepted but expected. The drafters of the Model Penal Code, despite some reservations, felt compelled to continue the burglary offense, for example, because “[c]enturies of history and a deeply embedded Anglo-American conception like burglary cannot easily be discarded.”²¹⁹ “If we were writing on a clean slate, the best solution might be to eliminate burglary as a distinct offense and make burglary an aggravating factor in the grading provisions for theft.”²²⁰

Of course, in a society without a codification tradition, it was possible for the code drafters to write on a clean slate. And, as is discussed below, there were special reasons why the Maldives needed to avoid the problems created by combination offenses.

A. THE PROBLEMS CREATED BY COMBINATION OFFENSES

Many of the problems created by combination offenses are similar to those problems created by overlapping offenses: they add length and complexity to a criminal code, which makes it more difficult to use and understand, without adding benefit. Their existence creates the possibility for prosecutorial manipulation of grading and punishment, by virtue of the prosecutor's discretionary control over the charging decision. This prosecutorial discretion also creates the possibility of disparate grading and punishment of similar offenders and, in the worst case, increases the risk of convicting an innocent defendant.²²¹

The existence of combination offenses also exacerbates the difficult dilemma that jurisdictions have in dealing with the problem of concurrent versus consecutive sentences. Consecutive sentences tend to overpunish offenders, by treating each of two offenses as if it were the only offense with its own sentence. Concurrent sentences have effect of trivializing one or the other of the offenses, since it adds nothing to the offender's punishment. The better approach is to avoid overlapping and combination offenses, which then allows punishment for every instance of independent wrongdoing but without double punishment.

²¹⁷ (...continued)
burglary at common law).

²¹⁸ *Cf.* ROBINSON, CRIMINAL LAW, *supra* note 49, at § 15.3 (suggesting administrative convenience as a reason why robbery statutes may have been retained).

²¹⁹ MODEL PENAL CODE & COMMENTARIES § 221.1 cmt. 1, at 57 (Tent. Draft No. 11 1960).

²²⁰ *Id.*

²²¹ *See supra* Part VII.A.

But the most serious difficulty created by combination offenses is its effect in sharply curtailing the sophistication of the code's grading judgments.²²² Consider the offense of robbery (which is theft and assault). Assume that theft and assault offenses each include three *grades of seriousness*. Thus, when prosecuted as two separate offenses, their combination would yield nine possible offense grading categories.²²³ If a code has a theft offense with grades a, b, and c, and an assault offense with grades x, y, and z, then an offender could be prosecuted for any of nine combinations:

		Theft Grades		
		a	b	c
Assault Grades	x	ax	bx	cx
	y	ay	by	cy
	z	az	bz	cz

These nine possible offense categories take into account all of the grading distinctions that the code has determined are relevant in judging the seriousness of these offenses. However, the same code's robbery offense is likely to carry only three offense grades,²²⁴ forcing a compression of the nine varieties of robbery (theft and assault) as envisioned by the uncombined offenses into the three categories offered by the combination offense (robbery alone). For the code to be fully effective in capturing relevant distinctions in behavior, the grading system should recognize nine grading categories when theft and assault are involved, which is made impossible by the combination offense of robbery.

The primary argument for retaining combination offenses is that while each underlying crime is independently punishable, the interaction between certain offenses creates a greater harm or evil and thereby justifies increased punishment.²²⁵ But addressing the interactive effect

²²² See ROBINSON, CRIMINAL LAW, *supra* note 49, at § 15.4, at 781 ("A better approach [than having combination offenses] would be to isolate distinct harms in distinct offenses . . . to recognize different grades of each offense depending on the seriousness of the particular kind of violation, and to allow liability for whatever combination of offenses the offender has committed.").

²²³

²²⁴ See, e.g., MODEL PENAL CODE & COMMENTARIES § 222.1 cmt 1, at 97-98 (Official Draft and Revised Comments 1980) (discussing grading schemes of various state robbery statutes); see also N.Y. PENAL LAW §§ 160.05, 160.10, 160.15 (McKinney 2004) (defining three grades of robbery); ALA. CODE §§ 13A-8-41 to 12A-8-43 (1975) (classifying robberies in to three classes); N.J. STAT. ANN. § 2C:15-1 (West 2001) (delineating robbery into two grades).

²²⁵ The Model Penal Code drafters relied on this rationale in including robbery as a separate offense. See MODEL PENAL CODE & COMMENTARIES § 222.1 cmt. 1, at 69 (Tent. Draft No. 11 1960) ("The combination of penalties for a petty theft and a petty threat or minor violence (continued...)

through the creation of combination offenses ultimately harms accurate grading more than helping it, as discussed above. Drafters can effectively take account of an interaction effect simply by adding a special grading provision to either of the underlying offenses. A theft committed in combination with an assault can be given a special grading boost in the grading provision of either the assault offense or the theft offense.

The kinds of difficulties created by combination offenses – complexity and confusion, unconstrained prosecutorial discretion, increased potential for unjustified disparity in grading, and complications in the proper grading of multiple offenses that ultimately must rely on judicial discretion for solution – are difficulties that are especially problematic for Maldivians and for other countries which have no code tradition. The lack of experience and training in the application of codes, among judges and prosecutors, exacerbates the likely effect of the combination offense difficulties. At the same time, because of the far-flung courts in the Maldives, there is a greater possibility for disparity in decision making. Aggravating this problem is the lack of adequate communication facilities, which hinders the ability of the Ministry of Justice to effectively oversee the courts on outlying islands, further increasing the potential for inconsistency.²²⁶ The Maldivians need a criminal code that is at once simple and straightforward yet one that is sufficiently comprehensive in its application so as to minimize the need for discretionary judgments that would bring disparity.

²²⁵ (...continued)

by no means corresponds to the undesirability and danger of the [robbery] offense."). The drafters surmised that robbery involves "a special element of terror in this kind of depredation" and results in "the severe and widespread insecurity generated by the bandit, indiscriminately assailing anyone who may be despoiled of property." MODEL PENAL CODE & COMMENTARIES § 222.1 cmt. 5, at 72 (Tent. Draft No. 11 1960).

Other combination offenses have been defended with similar justifications. *See* MODEL PENAL CODE & COMMENTARIES §212.1 cmt. 1, at 15 (Tent. Draft No. 11 1960) ("If the object of the kidnapping be the commission of another offense, the penalty for the latter, even if combined with a penalty for false imprisonment, may not be proportionate to the gravity of the behavior as a whole."). Supporters of California's burglary statute defend it by referencing the potential for violence that such a fact pattern creates:

Burglary laws are based primarily upon a recognition of the dangers to personal safety created by a burglary situation. Lawmakers are concerned that the intruder will harm the occupants in attempting to perpetrate the intended crime or that the occupants will panic or react violently to the invasion, thereby inviting more violence. The laws are primarily designed, then, not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall the germination of a situation dangerous to personal safety. Therefore the higher degree of the burglary law aims to prevent those situations which are most dangerous and thus most likely to cause personal injury.

People v. Lewis, 274 Cal. App. 2d 912, 920 (Cal. Ct. App. 2d App. Dist 1969).

²²⁶ For a discussion of these and related special challenges in the Maldivian situation, see *supra* notes 10, 11, 13, 16, 45-46 and accompanying text.

B. SOLUTIONS

As with overlapping offenses, the solution to the problem of combination offenses was quite easier than it would have been in common law countries. Drafters were not faced with the task of expunging traditional, redundant combination offenses.²²⁷ The Maldivians had no expectation of combination offenses that had to be overcome. Instead, drafters were able to simply define all *necessary* offenses, but no more, and use special grading provisions if it was necessary to take account of a special interactive effect between two offenses. They took what might be called a "building blocks" approach in defining the scope of offenses, in which each separate identifiable harm or evil could be represented by a single offense whose grading takes account of different levels of seriousness of the harm or evil. Thus, the overall seriousness of any criminal episode could be determined by adding up the offense grades of each of the "building blocks" involved. The approach offers grading sophistication while preserving simplicity.²²⁸

For example, the Draft Code includes no separate burglary offense. An offender who engages in conduct that constitutes common law burglary is liable for criminal trespass and any additional offenses, such as theft or rape, committed or attempted during the trespass. Under the grading provisions for criminal trespass, intrusion into a dwelling is an aggravated form of trespass, accounting for the extra harm (the "interactive effect") involved when a burglar commits his offense by entering a person's home.²²⁹ If the offender committed the trespass in order to steal something from the home, he commits the second offense of theft or attempted theft, which has five grades in existing Maldivian penal law.²³⁰ Combining the five theft grading categories with the three grading categories of criminal trespass²³¹ results in fifteen different grading combinations for a given burglary case. This provides a better estimate of the proper grade of the full criminal episode than the traditional burglary offense with its usual two or three grading categories.

Western lawmakers might have understandable hesitancy about what seems to be a radical departure from the Anglo-American tradition of criminalizing certain combinations of offenses. However, the Draft Code drafting work suggests that the goals of combination offenses, even the goal of recognizing special interactive grading effects, can be achieved more effectively through a non-combination approach. And an added advantage of the more simple yet more powerful separate "building-block" approach is that it sets the foundation for a similarly simpler yet more powerful sentencing guideline system, discussed in the next Part.

²²⁷ See *supra* notes 217-220 and accompanying text.

²²⁸ Note that the "building blocks" approach also provides a means to solve the concurrent-versus-consecutive sentence problem. A formula in the sentencing provisions reduces the proportion of the full sentence that is to be served for each additional offense, but all sentences are consecutive, thus no offense is trivialized. See DMPC § 1006.

²²⁹ DMPC § 230(c)(1).

²³⁰ DMPC § 210(b).

²³¹ DMPC § 230(c).

IX. SIMPLE YET POWERFUL SENTENCING GUIDELINES

The previous Parts have touched on the grading function of penal code. Codes not only define crimes but also establish the relative seriousness of the crimes by assigning each to a particular "grade" that sets the maximum, and sometimes minimum, sentence that may be imposed for the offense. The final step in the adjudication process -- the determination of a specific sentence within the range authorized by the code's grading -- is typically done by the exercise of judicial discretion or, in the modern trend, through application of sentencing guidelines. The movement toward sentencing guidelines is driven by a number of factors. First, sentencing guidelines are thought to have the potential to improve sentencing uniformity and to minimize the potential for abuse of discretion. Further, they properly preserve the criminalization and punishment authority with the legislature, letting the most democratic branch make the value judgments required to determine the relative seriousness of different harms and evils and to determine the factors that are to be relevant in assessing blameworthiness.

There is an obvious unfairness in similar offenders committing similar offenses but receiving noticeably different amounts of punishment. Excessive variation in sentences harms the moral credibility of the criminal justice system by allowing factors beyond the nature of the offense, such as a particular judge's sentencing philosophy, to influence a given offender's sentence. However, since no two offenders or crimes are exactly alike, some sentencing discretion is needed in any system. The goal of sentencing guidelines must be to allow the judicial discretion to account for the unique facts of each case but not to preempt legislative determination of the value and policy judgments necessary in defining the relative seriousness of offenses and the determinants of blameworthiness.²³²

Guidelines can also reduce the potential for abuse of sentencing discretion. The vast majority of sentencing judges may have no inclination toward bias, but even a conscientious judge can be subject to subconscious biases. For example, it is a well-known psychological phenomena that people empathize more, and find more, believable people like themselves.²³³

²³² For a general discussion of the proper allocation of sentence decisionmaking between judges and the legislature, see Paul H. Robinson & Barbara Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124 (2005).

²³³ FRANCIS BACON, *NOVUM ORGANUM, OR TRUE SUGGESTIONS FOR THE INTERPRETATION OF NATURE* 20-21 (London, William Pickering 1850) (1620) ("The human Understanding, when any proposition has been once laid down . . . forces every thing else to add fresh support and confirmation . . . [I]t is the peculiar and perpetual error of the human understanding to be more moved and excited by Affirmatives than Negatives, whereas it ought duly and regularly to be impartial."); Angela M. Pfeiffer et al., *Decision-Making Bias in Psychotherapy: Effects of Hypothesis Source and Accountability*, 47 J. COUNS. PSYCHOL. 429, 429 (2000) ("When examined as a whole, this research suggests that people tend to preferentially attend to information, gather information, and interpret information in a manner that supports, rather than tests, their decisions about another person."); Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2101-02 (1979) (finding that
(continued...)

Sentencing guidelines also allow the legislature, rather than the judiciary, to set the factors that will determine the amount of punishment. As is the case with the preference for comprehensive penal codes,²³⁴ as the most democratic branch, the legislature is best suited to make the value judgments called for in assessing the relative seriousness of offenses and the factors determining blameworthiness of an offender.²³⁵ As in penal code drafting, the legislature is also preferable for developing sentencing guidelines because it can consider sentencing from a jurisdiction-wide perspective, unlike a single sentencing judge who can deal only with the case before her.²³⁶ Finally, legislators must attend to a variety of policy issues, such as the financial resources available to the criminal justice system, which are beyond the perspective of judges.

A. THE SPECIAL NEED FOR AND CHALLENGE OF SENTENCING GUIDELINES IN THE MALDIVES

These interests make sentencing guidelines important to any comprehensive attempt to properly assess criminal liability and punishment. For an emerging democracy such as the Maldives, however, guidelines are even more critical. Young democratic regimes, as well as old ones, often must work to establish their public legitimacy, and fostering trust in the criminal justice process is a key element in that process.²³⁷ Abuses of discretion, particularly when there

²³³ (...continued)

subjects exposed to bias-confirming evidence regarding the death penalty found the evidence to be much more credible than equally strong but bias-disconfirming evidence); Mark Snyder et al., *Social Perception and Interpersonal Behavior: On the Self-Fulfilling Nature of Social Stereotypes*, 35 J. PERSONALITY & SOC. PSYCHOL. 656, 663 (1977) (“The perceivers’ attributions about their targets based upon their stereotyped intuitions about the world had initiated a process that produced behavioral confirmation of those attributions.”); Mark Snyder & William B. Swann, Jr., *Hypothesis-testing Processes in Social Interaction*, 36 J. PERSONALITY & SOC. PSYCHOL. 1202, 1205 (1978) (“[I]ndividuals will systematically formulate confirmatory strategies for testing hypotheses about other people.”).

²³⁴ See *supra* note 139 and accompanying text.

²³⁵ See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* ch. 5 (2d ed., 1994); Robert F. Blomquist, *The Good American Legislator: Some Legal Process Perspectives and Possibilities*, 38 AKRON L. REV. 895 (2005); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 406 (1908) (“We recognize that legislation is the more truly democratic form of lawmaking. We see in legislation the more direct and accurate expression of the general will.”).

²³⁶ This is not to say that systematic attempts to draft sentencing guidelines always will do so appropriately. Many sentencing guidelines systems have been drafted in sloppy and poorly thought-out ways. See Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18,121, 18,123, 41 Crim. L. Rep. (BNA) 3174, 3177 (1987).

²³⁷ See Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* 16 (undated),

(continued...)

are fears that they may arise from political considerations or ethnic bias, are clearly detrimental to building confidence in a regime. Inconsistent sentencing practices can also raise questions about an emerging government's fairness even when they derive from "innocent" factors such as the divergent philosophies of different sentencing judges. Finally, established, constitutional democracies typically have well-developed doctrines that govern the responsibilities of each branch of government.²³⁸ Nations without a legislative criminal lawmaking tradition, such as the Maldives, are faced with the constant challenge of demonstrating that the legislature, as the elected representative of the people, plays the central lawmaking role.²³⁹ Sentencing guidelines are thus a means for the legislature to assert control over the criminal justice process.

While the need for a consistent sentencing program was particularly compelling in the Maldives, the creation of sentencing guidelines presented a unique set of challenges. To begin with, many jurisdictions that have adopted sentencing guidelines have done so only after working with a modern criminal code for some time.²⁴⁰ Their judges, prosecutors, and defense attorneys thus have experience with comprehensive statutory adjudication schemes even before sentencing guidelines are implemented. This experience both eases the implementation process and boosted these parties' confidence in the ability of such a program to achieve just and reliable results. Maldivians, like many countries in its situation, lack this experience. Thus, to insure that the sentencing guidelines were both trusted and applied as intended, the guidelines needed to be transparent and straightforward to apply.

²³⁷ (...continued)

<http://www.ohrc.on.ca/english/consultations/racial-profiling-report.pdf> ("Left unchecked, mistrust towards the criminal justice system can lead to civil unrest.")

²³⁸ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (discussing the limits on executive power in the United States).

²³⁹ See, e.g., Maxwell A. Cameron et al., *Presidentialism and the Rule of Law: The Andean Region in Comparative Perspective* 2, 8 (Aug. 2, 2005) (unpublished manuscript), available at

http://www.politics.ubc.ca/fileadmin/template/main/images/departments/poli_sci/Faculty/cameron/Presidentialism_RuleofLaw.pdf (noting that prior scholars had attributed low levels of confidence in legislatures to the fall of several Latin American democracies using a presidential, as opposed to parliamentary system, but suggesting that presidential systems are more functional once the "rule of law" has been established).

²⁴⁰ For example, Minnesota adopted a modern criminal code in 1963, but the Minnesota Sentencing Guidelines Commission was not created until 1978. Although the lag in some American states may have been less significant, a certain familiarity with modern codes existed even in those jurisdictions. Moreover, even in jurisdictions without comprehensive criminal codes, American attorneys have long been accustomed to working with complete codes in other fields, such as the Uniform Commercial Code and the Internal Revenue Code. In short, in many western nations, any tradeoff between simplicity and completeness could be resolved in favor of the latter factor. Maldivian attorneys, judges, and defendants lack this luxury.

At the same time, the Maldivian judiciary lacks a judicial tradition of independence.²⁴¹ A well-established, institutionalized judiciary is likely to create informal pressures to gravitate toward uniform sentencing,²⁴² which may lessen the need for detailed sentencing regulations. Not having such a tradition, or even a library of written precedent to apply, creates a greater need in the Maldives for constraining sentencing guidelines, or at least guidelines giving more specific optional guidance.

Recent Maldivian policy decisions favoring the use of alternative punishments to prison²⁴³ have amplified concerns about disparity. A judiciary accustomed to incarceration as a standard punishment may be reluctant to impose non-incarcerative sentences without a means to translate these new punishments into the familiar language of imprisonment. At the same time, with a wide variety of punishment methods available, the potential for disparity in the amount of punishment given to similar offenders is increased. Thus, in the absence of guidelines covering the full range of sentencing methods, judges may shy away from the non-incarcerative sentences that are sought to be encouraged or, alternatively, may give non-incarcerative sentences but with each judge taking a different view of how and when the alternative sanctions are to be used and the punishment credit that should be given for each. Accordingly, the sentencing guidelines needed to account for a wide variety of alternative punishments and to provide a means to equate them with more traditional sanctions.

Finally, the criminal justice process in the Maldives is subjected to a high level of public scrutiny. Established democracies have, over many generations, developed a reputation for a certain level of fairness in adjudicating criminal matters. Such a reputation, while by no means infallible, builds a level of public support, or at least acquiescence. The Maldivian government lacks this luxury, and any perceived sentencing disparities can produce substantial public discourse, with the disparity attributed to the nefarious imaginings that commonly follow undemocratic or weak democratic governments. Accordingly, the success of the criminal justice reform project rests in part on the sentencing guidelines' ability to consistently deliver justice to a degree beyond what has been required in the past.

²⁴¹ See U.S. Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices: Maldives* (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41741.htm>

²⁴² See, e.g., Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 850 (1993) ("It is difficult indeed to envision an institutional judiciary that allowed its underlings in effect to ignore the decisions of those at the top.").

²⁴³ Legislatively-prescribed alternative punishments in the United States often include probation, house arrest, boot camps, drug treatment programs, and community service. The unique geography of the Maldives also allows the imposition of a term of relocation, or banishment, to a remote island as a punishment.

B. SOLUTIONS

These special requirements of the Maldivian situation, and that of most young democracies, calls for powerful yet simple sentencing guidelines -- in other words, calls for inventing a new guideline form that did not previously exist. A significant structural innovation was to integrate the sentencing guidelines into the Draft Code. The sentencing guidelines appear as Part III of the Draft Code, after the General Part in Part I and the Special Part in Part II. More important, the Code's offense definitions include not just a grading subsection but also a sentencing factors subsection. This allows the guidelines to piggy-back on the offense definitions themselves, cutting down dramatically on the length and complexity that would be required by a set of guidelines disconnected from the penal code, as has been typical in the past.²⁴⁴ It also affirms the conceptual similarity between grading factors and sentencing factors,²⁴⁵ a resemblance that often seems to have been lost in American law and policy making, where grading and sentencing traditionally have been treated as two very different enterprises.²⁴⁶

The integrated system gives drafters maximum ability to recognize relevant factors, no matter whether of great or small effect. An aspect of an offense that should at least double punishment can be treated as a grading factor. Each increase in grade doubles the maximum punishment authorized.²⁴⁷ Factors of lesser influence can be treated as a sentencing factor, which allows an adjustment to a offender's sentence of as little as 10%. Thus, drafters can calibrate the effect of a factor with some precision,²⁴⁸ as is commonly needed because offenses within a particular grade are often of widely varying significance. For example, property damage offenses commonly are graded according to the extent of the economic harm. But defacing a historic

²⁴⁴ See the U.S. Sentencing Guidelines as a striking point of comparison. Those guidelines are almost a criminal code of their own.

²⁴⁵ Grading and sentencing are closely related because many sentencing factors define aspects of the crime that change its gravamen. Grading factors typically define aspects of an offense that are specific to it; thus, using value or remediation cost is appropriate to define theft and vandalism crimes, but not assaults. Because of practical limitations, however, grading typically is limited in its scope and cannot define many aspects of a crime that shared intuitions of justice might use to assess its gravamen.

²⁴⁶ See Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV., 225, 248 (1993) ("In the federal system, the existing criminal law in Title 18 is so chaotic and unreliable with regard to grading that the Sentencing Commission was essentially forced to ignore the relative seriousness of offenses as expressed by their relative statutory penalties.").

²⁴⁷ Under the Draft Code, a one grade increase has the effect of doubling the maximum authorized penalty. See DMPC § 92 (setting forth the maximum authorized terms of imprisonment for offenses of each grade); DMPC § 93 (setting forth the maximum authorized fines for offenses of each grade). For example, an increase from a Class 2 misdemeanor to a Class 1 misdemeanor increases the maximum authorized term of imprisonment from six months to one year. See DMPC § 92.

²⁴⁸ See *supra* notes 203-205 and accompanying text.

landmark would widely be considered a more serious crime than vandalizing an abandoned warehouse, even if both misdeeds caused the same amount of damage. The proposed sentencing factor system allows the guidelines to distinguish the two cases without having to double the punishment of the greater harm over the lesser.²⁴⁹

The primary sentencing factors in the Code are general in nature and can apply to a wide variety of crimes. For example, sentences can be enhanced under the guidelines if an offense creates a “special harm,”²⁵⁰ if the offender refuses to make a good faith effort to compensate the victim, or if the offender has a prior criminal record. Alternatively, the guidelines allow punishment levels to be reduced if the wrongdoer expresses genuine remorse, if a partial defense exists, or if the crime was committed under extreme emotional distress. Ten such general factors are defined in the sentencing guidelines (Part III of the Draft Code). These are supplemented by offense-specific sentencing factors, such as enhancements for committing an assault within a home and using deception to commit a sexual assault, contained in the relevant offense definition (Part II of the Draft Code). The sentencing factors are thus brief, and yet account for the most important situations in which justice requires a sentence more severe or more lenient than the normal sentence for the offense. They also give the system substantial flexibility. Although the adjustments created by a single sentencing factor may be small, the aggregated effect of several factors may be significant.²⁵¹

Most sentencing schemes either fail to consider factors other than the most basic²⁵² or attempt to be more ambitious and end up with unacceptable length and complexity.²⁵³ The Draft Code’s sentencing guidelines, by contrast, attain sophisticated results without sacrificing simplicity. The process of determining a sentence under the Draft Code begins, as is the case with most sentencing programs, with the grade of the offender’s crime. Offenses are grouped into five felony grades and three misdemeanor grades. Each grade category is broken down further in the sentencing guidelines into a baseline sentence, five aggravated levels, and three mitigated levels. Aggravation and mitigation are determined by the sentencing factors described above. The relevant factors are totaled together, and the total is used to determine the offender’s

²⁴⁹ See DMPC § 1102(c).

²⁵⁰ Examples of such “special harms” include offenses committed in breach of a fiduciary duty, crimes where the victim is a child, a disabled person, or an elderly person, and other misdeeds that cause a harm that significantly exceeds the harm anticipated in the basic offense definition.

²⁵¹ See *supra* notes 203-205 and accompanying text.

²⁵² See, e.g., ARKANSAS SENTENCING COMMISSION, SENTENCING STANDARDS GRID, OFFENSE SERIOUSNESS RANKINGS AND RELATED MATERIAL (2003) (establishing offender sentence length only by considering a two-dimensional matrix of offense seriousness and offender history).

²⁵³ See, e.g., U.S. Sentencing Comm’n, Guidelines Manual vi (2005) (noting that the federal sentencing guidelines are 515 pages long, exclusive of the table of contents, appendices, and other organizational materials).

“box” on the sentencing guidelines grid, and thereby a specific proposed sentence. The proposed sentencing grid is as follows:²⁵⁴

	Felony A	Felony B	Felony C	Felony D	Felony E	M1	M2	M3
Statutory Maximum	25 Years	15 Years	8 Years	4 Years	2 Years	1 Year	6 Months	3 Months
5	22y, 6m	13y, 6m	7y, 2m, 12d	3y, 7m, 6d	1y, 9m, 18d	10m, 24d	5m, 12d	2m, 21d
4	20y	12y	6y, 4m, 24d	3y, 2m, 12d	1y, 7m, 6d	9m, 18d	4m, 24d	2m, 12d
3	17y, 6m	10y, 6m	5y, 7m, 6d	2y, 9m, 18d	1y, 4m, 24d	8m, 12d	4m, 6d	2m, 3d
2	15y	9y	4y, 9m, 18d	2y, 4m, 24d	1y, 2m, 12d	7m, 6d	3m, 18d	1m, 24d
1	12y, 6m	7y, 6m	4y	2y	1y	6m	3m	1m, 15d
Statutory Baseline	10y	6y	3y, 2m, 12d	1y, 7m, 6d	9m, 18d	4m, 24d	2m, 12d	1m, 6d
-1	7y, 6m	4y, 6m	2y, 4m, 24d	1y, 12d	7m, 6d	3m, 18d	1m, 24d	27d
-2	5y	3y	1y, 7m, 6d	9m, 18d	4m, 24d	2m, 12d	1m, 6d	18d
-3	2y, 6m	1y, 6m	9m, 18d	4m, 24d	2m, 12d	1m, 6d	18d	9d

That proposed sentence is not mandatory, at present, for two reasons. First, no sentencing program can account for the full diversity of crimes and offenders, so leaving some flexibility is warranted. Second, the guidelines' novelty also creates some concern; no similar sentencing scheme has been implemented, and requiring strict adherence to it without field experience seems imprudent. Nonetheless, the guidelines do gently nudge judges to follow them by requiring the judge who deviates from them to provide a written justification for any departure of more than two levels from the guideline sentence. Sentences deviating by more than two levels also may be appealed to the High Court, further encouraging conformity without demanding it.

²⁵⁴ DMPC § 1002.

In light of the interest in alternative sentences, the proposed sentencing guidelines also include an equivalency table that equates terms of incarceration with other punishments. This reduces the disparities between similar cases that often can result when alternative punishments are used, and may further encourage the use of alternative punishments by giving judges confidence that these non-incarcerative methods of punishment will carry an appropriate punitive value. Equivalencies in punishments in the Draft Code are set as follows:²⁵⁵

Incarceration	House Arrest	Community Service	Fine - the greater of:	Banishment to Another Island	Intensive Supervision	Probation
1 year =	2 years	1920 hours	25,000 Rufiyaa / 1 year's income	2 years	4 years	6 years
6 months =	1 year	960 hours	12,500 Rufiyaa / 6 months' income	1 year	2 years	3 years
3 months =	6 months	480 hours	6,000 Rufiyaa / 3 months' income	6 months	1 year	1.5 years
1 month =	2 months	160 hours	3,000 Rufiyaa / 1 month's income	2 months	4 months	6 months
7 days =	15 days	40 hours	500 Rufiyaa / 7 days' income	15 days	1 month	1.5 months

The Draft Code's sentencing guidelines are unique in their ability to provide a flexible, sophisticated, yet simple method for determining an offender's punishment. Our calculation is that they are within the range of what may realistically be administered by Maldivian judges, but only field experience can confirm this. The hope is that the use of such sentencing guidelines will enhance the reputation of the sentencing process, and the criminal justice system generally, for doing justice. And that confidence in the justness of the criminal justice system can do much

²⁵⁵ DMPC § 1005

to create the conditions in which a young democracy can thrive, even given the special demands placed upon criminal law by a Muslim society.

CONCLUSION

This Article examines the special situation that faced penal code codifiers in Muslim Maldives. On the one hand, comprehensive codification is more important and more likely to bring dramatic improvements in the quality of justice than in many other societies, due in large part to the problems of assuring fair notice and fair adjudication in the uncodified Shari'a-based system in present use. On the other hand, the challenges of such a project are greater, due in part to special needs for clarity and simplicity that arise from the relative lack of codification experience and training. But there turned out to be perhaps unexpected advantages to undertaking a comprehensive codification project in the Maldives. While the lack of a codification tradition created difficulties, it also gave drafters the freedom to invent new codification forms that would be difficult to adopt in a society with an entrenched codification history.

While it was a concern that any Shari'a-based code could conflict with international norms, in practice it became apparent that the conflict was not as great as many would expect. Opportunities for accommodation were available, sometimes through interesting approaches by which the spirit of the Shari'a rule could be maintained without violating international norms. In the end, this Shari'a-based penal code drafting project yielded a Draft Code that can bring greater justice to Maldivians and also provide a useful starting point for penal code drafting in other Muslim countries, especially those with an interest in moving toward international norms.²⁵⁶

But the code drafting project also may have much to offer penal code reform in non-Muslim countries, for the structure and drafting forms invented here often solve problems that plague most penal codes, even codes of modern format such as those based upon the American Law Institute's Model Penal Code, which served as the model for most American penal codes. The challenges of accessible language and format, troublesome ambiguous acquittals, overlapping offenses, combination offenses, and penal code-integrated sentencing guidelines have all been addressed.

While it may seem odd that a draft penal code for a small Islamic island-nation barely rising from the Indian Ocean could provide advances in the United States, we think it very much the case. This possibility exists because the problems of crime and punishment and people's views of the same are to a large extent universal.²⁵⁷ That means that the community of learning on these issues can be world wide, not country specific. And this, in turn, creates the potential

²⁵⁶ The Draft Code's official commentary lays out the Shari'a authorities that support a shift toward international norms on each point. *See, e.g.*, 2 FINAL REPORT OF THE MALDIVIAN PENAL LAW & SENTENCING CODIFICATION PROJECT 15 (January 2006) (discussing Shari'a authorities supporting the Code's burden of proof concepts).

²⁵⁷ *See, for example*, PAUL H. ROBINSON & ROBERT KURZBAN, CONCURRENCE & CONFLICT IN INTUITIONS OF JUSTICE, Minnesota Law Review (forthcoming 2006) (reviewing empirical studies demonstrating wide agreement across demographics and cultures of people's assessments of the relative blameworthiness of serious wrongdoing).

for a useful exchange of ideas, as is illustrated by this project of Americans helping to draft an Islamic penal code for a country in the Indian Ocean.²⁵⁸

²⁵⁸ As of this writing, the Draft Code has been approved by the Cabinet and submitted to the Majlis (Maldivian Parliament), which is currently debating its provisions. See <http://www.mv.undp.org/>

APPENDIX

Daniel Pipes, *U Penn Prof for Shari'a*, FRONT PAGE MAG., July 26, 2004:

It is easy to see how Professor Robinson would jump at the chance to develop what he calls "the world's first criminal code of modern format that is based upon the principles of Shari'a." Here is an opportunity for a leading criminal law practitioner to do something completely different – not Anglo-Saxon common law, not Napoleonic Code, but Shari'a. No wonder he ditched his standard seminar.

And he finds the present Maldivian criminal justice system inadequate, to the point that it systematically fails to do justice and regularly does injustice. He sees the need for wide-ranging reforms, and believes that without dramatic change, the system is likely to deteriorate further. Robinson's preliminary thoughts for reform include such basics as making the judiciary an independent branch of government, limiting the police's right to search, establishing the defendants' right to legal counsel, and ending the present practice of relying primarily on confessions as the basis for establishing criminal liability.

These are worthy objectives, to be sure, but Professor Robinson should stand back from this project and reassess it. This leading scholar, through his work in the Maldives, will render more acceptable Shari'a provisions about killing apostates from Islam, subjugating women, keeping slaves, and repressing non-Muslims (in this light, note the matter-of-fact comment in the course description that "as a matter of law, all citizens [of the Maldives] are Muslim").

Rather than cleanse and modernize the Shari'a code, I appeal to Professor Robinson to reject the Maldivian commission and take a totally different approach in his seminar, critiquing that code's criminal provisions from a Western point of view. He and his seminar students would then show how this religiously-based legal system contradicts virtually every assumption an American makes, such as the separation of church and state, the abolition of forced servitude, the right not to suffer inhumane punishments, freedom of religion and expression, equality of the sexes, and on and on.

The Shari'a needs to be rejected as a state law code, not made prettier.

Paul Robinson's Response to Daniel Pipes:

You object to my plan to assist the Maldivians in drafting a new criminal code. I think the opportunity ought to be enthusiastically embraced.

The Maldives does not allow the classic barbaric punishments of Shari'a, such as cutting off the hands of thieves or stoning adulterers to death. Indeed, Amnesty International reports that the country de facto abolished the death penalty for all offenses more than a half century ago. (And every one of the reforms you mention — independent judiciary, explicit limitations on police power, defense counsel at all stages, and moving away from the use of confessions — is something that the Maldivians themselves are now doing or committed themselves to do long before I ever showed up on the scene).

Does the country impose criminal liability and punishment that I find objectionable? Yes, which is precisely the reason that drives my interest in helping. I do criminal code consulting for many countries. A few days ago, one client, China,

beheaded a person for embezzlement. (Worse than anything the Maldivians have done.) Should I now refuse to advise them further on what I think a criminal code should look like? Your strategy of willful disengagement seems an odd way of bringing greater justice to the world.

The Maldivians are in the midst great social change. A special parliament called to draft a new constitution met for the first time two days ago; disagreements among the members spilled into demonstrations in the streets. A young and idealistic Attorney General, with much credibility with the people, was recently appointed, after police beatings of prisoners prompted riots. This man and many others in the country have made serious personal sacrifices to advance the cause of justice for Maldivians. He and others like him represent the forces of enlightenment that seek to move the country toward the principles of fairness and justice. When this man asks me to help draft a criminal code for his country, how could I possibly in good conscience refuse?

My views on criminal justice are well known. No one would think that I am inclined to tolerate barbaric punishments, nor would they think that I would renounce my independent judgment and be cowed into silence. (I was the lone dissenter in the promulgation of the United States Sentencing Commission guidelines.) If someone hires me to help draft a criminal code, that in itself tells you something about the person's agenda. If their goal is not fairness and justice, they are only hiring trouble. Why would they?

If the Western world had beat this country into submission through economic boycott and political isolation, we would take their request for Western advice to be a great victory. Why should the request to be shunned simply because some leaders of the country are people of conscience who by their own choice have sought the advice?

My goal is not to make their code "pretty," as you suggest, but rather to make it just. And the evidence to date suggests that this is their goal as well.

I do not know how the Maldivian criminal code project will turn out. Like many criminal code projects, it may go nowhere. I have no power other than the persuasiveness of my advice, which, experience tells, is often limited. But is it an enterprise worth undertaking? I would think it shameful to decline.

Pipes's reply:

Prof. Robinson's explanation of his project makes our differences clear: I focus on the substance of the Shari'a and he on the Maldivian means to carry it out.

See <http://www.frontpagemagazine.com/articles/ReadArticle.asp?ID=14372>