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In the summer of 2004, the United Nations Development Programme (UNDP) approached an American law professor with experience in penal code drafting to help a small country rewrite its penal code. Although drafting a new penal code is never an easy task, drafting this particular code presented a unique challenge. The country in question, the

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Maldives, is by constitutional mandate an Islamic nation.[1] The professor had to ask: Should Americans involve themselves in a project, the results of which would embody Islamic Shari'a, potentially violating fundamental principles of fairness, justice, and equality cherished by Americans?

Some argued that they should not. Among others, Daniel Pipes, a well-known commentator on Middle East affairs, publicly opposed the project.[2] Pipes argued that the project

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[1] Maldives Const. Ch. 1 § 7. In 1153, the Maldive king became a Muslim and by the 13th century the religious nature of the entire set of islands had become Islam. The country is now officially 100% Sunni Muslim. In addition to Islam, its legal tradition has been nominally influenced by three colonial powers: the Portuguese (1558), Dutch (1654) and the British (1796). In 1965, the Maldives finally gained independence from their status as a British protectorate. The first constitution of the Maldives was instituted in 1932. In 1953, the country was changed from a monarchy to a Republic. The Islamic legal school of thought that was followed prior to 1573 was the Maliki school of thought which predominates in North Africa. However, after 1573 and the passing of many prominent Islamic scholars, Maldivian scholars training in Shafi'i law gained prominence and the country replaced the Maliki school with the Shafi'i. 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 presently is Mohamed Rasheed Ibrahim, whose legal education is primarily from Egypt and Saudia Arabia where he spent a total of 17 years. Other judges have received training in Western countries, Pakistan, and Malaysia.

[2] Pipes wrote:

> 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 Maldive commission and take a totally different approach in his

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would legitimize the most extreme and, to Western eyes, the most unjust aspects of Islam. Instead of codifying Islamic law, he argued, the professor and his students should spend their time critiquing it and exposing its injustices. At the same time, Muslims and nationalists criticized the project, albeit for different reasons. They thought a team of foreigners, largely non-Muslim, would not be competent to draft a Shari'a-based law and could not be trusted to undertake such sensitive work.[3]

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[2] (...continued)
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.

Daniel Pipes, FrontPageMagazine.com, http://www.danielpipes.org/article/1975.

[3] See emails to Paul H. Robinson on file with the Law Review.

The professor publicly responded to Pipes[4] and, despite the opposition, took on the

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[4] Robinson's public 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

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project, but fundamental questions had to be answered. Would participation in the project be an act complicit in perpetrating injustice? Does the project have value, other than in "mak[ing] Shari'a prettier," as Pipes complained? In this Article, we -- the members of the Criminal Law Research Group primarily responsible for work on the Draft Maldivian Penal Code ("DMPC") -- offer our answers to these two questions – no and yes – and explain why the work is important not only to the Maldives, but also to further the interests of justice generally, in Muslim and non-Muslim countries alike.

I. CHALLENGES AND OPPORTUNITIES

We believe the answer to the first question – whether participation in the project is complicity in the perpetration of injustice – to be relatively straightforward. It became clear upon reviewing Maldivian law and discussions with Maldivian officials that, with some important exceptions,[5] the preponderance of value judgments concerning personal and property rights that exist in the Maldives do not diverge far from international norms. On their own, the Maldivians have adopted many progressive positions, such as their de facto elimination of the death penalty more than fifty years ago. While the DMPC continues to criminalize some behavior that Western codes do not, we believe that the promulgation of an effective penal code can advance justice, social stability, and democratic ideals more successfully than mere criticism.

The answer to the second question – whether there is value in the project other than in "mak[ing] Shari'a prettier" – is both more complex and more interesting. Although the Draft Code is based upon Shari'a, the project allowed more freedom in the formulation of criminal law rules than one might have expected. As Part II of this Article explains, Shari'a is quite different than commonly portrayed in the media. It is not a series of fixed and cruel rules but rather a body of principles remarkably pliant when engaged by a code-drafter attuned to modern forms and sensibilities. Shari'a derives from the Qur'an, the sayings and doings of Muhammad, as well as from the commentary of authoritative writers who have studied them. In this respect, 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.[6] The application of law requires an interpretive act: from a variety of specific points -- case decisions at common law, Quar'nic

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[4] (...continued)
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, supra note 3. 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." Id.

[5] See Part III.C. infra.

[6] It is unlike the common law system, of course, in that case decisions do not have binding effect in later cases.

passages in Shari'a -- is derived a more general principle, which is then interpreted as to its meaning for the case at hand.

The fixed rules of Shari'a commonly reported in the media are the special *hudud* offenses, which often exist as they do only because these are the offenses that happen to have specific mention in a Qur'anic passage. Indeed, 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 four centuries ago, as if Muhammad's wisdom was frozen in time in 632?[7] 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.[8]

The fact that much of Shari'a is a set of guiding principles, rather than unbending rules, has dramatic implications for the drafting of a Shari'a-based modern penal code. It gives code drafters elbow room when translating those principles into modern penal code provisions. This is especially true given that the extensive Shari'a literature reflects many differing views on proper interpretation. Part III of this Article describes how we dealt with the potential conflicts between Shari'a and international norms, sometimes having to find creative ways to accommodate the two. The resulting Draft Code is not one that we, or most Americans, would adopt; it is designed to embody Maldivian, not American norms. And of course this is as it should be: it is a code by which the Maldivians bind themselves, not us. Ultimately, there are provisions about which many Westerners will have pause but we think the nature and extent of the gap will be of dramatically less concern than most Westerners assume.

Perhaps more importantly, the most important advance was made with the initial decision to codify. Codification in itself assures the most important improvement in the availability of justice and, in particular, in adherence to the legality principle.[9] In fact, the reader will see, the Draft 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.[10]

We understood from the start the importance of the Maldivian decision to codify but we did not understand until we were into the project that it offered great opportunities for improving criminal codes generally and thereby the availability of justice, in many unexpected ways -- certainly providing greater opportunities than would have been available if such a code drafting project were undertaken in the United States or another country with a substantial codification

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[7] See generally Muhammad Taqi Usmani, The Authority of the Sunnah (1998); Yusuf al-Qaradawi, The Lawful and the Prohibited in Islam (1982).

[8] See generally Farid Esack, Qur'an, Liberation and Pluralism (1997); Fazlur Rahman, Islam (1979); Mohammad Arkoun, Rethinking Islam: Common Questions, Uncommon Answers (1994).

[9] See Part IV infra.

[10] 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).

history. The Maldives, and Muslim countries as a group, tend not to have a strong codification tradition.[11] And that absence turns out to have significant advantages for the project because

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[11] The form of Islamic law and its relation to the state gone through four main stages. In the first stage, during the earliest days of Islam, it can be argued 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 particularly known to have 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. WAEL HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW 32-33 (2005). 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 jurists. Id. at 63 ("locus of legal expertise" not the *qadis*, but rather a group of private individuals." 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. Id. at 62. The third stage occurred with the Muslim world's encounter with the West. During the late 19th Century, the Ottomans began to introduce elements of European codes into their system eventually formulating the *Majalla* or Ottoman Civil Code (1869-1876). Aharon Layish, *The Transformation of the Shari'a from Jurists law to Statutory Law in the Contemporary Muslim World*, 44 DIE WELT DES ISLAMS 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). The modern period of Islamic law has thus been "characterized" by the French and British colonization of the Muslim world and introduction of European codes, as well as, the codification of some Islamic rules. Lama Abu-Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789, 800 n.27 (2004). In countries like Egypt, this involved administering comprehensive codes of statutory law through a centralized court system. Clark B. Lombardi and Nathan J. Brown, *Do Constitutions Requiring Adherence to the Shari Threaten Human Rights? How Egypts Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law,* 21 Am. U. Intl L. Review 379, 388 (2006). Unfortunately, these codes often reflected European norms as opposed to Islamic norms, reflecting a process that did not involve consultation with leading Islamic jurists in the country. Id. at 388 (discussing the reason for the failure of Egypt's attempt at comprehensive codification in 1882). 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. Aharon Layish, *The Transformation of the Shari'a from Jurists law to Statutory Law in the Contemporary Muslim World*, 44 DIE WELT DES ISLAMS 1, 15 (2004). Similar demands were also being made in Egypt, particularly in relation to preserving the place of Islamic law through the nations constitution. Lombardi & Brown, *supra, at* 389 (discussing the reason for the failure of Egypt's attempt at comprehensive codification in 1882).

The Maldivian Penal Code project potentially represents a fifth stage in the relationship of Shari'a and the Muslim state. Although codification, and even comprehensive codification, has existed in the Muslim world, the Maldivian Penal Code project is distinct for several reasons.

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code structure and drafting forms in many of those countries are 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 subsequently developed. With no codification history, however, a 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 opportunity presented by the lack of a codification tradition brought with it special challenges. The lack of codification experience meant that the 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.[12] (Most judges have had religious rather than legal training.[13]) This meant that a prime drafting rule was to keep drafting forms simple and user-friendly. Further, in the Maldives in particular, simplicity and accessability was of special urgency because the country is comprised of hundreds of islands,[14] and communication

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[11] (...continued)
First, most comprehensive codification 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 Maldivian Penal Code adopts a comprehensive approach to codifying criminal law. Second, the previous codification in Muslim countries came as a result of modifying an already present European code. The Maldives had 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 Maldivian Penal Code has been representative and not autocratic, involving public debate in the legislature. In addition, Islamic scholars, lawyers, judges, ministers were regularly consulted during the progress of drafting the code.

[12] The lack of legal 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. See Ministry of Justice, Justice Human Resource Development Plan, 2004-2008, at 22. These courts are headed by magistrates. Id. at 22. In 2003, only 2 out of the 188 magistrates in the Island Courts had their first degree in law. Id. at 22-23. The vast majority of the magistrates held only a local certificate. Id. at 23. "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 magistrates to have a degree or diploma level qualification in law." Id. at 23.

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[14] See generally C.H.B. Reynolds, *Maldives*, Encyclopedia of Islam V. 6 (1991); THE CAMBRIDGE ENCYCLOPEDIA OF INDIA, PAKISTAN, BANGLADESH, SRI LANKA, NEPAL, BHUTAN AND THE MALDIVES (Francis Robinson, ed., Cambridge University Press, 1989); http://en.wikipedia.org/w/index.php?title=Maldives&oldid=46410291 The Maldives is a small
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facilities are not always good.[15] It is not uncommon that the ranking governmental official responsible for an island has no legal training yet might be called upon in some cases to apply the Code's provisions.

Another special challenge arose from Islamic law's greater role in the social lives of the population, as compared to law in Western countries. This meant not only that the code itself needed a broader range of offenses but also that it 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 rules.[16]

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. 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 forms. Part VI describes the unique verdict system created for the Maldives, which unambiguously labels the importantly different reasons for an acquittal, a labeling that avoids the debilitating confusion that can sometimes come with an acquittal, and 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, and Part VIII describes how we tackled the related problem of combination offenses, such as robbery and burglary, which is 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.

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[14] (...continued)
nation of islands located in the Indian Ocean about 700 miles south-west of Sri Lanka. It is comprised of 1,196 islands of which 211 are inhabited. The country primarily relies on fishing and tourism for acquiring revenue. The earliest settlers on the nation were probably from Southern India, followed by Indo-Aryan speakers from Sri Lanka and then traders from Africa and the Arab world. The main language is Dhivehi, but English is also spoken in commerce and is the medium of instruction in government schools.

[15] See Ministry of Justice, Justice Human Resource Development Plan, 2004-2008, 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.").

[16] For a discussion of the 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 full text and official commentary of the DMPC is available at http://www.mv.undp.org/[17] and at http://www.law.upenn.edu/fac/phrobins/draftislamicpenalcode/.[18]

II. THE SOURCE AND NATURE OF SHARI'A

To fully understand the opportunities and challenges presented, consider the nature of Shari'a. In technical terms, Shari'a refers collectively to the Islamic scripture, the Qur'an, and the Traditions of the Prophet Muhammad, the *Sunna*. In its broader and "popular" sense, Shari'a has come to also encompass the juristic interpretation (*Fiqh*) 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. The Qur'an is not primarily a "written" text, but rather an oral one

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[17] The Report containing the Draft Code and its Official Commentary, respectively, 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

[18] The process proceeded along these steps: Upon receiving the current Maldivian laws from the "core group" (comprised of members selected by the Attorney General), the Criminal Law Research Group (CLRG) compiled and then categorized all laws and regulations pertaining to crime and punishment, using a categorization system typical in modern codes, such as the A.L.I.'s Model Penal Code. Much if not most of current Maldivian penal law is uncodified Shari'a. Thus, we researched the writings of respected Muslim jurists, both classical and contemporary, likely to be accepted by Maldivians as authoritative sources for Islamic legal rulings on penal law. Our research emphasized the Shafi'i School, because it is dominant in the Maldives, but did not limit ourselves to it. The jurists we most benefitted from included Muhammad Ibn Rushd, Ahmad Ibn Naqib Al-Misri, Yahya al-Nawawi, Abu'l Hasan Al-Mawardi, Mohamed El-Awa, Javed Ahmad Ghamidi, and Yusuf Qaradawi. We also identified current penal law practice through consultation with members of the Maldivian legal community and the Attorney General's Office. Finally, we consulted the criminal codes of other Muslim countries -- the codes of Malaysia and Pakistan were particularly useful -- as well as those of various American states. The CLRG, after discussions with members of the core group, would produce an initial draft, which would then be reviewed by the core group and revised further. Once a draft gained the approval of the core group, it was distributed more widely for comment and further revision.

[19] For a discussion of the sources and methodology of Islamic law, see generally Mohammed Hashim Kamali, Principles of Islamic Jurisprudence (rev'd ed. 1991); Introduction to The Islamic Criminal Justice System xiii (M. Cherif Bassiouni, ed. 1982); Majid Khadduri & Herbert J. Liebesny, Origin & Development of Islamic Law (1955).

that has been transcribed. It 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 Old Testament 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 very small fraction 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.

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 evidence of *hadith* collections appearing in the late-7th century/early-8th century and growing exponentially in the 9th and 10th centuries. Many of these sayings are particularly useful as sources of legal instruction. 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.

Fiqh, or juristic interpretations, comprise the bulk of Shari'a in its broader understanding. They consist of legal opinions from jurists 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.

Jurists rely on four main sources to arrive at an opinion regarding what Islam says about a particular matter. The first source is the Qur'an itself, which is generally considered the most important source and in many places it comments upon itself. Every 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 commentary on the Qur'an. The third is known as *'ijma* or consensus of the scholars. This can sometimes function like precedent in common law. A jurist will give significant weight to the consensus opinion that groups of scholars may have held on an issue. There are of course different conceptions of "whose" consensus we are speaking of, but it is generally restricted to individuals within the scholarly class. Finally, the last source is *qiyas*, or reasoning by analogy. Here the jurists will analogize the situation they are presented with to another similar situation in order to arrive at a conclusion and hence maintain internal consistency. Other factors that are considered when arriving at an opinion are ideas like societal welfare (*maslaha*), juristic preference (*istihsan*), and custom (*'urf*). Historically, these jurists functioned in a way similar to the American Legal Institute in that they had no binding authority, but their opinions were quite seriously considered by the government judges. However, among individual Muslims, these juristic opinions were fundamental to providing legal details of the faith and essentially were elevated to a position of mandatory law.

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.[20] Only the Qur'an and the Prophetic Tradition are seen as of a divine source; the vast bulk of Shari'a, the juristic interpretation, is not.

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

There are many similarities between Shari'a and Western penal law,[21] many more that one would think listening to the standard press treatment. The two are based on traditions with similar origins,[22] and contain many similar offenses and defenses.[23] Nonetheless, there are

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[20] Technically speaking, the Qur'an contains only four crimes: unlawful sexual intercourse, accusation of unlawful sexual intercourse, theft, and brigandage. 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 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.

[21] For a claim of convergence between international 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.").

[22] 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).

[23] 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) (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); Imam Nawawi, Minhaj-at-Talibin: A Manual of Mohammedan Law According to the School of Shafi'i 453 (E.C. Howard, trans. 1914). Additionally, both American law and Islamic law recognize excuse defenses such as involuntary intoxication, insanity, and duress. Compare Robinson, supra, § 9.1, with Penal Code § 85 (Malay.) (involuntary intoxication); Bahnassi, supra, at 188 (suggesting that punishment is not justified in situations involving involuntary intoxication because the offender is unaware of the nature of his action); id. at 186 (describing the defense of insanity under Islamic law); Ahman Ibn Naqib Al-Misri, Reliance of the Traveler 583 (Nuh Ha Mim Keller trans. 1994) (noting that Islamic law forbids punishing mentally ill homicide offenders because they lack the appropriate ability to discern between right and wrong); Ibn Rushd, The Distinguished Jurist's Primer 480 (Imran Ahsan Khan Nyazee trans., (continued...)

fundamental differences. Islamic Shari'a is rooted in religion, while American jurisprudence is largely secular.[24] Because Islamic law's primary source is understood to be divine and unalterable,[25] its content is more resistant to change.[26] 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."[27] Thus, Islamic law extends into spheres untouched by American law.[28] Additionally, unlike American and many other Western cultures, Islam tends to place a greater emphasis on the community over the individual.[29] Virtually every individual action has potential ramifications for the community as a whole, and legal rules accordingly extend to the most personal and intimate matters.

These and other differences produce points of conflict between Shari'a on the one hand and international norms on the other. Each of these points of conflict presented a special challenge to penal code drafters. To maintain its moral credibility with the population, a penal

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[23] (...continued)
1994) (noting that Islamic law grants an excuse to defendants under duress because such individuals are said to lack the "will" to commit harm).

[24] 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 Part II supra. Religion is not the ultimate authority in American law, and while religious texts have influenced American law, they are not the principle basis for it. Muslim jurists generally consider the fundamental difference between Islamic law and American law to be the fact that, in American law, human reason is unrestricted in its ability to create law, whereas, in Islamic law, the "divine will" is the ultimate arbitrator. Iman Ahsan Khan Nyazee, General Principles of Criminal Law 31 (2000).

[25] Islamic law 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. Fazlur Rahman, Islam 69 (University of Chicago Press 1979).

[26] 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).

[27] Seyyed Hossein Nasr, Ideals and Realities of Islam 95 (Mandala 1991) (1966).

[28] Although American 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).

[29] 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, 493 (2004) ("Islam begins with the premise that individuals have obligations to each other, without which individual rights are unachievable.").

code cannot deviate too far from the community's shared intuitions of justice,[30] and many aspects of Shari'a have been internalized by the Maldivian community. Yet, Maldivians also seem to wish to adhere to international norms where possible. What can penal code drafters do to help resolve the points of conflict?

Some of the Shari'a-international norms conflicts have already been resolved in current Maldivan penal law, where the Maldivians adopted a rule that deviates from a literal interpretation of Shari'a.[31] Others are resolved in the DMPC by finding some device by which the conflicting views could be accommodated. In the end, however, there remain some important respects in which the Draft Code continues to deviate from international norms, although those respects are probably less dramatic than most readers would expect in a Shari'a-based penal code.

A. PRE-EXISTING DEVIATIONS FROM SHARI'A

The Maldives, and many other Islamic countries, have themselves chosen to adopt less than literal interpretations of Islamic Shari'a, long before this model penal code project began. For example:

Amputation Generally, under Shari'a, the penalty for theft is the cutting off of a hand or foot.[32] A first offense is punished with amputation of the right hand; a second offense is punished with amputation of the left foot.[33] Jurists disagree as to whether the remaining limbs should be cut off for subsequent offenses.[34] Cutting is only imposed if certain conditions are

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[30] See generally Paul H. Robinson & John M. Darley, The Utility of Desert, 91 Nw. U. L. 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).

[31] Note that Islamic tradition is not monolithic and thus expresses itself in many forms. This project was primarily concerned with the Maldivian expression of the Islamic tradition and, among other things, its preference for the Shafi'i legal school of thought.

[32] Ibn Rushd, The Distinguished Jurist's Primer 543-44 (Imran Ahsan Khan Nyazee trans., 1994); 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). The jurists' agreement on this penalty is derived from the Qur'anic verse: "[A]s for the man and the woman addicted to theft, cut off their hands . . . ." Verse 38, The Qur'an.

[33] Ibn Rushd, supra note 10, at 544; Ahmad Ibn Naqib Al-Misri, Reliance of the Traveler o14.1, 613-14 (Nuh Ha Mim Keller trans., 1994).

[34] 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 10, at 544-45; Mohamed S. El-Awa, Punishment in Islamic Law: A Comparative Study 5 (2000); Al-Misri, supra note 11, at o14.1, 614. However, other views hold that the penalty for subsequent thefts should not be amputation, but rather

(continued...)

met.[35] The Draft Code does not authorize the cutting of limbs for any offense,[36] which carries forward the rule under current Maldivian penal law[37] and under the penal codes of many other Islamic countries.[38]

Death Penalty for Non-Homicide Offenses Under Shari'a, death may be imposed as a penalty for adultery or apostasy,[39] although there is some disagreement in the Shafi'i school as to whether apostasy is punishable by death.[40] The practice 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 . . . ."[41] The U.N. Human Rights Committee has stated its view that imposing the death penalty for unlawful sexual intercourse and apostasy violates this provision

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[34] (...continued)
compensation, Ibn Rushd, supra note 10, at 544-45, and possibly imprisonment as well, Ibn Duyan, supra note 10, at 102-03.

[35] 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 Rushd, supra note 10, at 537-40. For other conditions, El-Awa, supra note 12, at 2-7; Al-Misri, supra note 11, at o14.2, 614; Ibn Duyan, Crime and Punishment Under Hanbali Law 89-104 (George M. Baroody, trans. Dar al-Salam, 1958).

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

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

[38] See, e.g., Penal Code §§ 379-382 (Malay.) (authorizing imprisonment, fines, and whipping, but not amputation, as punishment for theft).

[39] One of the traditional *hudud* punishments for a married person who commits adultery (*zina*) is stoning to death. Ibn Rushd, supra note 10, at 523; al-Misri, supra note 11, at o12.2, 610; Siddiqi, supra note 10, at 51. The traditional *hadd* punishment for apostasy (renouncing or abandoning Islam, known as *riddha*) is generally considered to be death. Ibn Rushd, supra note 10, at 552, al-Misri, supra note 11, at o8.1, 595; Siddiqi, supra note 10, at 51, 109.

[40] El-Awa argues against the interpretation that the *hadd* punishment for apostasy is death. El-Awa, supra note 12, at 50-53. He interprets the relevant Qur'anic passages as not specifying any penalty for apostasy in this life and as preventing compulsion of religious beliefs. Id. He argues that jurists began to support the death penalty as a punishment for apostasy for deterrent purposes. See id. Although a portion of the Shafi'i school hold this view, most schools view the death penalty as the *hadd* punishment for apostasy. Id. There is also 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). Ibn Rushd, supra note 10, at 552.

[41] International Covenant on Civil and Political Rights, art. 6(2).

because these crimes do not constitute the most serious crimes.[42] Instead, serious crimes should be limited to "intentional crimes, with lethal or other extremely grave consequences."[43] Current Maldivian law does not impose the death penalty for adultery or apostasy.[44] Under the Draft Code, the death penalty is available only for purposeful killing.[45]

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*).[46] The Draft Code does not authorize retaliatory wounding as a punishment for assault,[47] as is true under current Maldivian law and the law of many Islamic countries.[48]

B. ACCOMMODATIONS

During the drafting process, a number of devices were employed to ease the tensions between Shari'a and international norms. The selection of which accommodations would be sought and which would not was, of course, a determination that only the Maldivians could make and a matter on which there existed substantial political and legal limitations.[49]

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[42] See Concluding Observations of the Human Rights Committee: Sudan, UN document CCPR/C/79/Add.85, 19 November 1997, para. 8.

[43] Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (adopted by the UN Economic and Social Council 1984).

[44] 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.

[45] 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.

[46] Ibn Rushd, supra note 10, at 490; Siddiqi, supra note 10, at 52.

[47] 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).

[48] 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 also, e.g, Penal Code §§ 319-338 (Malay.) (authorizing imprisonment, fines, and lashes, but not retaliation, as punishment for assault).

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

Lashes as a Penalty Flogging or lashes is a traditional form of *hadd* punishment – the Qur'an authorizes lashes as punishment for a variety of *hudud* offenses.[50] Islamic jurists also consider lashes to be one of the forms of discretionary *ta'zir* punishment.[51] However, international norms bar such violent punishment. Article 5 of 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."[52] And lashes are generally held to be inhumane.[53]

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 wrists. As a footnote to the proposed text explains, "This definition of lashes seeks to capture the practice of punishing *hudud* offenses by 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."[54]

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[50] The *hadd* punishment for the offense of *zina* (unlawful intercourse, encompassing both adultery and fornication) committed by unmarried persons is 100 lashes. Ibn Rushd, supra note 10, at 524. The *hadd* punishment for the offense of *qadhf* (false accusations of unlawful intercourse) is 80 lashes. Id. at 531. The traditional *hadd* punishment for drinking *khamr* (intoxicating beverages) is generally considered to be 40 lashes, at least in the Shafi'i school, although some views hold that the traditional *hadd* punishment for this offense is 80 lashes, while some say 20 lashes. Id. at 535; Siddiqi, supra note 10, at 116-18.

[51] See Siddiqi, supra note 10, at 172-75; Al-Misri, supra note 11, at 619.

[52] See also International Covenant of Civil and Political Rights, art. 7.

[53] See, e.g, Hirad Abtahi, The Islamic Republic of Iran and the ICC, 3 J. Int'l Crim. Just. 635, 644 (2005) (noting that whipping is "regarded by international lawyers as torture and sometimes inhumane acts"); 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); 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).

[54] Id. 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: § 411 (Unlawful Sexual Intercourse), § 411(c)(5) authorizes 100 lashes for this offense, § 413 (Incest), § 413(b)(3) authorizes 19 lashes for this offense, § 612 (False Accusation of Unlawful Sexual

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Use of the Death Penalty 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. As noted previously, the Maldivians and many other Muslim countries have dropped it as a penalty for adultery and apostasy.[55] It remains on the books as an authorized punishment,[56] although it has not been used in the Maldives for 54 years, earning the country the status categorization of "de facto abolition" by Amnesty International.[57] Many will argue that its use violates international norms.[58]

The Draft Code's solution to the conflict is to keep the penalty legally available but under principled rules that make its application essentially impossible. That is, it would continue to perform a symbolic function and would reaffirm a deference to Shari'a but would continue in its current status of de facto abolition. 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."[59] Other provisions impose other limitations on its use.[60] 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 seriously than less serious violations.[61] If the death penalty

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[54] (...continued)
Intercourse), § 612(b)(2) authorizes 80 lashes for this offense, § 616 (Failing to Fast During Ramadan; Consuming Pork or Alcohol), § 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.

[55] See text accompanying note [??] supra.

[56] See Maldivian Penal Code §§ 36, 37.

[57] See Amnesty International, Abolitionist and Retentionist Countries: Abolitionist in Practice, http://web.amnesty.org/pages/deathpenalty-abolitionist3-eng (noting that the last known execution in the Maldives was in 1952).

[58] See Amnesty International, International Standards on the Death Penalty, http://web.amnesty.org/library/Index/ENGACT500012006?open&of=ENG-392.

[59] In our Final Report, Pro/Con Footnote 4 marks as an issue for discussion by the Majlis (the parliament) whether the death penalty should be removed from the Code altogether. Final Report, supra note [??], at ??.

[60] Draft Code § 1204 (Death Penalty) of the sentencing guidelines further limits the imposition of the death penalty. § 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." § 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). § 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)). § 1204(d) provides for an automatic appeal for complete review of all findings of fact and law.

[61] See, e.g., Paul H. Robinson, Criminal Law § 1.3 (1997) (discussing punishment theory (continued...)

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, which one can always do, then the death penalty is not legally authorized.

Criminalizing Criticizing Islam Shari'a criminalizes apostasy (*riddha*) -- voluntarily renouncing one's faith. It is often considered to be subject to the *hadd* punishment of death, although there is some disagreement over this (including within the Shafi'i school).[62] According to traditional views, a broad variety of conduct can be considered acts entailing apostasy.[63] 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," as well as an almost endless catch-all category; indeed, "the subject is nearly limitless."[64]

Including an offense that covers this broad range of acts could be thought to violate international norms of freedom of religion and freedom of expression.[65] The Draft Code's approach is to recognize the offense but to significantly narrow its reach and effect. The Draft Code does not criminalize converting from Islam,[66] but does include a provision that prohibits criticizing the fundamentals of Islam (Section 617). While thereby acknowledging the need to avoid publicly insulting Islam, Section 617 (Criticizing Islam) 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."[67] This limits the prohibition to only that speech or those materials that insults 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.[68] 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, as

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[61] (...continued)
and noting the relevance of the seriousness of the violation).

[62] See supra notes 17-18.

[63] For a discussion of apostasy and acts which constitute apostasy, see Ahmad Ibn Naqib Al-Misri, Reliance of the Traveler § o8.7 (Nuh Ha Mim Keller trans., Amana Publications 1994).

[64] Al-Misri, supra note 10, at o8.7, 596-98.

[65] For international protection of freedom of religion and freedom of expression, see, for example, Article 18 of the UN Universal Declaration of Human Rights ("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.").

[66] There are no provisions criminalizing the abandonment of one's faith in the Draft Code (see particularly Chapter 610 (Public Order and Safety Offenses)).

[67] The Maldivian Constitution defines the tenets of Islam as the "faith, belief and doctrines of Islam." Maldivian Constitution, art. 156.

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

long as one did not have that as one's purpose. Subsection (b) also provides an exception for conduct performed on the 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 as only quasi-criminal, a "violation" rather than an offense (less serious than the lowest misdemeanor), for which no imprisonment is authorized.[69]

Marriage Presuming Consent to Intercourse Under traditional views of Shari'a, 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,[70] and a wife is obligated to engage in sexual intercourse with her husband unless it would cause her harm.[71] This can be interpreted as contradicting 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."[72] The Draft Code does not follow the literal Shari'a principle but does not ignore the spirit behind it. Section 131(a) (Sexual Assault) criminalizes engaging in sexual intercourse without consent. 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 to 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 and common sense rebuttable presumption can stand-in as a somewhat milder form of, but nonetheless a continuing symbol for, the Shari'a rule.[73]

Presumption of Illicit Sexual Contact by Persons of Opposite Sex Alone Behind Closed Doors Under Shari'a, sexual intercourse and contact is only lawful between a husband and wife.[74] This rule is enforced by regulating many forms of interaction between men and women.

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[69] 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.

[70] Ahmad Ibn Naqib Al-Misri, Reliance of the Traveler § m5.4, at 526 (Nuh Ha Mim Keller trans., Amana Publications 1994) ("A husband possesses full right to enjoy his wife's person ([although sodomy] is absolutely unlawful) in what does not physically harm her.").

[71] Ahmad Ibn Naqib Al-Misri, Reliance of the Traveler § m5.1, at 525 (Nuh Ha Mim Keller trans., Amana Publications 1994) ("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.").

[72] Preamble to the UN Universal Declaration of Human Rights.

[73] In our Final Report, Pro/Con Footnote 7 discusses changing this rebuttable presumption to an absolute presumption or removing the presumption altogether. Final Report, supra note [??], at ??.

[74] See Ibn Rushd, supra note 10, at 521 (defining the offense of *zina* as "all sexual

(continued...)

One such specific regulation criminalizes two persons of the opposite sex who are not married to one another being together alone behind closed doors. Prohibiting such would seem to violate international norms in support of privacy.[75] (Indeed, even the criminalization of actual sexual contact or intercourse between unmarried persons may be said to be inconsistent with international norms regulating privacy.[76])

The Draft Code does not criminalize the act of being alone behind closed doors itself, although it does not ignore the thought behind the Shari'a rule. Section 412(c) (Unlawful Sexual Contact) contains a presumption that a person alone with another person of the opposite sex behind closed doors had sexual contact (a lesser offense than unlawful sexual intercourse[77]), but the presumption is rebuttable. The parties may explain that they had no sexual contact. Note that the burden of proof is on the prosecution to prove each offense element to a practical certainty.[78] Thus, in order to escape liability, the defendant need only raise enough doubt to make the factfinder be less than practically certain as to whether sexual contact occurred.[79]

C. Remaining Deviations from International Norms

Despite the efforts to find accommodations in the tension between Shari'a and international norms, some conflicts remain in the Draft Code, although, even here, the breadth of the gap commonly has been reduced. For example:

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[74] (...continued)
intercourse that occurs outside of a valid marriage").

[75] See Universal Declaration of Human Rights, art. 12 ("No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."); International Covenant on Civil and Political Rights, art. 17 (providing similar protection).

[76] See Susan Marks & Andrew Clapham, International Human Rights Lexicon 265 (2005) (noting that right to privacy has been the basis of challenges to laws criminalizing consensual sexual conduct, including same-sex relations).

[77] Compare DMPC § 412(d) (grading unlawful sexual contact as a Class 1, 2, or 3 misdemeanor) with DMPC § 411(c) (grading unlawful sexual intercourse as a Class E felony, or Class 1 or 2 misdemeanor).

[78] See DMPC § 15(a). "To a practical certainty" is used in the Draft Code to denote the highest standard of proof, the equivalent of the American conception of "beyond a reasonable doubt." The meaning that American law has associated with the phrase "beyond a reasonable doubt" has little to do with its actual phrasing, and the phrase does not carry the same meaning with it to the Maldives. The phrase "to a practical certainty" was chosen instead because the Maldivians felt it better communicated the appropriate standard.

[79] In our Final Report, Pro/Con footnote 13 discusses whether this should remain a rebuttable presumption of sexual contact or should be a separate, minor offense. Final Report, supra note [??], at ??.

Authorizing Polygamy Although jurists have interpreted the Qur'an and the traditions of the Prophet as expressing a preference for one wife,[80] as is the standard practice in the Maldives and most other Islamic countries,[81] Shari'a authorizes a man to have up to four wives.[82] A woman may not have more than one husband.[83] The Draft Code carries forward this 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. In practical effect of this provision is doubtful. There exists a strong social aversion to polygamy in the Maldives, so the absence of the formal prohibition is not likely to have an effect.[84] In other words, the situation is similar to some of the accommodations discussed in the previous section: the formal legal rule is consistent with Shari'a although the actual practice is consistent with international norms.

Criminalizing Fornication, Adultery, and Same-Sex Intercourse Because, under Shari'a, sexual intercourse is lawful only between a husband and wife,[85] both adultery and fornication are prohibited, as *zina*, which can be punishable by death (by stoning) when the offender is married, and by lashes when the offender is unmarried.[86] Because persons of the same sex may not marry, same-sex intercourse is necessarily included in the prohibition.[87] The

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[80] See Al-Misri, supra note [??] ("It is unlawful for a free man to marry more than four women. It is fitter to confine oneself to just one."). The preference for one wife is derived from Qur'anic passages such as verse 4:3, which provides "[i]f you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two or three or four; but if you fear that you shall not be able to deal justly (with them), then only one."

[81] See Heather Johnson, There are Worse Things Than Being Alone: Polygamy in Islam, Past, Present, and Future, 11 Wm. & Mary L. Rev. 563, 5 (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); Polygamy, http://muslim-canada.org/polygamy.pdf ("Polygamy is not practiced much in the Muslim world today").

[82] Ibn Rushd, supra note [??], at 47 ("The Muslim jurists agreed about the permissibility of (a man) marrying four women at the same time. . . .[T]he majority maintain that a fifth wife is not permitted, because of the words of the Exalted, '[M]arry of the women who seem good to you, two or three or four' and also because of a tradition related from the Prophet . . . that he said to Ghaylan when he converted to Islam and had ten wives, 'Hold on to four and let go the rest.'"); Ahmad Ibn Naqib Al-Misri, Reliance of the Traveler m6.10, at 530 (1994) ("It is unlawful for a free man to marry more than four women. It is fitter to confine oneself to just one.").

[83] Ahmad Ibn Naqib Al-Misri, Reliance of the Traveler 516 (1994).

[84] Maldives: Kingdom of a Thousand Islands, http://www.cpamedia.com/history/maldive_thousand_islands, (noting that "[p]olygamy is rare" in the Maldives).

[85] See supra note [50??].

[86] See Ibn Rushd, supra note [??] at 521, 523.

[87] For treatment of same-sex relations in the Qur'an, see verses 2:188, 49:13, 53:45,

(continued...)

Draft Code carries forward this criminalization, albeit with much 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 punishment for unlawful sexual intercourse between two unmarried persons as that of a Class 2 misdemeanor,[88] which has a maximum authorized term of imprisonment of six months;[89] the maximum authorized fine is 12,500 MVR, which is equivalent to approximately $1,060.[90] Section 411(c)(2) punishes same-sex intercourse as a Class 1 misdemeanor, which has a maximum term of imprisonment of one year, and a fine not to exceed 25,000 MVR, which is equivalent to approximately $2,120.[91] In fact, the prohibition is rarely enforced. However, its continued availability creates an unhealthy discretion in the government to bring a prosecution if it chose to do so.[92]

Criminalizing False Accusations of Adultery Under Shari'a, the crime of *qadhf* punishes false allegations of fornication or adultery.[93] The *hadd* punishment is flogging.[94] Draft Code Section 612 prohibits false statements accusing someone of committing unlawful sexual intercourse (under Section 411), although it requires that the prosecution prove to a practical certainty that the defendant knew that the statement was false. (Lashes is authorized, in addition to the standard punishment provided under the Draft Code's normal grading scheme,[95] in accordance with Shari'a, but recall that lashes under the Draft Code is only a symbolic punishment.[96])

Criminalizing the Drinking of Alcohol, the Eating of Pork, or the Failure to Fast Shari'a prohibits the drinking of intoxicating beverages.[97] The traditional punishment is flogging (40 lashes), but the modern view is that lesser punishments may be appropriate.[98] Consuming

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[87] (...continued)
11:78, and 24:32.

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

[89] See DMPC § 92(g).

[90] See DMPC § 93(b)(7).

[91] See DMPC § 92(f).

[92] See DMPC § 93(b)(6).

[93] Ibn Rushd, supra note 10, at 531.

[94] Id.

[95] See DMPC § 90 (setting forth grades of offense); § 92 (authorizing maximum terms of imprisonment for each grade); §93 (authorizing maximum fines for each grade).

[96] See text accompanying notes [??] supra.

[97] Ibn Rushd, supra note [??], at 534-35.

[98] The traditional punishment for drinking *khamr* (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. Ibn Rushd, supra (continued...)

pork is also prohibited according to the Qur'an and *Hadith*.[99] The Draft Code carries these offenses forward as Section 616 (Failing to Fast During Ramadan; Consuming Pork or Alcohol). The offenses are set as the lowest category, Class 3 misdemeanors; and an additional punishment of 40 lashes is authorized, as Shari'a requires.[100] More importantly, the offenses are limited in scope. They apply only to Muslims and only if done publicly. Thus, it is not an offense to consume privately. The lack of public consumption reaffirms the society's preference for adherence to Islamic tradition but limitation of the offense to public consumption reduces the intrusion on personal autonomy.

Thus, even where the Shari'a-international norms conflict remains, its extent is reduced through a variety of mechanisms, including the addition of high culpability requirements, limitations in the scope of the offense, the introduction of higher proof requirements, and/or dramatic reduction in the penalty available for the violation.

D. CONCLUSION

The net effect of the reforms, then, is to reduce but not wholly eliminate conflicts between the Draft Code and international norms, although many if not most of the remaining conflicts are of limited practical effect. The Shari'a rule may be the formality, but the practical reality is commonly something more consistent with international norms.

A Westerner 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 from its laws given its "de facto abolition" of the penalty. Or why not formally prohibit polygamy if their own social conventions do not allow it? Why not get "full credit," as it were, with the international community for practices that would be welcomed and approved? Why suffer the criticisms that come with keeping a formal rule that does conflict?

The probably obvious answer is that there is more to the political 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

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[98] (...continued)
note [??] at 535; see also Siddiqi, supra note [??], 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 [??], at 61-63 (citing the Kuwaiti penal code as an example of applying *ta'zir* punishment for this offense).

[99] See, e.g., the Qur'an, verse 5:3 ("Forbidden unto you are carrion and blood and swine-flesh . . . ."); Al-Misri, supra note [??] p30.2, at 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 draft Code. Fasting during Ramadan is obligatory under certain circumstances. See Al-Misri, supra note [??], i1.1, at 278-79. For more on fasting, see id. i1.1-33; Ibn Rushd, supra note [??] at ch. 10.1.

[100] See supra note [??].

international norms, it is commonly because their own social judgments have changed, not because international norms are a political force of serious influence with them. In such a situation, it is no surprise that they would wish to honor traditional Islamic practices even as their society was changing in ways that moves away from them. Muslims have little reason to rush to change the legal formalities if those formalities provide a comforting show of deference to a religion they cherish.[101]

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.[102] The benefits of comprehensive codification are well known:[103] providing fair notice of what the penal law commands and fair adjudication of each purported violation.[104] In 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."[105] Through codification, the legislature exercises its

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[101] Furthermore, the Islamic legal tradition has always been a diverse and complex one, producing a variety of legal interpretations over the course of its 1400 years. See note 13 supra. Traditionally, a great deal of flexibility existed within Muslim legal interpretations, which due to a variety of factors, including colonialism, were made rigid over time. Id. Hence, the formality of the law differing from the actual practice has also been a trademark of the classical Islamic legal tradition.

[102] For a discussion of the dramatic effect of codification in the context of Islamic law, see Aharon Layish, The Transformation of the Shari'a from Jurists' Law to Stautory Law in the Contemporatry Muslim World, 44 Die Welt Des Islams 1 (2004) (noting the resulting shift of authority from Islamic jurists to an often secular legislature).

[103] See generally Paul H. Robinson, Criminal Law § 1.5 (1997) [hereinafter Robinson, Criminal Law]; 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).

[104] See Robinson, Criminal Law, supra note 2, at § 2.2; Paul H. Robinson, Fair Notice and Fair Adjudication: Two Kinds of Legality, 154 U. Pa. L. Rev. 335, 337-46 (2005). Although fair notice and fair adjudication originated as Western ideas, they are arguably as relevant, is not more so, to an Islamic democracy such as the Maldives.

[105] William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 576 (2001) ("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

(continued...)

authority over criminal law and avoids de facto delegation to the judiciary to create or define crimes. In 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. 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,[106] and other crimes are subject to creation without legislative action. For example, under the current regime, the President may create penal offenses, which has occurred under Section 88[107] and the Law on Narcotic Drugs and Psychotropic Substances.[108] 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 Islamic Shari'a. This means that people other than 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 political history of an overreaching executive that was not hesitant to take over criminal lawmaking authority, because its island structure means that there is a 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.[109]

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

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[105] (...continued)
controvertible, fundamentally political, and thus best left to the political departments.").

[106] For example, the Maldives previously criminalized sexual assault in a separate statute. See Book 6, § 173(10) and (12). (Sexual assault is Chapter 130 in the Draft Code.) On this point, American codes did better than current Maldivian law. See Robinson, Cahill & Mohammad, supra note 4, at 50–51 (faulting numerous American codes for failing to comprehensively codify excuse and justification defenses, recognizing by implication that these codes otherwise reached the most common forms of criminal conduct).

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

[108] See Law on Narcotic Drugs and Psychotropic Substances, Act No: 17/77 (1977) (defining the offenses found in Chapter 720 of the Draft Code).

[109] See Part I supra.

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 they can be understood and applied. This is not always easy to do.[110] The Maldivian failure manifests itself in such things as a highly verbose and technical drafting style,[111] poor organization,[112] and the presence of overlapping offenses.[113]

But the task of an accessible penal law is all the more important for the Maldives for the political reasons described above, as well as because of its heavy reliance upon the Islamic Shari'a. In contrast to Western secular law, Shari'a is considered a sacred set of principles that guides every aspect of daily life.[114] Accordingly, any criminal code that makes the ambitious claim of "being" Shari'a 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 independent found in many Western nations. Any set of adjudication principles thus 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

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[110] It is an unmet challenge for the criminal codes of many American states. See Robinson, Cahill & Mohammad, supra note 4, at 24-63 (providing examples of the failure of many state criminal codes to clearly articulate rules of conduct).

[111] 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 R.I. Gen. Laws, § 11-23-1 (2004) (defining murder); W. Va. Code, § 61-1-8 (2004) (defining the offense of "desecration of flag").

[112] 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 Robinson, Cahill & Mohammad, supra note 4, at 35.

[113] See infra Part VII.

[114] Joseph Schacht, An Introduction to Islamic Law 1 (1964) .

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 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.[115] This division allows for the 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 as to the existing circumstances and likely consequences at the time of the offense conduct.[116] 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 in the single General Part definition as detailed and sophisticated a definition of culpability as is needed.[117] Other General Part provisions share the same advantages.[118] The General Part/Special Part division is not a novel invention, but rather a device common to all modern criminal codes.[119]

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[115] See Model Penal Code, tbl. of contents (1962) (denoting "Part I: General Provisions" and "Part II: Definition of Specific Crimes").

[116] See, e.g., Draft Maldives Penal Code § 24(e) (2005) (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 . . .").

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

[118] 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.

[119] See, e.g., Model Penal Code, tbl. of contents (1962); Nat't Commission of Reform of Federal Criminal Laws, Final Report, tbl. of contents (1971); Proposed Kentucky Penal Code, tbl. of contents (2003); Proposed Illinois Criminal Code, tbl. of contents (2003); Draft Maldives

(continued...)

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 reflect simply 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 intend a difference in meaning, even if none is intended. A common principle of statutory construction is that "different language implies a different meaning,"[120] yet recognizing a difference may make little sense in some instances.[121] 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 current Maldivian Penal Code,[122] as it is in many American codes,[123] 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,[124] 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:

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[119] (...continued)
Penal Code, tbl. of contents (2005).

[120] Robinson, Criminal Law, §2.3.

[121] For example, assigning what appear to be different culpability levels to "dealing" in stolen property. See note 37, infra, and accompanying text.

[122] See supra [??].

[123] 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 . . . ."

[124] 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).

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]

(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.[125] 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.[126]

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[125] DMPC § 120

[126] 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

(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, facilitating 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 ,[127] and all defined terms are listed in alphabetical order in a General Part "dictionary."[128] 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 Islamic law plays in a Muslim society, reaching areas untouched by Western law.[129] It regulates both secular and religious life by providing a "framework of reference for all individual and collective behaviours."[130] In an

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[126] (...continued)

(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.

(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.

[127] See, e.g., id.

[128] See MDPC § 17.

[129] See supra note [in Part II??].

[130] 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, 504-05 (2004) (quoting Bernard Botiveau, Contemporary Reinterpretations of Islamic Law: The Case of Egypt, in Islam and (continued...)

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 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.[131]

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 importantly 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, especially in a Muslin society, to use the 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.[132] Most if not

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[130] (...continued)
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 The Islamic Criminal Justice System 3, 12 (M. Cherif Bassiouni, ed. 1982) ("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 . . . .").

[131] See Muhammad Iqbal Siddiqi, The Penal Law of Islam 9 (1979) (describing "the purpose of punishment" as "the humiliation for the convict and *the lesson for the public*" (emphasis added)).

[132] See, e.g., Andrew D. Leipold, The Problem of the Innocent, Acquitted Defendant, 94 N.W. U. L. Rev. 1297, 1327-36 (2000) (advocating that a verdict of innocent be available with (continued...)

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 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 PMRCP and DMPC 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 DMPC 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."[133] 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,[134] 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.[135]

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.[136] The message of this verdict is to

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[132] (...continued)
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).

[133] See PMRCP §§ 4.2, 6.6.

[134] See PMRCP, Rule 6.6.

[135] 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).

[136] See PMRCP 6.6(a)(3) ("The court must enter a judgment of 'not guilty' if it finds that (continued...)

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.[137] 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, a statute of limitations, or double jeopardy.[138] The issue of whether a nonexculpatory defense applies is usually resolved prior to trial. If the 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, and 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. 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 bus driver's 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 DMPC was drafted in such a way. For example, the DMPC 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.[139] 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.[140])

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[136] (...continued)
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.'").

[137] Established under Rule 4.2, CMPC. See § 15 of the DMPC (requiring that a defendant prove all elements of a general defense, including a nonexculpatory defense, by a preponderance of the evidence).

[138] See Robinson, Criminal Law, supra note [??], § 10.1, at 569; see also DMPC Chapter 60 (listing and defining non-exculpatory defenses).

[139] See DMPC ch. 40 (Justification Defenses); DMPC ch. 50 (Excuse Defenses); DMPC ch. 60 (Nonexculpatory Defenses).

[140] 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 [??] §8.5, at 455.

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 Islamic law 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,[141] even if existing law already criminalizes the conduct at hand.[142] Even without the distorting effects of publicity and politics, ad hoc legislation often produces overlapping offenses. Michigan has a general trespass prohibition,[143] but it also has offenses that criminalize trespass on cranberry marshes and trespass on huckleberry and blackberry marshes.[144] Although it already has a general forgery offense,[145] the Illinois Code has at least eleven offenses criminalizing forgery of a particular kind of

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[141] 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, e.g., 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 crime"); David Skeel & William J. Stuntz, Christianity and the (Modest) Rule of Law, 7 U. Pa. J. Const. L. ?? (forthcoming 2005) ("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 to extract a more favorable plea bargain.").

[142] See William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 512 (2001) (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.").

[143] Mich. Comp. Laws. Ann. § 750.552 (West 2004). See also Paul H. Robinson et al., The Five Worst (and Five Best) American Criminal Codes, 95 Nw. U.L. Rev. 1, 37 (2000) (discussing Michigan's trespass overlap).

[144] Mich. Comp. Laws. Ann. §§ 750.548, 750.549 (West 2004).

[145]

document.[146] Although state law already criminalizes manslaughter generally,[147] Maryland lawmakers enacted a second statute criminalizing manslaughter by automobile or vessel.[148]

A. THE PROBLEMS CREATED BY OVERLAPPING OFFENSES

This kind of multiplying of offenses produces serious problems. It creates long and complex penal codes,[149] which make it more difficult to find relevant offenses and to promote uniform application.[150] This is a special problem in a society with little tradition and training in the use of comprehensive penal codes. But the more serious problems arise from the fact that offenses overlap with one another.

Overlapping offenses complicate the application and interpretation of both provisions.[151] According to standard interpretive canons, a code provision must be read so as not to render another code provision superfluous.[152] Where a newly added provision in fact is 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

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[146] See [IL Final Report vol 1??] 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).

[147] See Md. Ann. Code art. 27, 387 (1996).

[148] See Md. Ann. Code art. 27, 388 (1996).

[149] See Paul H. Robinson and 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).

[150] See, e.g. Robinson & Cahill, supra note ??, at 636 (noting that complexity and multiple prohibitions hamper the criminal law's notice function to the point where even attorneys find it difficult to decipher).

[151] Id. at 639.

[152] 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")

endangering bodily safety as a Class A misdemeanor.[153] 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.[154] 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.[155] 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 more serious of the overlapping offenses, while another charges the less serious. This has the offender's punishment depend not on what he did but his luck in the particular prosecutor assigned his case.

A related problem from overlapping offenses is that it gives 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.[156] 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.[157] 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.

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[153] 20 Ill. Comp. Stat. 5/12-5 (West 2005).

[154] See Robinson & Cahill, supra note ??, 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).

[155] See [IL Final Report vol 1??] 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).

[156] Compare Mass. Gen. Laws Ann. ch 265, § 9 (West 2000) to id. ch 265, § 12 (West 2000). See also Robinson et al., supra note ?? at 52 (identifying and discussing the disparity in sentences between boxing and prize fighting).

[157] See 720 Ill. Comp. Stat. Ann. 5/17-6 (Michie 1993) (setting the maximum penalty for "State Benefits Fraud" at a Class 3 felony); 305 Ill. Comp. Stat. Ann. 5/8A-6 (Lexis 1999) (setting the maximum penalty for public assistance fraud at a Class 1 felony); 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.").

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.[158] In Pennsylvania, for example, buying a small amount of marijuana could bring charges for possession of a controlled substance,[159] purchase of a controlled substance,[160] marijuana possession,[161] and a drug paraphernalia charge stemming from a plastic sandwich bag.[162] 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 what violation.

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."[163] 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.[164]) The use of

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[158] 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…").

[159] Pa. Stat. Ann. tit. 35, § 780-113(16) (West 2003).

[160] Pa. Stat. Ann. tit. 35, § 780-113(19) (West 2003).

[161] Pa. Stat. Ann. tit. 35, § 780-113(31) (West 2003).

[162] Pa. Stat. Ann. tit. 35, § 780-113(32) (West 2003). Since marijuana is generally transported in plastic bags, the paraphernalia offense should not be considered separate from the possession or purchase activity.

[163] The discretion of prosecutors to set punishment levels can be mitigated by a statutory provision, a "multiple-offense limitation provision," that attempts to limit prosecution for fully overlapping offenses. CITE MPC 1.07 AND MALDIVIAN DRAFT CODE PROVISION 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.

[164] 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.

overlapping offenses thus increases the percentage of guilty pleas.[165] 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.[166] Yet, lawmakers have in the past shown little concern for limiting the creation of new, overlapping offenses or for tailoring their legislation to cover only the gaps they see in the existing code,[167] 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 Islamic countries, like the Maldives project. Because Islamic countries have little tradition of comprehensive criminal law codification, the drafters of the proposed code were free to construct a code that from its start avoided overlap between offenses as much as possible. Further, Islamic countries have no tradition of large and complicated penal codes. Thus, there is not the same

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[165] See Stuntz, supra note ??, 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).

[166] See Paul H. Robinson & John M. Darley, The Utility of Desert, 91 Nw. U. L Rev. 453 (1997) ("If [the criminal law] earns a 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.").

[167] 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.").

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.[168] This was the approach taken in drafting the DMPC, by 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 DMPC defines assault broadly, [169] then specifies three distinct offense grades.[170] A sentencing factor increase for assaults that occur within the home allowed us to avoid creating a redundant offense of home invasion.[171] 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 alterative 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 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 an infinite 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

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[168] 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 Section1.07. See Michael T. Cahill, Offense Grading and Multiple Liability: New Challenges for a Model Penal Code Second, 1 Ohio St. J. Crim. L. 599 (2004) (??). The DMPC has a multiple-offense limitation provision, albeit one that has fewer overlapping offenses to worry about. Draft Maldives Penal Code § 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 where each offense is defined as a continuous course of conduct and the offender is accused based on the same uninterrupted conduct.")

[169] See, e.g., Draft Maldives Penal Code § 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.")

[170] See, e.g., Draft Maldives Penal Code § 120 (b) (2005) (distinguishing assaults into three grades: serious assault, injurious assault, and simple assault).

[171] See, e.g., Draft Maldives Penal Code § 120 (c) (2005) (increasing baseline sentence if assault takes place in a residence).

enumerated the various ways anticipated. Such attempts at enumeration proved futile when a clearly disrespectful action did not fit into any of the statutorily provided categories.[172] 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."[173]

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 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.[174]

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.[175] 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 DMPC 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.

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[172] See, e.g., Ga. Code Ann. § 31-21-44.1 (2002) (enumerating possible abuses of a dead body).

[173] 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.").

[174] 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.

[175] 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.'").

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."[176] Other examples of combination offenses, which are common in American and foreign penal codes,[177] include burglary,[178] arson,[179] and kidnapping.[180]

A combination offenses 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 its performance of this grading function is seriously problematic. As explained below, combination offenses in fact hamper rather than help proper

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[176] Paul H. Robinson, Peter D. Greene & Natasha R. Goldstein, Making Criminal Codes Functional: A Code of Conduct and a Code of Adjudication, 86 J. Crim. L. & Criminology 304, 309 (1996).

[177] 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 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

[178] Burglary "combines trespass and attempt to commit another substantive offense, such as theft." Id. at 310.

[179] 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).

[180] 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).

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,[181] 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.[182]

but the use of combination offenses is something of a historic origin. Because certain combination of offenses commonly appeared together before Common Law judges,[183] it was these repeating factual patterns, rather than logical or conceptual categories, that shaped Common Law offense definitions.[184] 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."[185] "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."[186]

Of course, in a society without a codification tradition, it was possible for the code drafters to in fact right 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, discussed previously: They add length and complexity to a criminal code, which makes it more difficult to use and understand, without adding benefit.

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[181] 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).

[182] See Lucy Morgan, Measure Stiffens Carjacking Penalty, St. Petersburg Times, Feb. 18, 1993, at 4B (noting the origins of Florida's carjacking law); Fla. Stat. Ann. § 812.133 (2005) (defining carjacking).

[183] See, e.g., 4 William Blackstone, Commentaries Ch. 16 (discussing arson and burglary at common law).

[184] Cf. Paul H. Robinson, Criminal Law § 15.3 at 780 (1997) (suggesting administrative convenience as a reason why robbery statutes may have been retained).

[185] Model Penal Code & Commentaries § 221.1 cmt. 1, at 57 (Tent. Draft No. 11 1960).

[186] Id.

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.[187]

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.

But the most serious difficulty created by combination offenses is its effect in sharply curtailing the sophistication of the code's grading judgments.[188] Consider the offense of robbery. 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.[189] 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,[190] forcing a compression of the nine varieties of robbery as envisioned by the uncombined offenses into the three categories offered by the combination offense. For the code to be fully effective in capturing relevant distinctions in behavior, the grading system should

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[187] See Part VII.A.

[188] See Robinson, supra note 10, § 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.").

[189] 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 the following nine combinations:

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

[190] 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); N.Y. Penal Law §§ 160.05, 160.10, 160.15 (McKinney 2004) (defining three grades of robbery); see also 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).

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.[191] But addressing the interactive effect 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, increase 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 some other Muslim 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

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[191] 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 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).

potential for inconsistency.[192] What the Maldivians need is 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.

B. SOLUTIONS

As with overlapping offenses, the solution to the problem of combination offenses was quite easier than it would have been in the United States. Drafters were not faced with the task of expunging traditional, redundant combination offenses.[193] The lack of a codification history meant that 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 in avoiding complexity.[194]

For example, the DMPC 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.[195] 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.[196] Combining the five theft grading categories with the three grading categories of criminal trespass[197] 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.

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[192] For a discussion of the these and related special challenges in the Maldivian situation, see text and notes at [13-15??] supra.

[193] See notes 185-187 and accompanying text.

[194] 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 [CITE MALDIVIAN PROPOSED CODE PROVISION 1006??],

[195] DMPC, § 230(c)(1).

[196] DMPC, § 210(b).

[197] DMPC, § 230(c).

American lawmakers might have understandable hesitancy about what seems to be a radical departure from the Anglo-American tradition of criminalizing certain comminations of offenses. However, the DMPC 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 Section.

IX. SIMPLE YET POWERFUL SENTENCING GUIDELINES

The previous Sections 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 establishes 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 -- typically is done by 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. Sentencing guidelines are thought to have the potential to improve sentencing uniformity, to minimize the potential for abuse of discretion, and to properly reserve the criminalization and punishment authority to 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 of similar offenders committing similar offenses receiving different sentences, 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. Because no two offenders or crimes are exactly alike, some sentencing discretion is needed in any system. But the goal of sentencing guidelines must be to allow the discretion needed by judges to take account of the unique facts of each case, not to preempt legislative determination of the value and policy judgments necessary in defining the relative seriousness of offenses and the determinants of blameworthiness.[198]

Guidelines also can 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.[199]

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

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[198] 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 Columbia Law Review 1124 (2005).

[199]

comprehensive penal codes,[200] as the most democratic branch, the legislative 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.[201] As in penal code drafting, the legislature is also preferable because it can consider sentencing from a jurisdiction-wide perspective, while a single sentencing judge, who can deal only with the case before her, cannot.[202] 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 Islamic democracy such as the Maldives, however, guidelines are even more critical. Young democratic regimes often must work to establish their public legitimacy, and fostering trust in the criminal justice process is a key element in that process.[203] Abuses of discretion, particularly when there 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.[204] Nations without a legislative criminal lawmaking tradition, such as the Maldives, are faced with the constant challenge of demonstrating that the legislature, as the

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[200] CROSS-REFERENCE TO EARLIER DISCUSSION??

[201] One might argue that an elected judiciary provides these benefits, but judges, even elected judges are rarely thought to be in the legislative business that would allow them to openly engage in decisionmaking based upon such value judgments. Further, even in jurisdictions with an elected judiciary, legislators typically are elected for shorter terns and in more competitive contests than are judges. Accordingly, legislative will is almost always more "democratic" than judicial decisions. In addition, legislators are free from the strictures of binding precedent of higher courts, stare decisis in the same court, and persuasive authority of lower and coordinate courts.

[202] 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).

[203] See Ontario Human Rights Commission, Paying the Price: The Human Cost of Racial Profiling ("Left unchecked, mistrust in the criminal justice system can lead to civil unrest.")

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

elected representative of the people, plays the central lawmaking role.[205] 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.[206] 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. Moreover, many cases are adjudicated on geographically-separated islands by local magistrates who lack the formal training Western judges typically possess. Thus, to insure that the sentencing guidelines were both trusted and applied as intended, the guidelines needed to be transparent and straightforward to apply.

At the same time, the Maldivian judiciary, like many of its Islamic counterparts, lacks the Western judicial tradition of independence.[207] A well-established, institutionalized judiciary is likely to create informal pressures to gravitate toward uniform sentencing,[208] 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.

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[205] 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).

[206] 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 the United States, any tradeoff between simplicity and completeness could be resolved in favor of the latter factor. Maldivian attorneys, judges, and defendants lack this luxury.

[207] 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

[208] 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.")

Recent Maldivian policy decisions favoring the use of alternative punishments to prison,[209] 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 alterative 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. The United States and other established democracies have, over many generations, developed a reputation for a certain level of fairness in adjudicating criminal matters.[210] Such a reputation, while not 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.

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 Penal Code. The sentencing guidelines appear as Part III of the Draft Penal Code, after the General Part in Part I and the Special Part in Part II. More importantly, 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.[211] It also affirms the conceptual similarity between grading factors and sentencing

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[209] 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.

[210] See, e.g., Ohio Commission on Racial Fairness, Action Plan 31 (2002) (being careful to describe the American criminal justice system as potentially "the fairest in the world and in history" before suggesting potential reforms)

[211] See the U.S. Sentencing Guidelines as a striking point of comparison. Those

(continued...)

factors,[212] 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.[213]

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 ought to double punishment or more can be treated as a grading factor. Each increase in grade doubles the maximum punishment authorized.[214] 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,[215] 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 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.[216]

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,"[217] if the offender refuses to made a good faith effort to compensate the

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[211] (...continued)
guidelines are almost a criminal code of their own.

[212] 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.

[213] 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.").

[214] Under the Draft Code, a one grade increase has the effect of doubling the maximum authorized penalty. See DMPC (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.

[215] See note 24?? infra.

[216] [CITE THE SG SECTION??]

[217] 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
(continued...)

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, in 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, in 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 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.[218]

Most sentencing schemes either fail to consider factors other than the most basic[219] or attempt to be more ambitious and end up with unacceptable length and complexity.[220] The DMPC's sentencing guidelines, by contrast, give sophisticated results without sacrificing simplicity. The process of determining a sentence under the DMPC 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.

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[217] (...continued)
definition.

[218] See note 24?? infra.

[219] [I THINK THERE ARE PROBABLY MANY BETTER EXAMPLES OF SENTENCING GUIDELINES THAT TOUCH ONLY ON THE MOST BASIC FACTORS AND IGNORE MANY IMPORTANT FACTORS. MINNESOTA IS ONE OF THE MORE SOPHISTICATED GUIDELINES, IF MY MEMORY IS CORRECT.] See, e.g., Minnesota Sentencing Guidelines Comm'n, Minnesota Sentencing Guidelines and Commentary 2 (2005) (describing the nature of that state's sentencing program and noting that its matrix generates a presumptive sentence based on "the two dimensions most important in current sentencing and releasing decisions offense severity and criminal history."

[220] 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).

The relevant factors are totaled together, and the total is used to determine the offender's "box" on the sentencing guidelines grid, and thereby a specific proposed sentence.[221]

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.

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[221] The proposed sentencing grid is as follows:

	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, 9n, 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

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.[222]

The DMPC'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 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 to

[222] Equivalencies in punishments in the DMPC are set as follows:

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

DMPC § 1005

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

CONCLUSION

The Article has examined the special situation in which criminal law codification finds itself in a Muslim society. On the one hand, such codification is more important and more likely to bring about dramatic improvements in the quality of justice than in non-Muslim societies, to a 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 the lack of experience and training with codifications. But there are also perhaps unexpected advantages to undertaking a general codification project in a Muslim country. That lack of a codification tradition that makes drafting more challenging because it requires greater simplicity and accessibility, also has the effect of permitting drafters the freedom to invent new codification forms that would not be tolerated in a society with an established codification tradition.

While it was a natural concern that any Shari'a-based code would necessarily conflict with international norms, in practice it became apparent that the natural conflict was not as great as many would expect and that opportunities for accommodation were available for those would seek them, sometimes through interesting drafting formulations by which the spirit of the Shari'a rule could be maintained without violating the norms of a modern democratic society. In the end, this Shari'a-based penal code drafting project yielded a Draft Code that can bring greater justice to Maldivians, but also that can be a useful starting point for penal code drafting in other Muslim countries that value the interests of legality and justice, especially those with an interest in moving toward shared international norms.[223]

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 form such as those based upon the Model Penal Code. 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 quite odd that a draft penal code for a small Islamic island-nation barely rising from the Indian Ocean could provide advances at home, 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.[224] That means that the community of learning on these issues can be world wide, not country specific, creating the potential for a useful exchange

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[223] The draft code's official commentary lays out the Shari'a authorities that support a shift toward international norms on each point.

[224] See Paul H. Robinson & Robert Kurzban, Concurrence & Conflict in Intuitions of Justice (forthcoming 2006) (reviewing empirical studies demonstrating wide agreement across demographics and cultures of people's assessments of the relative blameworthiness of serious wrongdoing).

that is illustrated by this project of Americans drafting a model Islamic penal code that can provide useful guidance in non-Muslim countries.[225]

[225] As of this writing, the DMPC has been approved by the Cabinet and submitted to the Majlis, which is currently debating its provisions. See http://www.mv.undp.org/