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Abstracts

Articles

Harsh Justice for International Crimes?

Margaret M. deGuzman 1

As the International Criminal Court (ICC) begins to sentence defendants for war crimes, crimes against humanity, and genocide, it must determine how much punishment is appropriate for these crimes. The initial sentencing decisions are especially important because they will serve as reference points for future sentences at the ICC and will likely influence the sentences of other international courts. Few international norms exist to guide the ICC. The punishment practices of other international courts have been inconsistent, ranging from very mild to quite severe. National norms are even more divergent. Punishments considered appropriate in some systems are deemed inhumane in others. Nonetheless, the limited commentary on the appropriate punishment severity for international crimes largely speaks with one voice: international justice should be harsh.

This Article takes issue with the call for harsh international punishment. Despite distracting appeals to punishment theory, such calls ultimately rest on the intuition that international crimes are so serious as to require harsh punishment. That intuition is misleading because at least in some cases, the rhetoric and narratives surrounding international crimes inflate perceptions of their seriousness. While judges exercising discretion cannot completely avoid the influence of intuitions, they should be cautious in applying them and should seek to develop norms to guide their sentencing decisions. Such norms should be rooted in the human rights regime in which international criminal courts are embedded. Attention to human rights norms will generally counsel leniency, and not harshness.

Comprehensive Immigration Reform(s):
Immigration Regulation Beyond Our Borders

Stella Burch Elias 37

American lawmakers, jurists, and scholars are vigorously debating the future direction of immigration regulation in the United States. Following the passage on July 27, 2013 of Senate Bill 744, some kind of comprehensive reform seems increasingly likely. Immigration law is inherently interjurisdictional and transnational, but thus far the conversation about immigration reform has failed to look beyond our own national borders for alternative models or practices. This Article seeks to broaden the immigration regulation debate by contrasting recent developments in immigration

regulation in the United States with those in other countries with federal systems. In three federal nations that traditionally had widely divergent approaches to immigration regulation—Germany, Australia, and Canada—strikingly similar multitiered, multigovernmental systems of immigration regulation have emerged in recent years. This Article proposes that the future direction of immigration regulation in the United States should consider the German, Australian, and Canadian models of immigration law and policy to shed light on a range of potentially desirable legislative, regulatory, and policy options. The German, Australian, and Canadian experiences strongly suggest that any reform of our own immigration laws should permit states and localities to play a greater role in immigrant selection, a continued role in immigrant inclusion, and a more limited role in the enforcement of immigration laws that exclude immigrants from the country.

Charitable Giving, Tax Expenditures, and Direct
Spending in the United States and the European
Union

Lilian V. Faulhaber

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This Article compares the ways in which the United States and the European Union limit the ability of state-level entities to subsidize their own residents, whether through direct subsidies or through tax expenditures. It uses four recent charitable giving cases decided by the European Court of Justice (ECJ) to illustrate the ECJ's evolving tax expenditure jurisprudence and argues that, while this jurisprudence may suggest a new and promising model for fiscal federalism, it may also have negative social policy implications. It also points out that the court analyzes direct spending and tax expenditures under different rubrics despite their economic equivalence and does not provide a clear rule for distinguishing between the two, adding to the confusion of Member States and taxpayers. The Article then surveys the U.S. Supreme Court's Dormant Commerce Clause jurisprudence, under which the Court analyzes discriminatory state spending provisions. The Article concludes that although both the Supreme Court and the ECJ prioritize formalism over economic equivalence, the Supreme Court's approach to tax expenditures is more defensible than that of the ECJ due to the different federal structures of the two jurisdictions.

Note

An Empirical Analysis of CFIUS: Examining
Foreign Investment Regulation in the United States

Paul Connell & 131
Tian Huang

With increasing injections of foreign capital in the United States and rising national security concerns, the legislative and executive branches have played an expanded role in policing international investment in American companies. Arguably, no government group serves a more critical gatekeeping role than the Committee on Foreign Investment in the United States (CFIUS). Yet, its evaluative process, which permits it to examine and block any foreign attempt to garner control of an American entity, is completely obscured from the public purview. However, the Committee's secrecy does not preclude all studies of its review process. Using various government databases and reports, this Note produces one of the first empirical analyses of the CFIUS process. This Notes show through event studies that CFIUS actions lead to large protectionist wealth transfers, and the regression analysis indicates that despite claims of discriminatory application against certain nations, CFIUS denials are best explained by factors relating to valid concerns about national security.

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