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**THE YALE JOURNAL
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Abstracts

Articles

- Seeking Inconsistency: Advancing Pluralism in International Criminal Sentencing Nancy Amoury Combs 1

Although the inherent pluralism of international criminal law has gained increasing scholarly acceptance in recent years, the scholarship pertaining to sentencing remains surprisingly universalist. Scholars reflexively expect international courts to sentence their defendants consistently with other international courts, and they advance sentencing principles that are intended to apply to international crimes, no matter where they are prosecuted.

This Article challenges that universalist viewpoint, both empirically and normatively. This Article demonstrates that scholarly expectations of sentencing consistency across international courts are premised on the misguided and factually unsupported notion that international courts constitute components of a unified criminal justice system. This Article goes on to maintain that sentencing disparities across international courts not only can be justified but are normatively desirable because they respond to a host of crucial differences in international criminal prosecutions, including differences in the kinds of atrocities that occurred, the level of perpetrator who can be prosecuted, and the international courts' own mandates. These differences create the need for differentiated sentencing schemes across different international tribunals and different situations of the International Criminal Court. Finally, this Article isolates domestic sentencing norms as a particularly crucial factor that should influence every tribunal's sentencing scheme. Domestic sentencing norms are vitally important to international sentencing primarily because a key constituency of the international criminal courts—local communities—considers them vitally important. Because domestic sentencing laws are understood to reflect and incorporate community norms, their inclusion will bestow on international prosecutions a much-needed legitimacy those prosecutions may otherwise lack.

- The Sad, Quiet Death of *Missouri v. Holland*: How Bond Hobbled the Treaty Power Michael J. Glennon & Robert D. Sloane 53

Many anticipated that Bond v. United States (2014) would confirm or overrule Justice Holmes's canonical decision in Missouri v. Holland (1920). Bond is now considered to have done neither; rather, it purportedly elided the constitutional issue by applying the canon of constitutional avoidance to the

treaty's implementing legislation, thus resolving Bond on statutory grounds alone and leaving Holland's validity for another day.

*This Article argues to the contrary that Bond eviscerated Holland. Chief Justice Roberts proceeded from the premise that "the statute—unlike the [treaty]—must be read consistent with principles of federalism inherent in our constitutional structure." This premise, upon which the core of the Court's subsequent analysis relied, is not, as the orthodox reading suggests, a mere clear-statement rule. By its terms, it is mandatory rather than precatory; and it cannot be reconciled with Holland. It abjures Holland's holding that a treaty and its implementing legislation must be evaluated together and that, under the Tenth Amendment, the validity of the latter depends upon the constitutionality in this regard of the treaty itself. Further, both the federalism-based canon of constitutional avoidance and background principle on which the Court relied tacitly, but necessarily, presupposed that Holland is no longer good law. Holland nonetheless continues to represent the most sensible and defensible reconciliation of the tension between the Treaty Clause and the Tenth Amendment. By abandoning Holland, the Court has interpreted the Constitution as disabling the nation from honoring international obligations of the sort at issue in *Medellín v. Texas*—in which the Court held that the federal government can do what Bond now holds it cannot. Bond took a lamentable step backwards for the United States, recreating one of the paramount problems that beset the nation under the Articles of Confederation.*

Expanding Standing to Develop Democracy: *Aparna Polavarapu* 105
Third-Party Public Interest Standing as a Tool for
Emerging Democracies

Standing doctrine can play an outsized role in marginalized groups' ability to protect their constitutional rights. The cultural and political dynamics in many developing countries routinely undermine the proper functions of the democratic system and make it unlikely that those parties most directly deprived of their rights will be heard by elected legislatures or be able to directly access courts. The vindication of their rights and the rule of law itself depend on the ability of others to litigate on their behalf. Thus, this Article argues for the expansion of standing doctrine to protect the democratic ideal in emerging democracies. Using Uganda and Kenya as case studies, this Article demonstrates that "third-party public interest standing"—the permission of third parties to institute judicial review proceedings on behalf of injured parties—serves two key ends. First, it allows for the discursive empowerment of marginalized groups. Second, in doing so, it enhances democracy.

Third-party public interest standing is viewed with suspicion by many Western supporters of democracy, but that suspicion is premised on faulty assumptions. The political and social contexts in many developing nations make overly strict limitations on standing dangerous to the rule of law. Where the executive and parliament are unresponsive or unaccountable to the population, and where access to the judiciary is near impossible for certain segments of the population, third-party standing may create the only opportunity for political presence. This Article both challenges the traditional perceptions of democracy and constitutionalism as inappropriate and incompatible with the needs of

emerging democracies and recognizes that innovations such as third-party public interest standing are necessary to further constitutional, democratic, and rule of law goals.

Note

Due Process of War in the Age of Drones

Joshua Andresen 155

The debate over how to properly rein in the errors and abuses of the drone program remains stalled between two ineffective and constitutionally problematic extremes. While some have defended executive unilateralism and others have called for an ex ante Drone Court, this Note defends ex post judicial review as the only constitutional and effective way to restore our constitutional balance of powers and the rule of law. The Note shows how judges should apply the international law of war to adjudicate the lawfulness of drone strikes and details a legal strategy for plaintiffs to bring a case under the Alien Tort Statute that reaches the merits. Adjudicating the legality of drone strikes for their compliance with the international law of war is an eminently legal task that our courts should feel compelled to carry out. Adherence to the rule of law, our constitutional separation of powers, and our national security interests all speak for ex post judicial review of drone strikes.

Essay

The Legal Adviser's Duty to Explain

Harold Hongju Koh 189

A great deal has been written about both international law and government lawyering. Most of the literature focuses on the government legal adviser's duties to his or her government client or the efforts among legal advisers to develop national or international networks. Instead, this Essay focuses on the crucial, overlooked responsibility of government international lawyers to explain publicly their government's international law rationale for its actions: what this author calls "The Legal Adviser's Duty to Explain."

This Essay explores the history and virtues of the Duty to Explain from the perspective of America's national experience. In arguing for a Duty to Explain, the author draws upon and generalizes from his own experience as the twenty-second Legal Adviser of the U.S. Department of State. He offers his thoughts in the hope that they will inspire other legal advisers and international legal scholars to reflect on their own national experiences and to offer their own national examples of how considered public legal explanation can enhance the legitimacy and sustainability of controversial public actions. This Essay closes by answering common objections to the notion of a public duty, concluding that broader recognition and study of such a public Duty to Explain would be both legally useful and politically prudent.

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