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Abstracts

Articles

Obscenity and Community Standards

Bret Boyce 299

This Article presents a comparative study of constitutional obscenity doctrine in the United States and Canada, and concludes that the community standards test that has long been the touchstone of this jurisprudence cannot be reconciled with fundamental principles of freedom of expression and conscience. In the United States, the imposition of community standards of morality is at odds with the U.S. Supreme Court's increasingly explicit rejection of mere majoritarian morality as a basis for criminal regulation, especially in the private sexual sphere. Moreover, the Court's embrace of local standards was always constitutionally anomalous and is increasingly so in the Internet age. The Supreme Court of Canada has tried to develop an alternative approach, insisting on a national standard grounded not in morality but in harm, especially harm to women. However, this national standard is largely a fiction, and the claim that whatever the community does not tolerate is by definition harmful is both theoretically and empirically untenable. The Canadian Court has implicitly recognized these difficulties in a recent decision that appears to jettison the community standards test altogether, and to focus purely on the question of harm caused by "degrading" and "dehumanizing" materials. It is not clear, however, that this new approach rescues the doctrine from the vagueness that has led to repressive and discriminatory enforcement in practice. Ironically, enforcement under this approach has especially targeted gays, lesbians, and feminists. Both the U.S. and Canadian experiences thus suggest that the obscenity prosecutions have been arbitrary and highly political. The author concludes that the prohibition of obscenity is incompatible with free expression, whether such prohibition is based on community standards, or on the harms that are said to flow from "degrading" and "dehumanizing" material. Bans on sexually explicit materials that involve only consenting adults in their production and distribution cannot be justified in societies committed to the freedom of speech and conscience.

**International Standards for Detaining
Terrorism Suspects: Moving Beyond the
Armed Conflict-Criminal Divide**

Monica Hakimi 369

Under what circumstances does international law permit a state to detain terrorism suspects not captured in a theater of combat? There continues to be confusion on this question, but two dominant strands of thought have emerged. One asserts that the law of armed conflict applies to permit extended detention with minimal legal process; the other claims that human rights law applies to prohibit detention unless accompanied by the ordinary criminal process. Neither strand tracks international practice. Rather than uniformly adopting one system or the other—armed conflict or exclusively criminal—international actors have been groping for new options. Based on a review of that practice, this Article argues that the global fight against terrorism should not be characterized as an armed conflict for purposes of application of a detention regime under the law of armed conflict, but that the reflexive rejoinder—if the law of armed conflict does not apply, then the criminal law must—is mistaken. Although the criminal law is an important tool for detaining terrorism suspects, human rights law also permits states to detain them administratively. Moreover, administrative detention better balances the liberty and security interests at stake in the context of particular terrorism suspects. Yet the legal parameters of security-based administrative detention are underdeveloped in international law. This Article thus begins the project of refining that law as it applies in the fight

against terrorism. The purpose of this project is twofold: to inhibit states from detaining unnecessarily or through uncontrolled and ad hoc measures; and to enable states to detain based on a lawful template that satisfies their security needs.

Notes

Modern-Day “Guarantee Clauses” and the Legal Authority of Multinational Organizations to Authorize the Use of Military Force

Peter E. Harrell 417

Recent political developments have brought renewed attention to “guarantee clauses,” which are treaty provisions that authorize a regional organization or other multinational entity to use military force against a member state under specified circumstances. The charter of the African Union (AU), for example, authorizes the AU to use military force to stop genocide or grave human rights crimes occurring within member nations. Scholars and political leaders, meanwhile, have called for guarantees that would protect fragile democratic governments against unlawful coups.

This Note develops a framework for assessing the legality of the use of force pursuant to guarantee clauses. It argues that military action pursuant to a guarantee clause is consistent with international law, but that jus cogens norms limit the range of specific circumstances under which guarantee clauses can provide legal authority for the use of armed force. After developing this framework, this Note applies it to several case studies in which regional organizations authorized the use of force. Finally, the Note concludes with a discussion of policy considerations relevant to the drafting of guarantee clauses.

Towards Common Interests and Responsibilities: The U.S.-India Civil Nuclear Deal and the International Nonproliferation Regime

Kate Heinzelman 447

In 2005, the United States and India announced their intention to conclude a bilateral civil nuclear deal to enable trade in peaceful nuclear materials and equipment, notwithstanding India’s refusal to join the Treaty on the Non-Proliferation of Nuclear Weapons. Over the last three years, the Bush administration has invested a considerable amount of time, effort, and political capital in obtaining the passage and acceptance of the U.S.-India deal. The deal is the centerpiece of American efforts to strengthen bilateral ties with the world’s largest democracy, secure access to its emerging market, and combat the proliferation of weapons of mass destruction. Recent signs that the deal may fail raise questions about the United States’s new approach to nonproliferation and the advisability of bilateral approaches that emphasize flexibility and particularization. This Note examines arguments critics have advanced regarding how the U.S.-India deal may threaten the international nonproliferation regime and suggests that the deal may not have the effects some of its critics fear. In conclusion, the Note suggests alterations that may strengthen the deal and others like it in the future.