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A Proposal for U.S. Implementation of the Vienna Convention's Consular Notification Requirement

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ABSTRACT

The Vienna Convention on Consular Relations (Vienna Convention), to which the United States is a party, requires signatories to notify the consulates of and to grant consular officers physical access to foreign criminal defendants. While the treaty has mostly functioned well for its states parties, the United States has recently encountered substantial problems—and international ill will—for its failure to comply with these requirements.

The language of the Vienna Convention reflects the historical and geopolitical landscape that existed in 1963—one in which the pace of immigration was at a relative lull and Cold War spy games, not state-level capital offenses, were top priority. Not long after the Vienna Convention's drafting, changes in U.S. immigration policy drastically increased the number of noncitizens and, in turn, foreign criminal defendants. Yet because the consular notification and access requirement applies to each foreign criminal defendant in the United States, no matter the severity of the crime, American authorities today cannot feasibly enforce its provisions.

The United States must preserve its reputation for observing its international obligations if it intends to invoke the Vienna Convention when its own citizens are detained abroad. This Comment proposes that the United States and high-priority partner countries enter into a series of bilateral modifications to the Vienna Convention that limit the scope of the notification requirement to foreign criminal defendants charged with capital offenses. This solution would lessen the administrative and logistical costs of American compliance with the Vienna Convention while granting consular officials access to their foreign nationals detained in U.S. custody—including the 143 noncitizens on death row across the country.

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INTRODUCTION

> To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which *Consuls* are deputed by their sovereigns.[1]
>
> —Justice William Johnson

In 1963, the United States entered into the Vienna Convention on Consular Relations (Vienna Convention), to which 173 countries are parties. The Vienna Convention requires a receiving state to notify a sending state's consulate upon request of any national of the sending state who is arrested, detained, or awaiting trial.[2] Thereafter, the Vienna Convention requires a receiving state to grant a sending state's consular officers physical access to a foreign national who is in prison, custody, or detention.[3] Such visits allow consular officers the opportunity to advise a foreign national of the rights to which he or she is entitled as a criminal defendant.

While the treaty has for the most part functioned well for its state parties, the United States has recently encountered substantial problems—and international ill will—for its failure to comply with the Vienna Convention's consular notice and access requirement. Domestically, the signs of turmoil appear in several U.S. Supreme Court cases that read the treaty narrowly or insist that it cannot be honored without implementing legislation, which Congress has failed to pass.[4] Internationally, the turmoil manifested itself in the 2004 decision of the International Court of Justice (ICJ) in *Case Concerning Avena and Other Mexican Nationals* (*Avena*),[5] which found that the United States violated its treaty obligations under the Vienna Convention by failing to inform fifty-one Mexican nationals of their rights to notification, and in the United States' subsequent withdrawal from ICJ jurisdiction.[6]

1. The Bello Corrunes, 19 U.S. (6 Wheat.) 152, 168 (1821) (emphasis added).
2. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. In this Comment, sending state refers to an individual's state of citizenship and receiving state refers to a state in which the individual has foreign national status.
3. *Id.*
4. *See infra* Part II.
5. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).
6. *See infra* Part II.D.

Some of these problems flow from divergences between the approaches of the United States and other nations toward capital punishment. Other problems flow from the treaty's implicit assumption that the sovereign signing the treaty—the federal government, in the case of the United States—also controls criminal justice. In the United States, however, state and local governments administer the criminal justice system. Poor timing also caused problems. Participants of the Vienna Conference did not anticipate how the treaty's provisions would apply as an unprecedented change in global immigration patterns and international travel occurred.

Part I of this Comment examines the history of consular relations and the Vienna Convention's place in that development and analyzes the notification and access requirement codified in Article 36. It puts Article 36 in the context of international travel at the time of the treaty's drafting and describes two changes that have occurred since the ratification of the treaty: the enormous growth of international travel and immigration, particularly to the United States, and the divergence between American and international attitudes toward capital punishment. Part II explores how that divergence has manifested itself in the treatment of the Vienna Convention in U.S. courts. While foreign nationals have often used the Vienna Convention to seek relief from their convictions, U.S. courts have not welcomed these efforts. Criminal defendants have been denied relief because of procedural default, failure to demonstrate prejudice, and the interpretation that the Vienna Convention does not confer any individually enforceable rights. Moreover, Part II explains how Congress's failure to enact legislation to implement the Vienna Convention and the United States' withdrawal from ICJ jurisdiction have made compliance with the consular notification and access requirement even less likely.

Rising immigration has led to a surge of noncitizens in American custody and, in turn, an unwieldy number of cases requiring consular notification and access. Thus, Part III proposes that the United States and high-priority partner countries enter into a series of bilateral modifications[7] to the Vienna Convention that limit the scope of the notification requirement to foreign criminal defendants charged with capital offenses—the category that has created the most litigation and ill will. The addition of language to Article 36 specifying that the requirement should apply only to capital cases would achieve this result.[8] The United States should prioritize making bilateral modifications to the Vienna Convention first

7. This Comment uses bilateral modification to mean an agreement between two states that alters their obligations under a treaty.

8. Vienna Convention on Consular Relations, *supra* note 2, art. 36.

with those countries whose citizens are most represented in the penal system, including Mexico. This solution would lessen the administrative and logistical costs of American compliance with the Vienna Convention, while granting consular officials access to their foreign nationals detained in U.S. custody—for instance, the 143 noncitizens on death row across the country.[9] Alleviating the burden of its treaty obligations should also encourage the United States to honor its commitments, generating workable reciprocity that will give the United States leverage to motivate other nations' compliance when American citizens are detained abroad.

I. BACKGROUND

Before examining the current state of consular relations, understanding the historical context from which the Vienna Convention developed is essential. As this Part describes, the rise of international travel and immigration to the United States in the postwar period caused demographic changes that created an opportunity for the international community to develop a comprehensive multilateral treaty on consular relations. Although the Vienna Convention's substantive provisions—in particular, the consular notification and access requirement of Article 36—reflect the body of consular law that existed at the time of the Vienna Conference in 1963, the Vienna Convention remains significant today because of the United States' continued adherence to capital punishment.

A. Consular Relations Before 1963

Nearly two centuries before the Vienna Convention appeared on the international legal landscape, consuls functioned as commercial stewards.[10] The first recorded event in the history of consular relations in the United States was the arrival of M. Gerard from France in 1788, commissioned by the king of France to serve as the consul general of France to the United States.[11] The United States entered into its first consular convention with France that same year and enacted the Act of April 14, 1792 to execute the convention.[12] This legislation set forth a procedure for estate administration of Americans who died abroad and gave consuls

9. *Reported Foreign Nationals Under Sentence of Death in the U.S.*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us (last updated Feb. 7, 2013).
10. *See generally* SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT (2d ed. 2005).
11. *See* 2 A COLLECTION OF THE DIPLOMATIC AND CONSULAR LAWS AND REGULATIONS OF VARIOUS COUNTRIES 1222 (A.H. Feller & Manley O. Hudson eds., 1933).
12. *Id.* at 1223.

the right of "receiving the protests or declarations which captains, masters, crews, passengers, or merchants, who are citizens of the United States, may respectively choose to make there."[13] As trade increased in the nineteenth and twentieth centuries, similar consular conventions became commonplace between the United States and its trading partners.[14]

As consular conventions became more common, the breadth of responsibilities enjoyed by American consular officials widened. In the eighteenth and nineteenth centuries, consuls focused on their traditional roles in commerce and navigation and rendered limited but important services to nationals. For instance, consuls were responsible for administering the estates of Americans who died abroad, for locating missing nationals, or even for responding to citizens' questions about local weather.[15]

Only in the twentieth century did legal assistance become an express function of the consular post.[16] Instructions issued to consular officials in 1927 articulated broader standards for the protection of American citizens and encouraged consular officials' intervention on citizens' behalves, because it was the officials' duty to "protect [citizens] before the authorities of the country in all cases in which they may be injured or oppressed."[17] In particular, consular officials became re-

13. *Id.* at 1226.

14. GRAHAM H. STUART, AMERICAN DIPLOMATIC AND CONSULAR PRACTICE 292–93 (2d ed. 1952) ("During the twentieth century a very rapid increase [in the number of treaties with provisions covering consular relations] has taken place and Feller and Hudson list over 900 such treaties as having been signed by 1933. . . . In 1951 the United States maintained consular representation in 101 different states or colonial possessions . . . ." (footnote omitted)).

15. *Id.* at 347 (reporting one story of an author in California asking the Consulate General in Paris, "What weather pervaded during Yuletide at Bordeaux in the years 1864, 1865, 1866, 1874, and 1875?" (internal quotation marks omitted)).

16. Although consuls provided limited legal protective services for American citizens before the twentieth century, foreign officials sometimes disputed the legitimacy of such representation. *See id.* at 324 (describing one situation in 1895 in which the Cuban governor general disputed the American consul's interference in government affairs after he raised questions about the confinement of Americans "without trial and in contravention of existing treaties").

17. 2 A COLLECTION OF THE DIPLOMATIC AND CONSULAR LAWS AND REGULATIONS OF VARIOUS COUNTRIES, *supra* note 11, at 1253, 1269. The 1927 Instructions describe the responsibilities expected of a consul regarding the legal protection of American citizens abroad:

> No civil or criminal jurisdiction can be exercised by [the consuls] over their countrymen without express authority by law or by treaty stipulation with the state in which they reside. . . . They should countenance and protect [citizens] before the authorities of the country in all cases in which [the citizens] may be injured or oppressed, but their efforts should not be extended to those who have been wilfully [sic] guilty of an infraction of the local laws, it being incumbent upon citizens of the United States to observe the laws of the country where they may be. It is their duty to endeavor on all occasions to maintain

sponsible for accepting notifications from the receiving state that citizens had been detained or incarcerated, for communicating with those citizens, and for demanding access to them to prevent abuse by the receiving state's authorities.[18]

Although consuls' roles grew more sophisticated, by the mid-twentieth century no official codification of international consular law existed on a wide multilateral basis.[19] As the number of states expanded, so did the number of consulates and the need for consular relations.[20] Rules concerning consular functions diverged in form between individual states over time, although they often represented the same customary practices. In 1949, the Secretary-General of the newly formed United Nations recommended that "in view of the continual expansion of international trade, the legal position and functions of consuls should be regulated on as universal a basis as possible."[21]

Protection of citizens was one consular function subject to early attempts at codification. In 1957, the International Law Commission (ILC), founded by the United Nations in 1947 to codify existing international law,[22] developed draft articles on consular relations that included the power "[t]o protect juridical entities and persons of the nationality of the sending State and, to that end[,] . . . [t]o see that nationals of the sending State enjoy all the rights accorded them under the laws of the country of residence, . . . [and t]o take all the necessary steps to obtain redress when the rights of juridical entities or persons of the nationality of the sending State are infringed."[23] Other provisions in the International Law Commission's draft, however, went beyond codification and represented "proposal[s]

> and promote all the rightful interests of citizens, and to protect them in all privileges that are provided for by treaty or are conceded by usage.

Id. at 1269–70.

18. *See* LUKE T. LEE, VIENNA CONVENTION ON CONSULAR RELATIONS 107–09 (1966). The role of consular officials in providing limited legal assistance to citizens, while understood to exist for some time, was not within the consul's traditional purview. *Id.* at 107 ("Although customary international law does not require the receiving state to *accord* the [rights to notification, communication, and access] to consuls, such rights often form the subject of consular instructions and treaties." (emphasis added) (footnotes omitted)).
19. Scholars made independent efforts to codify consular law as early as 1868. One regional multilateral convention between Bolivia, Colombia, Ecuador, Peru, and Venezuela preceded the Vienna Convention. *See* Special Rapporteur on Consular Intercourse and Immunities, *Rep. on Consular Intercourse and Immunities*, *reprinted in* [1957] 2 Y.B. Int'l Comm'n 71, 77–78, U.N. Doc. A/CN.4/108 (by Jaroslav Zourek).
20. *Id.* at 77.
21. U.N. Secretary-General, *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, ¶ 96, at 55–56, U.N. Doc. A/CN.4/Rev.1 (Feb. 10, 1949), *quoted in* LEE, *supra* note 18, at 16 (internal quotation marks omitted).
22. Statute of the International Law Commission, G.A. Res. 174 (II), U.N. Doc. A/RES/174(II) (Nov. 21, 1947).
23. Special Rapporteur on Consular Intercourse and Immunities, *supra* note 19, at 92.

de lege ferenda [on the basis of new law] more fitly coming under the progressive development of international law."[24] Upon receipt of the draft in 1961, the United Nations General Assembly adopted a resolution to convene the Vienna Conference on Consular Relations in 1963.[25] The Vienna Conference presented an opportunity to streamline rules and widen acceptance of international law through a growing multilateral forum—the United Nations.

Demographic changes after World War II shaped states' objectives at the Vienna Conference. A trip from the United States to either Europe or Asia in the prewar period typically involved sea vessels, a week's travel in each direction, and substantial expense.[26] Under such conditions, travelers fell into two classes: tourists[27] and immigrants.[28] Although massive postwar disruption led to an increase in international travel and migration through the 1950s,[29] immigrants during this era commonly sought citizenship from their host nations.[30] Consular notification was a less burdensome task for authorities—and, therefore, not at the

24. *Id.* at 82.
25. G.A. Res. 1685 (XVI), U.N. GAOR, 16th Sess. Supp. No. 17, U.N. Doc. A/RES/1685(XVI), at 61 (Dec. 18, 1961).
26. *See* Alejandro Portes & József Böröcz, *Contemporary Immigration: Theoretical Perspectives on Its Determinants and Modes of Incorporation*, 23 INT'L MIGRATION REV. 606, 610 (1989) ("[Puerto Rican migration] was encouraged by elimination of the barrier of a long and costly sea journey with the advent of inexpensive air travel."); Rubén G. Rumbaut, *Origins and Destinies: Immigration to the United States Since World War II*, 9 SOC. F. 583, 592 (1994) ("[W]hen cheap air travel was instituted between San Juan and New York . . . Puerto Ricans [became] the first 'airborne' [migrants] in U.S. history."); Valene L. Smith, *War and Tourism: An American Ethnography*, 25 ANNALS TOURISM RES. 202, 210 (1998) ("Air travel was beyond the means of most recent immigrant families but they visited Europe by ship until the outbreak of World War II . . . ."); *id.* at 215 (demonstrating through statistical evidence that in 1950, 67 percent of natural and naturalized U.S. citizens traveled by ship, while in 1959, less than 33 percent traveled by ship).
27. *Cf.* LEONARD J. LICKORISH & CARSON L. JENKINS, AN INTRODUCTION TO TOURISM 3 (1997) ("[During] the period between the world wars, much of international travel was for the privileged, wealthy and elite groups in society."); Smith, *supra* note 26, at 204 ("World War II was a milestone in tourism: it created the technology for fast, efficient global transit; it generated the motivations for mass tourism; and, because of the human horror of nuclear holocausts, it stimulated new internationalist political policies which favored tourism development."). *See generally* Anthony V. Williams & Wilbur Zelinsky, *On Some Patterns in International Tourist Flows*, 46 ECON. GEOGRAPHY 549 (1970).
28. *See* Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 8 (2008) (noting immigrants' unfamiliarity with U.S. laws and the proliferation of misinformation among the *notarios* [immigration consultants] and travel agents to whom they go for advice).
29. For an overview of this immigration shift and its causes, see Rumbaut, *supra* note 26, at 589.
30. *See id.* at 595–96. Among immigrants from Europe and Canada, 48 percent immigrated to the United States before 1960, and 63 percent overall became naturalized U.S. citizens. Compare that to immigrants from Latin America and the Caribbean, of whom only 7 percent immigrated to the United States before 1960 and 27 percent overall became naturalized U.S. citizens. *Id.*

forefront of the Vienna Convention—because immigrants were not noncitizens on the great scale they are today.[31]

For the United States, the national focus was less on immigration and more on geopolitical tensions. Cold War politics and the growing number of bilateral treaties between the United States and other countries prompted the United States' support for a multilateral consular treaty. At the time of the Vienna Conference in 1963, twenty-eight countries had enacted bilateral treaties with the United States for consular notification and access upon arrest of a sending state's national.[32] While these treaties generally affirmed the importance of the rights to consular notification and access, other agreements, such as the Soviet Union's assurance to the United States,[33] demonstrated that such rights oftentimes lacked teeth. In the early 1960s, the United States encountered difficulties obtaining a grant of consular access to Americans detained in the Soviet Union on espionage charges, although the bilateral treaty between the United States and the Soviet Union on consular relations contained no exception against access and notification in cases involving espionage charges.[34] In the midst of the Cold War, it was in the United States' national interest to seek an alternative weapon against ineffective bilateral treaties—the Vienna Convention.[35]

The Cold War may also help to explain the United States' willingness to enter into the Vienna Convention despite its implications for criminal justice in a federal system that divides enforcement between the states and the federal government. Most nations whose criminal justice practices concerned the United States—notably, the Soviet Union—were unitary sovereigns. Because it also operated the criminal justice system, the signing sovereign could enforce treaty obligations.[36] In the United States, however, control over the administration of

31. *See infra* notes 43–50 and accompanying text.
32. LEE, *supra* note 18, at 107 n.6.
33. *Id.* at 108 (providing for notification of arrest "within three days in large centres and seven days in remote areas as well as the right to visit such nationals without delay" (internal quotation marks omitted) (citing U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES (DIPLOMATIC PAPERS): SOVIET UNION 1933–1939, at 33–34 (1952))).
34. *Id.*
35. Indeed, the difficulties of achieving consular notification and access when the crime charged was espionage contributed to the requirement in the International Law Commission (ILC) draft for unconditional notification, regardless of whether the detained individual requested such notification. *See infra* Part I.B and accompanying notes.
36. *See* SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES 12 (Harold J. Berman & James W. Spindler trans., 2d ed. 1972) (explaining the interrelation of all–Soviet Union and Russian law and noting "the powers expressly granted . . . to the all-union authority are extremely broad"); *see also* Harold J. Berman, *Principles of Soviet Criminal Law*, 56 YALE L.J. 803, 807 n.26 (1947).

criminal justice historically exists at the state level.[37] Nonetheless, the divide between federal and unitary states seems not to have troubled participants of the Vienna Conference. Article 36, which codified the rights to consular notification and access,[38] did not limit the application of those rights to a particular type (federal or state) or severity (capital or noncapital) of crime. One explanation may lie in the assumption of the federal executive, which pushed for U.S. ratification, that the only crimes of concern would in fact be federal—espionage and other related offenses.[39] Today the difficulties in enforcing the Vienna Convention lie in applying it to state crimes—particularly murder and other capital offenses.[40]

Not long after the conclusion of the Vienna Conference, the United States heralded the significance of the Vienna Convention for international relations. President Richard Nixon described the Vienna Convention in his letter of transmittal to the Senate for its advice and consent in 1969 as "the first agreement envisaging the regulation of consular relations on a world-wide basis . . . [and] an important contribution to friendly relations between States."[41] Moreover, Secretary of State William Rogers called the Vienna Convention "an important contribution to the development and codification of international law [that] should contribute to the orderly and effective conduct of consular relations between States."[42] As Part II explains, however, the conduct of consular notification and access today is far from "orderly and effective"—a problem that bilateral modification of the Vienna Convention can help solve.

37. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 128 (1982) ("The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights."). In recent decades, however, criminal law has become increasingly federalized. *See* TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998) [hereinafter TASK FORCE] ("More than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970." (emphasis omitted)); Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 897 (2000) ("There is no doubt that many federal criminal statutes cover conduct that is usually (and has traditionally been) prosecuted by state and local authorities."); Brian W. Walsh, *Doing Violence to the Law: The Over-federalization of Crime*, 20 FED. SENT'G REP. 295, 295 (2008) (commenting on the abusive potential of federal criminal law's expansion). Nonetheless, the states remain the primary source of criminal prosecutions. *See* TASK FORCE, *supra*, at 18–19 (noting that less than 5 percent of all prosecutions are federal).

38. *See infra* Part I.B.

39. *See supra* notes 34–35.

40. *See* discussion *infra* Part I.C.

41. Message From the President of the United States Transmitting the Vienna Convention on Consular Relations and a Certified Copy of the Optional Protocol Concerning the Compulsory Settlement of Disputes, 91st Cong., 1st Sess. at III (May 5, 1969) (Comm. Print 1969).

42. *Id.* at VII.

B. The Vienna Convention on Consular Relations

1. General Provisions

The Vienna Convention marked the first international attempt to codify existing practices in consular law. Its text acknowledges its place in the long history of consular relations in the international sphere. The preamble, for instance, states that the parties have agreed to the Vienna Convention, while

> [r]ecalling that consular relations have been established between peoples since ancient times . . . [b]elieving that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems, [and r]ealizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective states.[43]

The articles of the Vienna Convention also systematize many of the consular functions states historically came to assume. Article 5 notes the role of consular officials in

> (a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law; . . .
>
> . . . .
>
> (e) helping and assisting nationals, both individuals and bodies corporate, of the sending State; . . .
>
> . . . .
>
> (i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where,

43. The phrase "not to benefit individuals" from the preamble is often cited as a reason against viewing the Convention as bestowing individual rights. Vienna Convention on Consular Relations, *supra* note 2, pmbl. For further discussion of the individual rights problem, see *infra* Part II.C.

> because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests . . . .[44]

Unlike Article 36, these provisions were noncontroversial when adopted and remain apposite to international relations today.

2. Article 36

Article 36 of the Vienna Convention is the target of this Comment's proposed modification. Its substantive provisions for consular access and notification—the product of contentious debate even at the Vienna Conference in 1963—are unworkable when applied contemporarily. Titled "Communication and contact with nationals of the sending State," Article 36 reads:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
>
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers

44. *Id.* art. 5. Note that consular protection is distinct from diplomatic protection. *See* CHITTHARANJAN F. AMERASINGHE, DIPLOMATIC PROTECTION 45–46 (2008) (explaining the provision of consular access to criminal defendant nationals held in another state is not "diplomatic protection," because the right does not "depend on a violation of international law by the foreign host State in respect of the national nor are they adversarially directed at the host State").

> shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.[45]

At first glance, the requirements of Article 36 are brief and simple. Under Article 36(1)(a), a consul has a right to communicate with a foreign national and vice versa, whether or not the foreign national is in any type of custody or detention.[46] If a foreign national wishes to voice a concern about a perceived wrong that occurs in the receiving state, the receiving state cannot obstruct access to the foreign national's consulate. Article 36(1)(b) and (c) require the receiving state to notify authorities of the sending state at the foreign national's request and to allow consular contact with the foreign national. Lastly, Article 36(2) is deferential to the receiving state by requiring conformity with its laws.

Yet Article 36 has had the "most tortuous and checkered background" of all provisions in the Vienna Convention.[47] At the heart of the controversy during the drafting process was whether Article 36 should require mandatory notification or notification only at the foreign criminal defendant's request. During the 1960s, the notification requirement was significant because of its potential application to Cold War detainees and the occasional civilian foreign national needing protection abroad.[48] While the International Law Commission draft would have imposed an unequivocal requirement for consular notification and access, paragraph (b) of the final text of Article 36 imposes the requirement only if the foreign criminal defendant "so requests."[49] Then, as now, the ability of a detained foreign crim-

45. Vienna Convention on Consular Relations, *supra* note 2, art. 36.

46. *See generally* JOHN QUIGLEY ET AL., THE LAW OF CONSULAR ACCESS: A DOCUMENTARY GUIDE (2010).

47. LEE, *supra* note 18, at 107.

48. *See supra* Part I.A.

49. Certain bilateral consular conventions since the Vienna Convention entered into force have integrated the mandatory notification requirement. *See, e.g.*, Convención Consular Entre los Estados Unidos Mexicanos y la República Popular de China [Consular Convention Between the United Mexican States and the People's Republic of China], art. 13, Mex.-China, Mar. 4, 1986 ("Where a national of the sending State is arrested, detained, or deprived of his freedom in any other manner, the competent authorities of the receiving State shall so inform the competent consular post as soon as possible.") (translated from Spanish).

The drafters also changed other notable elements of Article 36 between the ILC draft and the Vienna Conference. The final text of Article 36 remedied the ILC draft's failure to include express provision for notification in cases of arrest, as the phrase "detained in any other manner" in the final text incorporates arrests. Moreover, the final text of Article 36 imposed a

inal defendant to exercise consular rights depended largely on the defendant's familiarity with consular law.

Several U.N. delegations voiced concerns during the drafting process over the possible administrative drains the consular notification requirement could have on their countries. In response to the draft requiring mandatory notification, Canada, Japan, Kuwait, Thailand, the United Arab Republic, and the United States proposed an amendment requiring notification only at the foreign national's request. This optional notification language would potentially reduce the number of instances to which government officials would have to respond.[50] Though proponents of optional notification noted the requirement would most critically affect "a receiving state with a large number of alien immigrants dispersed throughout the country,"[51] they did not foresee the large increase in the number of immigrants in later decades. The British delegation also amended the Article to include the language: "The said authorities shall inform the person concerned without delay of his rights under this subparagraph," in order to "avoid any possible abuse by local authorities or misunderstanding by the person involved."[52] The British position may have been motivated by the nation's long history of foreign trade and travel[53] and by its consequent awareness of the likelihood that a British citizen may be detained without notice.

In the Vienna Conference plenary meetings held from March to April 1963, the fate of Article 36 was uncertain because of the controversy surrounding consular notification. After Malaysia, Japan, the Philippines, Thailand, the United Arab Republic, and Venezuela proposed yet another modification to the Article 36 language, the article failed to attain two-thirds majority approval in a 47–24–4 vote.[54] After India proposed reconsideration of Article 36, the Conference adopted the optional notification language in a 71–0 vote. This last-minute move prevented the Conference from excluding Article 36 altogether.[55] Out of this early

stricter requirement for notification "without delay," whereas the draft would only have required notification "without *undue* delay." *See* Draft Articles on Consular Relations Adopted by the International Law Commission at Its Thirteenth Session, Rep. of the Int'l Law Comm'n, 16th Sess., May 1–Jul. 7, 1961, 113, U.N. Doc A/4843; GAOR, 16th Sess., Supp. No. 9 (1961) (emphasis added).

50. LEE, *supra* note 18, at 110–11.
51. *Id.* at 110 (referring to statements made by delegations from Thailand, Canada, Philippines, Malaysia, and New Zealand).
52. *Id.* at 113–14.
53. *See generally* N. Kulendran & Kenneth Wilson, *Is There a Relationship Between International Trade and International Travel?*, 32 APPLIED ECON. 1001 (2000) (studying data on the United Kingdom).
54. LEE, *supra* note 18, at 112–13.
55. *Id.*

wrangling emerged the consular notification and access requirement that is the subject of litigation today—free communication and access with foreign criminal defendants and notification upon the foreign criminal defendant's request.

C. Global Change, Capital Punishment, and Consular Relations Today

Consular officials' function in assisting nationals abroad has become even more important in the nearly fifty years since the Vienna Conference. While immigration to the United States continues to rise, the United States has also become increasingly anomalous in its capital sentencing practices. Accordingly, as the number of noncitizens in American society has increased, so too has the number of noncitizens on death rows across the country. The rising number of capital cases involving noncitizens has caught the attention of the international community, prompting criticism from other states and compromising the United States' reputation for observing its consular obligations under the Vienna Convention.

The Vienna Conference in 1963 directly preceded the enactment of sweeping new immigration legislation in the United States, the significance of which was grossly underestimated when signed into law.[56] The Immigration and Nationality Act of 1965,[57] which eliminated nationality criteria for admission to the United States in order to end discrimination, led to a dramatic rise in immigration. Census data shows an increase in the noncitizen population from 2.05 million in 1950 before immigration reform, to 3.5 million in 1970, 6.9 million in 1980, and 11.7 million in 1990.[58] The United States began compiling immigration statistics in 1982, when noncitizens who entered the United States without authorization could no longer apply for legal residence based on their continuous residence in

56. With regard to the Immigration and Nationality Act of 1965, President Lyndon B. Johnson even stated, "This bill that we will sign today is not a revolutionary bill. It does not affect the lives of millions . . . . It will not reshape the structure of our daily lives or add importantly to either our wealth or our power." Jennifer Ludden, *All Things Considered: 1965 Immigration Law Changed Face of America* (NPR radio broadcast May 9, 2006), *available at* http://www.npr.org/templates/story/story.php?storyId=5391395; *see also Three Decades of Mass Immigration: The Legacy of the 1965 Immigration Act*, CENTER FOR IMMIGR. STUD. (Sept. 1995), http://www.cis.org/articles/1995/back395.html (quoting various politicians' predictions for the bill, including Senator Edward Kennedy's statement that "the ethnic mix of this country will not be upset . . . , [and the bill] will not inundate America with immigrants from any one country or area" (internal quotation marks omitted)).

57. H.R. 2580, 89th Cong. (1965).

58. No citizenship data is available from the 1960 census because of the omission of the question regarding citizenship. *See* Campbell J. Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-Born Population in the United States: 1850–1990* (U.S. Census Bureau Population Div. Working Paper No. 29, 1999), *available at* http://www.census.gov/population/www/documentation/twps0029/twps0029.html.

the United States.[59] In the midst of the "disintegration of the 'Second World'" in the Cold War,[60] illegal immigration rose until reaching a peak in the early 2000s and then slowed during the economic recession.[61] In 2010, the estimated unauthorized immigrant population stood at 10.8 million, 62 percent of which were Mexican citizens.[62] An estimated additional 21.2 million noncitizens were present as legal residents in 2010.[63] These immigration trends, in turn, have led to an increase in the proportion of noncitizens in custody.[64] Thus, substantially more individuals can invoke consular rights today in the United States than at the time of the Vienna Conference.

Since the 1970s, capital sentencing in the United States has been rising alongside increasing immigration. Between the earliest recorded execution in 1608 and 1972, the United States executed 14,489 people.[65] The surge in executions in the twentieth century prompted the Supreme Court in *Furman v. Georgia*[66] to rule that imposition of the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[67] After a four-year hiatus for capital sentencing under *Furman*, the Supreme Court's 1976 ruling in *Gregg v. Georgia*[68] held the death penalty did not always constitute cruel and unusual punishment because sentencing procedures in that case, which focused on the particularized nature of the crime and the defendant's circumstances, avoided the death penalty's "freakish" imposition.[69] Persuasive to the Court was the adoption of new statutes in thirty-five states specifying in detail the appropriate circumstances for capital sentencing: "The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*."[70] Texas, for instance, reenacted the death penalty in 1974 as part of the

59. *See* MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2010, at 1 n.1 (2011), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf (describing the provision of the Immigration Reform and Control Act of 1986 that prevented persons who entered the United States after 1981 from applying for legal permanent resident status).
60. Rumbaut, *supra* note 26, at 589.
61. *See* HOEFER ET AL., *supra* note 59, at 2.
62. *Id.* at 4.
63. *See id.* at 3.
64. *See infra* Part III.D.1.
65. *Executions in the U.S. 1608–2002: The ESPY File*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/executions-us-1608-2002-espy-file (last visited Apr. 9, 2013).
66. 408 U.S. 238 (1972).
67. *See id.* at 239–40.
68. 428 U.S. 153 (1976).
69. *Id.* at 206.
70. *Id.* at 179.

"legislative response." Texas executed its first inmate of the post-*Gregg* phase of capital sentencing in 1982 and was the site of the nation's first Latino execution in 1985.[71] Today, thirty-two states practice capital punishment, and many impose capital sentences with regularity.[72]

International trends in capital punishment indicate support for the death penalty is waning outside the United States.[73] The United States' capital punishment practices—especially at the state level—coupled with its poor compliance with the Vienna Convention have made the United States a target of international criticism. Mexico, by comparison, executed its last civilian criminal in 1937, executed its last military criminal in 1961, and abolished capital sentencing for civilian crimes in 1976.[74] All European nations except Belarus have abandoned the death penalty.[75]

The international community's focus on high-profile executions of noncitizens in the United States reflects a perception that the United States often ignores

71. Jon Sorensen et al., *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 CRIME & DELINQ. 481, 486 (1999); Martin G. Urbina, *A Qualitative Analysis of Latinos Executed in the United States Between 1975 and 1995: Who Were They?*, 31 SOC. JUST. 242, 258 (2004).

72. *See* TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, NCJ 236510, CAPITAL PUNISHMENT 2010—STATISTICAL TABLES 2 fig.3 (2011) (noting that Texas, Alabama, and Ohio accounted for more than half of U.S. executions in 2011); John Wagner, *Md. Assembly Votes to Repeal Death Penalty*, WASH. POST, Mar. 15, 2013, http://articles.washingtonpost.com/2013-03-15/local/37737059_1_death-penalty-capital-punishment-repeal-bill (describing Maryland's law prospectively abolishing capital punishment); *States of Punishment*, ECONOMIST (Apr. 20, 2012, 1:35 PM), http://www.economist.com/blogs/graphicdetail/2012/04/daily-chart-10 (mapping states with and without capital punishment as of April 20, 2012). States that abolished the death penalty include Alaska, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. Some states with capital punishment execute criminal defendants only infrequently. *See, e.g.*, *Number of Executions, 1893 to Present*, CAL. DEP'T CORRECTIONS & REHABILITATION, http://www.cdcr.ca.gov/Capital_Punishment/Number_Executions.html (last visited Apr. 9, 2013) (noting that California has executed 13 inmates in the 37 years since *Gregg*).

73. Such criticism comes as no surprise, given the divergence in sentencing practices between the United States and the rest of the world. The U.N. Commission on Human Rights, for instance, adopted a resolution expressing its view that "abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights." Comm. on Human Rights, Econ. & Soc. Council, Rep. on the 55th Sess., Mar. 22–Apr. 30, 1999, at 203, U.N. Doc. E/CN.4/1999/167, GAOR 55th Sess., Supp. No. 3 (1999). Some in the international community perceive the United States' support for capital punishment despite international human rights norms to the contrary as a manifestation of its sovereignty, characterized by its failure to abide by the obligations set forth in many international agreements and suspicion of internationalized institutions more generally. *See* ALAN W. CLARKE & LAURELYN WHITT, THE BITTER FRUIT OF AMERICAN JUSTICE: INTERNATIONAL AND DOMESTIC RESISTANCE TO THE DEATH PENALTY 23–24 (2007).

74. *Id.* at 44–45.

75. *Id.* at 39.

its treaty obligations. U.S. authorities' inconsistent compliance with the Vienna Convention's consular notification and access requirement stems from unfamiliarity with the treaty by several groups—law enforcement officials, advocates, judges, and foreign criminal defendants themselves.[76] While the federal government implements the consular notification and access requirements in regulations and two states have codified Article 36 in statutes,[77] law enforcement officers seem unaware of those obligations.[78] Lawyers and judges, who have the opportunity to spot compliance problems after a defendant's initial contact with law enforcement, also suffer from this awareness problem.[79] Moreover, foreign criminal defendants—the treaty's beneficiaries—are unlikely to know their rights under the Vienna Convention, let alone exhibit familiarity with a foreign criminal justice system.[80]

Despite the growing number of U.S. cases that deny relief based on the Vienna Convention,[81] foreign criminal defendants continue to argue that consular access would have been a valuable resource for their legal defenses. As a result, the problems posed by the Article 36 requirement domestically are unlikely to abate unless the United States limits the scope of its obligations. Consular notification before police questioning of a criminal defendant may result in a visit from a consular officer who could

> advise[] them not to speak with anyone, and that they in fact would not suffer any adverse consequence if they chose not to give statements, also that statements that they gave could have been used against them in court, that they can also have a court certified interpreter to be present at any stage of the proceedings, and also about the right to request assistance of legal counsel.[82]

76. Although authorities seem ignorant of the Vienna Convention when it comes to foreign criminal defendants, the United States eagerly invokes the Vienna Convention and is familiar with its provisions whenever U.S. citizens are in jeopardy abroad. *See infra* Part III.E.
77. For more detailed treatment, see discussion *infra* Part III.C.
78. *See infra* Part III.D.6.
79. *See infra* Part III.D.6.
80. Even if a foreign criminal defendant is aware of the Vienna Convention, an undocumented immigrant might be reluctant to assert consular rights for fear of the immigration consequences. Alternatively, if a foreign criminal defendant knows his or her rights and has the assistance of consular officials, the immigrant population may not cooperate in an investigation for fear of their own deportations. *See* Seth M.M. Stodder & Nicolle Sciara Rippeon, *State and Local Governments and Immigration Laws*, 41 URB. LAW. 387, 404 (2009) ("[T]he enforcement of immigration laws by state and local police officers would deter illegal immigrants from reporting crime or cooperating with police.").
81. *See infra* Part II.
82. State v. Martinez-Rodriguez, 33 P.3d 267, 276 (N.M. 2001); *see also Court Upholds Rights of Foreign Defendants to Consular Advice*, N.Y. TIMES, Mar. 28, 1999, http://www.nytimes.com/1999/03/28/us/court-upholds-rights-of-foreign-defendants-to-consular-advice.html

A foreign criminal defendant can also contact his or her consulate for assistance in locating defense witnesses abroad.[83] In California, for instance, the Mexican consulate offers legal assistance in capital cases through "gather[ing] information from local police and in Mexico in an effort to avoid execution."[84] These advantages, which foreign criminal defendants argue they could have had early in their cases, give them an incentive to include the Vienna Convention among their other claims in the extended process of post-conviction appeals, despite setbacks for Vienna Convention claims in U.S. courts.[85] Thus, Article 36 claims will continue unabated—and U.S. courts will continue rejecting them—unless the United States makes a major structural change to its treaty obligations to narrow the situations in which defendants can invoke the Vienna Convention.

II. U.S. COURTS' REJECTION OF VIENNA CONVENTION CLAIMS

Given the persistence of capital punishment in the United States and the widespread resistance to the practice elsewhere, it is not surprising that both foreign nations and criminal defendants have sought to use Article 36 of the Vienna Convention as a route to relief from capital sentences. Foreign criminal defendants began to invoke the treaty en masse in the 1990s. The convergence of two factors likely explains the sudden onset of litigation. First, by 1990, immigration rose dramatically,[86] widening the pool of potential foreign criminal defendants. Second, capital sentencing resumed after *Gregg* lifted the national hiatus on the death penalty, increasing the likelihood that a foreign criminal defendant would be subject to the death penalty and seek consular assistance.[87]

("[T]he Mexican consulate has said that it would have advised any Mexican under arrest to refrain from speaking to police until a lawyer was present.").

83. State v. Ramirez, 732 N.E.2d 1065, 1070–71 (Ohio Ct. App. 1999).

84. *See, e.g.*, Lance Pugmire, *Mexican Consul to Aid Defense in Murder Case*, L.A. TIMES, May 16, 2003, http://articles.latimes.com/2003/may/16/local/me-consul16 (highlighting the role of Carlos Giralt, then Mexican consul for the Inland Empire in California).

85. *See infra* Part II.

86. *See supra* notes 39–46 and accompanying text.

87. Courts' negative responses to Vienna Convention claims are consistent with systematic studies of the probability that a party invoking a treaty in litigation will win its case. David Sloss categorized cases according to whether they used "transnationalist treaty tools" (where a court states that a treaty is self-executing) or "nationalist treaty tools" (where a court states that a treaty is non-self-executing). In criminal cases, Sloss found the government won forty-six of forty-seven cases, even when courts adopted "transnationalist treaty tools" that suppose a treaty's legitimacy. Part of defendants' failures may be attributable to tough-on-crime attitudes, judicial notions of the inability of international law to provide rights to criminal defendants beyond those in the Constitution, or the fact that "criminal defense attorneys tend to raise treaty-based defenses disproportionately in cases where the defendants have a very weak case." *See* DAVID SLOSS, *United*

This Part addresses U.S. courts' responses to foreign criminal defendants' efforts to seek relief through Article 36. Even in cases in which a violation of a defendant's rights under the Vienna Convention has clearly occurred, courts will justify denials of relief based on procedural default, lack of prejudice, the absence of an individually enforceable right to relief, or the absence of legislation to implement the treaty.[88] Thus, foreign criminal defendants have been unable to persuade courts to suppress evidence,[89] dismiss indictments,[90] reverse convictions,[91] or

States, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY 504, 549–50 (David Sloss ed., 2009).

88. While this section focuses on United States jurisprudence, domestic courts in other countries also express reluctance to grant relief for Vienna Convention violations. *See, e.g.*, United States v. Lombera-Camorlinga, 206 F.3d 882, 888 (9th Cir. 2000) (en banc) ("[N]o other signatories to the Vienna Convention have permitted suppression . . . , and . . . two (Italy and Australia) have specifically rejected it."); Heather M. Heath, *Non-compliance With the Vienna Convention on Consular Relations and Its Effect on Reciprocity for United States Citizens Abroad*, 17 N.Y. INT'L L. REV. 1, 20 (2004).

89. U.S. courts have denied suppression of evidence as a remedy for Vienna Convention violations even when interpreting the Vienna Convention as having created an individually enforceable right. *See* United States v. Page, 232 F.3d 536, 540 (6th Cir. 2000) (holding failure to comply with the Vienna Convention is not a basis for dismissal of an indictment or suppression of evidence); *Lombera-Camorlinga*, 206 F.3d at 888 (holding that failure to comply with the Vienna Convention is not a basis for excluding post-arrest statements); United States v. Torres-Del Muro, 58 F. Supp. 2d 931, 933 (C.D. Ill. 1999) (holding that a defendant cannot invoke an exclusionary rule where neither the Vienna Convention explicitly provides for such a remedy nor does the Vienna Convention violation rise to a constitutional level); State v. Tuck, 766 N.E.2d 1065, 1066 (Ohio Ct. App. 2001) (holding that failure to comply with Article 36 does not warrant exclusion of post-arrest statements); *see also* Valerie Epps, *Violations of the Vienna Convention on Consular Relations: Time for Remedies*, 11 WILLAMETTE J. INT'L L. & DISP. RESOL. 1, 35 (2004) (arguing that Vienna Convention violations exhibit sufficient similarities to constitutional rights that suppression is effective as a remedy); Heath, *supra* note 88, at 20 (noting "[n]o signatory has permitted suppression of evidence as a remedy to Vienna Convention violations, and two countries have specifically denied it"); Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565 (1997) (arguing for restoration of the status quo ante, including suppression of evidence or granting a new trial); Frederic L. Kirgis, *Restitution as a Remedy in U.S. Courts for Violations of International Law*, 95 AM. J. INT'L L. 341, 345 (2001) (arguing that the United States should pursue restitution as a remedy for Vienna Convention violations in accordance with international remedial norms).

90. *See* United States v. De La Pava, 268 F.3d 157, 165–66 (2d Cir. 2001) (holding violation of the Vienna Convention is not a basis for dismissal of an indictment and that defendant's counsel was not ineffective for failing to move to dismiss the indictment on such grounds); United States v. Cordoba-Mosquera, 212 F.3d 1194, 1195–96 (11th Cir. 2000) (per curiam) (holding failure to comply with the Vienna Convention is not a basis for dismissal of an indictment); United States v. Li, 206 F.3d 56, 61–62 (1st Cir. 2000) (en banc) (holding similarly to the court in *De La Pava*).

91. *See* Joan Fitzpatrick, *Consular Rights and the Death Penalty After* LaGrand, 96 AM. SOC'Y INT'L L. PROC. 309, 310 (2002).

award damages in civil suits.[92] This Part also examines how the United States finally condemned the Vienna Convention by dismissing the international animus toward its capital sentencing practices and withdrawing from the jurisdiction of the International Court of Justice (ICJ).

A. Defendants Procedurally Default Vienna Convention Claims

Courts often use procedural default rules to deny relief to defendants invoking their Article 36 rights. In this situation, a foreign criminal defendant raises the Vienna Convention claim on appeal without raising the claim in a lower court. For the foreign national, procedural default is difficult because it bars "a claim based on a right not known to a defendant."[93] In U.S. law, a criminal defendant must raise objections at trial to preserve those issues on appeal,[94] but defendants usually do not raise the Vienna Convention at trial. As with other claims, the likelihood that a foreign criminal defendant will invoke the Vienna Convention early in his or her case depends on the quality of representation, which is worsened by widespread unawareness of the Vienna Convention's possible availability.[95] Therefore, the rule that a foreign criminal defendant must first raise a Vienna Convention claim in a lower court imperils the defenses of those who fail to act swiftly.

One of the first attempts by a foreign criminal defendant to make a Vienna Convention claim—and the most notable procedural default of such a claim—was *Breard v. Greene*.[96] A Virginia court convicted Angel Francisco Breard, a Paraguayan citizen and Argentinean native, of the capital murder and attempted rape of Ruth Dickie.[97] On appeal to the Supreme Court of Virginia, Breard did not raise his status as a foreign national as an issue and only mentioned it in passing in the context of enzyme typing his DNA.[98] Instead, Breard claimed that the trial court erred in refusing to grant a pretrial evidentiary hearing on the constitution-

92. *See* David Sweis, *The Availability of Damages to Foreign Nationals for Violation of the Consular Relations Treaty*, 19 N.Y. INT'L L. REV. 63 (2006) (addressing the availability of civil damages after the Seventh Circuit decision in *Jogi v. Voges*, 425 F.3d 367 (7th Cir. 2005), which concluded that a private cause of action is available under the Alien Tort Statute).

93. Heather L. Finstuen, Note, *From the World Court to Oklahoma Court: The Significance of* Torres v. State *for International Court of Justice Authority, Individual Rights, and the Availability of Remedy in Vienna Convention Disputes*, 58 OKLA. L. REV. 255, 256 (2005).

94. *See* FED. R. CRIM. P. 52.

95. *See* Part III.D.6.

96. 523 U.S. 371 (1998).

97. *See* Breard v. Commonwealth, 445 S.E.2d 670, 674 (Va. 1994). The facts presented at trial were gruesome, and Breard believed a "curse placed upon him by his ex-wife's father" motivated his actions. *Id.*

98. *See id.*

ality of death by electrocution, in denying the defendant's motions to prohibit imposition of the death penalty in his case, and in denying his motion for a bill of particulars.[99] After losing this appeal, Breard filed a motion for habeas relief in federal court, raising the Vienna Convention claim for the first time.

Like many foreign criminal defendants, Breard raised the Vienna Convention only in a last ditch attempt to avoid execution. In Breard's case, the Vienna Convention claim was especially urgent; the Supreme Court issued a per curiam opinion in *Breard* the same day as his scheduled execution.[100] The Court held the defendant procedurally defaulted on his Vienna Convention claim by failing to assert the claim in the state courts.[101] First, the Court reasoned that U.S. procedural rules govern the implementation of treaties and, accordingly, Breard's Vienna Convention claim had to comply with federal and state law.[102] Second, the Court stated that the Antiterrorism and Effective Death Penalty Act (AEDPA) effectively prevented Breard from claiming a Vienna Convention violation. The AEDPA ruled out the evidentiary hearing that Breard needed to prove prejudice because the AEDPA provides that a habeas petitioner who alleges a treaty violation will not be afforded a hearing if the petitioner "has failed to develop the factual basis of [the] claim in State court proceedings."[103]

Justices Stevens, Breyer, and Ginsburg dissented. Justice Stevens noted Virginia's accelerated execution schedule and "the international aspects of [the] case" as reasons to grant review of Breard's petition for certiorari.[104] In his dissenting opinion, Justice Breyer wrote he would have granted Breard's petition for certiorari based on the fact that the "novelty" of Breard's Vienna Convention claim was "cause" to prevent him from raising the claim at the state level and the possibility that the claim could create a "watershed rule of criminal procedure."[105]

In the same year as the Supreme Court's decision in *Breard*, the procedural default question garnered international attention in *LaGrand v. Stewart*.[106] *LaGrand* involved two German defendants tried and sentenced to death in Arizona without being informed of their right to contact the German consulate. Despite the Vienna Convention violation, the Ninth Circuit dismissed the claim because the defendants failed to raise the Vienna Convention as an issue in the

99. *See id.* at 674–76.
100. *See Breard*, 523 U.S. at 372.
101. *See id.* at 375.
102. *See id.* at 375–76.
103. *Id.* at 376 (quoting Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(e)(2) (2006)) (internal quotation marks omitted).
104. *Id.* at 379–80.
105. *Id.* at 380–81 (internal quotation marks omitted).
106. 133 F.3d 1253 (9th Cir. 1998).

state court before the appeal.[107] The defendants also raised a claim for ineffective assistance of counsel, as "the failure to notify them of their right to contact the German consulate 'effectively blocked LaGrands' ability to gather exculpatory or mitigating evidence.'"[108] The court found the evidence the defendants sought (relating to their abusive childhoods and experience in blended families) would not have affected their eligibility for the death penalty.[109] Thus, even though the defendants procedurally defaulted their Vienna Convention claims, they also experienced no prejudice.

Germany litigated the case against the United States in the ICJ, which determined the procedural default question in favor of the LaGrands. The ICJ held it was improper for the United States to implement a procedural default rule if it would prevent a foreign criminal defendant from raising a claim for violations of the Vienna Convention.[110] This decision accords with the perception that it is unfair to bar a defendant from asserting a right previously unknown to the defendant based on the defendant's failure to raise a claim in the lower court. While the United States issued an apology to the German government for the Vienna Convention violation after the decision in *LaGrand*, the ICJ ruling has not changed outcomes for foreign criminal defendants in American courts.[111]

Parties raising *LaGrand* as a rebuttal to *Breard* were unsuccessful. In *Torres v. Mullin*,[112] for instance, Justice Stevens argued the ICJ decision in *LaGrand* was binding and removed the "procedural bar" that would have required application of procedural default rules.[113] The Supreme Court, however, denied the defendant's petition for writ of certiorari awaiting the ICJ opinion in *Avena*.[114] In *Sanchez-Llamas v. Oregon*,[115] the defendant sought to set aside procedural default rules for his claim because he failed to raise it at trial or on appeal.[116] While it seemed *Breard* controlled on this point, the Court also considered Bustillo's argument that *LaGrand* precluded the application of procedural default rules.[117] The Court rejected the argument on the basis that ICJ rulings are not binding on U.S.

107. *Id.* at 1261.
108. *Id.* at 1262.
109. *Id.*
110. LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 466, ¶ 90 (June 27).
111. *See* Fitzpatrick, *supra* note 91, at 310, 315.
112. 540 U.S. 1035 (2003).
113. *Id.* at 1036.
114. *See* Part II.D.
115. 548 U.S. 331 (2006).
116. *Id.* at 351.
117. *Id.* at 352.

courts and held that "the same procedural default rules that apply generally to other federal-law claims" apply to Article 36 claims.[118]

The international community has criticized the United States for forfeiting defendants' Vienna Convention claims based on procedural default. It perceives the United States' rigid adherence to procedural default rules as "a device used by the United States to avoid keeping its word. . . . Allies and enemies alike . . . have reason to view the entire regime of consular relations as undercut by American intransigence on this point."[119] In response, Steven M. Novak has proposed an amendment to the Vienna Convention that would require disregarding procedural default rules when a foreign criminal defendant has resided in the United States for less than ten years, as this would decrease the likelihood that a defendant could be familiar with consular rights.[120] Nonetheless, *Breard* remains the law in the United States on procedural default in Vienna Convention claims.[121]

B. Defendants Fail to Demonstrate Prejudice

An alternative basis courts use to reject a foreign criminal defendant's Vienna Convention claim is the defendant's failure to demonstrate prejudice. As one scholar describes, "Because the individual right is to notification and access, not to consular assistance, it is difficult to determine exactly what harm the treaty violation has caused in any particular case."[122] As the number of foreign criminal defendants has risen with the influx of immigration, an overwhelming number of lower court cases have cited lack of prejudice as the deciding factor in ruling against a foreign criminal defendant.[123] Only the occasional dissenting opinion

118. *Id.* at 353–56, 360.

119. CLARKE & WHITT, *supra* note 73, at 55.

120. Steven M. Novak, *Everyone Knows* Medellin*; Has Anyone Heard of* O'Brien*? Reconciling the United States and the International Community by Amending the VCCR*, 43 J. MARSHALL L. REV. 817, 840–41 (2010).

121. *See, e.g.*, Flores v. Johnson, 210 F.3d 456 (5th Cir. 2000) (foreclosing adoption of a rule excluding evidence secured by police in violation of a defendant's right to consular notification under the Vienna Convention based on *Breard*'s holding that the Vienna Convention must comply with rules for federal habeas relief).

122. Fitzpatrick, *supra* note 91, at 309.

123. *But see* Gutierrez v. State, No. 53506, 2012 WL 4355518, at *1–2 (Nev. Sept. 19, 2012). The Nevada Supreme Court in *Gutierrez* notes that "while, without an implementing mandate from Congress, state procedural default rules do not *have* to yield to *Avena*, they *may* yield, if actual prejudice can be shown." *Id.* at *1. After concluding Gutierrez was entitled to an evidentiary hearing on the procedural bar question, the court reasoned that Gutierrez probably did suffer actual prejudice. *Id.* at *2.

> [W]ithout an evidentiary hearing, it is not possible to say what assistance the consulate might have provided. Would the problems with interpreter Gonzalez

claims prejudice is unnecessary to grant a stay of execution when a defendant claims an Article 36 violation.[124]

There exists a clear dichotomy between the United States and the international community in the determinativeness of prejudice in criminal cases. In the U.S. litigation of *LaGrand*, the court acknowledged the defendant's claim that consular contact would have afforded various opportunities but ultimately held that the denial of contact resulted in no prejudice. The ICJ, however, held that foreign criminal defendants need not prove they would have exercised their Vienna Convention rights or that the case would have reached a different result had they been afforded their Article 36 rights.[125]

Cases after *LaGrand* follow its logic. In 1996, the court in *Faulder v. Johnson*[126] found a violation of a Canadian defendant's Vienna Convention rights.[127] It reasoned, however, that the violation was harmless because the ultimate result would be the same whether or not the Canadian consulate assisted the foreign criminal defendant in obtaining evidence.[128] Similarly, in *Hernandez v. United States*,[129] the District Court held that the failure to advise a Dominican defendant of his rights to consular notification did not entitle the defendant to relief, unless he could prove a change in the outcome of his case. The defendant was unable to do so, and the court denied him relief.[130]

> have been recognized and addressed earlier? Would the hearing have been tape-recorded, in addition to stenographically reported? What is clear, though, is if a non–Spanish speaking U.S. citizen were detained in Mexico on serious criminal charges, the American consulate was not notified, and the interpreter who translated from English into Spanish at the trial for the Spanish-speaking judges was later convicted of having falsified his credentials, we would expect Mexico, on order of the ICJ, to review the reliability of the proceedings and the extent to which, if at all, timely notice to the American consulate might have regularized them.

Id. at *3.

124. See *State v. Issa*, 752 N.E.2d 904, 931–37 (Ohio 2001), in which a dissenting judge argues that the defendant's execution should be stayed on the basis of the ICJ decision in *LaGrand*, regardless of whether the failure to notify the defendant's consulate would have affected the outcome of the case. A possible alternative is for a foreign criminal defendant to sue in a private right of action under 42 U.S.C. § 1983 upon a showing of injury, rather than prejudice, but this is beyond the scope of this Comment. *See* Standt v. City of New York, 153 F. Supp. 2d 417 (S.D.N.Y. 2001); *see also* Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 78–80 (2012) (summarizing the development of precedent on section 1983 actions).

125. LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 466, ¶ 74 (June 27).

126. 81 F.3d 515 (5th Cir. 1996).

127. *Id.* at 520.

128. *Id.* ("[The] evidence that would have been obtained by Canadian authorities . . . was merely the same as or cumulative of evidence defense counsel had or could have obtained.").

129. 280 F. Supp. 2d 118 (S.D.N.Y. 2003).

130. *Id.* at 124–25.

Detained aliens appealing based on violations of immigration regulations that require notification in compliance with the Vienna Convention face the same prejudice hurdle. In *Waldron v. INS*,[131] the Second Circuit found that the Immigration and Naturalization Service (INS) failed to comply with immigration regulations, but that the criminal defendant failed to demonstrate prejudice.[132] The court set forth the standard that a defendant must demonstrate prejudice "where an INS regulation does not affect fundamental rights derived from the Constitution or a federal statute."[133] The Vienna Convention's consular notification and access requirement, as the court reasoned, did not equate to a "fundamental right[], such as the right to counsel, which traces its origins to concepts of due process."[134] The INS, like federal courts, expressed the concern that "the wholesale remand of cases, where no prejudice has been shown to result from the INS's failure to strictly adhere to its regulations, would place an unwarranted and potentially unworkable burden on the agency's adjudication of immigration cases."[135] Defendants, it appears, cannot avoid the prejudice problem regardless of the forum.

C. The Vienna Convention Does Not Confer Individually Enforceable Rights

A third basis courts have used to deny relief to foreign criminal defendants is the absence of an individually enforceable right to relief under the Vienna Convention.[136] Outside of U.S. courts, the question is settled—the Vienna Convention does create individual rights. The ICJ addressed the issue in its decision in *LaGrand*, which held the Vienna Convention created individual rights.[137] The Inter-American Court of Human Rights also concluded Article 36 creates individual rights, responding to Mexico's request for answers to questions about the United States' noncompliance with the Vienna Convention.[138] The question of whether the Vienna Convention creates individually enforceable rights, rather than rights available only to states, has been a recurring theme in the case law.[139]

131. 17 F.3d 511 (2d Cir. 1993).
132. *Id.* at 518–19.
133. *Id.* at 518.
134. *Id.*
135. *Id.*
136. *See, e.g.*, United States v. De La Pava, 268 F.3d 157, 164 (2d Cir. 2001) (stating in dicta "the Convention created no judicially enforceable individual rights").
137. LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 466, ¶ 77 (June 27).
138. Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 84 (Oct. 1, 1999).
139. While the individual rights question is not the focus of this Comment, other authors have addressed the topic. *See, e.g.*, Epps, *supra* note 89, at 35.

Even before the Supreme Court addressed the Vienna Convention, lower courts struggled over the individual rights problem in treaties. In 1990, for example, the Seventh Circuit stated that "[e]ven where a treaty provides certain benefits for nationals of a particular state—such as fishing rights—it is traditionally held that any rights arising from such provisions are, under international law, those of states and . . . individual rights are only derivative through the states."[140] That individual rights also arose as a theme in Vienna Convention cases is, therefore, not surprising.

A notable example of the individual rights problem in the context of the Vienna Convention is *State v. Martinez-Rodriguez*.[141] In *Martinez-Rodriguez*, the court held that the foreign criminal defendant had no standing to bring a claim for violations of the Vienna Convention not only because the Vienna Convention creates no individually enforceable rights but also because no individual remedy for violations of the Vienna Convention exists.[142]

The Ninth Circuit briefly entertained the possibility that the Vienna Convention confers individual rights. In *United States v. Lombera-Camorlinga*,[143] the dissent recognized the Vienna Convention creates individual rights because "foreign nationals are more than incidental beneficiaries [of the treaty]."[144] More recently, however, the court has stated "the right to protect nationals belongs to *States* party to the Convention; no private right is unambiguously conferred on individual detainees."[145] Foreign criminal defendants, rather, are mere beneficiaries of the protections Article 36 grants to states.

Without an individually enforceable right under the Vienna Convention, foreign criminal defendants have no remedy, but they continue to raise the Vienna Convention on appeal despite this problem. In *United States v. Li*, for instance, the First Circuit was deferential to the interpretation of the Vienna Convention held by the State Department, which maintained "[t]he [only] remedies for failures of consular notification . . . are diplomatic, political, or exist between states under international law."[146] Courts have held the Vienna Convention itself "prescribes no judicial remedy or other recourse for its violation."[147] Similarly, in

140. Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990).
141. 33 P.3d 267 (N.M. 2001).
142. *Id.* at 274; *see also* United States v. Li, 206 F.3d 56, 57 (1st Cir. 2000) (en banc).
143. 206 F.3d 882 (9th Cir. 2000) (en banc).
144. *Id.* at 889.
145. Cornejo v. Cnty. of San Diego, 504 F.3d 853, 855 (9th Cir. 2007) (holding that a foreign criminal defendant may not sue a municipality for violations of the Vienna Convention).
146. *Li*, 206 F.3d at 63.
147. United States v. Ademaj, 170 F.3d 58, 67 (1st Cir. 1999).

United States v. Ortiz,[148] the Eighth Circuit declined to grant relief to a foreign criminal defendant because it reasoned the Vienna Convention required no particular remedy.[149] It is unlikely, given the growing number of cases involving foreign criminal defendants that implicate the Vienna Convention, that U.S. courts will interpret the individual rights question any differently in future cases.

D. The United States Has Withdrawn From International Jurisdiction

The ICJ's 2004 ruling in *Avena* signaled the international community's distaste for the United States' repeated violations of the Vienna Convention and prompted the United States' withdrawal from ICJ jurisdiction pursuant to the Optional Protocol to the Vienna Convention. The Optional Protocol, ratified in 1969,[150] grants compulsory jurisdiction over disputes arising from the Vienna Convention to the ICJ for resolution.[151] In the wake of the Iran hostage crisis in 1979, the United States became the first country to invoke the Optional Protocol in its suit against Iran[152]—surprisingly, perhaps, given its hesitancy about international law more generally.[153] While a major impediment to meaningful assistance to Mexican nationals within the United States has been the development of case law denying relief to foreign criminal defendants under the Vienna Convention,[154] by withdrawing from the Optional Protocol in 2005, the United States also foreclosed the possibility of defendants' meaningful recourse to international courts.[155]

Mexican consular officials had attempted to intervene in the treatment of detained Mexican nationals in American custody long before *Avena*. Mexico has tracked active death penalty cases in the United States since the Supreme Court's 1976 ruling in *Gregg*.[156] Moreover, in response to the rising number of Mexican citizens involved in capital cases in the United States, Mexico has developed the

148. 315 F.3d 873 (8th Cir. 2002).
149. *Id.* at 887.
150. Optional Protocol Concerning the Compulsory Settlement of Disputes art. I, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.
151. *Id.*
152. CLARKE & WHITT, *supra* note 73, at 53.
153. *See* Note, *Judicial Enforcement of International Law Against the Federal and State Governments*, 104 HARV. L. REV. 1269, 1269 (1991) ("[L]itigants and judges have long been reluctant to accord international law the same status as other sources of federal law.").
154. *See* Part III.C.
155. *See* Part II.A.
156. *See* Memorial of Mexico, Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), I.C.J. Pleadings, ¶ 35 (June 20, 2003), *available at* http://www.icj-cij.org/docket/files/128/8272.pdf.

Capital Legal Assistance Program,[157] provided legal services to criminal defendants in judicial proceedings, filed *amicus curiae* briefs, and funded investigators and expert witnesses.[158]

In *Avena*, Mexico applied for review of the convictions of fifty-one Mexican nationals sentenced to death in Arizona, Arkansas, California, Florida, Illinois, Nevada, Ohio, Oklahoma, Oregon, and Texas. Mexico brought its claim under Article 36(2) for the United States' failure to give "full effect" to the provisions of the Vienna Convention.[159] The ICJ found that the United States breached its Article 36 obligation to inform the defendants of their rights to consular notification and access and allow Mexico access to its detained nationals. Ultimately, the ICJ required the United States to review the defendants' convictions and sentences.[160]

In the aftermath of *Avena*, in a memorandum to the U.S. attorney general, President George W. Bush wrote that "the United States will discharge its international obligations under [the ICJ decision in *Avena*] by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."[161] While the United States seemed to lend some credence to the international court's decision, it was unclear whether the memorandum bound the judiciary.[162]

Despite the President's apparent approval of *Avena*, on March 7, 2005, in a two-sentence letter from Secretary of State Condoleezza Rice to the United Nations, the United States withdrew from the Optional Protocol.[163] "As a consequence of this withdrawal," Secretary Rice wrote, the United States would "no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol."[164] Secretary Rice's letter seemed to indicate that the American

157. *See Asistencia Jurídica a Casos de Pena Capital en EUA* [*Judicial Assistance in Capital Cases in Mexico*], SECRETERÍA DE RELACIONES EXTERIORES (Mar. 29, 2012, 7:33 PM), http://www.sre.gob.mx/index.php/programas-de-proteccion-de-la-red-consular/295 (describing the United States' establishment of the Capital Legal Assistance Program to provide legal and technical services to Mexican nationals held in the United States for capital crimes).

158. *See* Memorial of Mexico, *supra* note 156, ¶¶ 36–38.

159. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J.12, 21 (Mar. 31).

160. *Id.* at 73.

161. Memorandum From President George W. Bush to the Att'y Gen. of the U.S. Regarding U.S. Response to the *Avena* Decision in the I.C.J. (Feb. 28, 2005) [hereinafter Memorandum], *available at* http://www.state.gov/s/l/2005/87181.htm.

162. Elizabeth A. Culhane, Note, *"In Accordance With General Principles of Comity": President Bush's Memorandum in* Medellin v. Dretke *and the Constitutional Limitations on the President's Ability to Enforce the ICJ's* Avena *Judgment at the State Level*, 51 ST. LOUIS U. L.J. 815 (2007) (proposing that state courts follow the ICJ's interpretation that the *Avena* judgment is binding because it is truest to the intent of the Vienna Convention).

163. Letter From Condoleezza Rice, U.S. Sec'y of State, to Kofi A. Annan, Sec'y-Gen. of the United Nations (Mar. 7, 2005).

164. *Id.*

withdrawal from the Optional Protocol was immediate, contrary to the suggestion in President Bush's memorandum that the United States would make a temporary exception for existing criminal cases involving Mexican defendants.[165] Concern in Mexico over the effect of nonrecognition of the Optional Protocol was strong enough that in response to the withdrawal, Secretary Rice met with Mexican President Vicente Fox on March 10, 2005, in preparation for a summit later that month.[166]

One motivation for U.S. withdrawal from the Optional Protocol was the State Department's perception that ICJ interference in American affairs went too far. The following public statement made this view apparent: "The International Court of Justice has interpreted the Vienna Consular Convention in ways that we had not anticipated that involved state criminal prosecutions and the death penalty, effectively asking the court to supervise our domestic criminal system."[167] The State Department qualified its statements, however, by noting that President Bush's decision to enforce the ICJ judgment in the case of the fifty-one Mexicans "should ensure that our withdrawal is not interpreted as an indication that we will not fulfill our international obligations."[168] Of course, as reviewed *infra* Part II.E, the United States did not enforce the ICJ judgment. Neither Jose Ernesto Medellín Rojas nor Humberto Leal Garcia, both named among the fifty-one Mexicans, obtained relief under the Vienna Convention.

The American response qualifying withdrawal with public statements signaling support of the Vienna Convention's underlying provisions reflected a concern with reciprocity. Alan W. Clarke and Laurelyn Whitt have stated:

> Notwithstanding U.S. withdrawal from the Optional Protocol, President Bush continue[d] to recognize that the United States must be seen to be complying with the [Vienna Convention] so that U.S. citizens can continue to receive consular assistance abroad—thus, the order to state courts to comply. Apparently, the United States wishe[d] to be seen as complying with the treaty obligations even as it resist[ed] strict compliance.[169]

While the American withdrawal from the Optional Protocol evinces its discomfort with the ICJ, it also creates the risk that the United States will be unable to re-

165. Memorandum, *supra* note 161 (expressing the president's determination that "the United States will discharge its inter-national obligations under [the ICJ decision in *Avena*] . . . by having State courts give effect to the decision in accordance with the general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision").
166. Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A1.
167. *Id.* (quoting State Department spokeswoman Darla Jordan).
168. *Id.*
169. CLARKE & WHITT, *supra* note 73, at 53.

quire other nations to submit to the ICJ's jurisdiction should another international incident like the Iran hostage crisis occur.[170]

E. The Vienna Convention Lacks Implementing Legislation

Uncertainty in the courts over whether the Vienna Convention needs implementing legislation is the most recent impediment to relief for foreign criminal defendants. For decades, the Vienna Convention was understood in the United States as a self-executing treaty,[171] pursuant to the president's treaty power under Article II and the Supremacy Clause of Article VI of the Constitution.[172] Construed as a self-executing treaty, the Vienna Convention would need no implementing legislation and automatically would have the effect of an act of Congress.[173]

In 2008, however, the Supreme Court ruled in *Medellín I* and *Medellín II* that the Vienna Convention did not create binding federal law in the absence of Congressional implementing legislation. Jose Ernesto Medellín, a Mexican citizen, was convicted and sentenced to death in Texas for the gang-related rape and murder of two teenage girls.[174] His appeals to the Supreme Court eliminated any possibility the United States would implement the ICJ judgment in *Avena*, which would have required review and reconsideration of cases involving defendants whose rights under the Vienna Convention were violated. Moreover, because all attempts by Congress to pass implementing legislation to date have failed,[175] the Court's holding makes certain that the Vienna Convention will remain nonbinding. Thus, the extent to which the United States will adhere to the Vienna Convention is uncertain, despite the United States' interest in other countries' recog-

170. *See id.* at 72.

171. *See* Jogi v. Voges, 480 F.3d 822, 830 (7th Cir. 2007) ("In theory, we would also have to resolve the question whether the Convention is self-executing before proceeding, because if it is not, then Jogi's suit must fail for that reason alone. . . . Here, however, it is undisputed that the Convention is self-executing, meaning that legislative action was not necessary before it could be enforced."); S. EXEC. REP. NO. 91-9 app. at 5 (1969) (providing testimony of State Department Deputy Legal Adviser J. Edward Lyerly at a Senate hearing before ratification that the Vienna Convention is "entirely self-executive and does not require any implementing or complementing legislation").

172. *See* U.S. CONST. art. II, § 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."); *id.* art. VI. ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

173. *See* United States v. Torres-Del Muro, 58 F. Supp. 2d 931, 932 (C.D. Ill. 1999); S. EXEC. REP. NO. 91-9, *supra* note 171, app. 5.

174. *See* Medellín v. Texas (*Medellín I*), 552 U.S. 491, 500–01 (2008).

175. *See infra* Part III.A.

nition of the right to consular notification and access in cases involving American citizens.

Medellín I, the first appeal to the Supreme Court, followed the Texas Court of Criminal Appeals' dismissal of Jose Ernesto Medellín's state habeas application claiming Vienna Convention violations.[176] Medellín appealed based on the ICJ judgment in *Avena* and President Bush's subsequent memorandum.[177] Chief Justice Roberts, writing for the majority, held that *Avena* was not enforceable in the United States and did not preempt state procedural rules. Moreover, the Court held that President Bush's memorandum, which implored courts to give effect to *Avena*, did not require states to provide reconsideration and review without regard to default rules.[178] Justices Breyer, Souter, and Ginsburg dissented on the ground that the Vienna Convention and its Optional Protocol were binding because the Vienna Convention is a self-executing treaty.[179] Moreover, the dissenting justices argued the ICJ judgment in *Avena* is binding on the United States because the United States agreed to submit to the ICJ's "compulsory jurisdiction" in similar cases.[180]

Medellín appealed again in *Medellín II*, seeking a stay of execution because of the possibility that Congress or the Texas Legislature might enact legislation to implement the ICJ ruling in *Avena*.[181] Citing Congressional inaction and the unlikelihood the legislature would intervene when there was no unlawfully obtained confession, the Court denied Medellín's petition for a stay of execution.[182]

The most recent iteration in the Vienna Convention case law is the Supreme Court's ruling in *Garcia v. Texas*,[183] issued on the night of Humberto Leal Garcia's scheduled execution, July 7, 2011. After Leal's Texas conviction and death sentence for the brutal murder of a sixteen-year-old girl at a party began a saga of appellate litigation.[184] Leal, a Mexican citizen, raised his Vienna Convention claim in his second federal habeas corpus petition in 1999 after seeking and being denied

176. *See Medellín I*, 552 U.S. at 503–04.
177. *See infra* Part III.A.
178. *See Medellín I*, 552 U.S. at 498; *see also supra* Part II.A (describing the difficulties procedural default rules pose to defendants who fail to raise a Vienna Convention claim before appeal).
179. *See Medellín I*, 552 U.S. at 538; *see also* Penny M. Venetis, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 ALA. L. REV. 97, 115–16 (2011) (explaining the ramifications of the Court's failure to construe the Vienna Convention as self-executing on human rights treaty enforcement more generally).
180. *See Medellín I*, 552 U.S. at 538.
181. Medellín v. Texas (*Medellín II*), 554 U.S. 759 (2008) (per curiam).
182. *Id.* at 760.
183. 131 S. Ct. 2866 (2011).
184. For a fuller description of the gruesome facts of Leal's case, see Leal v. Dretke, No. Civ. SA-99-CA-1301-RF, 2004 WL 2603736, at *2–4 (W.D. Tex. Oct. 20, 2004).

habeas corpus relief numerous times at the state and federal level.[185] The District Court dismissed Leal's appeal without prejudice because, although the court determined there was a violation of Leal's right to consular notification, the violation had not caused him "actual prejudice" within the meaning of *Avena*.[186] The Fifth Circuit vacated the District Court's findings about the Vienna Convention claim and dismissed Leal's habeas corpus petition with prejudice based on *Medellín*'s foreclosure of relief without implementing legislation.[187] Then, the Supreme Court rejected Leal's second petition for certiorari review, in which he raised the Vienna Convention claim for the first time, based on the Texas Court of Criminal Appeals' decision to dismiss his Vienna Convention habeas petition.[188]

During the summer of 2011, Leal sought to reopen his second federal habeas corpus petition filed in 1999 pursuant to Federal Rule of Civil Procedure 60(b) and to stay his execution pending Congressional consideration of the Consular Notification Compliance Act.[189] In declining to reopen the judgment, the District Court stated the following:

> Given the Supreme Court's ruling in *Medellín v. Texas* . . . and the Texas Court of Criminal Appeals' ruling in *Ex parte Medellín* . . . , it is doubtful there is any state or federal judicial forum currently available in which petitioner could obtain a ruling on the merits of his *Avena*/Vienna Convention claim. Even more significant is the fact the Fifth Circuit's dismissal *with prejudice* of petitioner's petition effectively determined petitioner's rights under the *Avena* decision and the Vienna Convention 'on the merits.'[190]

Almost simultaneously, Leal filed a third federal habeas petition, again seeking relief based on Vienna Convention violations.[191] The District Court held that Leal obtained a ruling "on the merits" of the Vienna Convention claim in the Fifth Circuit in 2009, so it would need to treat the petition as a successive habeas corpus

185. *See* Leal v. Texas, 525 U.S. 1148 (1999) (denying Leal's first petition for writ of certiorari on his conviction and sentence); *Leal*, 2004 WL 2603736 (denying, in a federal habeas corpus action, relief on various causes of action not including violations of the Vienna Convention); *Ex parte* Humberto Leal, No. WR-41743-02, 2007 WL 678628 (Tex. Crim. App. Mar. 7, 2007) (dismissing Leal's second state habeas petition based on Texas's writ abuse statute).

186. Leal v. Quarterman, Civ. No. SA-07-CA-214-RF, 2007 WL 4521519 (W.D. Tex. Dec. 17, 2007) (granting a certificate of appealability on whether Leal sustained "actual prejudice" within the ambit of *Avena*).

187. Leal Garcia v. Quarterman, No. 08-70003, 2009 WL 1658029 (5th Cir. Jun. 15, 2009), *superseded by* 573 F.3d 214 (5th Cir. 2009).

188. Garcia v. Texas, 552 U.S. 1295 (2008).

189. For more on the proposed legislation, see Part III.

190. Garcia v. Thaler, 793 F. Supp. 2d 894, 903 (W.D. Tex. 2011) (emphasis in original).

191. Garcia v. Thaler, 793 F. Supp. 2d 909 (W.D. Tex. 2011).

petition.[192] The District Court would not issue a stay of execution based on Leal's successive habeas corpus petition because there were not "substantial grounds upon which relief might be granted."[193]

The District Court's opinion emphasized the insufficiency of unpassed legislation:

> Absent the *passage of actual legislation* by the Congress or the Texas Legislature, or a ruling by the Supreme Court recognizing the existence of individually enforceable rights created by Article 36 of the Vienna Convention, petitioner remains without a forum in which to relitigate his newly re-cast *Avena*/Vienna Convention claims. . . . The filing of proposed legislation which might one day afford petitioner a remedy in the state or federal courts does not, standing alone, justify a stay of execution under such circumstances. . . . Petitioner's assertions herein concerning the likelihood of passage of the 'Consular Notification Compliance Act' are supported by little more than highly speculative predictions from a variety of political science professors and a handful of hopeful executive branch and congressional officers. . . . Congress has been on notice for more than a decade that foreign citizens who have attempted to assert their rights under Article 36 of the Vienna Convention . . . have confronted barriers to assertion of their consular notification rights as well [as] substantive rulings denying the existence of those very same rights.[194]

After emphasizing the years that had passed since each major turning point in the Vienna Convention jurisprudence, the court addressed the status of the Consular Notification Compliance Act, the "third attempt [at implementing legislation]."[195] The Consular Notification Compliance Act was underway, but at the time of the court's opinion, it had advanced only as far as the filing of "more, proposed, legislation."[196] Proposed legislation alone was not enough. Because "no genuine progress appear[ed] to have been made toward the actual passage of new, ameliorative, legislation since the Supreme Court denied Jose Ernesto Medellín's request for a stay of his execution in March, 2008," the District Court would not grant relief.[197]

Relying on *Avena*'s requirement for review and reconsideration of his appeal, Leal sought a stay of execution from the Supreme Court, claiming his convic-

192. *Id.* at 931.
193. *Id.* at 929–30.
194. *Id.* at 933–34 (emphasis in original).
195. *Id.* at 935.
196. *Id.*
197. *Id.*

tion violated the Vienna Convention.[198] Leal argued his execution would violate the Due Process Clause because of the existence of proposed legislation to enact the ICJ decision in *Avena*. The United States, in an amicus brief filed by the U.S. solicitor general, contended the Supreme Court should stay the execution until January 2012, given the "future jurisdiction" over Vienna Convention claims the pending implementing legislation would provide.[199]

Nonetheless, the Supreme Court held that a stay of execution was not appropriate in consideration of unenacted legislation. The Court stated: "Our task is to rule on what the law is, not what it might eventually be."[200] The per curiam opinion also reasoned that even if the Court could issue a stay in light of unenacted legislation, *Garcia* did not present appropriate circumstances to do so. The Court alluded to its opinion in *Medellín I*, in which it stated, "Congress has not progressed beyond the bare introduction of a bill in the four years since the ICJ ruling and the four months since our ruling in [*Medellín I*]."[201] Implementing legislation was not a priority for Congress at the time the Court decided *Medellín I*, and there was no indication to the Court in *Garcia* that circumstances had changed despite the "international consequences" cited by the dissent.[202] Importantly, the Court also emphasized that the United States made no argument about whether Leal would have any prospect of successfully proving prejudice if the Court recognized the Vienna Convention.[203]

Justice Breyer authored the dissenting opinion, joined by Justices Ginsburg, Sotomayor, and Kagan. While acknowledging the United States notified the United Nations of its withdrawal from the Optional Protocol of the Vienna Convention, the dissenting opinion stated that the "withdrawal does not alter the binding status of [the United States] prewithdrawal obligations."[204] Simply put, the United States failed to meet its legal obligations under *Avena* by not providing Leal the hearing to which he was entitled under the Vienna Convention.[205] On the issue of implementing legislation, the dissenting opinion maintained that the legislation proposed at the time of the opinion's issuance met the standard set

198. Leal also raised *Avena* at the state appellate level. *See Ex parte* Humberto Leal, No. WR-41743-02, 2007 WL 678628, at *1 (Tex. Crim. App. Mar. 7, 2007).
199. *See* Garcia v. Texas, 131 S. Ct. 2866, 2867 (2011); *see also* Brief Amicus Curiae of the Government of the United Mexican States in Support of Petitioner Humberto Leal García, Garcia v. Texas, 131 S. Ct. 2866 (2011) (No. 11-5001), 2011 WL 2581860.
200. *Garcia*, 131 S. Ct. at 2867.
201. *Id.* at 2868.
202. *Id.*
203. *Id.* For further discussion of the inadequacy of the Vienna Convention in providing a remedy for foreign criminal defendants because of the difficulty of proving prejudice, see Part II.B.
204. *See Garcia*, 131 S. Ct. at 2869.
205. *Id.* at 2869.

forth in *Medellín*. That is, passage of the legislation was enough of a "reasonable possibility" to warrant a stay.[206] Moreover, the dissent argued, granting a short-term stay would have "put Congress on clear notice that it must act quickly."[207]

The dissent paid special attention to the president's appeal, by way of the solicitor general, that a stay was necessary in order to prevent adverse foreign policy consequences.[208] This claim did not persuade the majority. Such a view lent too much credence to the executive branch when Congress spoke clearly through its inaction; the adverse foreign policy consequences were weak enough, or of low enough priority, that Congress passed no enacting legislation.[209]

Lastly, the dissent saw no procedural obstacle to the Court's legal authority to grant a stay based on "potential jurisdiction."[210] The timeline would go as follows. A stay of Leal's execution from July until September would allow time for passage of the pending legislation.[211] Upon passage, the Court's ruling would be clear, according to Justice Breyer: "[T]his Court would almost certainly grant the petition for a writ of certiorari, vacate the judgment below, and remand the case for further proceedings consistent with that law."[212]

The majority's reluctance to act without implementing legislation and, implicitly, its construal of the Vienna Convention as non-self-executing makes sense. While states dominate the U.S. criminal justice system, few, if any, have successfully come into compliance with the treaty's mandate.[213] Rather than resort to the judiciary to compel states into compliance, the Supreme Court seems to implore Congress and the President—the branches of government responsible for enacting the Vienna Convention—to take responsibility for the obligations the treaty sets forth. The Court *must* interpret the Vienna Convention as non-self-executing, because doing so requires Congress to enact implementing legislation if it intends the treaty to have any practical effect. While it may seem as though the Court

206. *Id.*
207. *Id.* at 2870.
208. *Id.* at 2868–70.
209. *Id.* at 2868.
210. *Id.* at 2870.
211. A district court opinion issued that September, however, was less optimistic about the possibility of Congress passing implementing legislation. *See* United States *ex rel.* Caballero v. Hardy, 837 F. Supp. 2d 905, 925 (N.D. Ill. 2011) ("Given the extended life of this case, and given the obvious fact that the proposed legislation may never be passed, I am not inclined to prolong this case any further.").
212. *Garcia*, 131 S. Ct. at 2870.
213. *See infra* notes 249–262 and accompanying text.

failed to enforce the basic language of the Convention, the Court could easily frame this move as an act of judicial deference.[214]

The international community paid close attention to the outcome of Leal's appeals in the United States. In 2009, the Inter-American Commission on Human Rights concluded the United States violated Leal's rights to consular notification and assistance and recommended Leal be granted a new trial. In the meantime, it implored the United States to delay Leal's execution, warning of a failure "to act in accordance with its fundamental human rights obligations as a member of the Organization of American States."[215]

At the time of the Court's ruling, Senator Patrick Leahy had proposed the Consular Notification Compliance Act, a bill that reaffirmed U.S. obligations under Article 36.[216] However, even if passage was a "reasonable possibility" at the time the opinion was issued,[217] the Court's decision not to issue the stay of execution here may have lowered the priority of the proposed legislation in Congress, thus contributing to its demise. Unless legislation emerges to make implementation of the Vienna Convention more manageable,[218] the United States' inability to meet its current treaty obligations threatens its expectations of reciprocity for consular access to Americans detained abroad.

III. BILATERAL MODIFICATION OF THE CONVENTION AS A PRACTICAL SOLUTION TO IMPLEMENTING THE VIENNA CONVENTION IN THE UNITED STATES

A. Failed Attempts at Legislative Reform

In the wake of the rulings in *Sanchez-Llamas* in 2006 and *Medellín* in 2008,[219] elected officials in Congress have twice proposed legislation that reaffirms the United States' obligations under the Vienna Convention and emphasizes the

214. *See* Switchmen's Union of N. Am. v. Nat'l Mediation Bd., 320 U.S. 297, 301 (1943) ("All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced.").

215. Medellín v. United States, Case 12.644, Inter-Am. Comm'n H.R., Report No. 90/09, OEA/Ser.L/V/II.135, doc. 37 ¶ 168 (2009).

216. *See infra* Part III.A.

217. *Garcia*, 131 S. Ct. at 2869.

218. There may still be cause for optimism. *See* Sandra Babcock, *The Limits of International Law: Efforts to Enforce Rulings of the International Court of Justice in U.S. Death Penalty Cases*, 62 SYRACUSE L. REV. 183, 195 (2012) ("The great majority of [Mexican] nationals [on death row] will not face execution for at least a dozen years, so they could eventually benefit from state or federal legislation designed to implement *Avena*.").

219. *See supra* Parts II.A, II.E.

rights of foreign nationals who have been denied consular access.[220] Like the proposals for compliance in the academic literature discussed *supra*, neither the Avena Case Implementation Act nor the Consular Notification Compliance Act has been adopted. More importantly, neither of these legislative reforms would increase the feasibility of U.S. compliance with the Vienna Convention.

In 2008, Representatives Howard Berman (D-CA) and Zoe Lofgren (D-CA) cosponsored the Avena Case Implementation Act,[221] which would have "create[d] a civil action to provide judicial remedies to carry out certain treaty obligations of the United States under the Vienna Convention on Consular Relations and the Optional Protocol to the Vienna Convention on Consular Relations."[222] It provided that "[a]ny person whose rights are infringed by a violation by any nonforeign governmental authority of article 36 of the Vienna Convention on Consular Relations may in a civil action obtain appropriate relief."[223] It further defined "appropriate relief" as "any declaratory or equitable relief necessary to secure the rights; and . . . in any case where the plaintiff is convicted of a criminal offense where the violation occurs during and in relation to the investigation or prosecution of that offense, any relief required to remedy the harm done by the violation, *including the vitiation of the conviction or sentence where appropriate*."[224] The act would have applied retroactively, had it been enacted.[225] The bill, however, never reported out of the House Committee on the Judiciary.

About three years later, on June 14, 2011, Senator Patrick Leahy (D-VT) revived Congressional discussion regarding compliance with the Vienna Convention when he introduced the Consular Notification Compliance Act.[226] The Act, which contained considerably more detail than the failed Avena Case Implementation Act, would have implemented Article 36 as follows:

> As required under . . . Article 36 of the Vienna Convention on Consular Relations, . . . if an individual who is not a national of the United States is detained or arrested by an officer or employee of the Federal Government or a State or local government, the arresting or detaining officer or employee, or other appropriate officer or employee of the Federal Government or a State or local government, shall notify that individual without delay that the individual may request that the con-

220. For a useful, detailed history of these attempts, see Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas, *Garcia*, 131 S. Ct. 2866 (No. 11-5001), 2011 WL 2743200.
221. H.R. 6481, 110th Cong. (2d Sess. 2008).
222. *Id.*
223. *Id.* § 2(a).
224. *Id.* § 2(b) (emphasis added).
225. *Id.* § 2(c).
226. S. 1194, 112th Cong. (1st Sess. 2011).

> sulate of the foreign state of which the individual is a national be notified of the detention or arrest.[227]

Thus, the Consular Notification Compliance Act incorporated the language of Article 36 directly into the legislation, as did the Avena Case Implementation Act. In cases finding violations of the Vienna Convention, the Act also provided that "the consulate of the foreign state of which the individual is a national shall be notified immediately by the detaining authority" in accordance with the Vienna Convention.[228]

Beyond its affirmation of U.S. treaty obligations, the Consular Notification Compliance Act would have allowed review of claimed violations of the Vienna Convention in federal court. Importantly, it would have limited review to petitions "filed by an individual convicted and sentenced to death" and would have required a stay of execution for defendants seeking review but for whom a date for execution had been set.[229] However, foreign defendants would still have to meet the "actual prejudice" standard.[230] It also contained a provision limiting procedural bars on use of a federal habeas corpus petition that raises violations of the Vienna Convention; such petitions shall not have "be[en] considered a second or successive habeas corpus application or subjected to any bars to relief based on pre-enactment proceedings other than as specified in paragraph (3) [of this subsection]."[231]

Congress also failed to enact the Consular Notification Compliance Act. On July 27, 2011, it, like the Avena Case Implementation Act, was referred to the Senate Committee on the Judiciary for hearings but did not report out into the Senate. While the Act enjoyed support from the Departments of Justice, State, Defense, and Homeland Security,[232] the Supreme Court's ruling in *Garcia*, which relied on Congress's failure to pass any legislative proposals to implement the Vienna Convention as the basis for its holding, coupled with the defendant's well-publicized execution earlier the same month, foreshadowed the Act's demise.

227. *Id.* § 3(a).
228. *Id.* § 4(b)(1)(A).
229. *Id.* § 4(a)(1)–(2).
230. *Id.* § 4(a)(3).
231. *Id.* § 4(a)(5).
232. Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas, *supra* note 220, at 7.

B. Existing Proposals for Compliance

Out of the Vienna Convention case law, a variety of approaches to improve compliance with the consular notification and access requirement have been developed, but none have been adopted. In the wake of the failure of the Avena Case Implementation Act,[233] Edward Duffy has argued that the United States should induce states to provide a remedy to foreign criminal defendants who suffered a violation of their Article 36 rights. As an alternative to preempting state law, creating a federal cause of action, seeking a constitutional amendment, or allowing removal to federal court in these cases,[234] Duffy suggests Congress could use the Spending Power to condition the receipt of state grants on compliance with the Vienna Convention.[235] For his proposal to be effective, however, elected officials in Congress would need an incentive to encourage states to comply—it is not clear whether such an incentive exists.

William Aceves has recommended that the United States, based on a sense of reciprocity, undertake a variety of measures to comply with its treaty obligations. These measures include monitoring of agencies at the local, state, and federal level; Congressional legislation to require law enforcement compliance; cooperation with foreign governments to establish procedures for compliance, enacting procedures to ease law enforcement compliance; Congressional legislation to recognize the right of foreign governments to sue in federal courts; and federal government suits on behalf of foreign governments for state and local violations.[236] This approach is an improvement. Reciprocity is a motivating factor for the United States to comply with its treaty obligations.[237] It does not, however, lessen the administrative burden of compliance by reducing the volume of instances to which the consular notification and access requirement would apply.[238]

233. *See* Part III.A.

234. *See, e.g.*, Global Satellite Comm'cn Co. v. Starmill U.K. Ltd., 378 F.3d 1269, 1271 (11th Cir. 2004) ("A defendant's right to remove an action against it from state to federal court 'is purely statutory and therefore its scope and the terms of its availability are entirely dependent on the will of Congress.'" (quoting 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3721, at 285–86 (3d ed. 1998))).

235. *See* Edward W. Duffy, *The Avena Act: An Option to Induce State Implementation of Consular Notification Rights After* Medellín, 98 GEO. L.J. 795 (2010).

236. *See* William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 313–17 (1998).

237. *See infra* Part III.E.

238. A recent piece on treaty compliance proposes enacting legislation to address "certain sets of treaty obligations of particular significance," including clear statements by the executive in treaties about whether those treaties are self-executing, and enabling the federal government to enjoin state and local governments from treaty violations. *See* Hathaway et al., *supra* note 124, at 90–104. While I agree that the United States should not limit its focus in improving treaty compliance to the treaty

Reform could also come directly from the courts. Revamping the clemency process in the wake of *Avena* and *LaGrand* would allow courts to reconsider convictions and sentences in cases involving Article 36 violations.[239] Executions pending international court decisions present a public relations obstacle for the United States. As a stopgap solution, the Attorney General could sue state governors to prevent executions of foreign nationals who suffered violations of their Article 36 rights.[240] Courts could also invoke international comity to stay proceedings while cases are heard internationally, as a way of "uphold[ing] international obligations (and thereby avoid[ing] the attendant diplomatic disadvantages of noncompliance) without eroding domestic federalism structures."[241] But these approaches are unsatisfying and unfeasible because of their dubious political benefits. Given the popular support capital punishment retains in the United States[242] and the perception that it would be politically unfeasible to enact broader appellate reforms that favor defendants,[243] states are unlikely to enact either proposal.

C. Existing Implementation at the Federal and State Levels

Schemes for compliance with the Vienna Convention at the federal and state levels elaborate on the provisions of Article 36 and describe in greater detail the responsibilities of law enforcement officers. Federal agencies have focused more on enacting regulations about notification—without a legislative mandate from Congress—whereas two states have directly implemented Article 36 through statute. While steps in the right direction, these measures are hollow unless Congress winnows the breadth of offenses to which the Vienna Convention applies.

itself, the proposal suggests broadening the coverage implementing legislation might provide by grouping "classes of treaty obligations, rather than just a single treaty." *Id.* at 94. This Comment, however, is distinct in its objective to narrow the scope of obligations the United States must observe through use of bilateral treaties.

239. *See* Harry S. Clarke, III, Note, *Determining the Remedy for Violations of Article 36 of the VCCR: Review and Reconsideration and the Clemency Process After* Avena, 38 GEO. WASH. INT'L L. REV. 131 (2006).

240. *See* Fitzpatrick, *supra* note 91, at 317.

241. Jehanne E. Henry, *Overcoming Federalism in Internationalized Death Penalty Cases*, 35 TEX. INT'L L.J. 459, 480–83 (2000).

242. *See Death Penalty*, GALLUP, http://www.gallup.com/poll/1606/death-penalty.aspx (last updated Apr. 10, 2013, 3:00 PM).

243. *See* Alex S. Ellerson, Note, *The Right to Appeal and Appellate Procedural Reform*, 91 COLUM. L. REV. 373, 390 (1991) (noting attempts by state courts to limit appellate procedures based on the governmental interest in alleviating administrative burdens).

1. Federal Level

At the federal level, the Departments of Justice and Homeland Security have exclusive but similar procedures for consular notification.[244] Both require notification upon request unless there is a bilateral treaty mandating notification without request. Homeland Security regulations, however, include the caveat that notification of consular officers shall not include information that the "detained alien has applied for asylum or withholding of removal."[245]

The United States is subject to a mandatory notification requirement for those countries that require consular notification, regardless of whether the detained individual requests contact.[246] Thus, the State Department has instructed federal, state, and local law enforcement officers to check the nationality of a suspected foreign criminal defendant to determine whether there is a mandatory notification requirement. If a country does not require mandatory notification, the consular officer should ask the foreign national whether he or she would like consular contact.[247] The 2010 State Department Consular Notification and Access Manual requires officials to make the following simple advisement when notification is optional:

> As a non-U.S. citizen who is being arrested or detained, you may request that we notify your country's consular officers here in the United States of your situation. You may also communicate with your consular officers. A consular officer may be able to help you obtain legal representation, and may contact your family and visit you in detention, among other things. If you want us to notify your consular officers, you can request this notification now, or at any time in the future. Do you want us to notify your consular officers at this time?[248]

2. State Level

While the federal government's compliance measures have been fairly limited given the failures of more sweeping legislative proposals in Congress, two

244. *Compare* 28 C.F.R. § 50.5 (2011) (Department of Justice), *with* 8 C.F.R. § 236.1(e) (2012) (Department of Homeland Security).

245. 8 C.F.R. § 236.1(e).

246. *See supra* note 49 and accompanying text. For a list of those countries that require consular notification regardless of whether the detained individual requests contact, see *Mandatory Notification Countries and Jurisdictions*, TRAVEL.STATE.GOV, http://travel.state.gov/law/consular/consular_5125.html (last visited Apr. 10, 2013).

247. *See* U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS 74–75 (3d ed. 2010), *available at* http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf.

248. *Id.* at 75.

states—California and Oregon—have enacted their own legislation to implement the Vienna Convention within their respective jurisdictions.

California. In 2000, after the first wave of Vienna Convention litigation and its Supreme Court debut in *Breard v. Greene*, California implemented the Vienna Convention at the state level through SB 287, codified in Penal Code section 834c. Without referring to the Vienna Convention directly, the statute requires every law enforcement officer to notify foreign criminal defendants of their right to contact their consulates.[249] California also requires notification in every instance of "arrest and booking or detention for more than two hours."[250] The statute specifies only that a "pertinent official" should make the requisite notification to the foreign criminal defendant's consulate, leaving assignment of that responsibility to each agency.

Unlike the Vienna Convention, which refers to the national of a sending state as though foreign national status were an established fact, the California statute also imposes broad requirements for identification of foreign criminal defendants. Law enforcement officers must advise a suspect who is "a known *or suspected* foreign national."[251] After a foreign criminal defendant requests contact with his or her consulate, the California statute defers to State Department procedure on consular notification.[252] California also specifies that law enforcement agencies should incorporate consular notification language into their procedures and training materials, and that such agencies must comply with mandatory notification requirements for certain countries regardless of whether the foreign criminal defendant requests contact.[253]

Notably, the statute imposes no consequence for noncompliance with its provisions. The California legislature was aware of this absence prior to the statute's enactment. As a legislative report described:

> It is not clear what the impact will be if an officer fails to follow this statutory mandate. Proposition 8 as adopted by the people of California in June of 1982 in part intended to make the federal Constitution the sole basis of exclusion of illegally obtained evidence. Thus, it is not clear that a violation of this statute would have any real impact on the outcome of a case.[254]

249. CAL. PENAL CODE § 834c(a)(1) (West 2008).
250. *Id.*
251. *Id.* (emphasis added).
252. *Id.* § 834c(a)(2).
253. *Id.* § 834c(c)–(d).
254. SB 287 BILL ANALYSIS, S. 287, 1999–2000 Reg. Sess., at 3 (Cal. 1999).

Unsurprisingly, even law enforcement organizations did not oppose this aspirational but unenforceable legislation.

The impetus for this legislation did not focus on the violation of foreign criminal defendants' supposed individual rights under the Vienna Convention. Rather, the California statute was "introduced to attempt to close the 'loop-hole' on Consular Relations Appeals for death row inmates."[255] The legislative report alluded to two stays of execution granted in response to Vienna Convention violations, presumably the cases of Joseph Faulder, a Canadian convicted in Texas, and Jaturun Siripongs, a Thai citizen convicted in California.[256] It noted: "Their appeals included the fact that they were not informed of their right to contact their nation's consulate in the U.S. Stays of execution often delay justice and the burden is once again on the taxpayer."[257] Somewhat ironically, just months after the report's issuance and before the legislation became law, Texas executed Faulder.[258] California executed Siripongs in 1999.[259]

Oregon. In 2003, Oregon passed HB 2047, requiring law enforcement officers to warn noncitizens of their right to contact a consulate. Like California, the Oregon legislation imposes no penalty for noncompliance. While the original version of the statute presumably imposed penalties, the amended version removed those penalties in a gesture to state police and prosecutorial organizations, which claimed the penalties were "too burdensome."[260] The Oregon legislation also responded to Mexico's request two years earlier to have such legislation enacted at the state level.[261] Nancy Alexander has expressed her optimism that the variety of policies and procedures adopted in Oregon will improve the likelihood

255. *Id.* at 2.

256. *See id.* For more information on the *Faulder* case and violations of the Vienna Convention claimed by Canadian citizens, see Susan McClelland, *Canadians in U.S. Prisons Denied Rights: Amnesty, Government Agree U.S. Officials Often Ignore Vienna Convention*, OTTAWA CITIZEN, May 17, 1998, at A11. Faulder claimed not to have known about the Vienna Convention during his detention for 15 years, until Amnesty International and the Canadian government received word of his case. *Id.*

257. SB 287 BILL ANALYSIS, S. 287, 1999–2000 Reg. Sess., at 2 (Cal. 1999).

258. *See* Barbara Whitaker, *Texas Executes Canadian Killer Despite International Pleas*, N.Y. TIMES, Jun. 18, 1999, at A24.

259. *Condemned Inmates Who Have Died Since 1978*, CAL. DEP'T CORRECTIONS & REHABILITATION, http://www.cdcr.ca.gov/Capital_Punishment/docs/CONDEMNEDINMATESWHOHAVEDIEDSINCE1978.pdf (last updated Feb. 1, 2013).

260. Peter Wong, *Bill Addresses Foreign Nationals' Rights*, STATESMAN J. (Salem, OR), Apr. 1, 2003, at 2C.

261. *Id.*

that law enforcement officers will inform foreign criminal defendants of their consular rights in that state.[262]

D. Designing the Bilateral Modification Treaty[263]

Given the great number of noncitizens present in the United States today, the United States can reduce the administrative burden of compliance with the Vienna Convention while observing its international obligations if it limits the consular notification and access requirement to a narrower set of cases. But the line to tread is thin. The United States cannot alter the treaty provisions in such a way that compromises the reciprocity American citizens receive under the Vienna Convention or that violates the principles for treaty modification set forth by the Vienna Convention on the Law of Treaties (Vienna Treaty Convention). Therefore, this Comment proposes the United States seek bilateral modification of the Vienna Convention to limit its application to noncitizen capital offenses and exclude the minor offenses that make U.S. compliance with Article 36 unrealistic.

1. Scope Limitation

Making consular notification a manageable responsibility for U.S. law enforcement officers requires limiting the scope of noncitizen offenses to which the Vienna Convention applies. The preceding sections of this Comment explained not only the difficulty of proving violations of the Vienna Convention but also the inconsistency of compliance at the federal, state, and local levels. Because noncitizens make up a much greater proportion of American society today than they did at the time of the Vienna Conference, there are an incredible number of cases in any given year—38,619 at the federal level in 2009[264]—in which a foreign criminal defendant could request consular notification and access. Thus, bilateral modification of the Vienna Convention would limit the obligation for consular notifica-

262. *See* Nancy Alexander, Comment, *Saved by the States? The Vienna Convention on Consular Relations, Federal Government Shortcomings, and Oregon's Rescue*, 15 LEWIS & CLARK L. REV. 819, 845 (2011).

263. A treaty is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Vienna Convention on the Law of Treaties art. 2, ¶ 1(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

264. U.S. SENTENCING COMM'N, FINAL QUARTERLY DATA REPORT, FISCAL YEAR 2010, at 47 tbl.26 (2010), *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2010_Quarter_Report_Final.pdf.

tion and access to those situations in which a foreign criminal defendant is held or tried for a *capital offense*.[265]

Statistical data on incarcerated populations reveals that a substantial proportion of individuals in custody are noncitizens, which proves just how unwieldy the United States' current treaty obligations are. In 2009, the United States incarcerated 94,498 noncitizens in state or federal prisons, up from 93,682 in the previous year.[266] In the federal system alone, 44.7 percent of offenders were noncitizens in 2009, a 10.8 percent increase from 1999.[267] California, Texas, Florida, New York, and Arizona have the highest proportions of noncitizens in detention.[268] In jails, noncitizens make up a smaller percentage of the total incarcerated populations, but their numbers are rising.[269] Noncitizens also constitute a substantial portion of bookings by the U.S. Marshals Service and the Drug Enforcement Agency.[270] The immigration status of these noncitizens is unknown in the statistical data.[271] If perfectly executed, the Vienna Convention would require law enforcement officers to inform every foreign criminal defendant of his or her

265. Approaches to Vienna Convention compliance that exclude the least serious offenses have been adopted in at least one country, even if as an informal procedure. Fitzpatrick, *supra* note 91, at 312 (noting that, in response to the ICJ decision in *LaGrand*, "Germany would take up only those cases where a minimum prison sentence of five years was at stake").

266. HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS, NCJ 230113, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES 23 tbl.20 (2010).

267. GLENN R. SCHMITT, U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2009, at 2 (2010), http://www.ussc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf.

268. WEST, *supra* note 266. These states detained 18,705, 9,618, 6,344, 6,111, and 3,259 inmates, respectively.

269. TODD D. MINTON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, NCJ 225709, JAIL INMATES AT MIDYEAR 2008—STATISTICAL TABLES 6 tbl.8 (2009) (noting noncitizens comprised 6.1 percent of the jail population in 2000 and 9 percent in 2008, in reporting jurisdictions).

270. BUREAU OF JUSTICE STATISTICS, NCJ 213476, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 19 tbl.1.3, 20 tbl.1.4 (2006), http://bjs.gov/content/pub/pdf/cfjs04.pdf (noting that noncitizens account for 42.6 percent of bookings by the Marshals Service and 23.7 percent by the DEA).

271. *See id.* (classifying individuals as either citizens or noncitizens with no further specification); SCHMITT, *supra* note 267, at A-2 (explaining that the U.S. Sentencing Commission reports "resident alien," "illegal alien," and "non-U.S. citizen, alien status unknown" in a single noncitizen category); WEST, *supra* note 266, at 23 (classifying individuals as either citizens or noncitizens and defining noncitizens as "inmates held by U.S. Immigration and Customs Enforcement (ICE)). Media inflation of the number of illegal immigrants, specifically, in custody is common. *See* Carl Bialik, *Counting Noncitizens in U.S. Prisons*, WALL ST. J. NUMBERS GUY BLOG (May 31, 2007, 2:53 PM), http://blogs.wsj.com/numbersguy/counting-noncitizens-in-us-prisons-117 (discussing television host Lou Dobbs's propagation of the statistic that one-third of prisoners are illegal immigrants).

consular rights and make adequate attempts to contact the consulate upon the defendant's request.

Noncitizens are usually responsible for crimes that, unlike capital offenses, fall outside the international limelight. In 2009, 68.2 percent of noncitizens convicted of a federal crime committed an immigration offense.[272] Thus, the overwhelming majority of offenses for which noncitizens are detained directly relate to their noncitizen status. In comparison, murders accounted for less than .01 percent of all offenses committed by noncitizens—a considerably lighter administrative burden for consular compliance by U.S. law enforcement officials.[273]

2. Form

This Comment proposes the use of a bilateral agreement to modify the treaty, or "*inter se* agreement," under Article 41 of the Vienna Convention on the Law of Treaties (Vienna Treaty Convention).[274] One scholar has suggested that Article 41 could be implemented to enforce a higher environmental quality standard than that provided for in a treaty.[275] The modification agreement would avoid the enforceability and informality problems associated with Memoranda of Understanding (MOUs), while still allowing the United States the flexibility to enter into bilateral agreements with the countries that present the greatest burdens for compliance. Modification of the Vienna Consular Convention would require the advice and consent of the Senate before ratification, as is true of all treaties.[276]

Other, less suitable forms could attempt to approximate the same result. The proposal could be contained in an MOU if the United States and another country wanted to evidence "their mutual *understandings* as to how they will conduct themselves."[277] The MOU would achieve less than a modification, as diplomatic assurances are less compelling than a treaty to which the United States is already a party. Moreover, the MOU that already exists between the United States and Mexico on consular protection demonstrates that the MOU cannot re-

272. SCHMITT, *supra* note 267, at 2.

273. U.S. SENTENCING COMM'N, *supra* note 264, at 47 tbl.26 (noting that there were only six murders in 38,619 total offenses by noncitizens).

274. Modification of the Vienna Convention would not conflict with its own terms. Article 36 is also subject to Article 73 of the Vienna Convention, which provides: "(1) [t]he provisions of the present Convention shall not affect other international agreements in force as between States Parties to them. (2) Nothing in the present Convention shall preclude States from concluding international agreements *confirming or supplementing or extending or amplifying* the provisions thereof." ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 225 (2d ed. 2007).

275. *Id.* at 274.

276. U.S. CONST. art. II, § 2.

277. AUST, *supra* note 274, at 20.

solve the compliance problem because the United States regularly contravenes its provision that the United States "allow and . . . facilitate . . . consular officials to be present at all times at the trials or judicial procedures" of Mexican nationals.[278]

Another alternative is an executive agreement. Some suggest that in most instances in which the United States makes an international agreement through the treaty power, the United States should instead utilize an executive-congressional agreement.[279] In some cases, Article I treaties can be interchangeable with executive agreements, whereas in others, treaties are the only option.[280] The traditional view, however, has been that Congress has long held power to regulate treatment of aliens, whether to the aliens' benefit or disadvantage, under what has been called "a power implicit in the sovereignty of the United States."[281] Allowing the President unlimited power to make international agreements through executive agreements without Senate consent would arguably withdraw all meaning from the treaty-making provision of the Constitution.[282] Bilateral modification ensures that both branches of government play a role in making fundamental changes to consular relations.

3. Terms

This Comment proposes sample language[283] for the United States to adopt to improve compliance with the consular notification and access requirement by limiting its application to capital offenses. This modification to Article 36 would require mandatory notification for capital offenses, while preserving an option for notification upon request in all other cases. The revision could read as follows:

> *MODIFICATION of Article 36 of the Vienna Convention on Consular Relations*
>
> *The United States of America and [Country],*

278. *See* QUIGLEY ET AL., *supra* note 46, at 28.
279. Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1241 (2008).
280. *See id.* at 1339, 1343 (arguing that although the United States can use executive-congressional agreements as a substitute for treaties in almost all agreements, treaties may be necessary for certain issues beyond Article I's scope, such as human rights).
281. Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 919 (1959).
282. *Id.* at 928.
283. The sample language is based in part on modification language found in Agreement Concerning Air Services Between Switzerland and Saudi Arabia, Switz.-Saudi Arabia, Jun. 9, 1965, 1026 U.N.T.S. 289.

Desiring to honor their international commitments to the fullest extent possible and to promote friendship and cooperation between the two countries,

Recognizing the importance of reciprocity of obligations,

And seeking to modify the Vienna Convention for the purpose of establishing a workable system of consular access and notification,

Have appointed their plenipotentiaries, duly authorized for this purpose, who have agreed to the following amended Article with additions underlined:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) ~~if he so requests,~~ the competent authorities of the receiving state shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner <u>for a capital offense. For all other offenses, the competent authorities of the receiving state shall, without delay and upon request by a national of the sending State, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any manner.</u> Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.[284]

4. Compliance With Treaty Law

Bilateral modification not only makes the most practical sense in terms of enforceability, but it is also permissible under international law. Article 41 of the Vienna Convention on the Law of Treaties (Vienna Treaty Convention) sets limitations on the circumstances in which parties to a treaty may modify the treaty's terms.[285] The Vienna Consular Convention, like any other multilateral treaty, falls within the Vienna Treaty Convention's ambit.[286] Thus, to develop a viable proposal to reform compliance with the Vienna Consular Convention, it is necessary to determine how to ensure compliance with existing international law norms embodied in the Vienna Treaty Convention.

Article 41 sets forth two situations in which "[t]wo or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone."[287] First, modification is permissible when the treaty provides for "the possibility of such a modification."[288] Second, modification may be permissible if the treaty itself does not prohibit modification, provided the following conditions are met:[289] The modification must "not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations"[290] and must "not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a

284. For the unmodified language of Article 36, see Vienna Convention on Consular Relations, *supra* note 2.

285. The Vienna Treaty Convention draws a distinction between modification (between two or more parties) and amendment (between all parties).

286. The United States is not a party to the Vienna Treaty Convention. While the United States signed the treaty on April 24, 1970, it has not been ratified by the Senate. *Vienna Convention on the Law of Treaties*, U.S. DEP'T STATE, http://www.state.gov/s/l/treaty/faqs/70139.htm (last visited Apr. 10, 2013). It remains significant, however, as an indication of customary international law and a codification of many principles already binding on states. *See* Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 286 (1988).

287. Vienna Convention on the Law of Treaties, *supra* note 263, art. 41, ¶ 1 ("Agreements to modify multilateral treaties between certain of the parties only").

288. *Id.* ¶ 1(a).

289. *Id.* ¶ 1(b).

290. *Id.* ¶ 1(b)(i).

whole."[291] In addition to the substantive requirements for modification, the Vienna Treaty Convention requires the parties to the modification agreement to notify other parties to the treaty of both the "intention to conclude the agreement" and the modification itself.[292]

The first situation Article 41 articulates does not limit a modification of the Vienna Consular Convention. The Vienna Convention itself provides: "1. The provisions of the present Convention shall not affect other international agreements in force as between States parties to them. 2. Nothing in the present Convention shall preclude States from concluding international agreements *confirming or supplementing or extending or amplifying* the provisions thereof."[293] Therefore, modification is permissible by the Vienna Convention's own terms.

Nor does the second situation prohibit the proposed bilateral modification. Limiting the scope of Article 36's application would increase the likelihood that the United States will comply with its obligations to provide consular notification and access to foreign criminal defendants. In the approximately fifteen years since defendants began raising Vienna Convention claims on appeal, the failure of the United States to abide by its treaty obligations has angered international observers and foreign governments. The requirement that the United States act only in capital cases would indeed "affect the enjoyment by the other parties of their rights under the treaty,"[294] but it would do so in a positive way.

5. Partner Countries

The United States should prioritize certain parties to the Vienna Convention as potential partners in developing a bilateral modification agreement. To reduce the number of cases that implicate Article 36, those countries whose citizens are incarcerated and tried for crimes most often should be the first countries with which the United States seeks bilateral modification. The United States could use these early agreements as templates for future bilateral modification agreements with countries with fewer citizens tried for crimes in domestic courts. As bilateral agreements become ubiquitous, the United States may be able to regain control over its international obligations and preserve its reputation for compliance.

291. *Id.* ¶ 1(b)(ii).
292. *Id.* art. 41(2).
293. Vienna Convention on Consular Relations, *supra* note 2, art. 73 (emphasis added). For a discussion of how Article 73 of the Vienna Consular Convention provides for supplementary treaties with certain caveats, see AUST, *supra* note 274, at 224–25.
294. Vienna Convention on the Law of Treaties, *supra* note 263, art. 41, ¶ 1(b)(i).

When choosing early partners for bilateral modification agreements, the United States should identify those countries whose nationals place the greatest burden on its criminal justice system. At the federal level, 29 percent of offenders are noncitizens from Latin American countries.[295] Moreover, the proportion of Latino offenders in the federal system who are noncitizens rose from 61 percent of noncitizens in 1991 to 72 percent in 2007.[296] The proportion of noncitizen Latino offenders far outweighs the noncitizen proportion of white and black offenders.[297] An overwhelming majority—92.1 percent—of immigration offenders were noncitizens and 86.3 percent of immigration offenders were Hispanic.[298] Yet the sentencing data available is only somewhat helpful, as it does not usually indicate country of citizenship.[299] In 2000, the most represented nations and regions in the federal criminal justice system were Mexico, China, Honduras, Caribbean, Dominican Republic, Asia (unspecified), Europe (unspecified), El Salvador, Guatemala, South America (unspecified), and Colombia.[300] Thus, Latin American states provide a clear starting point for reform.

Most of the Vienna Convention case law[301] involves noncitizen criminal defendants from Mexico. As a result, it is not surprising that existing proposals for reform suggest Mexico as the first partner country for an agreement to implement

295. MARK HUGO LOPEZ & MICHAEL T. LIGHT, A RISING SHARE: HISPANICS AND FEDERAL CRIME i (2009), *available at* http://www.pewhispanic.org/files/reports/104.pdf. One problem with the available data on criminal defendants, as this report notes, is that "[i]t is not possible to determine the birth country of sentenced offenders in the USSC's Monitoring of Federal Criminal Sentences data files." *Id.* at ii n.2.

At the time of this writing, Cuba announced it would ease travel restrictions for certain nationals. Although immigrants would still need to comply with U.S. visa policies, one might wonder what effect this policy change will have on the incidence of Cuban national criminal defendants. *See* William Booth, *Cuba to Ease Travel Abroad for Many Citizens*, WASH. POST, Oct. 16, 2012, http://www.washingtonpost.com/world/the_americas/cuba-to-ease-travel-abroad-for-many-citizens/2012/10/16/4f54607a-17a9-11e2-a346-f24efc680b8d_story.html; Jeff Franks, *Cuba Lifting Much-Reviled Travel Restrictions*, REUTERS, Oct. 16, 2012, http://www.reuters.com/article/2012/10/16/uk-cuba-reform-immigration-idUSLNE89F01T20121016.

296. LOPEZ & LIGHT, *supra* note 295, at i ("Among all Latino offenders, some 72% were not U.S. citizens, up from 61% in 1991.").

297. *Id.* at 1. Seventy-two percent of Latino offenders were noncitizens in 2007, whereas only 6 percent of black offenders and 8 percent of white offenders were noncitizens.

298. SCHMITT, *supra* note 267, at 5.

299. *See id.* at 2.

300. JOHN SCALIA & MARIKA F.X. LITRAS, BUREAU OF JUSTICE STATISTICS, NCJ 191745, IMMIGRATION OFFENDERS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 2000, at 2 tbl.2 (2002), http://bjs.ojp.usdoj.gov/content/pub/pdf/iofcjs00.pdf. Older statistics on juvenile offenders also indicate that Mexico and China are among the most represented countries in the federal criminal justice system. *See* JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, NCJ 163066, JUVENILE DELINQUENTS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 3 tbl.4 (1997), http://bjs.ojp.usdoj.gov/content/pub/pdf/Jdfcjs.pdf.

301. *See supra* Part II.

the Vienna Convention. Mexico is also significant because of its strong opposition to the death penalty and, in particular, its opposition to the use of the death penalty against Mexican citizens for crimes committed in the United States.[302] Thus, it makes sense for the United States to begin bilateral modification with an agreement with Mexico, as this would immediately reduce the administrative burden on law enforcement and increase the likelihood that Mexican consuls could successfully contact Mexican citizens in death penalty cases.

6. Awareness

Responsibility for Vienna Convention compliance under existing regulations and statutory schemes rests with law enforcement officers.[303] It would be dubious to assert, however, that most law enforcement officers are aware of the Vienna Convention's mandate, let alone consistently perform the consular notification as required by federal or state law.[304] One interview with an immigration agent illustrates the unawareness problem: "Because [the agent] was not aware of the treaty on . . . the date she made the arrest, 'it wouldn't have mattered' to her that [the defendant] was a Mexican national at that time, [the agent] said."[305]

Requiring consular notification upon every instance of arrest or detention of a foreign national prompts comparisons to the ubiquitous warnings required under *Miranda v. Arizona*.[306] If nothing else, agencies can take a lesson from *Miranda* to train law enforcement officers on Article 36 compliance as they would *Miranda* rights.[307] Courts, however, have been reluctant to consider Vienna Convention violations with the same importance as *Miranda* rights; thus, foreign criminal defendants have been unable to benefit from *Miranda*'s presumption of

302. *See* Michael Fleishman, Note, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases*, 20 ARIZ. J. INT'L & COMP. L. 359, 367 (2003); *supra* Part I.C.

303. *See supra* Part III.C.

304. *But see* Hathaway et al., *supra* note 124, at 105 (citing the State Department's instructions to law enforcement to conclude that "[m]ost local governments then began complying with the requirement that foreign citizens' consulates be notified when their citizens are 'arrested or committed to prison'" (quoting Vienna Convention on Consular Relations, *supra* note 2, art. 36(1)(b))).

305. Wayne Wilson, *Agent Says She Didn't Know of Treaty*, SACRAMENTO BEE, Oct. 20, 2000, at B8.

306. Indeed, after the initial state appeal upholding his death sentence but before formally raising the Vienna Convention claim in court, Humberto Leal Garcia's lawyer presented the Vienna Convention notification provision as "kind of like an additional *Miranda* warning." *Condemned Man Claims Rights Violation*, N.Y. TIMES, Oct. 27, 1998, http://www.nytimes.com/1998/10/27/us/condemned-man-claims-rights-violation.html (internal quotation marks omitted).

307. *See* Cara S. O'Driscoll, Comment, *The Execution of Foreign Nationals in Arizona: Violations of the Vienna Convention on Consular Relations*, 32 ARIZ. ST. L.J. 323, 327 (2000).

prejudice.[308] The Vienna Convention is also not nearly as ubiquitous as *Miranda* in either the public consciousness or the government sphere. Moreover, the training a *Miranda*-like advisement would require is an obstacle.[309] The practical difficulty of training law enforcement officers on the Vienna Convention on a grand enough scale to compel the same rote compliance that is now true of *Miranda*, however, may also provide a reason to shift the inquiry to the initial hearing stage.[310]

Today, the onus is on law enforcement officers responsible for the foreign criminal defendant to perform the task of informing the defendant of his or her rights to consular notification and notifying the consulate of a foreign criminal defendant.[311] Law enforcement organizations, however, are reluctant to support proposals that they perceive as burdensome.[312] Some state officials have even denied the government has any responsibility under the Vienna Convention, claiming, among other things, that the Vienna Convention does not confer individual rights, prosecutors already notify consulates, consulates offer questionable protection, and the standard procedures that protect citizens, such as *Miranda* warnings, already protect foreign nationals.[313]

The United States should not vest responsibility solely with law enforcement officers, who are sometimes unwilling or unlikely to perform their notification obligations. Bilateral modification could create a second responsible party in defense counsel. Indeed, defense counsel's failure to raise an Article 36 violation as an issue at trial or on appeal has been raised in court and argued academically as a claim for ineffective assistance of counsel.[314] In the Los Angeles area, for example, deputy public defenders have cited "alleged treaty violations" when moving for suppression.[315] It seems possible, therefore, to put the obligation to inform a for-

308. United States v. Esparza-Ponce, 7 F. Supp. 2d 1084, 1097 (S.D. Cal. 1998) ("[A] violation of the Convention does not rise to the level of a *Miranda* violation. Applying the presumption of prejudice mandated by *Miranda* is therefore inappropriate."). *Miranda*, which held that a defendant's statements cannot be used against the defendant unless authorities warn the defendant of the right against self-incrimination, demonstrates that criminal defendants have much greater protection under the Fifth Amendment than the Vienna Convention. *See* Miranda v. Arizona, 384 U.S. 436, 478–79 (1966).

309. *See* Chad Thornberry, Comment, *Federalism vs. Foreign Affairs: How the United States Can Administer Article 36 of the Vienna Convention on Consular Relations Within the States*, 31 MCGEORGE L. REV. 107, 142 (1999).

310. *Id.*

311. *See* U.S. DEP'T OF STATE, *supra* note 247, at 4.

312. *See* Part III.C and accompanying notes 244–262.

313. *See* Editorial, *Foreigners' Rights and Our Own*, CHI. TRIB., Jan. 28, 2003, http://articles.chicagotribune.com/2003-01-28/news/0301280301_1_vienna-convention-mexican-citizens-consulate (arguing for better Vienna Convention compliance in Cook County, Illinois).

314. *See* Daniel J. Lehman, Note, The Federal Republic of Germany v. The United States of America*: The Individual Right to Consular Access*, 20 LAW & INEQ. 313, 332 (2002).

315. Pugmire, *supra* note 84.

eign criminal defendant of his or her right to consular notification with defense counsel. Defense counsel are more likely to have a close relationship with the defendant, can more easily ascertain whether the defendant is a foreign national, and can initiate consular contact more meaningfully than law enforcement because of the attorney-client relationship.

Another alternative is to place the information requirement with judges. While Article 36 does not require judicial officials to perform the consular notification because they are not "competent authorities," the State Department has encouraged judicial officials to make a separate inquiry into whether a foreign criminal defendant has been informed of his or her Vienna Convention rights.[316] Chad Thornberry has proposed a requirement that state and federal courts ascertain a foreign criminal defendant's noncitizen status and determine whether a Vienna Convention violation occurred at the initial hearing stage.[317] Indeed, if one purpose of an arraignment is to inform the defendant of his or her rights,[318] the court could simply advise a foreign criminal defendant that he or she, as a noncitizen, has the right to consular notification under the Vienna Convention.

It is not clear, however, whether this modification can avoid the problem of noncitizen status unknown to the noncitizen. Foreign criminal defendants may have resided in the receiving state for so long that they are unaware of their foreign national status.[319] Arguably, though, noncitizens for whom this unawareness would be a problem are not as vulnerable as noncitizens who lack familiarity with the American legal system.

Timing of consular notification further complicates the potential success of bilateral modification. The Vienna Convention's requirement that the receiving state comply with Article 36 "without delay"[320] essentially places the burden on law enforcement officers under whose control the foreign criminal defendants remain. One court has noted, however, "[t]here is no prohibition anywhere in the [Vienna] Convention against continuing to question a foreign national while awaiting consular contact."[321] Realistically, then, the protection afforded by the right to consular notification and access depends in large part on the speed of

316. U.S. DEP'T OF STATE, *supra* note 247, at 18–19.

317. *See* Thornberry, *supra* note 309, at 142–43. Thornberry also argues that the initial hearing requirement would be both constitutionally and politically feasible because the power of the federal government to impose an obligation on state courts has long been recognized. *Id.*

318. *See, e.g.*, Deutscher v. State, 601 P.2d 407 (Nev. 1979).

319. *See* QUIGLEY ET AL., *supra* note 46, at 39–40. The Supreme Court in Medellin, for instance, noted that the defendant had resided in the United States since early childhood. *Medellín I*, 552 U.S. 491, 500 (2008).

320. Vienna Convention on Consular Relations, *supra* note 2, art. 36(1)(b).

321. United States v. Rodrigues, 68 F. Supp. 2d 178, 184 (E.D.N.Y. 1999).

action by both law enforcement officers and the foreign national's consulate. Today the timing of notification varies from immediate notification upon arrest or detention, to no later than 48 hours (as in *Avena*), to three working days (as in *Medellín*).[322] Speedy action by U.S. law enforcement officials, who will be responsible for substantially fewer foreign criminal defendants under the Vienna Convention after the United States begins to enter into bilateral modification agreements, will support the perception that the United States takes its obligations seriously.

E. U.S. Incentives for Bilateral Modification

In September 2011, Iran released Josh Fattal and Shane Bauer, the remaining two of a group of three American hikers detained on charges of spying, to the United States. The fanfare over their release, however, overshadowed the important role that the Vienna Convention played in enabling the United States to secure the release of its citizens. In 2009, a Congressional resolution claimed Iran had granted the United States, by way of the Swiss government, consular access to the three hikers.[323] Although the hikers were detained in July 2009, Iran granted the Swiss government permission to contact the hikers only twice—for the first time in September, then again in October.[324] Iran's failure to comply by denying the United States continued access to its citizens understandably led to criticism in the media, including the editorial page of the *New York Times*: "Iranian officials should comply with the Vienna Convention on Consular Relations and allow regular access to the three Americans."[325] Fattal and Bauer's saga demonstrates American officials will not hesitate to invoke the Vienna Convention when American citizens' rights are at stake abroad.

The United States' expectations of reciprocity under the Vienna Convention should motivate its compliance in cases such as those discussed in this Comment.[326] The United States is more willing to observe certain standards through treaties when it seeks to have those standards recognized for American citizens in other

322. *See* QUIGLEY ET AL., *supra* note 46, at 47–49.

323. S. Con. Res. 45, 111th Cong. (2009) ("Whereas officials of the Government of Iran have allowed consular access by the Embassy of the Government of Switzerland (in its formal capacity as the representative of the interests of the United States in Iran) to the 3 young United States citizens in accordance with the Vienna Convention on Consular Relations . . . ."). Switzerland represents the United States' interests in Iran.

324. *See* Editorial, *264 Days and Counting*, N.Y. TIMES, Apr. 21, 2010, http://www.nytimes.com/2010/04/22/opinion/22thu2.html.

325. *Id.*

326. *See, e.g.*, Gutierrez v. State, No. 53506, 2012 WL 4355518, at *1 (Nev. Sept. 19, 2012); Aceves, *supra* note 236, at 313–14.

countries, as in so-called "friendship treaties."[327] Indeed, a concern for reciprocity is present even in the State Department's instructions to law enforcement:

> These are mutual obligations that also pertain to American citizens abroad. In general, you should treat a foreign national as you would want an American citizen to be treated in a similar situation in a foreign country. This means prompt, courteous notification to the foreign national of the possibility of consular assistance, and prompt, courteous notification to the foreign national's nearest consular officials so that they can provide whatever consular services they deem appropriate.[328]

The United States can ensure it does not dismiss its Vienna Convention obligations by entering into bilateral modification agreements that narrow the scope of its obligations to a manageable set of important cases. By honoring its obligations, the United States will encourage other countries to accommodate its requests for consular access to American citizens detained abroad.

CONCLUSION

Nearly fifty years since the Vienna Conference, the United States is unable to execute the consular notification and access requirement of the Vienna Convention in its current form. The language of Article 36 reflects the geopolitical conditions in 1963—a time during which the pace of immigration was at a relative lull and Cold War spy games, not state-level capital offenses, were top priority. Not long after the Vienna Convention's drafting, changes in U.S. immigration policy drastically increased the number of noncitizens and, in turn, foreign criminal defendants. Because Article 36 applies to each foreign criminal defendant in the United States, no matter the severity of the crime, authorities cannot feasibly enforce its provisions.

U.S. jurisprudence ignores this problem. Courts have denied relief to foreign criminal defendants in cases in which law enforcement officials failed to inform defendants of their right to consular notification and access. Sometimes denials of relief resulted from the defendant's own case, whether from procedural default or failure to demonstrate prejudice. In other instances, denials of relief resulted from the treaty itself, whether its failure to confer individually enforceable rights, U.S. withdrawal from international jurisdiction, or the lack of implementing legislation. In response, the international community has condemned U.S. noncompli-

327. Henkin, *supra* note 281, at 910.
328. U.S. DEP'T OF STATE, *supra* note 247, at 3.

ance in high-profile death penalty cases. Foreign criminal defendants, undeterred, continue to raise Vienna Convention claims on appeal.

The bilateral modification proposed in this Comment would allow the United States to provide meaningful consular notification and access under the Vienna Convention. Of immediate concern to states parties to the Vienna Convention are capital cases in which the foreign criminal defendant had no opportunity to contact his or her consulate. The United States must preserve its reputation for observing its international obligations if it intends to invoke the Vienna Convention when its own citizens are detained abroad. Limiting the consular notification and access requirement to capital offenses—the smallest, yet most controversial set of cases in Vienna Convention jurisprudence—would create a manageable obligation for the United States to benefit both U.S. citizens and foreign criminal defendants.