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MEDELLÍN V. DRETKE: ANOTHER CHAPTER IN THE VIENNA CONVENTION NARRATIVE

Janet Koven Levit*

I. INTRODUCTION

International law is not made of discrete events, like a treaty-signing ceremony, the passage of legislation, or a diplomatic summit. Instead, international law is an iterative lawmaking process engaging numerous “transnational” actors as lawmakers. Indeed, as an international scholar, I feel like a storyteller, developing colorful characters and recounting undulating plots with surprising twists and turns.¹ One such story involves consular notification rights—the rights of detained foreign nationals who have become wards of a foreign country’s criminal justice system to communicate with their home country upon detention to request, among other things, legal assistance. The Vienna Convention on Consular Relations (“Vienna Convention”)² enshrines these rights, and an Optional Protocol to the Vienna Convention (“Optional Protocol”)³ anoints the International Court of Justice (“ICJ”) as a protector of such rights.

In the United States, with common crimes a creature of state law, and with local or state law enforcement officials typically responsible for arrest and detention, the state (not federal) criminal justice system is the principal gatekeeper of foreign nationals’ Vienna Convention rights. We thus confront a quintessential question of international

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1. See Janet Koven Levit, *A Bottom-up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 Yale J. Intl. L. 125 (2005); Janet Koven Levit, *The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits*, 45 Harv. Intl. L.J. 65 (2004).

2. *Vienna Convention on Consular Relations* (Apr. 24, 1963), 21 U.S.T. 77 [hereinafter *Vienna Convention*].

3. *Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes* (Apr. 24, 1963), 596 U.N.T.S. 487 [hereinafter *Optional Protocol*]; see generally Janet Koven Levit, *A Tale of International Law in the Heartland: Torres and the Role of State Courts in Transnational Legal Conversation*, 12 Tulsa J. Comp. & Intl. L. 163, 166 n. 21 (2004).

law's effect within a federal system: To what extent are individual states bound to enforce, often in the face of procedural hurdles, an international treaty entered into and ratified by the federal government? This was essentially the question that the United States Supreme Court decided to review in *Medellin v. Dretke*.⁴ Its resolution not only promised clarification of the Vienna Convention's practical effect within the United States but also illumination of an international treaty's on-the-ground impact when issues of state law are at stake. Thus, *Medellin* became one of this Term's most-anticipated cases.

I hoped in accepting this invitation to write about *Medellin v. Dretke* that we would now be discussing the climax of this consular notification rights story. Yet, this hope turned elusive. The Court dismissed the case for improvidently granting certiorari;⁵ thus, the Court in *Medellin* writes a very minor chapter in the saga. Yet, the Vienna Convention narrative is far from over; it continues to evolve with a center of activity that has shifted, at least for the time being, from the U.S. Supreme Court to the executive branch, as well as lower federal courts, state courts, and even local police departments. Whether the Court reasserts itself is an open question for subsequent Terms and subsequent symposia. What is patently clear, however, is that transnational actors, other than the Court, will continue to play a leading and constitutive role in the consular notification rights story.

II. CONSULAR NOTIFICATION RIGHTS

A. *International Court of Justice*

Article 36 of the Vienna Convention provides that detaining officials must inform a foreign national "without delay"⁶ of his right to request that his consulate be informed of the detention,⁷ and foreign consulates must be free to communicate with, visit, and/or arrange legal representation for foreign nationals.⁸ State parties to the Convention are obligated to give "full effect"⁹ to the aforementioned rights. Significantly for José Medellín, the Optional Protocol, which the United States not only ratified but also drafted (and championed),¹⁰ anoints the ICJ as the venue to consider all "[d]isputes arising out of the interpretation or application" of the Convention.¹¹

4. 125 S. Ct. 2088 (2005) (per curiam).

5. *Id.* at 2092.

6. *Vienna Convention*, *supra* n. 2, at art. 36(1)(b).

7. *Id.*

8. *Id.* at arts. 36(1)(a), 36(1)(c).

9. *Vienna Convention*, *supra* n. 2, at art. 36(2).

10. *Optional Protocol*, *supra* n. 3. The United States Senate ratified the Vienna Convention and Optional Protocol on October 12, 1969, and President Nixon proclaimed the treaty's entry into force on January 29, 1970. 115 Cong. Rec. 30997 (1969); *see also Report of the United States Delegation to the Vienna Conference on Consular Relations*, in Sen. Exec. E., 91st Cong., 1st Sess. (May 8, 1969). Interestingly, the United States was the first country to bring a case to the ICJ under the Optional Protocol. *See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 5, 24–26. For the current status of the Optional Protocol in the United States, *see infra* n. 108 and accompanying text.

11. *Optional Protocol*, *supra* n. 3, at art. I.

The concern behind Article 36 of the Vienna Convention is that a foreign national is a stranger to the detaining country's criminal justice system. A consular official may be able to guide the accused through language, cultural, legal, and procedural hurdles; to use diplomatic cachet to negotiate a settlement on behalf of the detainee (or even an extradition to the home country); and to arrange more competent legal representation than the detaining country often provides. Vienna Convention rights are reciprocal, offering precious comfort to United States citizens when traveling abroad, often to countries with criminal justice systems that offer less procedural protections than our own.¹²

In practice in the United States, detaining officials are typically members of state and local law enforcement agencies, and these officials often do not inform foreign national detainees of their Vienna Convention rights. By the time a foreign national raises the Vienna Convention transgression, the criminal prosecution often has progressed to a point where state procedural bar rules impede a court's ability to entertain Vienna Convention-related claims. Thus, in the United States, courts often do not have the opportunity to contemplate Vienna Convention violations and any concomitant prejudice to the foreign national.

Foreign states have become particularly angered when their foreign nationals receive death sentences without being informed of their Vienna Convention rights in a timely fashion, thereby spurring a flurry of Vienna Convention-related litigation in the ICJ pursuant to the Optional Protocol. In the first case, the State of Virginia executed a Paraguayan foreign national, Angel Francisco Breard, a few days after Paraguay filed a petition with the ICJ arguing that, in allowing Virginia to execute Mr. Breard without affording Vienna Convention protections, the United States had violated its obligations under the Vienna Convention.¹³ In response to a habeas petition in United States federal court following the ICJ petition, the U.S. Supreme Court held, per curiam, that while the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest,"¹⁴ the ICJ's *provisional order* requesting a stay would not trump either state or federal procedural default rules.¹⁵

12. See *A Travel Advisory*, 154 N.Y. Times A20 (Mar. 14, 2005).

13. *Breard v. Commonwealth*, 445 S.E.2d 670 (Va. 1994). In 1993, the State of Virginia convicted Mr. Breard, a Paraguayan national, of attempted rape and capital murder and soon thereafter sentenced him to death. *Id.* at 673. Paraguay argued in its April 3, 1998 ICJ petition that the United States violated the Vienna Convention on account of the Virginia authorities' failure to notify Breard of his right to contact the Paraguayan consulate; consequently, Virginia should, among other things, stay the scheduled April 14, 1998 execution pending an ICJ decision on the merits of Paraguay's case. *Request for the Indication of Provisional Measures, Order (Para. v. U.S.)*, 1998 I.C.J. 248. Breard had been procedurally barred from raising the Vienna Convention issues in his habeas proceedings. *Id.* at 249; see also *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998). On April 9, 1998, just five days before the scheduled execution, the ICJ issued a provisional order, asking the United States to stay the execution pending an ICJ decision on the substantive Vienna Convention claims. *Request for the Indication of Provisional Measures, Order, supra*.

14. *Breard v. Greene*, 523 U.S. 371, 376 (1998).

15. See *id.* The Court also concluded that even if Virginia's procedural default rules had permitted the Vienna Convention claim to proceed, Breard was not prejudiced by the Vienna Convention breach and thus would not have been granted relief. *Id.* at 377. Virginia executed Breard on April 14, 1998, and Paraguay thereafter requested that the case be removed from the ICJ's docket. *Case Concerning the Vienna Convention on Consular Relations, Order (Para. v. U.S.)*, 1998 I.C.J. 426 (Discontinuance Order of Nov. 10, 1998).

In the second case, filed in March 1999, Germany instituted ICJ proceedings against the United States on behalf of Walter and Karl LaGrand, who had not been afforded Vienna Convention protections until ten years following their arrest, long after their direct appeals and petitions for post-conviction relief had run their course in the Arizona state courts.¹⁶ While Arizona executed the LaGrands in spite of this petition and a concomitant ICJ order requesting a stay, Germany nonetheless pursued the ICJ case on the merits.¹⁷ The ICJ ultimately concluded that Arizona's procedural default rules violated the Vienna Convention because their application precluded defendants from challenging their sentences even though the state officers had not informed them of their consular protections.¹⁸

On January 9, 2003, Mexico initiated the most recent Vienna Convention case, known as *Avena*,¹⁹ against the United States on behalf of approximately fifty Mexican nationals on death row in various U.S. states.²⁰ The ICJ, relying heavily on its decision in *LaGrand*, concluded that the United States, in its arrest, detention, trial, and sentencing of the Mexican nationals, had violated its obligations under the Vienna Convention, most egregiously in its failure to notify these foreign nationals of their right to contact the Mexican consulate.²¹

16. *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. 466, 475–76. The LaGrands were German nationals convicted in Arizona of first degree murder, attempted armed robbery, and kidnapping. *Id.* at 475. When the LaGrands raised their Vienna Convention rights in their habeas corpus proceedings, the federal courts concluded that the LaGrands were procedurally barred from doing so. *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998), *cert. denied*, 525 U.S. 971 (1998). Karl LaGrand was executed on February 24, 1999, prompting Germany to file its ICJ petition on March 2, 1999. *Request for the Indication of Provisional Measures, Order (Ger. v. U.S.)*, 1999 I.C.J. 9, 12. Nonetheless, Walter LaGrand was executed on March 3, 1999 despite the ICJ issuing a provisional order asking the United States to “take all measures at its disposal to ensure that Walter LaGrand is not executed,” *id.* at 16 (internal quotation marks omitted), pending a final ICJ decision, despite efforts on the part of German and United States diplomats to intervene, *LaGrand Case*, 2001 I.C.J. at 478, and despite the Arizona Parole Board’s recommendation that the execution be stayed for sixty days in light of the ICJ case, *id.* at 479.

17. *LaGrand Case*, 2001 I.C.J. at 480.

18. *Id.* at 492, 497–98. Because the ICJ decision followed the LaGrand executions, the U.S. Supreme Court had no direct opportunity to rebuke or accept this holding in a habeas petition or a petition to stay an execution.

19. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12.

20. *Id.* The original claim related to fifty-four Mexican nationals, but as a result of Mexico making subsequent adjustments to its claim, the ICJ’s decision only dealt with the cases of fifty-two Mexican nationals, with criminal proceedings taking place in the following states between 1979 and the present: California (twenty-eight cases), Texas (fifteen cases), Illinois (three cases), Arizona (one case), Arkansas (one case), Nevada (one case), Ohio (one case), Oklahoma (one case), and Oregon (one case). *Id.* at 24. For an excellent summary of the *Avena* decision, see Dinah L. Shelton, *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 98 Am. J. Intl. L. 559 (2004).

21. The Court noted the rights in Article 36(1) of the Vienna Convention are intertwined—when a receiving state does not notify detainees of their Vienna Convention rights, it is hard to imagine how these detainees would then request that the consulate be informed, *Vienna Convention, supra* n. 2, at art. 36(1)(b), and how the consulate would then communicate with nationals, *id.* at art. 36(1)(a), or visit nationals and arrange for representation, *id.* art. 36(1)(c). The Court actually examined facts specific to each of the fifty-two cases and determined that in one case the United States had not breached its obligations under Article 36(1)(b) to inform the detainee of his Vienna Convention rights (case no. 22—Mr. Salcido), and that in three cases the United States had not breached its obligations under 36(1)(b) to notify the consulate of the detention if the detainee so requests (case no. 10—Mr. Juárez; case no. 22—Mr. Salcido; case no. 34—Mr. Hernández). *Case Concerning Avena and Other Mexican Nationals*, 2004 I.C.J. at 42–43, 46. The ICJ also concluded that the United States had violated Article 36(1)(a) in denying Mexican consular officials meaningful opportunity “to communicate with and have access to their nationals,” *id.* at 54, as well as its obligation in Article 36(1)(c) regarding the right

What, according to the ICJ, was the appropriate remedy for such violations? While Mexico argued that the conviction and sentences in all of the cases should be annulled,²² the ICJ determined, as it had in *LaGrand*, that the United States need only afford “review and reconsideration” to determine the extent to which each particular defendant had been prejudiced by the respective Vienna Convention violations.²³ The ICJ further concluded that procedural default rules, virtually the same rules that were under scrutiny in *LaGrand*, violate the Vienna Convention to the extent that they preclude such review and reconsideration.²⁴ The clemency process, according to the ICJ, was an inadequate review and reconsideration remedy.²⁵

B. *The Medellín Case*

1. Lower Courts

Mr. Medellín is one of the Mexican nationals named in *Avena*. Although Medellín informed the Texas officials that he was born in Laredo, Mexico at the time of his arrest,²⁶ these officials did not inform him of his Vienna Convention-based right to contact the Mexican consul.²⁷ In 1994, a Texas state court convicted Medellín of two counts of rape and murder and sentenced him to death. At trial, a court-appointed attorney represented Medellín and did not object to the Vienna Convention violation.²⁸ The Texas Court of Criminal Appeals upheld the conviction and sentence on March 16, 1997,²⁹ over a year before Paraguay filed the *Breard* case in the ICJ.

Medellín did not raise Vienna Convention issues until he filed his state habeas petition, at which point he argued that his sentence and conviction should be vacated on

of consular officers to visit their detained nationals and arrange for legal representation (although the ICJ only found violations of the right to arrange for legal representation in thirty-four of the fifty-four cases); *id.*

22. *Case Concerning Avena and Other Mexican Nationals*, 2004 I.C.J. at 23.

23. *Id.* at 65. (“[W]hat is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.”).

24. *Id.* Specifically, the ICJ stated that procedural default rules “may continue to prevent courts from attaching legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36, paragraph 1, prevented Mexico, in a timely fashion, from retaining private counsel for certain nationals and otherwise assisting in their defence.” *Id.* at 57. To the extent that procedural default rules preclude review and reconsideration when a receiving state, in this case the United States, denies detainees Vienna Convention protections, such procedural default rules violate Article 36(2) of the Vienna Convention, which requires that states, through local law, give “full effect” to the “purposes for which the rights accorded under [Article 36] are intended.” *Vienna Convention*, *supra* n. 2, at art. 36(2).

25. *Case Concerning Avena and Other Mexican Nationals*, 2004 I.C.J. at 65.

26. Jt. App., 2005 WL 189680 at *14, *Medellin*, 125 S. Ct. 2088.

27. Justice O’Connor points out in her dissent, “Medellín was arrested, detained, tried, convicted, and sentenced to death without ever being informed that he could contact the Mexican consul.” *Medellin*, 125 S. Ct. at 2097 (O’Connor, J., dissenting). The Mexican consulate discovered Medellín only because he wrote a letter from death row six weeks after his conviction was affirmed in the state court system. *Id.*

28. During the course of preparation for trial, lead counsel was suspended from the practice of law for ethics violations in another case. Br. for Petr., 2005 WL 176452 at *6 n. 5, *Medellin*, 125 S. Ct. 2088. During the guilt phase of the trial, Medellín’s counsel called no witnesses; during the penalty phase, counsel called a psychologist (who had never met Medellín) and Medellín’s parents. *Id.*

29. *Id.* at *6.

account of Texas state officials violating his Vienna Convention rights.³⁰ The state trial court, and later the Texas Court of Criminal Appeals, denied relief, concluding that Texas's contemporaneous-objection rule barred Medellín's Vienna Convention claim and further concluding that the Vienna Convention did not grant individuals the right to raise Vienna Convention claims to attack their sentences.³¹

Medellín filed a federal habeas petition in November 2001 (amended in 2002), again raising Texas's failure to inform him of his right to contact the Mexican consulate as grounds for relief.³² On June 26, 2003, the District Court for the Southern District of Texas rejected Medellín's Vienna Convention-based arguments;³³ it also, *sua sponte*, denied Medellín a Certificate of Appealability ("COA"), a prerequisite to pursuing further federal appeals under the Antiterrorism and Effective Death Penalty Act ("AEDPA").³⁴

In October 2003, Medellín appealed the district court's denial of a COA on several grounds, including the Vienna Convention claim.³⁵ The Fifth Circuit denied Medellín relief, concluding that Medellín was procedurally barred from raising the Vienna Convention claim, in spite of the *Avena* decision in the interim, reasoning that the Supreme Court's decision in *Breard* is binding precedent "until taught otherwise by the Supreme Court."³⁶ In the alternative, the Fifth Circuit concluded that it was bound by its own precedent which holds that Article 36 of the Vienna Convention does not create individual, judicially enforceable, rights.³⁷ Thus, the Fifth Circuit's decision precludes Medellín from the review and reconsideration that *Avena* requires.

2. U.S. Supreme Court

As Court watchers anticipated, on December 10, 2004 the Supreme Court granted Medellín's petition for a writ of certiorari to address the following questions: (1) Is "a federal court bound by the International Court of Justice's (ICJ) ruling that United States courts must reconsider petitioner José Medellín's claim for relief under the Vienna Convention on Consular Relations, without regard to procedural default doctrines"?³⁸

30. See *id.* at *7; *Application for Writ of Habeas Corpus* at 25–31, 45, *Medellín v. State*, No. 675430-A (Tex. 339th Dist. Ct. Mar. 26, 1998).

31. Br. for Petr., *supra* n. 28, at *7; see *Medellín*, 125 S. Ct. at 2097 (citing the Texas district court's conclusions of law that Medellín was "procedurally barred" from raising the Vienna Convention claims and, in the alternative, that Medellín "[lacked] standing to enforce" the Vienna Convention).

32. Medellín argued that that *LaGrand*, decided a few months prior to filing his habeas petition, "controls the interpretation of the Vienna Convention," Br. for Petr., *supra* n. 28, at *8 (internal quotation marks omitted), and that the federal courts are bound by its conclusions: (1) that individuals may bring challenges under the Vienna Convention; and (2) that procedural bar rules may not preclude such challenges. *Id.* at **7–8.

33. *Medellín v. Dretke*, 371 F.3d 270, 274 (5th Cir. 2004); Br. for Petr., *supra* n. 28, at *8.

34. *Medellín*, 371 F.3d at 274 (citing 28 U.S.C.A. § 2254 (2000)).

35. Br. for Petr., *supra* n. 28, at *13.

36. *Medellín*, 371 F.3d at 280 (interpreting *Breard* as holding that "ordinary procedural default rules can bar Vienna Convention claims"). For a discussion of the holding in the *Breard* case, see *supra* nn. 13–15 and accompanying text. Of course, the *Breard* case is the Supreme Court's response to a provisional request for a stay of execution and not a response to a final ICJ decision, as in the case of *Avena*. See also *infra* nn. 129–130 and accompanying text.

37. *Medellín*, 371 F.3d at 280 (citing *U.S. v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir. 2001) as binding precedent).

38. *Medellín*, 125 S. Ct. at 2089 (citation omitted) (*per curiam*).

and (2) Should a federal court “give effect, as a matter of judicial comity and uniform treaty interpretation, to the ICJ’s judgment”?³⁹

Yet, Medellín did follow the rhythm of most Supreme Court cases—brief writing, oral argument, decision. Surprisingly, on February 28, 2005, President Bush ordered state courts to “give effect to”⁴⁰ the *Avena* decision “in accordance with general principles of comity.”⁴¹ Given the Bush administration’s somewhat dismissive stance toward international law and international institutions in the prelude to the Iraq war and in some “war on terror” policies, this executive decision stunned international law advocates and Court watchers.⁴² At the same time, Texas state officials claimed they were not bound by the President’s memorandum.⁴³ Nonetheless, on the basis of this memorandum, Mr. Medellín filed a fresh habeas petition in the Texas Court of Criminal Appeals.⁴⁴

39. *Id.*

40. Memo. from George W. Bush, Pres., U.S., to Atty. Gen., U.S., *Compliance with the Decision of the International Court of Justice in Avena* (Feb. 28, 2005) (available at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>).

41. *Id.* The memorandum states:

The United States is a party to the Vienna Convention on Consular Relations (the “Convention”) and the Convention’s Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the “interpretation and application” of the Convention.

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its inter-national obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena)*, 2004 ICJ 128 (Mar. 31), 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.

Id.

This memorandum surfaced as an attachment to the United States amicus brief in the *Medellin* case. Br. Amicus Curiae for U.S. Supporting Respt., 2005 WL 504490, *Medellin*, 125 S. Ct. 2088. The brief stated, “[T]he President has determined that the foreign policy interests of the United States in meeting its international obligations and protecting Americans abroad require the ICJ’s decision to be enforced without regard to the merits of the ICJ’s interpretation of the Vienna Convention.” *Id.* at *48. It further stated, *id.* at *42:

[I]n light of the decision of the ICJ in *Avena*, the 51 named individuals may file a petition in state court seeking such review and reconsideration, and the state courts are to recognize the *Avena* decision. In other words, when such an individual applies for relief to a state court with jurisdiction over his case, the *Avena* decision should be given effect by the state court in accordance with the President’s determination that the decision should be enforced under general principles of comity. . . . The authority of the President to determine the means by which the United States will implement its international legal obligations is especially important in the context of a treaty, like the Vienna Convention, that not only protects foreign nationals in this country, but also protects Americans overseas.

42. The New York Times reported that “Before the administration’s strategy came into focus, international law professors greeted the memorandum with amazement. ‘This is a president who has been openly hostile to international law and international institutions knuckling under, and knuckling under where there are significant federalism concerns,’ Professor Spiro said.” Adam Liptak, *U.S. Says It Has Withdrawn from World Judicial Body*, 154 N.Y. Times A16 (Mar. 10, 2005). “Sandra Babcock, a Minnesota lawyer who represents the government of Mexico, said she had no doubt that the [P]resident was authorized to instruct state courts to reopen Mr. Medellín’s case and 50 others. ‘The law is on our side,’ Ms. Babcock said. ‘The [P]resident is on our side. I keep having to slap myself.’” *Id.*

43. Linda Greenhouse, *Justices Drop Capital Case Ruled on by World Court*, 154 N.Y. Times A17 (May 24, 2005).

44. *Medellin*, 125 S. Ct. at 2089–90.

Against this backdrop, the Court chose not to decide Medellín's case at this juncture; on May 23, 2005, the Court issued a per curiam decision to dismiss the writ as improvidently granted.⁴⁵ The Court initially reasons that "new developments," presumably the President's memorandum and the pending Texas state court habeas petition on the basis of *Avena* and the memorandum, "may provide Medellín with the review and reconsideration of his Vienna Convention claim that the ICJ required."⁴⁶ In other words, because the issues in the case may become moot, the Court determines that there is no reason to decide the larger questions bearing on the relationship between the United States legal system and the international legal system.

Given the Court's ultimate disposition, the Court's analysis could have easily stopped at this point. Yet, it did not. The decision quickly turns to discuss the case's procedural posture and, concomitantly, the intricacies of federal habeas law.⁴⁷ The Court ultimately reiterates that it would be "unwise to reach and resolve the multiple hindrances to dispositive answers to the questions here presented"⁴⁸ in light of "the possibility that the Texas courts will provide Medellín with the review he seeks pursuant to the *Avena* judgment."⁴⁹ Thus, the Court's opinion flows as if the Court would have to contend with several habeas-related procedural "hindrances" prior to answering the underlying international law questions.

45. Joining in this decision were Chief Justice Rehnquist, and Justices Scalia, Kennedy, Ginsburg, and Thomas.

46. *Medellin*, 125 S. Ct. at 2089–90.

47. First, the Court notes that as a precursor to federal habeas relief on the Vienna Convention claim, Medellín must satisfy the "fundamental defect" test. *Id.* (citing *Reed v. Farley*, 512 U.S. 339 (1994); *Hill v. U.S.*, 368 U.S. 424 (1962)) (internal quotation marks omitted). A fundamental defect "inherently results in a complete miscarriage of justice," *Hill*, 368 U.S. at 428, or is "an omission inconsistent with the rudimentary demands of fair procedure," *id.*

Second, when a state court has adjudicated a claim "'on the merits,' habeas relief in federal court is available only if such adjudication 'was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.'" *Medellin*, 125 S. Ct. at 2091 (citing 28 U.S.C. § 2254(d) (2000)). Although the Texas state courts considered Medellín's Vienna Convention claims prior to the *Avena* decision, these courts "arguably 'adjudicated on the merits,'" *id.*, three Vienna Convention-related claims, concluding that: (1) the Vienna Convention creates no "individual, judicially enforceable rights," *id.*; (2) state procedural bar rules preclude raising the Vienna Convention claims; and (3) Medellín was not prejudiced by any alleged transgression of the Vienna Convention, *id.* Thus, concludes the Court, Medellín would have to establish that the state's legal conclusions were contrary to established federal law before obtaining any federal habeas relief. *Id.*

Third, the Court raises the possibility that the ICJ decision could be viewed as a new procedural rule which, according to *Teague v. Lane*, 489 U.S. 288 (1989), would not be applicable retroactively to Medellín because he had already exhausted his direct appeals. *Medellin*, 125 S. Ct. at 2091.

Fourth, a COA is a prerequisite to proceeding in the Fifth Circuit. Medellín must offer a "substantial showing of the denial of a constitutional right," *id.* (citing 28 U.S.C. § 2253(c) (2000)) (internal quotation marks omitted, emphasis in original), in order to obtain a COA, and thus must show that a Vienna Convention violation would transgress a constitutional right, *id.* (citing *Slack v. McDaniel*, 529 U.S. 473 (2000)).

Finally, the Court suggests Medellín may have to exhaust state court remedies (or show that he has exhausted state-based remedies) prior to seeking federal habeas relief on the basis of the President's February 28 memorandum. *Id.* at 2092 (citing 28 U.S.C. § 2254).

While the Court does not decide whether Medellín had satisfied all of the requisite procedural standards, it nonetheless creates a daunting list of "several threshold [AEDPA] issues that could independently preclude federal habeas relief for Medellín." *Id.* at 2090. As such, the decision becomes cumbersome mired in federal habeas procedures and COA standards. Thus the opinion bears little resemblance to the international law questions at the heart of the certiorari petition.

48. *Medellin*, 125 S. Ct. at 2090.

49. *Id.* at 2092.

The Court's decision roused significant debate and discussion among the Justices. Justice O'Connor, joined by Justices Stevens, Souter, and Breyer, dissents from the Court's decision, arguing that, instead of dismissing the writ, the Court should vacate the Fifth Circuit's decision and remand for proceedings that would ultimately resolve three core issues: (1) whether the *Avena* decision is binding on United States courts, (2) whether Article 36 of the Vienna Convention creates individually enforceable rights, and (3) "whether Article 36(2) of the Convention sometimes requires state procedural default rules to be set aside so that the treaty can be given 'full effect.'"⁵⁰ Justice O'Connor agrees that Medellín's claim must be viewed through the lens of the AEDPA (which requires the issuance of a COA before appellate courts can hear the merits of habeas claims), a statute passed long after the United States ratified the Vienna Convention.⁵¹ Yet, Justice O'Connor's lengthy dissent then demonstrates how each COA procedural and legal threshold is arguably surmountable,⁵² concluding that Medellín's Vienna Convention-based arguments are "debatable"⁵³ and thereby "warrant a COA."⁵⁴ As opposed to the per curiam opinion that steers cautiously to avoid the "big picture" international law issues, Justice O'Connor argues that federal courts must affirmatively wrestle with such "questions of national importance when they are bound to recur."⁵⁵

Justice Ginsburg is the fifth decisive vote in garnering a majority in favor of the per curiam decision. In a separate concurrence, Justice Ginsburg contends that the Court

50. *Id.* at 2095 (O'Connor, J., dissenting).

51. *Id.* at 2098. As Justice O'Connor states, *id.*:

At every step, the federal courts must evaluate Medellín's Vienna Convention claim through the framework of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which controls the process by which a state prisoner may obtain federal habeas relief. And wherever the Convention, which has been in continuous force since 1969, conflicts with this subsequently enacted statute, the statute must govern.

52. The first set of claims is "jurisdictional." First, AEDPA section 2253(c)(2) requires a "substantial showing of the denial of a constitutional right." *Medellin*, 125 S. Ct. at passim (quoting 28 U.S.C.A. § 2253(c)(2)). According to Justice O'Connor, Texas cannot raise the claim at the Supreme Court because it did not argue such a claim below. *Id.* at 2099 (O'Connor, J., dissenting). The second claim involved is AEDPA section 2254(d), which states:

[A] writ of habeas corpus shall not issue on behalf of a person in state custody with respect to any claim "adjudicated on the merits in State court proceedings unless the adjudication of the claim— (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

Id. (quoting 28 U.S.C.A. § 2254(d)). Justice O'Connor states, "Whether Medellín's claim clears these hurdles is an appropriate consideration for an appellate court contemplating whether to grant a COA, and for this Court reviewing the denial of a COA." *Id.* She further determines that a state court decision, in this case the Texas court decision, is not entitled to deference under § 2254(d). *Id.*

The next set of claims is "non-jurisdictional." The first involves the "fundamental defect" test. This issue was not raised below, so Medellín did not have an opportunity to respond to it. *Medellin*, 125 S. Ct. at 2100. The second claim involves a showing of prejudice. *Id.* Texas's position on this issue has been rather confused. In certiorari papers, Texas stated that Medellín had a prejudice hearing in state court; in merits briefing, Texas claimed that Medellín cannot show "prejudice in a future proceeding," *id.*; however, this does not answer Medellín's primary complaint that he has not yet been afforded a prejudice hearing that the Vienna Convention requires (per the legal analysis in *Avena*), *id.* The third claim involves *Teague v. Lane* and retroactivity. O'Connor responded: "Whether *Teague* bars relief for Medellín is itself a highly debatable question that should be part of a proper COA analysis." *Id.*

53. *Medellin*, 125 S. Ct. at 2105.

54. *Id.*

55. *Id.* at 2096.

should have stayed the case (and thereby retained jurisdiction), but she could not garner a majority for this position.⁵⁶ Justice Ginsburg ultimately votes to dismiss the writ (with the majority), as opposed to joining the dissenters (who want to vacate and remand), because, in her view, it offers Texas state courts an immediate and clean opportunity to adjudicate Medellín's petition on the basis of the *Avena* decision and the President's memorandum—"two discrete bases for relief that were not previously available for presentation to a state forum."⁵⁷ Justice Ginsburg adds that the Texas courts may thereby offer Medellín the "reconsideration of his Vienna Convention claim that he now seeks in the present proceeding."⁵⁸ Additionally, Justice Ginsburg, among the Court's most ardent proponents of transnational law,⁵⁹ argues that the dismissal, pending the Texas courts' disposition, is indeed most respectful of transnational comity, a principle that she supports and that is at the core of the President's memorandum.⁶⁰

Justices Souter, Breyer, and Stevens, like Justice Ginsburg, would have preferred to stay Medellín's case until the Texas state courts contended with the new habeas petition. Nonetheless, as a second best course, they join Justice O'Connor's dissent instead of the Court's decision, as Justice Ginsburg did.⁶¹

In reflecting on the 2004 Term, *Medellin* left many questions unanswered and did little to bring closure or climax to the evolving Vienna Convention saga. Is the Vienna Convention self-executing, i.e., does it create individually cognizable rights? If so, do these treaty-based rights supplant or trump state-based procedural bar rules? More

56. *Id.* at 2092 (Ginsburg, J., concurring). Justices Souter, Breyer, and Stevens would have joined in this position. See *infra* n. 61 and accompanying text.

57. *Id.* at 2095.

58. *Medellin*, 125 S. Ct. at 2095 (quoting the per curiam decision) (internal quotation marks omitted).

59. See Ruth Bader Ginsburg, Assoc. J., U.S. S. Ct., Speech, "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication (Am. Socy. Intl. L. Apr. 1, 2005) (available at <http://www.asil.org/events/AM05/ginsburg050401.html>).

60. Justice Ginsburg argues that comity precludes any domestic court from re-examining the substantive merits of the Vienna Convention claims, as articulated in *Avena*. *Medellin*, 125 S. Ct. at 2094. Thus, in Justice Ginsburg's view, a remand to the Fifth Circuit to contemplate some of the federal habeas issues (which touch on the merits of the Vienna Convention claim) would merely muddy the path back to the Court (with the prospect of concurrent state and federal proceedings) in a way that is fundamentally antithetical to transnational comity.

Interestingly, Justice Scalia, who has publicly criticized those Justices who use foreign and international law in Constitutional jurisprudence, joins Justice Ginsburg's discussion of comity. See Antonin Scalia & Stephen Breyer, Discussion, *Constitutional Relevance of Foreign Court Decisions* (Am. U. College of L., D.C., Jan. 13, 2005) (available at Am. U., *Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer: AU Washington College of Law, Jan. 13*, <http://domino.american.edu/AU/media/mediaref.nsf/0/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument> (last updated Jan. 14, 2005)).

61. For Justice Souter, the "vacate and remand" route would allow the federal courts not only to consider the international law questions but also to distinguish the Court's 1998 decision in *Breard* because "Medellin's case now presents a Vienna Convention claim in the shadow of a final ICJ judgment." *Medellin*, 125 S. Ct. at 2106 (Souter, J., dissenting) (emphasis added). Recall that the Fifth Circuit denied the COA in part because it considered itself bound by the Supreme Court's *Breard* decision. See *supra* n. 36 and accompanying text. In *Breard*, the Court faced a *provisional* order from the ICJ requesting a stay of Mr. Breard's execution while the ICJ considered the merits of Paraguay's Vienna Convention claims. Even the per curiam decision suggests that *Breard* should be distinguished from Medellín's case on these grounds, stating that "[a]t the time of our *Breard* decision, however, we confronted no final ICJ adjudication." *Medellin*, 125 S. Ct. at 2091 n. 3 (per curiam).

Justice Breyer, joined by Justice Stevens, argues that Medellín's legal arguments, particularly that "American courts are now bound to follow the ICJ's decision in *Avena*," are "substantial," and vacating the Fifth Circuit's decision would importantly "remove from the books an erroneous legal determination." *Id.* at 2107 (Breyer, J., dissenting).

generally, what is the relationship between an ICJ decision and state or federal courts? And, are state courts bound by the President's executive order? The answers to these questions may very well be forthcoming.⁶² Nonetheless, for the time being, Mr. Medellín's fate rests with the Texas Court of Criminal Appeals.⁶³ So, for one who relishes international law as a venture in storytelling, there will certainly be more tales to tell.

III. THE LESSONS OF *MEDELLÍN*

Although somewhat lackluster, the *Medellín* decision nonetheless highlights much about the nature of transnational law. In particular, the *Medellín* decision (1) reminds us that state courts, and thus local practitioners, remain important players in the evolution and resolution of transnational legal issues; (2) implicitly reaffirms the breadth of executive power in foreign affairs; and (3) for those of us who are Court watchers and vote counters, provides insight into how the Court may resolve some of these issues in the future.

A. *The Supreme Court, State Courts, and Transnational Law in Practice*

In recent Terms, the Court has deliberately and conspicuously cited foreign and international law in high profile cases, such as *Lawrence v. Texas*⁶⁴ and *Grutter v. Bollinger*.⁶⁵ This Term, in *Roper v. Simmons*,⁶⁶ the Court cited foreign practices, foreign laws, and international agreements in furtherance of its conclusion that the juvenile death penalty was "cruel" and "unusual" in light of "evolving standards of decency that mark the progress of a maturing society."⁶⁷ Many international legal

62. The U.S. Supreme Court will hear consolidated oral arguments in two Vienna Convention cases on March 29, 2006, to determine: (1) Does the Vienna Convention convey individual rights of consular notification enforceable in U.S. courts?; (2) Does the state's failure to notify a foreign detainee of his rights under the Vienna Convention result in a suppression of his statements to police?; and (3) Whether, contrary to the ICJ's interpretation, state courts may refuse to consider Vienna Convention consular notification claims because of procedural bar rules? See *Bustillo v. Johnson*, 126 S. Ct. 823 (2005) (mem.), cert. granted, 126 S. Ct. 621 (2005) (mem.); *Sanchez-Llamas*, 126 S. Ct. 823 (mem.). Neither *Bustillo* or *Sanchez-Llamas* have been sentenced to death; nor are they members of the *Avena* class. Therefore, these cases are cleaner than *Medellín's* in that the *Avena* defendants, the President's memorandum, and the concomitant questions of executive power do not stand in the Court's path.

63. The Texas Court of Criminal Appeals, in a per curiam order, requested additional briefing from the parties, seizing particularly on the "several threshold issues that could independently preclude federal habeas relief for Medellín." *Ex Parte Medellín*, 2005 WL 1532996 at *2 (Tex. Crim. App. June 22, 2005) (quoting *Medellín*, 125 S. Ct. at 2090) (internal quotation marks omitted). For a list of these threshold issues, see *id.*, and *supra* nn. 47, 52 and accompanying text. Oral argument occurred on September 14, 2005, and the Texas Court of Criminal Appeals has not yet decided whether Medellín has met the Texas procedural requirements for a subsequent application for a writ of habeas corpus.

64. 539 U.S. 558 (2003).

65. 539 U.S. 306 (2003); see Levit, *supra* n. 3, at 163–64.

66. 125 S. Ct. 1183 (2005).

67. *Id.* at 1190; see *id.* at 1194, 1199. Justice Kennedy, for the majority, cites several international and foreign sources, while not controlling, as instructive in interpreting the Eighth Amendment prohibition on cruel and unusual punishment. These sources include: *African Charter on the Rights and Welfare of the Child* art. 5(3) (1990), OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999); *United Nations Convention on the Rights of the Child* art. 37 (Nov. 20, 1989), 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) (noting that every country except the United States and Somalia have ratified the Convention); *American Convention on Human Rights: Pact of San José, Costa Rica* art. 4(5) (Nov. 22, 1969), 1144 U.N.T.S. 123, 146 (entered into

scholars celebrate these citations as evidence that the Court is becoming an engaged transnational actor,⁶⁸ or, as some have argued, an active participant in a transnational judicial dialogue.⁶⁹

Yet, when the Court had the opportunity this Term to decide some of international law's existential questions—to determine when, and if, international law is actually *binding* on U.S. courts; to define the relationship between the federal legal system, state legal systems, and the international legal system; and to illuminate the often debated and controversial questions surrounding the status of treaties and international court decisions in United States law—the Court passed. *Medellin* is a potent reminder that the Supreme Court can be a shy, reserved, and tentative transnational actor. In *Medellin*, the Court thus reverts to a familiar role—one that it held comfortably for many years, indeed for many decades—that of a passive, rather than active, transnational actor.⁷⁰

As a result, *Medellin's* case, and fate, rests with the Texas state courts, and *Medellin* leaves some fifty other *Avena* cases pending before lower courts, many of which are state courts. Thus, *Medellin* highlights that state courts are transnational, not mere parochial, actors. Yet, scholars and advocates woefully under appreciate state courts' role as a critical touch point with international law.⁷¹

While the Texas state courts have to date resisted the incursion of transnational law in *Medellin's* case, some state courts have proved to be quite progressive and innovative transnational actors, honoring and thereby solidifying international law.⁷² Consider how another *Avena* case unfolded in Oklahoma, the case of Osbaldo Torres. Until the point when the ICJ decided *Avena*, Torres's story reads much like *Medellin's*.⁷³ The ICJ issued the *Avena* decision on March 31, 2004, and Torres was the first *Avena* defendant scheduled for execution. The approach of Torres's May 18, 2004 execution date sparked

force July 18, 1978); *International Covenant on Civil and Political Rights* art. 6(5) (Dec. 19, 1966), 999 U.N.T.S. 171, 175 (entered into force Mar. 23, 1976) (ratified by the United States, and subject to reservation regarding Article 6(5)); *Criminal Justice Act* (1958), 11 & 12 Geo. 6, ch. 58 (U.K.). In addition, Justice Kennedy notes that the only countries other than the United States that execute juvenile offenders are: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, Congo, and China.

68. The usage of international and foreign law by the Supreme Court indicates that “transnational legal process can succeed in internalizing norms into the U.S. domestic system.” Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, 12 *Tulsa J. Comp. & Intl. L.* 1, 18 (2004).

69. See e.g. Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 *Geo. L.J.* 487 (2005).

70. See Levit, *supra* n. 3; Janet Koven Levit, *Going Public with Transnational Law: The 2002–2003 Supreme Court Term*, 39 *Tulsa L. Rev.* 155 (2003) [hereinafter Levit, *Going Public with Transnational Law*].

71. There are admittedly some scholars who discuss state courts' role in compliance with international law, but these scholars typically view state courts as placing limits on international law—as reigning it in—rather than progressively championing international law; these scholars tend to argue that state law, as opposed to federal, treaty-based law, controls in certain situations. See e.g. Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 *N.C. L. Rev.* 457 (2004). Elsewhere I have reflected on why international scholars and practitioners have largely overlooked the role of state courts in solidifying and enforcing international law, and I will not repeat that discussion here. See Levit, *supra* n. 3, at 183–86.

72. See Rosalyn C. Higgins, J., Intl. Ct. of Just., *Judging International Law* (Yale L. Sch. Oct. 8, 2004) (available at http://www.law.yale.edu/outside/html/Alumni_Affairs/alumniwkend_av04.htm) (noting that sometimes state courts, like the Oklahoma Court of Criminal Appeals, and offering other European examples, will step ahead of constitutional courts and make decisions that profoundly impact the evolution of international law).

73. For a detailed discussion of the *Torres* case, see Levit, *supra* n. 3.

a flurry of high-profile, high-intensity legal activity, including an amicus brief on behalf of international law experts and former diplomats (not a common occurrence at the Oklahoma Court of Criminal Appeals).⁷⁴ On May 7, 2004, the Oklahoma Parole Board recommended clemency for Torres.⁷⁵ On May 13, 2004, just five days before Torres's scheduled execution, the Oklahoma Court of Criminal Appeals, by a three-to-two decision, stayed the execution and remanded the case for an evidentiary hearing to determine, in part, whether Torres was "prejudiced by the State's violation of his Vienna Convention rights."⁷⁶ Acting under the cover of the Court of Criminal Appeals decision, as well as the decision of the Parole Board, the Governor commuted Torres's sentence to life in prison without parole later that day.⁷⁷

In a special, unpublished concurrence, Judge Charles Chapel offered his view of the Oklahoma Court of Criminal Appeals' legal obligations in the wake of the *Avena* decision. Judge Chapel reasons that the United States freely and consensually signed and ratified the Vienna Convention, including the Optional Protocol, creating binding, contract-like legal obligations between the United States and other parties to the Convention.⁷⁸ By virtue of the Supremacy Clause,⁷⁹ the Court of Criminal Appeals "is bound by the Vienna Convention and Optional Protocol"⁸⁰ and is obligated "to give effect" to both.⁸¹ The *Avena* decision, as a "product of the process set forth in the Optional Protocol,"⁸² likewise deserves the Court of Criminal Appeals' "full faith and credit."⁸³ Judge Chapel thereby concludes that his court should review and reconsider

74. Br. of Intl. L. Experts & Former Diplomats as Amici Curiae in Support of Petr., *Torres v. Okla.*, No. PCD-2004-442 (Okla. Crim. App. Apr. 30, 2004) (available at <http://www.asil.org/pdfs/TorresAmicabrief.pdf>); see Levit, *supra* n. 3; *infra* nn. 89–90 and accompanying text.

75. See Julie E. Bisbee, *Okla. Panel Backs Clemency for Mexican Inmate: State Feels Heat of Court Ruling*, Commercial Appeal (Memphis, Tenn.) A4 (May 8, 2004) ("Susan B. Loving, chairwoman of the board, said Torres's rights under the Vienna Convention were violated. She said that the board will let a higher authority determine what bearing the world court ruling has on Torres's case. 'We'll let the governor make this decision.'"); see also Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 98 Am. J. Intl. L. 579, 581 (2004).

76. *Torres v. Okla.*, No. PCD-2004-442, slip op. at 2 (Okla. Crim. App. May 13, 2004) (order granting stay of execution and remanding case for evidentiary hearing) (copy on file with author).

77. Off. of Gov. Brad Henry, *Gov. Henry Grants Clemency to Death Row Inmate Torres*, http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1 (May 13, 2004). The Press Release issued by the Governor's office states, *id.*:

The International Court of Justice ruled on March 31 that Torres' rights were violated because he had not been told about his rights guaranteed by the 1963 Vienna Convention. Under agreements entered into by the United States, the ruling of the ICJ is binding on U.S. courts.

"I took into account the fact that the U.S. signed the 1963 Vienna Convention and is part of that treaty," the Governor said.

"In addition, the U.S. State Department contacted my office and urged us to give 'careful consideration' to that fact."

78. *Torres*, slip op. at 5–6 (Chapel, J., concurring).

79. The Supremacy Clause explicitly states that "[t]reaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2.

80. *Torres*, slip op. at 6.

81. *Id.* at 8.

82. *Id.* at 9–10.

83. *Id.* at 8.

Torres's case "in light of the Vienna Convention violation, without recourse to procedural bar."⁸⁴

What are the advocacy-related implications of *Torres* and *Medellin*? As state judges will often be the initial touch point with international-law related issues, they must be educated on fundamental issues of international law. Supreme Court Justices have gained much appreciation for transnational law through their participation in international conferences and informal meetings with their foreign counterparts.⁸⁵ Federal judges and foreign judges must recognize state court judges as co-participants in the making and shaping of international legal norms and should open their cross-border judicial conversations—both formal (opinion-writing and cross-citing of foreign and international law) and informal (hobnobbing at conferences and foreign study abroad programs)—to include their state counterparts.⁸⁶ In addition, efforts such as the American Society of International Law's *International Law: A Handbook for Judges*⁸⁷ are commendable, although in focusing on "problems and issues that federal judges may confront,"⁸⁸ the *Handbook* inevitably misses a host of issues that may arise before state judges.

The legal brief is a prime opportunity to educate state judges on transnational law. While Supreme Court advocacy certainly has a "sizzle," nongovernmental organizations ("NGOs") and international law advocacy clinics should turn some energy from filing Supreme Court amicus briefs to filing amicus briefs before the state courts that will often be the first, or primary, judicial touch point with cutting edge issues of international law. Judge Chapel, and his law clerks, relied heavily on an amicus brief filed on behalf of experts in international law and former diplomats,⁸⁹ as evidenced by Judge Chapel's echoing of many of the cases and arguments appearing in that brief.⁹⁰

84. *Id.* at 11. The "review and reconsideration," *Torres*, slip op. at 15, will evaluate Torres's case for prejudice, asking: (1) did Torres know that he had a right to contact the Mexican consulate?; (2) would Torres have availed himself of this right?; and (3) would the consulate have assisted Torres? *Id.* at 12. Judge Chapel thereby adopts the analysis that other lower courts have adopted in determining prejudice in the face of Vienna Convention violations. See *U.S. v. Villa-Fabela*, 882 F.2d 434, 440 (9th Cir. 1989), *overruled on other grounds*, *U.S. v. Proa-Tovar*, 975 F.2d 592 (9th Cir. 1992); *U.S. v. Esparza-Ponce*, 7 F. Supp. 2d 1084 (S.D. Cal. 1998); *U.S. v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1126 (C.D. Ill. 1999); *People v. Preciado-Flores*, 66 P.3d 155, 161 (Colo. App. 2002); *Zavala v. State*, 739 N.E.2d 135, 142 (Ind. Ct. App. 2000); *State v. Cevallos-Bermeo*, 754 A.2d 1224, 1227 (N.J. Super. Ct. App. Div. 2000). Judge Chapel concludes that Torres may have been prejudiced by the state's violation of the Vienna Convention and thus avidly supports the court in its decision to remand:

I have concluded that there is a possibility a significant miscarriage of justice occurred, as shown by Torres's claims, specifically: that the violation of his Vienna Convention rights contributed to trial counsel's ineffectiveness, that the jury did not hear significant evidence, and that the result of the trial is unreliable.

Torres, slip op. at 15.

85. See Levit, *Going Public with Transnational Law*, *supra* n. 70, at 164–65.

86. In this regard, I commend the United States Judicial Conference International Judicial Relations Committee for including a state supreme court justice as a member.

87. David J. Bederman, Christopher J. Borgen & David A. Martin, *International Law: A Handbook for Judges* (Am. Socy. of Intl. L. 2003).

88. *Id.* at 1.

89. See Br. of Intl. L. Experts & Former Diplomats as Amici Curiae in Support of Petr., *supra* n. 74.

90. This dynamic—amicus brief argument finding its way into judicial opinions—was mentioned in Sean Murphy's *Contemporary Practice of the United States Relating to International Law*. Murphy, *supra* n. 75, at 584 n. 13. Regrettably, however, the Court of Criminal Appeals' receipt of an amicus brief in *Torres* was a

As lawyers draft and structure such briefs, it is incumbent upon those training lawyers, namely legal educators, to begin approaching issues of transnational law as integral, rather than peripheral, to the law school curriculum. Some significant efforts are being made in this regard. In her public speaking on transnational law, Justice O'Connor repeatedly calls upon law schools to instill in students a duty "to respect not only domestic law, but also the law of nations."⁹¹ The University of Michigan Law School requires all students who have entered after the fall of 2001 take a two-credit course in transnational law.⁹² Many law school textbooks in core classes (contracts, torts, property, constitutional law, etc.) now include notes and material on relevant international and foreign law.⁹³ Many students, especially between the first and second years of law school, study in a foreign country. The American Association of Law Schools, the umbrella organization for law schools and faculty, sponsored a workshop at its 2006 Annual Meeting, entitled "Integrating Transnational Legal Perspectives into the First Year Curriculum"⁹⁴ and has launched a sister organization—the International Association of Law Schools.⁹⁵

Finally, educating state court judges requires that international legal scholars and practitioners appreciate that most state judges do not have life tenure and thus must stand

stark aberration from standard practice, rather than the rule. When asked whether their chambers receive many amicus briefs, Judge Chapel's law clerk Lou Kohlman answered "rarely," and further admitted how helpful the amicus brief was in researching the international law issues. Interview with Lou Kohlman, Law Clerk, Chambers of the Honorable Charles Chapel in Tulsa, Okla. (Oct. 21, 2004) (notes on file with author). International law experts filed a similar amicus brief on behalf of Medellin. Br. of Former United States Diplomats as Amici Curiae in Support of Petr., *Medellin v. Dretke*, No. 04-5928 (Tex. Dept. Crim. Just. Jan. 24, 2005) (copy on file with author).

91. Sandra Day O'Connor, Assoc. J., U.S. S. Ct., Keynote Address, *Remarks by Sandra Day O'Connor* (S. Ctr. for Intl. Studies, Atlanta, Ga., Oct. 28, 2003) (available at http://www.southerncenter.org/OConnor_transcript.pdf). O'Connor adds, *id.* at 3:

Law schools must ensure that their students are well-versed in the increasingly international aspects of legal practice. Some schools have already taken up the challenge: For example, NYU Law School has brought foreign law professors to the United States to share their expertise and perspectives; Yale has established a seminar for members of constitutional courts from around the world; and the Michigan Law School requires all students to complete a two-credit course in transnational law.

See also Phillip Kurata, *Justice O'Connor Says U.S. Will Help Train Judges in Arab Countries*, <http://usinfo.state.gov/mena/Archive/2004/Feb/02-995699.html> (last updated Sept. 17, 2003) ("[S]everal American law schools, such as Yale University, New York University, and the University of Michigan, will provide training in commercial arbitration, and transnational judgments for both new and experienced judges."). Given Justice O'Connor's commitment to transnational legal education, it is not surprising that she dedicated Georgetown's new Eric E. Hotung International Law Center Building. Geo. U., *Georgetown Law Dedicates Hotung International Building*, <http://www.law.georgetown.edu/news/releases/october.27.2004.html> (Oct. 27, 2004).

92. U. Mich. L. Sch., *The University of Michigan Law School Course Descriptions: Upper Class*, http://cgi2.www.law.umich.edu/_ClassSchedule/CourseList.asp#FirstYearRequired (last accessed June 30, 2005).

93. See e.g. Charles L. Knapp, Nathan M. Crystal & Harry G. Prince, *Problems in Contract Law: Cases and Materials* 9–10 (5th ed., Aspen 2003) (noting that the Convention on Contracts for the International Sale of Goods is a significant source of contract law); Thomas D. Rowe, Jr., Suzanna Sherry & Jay Tidmarsh, *Civil Procedure* ch. 1 (Foundation Press 2004) (discussing American civil procedure in comparative perspective); Geoffrey R. Stone et al., *Constitutional Law* (5th ed., Aspen 2005) (including note material throughout on foreign law).

94. Assn. Am. L. Schs., Workshop, *Integrating Transnational Legal Perspectives into the First Year Curriculum* (Washington, D.C., Jan. 4, 2006).

95. Intl. Assn. L. Schs., <http://www.ialsnet.org> (last visited Feb. 19, 2006).

for periodic re-election. Thus, even if a state judge understands how international law may impact a particular case, that judge may be unwilling to grant international law deference if perceived as politically problematic. This dynamic is a real problem in “red states,” or America’s heartland, where fears of exporting sovereignty run deep.⁹⁶ Thus, educating judges, alone, may not be enough—international scholars and educators must better educate the constituents that will elect and retain judges. Here, I believe that we as a discipline have been rather near sighted. International law, for the most part, is a coastal enterprise—many of the great scholars, think tanks, and international law practices reside on the coasts, and logically so. Yet, for the most part, the international legal community does not reach out to middle America; there is little celebration of the type of international law that impacts the small business person, farmer, or state judge. In such neglect, we have allowed talk-radio hosts to co-opt rhetoric and mold attitudes. Thus, we must reconceive legal advocacy as more than brief-writing and appellate arguments—it must also encompass broader efforts to educate the public through the media and through demonstrating how international law, if not obeyed, will have real consequences at home, in places like Oklahoma and Texas, and not merely in Guantanamo or Iraq. *Medellin* demonstrates that state courts and state officials are, and will remain, transnational actors; whether these courts further the stature of international law or resist international law at every turn is an open question that, in great part, depends on the quality of advocacy and the nature of legal education.

B. Executive Power: The President as a Transnational Actor

Medellin also has much to say, albeit implicitly, about the breadth and depth of executive power in foreign affairs. The President’s memorandum of February 28, 2005 shifted some focus in the *Medellin* case from the status of international law to the pre-eminence of executive power in international affairs. Recall that the Court accepted the writ of certiorari in *Medellin* to determine whether an international treaty (and a decision made pursuant to that treaty) is binding on state courts or, alternatively, whether notions of comity demand deference to the ICJ decision. In the memorandum, the President, “pursuant to the authority vested in [him] by the Constitution”⁹⁷ ordered state courts to follow the ICJ decision in the name of comity.⁹⁸ Thus, the memorandum inserts a distinct question in the foreground: Does the President have unilateral power to decide when and how the United States will comply with international law and international legal decisions?

Nonetheless, the memorandum clearly provided the Court with reason to pause in *Medellin*—to avoid answering the questions at the core of its decision to grant the writ of certiorari—and undoubtedly changed the course of the case.⁹⁹ Thus, while the Court

96. See e.g. *Torres v. Okla.*, No. PCD-2004-442 (Okla. Crim. App. May 13, 2004) (Lumpkin, J., dissenting) (copy on file with author).

97. Memo., *supra* n. 40.

98. *Id.*

99. Oral Argument Transcr., *Medellin*, 125 S. Ct. 2088 (available at 2005 U.S. Trans LEXIS 25 (No. 04-5928) (Mar. 28, 2005, Washington, D.C.)). Note also that neither the federal government nor the President (nor any executive department) was a party in this case; yet the Court granted the solicitor general’s motion to participate in oral argument as *amicus curiae*. See *Medellin*, 125 S. Ct. 1622 (mem.).

purportedly remained agnostic to the legal effect of the President's memorandum,¹⁰⁰ in dismissing the case upon its surfacing, the Court for the moment implicitly endorses the memorandum as a legitimate exercise of executive power.¹⁰¹ *Medellin* thereby reminds us that the executive branch, the President in particular, wields significant power in foreign affairs.¹⁰² Thus, *Medellin* effectively transforms the President into a dominant player in the Vienna Convention narrative.

Given that deference to international law and international institutions is not a hallmark of the Bush administration, it is worth pausing to reflect on the President's role in the *Medellin* case and in the Vienna Convention story more generally. In particular, why would the President have issued the February 28 memorandum ordering lower courts to follow *Avena* in the first place? One can only speculate. First, the State Department (or at least offices within the State Department) with a diplomatic corps spread throughout the globe, understands that its employees—diplomats—are a primary beneficiary of Vienna Convention rights; thus the State Department advocates strongly on behalf of the Vienna Convention and implementation of consular notification rights.¹⁰³ Thus, while the memorandum may on one level seem discordant with the administration's general approach toward international institutions, it may actually be in accord with at least one executive agency's perceptions of what is in the "national interest."

Second, as the memorandum essentially recast the case as one about executive power, the administration steers the Court from questions bearing on the domestic status of international law and the enforceability of treaty obligations in federal court—questions which the Court has not yet clearly answered and questions which inevitably

100. 125 S. Ct. at 2096 (O'Connor, J., dissenting) (noting that the Court remains "rightfully agnostic" to the memorandum).

101. In the shadow of the previous Term's decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that due process requires that a United States citizen being held as an enemy combatant must be given a meaningful opportunity to contest the factual basis for detention), and *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that enemy combatant detainees held by the United States military in Guantanamo Bay may challenge their detentions in United States courts), where the Court arguably placed some limits on the exercise of executive power, this reaffirmation, even if implicit and passive, was likely some comfort to the administration.

102. See e.g. *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Of course, there are limits to executive power in foreign affairs. See e.g. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

103. The State Department works with state and local officials to further implementation of Vienna Convention rights when a foreign national is detained. James Lawrence, a Public Affairs Specialist, is charged with traveling the United States to train and educate local law enforcement officials in consular notification matters. Interview with James A. Lawrence, Pub. Affairs Specialist, Consular Notification & Outreach Div., U.S. St. Dept. in Washington, D.C. (Jan. 5, 2006); see also U.S. Dept. of St., Consular Notification and Outreach Div., Off. of Policy Coordination and Pub. Affairs, Bureau of Consular Affairs, *State Department Consular Notification and Access Activities from January 1998 to January 2006* (2006) (copy on file with author); U.S. Dept. of St., *Consular Notification and Access* (Sept. 2005) (CD-ROM) (copy on file with author); Off. of Policy & Pub. Affairs, Bureau of Consular Affairs, U.S. Dept. of St., *Consular Notification and Access Reference Card: Instructions for Arrest and Detentions of Foreign Nationals* (2004) (copy on file with author); U.S. Dept. of St., *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials To Assist Them* (Jan. 2003) (available at http://travel.state.gov/consul_notify.html); U.S. Dept. of St., *Arresting a Non-U.S. Citizen: Consular Notification Process* (available at <http://travel.state.gov/pdf/CNAFlowcolor.pdf>).

bear on the administration's policies in the "war on terror."¹⁰⁴ Given the composition of the Court at the time it heard *Medellin*, especially given Justice O'Connor's increasingly transnationalist bent,¹⁰⁵ the administration may not have wanted to risk a decision that would elevate the stature of international treaty commitments and potentially constrain its autonomy in foreign policy decisions.

Third, and perhaps most significant, the memorandum was just the first stage in the administration's Vienna Convention strategy. Unlike the United States federal court system, which rests on *stare decisis* and precedent, ICJ decisions are binding only on parties, in this case Mexico and the United States.¹⁰⁶ Recall that the February 28 memorandum only requires state courts to give effect to *Avena* for the fifty-one Mexican nationals identified therein.¹⁰⁷ In an additional twist, on March 7, 2005, the Secretary of State informed the United Nations of the United States' withdrawal from the Optional Protocol to the Vienna Convention, the attendant treaty that empowers the ICJ to decide Vienna Convention-related disputes.¹⁰⁸ As the United States no longer accepts the compulsory jurisdiction of the ICJ in the wake of the *Nicaragua* litigation,¹⁰⁹ the withdrawal from the Optional Protocol forecloses the possibility of the United States finding itself in a similar predicament—either abide by ICJ decision or defer to state procedural laws—in the future. From the administration's perspective, therefore, the costs associated with the memorandum (namely re-opening the *Avena* cases) were relatively low, while the benefits (derailing the case and implicitly concentrating foreign affairs power in the President) were quite high. Thus, when one considers the

104. In other words, as Harold Hongju Koh characterized it, the administration took "the bat out of the Supreme Court's hand." Liptak, *supra* n. 42 (internal quotation marks omitted). This Term, the Court certainly may clarify such issues of domestic enforceability of international law in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 620 (mem.), as well as *Hamdan v. Rumsfeld*, 126 S. Ct. 622 (mem.).

105. See *infra* nn. 122–130 and accompanying text.

106. *Charter of the United Nations, with Annexed Statute of the International Court of Justice* (June 26, 1945), 59 Stat. 1031, 1062.

107. See Memo., *supra* n. 40 (providing a text of the memorandum).

108. The letter read:

Dear Mr. Secretary-General:

I have the honor on behalf of the Government of the United States of America to refer to the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, done at Vienna April 24, 1963.

This letter constitutes notification by the United States of America that it hereby withdraws from the aforesaid Protocol. As a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol.

Sincerely,
Condoleezza Rice

Ltr. from Condoleezza Rice, U.S. Sec. of St., to Secretary-General, United Nations (Mar. 7, 2005) (available at Discourse.net, *US Announces Withdrawal from Consular Convention*, http://www.discourse.net/archives/2005/03/us_announces_withdrawal_from_consular_convention.html (accessed Mar. 27, 2006)); see Frederic L. Kirgis, *Addendum to ASIL Insight, President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights*, <http://www.asil.org/insights/2005/03/insights050309a.html> (Mar. 2005); Charles Lane, *U.S. Quits Pact Used in Capital Cases: Foes of Death Penalty Cite Access to Envoys*, Wash. Post A01 (Mar. 10, 2005) (available at <http://www.washingtonpost.com/ac2/wp-dyn/A21981-2005Mar9?language=printer>).

109. See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14.

memorandum in a broader context, beyond the fifty-some *Avena* defendants, it is quite consistent with the administration's ambivalence and skepticism toward international law and institutions.¹¹⁰

C. *Court Watching, Vote Counting, and an Ode to Justice O'Connor*

In recent years, a growing coalition of transnationalist Justices, Justices who view the Court in the context of a global legal community, have importantly steered the Court's jurisprudence.¹¹¹ Justices Ginsburg, Breyer, Stevens, and Souter are firmly in the transnationalist camp, and Justice Kennedy, with his conspicuous citations of international and foreign law in both *Lawrence v. Texas* and *Roper v. Simmons*, appears to have joined as well.¹¹² When I originally drafted this piece in June 2005, I concluded

110. Parenthetically, in pursuing this strategy, the administration evinces strategic prowess. In the wake of the memorandum (and particularly prior to the United States withdrawal from the Optional Protocol), Medellín's attorneys, human rights groups, and international law advocacy clinics celebrated the memorandum as an appropriate, legitimate, and legal use of the President's powers in foreign affairs (while Texas state officials opposed it). See *supra* n. 42 and accompanying text. Thus, the memorandum shifted the rhetoric of many who had been openly hostile to the President's exercise of power in the war on terror and in other outposts, such as Guantanamo, into proponents of the President's use of executive power, at least in this instance. While there certainly was some backtracking when the President ultimately pulled out of the Optional Protocol, the administration may appropriate these arguments, or at least some of the rhetorical sound bites, in support of its subsequent decision to withdraw from the Optional Protocol and as it attempts to assert itself in the war on terror.

111. In fact, just last year The University of Tulsa College of Law sponsored a conference on this very subject. *International Law and the 2003–04 Supreme Court Term: Building Bridges or Constructing Barriers between National, Foreign and International Law?* (U. Tulsa College of L., Tulsa, Okla., Oct. 28–29, 2004); see Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, 12 *Tulsa J. Comp. & Intl. L.* 1 (2004). Koh comments:

What is the core of the transnationalist philosophy? Justice Blackmun put it well in an opinion he wrote in the *Aerospatiale* case in 1987. He said, U.S. courts must look beyond national interest to the "mutual interests of all nations in a smoothly functioning international legal regime," and U.S. courts must "consider if there is a course that furthers, rather than impedes, the development of an ordered international system." By so saying, he suggested that American judges should not simply worry about the United States of America, they should render rulings that are consistent with the development of an orderly international legal regime.

Id. at 6 (quoting *Société Nationale Industrielle Aérospatiale v. S.D. Iowa*, 482 U.S. 522, 555, 567 (1987)) (footnotes omitted); see also Harold Hongju Koh, *International Law as Part of Our Law*, 98 *Am. J. Intl L.* 43, 53 (2004). Koh also comments that:

Unlike nationalist jurisprudence, which rejects foreign and international precedents and looks for guidance primarily to national territory, political institutions, and executive power, the transnationalist jurisprudence assumes America's political and economic interdependence with other nations operating within the international legal system.

Id.

112. See *supra* nn. 64, 66–67 and accompanying text. The domestic political backlash to Justice Kennedy's stance was fierce, with reverberations felt deep in the blistering debate over the Bush administration's judicial appointments and the fate of the filibuster. Representative Tom DeLay stated, "We've got Justice Kennedy writing decisions based upon international law, not the Constitution of the United States. That's just outrageous, and not only that, he said in session that he does his own research on the Internet. That is just incredibly outrageous." Fox News, *DeLay Rips Justice Kennedy*, http://www.foxnews.com/printer_friendly_story/0,3566,154009,00.html (Apr. 20, 2005) (internal quotation marks omitted). Another article stated:

But his ever-polite manner is not at issue; what detractors question are his judicial views. In writing a decision this year that banned the death penalty for juveniles, Justice Kennedy bolstered his argument by citing similar bans in such questionable arenas of human rights as Nigeria and Iran.

Writing in *National Review*, Mr. Bork called the decision a "dazzling display of lawlessness" that comes "close to accepting foreign control of the American Constitution." Two marquee names of

that the dissent in *Medellin* reveals Justice O'Connor as a firm transnationalist and thus a sixth vote in a solid transnationalist majority. Unfortunately, due to Justice O'Connor's resignation, this discussion becomes much more of a wistful retrospective rather than a predictive prospective.

Justice O'Connor is a strong proponent of transnational law and its role in our globalizing world, but, for much of her judicial career, Justice O'Connor's advocacy for transnational law took place outside the confines of her jurisprudence. She has participated in the United States Judicial Conference International Judicial Relations Committee for a number of years, delivered numerous speeches championing transnational law,¹¹³ met with foreign dignitaries and judges on constitutional courts,¹¹⁴

Christian conservatism, Mr. Farris and Phyllis Schlafly, demanded his impeachment. The House majority leader, Tom DeLay, warned that Congress could remove judges who failed to show "good behavior."

Jason DeParle, *In Battle to Pick Next Justice, Right Says Avoid a Kennedy*, 154 N.Y. Times A1, A12 (June 27, 2005); see also H.R. Res. 568, 108th Cong. (Mar. 17, 2004). The text of House Resolution 568 begins:

Expressing the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the laws of the United States.

H.R. Res. 568, 108th Cong. at 1.

113. Justice O'Connor comments:

A skeptic of the relevance of non-U.S. law to the United States legal system would begin by asking why judges and lawyers should divert their attention from the intricacies of the Employee Retirement Income Security Act, or the Americans with Disabilities Act, or the Bankruptcy Code, to the principles and decisions of foreign and international law. The reason, of course, is globalization. No institution of government can afford any longer to ignore the rest of the world. One-third of our gross domestic product is internationally derived. We operate today under a large array of international agreements and organizations directly impacting judicial decision[]making, including the U.N. Convention on Contracts for the International Sale of Goods, NAFTA, the World Trade Organization, the Hague Conventions on Collection of Evidence Abroad and on Service of Process, and the New York Convention on Enforcement of Arbitral Awards. But globalization is much more than simply these agreements and organizations. Globalization also represents a greater awareness of, and access to, peoples and places far different from our own. The fates of nations are more closely intertwined than ever before, and we are more acutely aware of the connections.

Harnessing the good that can come from our increasingly global world while avoiding these pitfalls requires those with power and influence in our country to develop a greater knowledge and understanding of what is happening outside our nation's borders.

O'Connor, *supra* n. 91; Sandra Day O'Connor, Assoc. J., U.S. S. Ct., Keynote Address, *Globalization, International Law, and American Courts* (Am. Socy. Intl. L., Mar. 16, 2002) (available in 96 Am. Socy. Intl. L. Proc. 348, 350 (2002)) ("Although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American Courts."); see Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law* (Am. College of Tr. Law., Fla., 1997) (available at Intl. Jud. Observer, *Secundum Legem* 2, [http://www.fjc.gov/library/fjc_catalog.nsf/DPublication!openform&parentuid=8368D21A74D8B B3385256CA300696E11](http://www.fjc.gov/library/fjc_catalog.nsf/autoframepage!openform&url=/library/fjc_catalog.nsf/DPublication!openform&parentuid=8368D21A74D8B B3385256CA300696E11)).

114. Justices O'Connor, Kennedy, Thomas, Ginsburg, and Breyer met with European justices to discuss the new European Constitution in July 2003. Tony Mauro, *Supreme Court Opening Up to World Opinion*, 26 Leg. Times 1, 1, 8 (July 7, 2003). Justices Ginsburg, O'Connor, and Breyer discussed the death penalty and terrorism with President Chirac in the summer of 2003. Joan Biskupic, *Supreme Court Citing More Foreign Cases*, USA Today A-09 (July 8, 2003). Justice O'Connor met with Canadian Supreme Court justices in 2004. Hope Yen, *Justice O'Connor was Top Traveler on a Court with Cash to Fly First Class*, Plain Dealer (June 11, 2005) (available at <http://www.cleveland.com/printer/printer.ssf?/base/ispol/111848941681580.xml&coll=2>).

convened a conference in the Middle East on the rule of law and judicial reform,¹¹⁵ supported efforts in American law schools to mainstream transnational law,¹¹⁶ and assisted in American Bar Association legal and judicial reform projects in Eastern Europe.¹¹⁷ In fact, of all the Justices, Justice O'Connor was the "most frequent flier" in 2004, with numerous foreign trips to destinations such as France, the Hague (Iraqi judicial conference), Canada, and Austria.¹¹⁸

Yet, on the bench, Justice O'Connor's positions vis-à-vis transnational law were, prior to this Term, more elusive and less predictable. In the 2002 Term, Justice O'Connor concurred separately in *Lawrence v. Texas* and thus did not join in the Court's discussion of transnational law.¹¹⁹ In *Grutter v. Bollinger*, Justice O'Connor, writing for the majority, upheld the University of Michigan Law School's admission practices, which factored racial diversity into admissions decisions,¹²⁰ yet, in juxtaposing Justice Ginsburg's concurrence, which cites international treaties in support of the Court's conclusions,¹²¹ Justice O'Connor's choice not to cite such treaties appears conspicuously deliberate.

This Term, however, Justice O'Connor unequivocally exposes her transnationalist bent from the bench. While, Justice O'Connor dissented in *Roper v. Simmons*,¹²² she does not join Justice Scalia's dissent in part because she disagrees with his animosity toward foreign and international law.¹²³ Likewise, the tone of Justice O'Connor's

115. In September 2003, Justice O'Connor led a United States delegation to the Arab Judicial Forum. Kurata, *supra* n. 91.

116. For cites to Justice O'Connor's speeches on transnational law and legal education, see *supra* n. 91 and accompanying text.

117. Linda Greenhouse, *Heartfelt Words From the Rehnquist Court*, 152 N.Y. Times 3 (July 6, 2003) (noting that, in addition to the meeting with the European justices, Justice O'Connor has been active in the American Bar Association's reform project for Central Europe).

118. Yen, *supra* n. 114.

119. *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring).

120. *Grutter*, 539 U.S. at 343-44.

121. Justice Ginsburg, joined by Justice Breyer, cites international treaties to lend further support to the Court's admonition in *Grutter* that "race-conscious programs 'must have a logical end point.'" *Grutter*, 539 U.S. at 344 (citing, respectively, *International Convention on the Elimination of All Forms of Racial Discrimination* pt. I, art. 2(2) (Mar. 7, 1966), 660 U.N.T.S. 212 (ratified by the United States on October 21, 1994; entered into force for the United States on November 20, 1994; signed by the United States in 1992); *Convention on the Elimination of All Forms of Discrimination Against Women* pt. I, art. 4(1) (Dec. 18, 1979), 1249 U.N.T.S. 13).

122. See *supra* nn. 66-67 and accompanying text for a discussion of the transnational law implications of *Roper v. Simmons*.

123. Justice O'Connor did not believe, however, that the international consensus should outweigh a perceived lack of domestic consensus against the juvenile death penalty. *Simmons*, 125 S. Ct. at 1215 (O'Connor, J., dissenting). Justice O'Connor argues:

I disagree with Justice Scalia's contention, that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. This inquiry reflects the special character of the Eighth Amendment, which, as the Court has long held, draws its meaning directly from the maturing values of civilized society. Obviously, American law is distinctive in many respects, not least where the specific provisions of our Constitution and the history of its exposition so dictate. But this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of

dissent in *Medellin* is notably respectful of, if not somewhat deferential to, international law. She opens with a compelling description of the Vienna Convention, particularly Article 36, as the critical safeguard among the 167 state parties of “open channels of communication between detained foreign nationals and their consulates.”¹²⁴ Justice O’Connor then contends that “individual States’ (often confessed) noncompliance” with the Vienna Convention is a “vexing problem” that is “especially worrisome in capital cases.”¹²⁵

Furthermore, Justice O’Connor, unlike the majority in *Medellin*, does not shy from the underlying international-law questions but instead engages them.¹²⁶ Justice O’Connor first contemplates whether individuals, like Medellín, have standing to challenge in court a state’s violation of the Vienna Convention’s notification procedures. Texas, and the United States, argue vociferously that individuals have no standing in federal court, but Justice O’Connor, after close examination of the Vienna Convention’s text,¹²⁷ expresses her strong belief that Article 36 indeed confers individuals standing to challenge alleged transgressions.¹²⁸ Justice O’Connor then discusses the effect of procedural default rules on a foreign national’s ability to raise Vienna Convention claims. Interestingly, Justice O’Connor notes that *Breard*, a decision in which the Court privileged state procedural default rules in the face of a provisional ICJ order requesting a stay of execution, does not necessarily control in Medellín’s case because *Avena* may represent “new international law”,¹²⁹ she adds that the Court has historically revisited treaty interpretations in light of such legal developments.¹³⁰

This Term, Justice O’Connor’s jurisprudence clearly converges with her speeches on globalization and “transjudicialism.” Unfortunately, Justice O’Connor will not remain on the bench to further this transnationalist position, and her replacement, Justice

individual countries—that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus. The instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.

Id. at 1215–16 (citations omitted).

124. *Medellin*, 125 S. Ct. at 2096 (O’Connor, J., dissenting).

125. *Id.* She uses statistics to reaffirm these points: (1) in 2003, 56,000 noncitizens were held in state prisons; (2) noncitizens accounted for over 10% of the prison population in California, New York, and Arizona; and (3) as of February 2005, there were 119 noncitizens from thirty-one nations on state death rows. *Id.*

126. Justice O’Connor argues that the Court must answer the underlying international law questions as “necessary to explain why the COA’s denial should be vacated.” *Id.* at 2101. She further argues that reasonable jurists could vigorously disagree on whether the Vienna Convention, the Optional Protocol, and the *Avena* decision are binding on state courts or merely the political branches, as Texas argues. Thus, Justice O’Connor concludes the Fifth Circuit should issue a COA and hear the substantive merits of Medellín’s case. *Id.*

127. Particularly the language that states, “inform the person concerned without delay of *his rights under this sub-paragraph*.” *Medellin*, 125 S. Ct. at 2103 (citing *Vienna Convention*, *supra* n. 2, at art. 36(1)(b)) (internal quotation marks omitted, emphasis in original).

128. *Id.* at 2104 (“I question whether more would be required before a defendant could invoke that statute to complain in court if he had not been so informed.”).

129. *Id.* at 2105.

130. *Id.* (“In the past, the Court has revisited its interpretation of a treaty when new international law has come to light. Even if *Avena* is not itself a binding rule of decision in this case, it may at least be occasion to return to the question of Article 36(2)’s implications for procedural default.”).

Alito, appears significantly less transnationalist in bent.¹³¹ Furthermore, Chief Justice Roberts' confirmation hearings suggest that he is not particularly friendly to transnational law.¹³² Thus, the Court reconstitutes with a much more tenuous transnationalist majority as it begins the 2005 Term. This, of course, will have implications for other Vienna Convention cases, as well as any other case involving transnational law.¹³³

IV. CONCLUSION: INTERNATIONAL LAWMAKING: TRANSNATIONAL LEGAL PROGRESS

The *Medellin* case, as part of an ongoing Vienna Convention story, offers much insight into how international law is made in practice, as opposed to how it is purportedly made in the international law textbooks. International law is a process—it is often a complex story. In the instant example, the codification and entry into force of the Vienna Convention—a treaty—was certainly not the climax of the story involving consular protection rights; nor was the Court's decision in *Medellin*. Some scholars, most prominently Harold Hongju Koh, package this phenomenon as “transnational legal process.”¹³⁴ Others, principally, Paul Schiff Berman, offer a distinct “law and globalization” view of international law and lawmaking.¹³⁵ Whatever the theoretical

131. Adam Liptak & Adam Nagourney, *Judge Alito the Witness Proves a Powerful Match For Senate Questioners*, 155 N.Y. Times A27 (Jan. 11, 2006) (reporting on the confirmation hearings and then Judge Alito's cautious resistance toward foreign law).

132. David D. Kirkpatrick, *Nominee's Role in Tribunal Case Draws Democrats' Interest*, 154 N.Y. Times A16 (Aug. 25, 2005); Adam Liptak & Robin Toner, *Roberts Parries Queries on Roe and End of Life*, 154 N.Y. Times A1, A26 (Sept. 15, 2005).

133. See *supra* n. 62 and accompanying text.

134. The domestic and international process of defining an international rule, refining the international rule, incorporating international rules into domestic legal systems, and enforcing international rules as domestic laws, engages a multitude of transnational actors that repeatedly interact in various forums, coalesce in a type of epistemic community, and ultimately reconstitute state interests in support of the international rule. See Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 Yale L.J. 2599 (1997) (reviewing Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harv. U. Press 1995)) [hereinafter Koh, *Why Do Nations Obey International Law?*]; see also Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford U. Press 1995); Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 Stan. L. Rev. 1479 (2003); Harold Hongju Koh, *How Is International Human Rights Law Enforced?* 74 Ind. L.J. 1397 (1999); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 Hous. L. Rev. 623 (1998); Harold Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181 (1996). Koh defines “transnational actors” as: individuals, corporations, non-governmental entities, public-interest organizations, sub-governmental entities, regional organizations, and international bodies. Koh, *Why Do Nations Obey International Law?* *supra*, at 2626. Koh further comments that the

[transnational legal process] can be viewed as having three phases. One or more transnational actors provokes an *interaction* (or series of interactions) with another, which forces an *interpretation* or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to *internalize* the new interpretation of the international norm into the other party's internal normative system. The aim is to “bind” that other party to obey the interpretation as part of its internal value set. . . . The transaction generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalize those norms; and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process.

Id. at 2646 (footnotes omitted, emphasis in original).

135. See Paul Schiff Berman, *From International Law to Law and Globalization*, 43 Colum. J. Transnatl. L. 485, 489–90 (2005) (arguing that international law demands “interdisciplinary study of . . . processes of

gloss and packaging, these scholars, and the present example, importantly recognize that the notion of “international law as treaty” or “international law as intergovernmental organization” is a woefully static and under-inclusive way to conceive of the international lawmaking process.

The Vienna Convention story involves a volley of sorts between the ICJ, Supreme Court, and lower courts. While this article focuses on the role of courts and judges in transnational legal processes, they are not the sole, or even the primary, characters in the narrative. Parole boards, state governors, the President, the United States State Department, the Mexican government, NGOs, law professors, human rights advocacy clinics, and diplomats importantly contribute to the Vienna Convention story.

With each additional chapter, the sanctity of the Vienna Convention’s consular protection rights becomes incrementally enmeshed in the domestic psyche. One need only compare the fate of Mr. Breard and the LaGrand brothers with that of Mr. Torres and Mr. Medellín. Skeptics will certainly point to the United States’ withdrawal from the Optional Protocol as a significant retreat in affording Vienna Convention protections. To a certain extent, they are correct, and this chapter of the story reveals transnational legal processes as far from linear and unidirectional—there will be inevitable stalling, changes in momentum, or even backsliding. Yet, immediately after Secretary Condoleezza Rice announced the United States’ withdrawal, the State Department reiterated that the “United States has not withdrawn from the Vienna Consular Convention and remains committed to its principles and provisions.”¹³⁶ No *Avena* defendant has been executed since the *Avena* decision. And the State Department continues its on-the-ground efforts to enhance Vienna Convention compliance through its consular outreach and education division.

At the end of the day, *Medellin* reveals the Court as a rather tentative transnational actor. And, of course, with the departures of Chief Justice Rehnquist and Justice

international, transnational, and subnational norm development and interpenetration” and that the new scholarship should be “truly interdisciplinary, drawing on insights not only of international relations theorists, but also of anthropologists, sociologists, critical geographers, and cultural studies scholars”); *see also generally* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. Pa. L. Rev. 311 (2002).

136. U.S. Dept. of St., *Announcement: All Consular Notification Requirements Remain in Effect*, http://travel.state.gov/news/news_2155.html (last visited on July 7, 2005) (emphasis omitted). The notice continues by stating:

The obligations of American law enforcement personnel regarding consular notification and access for arrested or detained foreign nationals are unchanged by this event. Here are the key facts:

[1] The U.S. remains a party to the Vienna Convention on Consular Relations (VCCR), and all of our obligations under this treaty remain in effect, including our obligations with regard to consular notification[;]

[2] The U.S. is fully committed to compliance with our international legal obligations under the VCCR, and actively works to improve compliance nationally[;]

[3] American law enforcement personnel must continue to inform, without delay, all foreign nationals who are arrested or detained that consular officials of their country may be notified of the detention[; and]

[4] If the detainee requests it, law enforcement personnel must continue to notify consular officials from the detainee’s country of the detention and must continue to give such consular officials access to the detainee.

Id.

O'Connor, the Court reconstitutes this Term with less of a transnationalist bent, with certain implications for future cases. However, in leaving critical questions unanswered, the Court empowers lower courts to work through these transnational issues on their own—*Medellin* thus reminds us that state courts, state judges, and all of us, as lawyers and practitioners in the heartland, remain important transnational actors who will continue to contribute to the ongoing Vienna Convention saga.

