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MEDELLÍN, NORM PORTALS, AND THE HORIZONTAL INTEGRATION OF INTERNATIONAL HUMAN RIGHTS

*Margaret E. McGuinness**

INTRODUCTION

The dominant narrative of the *Medellín v. Dretke*[1] line of cases challenging widespread noncompliance by the United States with the notification provisions of Article 36 of the Vienna Convention on Consular Relations (VCCR)[2] tells a story of vertical treaty enforcement. The United States has agreed to be bound by a treaty that requires law enforcement authorities to inform foreign nationals arrested in this country of their right to notify their consulates and also requires authorities to permit the foreign consulate to assist its nationals. The United States has further agreed that the International Court of Jus-

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1 544 U.S. 660 (2005) (per curiam). I use the term "*Medellín* cases" to refer to direct and collateral (state and federal post-conviction habeas) challenges brought by capital defendants or death row convicts on the basis of a violation of the Vienna Convention on Consular Relations notification provisions.

2 Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].

tice (ICJ) has jurisdiction to resolve any disputes between state parties arising under the treaty.[3] In a 2003 opinion, the ICJ ordered the United States to provide a remedy in the form of additional review for fifty-one Mexican nationals on death row in the United States.[4] One of these Mexican defendants, Jose Ernesto Medellín, subsequently requested federal habeas relief on the basis of the ICJ opinion.[5] The Supreme Court granted *certiorari* in Medellín's case, but in May 2005 dismissed the case on the ground that *certiorari* had been improvidently granted.[6] What effect U.S. federal courts should give the ICJ opinion, including the ICJ's interpretation of obligations under the VCCR and the nature of remedies for non-notification, was thus left unresolved.

A year later, the Court revisited the question of vertical treaty enforcement in *Sanchez-Llamas v. Oregon*.[7] On the question of what effect U.S. courts should give to the ICJ's interpretation of a treaty, the Court in *Sanchez-Llamas* noted that while the ICJ ruling was entitled to "respectful consideration," in the absence of specific language in the treaty, the Court was final arbiter on what remedies for failure to notify would be available to individual defendants in U.S. courts.[8] The Court therefore held that the remedies requested—suppression of incriminating statements and habeas review of a procedurally defaulted claim—were not constitutionally required.[9] In short, the Court rejected the contention that "'the United States is *obligated* to comply with the Convention, *as interpreted by the ICJ*.'"[10] Chief Justice Roberts,

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3 Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 [hereinafter Optional Protocol].

4 Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1, para. 12, at 11 (Mar. 31), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imusjudgment/imus_imusjudgment_20040331.pdf.

5 *Medellín*, 544 U.S. at 662; *see infra* Part II.A. (discussing the *Medellín* case).

6 *Medellín*, 544 U.S. at 667.

7 126 S. Ct. 2669 (2006). *Sanchez-Llamas v. Oregon*, 126 S. Ct. 620 (2005) (cert. granted), was consolidated with a Virginia case, *Bustillo v. Johnson*, 126 S. Ct. 621 (2005) (cert. granted).

8 *Sanchez-Llamas*, 126 S. Ct. at 2683 (quoting Breard v. Greene, 523 U.S. 371, 375 (1998)); *see infra* Part II; *see also infra* Part III (discussing remedies under the treaty).

9 *Sanchez-Llamas*, 126 S. Ct. at 2687–88. The majority did not address the question of whether the VCCR created a judicially cognizable right, instead holding that, even if the treaty did create a judicially cognizable right, (1) the remedy sought in the *Bustillo* case (suppression of statements) was not available for violation of the notification provision; and (2) the post-conviction review of the Article 36 violation sought in *Sanchez-Llamas* had been procedurally defaulted. *Id.*

10 *Id.* at 2683 (quoting Brief of ICJ Experts as Amicus Curiae in Support of Petitioners at 11, *Sanchez-Llamas*, 126 S. Ct. 2669 (Nos. 04-10566 & 05-51)).

writing for the majority, was clear: "If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department.'"[11]

The academic literature on *Medellín* and the early analysis of *Sanchez-Llamas* focuses on the vertical enforcement of international legal obligations in the United States and the implications of the Court's response to the ICJ for constitutional and international law.[12] This dominant narrative captures an important aspect of the case, but misses a significant point about the legacy of *Medellín*. The central legacy of the *Medellín* cases will not be their place in the jurisprudence of treaty enforcement and compliance.[13] Rather, the enduring legacy of the VCCR line of cases rests in its role in a larger transnational norm convergence. The *Medellín* cases tell the story of the persistent objection of the United States to any international restrictions on the death penalty and the efforts of a transnational advocacy network of nongovernmental organizations (NGOs), capital defense attorneys, and foreign governments to nudge the United States toward limiting the application of the death penalty, notwithstanding that persistent objection. The claims in the VCCR cases arose not out of an abstract concern about U.S. treaty violations, or even out of concerns about the general effects of failures to notify foreign nationals of their rights—though, to be sure, these concerns motivated particular actors at particular times. That these cases arose at all was because the United States was out of step with an international trend toward de facto and de jure abolition of the death penalty.

Popular support for the death penalty in the United States has a long provenance.[14] At a time when international and foreign law and practice was moving toward abolition, American legislative trends in the late 1990s served to reduce the collateral procedural attacks available to capital defendants.[15] In response, and notwithstanding the per-

11 *Id.* at 2684 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

12 *See, e.g.*, Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1, 20–23 (2006) (discussing three views of enforceability of the ICJ decision); *see also infra* note 88 and accompanying text.

13 *See infra* Part II. *Sanchez-Llamas* will likely be a footnote in what will continue to be a rich tradition of treaty interpretation and elaboration in the federal courts. Indeed, *Sanchez-Llamas* may not even be the last word on remedies under the VCCR, as the Court largely left to the states the scope and extent of judicial remedies for noncompliance.

14 *See infra* Part II.

15 *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

sistent objection of the United States to accede to any international obligation to do anything more regarding the death penalty than is already proscribed by the Eighth Amendment,[16] litigants seeking to challenge both the legality of capital punishment and the statutory restrictions on appeals began to invoke foreign and international law as evidence of "evolving standards" of the restriction against "cruel and unusual punishment." Some commentators and judges responded to these tactics by warning about the dangers of invoking—by the merest of mention in a judicial opinion—any law to which the United States did not consent.[17]

Much to the consternation of these critics, the Supreme Court has been receptive to appeals to foreign and international norms when analyzing evolving standards under the Eighth Amendment. In just the past three terms, the Court looked to laws and policies beyond our shores in decisions to ban the death penalty in the case of juveniles[18] and the mentally retarded.[19] Reaction has ranged from outrage over the "outsourcing" of American law accompanied by nativist fears of an erosion of sovereignty[20]—and even death threats against Justices who deign to discuss foreign or international law[21]—to

16 *See infra* notes 134–45 and accompanying text (discussing the reservations the United States attached to the death penalty regulations in the International Covenant on Civil and Political Rights (ICCPR)).

17 *See* Atkins v. Virginia, 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting) (noting the irrelevance of the views of the world community to interpreting the Constitution); *see also* Justice Antonin Scalia, Keynote Address at the American Society of Internatinoal Law Proceedings: Foreign Legal Authority in the Federal Courts (Apr. 2, 2004), *in* 98 AM. SOC'Y INT'L L. PROC. 305, 310 (2004) ("If there was any thought absolutely foreign to the founders of our country, surely it was the notion that we Americans should be governed the way Europeans are.").

18 Roper v. Simmons, 543 U.S. 551, 575–78 (2005).

19 *Atkins*, 536 U.S. at 316 n.21. The Court has also invoked international law in striking down homosexual sodomy laws. Lawrence v. Texas, 539 U.S. 558, 573 (2003).

20 *See, e.g.*, Laurence E. Rothberg, *International Law, U.S. Sovereignty, and the Death Penalty*, 35 GEO. J. INT'L L. 547, 547–48 (2004). Rothberg argues that "the sovereignty of the United States regarding a significant aspect of its criminal justice system is threatened . . . by the insinuation of international and foreign law into U.S. judicial decision-making regarding certain aspects of death penalty administration." *Id.* (footnote omitted).

21 *See* Bill Mears, *Justice Ginsburg Details Death Threat*, CNN.COM, Mar. 15, 2006, http://www.cnn.com/2006/LAW/03/15/scotus.threat/index.html (discussing death threats against Justices O'Connor and Ginsburg from what Ginsburg called an "irrational fringe," who view reference to international law as "a huge threat to our Republic and Constitutional freedom").

unqualified cheers that the Court was finally paying attention to its brethren international and foreign courts.[22]

Yet judges and commentators who may be sympathetic as a substantive or political matter to human rights standards set by international treaties, and who also find themselves in agreement with decisions handed down by international tribunals, have been careful to note that the use of foreign and international sources is only appropriate so long as it is not construed as binding on the United States.[23] Despite these expressed limitations on the Court, and notwithstanding the *Sanchez-Llamas* rejection of meaningful vertical enforcement of the ICJ interpretation of a human rights claim, something interesting has taken place in state and federal courts in the past decade. While the United States in the exercise of its foreign affairs powers has become more sophisticated in its use of reservations, understandings and declarations to limit its obligations under the central human rights regimes (e.g., the International Covenant on Civil and Political Rights (ICCPR)[24] and the Convention Against Torture (CAT)),[25] and has become more confident in its rejection of other multilateral regimes (e.g., the International Criminal Court)[26] practice within U.S. courts has moved closer to the international standards in the one area

22 *See* Amnesty Int'l, *A Victory for International Law—An End to the Execution of Child Offenders in the USA*, THE WIRE, Apr. 2005, *available at*, http://web.amnesty.org/wire/April2005/USA (referring to the Court's decision in *Roper* as a "victory for international law"); Human Rights Watch, Supreme Court Ban Ends "Barbaric" Executions, June 20, 2002, http://hrw.org/english/docs/2002/06/20/usdom4052.htm (celebrating the *Atkins* decision as putting an end to the "barbaric" practice of executing the mentally retarded); Human Rights Watch, Supreme Court Ends Child Executions, Mar. 1, 2005, http://hrw.org/english/docs/2005/03/01/usdom10231.htm (praising the *Roper* decision by saying, "[T]he United States can now hold its head up as a just society on this issue").

23 *See* Stephen Breyer, Keynote Address at the American Society of International Law Proceedings (Apr. 4, 2003), *in* 97 AM. SOC'Y INT'L L. PROC. 265, 266 (2003); Harold Hongju Koh, *Paying Decent Respect to International Tribunal Rulings*, 96 AM. SOC'Y INT'L L. PROC. 45, 46 (2002); Antonin Scalia & Stephen Breyer, U.S. Supreme Court Justices, American University Washington College of Law, U.S. Ass'n of Const'l Law Discussion: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005), *available at* http://www.wcl.american.edu/secle/founders/2005/050113.cfm [hereinafter Scalia-Breyer Debate].

24 International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

25 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force on June 26, 1987) [hereinafter Convention Against Torture].

26 *See* Letter from John R. Bolton, U.S. Under Sec'y of State for Arms Control and Int'l Sec., to Kofi Annan, U.N. Sec'y Gen. (May 6, 2002), *available at* http://www.state.

where it has steadfastly rejected international influence: the death penalty.[27]

In the *Medellín* cases, the VCCR consular notification and assistance provisions operated as a "norm portal," a formal procedural mechanism through which external norms on the death penalty could be imported into the U.S. legal system. I use the term "norm portal" to describe any *horizontal gateway that allows, through a formal procedural mechanism or substantive right, the importation of external norms into a legal system.*[28] A norm portal represents an alternative pathway for international human rights norms to enter a legal system. Where those norms may not otherwise be enforceable through traditional vertical adjudicatory processes—either because the importing state has not formally adopted the human rights obligation, or because vertical judicial structures have failed to enforce it—the norm portal permits those norms to seep into the legal system, forcing mediation between the external norm and the domestic standard. A norm portal has the characteristic of being both formal, in that it relies on a binding procedural obligation such as a treaty, and horizontal, in that it operates to import or export—and thus gives effect to—an international norm *across* state borders without the vertical command of an international tribunal or the highest domestic court.[29]

The VCCR norm portal enabled a transnational advocacy support network comprised of individual advocates, NGOs, international and regional organizations, and foreign state governments to support the defense of capital defendants and engage in legal and political advocacy at the federal, state and local level.[30] The network was successful in winning clemency in one case, additional review in dozens of cases, passing two state statutes codifying procedural rights for foreign nationals, and setting general conditions through which the United States complies with its consular notification obligations. Compliance with the notification obligation has in turn permitted foreign governments to advocate directly on behalf of their nationals and therefore avoid death sentences.[31]

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gov/r/pa/prs/ps/2002/9968.htm (indicating that the United States did not intend to become a party to the Rome Statute of the International Criminal Court).

27 *See infra* Part II.B.

28 *See infra* Part V. My thinking on norm portals is limited, at this stage, to spatial portals that operate between legal systems. Norm portals may, however, operate temporally, as with the Alien Tort Claims Act.

29 See *infra* Part V, for a discussion of other potential forms of norm portals.

30 See *infra* note 55 and accompanying text for a discussion of Charles Epp's notion of transnational advocacy support networks.

31 *See infra* Part IV.

This shift has taken place notwithstanding the persistent objection of the United States to any international efforts to constrain its use of capital punishment and without any change of official federal policy about the death penalty or change in the U.S. position on the VCCR.[32] If the purpose of persistent objection to the abolitionist position in international human rights regimes was to preserve complete sovereign prerogative over the manner and timing of expansion of criminal procedural rights in this country, it appears to have failed, at least in regard to foreign national defendants. And, because the VCCR cases came at a time when the death penalty was already under concerted attack by advocates within the United States, the exploitation of the VCCR norm portal has contributed to the momentum toward convergence with the international abolitionist norm.

This Article examines the *Medellín* line of cases as an illustration of how the VCCR norm portal operates, and draws conclusions about how norm portals help facilitate international human rights convergence. It proceeds in five parts. In Part I, I describe current predictive and explanatory accounts of human rights behavior, and set forth a typology of human rights norm transferal: Formal Vertical; Informal Vertical; Formal Horizontal; and Informal Horizontal. In Part II, I examine the "vertical" story of *Medellín v. Dretke* and the international shift toward abolition of the death penalty that took place beginning in the late 1980s. In Part III, I explore the ways in which the consular function has traditionally been conceived as a means of mediation between two national legal systems, and how, by the 1990s, consular protection had absorbed formal international standards of due process and fair treatment for foreign aliens.

In Part IV, I analyze how a transnational network of human rights activists, NGOs, and defense lawyers carried out a concerted and coordinated effort to bring national criminal justice systems into conformance with the abolition of the death penalty, and in the process produced a "norm cascade" on the question of consular notification in death penalty cases: the U.S. government provided guidance and training to state and local governments; state and local governments trained police and courts; state and federal courts expanded procedural remedies for failure to notify (including suppression of confessions and ineffective assistance of counsel claims); and states began to consider and adopt legislation to enforce the notification requirement. The VCCR now serves to mediate between the legal protections of-

32 *See infra* Part III (discussing U.S. commitment to the notification and assistance provisions of the VCCR, notwithstanding its withdrawal from the Optional Protocol).

fered in the state and federal courts and the protections offered by international human rights law.

In Part V, I explain that in the *Medellín* cases, the Formal Horizontal procedural mechanism afforded by the VCCR norm portal proved most salient to integrating the external norm of death penalty abolition into the U.S. legal system. Norm portals offer formal entry points through which transnational actors can confront persistent objectors or noncomplying states with the international standard. I suggest that the norm portal mechanism may be at work in other formal interstate procedural obligations (e.g., extradition treaties and international refugee law) that facilitate horizontal integration of international human rights. I also raise potential critiques of the use of norm portals and conclude that the democracy and sovereignty concerns raised by the use of nonbinding foreign and international legal authority in judicial opinions have less traction where norm portals are adopted, because the portals themselves reflect formal decisions of the political branches and are subject to political reversal. Norm portals should therefore be embraced by human rights advocates who are seeking to bring U.S. practice in line with international standards and, correspondingly, feared by those who seek to keep the United States walled off from the "insidious wiles" of the influence of international human rights law.[33]

I. Explanatory and Predictive Accounts of Transnational Human Rights Norm Transfer

If the United States has persistently objected to being bound to international efforts to abolish the death penalty, how can international or foreign law affect the application of the death penalty in the United States? General theories of international law have struggled to explain how international human rights law affects the behavior of states.[34] This is primarily because theories of international law seek to

33 President George Washington, Farewell Address to the People of the United States (Sept. 26, 1796), *available at* http://www.yale.edu/lawweb/avalon/washing.htm ("Against the insidious wiles of foreign influence . . . the jealousy of a free people ought to be constantly awake, since history and experience prove that foreign influence is one of the most baneful foes of republican government.").

34 Oona Hathaway has created a helpful typology of general theories of international law compliance: (1) rational actor models (realism ("Compliance as Coincidence"); institutionalism ("Compliance as Strategy"); and liberalism ("Compliance as By-Product of Domestic Politics")) and (2) normative models (managerial model ("Compliance Is Due to a Norm of Compliance and Fostered by Persuasive Discourse"); fairness model ("Compliance Occurs when Rules Are Legitimate and Just"); transnational legal process model ("Compliance Occurs Because Norms Are Internal-

explain how states behave in interaction with one another and how international rules and institutions affect interstate behavior. The international human rights system, by contrast, addresses itself to two separate, but related, questions: (1) how states treat the rights of their own inhabitants; and (2) whether and how states care about human rights conditions in other states. The prevailing accounts of international law are more helpful in responding to the second question.[35] But theories about interstate relations and rulemaking are less helpful to answering the first question and explaining human rights behavior which, for the most part, takes place exclusively through domestic processes.

The insufficiency of general international law theory to respond to these questions about human rights behavior has led legal scholars to look to political science and sociology to supplement our understanding of how law and legal regimes affect human rights practices. These current approaches fall under three general categories: (1) liberal theory; (2) constructivism/socio-legal theory; and (3) transnational legal process.

A. Liberal Theory

Liberal theory seeks to account for human rights behavior by examining domestic political structures and processes.[36] Liberal theory predicts that certain domestic conditions (e.g., commitment to democratic institutions) are prerequisites to achieving state compliance with its obligations under the international human rights system.[37] It posits that a central purpose of signing onto international obligations

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ized")). Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1935–36 (2002). Hathaway's analysis was limited to how these theories would predict compliance with human rights treaties to which a state has acceded, in order to measure the effectiveness of human rights treaties. *Id.* at 1963–64.

35 I have written elsewhere about the value, for example, of rational choice analysis to understanding how and when governments adopt foreign policies of human rights. *See* Margaret E. McGuinness, *Exploring the Limits of International Human Rights Law*, 34 GA. J. INT'L & COMP. L. 393, 397–98 (2006). The foreign states who participated in the supranational and domestic litigations brought in response to U.S. noncompliance with the VCCR were, in part, motivated by foreign policy considerations, calculating how and when to leverage their political capital against the United States. *See infra* Parts II, IV.

36 Hans Peter Schmitz & Kathryn Sikkink, *International Human Rights*, *in* HANDBOOK OF INTERNATIONAL RELATIONS 517, 521 (Walter Carlsnaes et al. eds., 2001). Liberal theory responds to the neo-liberal institutionalism, which, like classical realism, emphasizes the role of state interest in creating incentives to enter international institutions that help coordinate behavior. *Id.*

37 *See* Hathaway, *supra* note 34, at 1953.

is to "lock-in" the commitment to certain domestic behavior in the future. The rationales for locking-in an obligation among a community of liberal states are based on some instrumentalist rational choice calculations (for example, membership in trade and security organizations) about the value of liberal international institutions to the ongoing viability and welfare of the state. Of central importance to compliance, therefore, is the creation of regimes that persuade or coerce appropriate behavior. This is not merely a procedural claim, as the appropriate behavior among liberal states is premised on the universality of human rights and the normative value of promoting human rights as a means to achieve global peace.[38]

In this case, the United States is either not a party to, or has taken reservations to, the central instruments outlawing or restricting use of the death penalty. However, the United States is a party to the VCCR. Liberal theory would suggest that the ratification of that treaty would create an opportunity for domestic interest groups to bring pressure on domestic political institutions to comply with the obligation. The availability of a binding commitment under which to bring pressure on domestic actors proved salient in the *Medellín* line of cases.[39] Because the VCCR is silent on the question of the death penalty, we need to look beyond liberal theory to find an explanation for how to change domestic behavior in a state that has expressly objected to the international standard.

B. Constructivist and Socio-Legal Accounts

Constructivist and socio-legal accounts of transnational behavior can help fill some of the gaps in liberal theory, such as how to account for changes in behavior of a persistent objector who has real power within the international community. Ryan Goodman and Derek Jinks have criticized traditional liberal internationalist approaches for overemphasizing the processes of coercion and persuasion and misunderstanding or underestimating the role of the element of sociological acculturation, which they describe as "the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture."[40] This might suggest that, for the United States, the question is not so much how to enforce the international law abolishing

38 *See* Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 513–53 (1997); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 509–14 (1995).

39 *See infra* Parts IV, V.

40 Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 626 (2004).

the death penalty, since the United States has rejected that obligation, but how to change the belief patterns that create support for the death penalty.

Constructivism approaches international relations by focusing "on the role of ideas, norms, knowledge, culture and argument in politics, stressing in particular the role of collectively held or 'inter-subjective' ideas and understandings on social life."[41] Constructivism does not make any particular claims about substantive outcomes of these processes, but, like rational choice theory, focuses on the "nature of social life and social change."[42] Whereas in rational choice, agents (i.e., states) act rationally to maximize their preferences, under a constructivist approach, "agents and structures are mutually constituted in ways that explain why the political world is so and not otherwise."[43] Whereas rational choice analysis requires the assumption that actors are motivated primarily by the desire to maximize their utility, constructivism requires the assumption that actors—including states—are shaped by the social factors of their milieu.[44] For international human rights, constructivism offers a method for analyzing social interactions of states, NGOs, and individuals with one another and with legal structures that takes into account the power of norms and ideas. Most important, it offers a framework for assessing the ways in which norms, ideas and actors interact with domestic processes.[45]

One way in which this interaction occurs is through norm entrepreneurs, or transnational advocacy networks, "working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services."[46] This definition is intended to apply to the nongovernmental actors which help construct legal rules by calling attention to issues through public-

41 Martha Finnemore & Kathryn Sikkink, *Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics*, 4 ANN. REV. POL. SCI. 391, 392 (2001).

42 *Id.* at 393.

43 *Id.*

44 Constructivists reject the claim that their approach is unhelpful to understanding causation, noting that "understanding how things are put together and how they occur . . . is essential in explaining how they behave and what causes political outcomes." *Id.* at 394. *See* Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1272 (2006).

45 *See* Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction* to THE POWER OF HUMAN RIGHTS 1, 3 (Thomas Risse et al. eds., 1999).

46 MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS 2 (1998).

ity and information campaigns.[47] Where there has previously been no legal action, these networks can make it amenable to legal action: "Frames that later appear in the law often originate in groups in civil society."[48] In the human rights area, constructivism suggests that the role of the state may therefore be less salient to norm transformation, as states are often only "reacting to political changes fomented in an increasingly transnational civil society."[49]

In the domestic context, Cass Sunstein has explained the phenomenon of rapid change in social behavior as resulting in "norm cascades."[50] Malcolm Gladwell has adopted the sociological concept of "tipping points," to describe the moment when a social idea or norm crosses a magic threshold that leads to widespread adoption.[51] Constructivists apply a similar approach to the international system, looking for tipping points in the spread of ideas or norms across national borders. Studies of transnational advocacy networks suggest five steps to changing norms in nonconforming states, which could be considered the transnational norm cascade or tipping point: (1) a situation of domestic repression/nonconformity; (2) initial NGO mobilization and government denial of the right; (3) tactical concessions by the government; (4) rhetorical acceptance of the human right norm; and, finally, (5) compliant behavior.[52]

The central critique of constructivism is that it is insufficiently concrete or specific, and thus fails to provide an effective framework through which to make causal predictions of state behavior and/or to design a blueprint for regimes or strategies for addressing human rights violations.[53] Constructivism may tell us something about global processes and interactions at a macro level, but to the critics offers

47 Kathryn Sikkink, *A Typology of Relations Between Social Movements and International Institutions*, 97 AM. SOC'Y INT'L L. PROC. 301, 302 (2003).

48 *Id.*

49 Finnemore & Sikkink, *supra* note 41, at 400.

50 Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 912 (1996) (defining norm cascades).

51 MALCOLM GLADWELL, THE TIPPING POINT 12–13 (2002).

52 Schmitz & Sikkink, *supra* note 36, at 531.

53 For an overview of constructivism and its rationalist critics see James Fearon & Alexander Wendt, *Rationalism v. Constructivism: A Skeptical View*, *in* HANDBOOK OF INTERNATIONAL RELATIONS, *supra* note 36, at 52, 54–58; *see also* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 170–72 (2005); Goodman & Jinks, *supra* note 40, at 624 ("Regime design debates often turn on unexamined or undefended empirical assumptions about foundational matters such as the conditions under which external pressure can influence state behavior, which social or political forces are potentially effective, and the relationship between state preferences and material and ideational structure at the global level.").

little help in predicting how a norm shift—for example from toleration of the death penalty to abolition—will take place.[54]

International relations constructivism can draw useful lessons from studies of domestic processes to understand how human rights norm cascades are initiated and sustained. The political scientist Charles Epp has identified domestic "support structures for legal mobilization" as a dependent variable in accounting for the rights revolution in the United States of the Warren and Burger eras:

> [S]ustained judicial attention and approval for individual rights *grew primarily out of pressure from below, not leadership from above.* This pressure consisted of deliberate, strategic organizing by rights advocates. And strategic rights advocacy became possible because of the development of . . . the support structure for legal mobilization, *consisting of rights-advocacy organizations, rights-advocacy lawyers, and sources of financing, particularly government-supported financing.*[55]

The process that has come to bear on foreign nationals facing the death penalty in the United States can be analogized to this type of advocacy support structure.[56]

C. Transnational Legal Process

1. Traditional TLP

Harold Koh's theory of transnational legal process (TLP) is based on broad constructivist notions and provides more specificity about how international law is integrated into domestic legal systems—that is, how international law "comes home."[57] Koh posits that norm-internalization among transnational actors (states, international institutions, NGOs, and individual participants in the legal system) occurs through three phases: interaction provoked by one or more transnational actors seeking to impose the norm on another actor; interpretation or enunciation of the norm applicable to the situation; and,

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54 Goodman & Jinks, *supra* note 40, at 624 n.5 (citing Jeffrey T. Checkel, *The Constructivist Turn in International Relations Theory*, 50 WORLD POL. 324, 325 (1998)).

55 CHARLES R. EPP, THE RIGHTS REVOLUTION 2–3 (1998) (emphasis added). In the VCCR context, foreign governments provided some financing to NGOs and advocates. *See infra* Part IV.A–B.

56 *See infra* Part IV.B.

57 Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 626–27 (1998); *see also* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184–87 (1996); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2624–29 (1997) [hereinafter Koh, *Why Do Nations Obey International Law?*] (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY (1995) and THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995)).

finally, successful internalization of the norm by the party targeted by the first party's interaction.[58] "It is through this transnational legal process, this repeated cycle of interaction, interpretation and internalization, that international law acquires its 'stickiness,' that nation-states acquire their identity, and that nations come to 'obey' international law out of perceived self-interest."[59]

Koh's theory is predictive, even instructional, in terms of governmental and advocacy strategies: "If transnational actors obey international law as a result of repeated *interaction* with other actors in the transnational legal process, a first step is to empower more actors to participate."[60] He also considers the importance of creating additional fora to provide opportunities for interpretation and enunciation of human rights norms and of adopting strategies of social, political and legal internalization of norms.[61] TLP would predict first a "horizontal"—that is interstate—interaction on a norm, which is then followed by adoption through "vertical" processes, e.g., judicial adoption of a norm. In 1997, Koh posited that, in light of the fact that the existing horizontal transnational regimes in human rights were notoriously weak, the best compliance strategies may be "vertical strategies of interaction, interpretation, and internalization," by which he meant working within judicial systems to announce norms that would bind the political actors who can bring about human rights compliance.[62]

This TLP process of the horizontal interaction followed by vertical process helps explain, for example, the *Atkins v. Virginia*[63] and

58 Koh, *Why Do Nations Obey International Law?*, *supra* note 57, at 2646.

59 *Id.* at 2655.

60 *Id.* at 2656. Koh goes on to explain: "For activists, the constructive role of international law in the post-Cold War era will be greatly enhanced if nongovernmental organizations seek self-consciously to participate in, influence, and ultimately enforce transnational legal process by promoting the internalization of international norms into domestic law." *Id.* at 2658.

61 *Id.* at 2656–57 ("Legal internalization occurs when an international norm is incorporated into the domestic legal system through executive action, judicial interpretation, legislative action or some combination of the three.").

62 *Id.* at 2656. A key participant in the VCCR narrative has written that "Koh's writings on the 'transnational legal process' provide a useful conceptual framework" of analysis for understanding the role of international human rights law in death penalty litigation in the United States. Sandra Babcock, *The Role of International Law in United States Death Penalty Cases*, 15 LEIDEN J. INT'L L. 367, 369 (2002). Koh has used his own theory to explain the developments of the VCCR death penalty cases. Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1091–97 (2002).

63 536 U.S. 304 (2002).

Roper v. Simmons[64] cases. In those cases, the Court announced standards restricting the death penalty which were in part premised on an understanding of what the international community required.[65] In the *Medellín* line of cases, TLP might predict that the VCCR norm will have best effect when it is formally elaborated through interstate interaction—perhaps facilitated by international institutions—and then announced by the ICJ or the Supreme Court before being integrated into constitutional criminal procedural requirements.

2. Networks

Transnational network theory is a complement to TLP that focuses on the ways disaggregated governmental functions operate across borders. Anne-Marie Slaughter defines transnational networks as representing "all the different ways that individual government institutions are interacting with their counterparts either abroad or above them, alongside more traditional state-to-state interactions."[66] A governmental network "is a pattern of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the 'domestic' from the 'international' sphere."[67] Horizontal networks are those that operate *across* national borders between, for example, counterpart governmental officials in different countries.[68] A vertical network operates *between* national entities and supranational entities and requires "the relatively rare decision by states to delegate their sovereignty to an institution above them with real power—a court or a regulatory commission."[69]

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64 543 U.S. 555 (2005).

65 *See* Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 48–49, 52 (2004); Koh, *supra* note 62, at 1118–29 (defining transnational or "transgovernmental" networks as "involv[ing] specialized domestic officials *directly* interacting with each other").

66 ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 14 (2004); *see also* Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 4–5 (2002).

67 SLAUGHTER, *supra* note 66, at 14.

68 *Id.* at 13.

69 *Id.* The purest form of vertical judicial network exists at the EU, where the ECJ has power to bind the courts of member states of the EU. The International Court of Justice arguably has more limited effect, as it does not serve to directly bind courts in the same way the ECJ binds national courts of the EU, or the U.S. Supreme Court binds the federal and state courts. But its decisions are nonetheless binding on state parties that have acceded to its jurisdiction. It is precisely this question of delegation of national judicial authority to the ICJ that lies at the heart of the nationalist/internationalist debate in *Medellín*.

Judicial networks theory is a sub-species of governmental network theory that accounts for norm transfer as a reflection of judicial interaction—both horizontal (through trans-judicial dialogue)[70] and vertical (giving domestic judicial effect to the opinions of international tribunals).[71] Horizontal judicial dialogue describes the process through which judges from jurisdictions around the world engage in direct and indirect conversations about the law, which are then reflected in their own opinions.

Direct judicial conversations occur at the myriad and ever-increasing opportunities for judges from around the world to meet one another at conferences, seminars and exchange programs.[72] These direct encounters are posited as transformative, "socializ[ing] their members as participants in a common judicial enterprise."[73] They are also derided as creating "cosmopolitan" judges who envision themselves as attendees at a sort of global cocktail party and who care far too much about what their colleagues on other supreme courts think of them.[74]

Related to these direct encounters are the indirect, "messy conversations" that Justice Breyer referred to when discussing the citation of foreign courts by the Supreme Court and citation of our Supreme Court by high courts in foreign jurisdictions.[75] Indirect conversations also take place semi-vertically between national court opinions and the opinions of international courts, tribunals and commissions.

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70 Dialogue is often cited as the rationale for citation to foreign and international legal opinions. *See, e.g.*, Breyer, *supra* note 23, at 266–67; Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 488–90 (2005).

71 *See, e.g.*, Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV 2029, 2086–2123 (2004); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 460–77 (2003). For a summary of the work the American Society of International Law (ASIL) has done is this area, see FREDRIC L. KIRGIS, THE AMERICAN SOCIETY OF INTERNATIONAL LAW'S FIRST CENTURY (2006). For an example of how ASIL trains U.S. judges on international law, see DAVID J. BEDERMAN ET AL., INTERNATIONAL LAW: A HANDBOOK FOR JUDGES (2003).

72 SLAUGHTER, *supra* note 66, at 96–99.

73 *Id.* at 99. I have argued elsewhere that international travel and engagement with scholars and judges at international seminars may have influenced Justice Harry Blackmun's "internationalist" turn. Margaret E. McGuinness, *The Internationalism of Justice Harry Blackmun*, 70 MO. L. REV. 1289, 1304–06 (2005).

74 Justice Kennedy has been singled out for such criticism—directly and indirectly—after he authored the majority opinions in *Lawrence* and *Roper*. *See, e.g.*, Scalia, *supra* note 17, at 309–10; Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 42.

75 Scalia-Breyer Debate, *supra* note 23.

These conversations are semi-vertical in that they sometimes occur in discussion of nonbinding, but informative precedent, and sometimes they are persuasive authority.[76] Where they are between completely separate courts that operate under the assumption of comity, or judicial equality, they are purely horizontal interaction.

The line between vertical authority and horizontal conversations is further blurred in the United States as a result of the predominantly dualist approach to international law within the American constitutional order.[77] Indeed, the majority opinion in *Sanchez-Llamas* suggests that, even where the United States has delegated adjudicatory authority to a supranational court via treaty obligation, the last-in-time rule and federalism may limit the enforceability of the international adjudication.[78] As a result of this dualism, the constitutionality of certain international adjudication has been challenged by some scholars as representing impermissible delegations of judicial authority.[79] Others have sought to reconcile some delegations as within the powers of the political branches.[80]

Setting aside the constitutionality of giving effect to international judgments or citing foreign judges, the global judiciary theory is deficient for the separate reason that it has a tendency to overemphasize the role of judicial elites (supreme and high courts) in the process of transnational norm transfer.[81] Correspondingly, it tends to under-

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76 An example of the latter is the effect of European Court of Human Rights decisions on constituent national courts in Europe. *See* SLAUGHTER, *supra* note 66, at 80–81; *see also* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 295–96 (1997) (discussing the different meanings state parties to the European Convention give to the obligation to abide by ECHR opinions).

77 I say "predominantly" because several constitutional doctrines help save the application of the international rule. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1)(a) (1987) ("An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled."); *see also* CURTIS A. BRADLEY & JACK GOLDSMITH, FOREIGN RELATIONS LAW 568–80 (2d ed. 2006) (discussing the *Charming Betsy* doctrine requiring federal courts to construe statutes so that they do not violate international law).

78 *See* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2672–73 (2006); *infra* notes 89–90 and accompanying text.

79 *See, e.g.*, Ku, *supra* note 12, at 58–63.

80 *See, e.g.*, Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004).

81 For a view that nonelite courts have a role to play, see Janet Koven Levit, *A Tale of International Law in the Heartland:* Torres *and the Role of State Courts in the Transnational Legal Conversation*, 12 TULSA J. COMP. & INT'L L. 163, 183–86 (2004).

emphasize the crucial role of litigants, advocacy groups, and, significantly, the trial court judges who oversee the criminal justice system. It is thus more helpful in explaining whether (and which) federal appellate and Supreme Court judges are receptive, as a matter of judicial pre-disposition, to appeals to foreign and international trends, and less helpful to the project of explaining how and through whom the transnational dialogue over a particular norm originates.

3. Responding to the Realist Critiques

A central critique of the TLP and constructivist, socio-legal accounts comes from the realist/rational choice schools of thought to which these process-oriented theories initially responded.[82] The realist/rational choice account places nation-states and state action at the center of events, and attempts to account for all human rights behavior as a reflection of a state monolith balancing fair and decent treatment of its inhabitants against concerns for state security.[83] This approach is useful insofar as it explains the basic instrumentalism of states when they act as political entities within international institutions, but it fails to account adequately for the actions of the disaggregated elements of the state in domestic politics and of nonstate actors.[84]

The rational choice "sovereigntist" theorists have a normative agenda which additionally weakens their positive account: they do not think states *should* care about the welfare of individuals in other countries, at least not in the sense of cosmopolitanism or universality.[85] The rationale for that normative claim rests on realism—in which power matters to international relations—and American exceptionalism—which posits that the world may be better off when the hegemon

82 I do not mean to suggest that rational choice does not explain behavior within the liberal, constructivist or TLP theories. Each of them assumed, to one degree or another, that participants in the international legal system act at times to further certain self-interest.

83 GOLDSMITH & POSNER, *supra* note 53, at 170–72; *see also* Eric A. Posner, *International Law and the Disaggregated State*, 32 FLA. ST. U. L. REV. 797, 804–19 (2005) (discussing the way nonstate actors influence states to comply with or violate international law).

84 *See* Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, LAW & CONTEMP. PROBS., Autumn 2004, at 195, 198 (discussing the limitations of realist theory to explain the international human rights system).

85 GOLDSMITH & POSNER, *supra* note 53, at 209–15; *see* Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1419 (2006).

is free to behave without restraint.[86] I do not intend to respond to that claim here, but I do intend to demonstrate that the assumptions about state action underlying the rational choice sovereigntist approach are flawed when applied to international human rights.

The best (or worst) the rational choice sovereigntists can say about the constructivist and legal process accounts is that they are not terribly helpful. To be sure, there is frequently a failure to connect investigatory, descriptive case studies and data collection with the work being done to systemize and theorize how human rights behavior changes. And it is surely also the case that there are not enough systematic case studies available against which to test constructivist theories. But perhaps these critics have not been looking in the right places or do not want to acknowledge processes that are occurring all around.

D. A Typology of Norm Transfer

This Article is an effort to connect the theoretical with thick description. Case studies tend to present the universe from a worm's eye view. Integrative approaches that take account of the fine details of a particular litigation along with the interstate interactions that alter and in some cases drive events may be a useful means of explaining the broader legal trends. Examining the action on the ground in a line of cases that raise claims in U.S. courts—claims that were initiated and elaborated through transnational interactions—can illuminate both how international human rights norms are transmitted and integrated and the logical limits of vertical and horizontal processes.

Each of these predictive and explanatory accounts can be seen operating within a typology of methods of international human rights norm integration: (1) Formal Vertical (supranational and domestic adjudication of rights); (2) Informal Vertical (norm-setting, aspirational charters and institutions); (3) Formal Horizontal (procedural legal gateways); (4) Informal Horizontal (informal political and social interaction, information sharing, and acculturation).[87] As this Article demonstrates, each of these methods played a role in the *Medellín* cases, and at times, the processes interacted with one another. But one proved most salient to the ultimate norm shift: the formal horizontal process represented by the VCCR norm portal.

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86 GOLDSMITH & POSNER, *supra* note 53, at 83–89; *see* NIALL FERGUSON, COLOSSUS: THE PRICE OF AMERICA'S EMPIRE 186–93 (2004).

87 *See infra* tbl.1 (illustrating examples of each of these methods of norm integration).

II. A TALE OF TWO LEGAL NORMS: THE VIENNA CONVENTION ON CONSULAR RELATIONS MEETS THE ABOLITION OF THE DEATH PENALTY

The *Medellín* story presents, at first blush, a question that is centrally about vertical integration and the command and control aspects of international law compliance: when must a national court take cognizance of a decision of an international tribunal? The answer to that question involves a range of highly contested constitutional questions concerning whether U.S. courts are permitted or required to give effect to ICJ judgments, the constitutionality of the executive branch placing restrictions on U.S. treaty obligations, the effect of later-in-time congressional statutes to U.S. treaty obligations, and the ability of the federal government to restrict, through international agreement, the police powers of the federal states.[88]

Medellín illustrates how the persistent objection of the United States to abolish the death penalty raised the stakes for international advocacy networks and ultimately led to the adoption of the VCCR as a norm portal to affect change in the U.S. legal system. When the Supreme Court dismissed *Medellín v. Dretke* on the ground that *certiorari* had been improvidently granted, the Court appeared to be avoiding a question of treaty enforcement of vital importance to the fate of the petitioner and to dozens of other death row inmates: how should federal and state courts give effect to a decision of the ICJ? The question was partially resolved by *Sanchez-Llamas*, in which the Court held that while the ICJ's earlier decision in *Avena* was entitled to "respectful consideration," the ICJ interpretation of judicial remedies under the VCCR was not binding on U.S. courts.[89] *Sanchez-Llamas* did not arise directly from the capital defendants whose rights were at issue in the ICJ case, and thus the Court's opinion did not address the final disposition of *Medellín*, which turns on what judicial effect will be given to President Bush's decision to abide by the ruling of the ICJ

88 There has been vigorous scholarly debate on these questions. *See* Curtis Bradley, Lori Fischer Damrosch, & Martin Flaherty, Discussion: Medellín v. Dretke*: Federalism and International Law*, 43 COLUM. J. TRANSNAT'L L. 667, 681–88 (2005) (edited version of debate held at Columbia Law School); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1278–1310 (2000); Ku, *supra* note 12, at 20–22; Swaine, *supra* note 80, at 1604–11; David Weissbrodt, *International Human Rights Law Perspective on* Grutter *and* Gratz, 21 CONST. COMMENT. 275, at 280–83 (2004); *see also* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995).

89 Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2672–73 (2006).

and require the states to provide additional review in those cases.[90] How *Medellín* came to be heard by the Supreme Court and the implications of Medellín's claims about the import of consular assistance, had far broader repercussions in death penalty practice in the United States than the question of constitutional law suggests.

A. *The Vertical Story:* Avena *and* Medellín v. Dretke

Jose Ernesto Medellín is a Mexican national sitting on death row in Texas. In 1993, Medellín was convicted of murder in a Texas state court and sentenced to death.[91] At the time of his arrest, he told the police that he was Mexican, but he was not informed of his right under the VCCR to contact the Mexican consulate.[92] Medellín was represented at trial by a court-appointed attorney who failed to raise the VCCR claim.[93] On April 29, 1997, after a number of appeals, Mexican consular authorities finally learned of Medellín's detention when he wrote to them from death row, and they began assisting him.[94] Medellín's attorneys on appeal filed a federal habeas corpus petition in the U.S. District Court for the Southern District of Texas in November 2001. Eighteen months later, the district court denied habeas relief on all claims.[95]

In January 2003, while Medellín's case was pending in district court, the Mexican government initiated proceedings in the International Court of Justice against the United States, alleging violations of the VCCR in the cases of Medellín and fifty-three other Mexican nationals who had been sentenced to death in state criminal proceedings.[96] Mexico argued in its application to the ICJ that the United

90 *See* Mark Warren, *Unanswered Questions Remain After U.S. Supreme Court Ruling*, ARTICLE 36 UPDATE, July 2006, http://www3.sympatico.ca/aiwarren/news.html.

91 Medellín v. Cockrell, No. H-01-CV-4078, slip op. at 1 (S.D. Tex. June 25, 2003).

92 *Id.* at 18

93 In 1993, the claim was unknown to criminal defense lawyers in the United States. *See infra* notes 197–208 and accompanying text.

94 *See* Brief Amicus Curiae of the United Mexican States in Support of José Ernesto Medellin at 3, *Ex Parte* Medellin, No. AP-75207, 2005 WL 1532996 (Tex. Crim. App. 2005).

95 *Medellín*, slip op. at 1.

96 Application Instituting Proceedings, Avena and Other Mexican Nationals (Mex. v. U.S.), paras. 69–267 (Jan. 9, 2003) [hereinafter Application of Mexico in the *Avena* Case], *available at* http://www.icj-cij.org/cijwww/cdocket/cmus/cmusorder/cmus_capplication_20030109.PDF. Mexico withdrew its application with respect to two of the nationals on the grounds that one was a dual national of the United States and Mexico and upon learning that the second national had, in fact, received notification of his consular rights. *See* Sarah M. Ray, Comment, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Rela-*

States had failed to comply with its obligations under the notification provisions of Article 36 of the VCCR in fifty-four cases in eleven federal states in which Mexican nationals had been convicted of a capital crime and sentenced to death.[97] Mexico petitioned the court to recognize that "the right to consular notification under the Vienna Convention is a human right," and that the United States should be ordered to "restore the status quo ante," by overturning the convictions and sentences of the Mexican nationals that were done "in violation of the United States international legal obligations."[98] Mexico further requested that the United States be ordered to take "steps necessary and sufficient" to ensure that domestic law gave full effect "to the purposes for which the rights afforded by Article 36 are intended" and "establish a meaningful remedy at law for violations of the rights afforded to Mexico and its nationals by Article 36 of the Vienna Convention," including by removing any procedural bars for "failure timely to raise a claim or defence [sic] based on the Vienna Convention" in any cases where the United States breached its notification obligations.[99]

Jurisdiction of the Court rested in the Optional Protocol of the VCCR, under which any dispute under the Convention would be subject to adjudication by the ICJ, and which the United States ratified when it joined the treaty.[100] By acceding to ICJ jurisdiction, the United States was agreeing that any ICJ interpretation of the United

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tions, 91 CAL. L. REV. 1729, 1760 (2003) (discussing how the United States responded to *LaGrand* by having three of the fifty-four Mexican nationals' sentences commuted by the Governor of Illinois). Mexico further alleged that the United States had violated its obligations under Articles 5 and 36 of the VCCR by "arresting, detaining, trying, convicting, and sentencing [to death]" fifty-two Mexican nationals. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1, para. 12, at 10 (Mar. 31), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imusjudgment/imus_imusjudgment_20040331.pdf.

97 Application of Mexico in the *Avena* Case, *supra* note 96, paras. 1–2.

98 *Avena*, 2004 I.C.J. para. 12, at 11.

99 *Id.* at 19–20. At the time of the original application, Mexico filed a separate request for provisional measures to ensure that none of the Mexicans on death row would be executed during the time the case was being decided by the ICJ. The ICJ issued a provisional order on February 5, 2003, concluding that three Mexican nationals were most likely to face execution within six months of the application and ordering the United States to "take all measures necessary" to ensure that those individuals "are not executed pending final judgment in these proceedings." *Id.* para. 3, at 8.

100 Optional Protocol, *supra* note 3. The ICJ has both compulsory and compromissory jurisdiction. Statute of the International Court of Justice arts. 34–38, June 26, 1945, 59 Stat. 1055, T.S. No. 993 (outlining the competence of the ICJ). The Optional Protocol is an example of compromissory jurisdiction. Article I of the Optional Protocol provides:

States' obligations under the VCCR would act as a command on the United States. In 1979, the United States had relied on the ability of the ICJ to make a pronouncement that would hold Iran, a VCCR signatory state, legally responsible for the taking of official U.S. hostages in 1979.[101] When Mexico brought the *Avena* case before the ICJ in January 2003,[102] it appeared to be following the United States' footsteps—availing itself of the binding supranational adjudication mechanism required under the treaty.

Article 36 of the Vienna Convention guarantees that detained foreign nationals are informed of their right to notify their consular officer and that the consular officer is afforded free access and communication with any national who so requests it:

> (1)(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
>
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.[103]

"Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol."

Id. art. I. Mexico acceded to the Optional Protocol on March 5, 2002. *See infra* note 391 and accompanying text.

101 In 1980 the ICJ issued a judgment in a dispute between the United States and Iran involving U.S. diplomatic and consular staff in Tehran. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

102 *See* Application of Mexico in the *Avena* Case, *supra* note 96.

103 VCCR, *supra* note 2, art. 36(1).

Article 36(2) further provides that, while the obligations of state parties to the VCCR shall be exercised "in conformity with the laws and regulations" of the state, they must "enable full effect to be given to the purposes for which the rights accorded under this article are intended."[104]

The importance of consular contact to a defendant's criminal case was long recognized by Mexico, and Mexican consular offices had been active in protecting the interests of their nationals as early as the 1920s.[105] By 2003, Mexico had an additional program in place under which it provided direct assistance to capital defendants in the United States by providing funding for experts and investigators, gathering mitigating evidence, acting as a liaison with Spanish-speaking family members, and ensuring that Mexican nationals are represented by competent and experienced defense counsel.[106] At the time of Medellín's arrest in 1993, this formal program was not in place.

On March 31, 2004, the ICJ issued its decision, the *Avena* ruling.[107] The court found the United States had breached parts of the VCCR in the case of Medellín and fifty-three others by failing "to inform detained Mexican nationals of their rights under that paragraph" and "to notify the Mexican consular post of the[ir] detention."[108] The court also held that the United States violated its obligations "to enable Mexican consular offices to communicate with and have access to their nationals," under the Convention.[109] The ICJ denied Mexico's request for annulment of the convictions and sentences. However, it directed that U.S. courts give the death row inmates effective "judicial review and reconsideration" of their convictions and sentences in light of this failure, without applying procedural default rules to prevent consideration of the defendants' claims.[110]

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104 *Id.* art. 36(2).

105 Affidavit of Everard Kidder Meade IV para. 7, Torres v. State, 2004 WL 3711623 (Okla. Crim. App. May 13, 2004) (No. PCD-04-442) [hereinafter Meade Affidavit].

106 *See infra* Part IV.B.2.i. (discussing the Mexican Capital Legal Defense Program).

107 *See* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1 (Mar. 31), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imusjudgment/imus_imusjudgment_20040331.pdf.

108 *Id.* at 43.

109 *Id.*

110 *Id.* at 53, 60–61. The court reached its decision by a vote of fourteen to one. Both the United States and Mexican judges voted with the majority. The Venezuelan judge was the lone dissenter. This is not the result that would have been predicted by some ICJ critics, who claim that national allegiance often trumps faithful adjudication of international law. *See* Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 624–26 (2005).

Medellín's attorneys returned to the U.S. courts with the ICJ judgment in hand to renew their state and federal habeas claims. Texas courts had previously denied Medellín's VCCR claim, and two federal courts refused to overturn the rulings of the Texas courts.[111] The United States Court of Appeals for the Fifth Circuit acknowledged the ICJ's judgment in *Avena*, but held that it was precluded from giving effect to the judgment by prior U.S. Supreme Court precedent.[112] Because Medellín had not raised the VCCR claim at trial, the claim was procedurally defaulted under the 1996 amendments to the federal habeas statute.[113] The Fifth Circuit further stated that the VCCR does not serve to confer rights upon individuals.[114]

The U.S. Supreme Court granted *certiorari* to review the decision of the Court of Appeals regarding two questions:

> 1. In a case brought by a Mexican national whose rights were adjudicated in the *Avena* Judgment, must a court in the United States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the *Avena* holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to procedural default doctrines?
>
> 2. In a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the *LaGrand* [an earlier ICJ decision] and *Avena* Judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?[115]

Prior to oral argument in the case, in a memorandum to the Attorney General on February 28, 2005, President Bush directed state courts to give effect to the ICJ ruling in *Avena* and to review the cases of Medellín and the fifty other Mexican foreign nationals on death row in the United States.[116] Bush stated that he had determined "that the United States will discharge its inter-national obligations under

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111 Medellín v. Cockrell, No. H-01-CV-4078, slip op. at 1–4 (S.D. Tex. June 26, 2003).

112 Medellín v. Dretke, 371 F.3d 270, 280 (5th Cir. 2004), *cert. dismissed* 544 U.S. 660 (2005). The Fifth Circuit cited *Breard v. Greene*, 523 U.S. 371, 375 (1998), finding that it "ruled that Vienna Convention claims, like Constitutional claims, can be procedurally defaulted, even in a death penalty case."

113 28 U.S.C. § 2254(a), (e)(2) (2000).

114 *Medellín*, 371 F.3d at 280 (citing United States v. Jiminez-Nava, 243 F.3d 192, 198 (5th Cir. 2001)).

115 Petition for Writ of Certiorari at *11, Medellín v. Dretke, 544 U.S. 660 (2005) (No. 04-5928), 2004 WL 2851246.

116 Memorandum from George W. Bush, President of the United States, to the U.S. Attorney General (Feb. 28, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html.

the decision of the International Court of Justice" and that it would do so "by having State courts give effect to the decision in accordance with general principles of comity. . . ."[117] While Bush appeared to be conceding ICJ authority to interpret U.S. obligations under the VCCR, the United States announced its withdrawal from the Optional Protocol to the VCCR a week later.[118] The executive memorandum to review the cases is still in effect, but the withdrawal from the Optional Protocol affects future disputes, reversing the earlier decision granting the ICJ decision-making authority over these disputes.

The Court heard argument in *Medellín*, but dismissed that case on the grounds that *certiorari* had been improvidently granted.[119] The effect of the ICJ decision, and the intervening effect of Bush's memorandum, were submitted and argued before the Texas Criminal Court of Appeals, which has not issued an opinion as of this writing.[120] What effect is to be given to the opinion and the memorandum is an interesting question of law, but tangential to my main argument. These are, in effect, the *vertical* processes that are less important—not entirely unimportant, just less so—precisely because they can be shut off by certain executive acts (e.g., withdrawal from the jurisdiction of the ICJ in future disputes).

It is technically accurate that the issue before the Court in *Medellín* was not the death penalty in the way that the death penalty was directly challenged in *Atkins* and *Roper* (indeed, *Sanchez-Llamas* involved noncapital convictions). But the story of how *Medellín* cases came to be brought is centrally about the persistence of the death penalty in the United States and the ways in which horizontal networks emerged to push the abolitionist agenda within U.S. courts.

B. Abolition of the Death Penalty in International Law and Practice

Like many legal narratives, the story of the VCCR right to notification and the death penalty in the United States is more complex (and therefore more interesting) than this initial account of the vertical integration of international law suggests. First, there is the obvious gap in time between the United States acceding to the VCCR in 1969 and the rise of the VCCR defense in capital cases in the late 1990s.

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117 *Id.*

118 *See* Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, March 10, 2005, at A1 (reporting on a letter sent by U.S. Secretary of State Condolezza Rice to U.N. Secretary-General Kofi Annan indicating that the United States was withdrawing from the Optional Protocol).

119 *Medellín*, 544 U.S. at 667.

120 *Ex parte* Medellín, No. AP-75207, 2005 WL 1532996 (Tex. Crim. App. filed June 22, 1995).

Why did it take thirty years for defense counsel to discover this failure of notification as a potential defense to or basis of collateral attack in criminal cases?[121] The answer to this question requires an examination of the behavior of the various actors whose interests converge when foreign nationals are charged with capital crimes in the United States. The surge of VCCR claims in capital cases occurred only after the norm shift from international toleration of the death penalty to abolition.

For many years, some persistent objectors to abolition of the death penalty took the position that the death penalty should not even be considered as subject to international interpretation and elaboration on the grounds it was within the U.N. Charter exception for activities "essentially within the domestic jurisdiction of any state."[122] At the time the ICCPR was being negotiated in 1950, states barely considered a complete international ban on the death penalty.[123] Like the Universal Declaration of Human Rights of 1948,[124] the ICCPR sought to protect the "right to life," but that right enumerated was limited to protection only against arbitrary deprivations of life.[125] The European Charter of 1950 also expressly permitted the death penalty. State sanctioned executions were lawful so long as certain procedural rights were observed.

Nonetheless, a modern abolitionist movement began to emerge in the late 1940s, and the several of the former fascist dictatorships, including Germany, Austria and Italy abolished the death penalty.[126] Abolitionism thus grew up outside of, but parallel to, the creation of the regional and international human rights regimes in the post-war

121 Immigration attorneys discovered the VCCR earlier, because INS had adopted regulations that required adherence to the notification provisions. See *infra* Part III.B, for discussion of the early immigration cases.

122 William A. Schabas, *International Law, Politics, Diplomacy and the Abolition of the Death Penalty*, 13 WM. & MARY BILL RTS. J. 417, 420 (2004) (quoting U.N. Charter art. 2, para. 7).

123 U.N. ESCOR, Hum. Rts. Comm., 6th Sess., 194th mtg., U.N. Doc. E/CN.4/SR.194 (1950); ICCPR, *supra* note 24.

124 Article 3 of the Universal Declaration states: "Everyone has the right to life, liberty, and security of person." Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

125 *See* ICCPR, *supra* note 24, art. 6(1) ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.").

126 Schabas, *supra* note 122, at 419.

period.[127] The language of the ICCPR on the question of the death penalty reflected this parallel movement and suggested a program toward abolition. Thus, while outright abolition was not achievable when negotiations over the ICCPR began, by the time the ICCPR entered into force in 1976, support for full abolition had grown. In addition to protecting arbitrary deprivations of life, the ICCPR provides:

> In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant . . . and can only be carried out pursuant to a final judgment rendered by a competent court.[128]

The U.N. General Assembly passed Resolution 2857 in 1971, which called for restricting the crimes for which the death penalty would be available and recognized progressive abolition as a goal.[129]

International campaigns to abolish the death penalty stepped up in the 1980s. In 1989, the Convention on the Rights of the Child was adopted, outlawing the death penalty for persons below the age of eighteen.[130] (The United States has not ratified the Convention, but its provisions were discussed by the Court in the *Roper* case.[131]) Also in 1989, Amnesty International published its groundbreaking survey and analysis of the death penalty, *When the State Kills*.[132] Amnesty reported that only thirty-five countries were abolitionist for all crimes; an additional eighteen countries were abolitionist for ordinary crimes; another twenty-seven retained capital punishment on the books but were abolitionist in practice. One hundred countries retained and carried out the death penalty for ordinary crimes. The majority of states continued to employ capital punishment, but momentum appeared to be in the direction of abolition.[133]

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127 *See* Koh, *supra* note 62, at 1094–95 (discussing the "de facto moratorium on the death penalty that took effect throughout most of Western Europe" in the post-war period).

128 ICCPR, *supra* note 24, art. 6(2).

129 G.A. Res. 2857, U.N. GAOR, 26th Sess., Supp. No. 29, at 94, U.N. Doc. A/8429 (Dec. 20, 1971).

130 Convention on the Rights of the Child art. 37(a), Nov. 20, 1989, 1577 U.N.T.S. 3 (prohibiting executions for crimes committed under the age of eighteen).

131 Roper v. Simmons, 543 U.S. 551, 576 (2005).

132 AMNESTY INT'L., WHEN THE STATE KILLS (1989).

133 Schabas, *supra* note 122, at 421 (discussing *When the State Kills* and noting that "with each decade subsequent to 1948, the number of states abolishing capital punishment increased").

Formal legal efforts culminated with the adoption of Optional Protocol 2 to the ICCPR in 1991, which banned the death penalty.[134] In addition, protocols to the European Convention on Human Rights[135] and the American Convention on Human Rights[136] also outlawed the death penalty. The trend toward abolition in Latin America appeared to gain momentum even earlier than in Europe.[137]

The death penalty continued in the United States, with the notable exception of the period between 1967 and 1977 when a de facto moratorium on capital punishment was in place. The moratorium resulted from the Supreme Court's decision in *Furman v. Georgia*[138] striking down the death penalty statutes in forty states on the grounds that they permitted unfettered jury discretion.[139] It was not lifted until the *Gregg v. Georgia*[140] decision of 1976, when states reformed the procedures and sentencing guidelines in a way the Court found to meet constitutional minimums.[141] Popular support for capital punishment in the United States had waxed and waned during the first decades following World War II, reaching an all-time low of forty-two percent in 1966, and resurging in the 1980s.[142] The resurgence was assisted, in part, by a series of cases in which the Court laid out the procedural protections under which the federal state could impose death sentences and carry out executions.[143] By 1989, thirty-seven U.S. states retained the death penalty for ordinary crimes.[144] Throughout this period, the United States did not accede to any international obligations regarding limits upon capital punishment. When

134 Second Optional Protocol to the International Covenant on Civil and Political Rights art. 1, Dec. 15, 1989, 1642 U.N.T.S. 414, 415.

135 Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Sept. 3, 1953, 213 U.N.T.S. 221, 224.

136 Organization of American States, American Convention on Human Rights art. 4, *opened for signature* Nov. 22, 1969, 9 I.L.M. 673, 1144 U.N.T.S. 123.

137 A U.S. delegate to the San Jose Conference of 1969, at which the American Convention was adopted, noted "'the general trend, already apparent, for the gradual abolition of the death penalty.'" Schabas, *supra* note 122, at 425 (quoting OAS Doc. OEA/Ser.K/XVI/1.1, doc. 10, at 9)).

138 408 U.S. 238 (1972).

139 *Id.* at 239 (striking down Georgia's death penalty statute on the basis of juries' unfettered sentencing discretion and voiding the death penalty statutes of over forty states).

140 428 U.S. 153 (1976).

141 *Id.* at 206–07 (reinstating the death penalty).

142 Koh, *supra* note 62, at 1095.

143 *See, e.g., id.* at 1099–1102 (analyzing U.S. Supreme Court cases dealing with the death penalty to illustrate how the death penalty gained new life in the 1980s).

144 Death Penalty Information Center, State by State Information, http://www.deathpenaltyinfo.org/state (last visited Oct. 14, 2006).

the United States did finally accede to the ICCPR in 1993, it did so with reservations to every aspect of the treaty that would require it to give the treaty provisions direct effect in U.S. courts and also limited U.S. obligations regarding the death penalty to those that would be required under the Eighth Amendment.[145]

What caused this international norm shift in the 1990s? The End of the Cold War was an important catalyst. First, the end of the East-West conflict promoted newly democratizing states to join western institutions and "lock-in" western human rights norms. The European Human Rights Convention was amended to abolish the death penalty in 1985.[146] The states of the former Warsaw Pact, with an eye to joining the European Union, were anxious to sign on to commitments to the central human rights instruments of Europe that would serve as entry into the club.

Second, just as the trend in Europe and elsewhere was toward reinvigorating the possibility of real enforcement of core international human rights norms, the United States seemed to be going backward, taking a "law and order" attitude at home and an "exceptionalist" attitude abroad. Even Bill Clinton, during his campaign for the presidency in 1992, took time out to preside over the execution of a mentally impaired death row inmate in Arkansas.[147] It cannot be overestimated the extent to which American exceptionalism on capital punishment was a stone in the shoe of American global diplomacy.[148] European allies, in particular, freed from the relational constraints of the Cold War, were increasingly emboldened to confront the United States on this issue.[149]

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145 *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights and Conditional Consent*, 149 U. PA. L. REV. 399, 417 (2000).

146 *See* Protocol No. 6 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty art. 1, *opened for signature* Apr. 28, 1983, Europ. T.S. No. 114 (entered into force March 1, 1985).

147 *See* Christopher Olgiati, *The Whitehouse Via Death Row*, THE GUARDIAN, Features p.18 (Oct. 12, 1993).

148 *See* Harold Hongju Koh & Thomas R. Pickering, *American Diplomacy and the Death Penalty*, FOREIGN SERV. J., Oct. 2003, at 19; Schabas, *supra* note 122, at 434 (noting international disagreements between the United Nations and the European Union on one side and the United States on the other).

149 One example of these efforts was a 2001 symposium sponsored by the Council of Europe and the Pan-European parliament aimed at a worldwide moratorium. Texas was invited and attended part of the conference. John Quigley, *International Attention to the Death Penalty: Texas as a Lightning Rod*, 8 TEX. J. C.L. & C.R. 175, 176 (2003).

At the same time, international and domestic NGOs had a window of opportunity to leverage both these trends—the momentum created by new states signing on to the major international and regional human rights treaties and the willingness of European states to confront the United States. International organizations also played a role by monitoring ongoing compliance with obligations and reporting on the persistent objectors like the United States and China. Because the United States had not obligated itself to a ban, these reports tended to focus on the problems with fair application of the death penalty in the United States.[150] Together with the work of domestic abolition groups and legal organizations such as the ABA, a body of empirical data was compiled suggesting that the death penalty in the United States was applied disproportionately to African-Americans, other minority groups, the poor, and the mentally impaired.[151]

The trend toward abolition gained significant momentum in the early 1990s. Since 1991, over fifty countries have acceded to Optional Protocol 2; seventy countries are now bound by their accession to international treaties banning the death penalty in all cases. Among the countries that have not adopted a total ban, eleven countries limit the death penalty to extreme crimes such as genocide, war crimes, and

150 The 1997 Report of U.N. Human Rights Commission Special Rapporteur Waly Ndiaye stated:

> [I] remain[ ] deeply concerned that death sentences continue to be handed down after trials which allegedly fall short of the international guarantees for a fair trial, including lack of adequate defence during the trials and appeals procedures. [Areas of special concern are] the imposition and application of the death penalty on persons reported to be mentally retarded or mentally ill. . . . [and] those cases which were allegedly tainted by racial bias on the part of the judges or prosecution and about the non-mandatory nature of the appeals procedure after conviction in capital cases in some states.

The Special Rapporteur, *The Report of the Special Rapporteur on the Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories*, para. 551, *delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/1997/60/ADD.1 (Dec. 24, 1996).

151 Elizabeth Olson, *U.N. Report Criticizes U.S. for "Racist" Use of Death Penalty*, N.Y. TIMES, Apr. 7, 1998, at A17; *see also* David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1651 (1998) ("While blacks make up only thirteen percent of the nation's civilian population, blacks make up forty-one percent of the nation's death row population."); Stephen B. Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 434 (1995) (noting that a study of the death sentencing in Harris County, Texas, "which has carried out more executions and sentenced more people to death than most states," found that blacks were sent to death row nearly twice as often as whites).

high treason.[152] The death penalty persists on the books and in practice in China, the Middle East, most parts of central and eastern Africa, and the English-speaking Caribbean.[153] Sixty-three countries share the de jure U.S. position of retaining capital punishment for a range of ordinary crimes, down from 100 in 1989.[154] Of those countries, however, fewer than thirty have actually carried out executions in the past decade.[155] During 2004, 3,797 people were executed in twenty-five countries.[156] Thus, with the prominent exceptions of China, Iran, Vietnam and the United States, which together account for 97% of the executions carried out in a year, the international trend since 1990 has been toward both de facto and de jure abolition.[157] Thirty-seven of the fifty U.S. states retain the death penalty, as do the U.S. federal government and military.[158]

In the meantime, abolition has become the norm in the administration of international and transitional justice. The death penalty was not permitted as punishment under the 1994 statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR),[159] nor is it permitted under the Rome Statue of the International Criminal Court.[160] In 2003, during the U.S. occupation of Iraq, Paul Bremer signed a Coalition Provisional Authority decree suspending capital punishment in Iraq.[161] The death penalty was reinstated by the Iraqi government

152 Amnesty Int'l, Facts and Figures on the Death Penalty, http://web.amnesty.org/pages/deathpenalty-facts-eng (last visited Oct. 14, 2006).

153 *See id.*

154 *Id.*

155 *Id.*

156 Press Release, Amnesty Int'l, Death Penalty: 3,797 Executed in 2004 (Apr. 5, 2005), http://news.amnesty.org/index/ENGACT500112005. Those countries were Afghanistan, Bangladesh, Belarus, China, Egypt, India, Indonesia, Iran, Japan, Jordan, North Korea, Kuwait, Lebanon, Pakistan, Saudi Arabia, Singapore, Somalia, Sudan, Syria, Taiwan, Tajikistan, United States, Uzbekistan, Vietnam and Yemen. This represents a downward trend in de facto execution rates. *See* Eric Prokosch, *Human Rights v. The Death Penalty: Abolition and Restriction in Law and Practice*, AMNESTY INT'L, May 13, 1998, http://web.amnesty.org/library/Index/ENGACT500131998.

157 *Id.*

158 Death Penalty Information Center, *supra* note 144.

159 *See* Amnesty Int'l, The Death Penalty Questions and Answers, at 2, http://www.amnestyusa.org/abolish/dp_qa.pdf (last visited Oct. 14, 2006).

160 *See* Amnesty Int'l, *International Criminal Court Excludes Death Penalty*, DEATH PENALTY NEWS, Sept. 1998, *available at* http://web.amnesty.org/library/index/ENGACT530041998.

161 Coalition Provisional Order No. 7 (CPA/ORD/9 June 2003/07) § 3(1) (2003), *available at* http://www.cpa-iraq.org/regulations/20030610_CPAORD_7_Penal_Code.pdf.

after the transfer of sovereignty from the CPA, and is an available punishment for convictions of the Iraqi Special Tribunal.[162] Abolition has not yet become a norm of customary international law, which requires both consistent state practice and compliance with the practice out of a sense of legal obligation (*opinio juris*).[163]

For states that are parties to these international abolitionist obligations, the illegality and immorality of the death penalty is a settled matter. The persistence of the death penalty as a practice of a handful of states is thus seen by abolitionist states as an obstacle to be overcome. In this way, the abolitionist movement reflects the dimension of the international human rights regime in which states care about the practices of other states. Abolitionist states take seriously their obligations not only to live up to the abolitionist standard, but to take efforts to bring objecting states into the abolitionist fold, including employing persuasion and coercion. Coercion is reflected through the conditioning of membership or access to other club goods (such as trade concessions or foreign aid) or direct retaliation by the use of economic or security sanctions. The art of state persuasion can be carried out through traditional diplomatic dialogue, the use of information, and the invocation of liberal values.

The difficulty with American exceptionalism on the death penalty is that, as the richest and most powerful nation in the world, coercion is not a viable option for individual states. Moreover, attempts to act as a block against the United States, as in the case of the EU, proves a difficult collective action problem. The federal system of the United States creates an additional obstacle to interstate coercion or persuasion. Many of the diplomatic counterparts at the national level may be sympathetic to appeals to international abolitionist standards. But the laws under which the death penalty is carried out and enforced are, for the most part, laws of U.S. states.

Abolitionist states therefore required both a way to leverage their individual objection to the death penalty practices of the United States and a means of entry into the state and federal legal systems in which capital sentences are sought, handed down, and enforced. Consular notification and assistance would prove a relatively robust method through which to accomplish both objectives.

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162 *See* Statute of the Iraqi Special Tribunal art. 27, Dec. 10, 2003, 43 I.L.M. 231.

163 Yet preeminent abolitionists see the trend of treaty accession and practice as suggesting that this ripening into custom may occur in the near future. Schabas, *supra* note 122, at 419.

III. THE CONSULAR FUNCTION AS NORM MEDIATOR

The Vienna Convention on Consular Relations was drafted and ratified to codify the customary international law that had grown up over centuries of consular practice. Since the very first days of the Republic, the United States has participated in the practice of sending and receiving consuls, and the protection of the welfare and well-being of nationals has a long tradition as part of the consular function.[164] In contrast to diplomats, consular officers are not empowered to deal with interstate political matters.[165] Rather, consuls traditionally have been envoys serving in a foreign state or territory for the purpose of protecting the direct commercial interests of the sending state. This traditional role of *consuls marchand* (commercial consuls) included within it the legal protection of individual nationals of the sending state who might find themselves in a foreign territory in order to carry out commerce.[166]

The traditional view evolved over time, particularly as transportation methods advanced and personal and temporary business travel to foreign states became easier.[167] Among the modern duties of a consular officer are the issuing of passports to nationals and visas to non-nationals seeking to visit the sending state, performing legal functions such as notarizing documents and assisting nationals who find themselves in distress while overseas.[168] Prior to the adoption of the VCCR as a multilateral treaty, bilateral consular conventions predominated.[169] By the 1950s, bilateral treaties commonly recognized consu-

164 For a history of the consular function during the first 130 years of the United States, see CHARLES STUART KENNEDY, THE AMERICAN CONSUL (1990).

165 Diplomats may sometimes serve concurrently as consuls, in which case they carry out political functions along with commercial and protective functions.

166 *See* LUKE T. LEE, CONSULAR LAW AND PRACTICE 124 (2d ed. 1991).

167 *See id.* (noting that the traditional consular function of protection "has assumed growing importance as more and more people travel abroad—aided by reduced barriers to movement, cheaper transport, and the tourist and package-travel industry").

168 The nature of the American consular service changed after World War I. *See* KENNEDY, *supra* note 164, at 223 (noting how the duties of consuls changed during WWI after they started to "oversee the evacuation of Americans from the war zone in Europe, report on the fast-moving political and military developments, and represent one or another of the belligerents as the neutral protecting power prior to the U.S. entry into the war in 1917"). *See generally* U.S. Department of State, The Bureau of Consular Affairs, *Our Mission*, http://travel.state.gov/about/mission/mission_307.html (last visited Oct. 14, 2006) (describing the duties of the Bureau of Consular Affairs: issuing passports, providing support to U.S. citizens abroad, and issuing visas).

169 The United States was a party to twenty-two separate bilateral conventions prior to adoption of the VCCR. Victor M. Uribe, *Consuls at Work: Universal Instruments*

lar access (access by a consular officer of the sending state) to foreign nationals (citizens of the sending state) who have been detained. Some of these treaties detailed the right of a foreign consul to "interview, communicate with, and advise any national" in the receiving state, to visit any national "who is imprisoned or detained," and to be "informed immediately by the appropriate authorities of the receiving state when any national of the sending state is confined in prison awaiting trial or otherwise detained in custody within his consular district."[170] Other bilateral treaties recognized a further sovereign right of the sending state to "arrange for legal assistance" for detained nationals as well as an individual right "at all times to communicate with the appropriate consular officer."[171] In the bilateral treaties that addressed notification, it was mandatory. That is, the detained individual did not have the option to choose whether the consulate would be notified; the receiving state was required to notify consular representatives. The VCCR introduced a new dimension to consular assistance: individuals are to be informed about consular notification, and, importantly, are allowed the choice whether to notify the consulate.[172]

A. *Rationales for the Notification and Access Provision*

Western democratic states with well-developed criminal justice systems have generally agreed on the rationales for the notification provision.[173] Colin Warbrick, writing in the late 1980s about the role of British consular officers, noted the importance of access to enable the detainee to obtain local services, including lawyers for remand prisoners and doctors for mental patients.[174] In short, the right of consular office serves "[t]o minimize the disadvantages experienced

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of Human Rights and Consular Protection in the Context of Criminal Justice, 19 HOUS. J. INT'L L. 375, 387 (1997).

170 Consular Convention art. 15, U.S.-Costa Rica, Jan. 12, 1948, 1 U.S.T. 247, 264.

171 U.S.-U.K. Bilateral Consular Convention art. 15, June 6, 1951, 3 U.S.T. 3426, 3439.

172 See discussion of VCCR Article 36 at text accompanying *supra* notes 103–04.

173 During the negotiations on Article 36, the United States delegation noted that no country should be allowed to disregard its obligation in certain circumstances to inform consuls of the sending State of the arrest of its national. U.N. Doc. A/CONF.25/C.2/SR.16, at 10 (March 15, 1963). Italy added to this view by noting that consuls would be prevented from discharging their basic protective functions unless they were notified that one of their nationals had been arrested. U.N. Doc. A/CONF.25/C.2/SR.17, at 3 (March 17, 1963).

174 *See* Colin Warbrick, *Protection of Nationals Abroad*, 37 INT'L & COMP. L.Q. 1002, 1003 (1988).

by accused foreigners,"[175] which can include unfamiliarity with the foreign language and legal system. Consular notification is also viewed as an important measure to prevent maltreatment of a detainee. When they are in the power and physical custody of a foreign state, nationals may be most at risk of torture or inhuman treatment, "for which *ex post facto* remedies are scarcely adequate."[176] A right of access of third parties to persons in detention became viewed as an important deterrent to such mistreatment.[177] Indeed, consular notification has frequently been considered important to ensure not just adequate treatment, but, in fact, *better* treatment than an individual detainee would otherwise receive in the foreign system.[178] In the case of disparate legal systems, the consular function serves to mediate between a mature criminal justice system (that of the sending state) and a less mature foreign legal system with fewer general procedural protections or fewer protections for foreigners in which the national of the sending state would be particularly vulnerable to unfair or unequal treatment.[179]

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175 S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 ST. MARY'S L.J. 719, 721 (1995); *see also* Uribe, *supra* note 169, at 387 ("Consular functions aim to protect the interests of the sending state and its nationals.").

176 *See* Shank & Quigley, *supra* note 175, at 736; Uribe, *supra* note 169, at 395.

177 *See* Shank & Quigley, *supra* note 175, at 736–37.

178 Consular officers of the United States are required to visit American expatriate prisoners on a regular basis. *See* U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS 42 (1998) [hereinafter STATE DEP'T INSTRUCTIONS], *available at* http://travel.state.gov/pdf/CNA_book.pdf (noting that an important function of the consulate is to provide "assistance to citizens who are detained by foreign government" by "visiting them in prison *to ensure that they are receiving humane treatment*" (emphasis added)).

179 I do not mean to suggest that all mature criminal justice systems within generally democratic countries have equal levels of procedural protections. Nor do I mean to suggest that the criminal justice systems of the developed democracies are problem free. The point here is that the consular function traditionally mediated between the system of the sending state and the receiving state. The notification and access provisions of the VCCR may be less compelling for a foreign national of a sending state with an abysmal system of criminal procedural protection who finds herself in, for example, Sweden. *See* U.S. DEP'T OF STATE, 109TH CONG., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2004: SWEDEN § 1(c)–(e) (Comm. Print 2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41710.htm (noting that Sweden fully complies with international protections against torture or other cruel, inhuman and degrading treatment, has a fair and independent judiciary that guarantees fair trials, and is a country where arbitrary arrests and detention generally do not occur). But even Sweden, for all its advantages, is not perfect. *Id.* § 2(c) ("According to police statistics, the number of reported anti-Semitic hate crimes has increased since the end of the 1990s.").

Already in the mid-1970s, the United States articulated its support of these rationales for the notification provision of the VCCR. Article 36 was specifically cited as an essential tool for effective protection of U.S. citizens abroad, one which served as a deterrent (though by no means a perfect one) against abuse in countries with little to no protection from abuse within their criminal justice systems.[180] Among the particular concerns of the United States was the danger of coerced statements during detention.[181] Arbitrary or draconian application of the death penalty—particularly for less severe crimes which the United States did not consider warranting capital punishment (for example, drug smuggling) also raised the need for early consular notification. The United States viewed the necessary leverage for protesting bad practices and ultimately protecting individuals as emanating from the early consular or diplomatic (i.e., political) intervention afforded by notification. Diplomatic or political intervention is carried out almost exclusively by the Executive, but at least one recent high-profile case involved direct intervention by a Senator.[182]

Consular notification thus holds out the promise of subsequent *extra* protection of diplomacy and political interference. Although it is never explicitly discussed in the legal analysis of the consular function, diplomatic interference is the dimension that is most salient to Americans when they travel overseas. In the event of a miscarriage of justice, many Americans believe that their own government will go to extreme measures, throwing its reputation and clout behind their cause until justice is served.[183] Despite the occasional well-publicized

180 *See U.S. Citizens Imprisoned in Mexico: Hearings Before the Subcomm. on International, Political, and Military Affairs, Part 2*, 94th Cong. 6 (1975) (statement of Leonard F. Walentynowicz, U.S. Dep't of State) (stating that "a particular issue of prime importance is that of denied or delayed consular access," and that "[w]ith early access to each prisoner we are convinced we can go a long way toward guaranteeing the prisoner against mistreatment and *forced statements at the time of arrest*" (emphasis added)).

181 *Id.*

182 Article II of the U.S. Constitution notes that the President shall receive ambassadors and consuls. U.S. CONST. art. II, § 3, cl. 3. The House and Senate often become involved in high-profile cases. *See, e.g.*, S. Res. 148, 104th Cong., 141 CONG. REC. 18063–64 (1995) (discussing the arrest of Harry Wu, an American citizen and human rights activist arrested on political charges in China). Releases of American citizens held on political charges have been secured after sustained diplomatic pressure. *See* Elisabeth Rosenthal, *China Frees U.S. Citizen Held Since April on Spy Charges*, N.Y. TIMES, Sept. 29. 2001, at A4; *see also* Jeff Leeds & Sharon Waxman, *For a Music Maker in Hot Water, Help From Friends in High Places*, N.Y. TIMES, July 8, 2006, at A1, B13 (detailing the intervention of Senator Orrin Hatch to help secure the release of music producer Dallas Austin from jail in Dubai, where he had been arrested for cocaine possession).

183 For an early example of where this did happen, see *Meade v. United States*, 76 U.S. 691, 693 (1869) (discussing the imprisonment in Spain of U.S. citizen Richard

successful interventions, they are, in reality, the least likely outcome for average Americans charged with ordinary crimes overseas, even where the sentence for that crime might be harsher than it would be in the United States.[184]

The rationales for notification and access went beyond these practical considerations. The VCCR entered into force during a time of increased legalization of international human rights. The aspirational goals of the U.N. Charter[185] and the Universal Declaration of Human Rights,[186] which set standards of treatment of individuals, were supplemented by more formal human rights agreements such as the International Covenant on Civil and Political Rights (ICCPR),[187] the International Covenant on Economic Social and Cultural Rights (ICESCR),[188] the Inter-American Declaration on the Rights and Duties of Man,[189] and the European Convention on Human Rights Charter.[190] These human rights instruments included provisions protecting individuals facing criminal prosecution and also required nondiscrimination on the basis of nationality.[191] Through incorporation into these multilateral human rights instruments, the fair treatment of foreign nationals by one state became a concern not just of the national's home state acting under its sovereign prerogative to extend protection to its citizens overseas, but of all members of the international community. Indeed, the codification of notification and access under Article 36 of the VCCR was explicitly seen by some delegates to the VCCR conference as part of the broader project to enumerate and codify human rights protections. The delegate from Greece, for example, noted that by incorporating the right of notifica-

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Meade in 1816 who was "finally released only by reason of the active interposition of the government of the United States in his behalf").

184 *See, e.g., 48 Hours Mystery: Lori Berenson Speaks*, (CBS television broadcast Oct. 19, 2000), *available at* http://cbsnews.com/stories/2000/10/18/48hours/main242175.shtml (describing the background of Lori Berenson, an American sentenced to life in a Peruvian prison after being convicted of involvement with a terrorist group).

185 U.N. Charter art. 1.

186 Universal Declaration of Human Rights, *supra* note 124.

187 ICCPR, *supra* note 24.

188 International Covenant on Economic, Social, and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3, 5 (entered into force Jan. 3, 1976).

189 American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Official Rec., OEA/Ser./L./V./II.23, doc. 21 rev. 6.

190 Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 135, art. 6, 213 U.N.T.S. 228; *id.* art. 14, 213 U.N.T.S. 232.

191 *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 135, arts. 1–14, 213 U.N.T.S. at 224–32; ICCPR, *supra* note 24, arts. 24, 26.

tion and access into the treaty, the conference was "following the present-day trend of promoting and protecting human rights, for which future generations would be grateful."[192]

In 1985, the U.N. General Assembly adopted "The Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live,"[193] which provides, in part, that "[a]ny alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national."[194] This declaration merged the norm of nondiscrimination against foreign nationals found in the central human rights treaties with the notification provisions of the VCCR and customary international law. As a General Assembly resolution, the Declaration is not binding as a matter of international law, but it succeeds in reframing the notification right as one of an individual right of the foreign national. By reading the declaration together with the VCCR, it is possible to conclude, as Warbrick did, that the "interest of the individual in consular protection is, in some of its aspects, a personal right and not a matter of concern only to the two States."[195]

By the late 1980s, the notification and assistance requirement of Article 36 became viewed as supplemented by other international human rights standards, in particular, by ICCPR Article 14, which details the criminal procedure protections owed individuals. The ICCPR thus served to give content to the rights understood to constitute the "international minimum standard" of treatment required for foreign nationals.[196] This view of the consular function thus signaled a subtle shift from the traditional view as mediating between two sovereigns—i.e., between the legal system of the sending state and that of the receiving state—toward mediation between an international standard and that of the receiving state.

Despite the practical and human rights-based rationales of consular intervention that underlie the notification and access provisions, as Warbrick notes, "nowhere is there an indication that the individual

192 *See* 1 U.N. Conference on Consular Relations, 2d Comm., 17th mtg. at 339, U.N. Doc. A/CONF. 25/16 (Mar. 15, 1963) (remarks of the Greek delegate, Mr. Spyridakis).

193 G.A. Res. 40/144, U.N. Doc. A/40/53 (Dec. 13, 1985). The General Assembly later adopted standards applicable to all individuals facing detention. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. Doc. A/43/49 (Dec. 9, 1988).

194 G.A. Res. 40/144, *supra* note 193, art. 10.

195 Warbrick, *supra* note 174, at 1004.

196 *Id.* (citing Geoffrey Marston, *United Kingdom Materials on International Law 1986*, 57 BRIT. Y.B. INT'L L. 487, 605 (1986)).

has a right to demand that his consulate takes steps to visit him and secure services for him."[197] Rather, to the extent that an individual right is created by the notification and access requirement, it is a right fully contingent on the decision of the sending state to maintain a consular presence and also the willingness or ability of the consul of the sending state to accept the notification and render assistance. It cannot, for example, be compared to the right to counsel in the United States.[198] Unlike the provision of counsel in the oft-recited Miranda statement, if a consul is not available, none will be provided to the foreign detainee.[199] Consular representation—and thus the intervention on which the rationales for notification are premised—remains an expression of the sovereign prerogatives of the sending state.[200]

B. Enforcement and Remedies

Given the contingent nature of the right, it is thus not terribly surprising that state signatories barely contemplated the possibility of a judicial remedy in cases of a failure to notify. Judicial enforcement of individual rights created under the VCCR is not directly mentioned in the *travaux préparatoires* (negotiating history) of the Convention.[201] The U.S. State Department's view was that enforcement of the rights and obligations created under the treaty rested primarily with the

197 *Id.*

198 *See* Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (deciding that indigent defendant in a criminal prosecution has the right to have counsel appointed to him or her).

199 In practice, this can be a real problem for nationals of poor countries who find themselves in countries with little or no consular representation.

200 Several countries have adopted national legislation that requires their consular officers to render assistance. *See, e.g.*, 22 U.S.C. § 1732 (2000) ("Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, *it shall be the duty of the President* forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, *the President shall forthwith demand the release* of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release . . . .") (emphases added); Foreign Missions and International Organizations Act, 1991 S.C., ch. 41 (Can.).

201 *See* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1 (Mar. 31), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imusjudgment/imus_imusjudgment_20040331.pdf (describing how the United States disagreed with the notion that the VCCR required a judicial remedy for a failure of immediate notification and that "such an understanding was supported neither by the terminology, nor by the object and purpose of the Vienna Convention, nor by its travaux préparatoires").

state signatories and that remedies were limited to diplomacy or interstate dispute resolution; the treaty did not create a judicially cognizable individual right.[202] Moreover, the U.S. view reflected a broad international consensus.[203] During the period 1969–1989, none of the state parties to the VCCR took the position that judicially cognizable rights were created under the treaty.[204]

Because the VCCR was ratified by the Senate as a self-executing treaty, no subsequent legislation was necessary to give it full legal effect within the United States.[205] Congress did not pass any legislation that would provide specific guidance requiring federal law enforcement agents to follow Article 36.[206] The State Department continued to issue guidance to consular officers overseas about the scope of their duty to assist American citizens.[207] The Immigration and Naturalization Service (INS) adopted a rule in 1979 that required INS officials to comply with Article 36 when detaining foreign nationals.[208] The De-

202 *See* State v. Sanchez-Llamas, 108 P.3d 573, 579 (2005) (noting that the conclusion that the VCCR does not create an individual right is "confirmed by the fact that, since at least 1970, the State Department has maintained that the VCCR does not create enforceable individual rights").

203 The record of the conference contains no discussion of justiciability of the right of notification. There are, however, several references by delegates to the VCCR as a means to protect "individual" rights. *See, e.g.*, 1 U.N. Conference on Consular Relations, 2d Comm., 16th mtg. at 337, U.N. Doc. A/Conf.25/16 (Mar. 15, 1963) (quoting U.S. delegation, speaking in support of proposed amendment to require notification only at the informed request of the detainee and explaining that the purpose of Article 36, as eventually adopted, was to benefit the detainee and "to protect the rights of the national concerned").

204 *See* Counter-Memorial of the United States, LaGrand Case (F.R.G. v. U.S.), 2000 I.C.J. Pleadings 64–68 (Mar. 27), paras. 76, 97.

205 *See* S. EXEC. REP. NO. 91-9, app. at 5 (1969) (statement by Deputy Legal Adviser J. Edward Lyerly) (describing how the treaty was "entirely self-executive [sic] and does not require any implementing or complementing legislation"); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. 1, ch. 2, intro. n. at 41 (1987) (noting that "[u]nder the Supremacy Clause, self-executing treaties concluded by the United States become law . . . as of the time they come into force for the United States"); *id.* § 111(3) (describing how a "'non-self-executing agreement' will not be given effect as law in the absence of necessary implementation").

206 *See infra* text accompanying note 426.

207 *See* 1 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL §§ 420–22 (2004), *available at* http://foia.state.gove/regs/search.asp (describing the importance of gaining access to a citizen arrested abroad).

208 8 C.F.R. § 242.2(e) (1979). The instructions required the INS office to inform the detained national of the right to consular notification. *Id.*; *see also* Shank & Quigley, *supra* note 175, at 738 ("Apart from the immigration instructions, no other federal administrative directive pertaining to consular access for foreigners in the United States exists."). This included no instructions to Department of Justice attorneys and United States Attorney's offices regarding the notification provisions. By

partment of Justice and the military had adopted consular notification guidelines prior to the VCCR and updated them subsequent to the adoption of the VCCR.[209] None of these regulations provided specifically for judicial review, beyond what would otherwise be available through the administrative review process.[210] At the state and municipal level, there was a general lack of administrative guidance on the notification provisions for law enforcement personnel. Police training on procedures did not include training on the VCCR.[211] State and local police forces thus operated in blissful ignorance of the requirement, with the result that noncompliance was widespread.[212]

The Optional Protocol of the VCCR did, however, provide for the adjudication of interstate disputes arising between state signatories before the ICJ. Until the *Breard* case in 1998,[213] jurisdiction of the ICJ to decide a case under the VCCR had been invoked only once, in the case of the taking of American hostages in Tehran in 1979.[214] Currently, 172 states are signatories to the VCCR.[215] And yet there have been only four applications, including *Breard*, brought under the Op-

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contrast, the U.K. by the mid-1990s had "issued instructions to police that detained foreigners, regardless of their states of nationality, 'may communicate at any time' with their consulate and that they must be asked if they wish the police to inform their consulate of their detention." *Id.* at 738 (citation omitted).

209 *See, e.g.*, 28 C.F.R. § 50.5 (1999); *see also* Mark Warren, Consular Notification: Statutory and Regulatory Provisions, July 2006, http://www3.sympatico.ca/aiwarren/compliance.htm (referencing a 1983 FBI manual).

210 *See* 8 CFR § 242.2(e) (1979); Shank & Quigley, *supra* note 175, at 738.

211 Shank & Quigley, *supra* note 175, at 739. To be sure, police and law enforcement officials permitted detainees to contact someone. Detainees who were aware of the right to consular access could contact their consulates and police did not generally interfere with those subsequent contacts and communications. *Id.* But it was no substitute for the police informing the foreign national of the right, which may have the additional value of placating any fears on the part of the detainee that contact with the consulate would be construed as hostile by the police. *Id.*

212 *See id.* at 748.

213 *See infra* Part IV.B.4.i. (discussing *Breard*).

214 United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, paras. 45–47, at 24–26 (May 24).

215 *See* VCCR, *supra* note 2, art. 79.

tional Protocol to challenge state violations of the VCCR.[216] Each of these cases raised Article 36 concerns.[217]

Enforcement of the VCCR was therefore largely carried out through classic interstate diplomacy. Violations of the treaty typically were raised by the sending state to the foreign ministry of the receiving state through formal channels, such as presentation of a diplomatic note.[218] For the United States, monitoring of compliance with the notification provision abroad, for example, was and continues to be carried out by State Department representatives.[219] Similarly, foreign states with consular representation in the United States typically lodge their complaints with the Department of State.[220] To the extent that the State Department provides a "remedy" for failure of enforcement by federal, state or local law enforcement authorities, it might be through a formal apology and assurance to the foreign state that steps would be taken to ensure compliance in the future.[221]

Given the view of the signatory states that, while the notification requirement serves to protect individuals, it can only be enforced between states, it is not surprising that few individual VCCR claims were raised in U.S. courts in the first two decades the treaty was in force. Between 1966 and 1994, the VCCR was directly invoked in only nineteen reported state and federal cases; none of them raised a claim

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216 *See, e.g.*, Breard v. Greene, 523 U.S. 371 (1998); Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1 (Mar. 31), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imusjudgment/imus_imusjudgment_20040331.pdf; LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27); *U.S. Staff in Iran*, 1980 I.C.J. 3. The ICJ has also addressed individual rights under a bilateral consular treaty. *See* Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 176, at 178 (Aug. 27).

217 *See Breard*, 523 U.S. at 376; *Avena*, 2004 I.C.J. at 17 (noting how "Mexico based the jurisdiction of the Court on Article 36"); *LaGrand*, 2001 I.C.J. at 470 ("Germany based the jurisdiction of the Court on Article 36."); *U.S. Staff in Iran*, 1980 I.C.J. at 6 (noting that the U.S. government requested that the ICJ "adjudge and declare as follows: . . . that the Government . . . of Iran . . . violated its international legal obligations to the United States as provided by . . . Articles 5 [and] 36").

218 *See* LEE, *supra* note 166, at 93–95.

219 *See* M. Wesley Clark, *Providing Consular Rights Warnings to Foreign Nationals*, FBI L. ENFORCEMENT BULL., March 2002, at 22, 25, (citing 28 C.F.R. § 50.5(a)(1), (a)(3) (2006)), *available at* http://www.fbi.gov/publications/leb/2002/mar02leb.pdf. Clark notes that while 28 C.F.R. § 50.5 discusses consular notification in cases of arrest, it fails to require that notification be made in the case of detention not constituting arrest. *See also* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.173 (2005).

220 *See* LEE, *supra* note 166, at 62–63; STATE DEP'T INSTRUCTIONS, *supra* note 178, at 18.

221 Counter-Memorial of the U.S., *supra* note 204, para. 50; *see infra* Part IV.C.

under Article 36.[222] Several cases were, however, brought under the Immigration and Naturalization Service regulations governing deportation of foreign nationals.[223] In one of those cases, the court held

222 Many of these cases considered questions of consular immunity. Federal cases: Gerritsen v. Consulado General De Mexico, 989 F.2d 340, 346 (9th Cir. 1993) (holding that consul and vice-consul were entitled to immunity under VCCR in § 1983 claim); Risk v. Halvorsen, 936 F.2d 393, 398 (9th Cir. 1991) (explaining that VCCR provides consular officials with immunity in a suit brought by a father whose children were taken to Norway in violation of a U.S. court order); Gerritsen v. de la Madrid Hurtado, 819 F.2d 1511, 1519 (9th Cir. 1987) (holding that wrongful acts committed by officials and employees were not consular functions and so did not qualify for immunity under VCCR); DuPree v. United States, 559 F.2d 1151, 1155 (9th Cir. 1977) (holding that consul did not have standing to intervene under VCCR in a suit filed by Mexican nationals against United States); United States v. Wilburn, 497 F.2d 946, 948 (5th Cir. 1974) (holding that under VCCR, vice consul can be called as a witness and to elect to testify or produce requested documents); Heaney v. Gov't of Spain, 445 F.2d 501, 505–06 (2d Cir. 1971) (holding that consul should be granted immunity under VCCR in civil action based on a public act concerning diplomatic activity); Ford v. Clement, 834 F. Supp. 72, 77 (S.D.N.Y. 1993) (granting immunity to consul-general under VCCR in defamation suit by former vice-consul); United States v. Cole, 717 F. Supp. 309, 323–24 (E.D. Pa. 1989) (holding that consul-general was not entitled to immunity under VCCR for money laundering); Koeppel & Koeppel v. Fed. Republic of Nigeria, 704 F. Supp. 521, 524 (S.D.N.Y. 1989) (finding that consul was immune from suit for providing a foreign national with refuge after he allegedly started a fire). State cases: *In re* Stephanie M., 867 P.2d 706, 712–13 (Cal. 1994) (raising notice requirement in guardianship cases under the VCCR); People v. Corona, 259 Cal. Rptr. 524, 531–32 (Cal. Ct. App. 1989) (finding that defendant not entitled to post-conviction relief for improper admission of consul testimony without waiver of consular immunity privilege); Silva v. Super. Ct., 125 Cal. Rptr. 78, 86 (Cal. Ct. App. 1975) (holding that consul only afforded immunity for official consular matters); Ill. Commerce Comm'n v. Salamie, 369 N.E.2d 235, 237 (Ill. App. Ct. 1977) (forcing honorary consul for another nation to testify to matters not in relation to his functions as honorary consul); Commonwealth v. Jerez, 457 N.E.2d 1105, 1109 (Mass. 1983) (holding that consular officer was immune under VCCR for altercation that occurred during exercise of consular functions); Republic of Argentina v. City of New York, 250 N.E.2d 698, 704 (N.Y. 1969) (exempting premises owned by foreign consul from municipal real-estate taxes); Cocron v. Cocron, 375 N.Y.S.2d 797, 805 (N.Y. Sup. Ct. 1975) (holding that consular officials are only immune from civil suits in relation to official consular matters). For a rare pre-VCCR case on consular notification, see United States v. Coplon, 89 F. Supp. 664, 665 (S.D.N.Y. 1950) (examining a pre-trial motion challenging unreasonable delay in providing consular notification).

223 *See, e.g.*, United States v. Ibarra, 3 F.3d 1333, 1335 (9th Cir. 1993); United States v. Zaleta-Sosa, 854 F.2d 48, 52 (5th Cir. 1988); United States v. Cerda-Pena, 799 F.2d 1374, 1379 (9th Cir. 1986); United States v. Arambula-Alvarado, 677 F.2d 51, 52 (9th Cir. 1982); Tejeda-Mata v. INS, 626 F.2d 721, 726 (9th Cir. 1980); United States v. Bejar-Matrecios, 618 F.2d 81, 82 (9th Cir. 1980); United States v. Hernandez-Rojas, 617 F.2d 533, 535 (9th Cir. 1980); United States v. Vega-Mejia, 611 F.2d 751, 752 (9th Cir. 1979); United States v. Arango-Chairez, 875 F. Supp. 609, 616 (D. Neb. 1994); United States v. Floulis, 457 F. Supp. 1350, 1355 (W.D. Pa. 1978).

that the INS regulation—not the treaty itself—created a personal right.[224]

The original purpose of the consular function, reflecting the desire to strengthen the sovereign prerogative of the sending state to choose to protect its nationals and mediate between the legal system of the receiving state and the home country, or to choose not to protect its nationals at all, was preserved and strengthened by the VCCR regime. The extent to which the VCCR could serve to mediate between the legal system in which a foreign national found himself and the norms of external systems (whether international or that of the sending state) was limited by confining remedies to interstate dispute resolution. The effectiveness of outside consular intervention to alter legal outcomes in particular cases depended as much on the political power of the sending state vis-à-vis the receiving state as it did on the legal requirements of the convention. But by the 1990s, the increased legalization of the international human rights regime, combined with the trend toward the abolition of the death penalty, resulted in a new, more robust VCCR notification requirement that could be exploited by transnational advocacy support networks to affect the actual outcomes in capital cases of foreign nationals.

IV. DEFENDANT "ZERO" AND THE NORM CASCADE

This evolution of consular notification as an expression of sovereign prerogative and a mechanism of mediation between two legal systems to its use as a formal portal through which external human rights norms could enter into a legal system, be elaborated, considered, and ultimately affect outcomes in particular cases, required a defendant "zero." That initial defendant would be the first foreign national to raise the claim of a judicially cognizable individual right arising from the notification provision of VCCR and challenge the denial of consular notification as an infringement on protections from arbitrary and unfair application of the death penalty.

The first case brought under the Article 36 notification provisions of the VCCR was not a criminal case. In *United States v. Calderon-Medina*,[225] the INS detained a Mexican national for deportation on the grounds that his immigration status was irregular. The INS failed to

224 United States v. Rangel-Gonzales, 617 F.2d 529, 532–33 (9th Cir. 1980) (noting that "[t]he right established by the regulation and in this case by treaty is a personal one," while emphasizing "the purpose of the treaty which the [INS] regulation implements, namely to promote assistance to aliens from officials of their country of origin").

225 591 F.2d 529 (9th Cir. 1979).

inform the Mexican national of his right, under INS regulations, to have the consulate notified of his detention and ordered him deported. The Mexican national appealed the order on the basis of the failure to notify him of his right to contact the consulate. On remand back from the Ninth Circuit for a determination of facts,[226] the district court held that the deportation was not precluded by due process. In a companion case, the Ninth Circuit set forth a test for nullification of deportation orders where there was a failure to notify under the regulations implementing Article 36: "(1) the man did not know of his right to contact a consul; (2) he would have contacted a consul had he known of his right; and (3) consular assistance might have improved his chance of avoiding deportation."[227] On the evidence before it, the court voided the deportation order. While this case was not brought in a capital case, the reasoning of the court would prove important to later claims.

A. Faulder v. State[228]

Defendant "zero" was a Canadian national named Joseph Stanley Faulder.[229] Faulder was convicted in Texas state court of a murder that took place in 1975 and was sentenced to death.[230] At the time of his arrest, he was not notified of his right to contact the Canadian consulate.[231] Significantly, Faulder presented no mitigating evidence during the penalty phase of his trial.[232] In September 1991, Sandra

226 *Id.* at 532.

227 Shank & Quigley, *supra* note 175, at 731 (citing *Rangel-Gonzales*, 617 F.2d at 533) (discussing disposition of *Calderon-Medina* on remand from court of appeals).

228 81 F.3d 515 (5th Cir. 1996).

229 For a description of the case from his defense counsel, see Babcock, *supra* note 62, at 374–77. *See also* Mark Warren, *Foreword* to YING-JEN LO, HUMAN RIGHTS LITIGATION PROMOTING INTERNATIONAL LAW IN U.S. COURTS, at xiii–xiv (2005). Warren is a Canadian volunteer for Amnesty International who assisted Sandra Babcock in the Faulder defense. Babcock, *supra* note 62, at 377 n.37. He is also the creator and author of the Web resource Foreign Nationals, Consular Assistance and the Death Penalty, http://www3.sympatico.ca/aiwarren/.

230 *Faulder*, 81 F.3d at 517. Among the procedural twists and turns of Faulder's case was a reversal of his first conviction by the Texas Court of Criminal Appeals on the basis that the admission of Faulder's confession taken in violation of the Fifth Amendment was in error. *Id.* at 517 (citing Faulder v. State, 611 S.W.2d 630 (Tex. Crim. App. 1979)). The second conviction was obtained through testimonial evidence of an accomplice. *Id.*

231 Babcock, *supra* note 62, at 375. Canada maintained a consulate in Dallas, just hours from the place of Faulder's incarceration.

232 His attorneys would later claim that mitigating testimony would have been available, had his family even been aware of the legal proceeding against him. *Id.* But the State of Texas maintained that Faulder did not want to contact his Canadian

Babcock, a staff attorney at the Texas Resource Center, an organization which provided post-conviction relief (primarily through federal habeas proceedings) for indigent capital defendants, took charge of Faulder's appeals.[233] Sometime after Babcock filed the state habeas claim in 1992, an officer of the Canadian consulate informed her about the existence of the VCCR and encouraged her to look into whether the treaty might have applicability in Faulder's case.[234] Babcock amended her state habeas petition to include a claim based on Texas' failure to timely notify the Canadian consulate of Faulder's arrest.[235] The trial court denied the habeas petition and the Texas Court of Criminal Appeals affirmed the denial.[236]

A VCCR claim was subsequently raised in *Santana v. State*,[237] in which a national of the Dominican Republic was convicted of murder in Texas and sentenced to death.[238] There, the failure to notify claim was not raised at trial but was raised shortly before his scheduled execution.[239] The Texas court refused to rule on the VCCR challenge on the ground that it could not confirm that the Texas authorities knew that Santana was a Dominican national.[240] The government of the Dominican Republic filed a petition with the Inter-American Commis-

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relatives. In its subsequent rejection of habeas on the grounds that the VCCR violation did not constitute prejudice, the court relied on "the fact that Faulder maintained from the time of his arrest that he had no desire to contact his family in Canada." Faulder v. Johnson, 178 F.3d 741, 741 n.1 (5th Cir. 1999).

233 John Cary Sims & Linda E. Carter, *Representing Foreign Nationals: Emerging Importance of the Vienna Convention on Consular Relations as a Defense Tool*, CHAMPION, Sept.–Oct. 1998, at 28, 28. Interestingly, a student note published in February 1994 discussed the Faulder case, and made the first argument in the American legal literature that state law enforcement practices should conform with the obligations of the VCCR and that failure to notify should form the basis of review of criminal convictions. Gregory Dean Gisvold, Note, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 MINN. L. REV. 771, 777–78 (1994).

234 Sims & Carter, *supra* note 233, at 28.

235 *Id.*

236 Appellant's Brief at 3, *Faulder*, 178 F.3d 741 (No. 99-20542).

237 714 S.W.2d 1 (Tex. Crim. App. 1986).

238 Adele Shank, a capital litigator, worked on the Santana appeals in late 1992 and early 1993. E-mail from Sandra Babcock, Associate Professor of Law, Northwestern University, to Margaret E. McGuinness, Associate Professor of Law, University of Missouri-Columbia (Sept. 18, 2006) (on file with author).

239 The Dominican Republic did maintain consular offices in the United States at the time of Santana's trial and Dominican law did require consular officers to assist detained Dominican nationals. *See* Shank & Quigley, *supra* note 175, at 723 & nn.18–20 (citing Application for Post-Conviction Writ of Habeas Corpus at 12–13, *Ex parte* Santana, No. 68,930 (Tex. Crim. App. Mar. 19, 1993)).

240 Shank & Quigley, *supra* note 175, at 746.

sion on Human Rights (IACHR) challenging the failure of the United States to provide a remedy for the VCCR violation.[241] The Commission issued a provisional measure requesting that Texas delay the execution of Santana pending hearing the case. Texas did not stay the execution, and Santana was executed as scheduled in 1993.[242] Although the decision in *Santana* was reached prior to the adjudication of the claim in *Faulder*, because Santana was not believed to be a foreign national at the time of his arrest, his case represented a kind of false start.

In *Faulder*, Babcock raised the VCCR claim in a collateral federal case seeking habeas corpus relief.[243] Texas admitted that the Canadian consulate had not been notified at the time of Faulder's arrest.[244] In reviewing the district court's denial of habeas relief, the Fifth Circuit held that there had, in fact, been a violation of Faulder's rights under the VCCR, noting that the Convention "requires an arresting government to notify a foreign national who has been arrested, imprisoned or taken into custody or detention of his right to contact his consul," and that "Canadian regulations require the Canadian consul to obtain case-related information if requested by the arrestee."[245] The court nonetheless denied relief to Faulder on the basis that "Faulder and Faulder's attorney had access to all of the information that could have been obtained by the Canadian government," and was therefore "merely the same as or cumulative of evidence defense counsel had or could have obtained."[246] The Fifth Circuit denied relief and a subsequent request for rehearing en banc and the Supreme Court denied certiorari.[247]

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241 *Id.*, at 746–47 & n.153 (citing Individual Complaint to the Inter-American Commission on Human Rights Against the United States of America on behalf of Carlos Santana, Case 11.130, Inter-Am. C.H.R. (1993)).

242 Shank & Quigley, *supra* note 175, at 747 (noting that a petition to the IACHR was also filed in *Fierro v. State*, 706 S.W.2d 310 (Tex. Crim. App. 1986)).

243 In addition to the VCCR violation, Faulder requested relief on the grounds that the use of special, private prosecutors violated his Eighth and Fourteenth Amendment rights, that the chief witness testified falsely in violation of the Fifth, Sixth and Fourteenth Amendments, and that he received ineffective assistance of counsel. Faulder v. Johnson, 81 F.3d 515, 517 (5th Cir. 1996). The district court had denied relief to Faulder, but issued the required certificate of probable cause required to appeal the denial of habeas. *Id.*

244 *Id.* at 520.

245 *Id.* (citing the VCCR, *supra* note 2).

246 *Id.*

247 Appellant's Brief, *supra* note 236, at 4. Two subsequent state habeas challenges were brought based on the use of the private state prosecutors and the ground that state clemency procedures violated due process. *Id.* at 5–6.

In 1999, twenty-two years after Faulder was put on death row and after two subsequent state habeas appeals were denied,[248] Faulder's attorneys went back to federal court and brought suit under the Alien Tort Statute (ATS)[249] and 42 U.S.C. § 1983.[250] The suit included two claims: First, that living through nine execution dates and repeated stays of execution amounted to psychological torture that was a violation of his constitutional rights within the meaning of § 1983 and also represented a violation of the Torture Convention,[251] which is the "law of nations" within the meaning of the ATS;[252] and second, that the failure of consular notification violated the VCCR and was thus also a tort within the meaning of the ATS.[253] The first claim was dismissed on the grounds that neither § 1983 nor the ATS provided an exception to the Anti-Injunction Act[254] restrictions on the ability of federal courts to enjoin state proceedings.[255] The district court further denied Faulder's request for a temporary restraining order on the grounds that the underlying claim of psychological torture under the Eighth Amendment and the Torture Convention had been held not to create grounds for relief on the basis of the psychological impact of stays of execution and the drawing out of time on death row.[256] The court rejected the second claim as barred by collateral estoppel on the ground it had been actually litigated and decided in the earlier Fifth Circuit habeas opinion.[257] The district court noted in dicta, however, that it disagreed with the defendant's claim that violations of the VCCR do not create an individual right.[258] The court noted that the Fifth Circuit's earlier opinion in *Faulder* was premised

248 *Id.*

249 28 U.S.C. § 1350 (2000).

250 Faulder v. Johnson, 99 F. Supp. 2d 774, 775 (S.D. Tex. 1999).

251 Convention Against Torture, *supra* note 25.

252 *Faulder*, 99 F. Supp. 2d at 775 (quoting 28 U.S.C. § 1350).

253 *Id.* at 775.

254 28 U.S.C. § 2283.

255 *Faulder*, 99 F. Supp. 2d at 776. The court rejected Faulder's claim that his § 1983 claim fell within one of the expressly authorized exceptions to the Anti-Injunction Act. *Id.* at 776–78.

256 *Id.* at 777 (citing White v. Johnson, 79 F.3d 432 (5th Cir. 1996)). In *White*, the Fifth Circuit found that claims under both the ICCPR and the Torture Convention would fail, in that the United States signed reservations to both treaties that limited their protection to whatever treatment is barred by the Eighth Amendment. *White*, 79 F.3d at 439.

257 *Faulder*, 99 F. Supp. 2d at 778.

258 *Id.*

on the ability to assert an individual right,[259] and also that the Ninth Circuit had held that the VCCR created an individual right.[260]

On June 16, 1999, the Fifth Circuit denied Faulder's appeal from the district court's dismissal.[261] Faulder was executed the next day.[262]

Canada had requested a list of all Canadian nationals on Texas' death row every year of the first fourteen that Faulder was on death row, but Faulder's name never appeared on the list.[263] Once they were informed of Faulder's incarceration and death sentence (which they learned from Babcock in 1992), the Canadian government, public at large, and individual Canadian advocates became involved in efforts to commute his sentence.[264] The federal habeas petition included affidavits and testimony from witnesses in Canada in his support, along with an amicus brief filed by the Government of Canada.[265] Delegations of Canadian parliamentarians met with the Texas Pardons Board.[266] Canadian Foreign Minister Lloyd Axworthy met personally with Secretary of State Madeline Albright and requested that she intervene in the case.[267] Albright's only intervention in the case occurred in November 1998, following one of the many stays of Faulder's execution date, in the form of a letter to then-Governor George W. Bush in which she noted the importance of consular notification to the protection of American citizens abroad, adding that, while it was the position of the United States Government that Faulder was not entitled to a *judicial* remedy, the circumstances of the failure of notification in his case might warrant the political solution of clemency relief.[268] Bush denied clemency, but the federal govern-

259 *Id.*

260 *Id.* (citing Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996) and United States v. Lombera-Camorlinga, 170 F.3d 1241, 1243 (9th Cir. 1999)).

261 Faulder v. Johnson, 178 F.3d 741, 742 (5th Cir. 1999).

262 Death Penalty Information Center, Confirmed Foreign Nationals Executed Since 1976, http://www.deathpenaltyinfo.org/article.php?scid=31&did=582#executed (last visited Oct. 14, 2006).

263 Babcock, *supra* note 62, at 375.

264 *Id.* at 375–76.

265 *Id.* at 375. The Canadian government had also filed briefs in support of Faulder in his state proceedings. *Id.*

266 *Id.*

267 *Id.*

268 *Id.* at 376 (quoting Letter from Madeleine K. Albright, U.S. Sec'y of State, to George W. Bush, Governor, State of Tex. (Nov. 27, 1998)). Albright noted specifically that over 300 Texans were incarcerated in foreign prisons in the prior calendar year. *Id.*

ment set the stage for an eventual outcome it explicitly did not support: judicial remedy.[269]

Canada did not neglect the potential "vertical" legal processes available to it. Following his final stay of execution during the pursuit of remedies in Texas and federal court, Faulder filed a petition with the Inter-American Court of Human Rights (IACtHR) "arguing that Texas had subjected him to cruel, inhuman or degrading treatment" in violation of the Torture Convention, the ICCPR and the American Declaration of the Rights and Duties of Man.[270] The gravamen of this complaint is known as the "death row phenomenon," the idea that mere presence of death row and the uncertainty of the ultimate time of death represents a unique psychological trauma on the inmate.[271] The IACtHR issued precautionary measures requesting the United States to stay the execution pending resolution of his claim.[272] That request was ignored and Faulder was executed.[273]

The press played a significant role in the nongovernmental processes. Editorials ran in the major U.S. and Canadian papers supporting commutation of Faulder's death sentence.[274] The abolitionist network, which has developed excellent domestic organizational capabilities, inundated the Texas Board of Pardons and Paroles with over 4,000 letters supporting commutation.[275] As Faulder's attorney noted, all of the separate and concerted governmental, NGO and private acts that took place to prevent Faulder's execution failed in one important regard: Texas executed Faulder.[276] But the broader effects of the case were felt in Canada, where public support for the death penalty dropped following the last stay of Faulder's execution in 1998.[277]

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269 Faulder's attorney subsequently discovered that some members of the Texas Pardons Board had voted without reviewing the letter from Albright, which became the basis for a challenge to the clemency decision. *Id.* at 377.

270 *Id.* at 376.

271 Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 766 n.147 (2005).

272 Babcock, *supra* note 62, at 377.

273 *Id.*

274 *Id.* at 375. *See, e.g.*, Editorial, *Gallows Watch: Canadian's Death Sentence Should Be Commuted to Life*, DALLAS MORNING NEWS, June 15, 1999, at 12A; Editorial, *Stan Faulder's Execution*, TORONTO STAR, June 18, 1999, at ed. 1; Paul Stanway, *Faulder Execution Doesn't Make Case*, CALGARY SUN, June 20, 1999, at C6; Editorial, *Texas and International Law*, N.Y. TIMES, Dec. 9, 1998, at A28 (arguing that the Texas Pardons Board should commute Faulder's death sentence to life in prison).

275 Babcock, *supra* note 62, at 375.

276 *Id.* at 377.

277 *Id.* (citing Janice Tobbetts, *Support for Death Penalty Falls*, MONTREAL GAZETTE, Dec. 31, 1998, at A3).

Also significant in this narrative of norm transfer is that, in the 1996 case, the Fifth Circuit adopted Babcock's framing of the VCCR notification provision as a right belonging to the criminal defendant thus providing a basis for challenge to all criminal convictions in which the right was denied.[278] The challenge for criminal defendants was coming up with ways in which denial of the right would rise to the level of a violation of well-settled criminal due process, such as voluntariness of confessions and the right to effective assistance of counsel that could be raised in direct appeals or collateral challenges. These avenues of argument remain open post-*Sanchez-Llamas*.

What is unusual in this case is that the spark igniting the "discovery" of the VCCR came from a traditional state actor, the government of Canada, interacting with a domestic criminal defense attorney.[279] In some ways, the story of the VCCR and the death penalty follows the traditional narrative of the consular function for expatriates in foreign lands. The consular function serves to mediate between the domestic legal system (here, a Canadian system in which the death penalty was illegal and no executions had been carried out since 1962[280]), and the foreign system (the criminal justice system of the State of Texas which executed thirty-seven prisoners in 1997[281]) which the national government does not fully control. But it does so in a nontraditional way.

The groups that are traditionally considered "norm entrepreneurs" in international human rights—the well-established transnational NGOs and high-profile legal academics—became involved after the spark from the government of Canada and their work, in turn, further energized the official position of Canada. Amnesty International was actively involved in Faulder's case starting in spring 1992, supporting Babcock with governmental lobbying, publicity and research.[282] The Canadian government was actively engaged in traditional diplomatic appeals to the U.S. government and explicitly sought clemency.[283] Only after concerted lobbying by NGOs and aca-

278 Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996).

279 Sims & Carter, *supra* note 233, at 28.

280 Amnesty Int'l, The Death Penalty in Canada: Twenty Years of Abolition (Apr. 2000), http://www.amnesty.ca/deathpenalty/canada.php. The death penalty was abolished in Canada by an Act of Parliament in 1976. It was retained for only extreme military crimes until 1998 when it was removed from the National Defense Act. No military execution had taken place since the late 1940s. The last civilian execution took place in Canada in 1962. *Id.*

281 Tex. Dep't of Justice, Texas State Executions by Year (Sept. 13, 2006), http://www.tdcj.state.tx.us/stat/annual.htm.

282 Babcock, *supra* note 62, at 375–76.

283 *Id.*

demics did the government of Canada agree to engage in legal actions, such as filing amicus briefs.[284]

The consular function was not the only way in which a formal procedural mechanism had served to mediate between U.S. and Canadian law on the death penalty. The Supreme Court of Canada in 2001 cited what it perceived to be the arbitrary application of the death penalty in the United States in an opinion refusing extradition of persons sought in the United States on capital charges.[285] Up to that point, Canada had been willing to extradite individuals found in Canadian territory who were wanted on capital charges in the United States,[286] even though the terms of the U.S.-Canada extradition treaty would have permitted it to refuse if the United States failed to provide on request "such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed."[287] The Canadian government had not uniformly requested such assurances.

The Canadian courts had been generally deferential to the discretionary decision of the government to extradite.[288] In the *Burns* case, however, the Canadian government had chosen to extradite two men wanted for capital murder charges in the state of Washington.[289] In deciding the appeal of the extradition, the Canadian Court specifically held the U.S. capital punishment practices to be arbitrary, in that innocent persons had a substantial chance of being executed.[290] The Canadian Court cited a *Chicago Tribune* study concluding that a number of persons on Illinois death row were, in fact, innocent,[291] a U.S. Department of Justice study demonstrating a racial disparity in the application of the death penalty,[292] and the American Bar Association's call for a moratorium on the death penalty on the grounds of inadequate capital representation and racial and socio-economic bias in sentencing patterns.[293]

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284 E-mail from Mark Warren, Dir. of Human Rights Research, Amnesty Int'l, to Margaret E. McGuinness, Assoc. Professor of Law, Univ. of Missouri-Columbia (July 20, 2006) (on file with author) [hereinafter Warren e-mail].

285 United States v. Burns, [2001] S.C.R. 283, 287–88.

286 *See* Kindler v. Can. (Minister of J.), [1991] S.C.R. 779, 780–84; Reference Re Ng Extradition (Can.), [1991] S.C.R. 858, 859–60.

287 Treaty on Extradition, U.S.-Can., art. 5, Dec. 3, 1971, 27 U.S.T. 983.

288 Quigley, *supra* note 149, at 184–85.

289 *Burns*, [2001] S.C.R. at 284–85.

290 *Id.* at 287–88.

291 *Id.* at 343–44.

292 *Id.* at 344–45.

293 *Id.* at 342. The Court did not go so far as to conclude that there was "an international law norm against the death penalty, or against extradition to face the

Because it found the death penalty as practiced in the United States to be arbitrary, it further found that extradition would run afoul of Canadian constitutional protection against the deprivation of life "except in accordance with the principles of fundamental justice."[294] In the context of extradition, the Court held that the Canadian government was required to "ask for and obtain an assurance that the death penalty will not be imposed as a condition of extradition."[295] This decision has been characterized as "a serious embarrassment to the United States,"[296] but it can be seen as one of the ways foreign courts serve as actors in the process of horizontal international norm transmission. Further, the case had been supported in Canada by an informal coalition of NGOs, academics, and attorneys who were actively looking for a test case to challenge the Court's previous decision[297] that had found no impediments to extraditions of capital defendants to the United States.[298] It also demonstrates that "norm portals" serve as two-way valves, allowing the import or export of norms that are seen as rights-expanding, and preventing the import or export of norms that are seen as rights-restricting.

The discussion between Babcock, a criminal defense attorney, and a consular officer of the Canadian government set off a chain of events that led, ultimately, to adjudication at the IACtHR,[299] the ICJ[300] and the U.S. Supreme Court[301] and to diplomatic tensions between the United States and its two most important economic partners—Mexico and Canada.

B. The Transnational Advocacy Support Network

As noted earlier, "support structures for legal mobilization" are often the key independent variable in norm cascades.[302] The *Medellín*

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death penalty" but instead found "significant movement towards acceptance internationally of a principle of fundamental justice that Canada has already adopted internally, namely the abolition of capital punishment." *Id.* at 287.

294 *Id.* at (quoting Canadian Charter of Rights and Freedoms, art. 7).

295 *Id.* at 360.

296 Quigley, *supra* note 149, at 185.

297 Kindler v. Can. (Minister of J.), [1991] S.C.R. 779, 782.

298 Warren e-mail, *supra* note 284.

299 The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, 1999 Inter-Am. Ct. H.R. (Ser. A) No. 16 (Oct. 1, 1999).

300 Avena and Other Mexican Nationals (Mex. V. U.S.), 2004 I.C.J. 1 (Mar. 31), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imusjudgment/imus_imusjudgment_20040331.pdf.

301 Medellín v. Dretke, 544 U.S. 660 (2005).

302 *See supra* note 55 and accompanying text.

line of cases was no exception. A transnational network of human rights activists, NGOs, defense lawyers, and, most notably, foreign governments, carried out a concerted and coordinated effort to bring the U.S. criminal justice system into conformance with the abolition of the death penalty. These "norm entrepreneurs" tactically adopted the VCCR as part of a broader global strategy of abolition. To be sure, some of the members of this network were at different times motivated by additional concerns, including holding the United States to account for its international obligations at a time when the unipolarity of U.S. power was difficult to counterbalance. Nonetheless, the network worked centrally toward overturning capital convictions and preventing future death sentences.[303]

1. The Capital Defense Bar

The capital defense bar was the first line in the norm integration. In addition to the connection with and access to the broad transnational abolitionist movement that represented the advocacy support network in these cases, capital defenders are amenable to novel arguments of law.[304] Their clients have nothing left to lose by such strategies. Thus, it was the capital defense bar that began in earnest the efforts to have U.S. courts consider foreign and international practices in cases challenging the juvenile death penalty[305] and execution of the mentally retarded.[306] Looking for any tool to prevent or overturn a death conviction, the bar stumbled on the VCCR, which at least would provide additional leverage in cases of foreign nationals.

Whatever the real or perceived value, as one commentator has observed, "[i]n the mid-1990s, criminal defense attorneys discovered

303 Only after the initial wave of *Medellín* cases did advocates seek noncapital cases to test the more doctrinal question of the enforceability of an ICJ opinion. *See* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2684 (2006) (rejecting argument that ICJ decisions are binding and affirming conviction of defendant for attempted murder and other felony offenses).

304 *See* ANNE JAMES ET AL., BRIDGING THE GAP: EFFECTIVE REPRESENTATION OF FOREIGN NATIONALS IN U.S. CRIMINAL CASES (2005), *available at* http://internationaljusticeproject.org/pdfs/BridgingtheGap2nd.pdf (giving examples of how attorneys were and are instructed in these claims).

305 *Cf.* Roper v. Simmons, 543 U.S. 551, 575–79 (2005) (acknowledging overwhelming global opposition to imposing the death penalty against juveniles).

306 *Cf.* Atkins v. Virginia, 536 U.S. 304, 316 n.20 (2002) (noting that imposing the death penalty on the mentally retarded is "overwhelmingly disapproved" internationally).

the Vienna Convention on Consular Relations."[307] Indeed, an article from 1995 arguing that the VCCR was essential to providing adequate criminal defense for foreign nationals noted the value of this "discovery" for criminal defense lawyers:

> Thus far, courts have given little attention to protecting the right of consular access. The lack of attention stems in part from the fact that attorneys are often unaware of this right and . . . fail to raise it at trial or to assign the denial of consular access as error in the initial appeal.[308]

The right of consular access was viewed as "a linchpin for the effectuation of other rights in the criminal process."[309]

The explicit advice to capital defenders was to develop strategies in criminal cases against foreign nationals that would "show prejudice" from the failure to notify:

> Drawing on the lessons we can distill from *Breard*, *Rangel-Gonzales* and *Faulder*, defense counsel should develop a record that specifically demonstrates what the foreign consul would do that a defense attorney would not have been able to accomplish. The court decisions . . . reflect the view that consular assistance for actions that the defense attorney could have taken is insufficient for prejudice. Thus, it is important to emphasize the resources and special expertise of the consulate. If the foreign consul would have helped with financial resources for investigation, for example, the record could reflect the additional people who would have been interviewed, the additional trips to the defendant's home country that defense counsel would have used to assist in the defense, or the additional experts who would have been retained.[310]

This advice included, significantly, ways in which the role of the consular officer could be distinguished from the role of defense counsel, for example, in explaining the importance of the right to remain silent within the American system or the risks inherent in going to trial versus accepting a plea arrangement.[311] Advocates argued that the notification provision was important to help overcome discrimination based on alienage, particularly in capital cases where the prosecu-

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307 Linda E. Carter, *Compliance with ICJ Provisional Measures and the Meaning of Review and Reconsideration under the Vienna Convention on Consular Relations:* Avena and Other Mexican Nationals (Mex. v. U.S.), 25 MICH. J. INT'L L. 117, 119 (2003).

308 Shank & Quigley, *supra* note 175, at 727.

309 *Id.* at 752.

310 Sims & Carter, *supra* note 233, at 58.

311 *Id.*

tion, judge and jury enjoy considerable discretion.[312] The criminal defense bar began to frame the consular notification provision as designed "[t]o compensate for the disadvantages experienced by accused foreign nationals,"[313] which would appeal to basic judicial notions of fairness and fair play. An advocacy discussion from 1995 shows how this was accomplished:

> Foreign nationals arrested in the United States confront this disadvantage [of alienage] in several ways. In most cases, they are unfamiliar with U.S. customs, police policies, and criminal proceedings. For instance, an accused from Latin America would be familiar with the Napoleonic-style legal system, which differs significantly from practices in the United States. A foreigner may also be particularly vulnerable to deception used by police detectives as a standard interrogation technique. Moreover, an accused from a country with an authoritarian government may anticipate torture or retaliation against family members; thus, even cajoling statements by police interrogators may evoke fear.[314]

In death penalty cases, this perceived marginal advantage of consular notification became important.

As a result of this discovery of the VCCR taking place within criminal defense circles, early writing in the United States about the VCCR originated not with the kinds of public international law scholars who filed amicus briefs in *Medellín* debating whether Article III courts should have a role in giving effect to an international court judgment, but with practicing local criminal defense lawyers who joined up with foreign governments and international human rights advocates.[315] International human rights professors were eventually recruited to join that network, to identify ways to increase VCCR compliance and ways to develop arguments about noncompliance that could be used in death penalty cases.[316]

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312 Shank & Quigley, *supra* note 175, at 739–40; *see also supra* notes 292–93 and accompanying text (discussing racial disparities in capital sentencing).

313 *See* Logene L. Foster & Steven Doggett, *Vienna Convention: New Tool for Representing Foreign Nationals in the Criminal Justice System*, CHAMPION, Mar. 1997, at 16, 16.

314 Shank & Quigley, *supra* note 175, at 720.

315 *See* Robert F. Brooks & William H. Wright, Jr., *States Deny Treaty Rights to Foreign Defendants*, NAT'L L.J., Nov. 4, 1996, at B8 (Brooks and Wright are practicing attorneys who represented Mario Murphy and were very active in mobilizing and informing the legal community); Foster & Dogget, *supra* note 313, at 18 (noting that Foster and Doggett practice criminal defense law); Warren e-mail, *supra* note 284. Shank and Quigley are law professors, as are Sims and Carter. Sims and Carter's article in CHAMPION, *supra* note 233, was addressed to the defense bar.

316 E-mail from William Aceves, Professor of Law and Dir. of the Int'l Legal Studies Program, Cal. W. Sch. of Law to Margaret E. McGuinness, Assoc. Professor of Law,

2. Foreign States as Agents: Litigation and Advocacy

The *Medellín* line of cases points out the important role abolitionist foreign states have played in chipping away at the death penalty in the United States.[317] States acted in a variety of roles: as traditional unitary instrumental actors, promoting their interest in political, diplomatic and public arenas; as state agents of their citizens, representing claims before international tribunals; and as norm entrepreneurs, directly advocating on behalf of their nationals or the nationals of other abolitionist states.

i. Mexico

Mexico has a unique interest in looking out for the welfare of its nationals in the United States, the country with the largest number of expatriate Mexicans. During the 1980s, the number of legal immigrants from Mexico in the United States reached three million; an estimated 800,000 were in the country without documentation.[318] By the end of that decade, Mexican nationals represented the single largest group of noncitizens in the United States, many of whom were present unlawfully, occupied the lowest rung in the socio-economic ladder, and were victims of widespread discrimination.[319] Despite well-known problems with the administration of criminal justice at home (including endemic corruption and lack of adequate procedural safeguards),[320] Mexico initiated in 1986 the program of Legal Con-

Univ. of Missouri-Columbia (July 31, 2006) (on file with author) [hereinafter Aceves e-mail].

317 *See* Babcock, *supra* note 62, at 377 ("Undoubtedly, foreign governments have been the most influential agents in transnational capital litigation.").

318 Jorge Durand et al., *Mexican Immigration to the United States: Continuities and Changes*, 36 LATIN AM. RES. REV. 107, 107–08 (2001).

319 Approximately one million Mexicans remained undocumented in 1992, which represented thirty-one percent of the total unauthorized population in the United States. *Id.* at 107–08. Precise numbers of foreign nationals are hard to come by. The Census Bureau estimates that twelve million residents in the United States are noncitizens and that more than twenty million foreigners visit the United States each year. *See* JAMES ET AL., *supra* note 304, at 5 (citing Campbell J. Gibson & Emily Lennon, U.S. Bureau of the Census, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850–1990* (Population Division Working Paper No. 29), *available at* http://www.census.gov/population/www/documentation/twps0029/twps0029.html).

320 The Mexican criminal justice system continues to be plagued by poor, overcrowded prison systems, arbitrary arrests and detentions, corruption, and a lack of transparency. *See* U.S. DEP'T OF STATE, 2005 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: MEXICO (2006), *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/62736.htm.

sultation and Defense for Mexicans Abroad as a means of supporting consular officers in their representation of Mexicans facing criminal legal proceedings outside Mexico.[321]

Mexico has a long history of leveraging consular protection on behalf of nationals on death row in the United States.[322] Mexico's awareness of the problem of non-notification was heightened by the Faulder case, and Mexico subsequently played a direct advocacy role in *Fierro v. State*.[323] Fierro was a Mexican national convicted and sentenced to death for murder of a taxicab driver. Fierro confessed to the El Paso police five months after the murder.[324] The police did not inform him of his right to notify the Mexican consulate, despite the fact that Mexico operated a consulate in El Paso.[325] The circum-

321 In effect, "Mexicans Abroad" meant Mexican nationals in the United States. Application of Mexico in the *Avena* Case, *supra* note 96, paras. 19, 22. This program was put in place five years after the Mexican Foreign Ministry created a special category of consular officer devoted to protecting the interests of Mexican nationals abroad. *Id.* This category is roughly equivalent to the American Citizen Services office within the Consular Affairs Bureau of the U.S. State Department. Thus, more than forty years lapsed between the time of the 1942 Consular Convention between the United States and Mexico and the Mexican foreign ministry elevating the protective consular function to a level of significance.

322 *See* Meade Affidavit, *supra* note 105 (describing the measurable impact consular intervention during the 1920s, '30s and '40s had in helping Mexican nationals avoid death sentences in the United States).

323 706 S.W.2d 310 (Tex. Crim. App. 1986). Mexico was aware of the importance of the consular notification provisions under the 1923 Claims Convention with the United States, under which the United States had filed several claims of "denial of justice." Several of the cases addressed by the Commissioners made reference to the efforts of United States consular officers to protect the rights of their detained nationals. *See, e.g.*, Harry Roberts (U.S. v. Mex.), 4 R. Int'l Arb. Awards 77 (1926); B.E. Chattin (U.S. v. Mex.), 4 R. Int'l Arb. Awards 282 (1927). Among the claims adjudicated by the Commission was that of Walter H. Faulkner, who claimed that Mexican authorities had prevented him from communicating with the United States consul for a period of several days. Although the Commission ultimately concluded that claimant failed to prove he was deprived of consular access, it held that "a foreigner, not familiar with the laws of the country where he temporarily resides, should be given this opportunity." Walter H. Faulkner (U.S. v. Mex.), Opinions of the Commissioners Under the Convention Concluded September 8, 1923, at 86, 90 (1926). Brief *Amicus Curiae* of the Government of the United Mexican States in Support of Petitioner Jose Ernesto Medellín at 18, Medellín v. Dretke, 544 U.S. 660 (2005) (No. 04-5928), 2005 WL 152925.

324 Fierro had been arrested on the tip of a sixteen-year-old with a history of mental problems, who had claimed to be in the cab with Fierro and witnessed the murder. Shank & Quigley, *supra* note 175, at 725. There was no physical evidence to connect Fierro to the crime. *Id.*

325 *Id.* at 726.

stances of the confession were questionable.[326] The confession was presented at trial and Fierro was convicted and sentenced to death.[327] On the basis of a new petition in 1994, a district court threw out the confession on the ground that there was "a strong likelihood that the Defendant's confession was coerced by the actions of the Juárez police" with the acquiescence of the El Paso police.[328] On appeal, the Texas Court of Criminal Appeals disagreed with the setting aside of the conviction, finding that the introduction of the confession was harmless error.[329] On a 5-4 vote, the Court of Criminal Appeals found the additional evidence sufficient to sustain the guilty verdict.[330]

ii. The IACtHR case

In December 1997, just a few months following the executions of two Mexican citizens—Irineo Tristan Montoya in Texas[331] and Mario Benjamin Murphy in Virginia[332]—Mexico brought a case against the United States before the IACtHR seeking an advisory opinion as to the legal obligation of the United States to enforce the Article 36 notification requirement and clarification of the minimal judicial remedy for

326 The El Paso police cooperated with the Ciudad Juárez, Mexico police department in the investigation, and the Ciudad Juárez police arrested Fierro's mother and stepfather to question them regarding Fierro. *Id.* at 725–26. During his questioning at the El Paso police station, the detective offered to allow Fierro to speak with the Ciudad Juárez police, who apparently convinced him that his parents would not be released until he confessed. *Id.* at 726. The stepfather later testified that as he was being released in Ciudad Juárez, an officer told him that it was because Fierro had confessed in El Paso. *Id.*

327 *Ex parte* Fierro, 934 S.W.2d 370, 371–72 (Tex. Crim. App. 1996).

328 Quigley, *supra* note 149, at 183 (citing *Fierro*, 934 S.W.2d at 371).

329 *Fierro*, 934 S.W.2d at 371–72.

330 Quigley, *supra* note 149, at 183 (citing *Fierro*, 934 S.W.2d at 377). The prosecuting attorney at the trial had filed an affidavit to the appeals court indicating that, had he known of the circumstances of the confession, he would have joined a motion to suppress the confession. *Id.*

331 *In re* Irineo Tristan Montoya, 520 U.S. 1284 (1997) (denying habeas petition requesting stay of execution). The fact that Montoya was the first Mexican executed in the United States in over fifty years galvanized Mexican public opinion. In addition, Mexico had filed four diplomatic protests with the State Department, filed a formal request for commutation with the Texas Board of Pardons and Paroles, and requested a reprieve from the Governor of Texas. *See* Application of Mexico in the *Avena* Case, *supra* note 96, para. 49, at 22. The April 1997 exoneration and release of Ricardo Aldape Guerra from Texas death row after serving fifteen years in prison further focused attention on other Mexicans facing the death penalty in the United States. *See Mexican Long Held in Texas Murder Wins His Freedom*, N.Y. TIMES, Apr. 17, 1997, at A16. For more discussion of the Adalpe Guerra case see *infra* note 356.

332 Murphy v. Netherland, 116 F.3d 97, 98 (4th Cir. 1997).

failure to notify detainees who are subsequently sentenced to death.[333] The application was thus explicitly limited to capital cases. The first interpretation of the United States' legal obligations in terms of a remedy was issued on April 30, 1998, when the Inter-American Commission made a requested written submission to the IACtHR in which it concluded that, in death penalty cases, the due process rights established under the American Declaration on the Rights and Duties of Man require a judicial remedy for a violation of the VCCR notification provisions.[334] Amnesty International, Human Rights Watch, the International Human Rights Law Institute, and the Minnesota Advocates for Human Rights also made submissions to the IACtHR in support of a finding of an individual right to a remedy for violations of Article 36.[335]

The issue for human rights activists was not so much the immediate fate of the tens of thousands of foreign nationals arrested in the United States each year,[336] but rather the persistence of the death penalty in the United States. The positions taken by (nearly all) the other OAS states that submitted briefs, along with the NGO amici, was similarly rooted in the abolitionist position.[337]

This was the first opportunity for the United States to take a formal position on the question of remedies for non-notification in an international forum. In addition to submitting several procedural challenges to the request for advisory opinion,[338] the United States argued that the VCCR did not create an individual right to consular

333 Advisory Opinion, *supra* note 299, para. 1. For a summary of the procedural basis of the advisory opinion, see William J. Aceves, *The Right to Information on Consular Assistance in the Framework of the Guarantee of Due Process of Law, Inter-American Court of Human Rights*, 94 AM. J. INT'L L. 555, 555–56 (2000).

334 Aceves, *supra* note 333, at 556 & n.7. Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, and Paraguay also made submissions to the Court. *Id.* at 556.

335 *Id.* at 556.

336 There are no comprehensive statistics available on the total number of foreign citizens arrested each year in the United States, but the Bureau of Justice Statistics estimated at year end 2001 that approximately four percent of the inmate population in state institutions are noncitizens. *See* JAMES ET AL., *supra* note 304, at 5 (citing U.S. DEP'T OF JUSTICE, CRIMINAL OFFENDERS STATISTICS, *available at* http://www.ojp.usdoj.gov/bjs/crimoff.htm). Applying the same ratio in the federal prison system, some 52,000 foreign nationals are imprisoned in the United States. *Id.*

337 The OAS states that retain the death penalty are Guatemala, Guyana, Belize, Antigua, Bahamas, Barbados, Dominica, Jamaica, Trinidad and Tobago, St. Kitts and Nevis, St. Vincent, St. Lucia, Grenada (abolitionist in practice), and Bolivia (military law only). *See* Amnesty Int'l, Abolitionist and Retentionist Countries, Sept. 5, 2006, http://web.amnesty.org/pages/deathpenalty-countries-eng.

338 *See* Aceves, *supra* note 333, at 556.

assistance but rather "provides that a receiving State must inform a detainee that, if he requests, sending State consular officers may be *notified* of his detention (hence, the term "consular notification")."[339] Further, the United States argued that compliance with the VCCR was not a prerequisite for observance of human rights in criminal cases. The international human rights instruments invoked by Mexico in its petition were applicable to all foreign nationals—regardless of the status of consular relations between the two states.[340]

In its published opinion of October 1999, the IACtHR addressed eight issues on the merits of the case:[341] (1) Based on the text and its *travaux preparatoires,* Article 36 "endows a detained foreign national with individual rights that are the counterpart to the host State's correlative duties;"[342] (2) the right to seek consular assistance under Article 36 concerns the protection of human rights and is thus part of the body of international human rights law;[343] (3) the phrase "without delay" included in Article 36(1)(b) requires that foreign nationals be informed of their right to consular assistance at the time they are detained (time of deprivation of liberty) and in any event before they are required to make statements to law enforcement officials;[344] (4) the sending state need not issue a protest in order to trigger the rights belonging to the individual foreign national;[345] (5) Articles 2 (no discrimination on the basis of national origin), 6 (right to life), 14 (equality before the law and fair judicial proceedings), and 50 (application to federal states) of the ICCPR concern the protection of human rights in the American states;[346] (6) the dynamic evolution of international human rights law renders enforcement of Article 36(1)(b) of the VCCR essential to the implementation of due process of law for all individuals as set out in Article 14 of the ICCPR;[347] (7) failure to notify in cases in which the death sentence is imposed is also an arbitrary deprivation of life that gives rise to state responsibility and

339 *Id.* at 557 (citing Written Observations of the United States of America 5 (June 10, 1998) (on file with author)).

340 *Id.*

341 The IACtHR rejected the procedural objections made by the United States and affirmed its authority to issue advisory opinions. Advisory Opinion, *supra* note 299, para. 65.

342 *Id.* para. 84.

343 *Id.* para. 141, at 64.

344 *Id.*

345 *Id.* para. 141, at 65.

346 *Id.* Antigua and Barbuda, the Bahamas, Saint Kitts and Nevis, and Saint Lucia were the only OAS member states not parties to the ICCPR at the time of the opinion. *Id.* para. 109.

347 *Id.* para. 141, at 65.

an obligation to make reparations;[348] and (8) the obligations under Article 36 must be observed regardless of the federal structure of the United States.[349]

Because it swept so broadly to include arguments based on the traditional diplomatic remedies of consular violations, the nonapplication of ICCPR to the United States in light of its reservations, and the limitations on the national government's ability to fashion relief where the criminal justice system operates largely through federal states, this opinion provided the basis for subsequent legal arguments before the ICJ and those in the U.S. courts seeking to give the ICJ opinions effect.[350]

Abolitionist academic observers at the time of the opinion were untroubled by this apparent overreaching because it operated to expand human rights and limit the application of the death penalty. William Aceves noted the IACtHR "employ[ed] a teleological method of interpretation that is reminiscent of the early case law of the European Court of Justice. . . . [B]as[ing] its analysis on the notion that due process is not a static concept; it is dynamic and evolutionary."[351]

3. Foreign Governments and NGOs: Role Reversals

Following the IACtHR advisory opinion, Mexico established in September 2000 the Mexican Capital Legal Assistance Program (MCLAP) in the United States, whose mission would be to provide advisory and financial support to Mexican nationals charged with capital crimes in the United States.[352] At the time, it was the only such

348 *Id.* para. 137. In so holding, the Court noted its earlier advisory opinion that limited capital punishment by the principle of no arbitrary deprivation of life. *Id.* para. 134; *see also* Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights) Advisory Opinion OC-3/83, 1983 Inter-Am. Ct. H.R. (Ser. A) No. 3 paras. 52, 55 (Sept. 8, 1983).

349 Advisory Opinion, *supra* note 299, para. 141 at 65. This conclusion was in line with an earlier case in which the IACtHR had held that a state may not base its noncompliance with international obligations on its federal structure. *See* Garrido and Baigorria Case, 1998 Inter-Am. Ct. H.R. (Ser. C) No. 39, para. 46 (Feb. 6, 1996).

350 Paraguay had filed its complaint in the *Breard* case in 1998, a year before the Advisory Opinion was issued; the arguments were nonetheless available—and were used—in the subsequent ICJ cases. *See infra* Part IV.B.4.

351 Aceves, *supra* note 333, at 561.

352 Application of Mexico in the *Avena* Case, *supra* note 96, para. 25. Mexico had created the Program of Legal Consultation and Defense for Mexicans Abroad which trained "a select cadre of consular officers in American law for the express purpose of assisting attorneys representing Mexican nationals in United States legal proceedings." *Id.* para. 22.

capital legal assistance program of a foreign government in the United States.[353]

The stated purpose of the program was to "enhance the quality of legal representation available to Mexican capital defendants, to improve the ability of Mexican consular officers to assist them, and to increase awareness of and compliance with Article 36 of the Vienna Convention."[354] The effect of the program was remarkable in addressing the very inadequacies in representation and bias in sentencing that had been raised in the earlier, unsuccessful challenges based on non-notification. As Mexico noted in its *Avena* application to the ICJ:

> Since its inception, the Program's attorneys have assisted with approximately 110 cases. They have played a decisive role in preventing the imposition of the death penalty in 27 cases; 80 others remain pending. Through the program, Mexico has filed amicus curiae briefs in 13 cases and offered important legal assistance to defence counsel in 49 other cases. Often, Program attorneys have raised claims and emphasized issues of international law that would otherwise have been overlooked by defence counsel inexperienced in representing foreign nationals.[355]

This statement shows how the role of the foreign government to communicate with and, where necessary, lodge protests against the national government was supplemented by a strategy in which the foreign government became an active advocate on behalf of its nationals. In capital cases, the traditional consular function carried out by the government of Mexico was aided by this super public defender, which possessed full governmental power at home that could be leveraged to assist in the essential functions of criminal defense: investigating, locating witnesses, and formulating legal defenses—some of them novel claims based on international human rights law.

In addition to providing services at the defense counsel level, the government of Mexico intervened directly as a party in several cases following the IACtHR opinion. Prior to the IACtHR opinion, the government of Mexico intervened directly in three VCCR cases as a party or as amicus curiae.[356] In the three years following the IACtHR opin-

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353 *Id.* para. 25.

354 *Id.* The first director of the MCLAP was Sandra Babcock, the attorney to raise the VCCR claim in the Faulder case. *See supra* text accompanying notes 233–35. El Salvador established a similar program in 2003. Warren e-mail, *supra* note 284.

355 Application of Mexico in the *Avena* Case, *supra* note 96, para. 26.

356 *See* Murphy v. Netherland, 116 F.3d 97 (4th. Cir. 1997) (listing Mexico as amicus curiae assisting the defendant-appellant); Consulate Gen. of Mex. v. Phillips, 17 F. Supp. 2d 1318 (S.D. Fla. 1998); United Mexican States v. Woods, No. CV 97-01075-PHX SMM (D. Ariz. May 19) (filing suit for injunction to prevent execution of Mexi-

ion and through the MCLAP, Mexico intervened as amicus curiae in sixteen cases and funded or assisted an additional ninety-nine cases.[357] While the IACtHR opinion did not appear to shift the receptiveness of the U.S. government or state or federal courts on the question of remedies for convictions that pre-dated the IACtHR opinion, it laid a significant jurisprudential foundation for other challenges in traditional "vertical" fora such as the ICJ.

4. The Persistence of Traditional Statehood

Mexico did not abandon diplomatic channels after the IACtHR opinion was issued. It continued to submit diplomatic protests or requests for clemency to state and federal officials.[358] In the two pre-IACtHR executions—Irineo Tristan Montoya in Texas[359] and Mario Benjamin Murphy in Virginia[360]—Mexico requested commutation and federal government intervention with state authorities. In both cases, the federal government remained silent.[361] After the executions were carried out, the State Department issued a formal apology to the government of Mexico for the violations of the VCCR.[362]

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can national who had not received consular notification at time of arrest), *aff'd* 126 F.3d 1220 (9th Cir. 1997). Mexico also filed an amicus brief in *Guerra v. Johnson*, 90 F.3d 1075 (5th Cir. 1996); Brief Amicus Curiae of United Mexican States, *Guerra*, 90 F.3d 1075 (No. 95-20443), *available at* http://www.yale.edu/lawweb/avalon/diana/guerra/20443ac.html. That case did not involve a VCCR challenge, but instead the applicability of international norms banning racially discriminatory treatment.

357 Mexico stated in its pleadings in *Avena*:

> Through the combined efforts of consular officers and the Program lawyers, Mexico has played a decisive role in preventing the imposition of the death penalty in at least forty-five cases in less than three years. In that same time, Mexico has filed sixteen amicus curiae briefs in U.S. courts, has provided funds for investigators and experts in at least twenty-two cases, and has offered important legal assistance to defense counsel in sixty-seven other cases.

Memorial of Mex., Avena and Other Mexican Nationals (Mex. v. U.S.) para. 38 (June 20, 2003) (citations omitted), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imuspleadings/imus_ipleadings_toc.htm.

358 *See* Application of Mexico in the *Avena* Case, *supra* note 96, para. 49 (noting that Mexico had filed diplomatic notes expressing the "vital nature of the rights to consular notification" in at least twenty capital cases involving Mexican nationals between 1997 and 2003).

359 *In re* Irineo Tristan Montoya, 520 U.S. 1284 (1997).

360 Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997).

361 Application of Mexico in the *Avena* Case, *supra* note 96, paras. 50–59.

362 *See id.* para. 53. Mexico accepted the July 1997 apology over the execution of Montoya, but maintained its view that the United States had to do more than apologize—particularly in capital cases—and provide some sort of judicial relief in failure to notify cases. *Id.* Mexico also noted that, at that time, thirty-six Mexican nationals

In 2000, Texas executed Miguel Angel Flores and again the State Department issued Mexico a diplomatic note apologizing for the failure of Texas authorities to comply with Article 36.[363] In 2002, Texas executed Javier Suarez Medina.[364] In that case, the Mexican government made direct protests through its foreign minister to the U.S. Secretary of State and President of Mexico directly requested a reprieve from the Governor of Texas.[365] Mexico supported Medina's individual petition to the IACtHR.[366] In *Medina*, Mexico also requested the support of other governments and international organizations, which submitted their views to courts and the state and federal officials involved in the case.[367] In the *Flores* case, Mexico protested formally to the State Department and to the Texas authorities.[368] It also supported Flores' petition to the IACtHR, which resulted in an issuance by the IACtHR of precautionary measures.

i. Paraguay

Paraguay intervened in the non-notification case of Angel Breard in 1996, well before the IACtHR advisory opinion.[369] Breard was a Paraguayan national who was not notified of his right to contact his consulate, was charged with murder and attempted rape, and subsequently tried, convicted and sentenced to death in Virginia state court.[370] Breard raised the VCCR claim for the first time in his federal habeas action.[371] The government of Paraguay filed suit against the governor of Virginia in federal court, seeking an injunction of the ex-

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remained on death row in the United States; in none of the cases did the arresting authorities comply with the Article 36 notification requirement. *Id.* Following the State Department apology over the execution of Murphy, Mexico again filed a diplomatic note stating that apology was an inadequate remedy for violation of the VCCR. *Id.* para. 56.

363 *Id.* paras. 57–58.

364 *Id.* para. 59.

365 *Id.*

366 This petition, like that of Flores, resulted in an order of precautionary measures by the IACtHR. *Id.*; Javier Suarez Medina, Case 12.421, Inter-Am. C.H.R., Report No. 91/05, OEA/Ser.L/V/II.124, doc. 5, para. 5 (2005), *available at* http://www.cidh.oas.org/annualrep/2005eng/USA.12421eng.htm.

367 Application of Mexico in the *Avena* Case, *supra* note 96, para. 59. Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala. Honduras, Panama, Paraguay, Poland, Slovenia, Spain, Switzerland, Uruguay, Venezuela, the Holy See and the European Union all supported Mexico's efforts. *Id.*

368 *Id.* paras. 233–34.

369 Breard v. Greene, 523 U.S. 371, 374 (1998) (per curiam) (denying certiorari).

370 *Id.* at 371.

371 *Id.* at 373.

ecution and a declaration voiding the conviction as a remedy for the VCCR violation.[372] This was the first such suit filed by a foreign government directly against a state official seeking to enjoin an execution and commute a death sentence.[373] On appeal to the Supreme Court, Breard's habeas claim was consolidated with the Paraguay suit against Virginia. Paraguay had filed a parallel case at the ICJ, in which it requested provisional measures to stay Breard's execution while the ICJ considered Paraguay's application for state remedies against the United States for the violation of the Convention. The ICJ issued provisional measures requesting that the United States take "all measures at its disposal" to prevent the execution.[374] Four other foreign governments filed amici briefs in support of Paraguay in its suit before the Supreme Court.[375]

The Supreme Court refused to give effect to the ICJ provisional measures order, deciding Breard's appeal on the basis of federal habeas law, under which Bread's claim was deemed procedurally defaulted.[376] The Court found Paraguay's claim against Virginia was barred under the Eleventh Amendment and failed to state a claim under § 1983.[377]

ii. Germany

Germany also took on the role of advocate on its own behalf and on behalf of two German nationals facing the death penalty in Arizona, Karl and Walter LaGrand. Germany started with traditional diplomatic interventions with the U.S. government and Arizona state officials.[378] When those efforts failed to stop the execution of one of the brothers, Germany wasted no time and filed an application to the

372 Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1271 (E.D. Va. 1996), *aff'd*, 134 F.3d 622 (4th Cir. 1998).

373 Mexico became the second when it filed suit against Arizona on behalf of death row inmate Ramon Martinez Villarreal on the basis of failure to notify. Babcock, *supra* note 62, at 378–79 & n.47 (citing Complaint, United Mexican States v. Woods (D.C. Ariz. 1997) (No. CV 97-1075-PHX SMM)). The case was dismissed for lack of subject matter jurisdiction. United Mexican States v. Woods, 126 F.3d 1220, 1221 (9th Cir. 1997). The executions of Murphy and Montoya, *see supra* notes 331–32 and accompanying text, took place while the *Villarreal* case was pending.

374 Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 258 (Apr. 9).

375 Babcock, *supra* note 62, at 378.

376 *Breard*, 523 U.S. at 375–77; *see also* Jonathon I. Charney & W. Michael Reislman, *Agora:* Breard, 92 AM. J. INT'L L. 666, 673 (1998) (providing a detailed factual and procedural summary of the *Breard* case).

377 *Breard*, 523 U.S. at 377–78.

378 Babcock, *supra* note 62, at 381.

ICJ on March 2, 1999, requesting provisional measures to stay the execution,[379] which the ICJ issued the day after the application.[380] Germany then filed suit under the original jurisdiction of the Supreme Court, requesting it to comply with the ICJ order and stay the execution.[381] The Supreme Court denied the request for the stay as did the Arizona governor.[382] Walter LaGrand was executed.[383]

Unlike Paraguay, Germany did not drop its case before the ICJ, but pursued it to a final disposition, in which the ICJ held that the United States had violated the VCCR, and that it had also violated the prior provisional measure issued by the ICJ.[384] The ICJ further held that, in the case of future non-notification for German nationals who are subjected to "severe penalt[y]," the United States would be required to provide "review and reconsideration" of the convictions.[385] The ICJ opinion was aimed primarily at fashioning an appropriate remedy for noncompliance in death penalty cases.[386] Most important, the ICJ agreed with the IACtHR advisory opinion in holding that the VCCR created an individual right to consular notification and access, not just a right of the sending state.[387] The ICJ left the U.S. government with some leeway in interpretation of how to carry out the "review and reconsideration" requirement, leaving the "choice of means"

379 Application Instituting Proceedings, LaGrand Case (F.R.G. v. U.S.) (Mar. 2, 1999), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm (follow "Application" hyperlink).

380 Request for the Indication of Provisional Measures Concerning the Vienna Convention on Consular Relations (F.R.G. v. U.S.) (Order of Mar. 3, 1999), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusorder/igus_iorder_19990303.htm.

381 Federal Republic of Germany v. United States, 526 U.S. 111 (1999).

382 *Id.*; LaGrand Case (F.R.G. v. U.S.) 2001 I.C.J. Pleadings 466, paras. 23–28 (June 27, 2001), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm.

383 Babcock, *supra* note 62, at 381.

384 *LaGrand*, para. 128(5).

385 *Id.* para. 125.

386 *See* Babcock, *supra* note 62, at 382 ("Germany's persistence in obtaining the Judgment, as well as the decision itself, have served to highlight the international community's dissatisfaction with the United States' administration of the death penalty."). Interestingly, Germany had argued that had it been aware of the LaGrand trial, consular officers would have provided mitigating evidence at the penalty phase of the trial. The United States argued, effectively as it turns out, that Germany was unable to demonstrate that it would have provided such assistance in 1984. *LaGrand*, para. 72. The Court found it immaterial whether actual assistance would have affected the outcome, but rather held that establishing a violation of Article 36 was enough to require a remedy; no prejudice need be shown by the defendant. *Id.* para. 73.

387 *Id.* para. 128(3).

to the United States.[388] Up to the time of the *Avena* decision, this permitted the United States to take the position that compliance with a remedy could be brought about through state clemency proceedings; judicial action by U.S. courts would not be necessary to compliance with the ICJ order.[389]

Following the IACtHR advisory opinion in October 1999 and the ICJ *LaGrand* final opinion in June 2001, full compliance with the requirement of consular notification at the time of arrest was still not taking place for Mexicans or other foreign nationals, and Mexican nationals were not successful in achieving reversals or obtaining collateral relief.[390] That was in part due to the fact that the advisory opinion was not binding on the United States. Mexico thus pursued its case before the ICJ to secure a binding decision that could halt the executions of other Mexicans on death row. To do so, Mexico acceded to the dispute resolution provisions of the VCCR, which would enable it to bring a challenge against the United States before the ICJ.[391]

5. The Collateral Role of International Organizations

The international and domestic governmental institutions that liberal theory might predict would play a role in promoting norm shift among persistent objectors have been marginal actors in this case. With the exception of the IACtHR and its initial legal opinion, the major human rights organs—the U.N. Human Rights Commission,

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388 *Id.* para. 125.

389 Counter-Memorial of the United States, Avena and Other Mexican Nationals (Mex. v. U.S.) paras. 6.53–6.78 (Nov. 3, 2003), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imuspleadings/imus_ipleadings_20031103_c-mem_06.pdf.

390 *See* Application of Mexico in the *Avena* Case, *supra* note 96, para. 27 ("[Mexico's] assistance often comes too late because local authorities of the constituent states of the United States have neglected to inform Mexican nationals of their consular rights. If and when Mexican consulates heard of a detention and prosecution, many forms of assistance that could have been rendered at an earlier stage have been foreclosed by the operation of United States municipal law.").

391 William J. Aceves, *Consular Notification and the Death Penalty: The ICJ's Judgment in* Avena, ASIL INSIGHTS, n.7, Apr. 2004, http://www.asil.org/insights.insigh130.htm#.edn7 (Mexico acceded to the Optional Protocol on March 5, 2002). In a press release, the Government of Mexico noted that "[t]he main goal of the lodging of this complaint is for the ICJ to issue a ruling . . . regarding the noncompliance by different U.S. state and municipal authorities of their international legal obligation covered by the VCCR." Press Release, Gov't of Mex., The Government of Mexico Submits to the International Court of Justice in the Hague the Cases of 54 Mexicans Sentenced to Death in the U.S. 1 (Jan. 9, 2003), *available at* http://www.internationaljusticeproject.org/pdfs/UnoffTransMexicoICJ.pdf.

the Human Rights Committee and the U.N. General Assembly—played almost no role. This is primarily because the United States was not a party to Optional Protocol 2 of the ICCPR prohibiting the death penalty and also has not acceded Optional Protocol 1 of that treaty, through which states agree to be subject to the individual complaint procedures at the Human Rights Committee.

The most valuable role international institutions played was as supplemental information conduits. They transmitted public and private facts about the application of the death penalty in the United States and served as a kind of bully pulpit from which abolitionist states could raise their objections to U.S. practices.[392] They also played a role as a chip in the stakes for global human rights reputation. Following the *LaGrand* decision, the United States was kicked off the U.N. Human Rights Commission for the first time in its history. Notably, however, these institutions did not provide a significant forum for direct horizontal discussion between the national government of the United States and the abolitionist states on the death penalty question. Much of the diplomacy took place through bilateral, not multilateral, channels.

C. Federal, State and Local Responses Post-IACtHR

Between 1996 and 2003, the State Department took steps to bring the United States in compliance with the notification provisions. Consistent with its view that the responsibility for enforcing the VCCR lay with the executive, not the judiciary, it embarked on a broad educational program to inform local and state police, prosecutors, and courts about the notification requirement.[393] The State Department training materials for state and local law enforcement officials, prosecutors, and judges make clear that the importance of the notification provision is "to help ensure that foreign governments can extend appropriate consular services to their nationals in the United States and that the United States complies with its legal obligations to such governments."[394] In turn, states have published their own guidelines on consular notification to local police.[395] These efforts have had an impact on law enforcement officials on the ground, and, importantly, on state courts.

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392 *See* Olson, *supra* note 151.

393 *See* Clark, *supra* note 219, at 22.

394 *See* STATE DEP'T INSTRUCTIONS, *supra* note 178, at i.

395 *See, e.g.*, GEORGIA DEP'T OF CMTY. AFFAIRS, A MODEL LAW ENFORCEMENT OPERATIONS MANUAL § 8-1, *available at* http://www.dca.state.ga.us/development/research/programs/downloads/law/Chap8-1.html.

Precise, measurable effects on state trial judges are difficult to come by, in part because many judicial decisions in criminal trials are unreported, and in part because judges do not always acknowledge the rationales under which they reached decisions. Among the reported cases, state courts split on the question whether Article 36 creates an individual right that is judicially cognizable. Illinois state courts held that the VCCR creates a judicially enforceable individual right but that suppression of evidence was not available as a remedy.[396] Other courts have held the opposite, finding no judicially enforceable right.[397] Most courts to address the question have, like the

396 People v. Salgado, 854 N.E.2d 266, 277 (Ill. App. Ct. 2006) (finding that the defendant "does have individual rights under the Vienna Convention, which were violated," but the remedy for a violation is not suppression of evidence); People v. Montano, 848 N.E.2d 616, 619 (Ill. App. Ct. 2006) (noting that although the VCCR arguably conveys an individual right, Article 36 "does not create a fundamental," constitutional right); People v. Sanchez, 841 N.E.2d 478, 488 (Ill. App. Ct. 2005) (finding that "despite the recent cases establishing the fact the Vienna Convention is self-executing and that an individual right is created," suppression of evidence was not an appropriate remedy).

397 Several post-*Avena* federal cases found no judicially enforceable individual right. *See* Maharaj v. Sec'y for the Dept. of Corr., 432 F.3d 1292, 1307 (11th Cir. 2006) (holding that "the Vienna Convention does not confer judicially enforceable *individual rights*" and that "a criminal defendant could not seek to have an indictment dismissed based on an alleged violation of Article 36 of the Vienna Convention"); Ortega v. Dretke, No. 3-05-CV-0439-R, 2005 WL 1552802, at *2 (N.D. Tex. July 1, 2005) (following the decisions of the Fifth Circuit which held that Article 36 does not create a judicially enforceable right); Dimas-Lopez v. United States, No. 01 Civ.7170, 2005 WL 1241890, at *3 (S.D.N.Y. May 25, 2005) (finding that the VCCR does not convey individual rights and therefore is not grounds for vacating a sentence); Moyhernandez v. United States, No. 02 Civ.8062 MBM, 2004 WL 3035479, at *2 (S.D.N.Y. Dec. 29, 2004) (finding that the Vienna Convention "was meant to protect the rights of states to care for their nationals traveling abroad, not to protect the rights of individuals" and as a result "[f]ailure to notify the consul of a defendant's home country . . . is not a basis for dismissing an indictment"). Several post-*Avena* state cases also found no judicially enforceable individual right. *See* People v. Ontiveros, No. D044146, 2006 WL 1725906, at *1 (Cal. Ct. App. June 23, 2006) (finding that even if VCCR creates individual rights, suppression of evidence is not an appropriate remedy); Gomez v. Commonwealth, 152 S.W.3d 238, 242 (Ky. Ct. App. 2004) (finding that the "Vienna Convention does not confer standing on an individual foreign national to assert a violation of the treaty in a domestic criminal case"); State v. King, 858 A.2d 4, 13 (N.J. Super. Ct. App. Div. 2004) (holding that no private enforceable right is created under the VCCR and the exclusionary rule is not an appropriate remedy); State v. Homdziuk, 848 A.2d 853, 859 (N.J. Super. Ct. App. Div. 2004) (holding that "the exclusionary rule is inapplicable as a remedy for violation of Article 36 of the VCCR"); People v. Ortiz, 795 N.Y.S.2d 182, 182 (N.Y. App. Div. 2005) (finding that "[i]t is questionable whether [the VCCR] confers judicially enforceable rights upon individuals, as opposed to foreign states" but in any event, "a violation . . . provides no basis for suppression of a statement"); State v. Linnik, No. CA2004-06-015, 2006 WL 456792, at

Supreme Court in *Sanchez-Llamas*, found that even assuming an individual right, suppression of evidence under the exclusionary rule is not an appropriate remedy.[398] This suggests that the campaign to in-

*6 (Ohio Ct. App. Feb. 27, 2006) (holding that "exclusion of incriminating statements is not the appropriate remedy for an alleged violation of the consular notification right").

398 There are several state cases in which courts found that, even assuming an individual right, suppression was not an appropriate remedy. *See* People v. Valencia, No. A099446, 2004 WL 887210, at *3 (Cal. Ct. App. Apr. 27, 2004) (noting that "[s]uppression is not a proper remedy for the failure of police to notify a foreign national of the right to consular notification . . . in light of . . . (3) the lack of reciprocal rights for American nationals in other countries"); Rahmani v. State, 898 So.2d 132, 134 (Fla. Dist. Ct. App. 2005) (finding that the requirement to inform a detained person about their VCCR rights "does not arise on the point of arrest and prior to the custodial interrogation accompanied by *Mirada* warnings"); State v. Byron, 683 N.W.2d 317, 323–24 (Minn. Ct. App. 2004) (finding that in order to "obtain a remedy for violation of the Vienna Convention, a defendant must first show that the violation resulted in actual prejudice," which the defendant had not shown); People v. Herrera, No. 05-208, 2006 WL 758544, at *13 (N.Y. Sup. Ct. Mar. 22, 2006) (finding that "[s]uppression of an otherwise voluntary post arrest statement is not an appropriate remedy for an alleged Article 36 . . . violation"); State v. Quintero, No. M2003-02311-CCA-R3-CD, 2005 WL 941004, at *10 (Tenn. Crim. App. Apr. 22, 2005) (holding that Article 36 does not give a foreign national the right to suppress evidence upon violation of the treaty). There are also several reported and unreported post-*Avena* federal cases in which courts arrived at the same conclusion. *See* United States v. Rodriguez, 162 F.App'x 853, 857 (11th Cir. 2006) (finding that even if authorities had failed to inform a person of his or her rights under the VCCR, "the proper remedy is not to suppress the statements"); Darby v. Hawk-Sawyer, 405 F.3d 942, 946 (11th Cir. 2005) (finding that even "[a]ssuming *arguendo* that . . . the VCCR confers an individual right to consular assistance, Darby failed to show the alleged VCCR violation had a prejudicial effect on his trial"); Cardenas v. Dretke, 405 F.3d 244, 253 (5th Cir. 2005) (finding that even if petitioner's claim was not procedurally barred, "his claim fails because this court has determined in the past that the Vienna Convention does not confer individually enforceable rights"); Acosta v. United States, 130 F.App'x 881, 883 (9th Cir. 2005) (finding that a contention that petitioner was "wrongly denied the protections afforded by Article 36(1)(b) of the [VCCR]" was unpersuasive); United States v. Rodriguez-Preciado, 399 F.3d 1118, 1130 (9th Cir. 2005) (reaffirming a previous decision that determined exclusion of evidence in a criminal prosecution is not a proper remedy for a Vienna Convention violation); Plata v. Dretke, 111 Fed. App'x. 213, 216 (5th Cir. 2004) (finding that petitioner's argument regarding "prejudice suffered at trial because he did not understand the benefit of pleading guilty before trial does not make the district court's denial of his VCCR claim debatable"); United States v. Valdez, 104 F.App'x 624, 626–27 (9th Cir. 2004) (finding that "even though Valdez's rights under the Vienna Convention were violated, suppression of any wrongly obtained evidence is not the appropriate remedy for such a violation"); United States v. Umbacia, No. 8:05-CR-99-T-24EAJ, 2005 WL 1424821, at *2–3 (M.D. Fla. June 17, 2005) (finding that dismissal of the indictment would not be an appropriate remedy for a VCCR violation); United States v. McAtee, No. CR05-2005, 2005 WL 1330683, at *9 (N.D. Iowa June 2, 2005) (finding that "defendant suffered no

crease compliance with the VCCR and thereby reduce capital sentences or prevent executions has not been an unalloyed success.

However, the language in some of the reported opinions and the existence of the training programs in the courts suggest that the notification requirement is being increasingly enforced and is having a measurable effect in many places. In *Alexander v. State*,[399] a Mexican national unlawfully present in the United States was convicted of murder and sentenced to fifty-five years.[400] On a direct appeal, the Indiana Court of Appeals upheld the conviction against challenges that did not include a VCCR non-notification claim.[401] Nonetheless, in a separate concurrence Judge Mathias noted that, while there was no evidence whether Alexander had been notified of his right to notify the consulate, the "right to contact a consular officer is an important right that should not be ignored under any circumstance" and that "failure to inform a defendant of his or her Vienna Convention right is particularly egregious in cases . . . where risk of conviction of the charged crimes carries such a high penalty."[402] He went further to discuss the important reciprocity implications:

> American citizens abroad would like to believe that they will be treated fairly if they have a misfortune that subjects them to the police, prosecutorial and penal authorities of a country they are visiting. But confidence in such fair treatment is unwarranted if we as a nation do not set an example in our treatment of foreign nationals under similar circumstances in United States courts. I would therefore urge law enforcement authorities to make such advice of

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prejudice as a result of the delayed notification of the Canadian Consulate"); United States v. Ruiz Gutierrez, No. CRIM.A. 04-470(ESH), 2005 WL 1115952, at *1 (D.D.C. May 11, 2005) (finding that even if the VCCR does convey individual rights, a dismissal of an indictment would not be an appropriate remedy for an Article 36 violation); Carbajal v. United States, No. 99 Civ.1916(MGC), 2004 WL 2283658, at *7 (S.D.N.Y. Oct. 8, 2004) (finding that even if the plaintiff's VCCR rights have been violated, plaintiff has failed to show how that violation prejudiced him); United States v. Brodie, 326 F. Supp. 2d 83, 90 (D.D.C. 2004) (finding that "a violation of the Vienna Convention's requirement does not require suppression"); U.S. *ex rel.* Hurtado v. Briley, No. 03-C-7436 2004 WL 1462441, at *4 (N.D. Ill. June 28, 2004) (denying a claim for habeas relief after Illinois Appellate Court determined that suppression was an inappropriate remedy for a Article 36 violation); Jimenez v. Dretke, No. 3:02-CV-1716-M, 2004 WL 789809, at *4 (N.D. Tex. Apr. 13, 2004) (finding that even if VCCR did convey individual rights a petitioner "would not be entitled to habeas corpus relief").

399 837 N.E.2d 552 (Ind. Ct. App. 2005).

400 *Id.* at 554–55.

401 The defendant did, however, argue that admitting into evidence his status as an illegal alien as an aggravating factor in his sentencing was improper. The court rejected the contention. *Id.* at 556.

402 *Id.* at 557. (Mathias, J., concurring).

> a foreign national's right to consular contact standard operating procedure in order to help establish an efficient and objectively fair notice and contact process that compliments the Sixth Amendment indigent right to counsel.[403]

In other cases where convictions have been overturned on non-VCCR grounds, it seems clear that the failure to notify is viewed as a basic violation of fairness by state judges.[404] State judges have, for example, admonished local prosecutors for proceeding with cases in the absence of consular notification. In two examples in Kansas from 2000, courts announced in dicta the importance they attached to the notification provision, and urged state prosecutors to become familiar with Article 36.[405]

The *Torres* case in Oklahoma state court represents an important example of the force this appeal to fairness has with state judges.[406] Osbaldo Torres was one of the fifty-four Mexicans included in the *Avena* application. Two months after the *Avena* decision was issued, the Oklahoma Court of Criminal Appeals voted 3-2 to stay the execution of Torres and remand the case for an evidentiary hearing to determine if denial of the notification right resulted in prejudice.[407] In an unpublished concurring opinion, Judge Chapel "reasoned 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 State Parties."[408] Judge Chapel held that the Oklahoma Court was bound by the Supremacy Clause to give effect to both the VCCR and the decision of the ICJ, not because the ICJ operated as superior authority over U.S. courts, but because the President and Senate had committed the nation to be bound by the VCCR.[409] The governor of Oklahoma granted clemency and commuted Torres' sentence to life without parole on the explicit grounds that the failure to notify violated the VCCR.[410]

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403 *Id.* at 557–58.

404 *See* Levit, *supra* note 81, at 183–87.

405 Rebecca E. Woodman, *International Miranda? Article 36 of the Vienna Convention on Consular Relations*, 70 J. KAN. B. ASS'N 41, 41 (2001).

406 *See* Torres v. State, 120 P.3d 1184 (Okla. Crim. App. 2005).

407 Levit, *supra* note 81, at 171–72.

408 *Id.* at 172 (citing Torres v. State, No. PCD-04-442, 2004 WL 3711623, at *1–2 (Okla. Crim. App. May 13, 2004) (Chapel, J., concurring)).

409 *Torres*, 2004 WL 3711623, at *2–3 (Chapel, J., concurring).

410 Levit, *supra* note 81, at 172–73 (discussing the clemency of Torres). In a later published opinion reviewing the remand court's analysis of whether the failure to notify had prejudiced Torres' trial, Judge Chapel wrote for the Oklahoma Court:

State political branches have stepped in to provide protection as well. Because of the uncertainty of what legal effect to give a failure to notify, two states have amended their criminal codes to explicitly require police notification in all arrests, and additional states have considered proposals.[411] The motivation behind these statutes is to eliminate the claim of failure to notify and the additional costs associated with defending such claims, which certainly weakens, but does not eliminate, the value of habituating police to notification.[412] Regardless of whether the individual who is convicted without notification at the time of arrest may raise non-notification as grounds for suppressing statements, the habit of notification can take hold.

Moreover, the defense bar is now alerted to the value of consular assistance and will serve as a backstop for police failures. Left open by *Sanchez-Llamas* is the potential for a multitude of state and local approaches to VCCR enforcement, including the fashioning of remedies for failure to notify. For some states it may mean that failure to raise the consular assistance claim presents grounds for an ineffective assistance of counsel claim, for others, grounds for suppression of statements made to police, or to a question of overall prejudice at trial. Others may opt to eliminate a judicial remedy. Whatever the motives behind state notification statutes or programs to train local law enforcement, they serve to permit the mediating effects of outside actors and norms to enter into the criminal justice system through the VCCR norm portal.

> The essence of a Vienna Convention claim is that a foreign citizen, haled before an unfamiliar jurisdiction and accused of a crime, is entitled to seek the assistance of his government. Even if that assistance cannot, ultimately, affect the outcome of the proceedings, it is a right and privilege of national citizenship and international law. The issue is not whether a government can actually affect the outcome of a citizen's case, but whether under the Convention a citizen has the opportunity to seek and receive his government's help. This protection extends to every signatory of the Convention, including American citizens.

Torres, 120 P.3d at 1187.

411 *See* CAL. PENAL CODE §§ 834c, 5028 (West 2000); OR. REV. STAT. § 181.642 (2005). For cases applying the California statute, see People v. Garcia, No. C047098, 2005 WL 697970 (Cal. Ct. App. Mar. 28, 2005); People v. Valencia, No. A099446, 2004 WL 887210 (Cal. Ct. App. Apr. 27, 2004); People v. Pathan, No. H022600, 2002 WL 31854948 (Cal. Ct. App. Dec. 13, 2002); People v. Ortiz, No. B145601, 2002 WL 937642 (Cal. Ct. App. May 8, 2002). *But see* State v. Sanchez-Llamas, 108 P.3d 573 (Or. 2005) (decided before the Oregon statute was law, holding that the VCCR does not confer individual rights to a detained foreign national to be asserted in a criminal proceeding).

412 Aceves e-mail, *supra* note 316.

By the time Jose Medellín filed his cert petition with the Supreme Court, a shift had occurred that resulted in: (1) improved law enforcement compliance with the notification procedure; (2) involvement of foreign governments with meaningful defense of nationals in capital cases; (3) heightened vigilance of defense counsel on the value of consular involvement in consular cases; (4) openness of state court judges to the value of consular assistance;[413] (5) increased awareness in the general public (and thus among potential jurors) of potential disadvantages of foreign nationals facing the death penalty; (6) increased receptiveness of governors and other state politicians to appeals to procedural fairness; and (7) a measurable increase in commutations and clemencies and an accompanying decrease in capital sentences applied to foreign nationals.[414]

If the *Medellín* line of cases resulted in only one clemency and the avoidance of a death sentence in only a handful of cases, it can nevertheless be measured as a shift toward de facto abolition. And, to the extent that these measurable shifts toward the abolitionist norm have already taken place on the ground within the criminal justice systems of the federal states, it diminishes the significance of any failure of vertical enforcement of the *Avena* ruling by the Supreme Court.

V. THE SALIENCE OF NORM PORTALS

Given the myriad actors and various horizontal and vertical processes at work in the *Medellín* cases, how can we determine which factors were determinative in pushing the abolitionist norm to a tipping point? Part of the purpose of a constructivist approach is to move away from the over-determination of input factors that marks rational choice analysis. It is thus important to understand how all of the processes and actors contributed to the norm shift. International human rights law is centrally concerned with giving domestic legal effect to international legal norms. It is therefore useful to identify the criteria and conditions under which domestic legal institutions courts change to become amenable to an appeal to international human rights.

Identification of those criteria and conditions is helpful not only as a descriptive matter, but can help predict ways in which external norms can be imported into the systems of persistent objectors. Understanding the nature of those mechanisms will also make them amenable to the kind of scrutiny necessary for domestic democratic

413 *See, e.g.*, Levit, *supra* note 81, at 183–86 (highlighting the role of "state court judges as co-participants in the making and shaping of international legal norms").

414 *See supra* notes 404–12 and accompanying text.

accountability. At the same time, it is important to acknowledge that these transnational efforts did not occur in a vacuum. While the VCCR was being invoked as a norm portal through which to introduce increased procedural protections toward an abolitionist norm, other efforts were taking place in the United States to expose problems in the administration of the death penalty.

Why was the adoption of the VCCR as a norm portal successful in these cases? First, the VCCR appeals to judges' and government officials' sense of obligation. While the United States may be under no obligation to curtail the death penalty, it has made a promise to abide by the reciprocal obligations of the VCCR.[415] The governor of Oklahoma, in granting clemency in *Torres*, was quite explicit: "'I took into account the fact that the U.S. signed the 1963 Vienna Convention and is part of that treaty' . . . ."[416] All through the *Medellín* line of cases, state and federal courts have indicated in dicta the importance attached to such national promises.[417] Second, as a reciprocal obligation, the VCCR appealed to judges' and politicians' sense of duty not to engage in acts of omission or commission that would put Americans in harm's way. Third, it is formal. A treaty, like a statute, offers judges concrete guidelines for what is expected. This differentiates use of norm portals from more general discussions of appeals to foreign or international legal trends that can, rightly, be criticized as selective or vague. The language of Article 36 is, to be sure, subject to interpretation on the question of appropriate remedy, but the general requirement of notification is not vague or ephemeral and the U.S. government has repeatedly underscored exactly the rationales at stake in notification. Fourth, it is a procedural requirement and thus allows state government officials cover to comply with the treaty without having to support explicitly the expansion of rights—and the corresponding reduction in death sentences—that is facilitated by such compliance. Finally, as a self-executing treaty binding on the state and federal governments, it can be invoked and enforced without respect to the enforceability of the ICJ opinion. To be sure, some state courts have restricted the availability of judicially cognizable remedies, and the decoupling of U.S.-fashioned remedies allowed under *Sanchez-Llamas* permits them to continue to do so. The aggregate effect of the cases, however, has been to increase compliance with notifi-

415 I owe Phil Peters a special thanks for suggesting this line of inquiry.

416 Press Release, State of Okla. Office of Gov. Brad Henry, Gov. Henry Grants Clemency to Death Row Inmate Torres (May 13, 2004), *available at* http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1.

417 *See supra* notes 404–05 and accompanying text.

cation and thus achieve the desired reduction in overall death sentences.

A. *Medellín Within the Typology of Norm Transfer*

In the *Medellín* cases, norms were communicated, elaborated and integrated horizontally and vertically at domestic, transnational and international levels of interaction. The notification rule was a treaty obligation enforceable through the vertical command and control of a supranational court. In these cases, however, it operated as a horizontal entry point into the criminal justice system of the states—at the law enforcement, judicial and political levels—through which domestic courts were confronted with external norms. That entry point was the well-established, codified, and formalized function of consular protection, which mediated between the outside norm and the domestic practice.

In addition to the use of the VCCR as a horizontal norm portal, the process of norm transfer in these cases included supranational adjudication (ICJ, IACtHR), informal vertical efforts (UN resolution on rights of aliens), and of course, informal horizontal efforts by advocacy support networks. These methods of norm integration in the *Medellín* cases can be mapped out, broadly, against the typology of norm integration. (*See* Table 1).

TABLE 1 TYPOLOGY OF METHODS OF HUMAN RIGHTS NORM INTEGRATION

Type	Characteristics	Examples	Significance in *Medellín* cases
Formal Vertical	Supranational adjudication	ICJ, ECHR, ECJ, IACtHR	Medium
Informal Vertical	Aspirational institutions, norm-setting charters	UN Human Rights Comm.; General Assembly	Low
Formal Horizontal	Norm portals; procedural gateways	Extradition treaties, VCCR, Refugee Convention	High
Informal Horizontal	Political and social interactions, information sharing, acculturation	NGOs networks, bilateral and multilateral diplomacy	Medium

The VCCR case study demonstrates the ways in which state and nonstate actors engage in the process of norm transfer in traditional and nontraditional ways and illustrates the value of the soft empiricism or thick description of constructivism. Applying the constructiv-

ist methodology to the *Medellín* cases reveals that neither informal nor formal legal mechanisms are independently responsible for the norm shift. The vertical process of norm integration through courts was not determinative to the cases. For example, a definitive ruling by the Supreme Court on whether the VCCR itself or the ICJ order in *Avena* are to be given direct effect by U.S. courts was not necessary to the overall shift. At the same time, appeals to international courts were crucial along the way to elaborating the emerging norm. The 1999 advisory opinion of the IACtHR,[418] however, was a key step toward integrating the notification provision into a new international standard of procedural justice in death penalty cases. This suggests that international tribunals serve a norm-announcing role beyond the "command and control" function.[419]

The ICJ in this case may have provided a technically narrow ruling intended to elaborate the rights and obligations under the VCCR to the parties before it, but it had the effect of announcing an enhanced standard of treatment for aliens facing the death penalty.[420] It is thus less important whether the narrow ruling is given direct effect in national courts. The norm announcement can serve as either persuasive authority or the kind of dicta that appeals to a general sense of fairness for state judges and officials.

NGOs and advocates also operated in interesting ways. Individual advocates and clients proved essential to the initiation of the norm cascade that contributed to a quantifiable norm shift on the application of the death penalty. NGOs stepped into the shoes of nation-states in some cases. In this case, NGOs acted as a kind of watchdog for all the governments outside the United States, and served as a bridge between public defenders and the consulates, providing direct resources and services to consular officials to assist them in carrying out their official roles.[421]

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418 Advisory Opinion, *supra* note 299.

419 *See* Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 38 GEO. WASH. INT'L L. REV. (forthcoming 2006) (manuscript at 25–27, *available at* http://ssrn.com/abstract=793485).

420 The language of the opinion was "severe penalties." Avena and Other Mexican Nationals, 2004 I.C.J. 1, para. 151 (Mar. 31), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imusjudgment/imus_imusjudgment_20040331.pdf. This leaves open the possibility that the additional consideration due foreign nationals facing life sentences without parole may be vulnerable to a concerted assault through the VCCR norm portal. In any event, the ICJ was not extending the protections to minor crimes.

421 *See generally* JAMES ET AL., *supra* note 304 (explaining that the document is intended to be used by attorneys defending foreign nationals).

Despite the persistence of traditional diplomacy as a method of interaction, relative to the role of other actors, the role of nation-states *qua* states appears to be diminishing in transnational human rights litigation. This bears out constructivist and TLP predictions about the role of nonstate actors and the salience of norms and ideas themselves. Mexico, Germany, and Paraguay each supplemented interstate diplomacy with direct appeals to the subsidiary federal states, and with direct participation as *amici* or litigants in U.S. proceedings.

Sandra Babcock has said the following of Paraguay's and Mexico's efforts in these cases:

> Viewed through the lens of Koh's [TLP] model, Paraguay's and Mexico's efforts on behalf of their nationals succeeded in provoking interactions with the lower federal courts, the US Supreme Court, the ICJ and several foreign governments, furthering the internalization of international norms regarding the death penalty. Today, dozens of foreign nationals on death row continue to litigate the claims first raised by Faulder, Breard and others. Foreign governments have also continued their efforts to block the executions of their nationals, by litigating both in domestic courts and before international tribunals. This litigation has led other international law-making fora to issue decisions condemning the execution of foreign nationals who were deprived of any opportunity for consular assistance.[422]

Missing from Babcock's description are the international conditions that made it possible, even likely, that Mexico and Paraguay would challenge the United States on the death penalty. The essential pre-condition was the shifting international consensus on the death penalty. The *Medellín* cases came about when they did because the abolition of the death penalty had reached an international tipping point. Between 1989 and 1995, co-extensive with the end of the Cold War and the emergence of several newly democratic and democratizing states, the international norm moved from one of death penalty toleration to abolition. This shift was powerful enough to prompt states to take a position on judicial enforceability of individual rights under the VCCR that seemed at odds with the history of consular protection.

The death penalty norm cascade further primed the IACtHR and ICJ to rule on the VCCR in a way that appeared to be contrary to long-standing practice and interpretation of the parties to the convention. Some might argue that the parties to the international litigations were motivated by anti-Americanism, or at least an attempt to assert sover-

422 Babcock, *supra* note 62, at 379.

eignty and counterbalance U.S. political hegemony through legal challenges. Such views cannot be totally discounted, as diplomatic and political motivations certainly played a role along with the anti-death penalty concerns. Whatever the motivations, however, it was the fact of widespread VCCR noncompliance of the United States that enabled the international tribunals to rule as they did.

The *Medellín* line of cases also raises some interesting questions about the U.S. reaction. The U.S. position that the notification provision of the VCCR did not create a judicially cognizable individual right was consistent up through and beyond the adverse *Avena* ruling. U.S. courts are generally deferential to the executive branch on questions of treaty interpretation.[423] Here, the U.S. government acted, often in contradictory ways, through multiple disaggregated entities, each with a slightly different approach. Taken together, these disaggregated acts dilute the effect of American persistent objection to de jure abolition. At the federal level, those disaggregated entities were the State Department (consistently arguing at the international level to give no judicial effect to the VCCR,[424] but appealing directly to state governors for clemency and setting in place training and guidance on notification procedures),[425] Congress (keeping in place the restrictions on habeas appeal and failing to adopt national guidelines on notification),[426] and the President (issuing a memorandum of compliance with *Avena*, unilaterally withdrawing from the Optional Protocol of the VCCR).[427] At the state and local levels, police and prosecutors shifted practice in response to federal pressures, and legislatures have taken up the question of whether and how to codify the notification obligation.[428] While federalism has been viewed as an obstacle to bringing U.S. human rights practices up to the international standard, the use of the VCCR demonstrates that state courts can be more receptive to arguments based on international law, particularly where the argument is made through a formal U.S. commitment.[429]

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423 *See* BRADLEY & GOLDSMITH, *supra* note 77, at 442–51.

424 *See, e.g.*, *Avena*, 2004 I.C.J., paras. 29–30; LaGrand Case (F.R.G. v. U.S.), para. 40 (June 27, 2001), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm.

425 *See, e.g.*, *supra* notes 268–69 and accompanying text.

426 *See supra* text accompanying note 206.

427 *See supra* note 118 and accompanying text.

428 *See, e.g.*, *supra* note 411 and accompanying text.

429 A notable example is the Missouri Supreme Court, which in *Roper v. Simmons* invoked views of the international community. State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 411 (Mo. 2003), *aff'd*, 543 U.S. 551 (2005).

It would be misleading to suggest that invoking the VCCR as a norm portal was the only tactic being applied by transnational and domestic abolitionist advocacy networks. The period between 1990 and 2004 witnessed a variety of other approaches and innovations to limiting the judicial application of the death penalty in the United States that coincided with the appeal to international norms.[430] The measurable reduction in death sentences and actual executions between 1995 and 2005 is therefore likely the product of several variables: changes in the attitude and behavior of jurors and judges; a reduction of the kinds of violent crimes eligible for capital punishment; innocence projects; and even political expediency.[431] The fact that VCCR-based claims were just one of many factors contributing to this de facto reduction in death penalty sentences and executions, however, does not lessen its value as a norm portal. As with many other areas of human rights expansion, many frontal attacks on the practice can be made at once.

The fact that the VCCR has been invoked as a norm portal for purposes other than to reduce the death penalty also does not diminish its overall salience. Indeed, that it has been invoked to ensure minimal due process and overcome prejudice, bias, or discrimination against foreign nationals in accordance with international standards tends to support its importance as a norm portal for external norms. Further, the fact that the VCCR may centrally protect sovereign prerogatives of protection does not dilute its role as a norm portal. Other treaties or structures that serve as norm portals may have other primary purposes—extradition treaties are not, for example, fundamentally a filter system, but are intended to facilitate and make more expedient the transfer of suspects and defendants.[432] That they can additionally serve to mediate between legal systems and harmonize death penalty practice, does not detract from their central purpose.[433]

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430 Among these were the rise of the use of DNA to try to prove actual innocence, and the publication of several important studies demonstrating high rates of error and racial bias in capital sentencing. For links to studies and relevant articles, see Int'l Justice Project, Brief Bank & General Resources, http://www.internationaljustice project.org/briefs.cfm#resources (last visited Oct. 14, 2006).

431 Following *Ring v. Arizona*, 536 U.S. 584 (2002), juries, not judges, must determine death sentences. *Id.* at 587. In December of that year Kansas also declared the death penalty unconstitutional under its state constitution. *See* State v. Marsh, 102 P.3d 445, 458 (Kan. 2004), *rev'd*, 126 S. Ct. 2516 (2006).

432 *See* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION 735–49 (4th ed. 2002).

433 Requiring assurances that the death penalty will not be sought against extraditable defendants usually results in an agreement to seek, at most, a life sentence. *Id.* at 739 n.476 (citing U.S.-U.K. extradition treaty).

Historically, American advocates have resisted raising international law generally (and international human rights defenses in criminal cases more specifically) in U.S. courts. Sandra Babcock attributes this resistance to education: "International law is not a required subject in the vast majority of law schools in the United States. As a result, few law school graduates understand the relevance of international law in domestic legal proceedings."[434] An additional reason posited is the related concern that judges—themselves the products of law school experiences that did not adequately introduce them to international law—will be unreceptive: "'[L]itigators [. . .] look at judges, and assess what they will find persuasive. International law has not fit that criteria. Indeed, some litigators have been concerned that citations to international law would signal an essential weakness in their case under domestic law.'"[435] Thus, the actions of the judges in these cases will affect the ways in which future litigants raise international human rights arguments.

The *Medellín* cases suggest that perhaps judges (and state officials) care more about some kinds of international law than others. Here, the VCCR represented a firm promise made by the United States. The federal government acknowledged its obligations under the VCCR and even conceded the widespread noncompliance with the notification provisions.[436] Congress made clear that the treaty would be "self-executing," that is, it would not require implementing legislation.[437] This is in contrast with appeals in the *Atkins* and *Roper* cases to the ICCPR Optional Protocol 2 or the International Convention on the Rights of the Child as evidence of a standard: the United States was not party to those international obligations.

B. Mapping Other Norm Portals

Understanding how the formal horizontal method of norm transfer has operated in the VCCR case is illustrative of how other norm portals may operate to facilitate the entry of horizontal integration of international human rights into the legal systems of other persistent objectors or noncompliant states.[438] Bilateral extradition treaties and international refugee law have operated in the past to limit the appli-

434 Babcock, *supra* note 62, at 374 n.31.

435 *Id.* (alterations in original) (quoting Martha F. Davis, Lecture, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417, 418 (2000)).

436 *See supra* text accompanying note 212.

437 *See supra* note 205 and accompanying text.

438 *See supra* tbl.1.

cation of the death penalty in foreign states.[439] In both those formal systems, a binding treaty obligation acts to *export* international and foreign norms. In extradition, bilateral and multilateral treaties have been used as a means through which to consider the appropriateness of the death penalty, with many states refusing to extradite in the absence of a guarantee that the death penalty will not be sought.[440] In refugee cases, a host of international human rights standards (including prohibitions against the death penalty, torture and cruel, inhuman and degrading treatment) have been applied to practices that that have been interpreted by different national courts as meeting the standard of "reasonable fear of persecution" established in the Refugee Convention.[441] These interpretations have the effect of preventing future human rights violations in the sending state and thus, in effect, altering the practice in that state as regards specific individuals or broad classes. Some arguments made by human rights activists to invoke immigration law in the pursuit of human rights protection suggest that general immigration law—which establishes a literal portal to states' jurisdictions—might also serve as a norm portal for transnational regulation of human rights.[442]

International jurisdictional rules may also serve as horizontal norm portals. Through criminal universal jurisdiction, for example, criminal jurisdiction is permitted in all legal systems on the theory that all countries are bound by *jus cogens* norms to prosecute crimes against humanity without regard to principles of territorial or national

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439 *See* BASSIOUNI, *supra* note 432, at 735–51 (discussing the death penalty as grounds for exception, exemption or exclusion under a number of bilateral and multilateral extradition treaties); *see, e.g.*, Extradition Treaty with Great Britain and Northern Ireland, art. V, U.S.-Britain-N. Ir., Mar. 31, 2003, S. TREATY DOC. No. 108-23, art. 1; *see* Convention Relating to the Status of Refugees, adopted July 28, 1951, art. 1(A)(2), 189 U.N.T.S. 150 [hereinafter Refugee Convention].

440 *See* discussion of Canadian extradition cases *supra* notes 285–301. *See also* In re Soering, 1988 CRIM. L. REV. 307. For a discussion of *Soering*, *see* BASSIOUNI, *supra* note 432, at 739–41.

441 *See* Refugee Convention, *supra* note 439, art. 1(A)(2); *see also* GUY GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 40–79 (2d ed. 1996) (examining what practices are considered persecution under the Convention); Lori A. Nessel, *Forced to Choose: Torture, Family Reunification and United States Immigration Policy*, 78 TEMP. L. REV. 897, 897 & n.5 (2005) (discussing national asylum laws that prohibit repatriation of foreign nationals who will face death penalty or torture upon return to their home country).

442 *See, e.g.*, William J. Aceves & Paul L. Hoffman, *Using Immigration Law to Protect Human Rights: A Critique of Recent Legislative Proposals*, 23 MICH. J. INT'L L. 733, 769–72 (2002).

jurisdiction.[443] Efforts to expand universal jurisdiction to include jurisdiction over civil claims, such as mass environmental torts, may represent a new mechanism through which to import international norms into the legal systems of persistent objectors.[444]

C. *The Robustness of Norm Portals*

Rather than dilute the democratic accountability of laws that are applied in U.S. courts, use of norm portals may be democracy-enhancing. Norm portals are formal mechanisms that reflect the increased legalization of the modern international human rights system. While the international human rights system may, as a matter of philosophical underpinning, represent a return to natural law and a move away from the positivism that marked interstate relations in the nineteenth and early twentieth centuries, it is nonetheless a formal system.[445] Norm portals, as formal mechanisms, add a layer of precision to the process through which international human rights norms seep into domestic legal systems. This formalism may also save them from the democracy concerns raised when nonbinding foreign or international law is directly invoked in U.S. courts.

Moreover, the use of international human rights law is different from the application of other international law and, of course, foreign law. International human rights law is typically only invoked when it is rights-expanding. Thus, objections to substantive human rights are infrequently used by the U.S. government to defend nonenforcement. Rather, the government tends to rely on other formal elements of international law to argue that the external norm is unenforceable in U.S. courts. In particular, the government invokes the international law of treaties to defend nonadoption of a norm (as with ICCPR Optional Protocol 2), the law of reservations to treaties to defend federalism constraints on enforcement (as with U.S. reservations to the ICCPR), and also the general limits of the applicability of customary international law in those areas where the United States has not adopted the treaty standard. The Eighth Amendment arguably provides a unique constitutional entry point (perhaps acting as a norm portal within the Bill of Rights) in that it permits taking into account

443 *See, e.g.*, James Cockayne, *On the Cosmopolitanization of Criminal Jurisdiction*, 3 J. INT'L CRIM. JUST. 514, 523 (2005) (book review).

444 These examples are merely illustrative. I plan a more comprehensive mapping of potential norm portals as a follow-on project.

445 *See* Louis Henkin, *Human Rights: Ideology and Aspiration, Reality and Prospect*, *in* REALIZING HUMAN RIGHTS 3, 15–16 (Samantha Power & Graham Allison eds., 2000); PHILIP ALSTON & HENRY STEINER, INTERNATIONAL HUMAN RIGHTS IN CONTEXT (3d ed. 2006).

international fairness under the "evolving standards" of "cruel and unusual."[446]

That is not to say that some international standards on human rights may present unique dilemmas for the United States. International interpretations of the "right to life" that might also incorporate a ban on abortion may conflict with the privacy rights outlined in *Roe v. Wade*.[447] International protections against some kinds of speech might similarly run afoul of U.S. constitutional protections. In those cases, the United States can respond to an open norm portal by shutting it through withdrawal from the treaty, but it is not clear that withdrawal is a practical option for the VCCR (or, for that matter, extradition treaties).

The VCCR is of such fundamental importance to the protection of U.S. business and American citizens abroad that withdrawal may not, in practice, be feasible. The United States has done the next best thing by withdrawing from the Optional Protocol. Withdrawal from the protocol does not, however, appear to have affected the norm shift that has already occurred in U.S. courts. While it is true as a doctrinal matter that the ICJ opinions in *LaGrand* and *Avena* are only directly binding on the parties to those cases, and that withdrawal from the Optional Protocol prevents any future ICJ litigation on the matter, those cases in which the VCCR is interpreted as creating an individual right to which a concrete remedy must be provided, remain as an international rule of decision for interpretation of the rights of foreign nationals. The VCCR has thus accomplished a one-way importation of additional protection in capital cases. And it is already having important residual effects in noncapital cases and civil cases.[448]

Norm portals also serve an important role in interstate relations by equalizing the reciprocity game. The United States takes the VCCR seriously because it is concerned that it have full access to American citizens who are detained overseas. Thus, when the State Department communicated its concerns with the governors of Virginia and Oklahoma, it focused on this reciprocity of obligation. Of course, the VCCR does not offer tit-for-tat opportunities for retaliation as, for example, violations of the trade regime under the WTO Dispute Settlement Understanding. Moreover, the parties who might wish to retaliate, for example, by detaining American citizens without access to the U.S. government, are not inclined to do so in light of over-

446 *See* Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 48 (1994).

447 410 U.S. 113 (1973).

448 *See, e.g.*, Jogi v. Voges, 425 F.3d 367, 384–85 (7th Cir. 2005).

whelming U.S. power and its ability to inflict greater economic or even military harm. Nonetheless, the invocation of the VCCR or an extradition treaty offers a formalized method of extracting a penalty from the United States for failing in its reciprocal obligation.

CONCLUSION

The sovereigntists are right that views of people outside the United States are affecting how cases get decided. But they are wrong about how it is coming about. The fears of unaccountable, cosmopolitan judges with life tenure picking and choosing from international and foreign decisions are as overblown as the claims of responsible global judicial dialogue. It was not the judges on the international cocktail circuit who brought about the norm shift in these cases. Indeed, Justice Breyer seemed to concede the relatively minor role of judges in the process of legal globalization when he put the burden on lawyers to raise international law issues in their arguments.[449] To the extent that judges do take on an internationalist bent, it is in extremely subtle ways, and ways which are, ultimately, framed in U.S. notions of fairness and justice—a kind of "good" American exceptionalism.[450]

It was also not "unaccountable" international institutions that started the norm cascade, but rather individual advocates and national governments.[451] Norm portals may facilitate changes in U.S. human rights practice that some sovereigntists will object to as reflecting restraints on U.S. power. The *Medellín* cases demonstrate, however, that invocation of international human rights law through the VCCR norm portal has operated similarly to other novel claims in U.S. courts that have led to "tipping points" on important social and legal norms.

Following *Sanchez-Llamas*, state officials and judges are free to elaborate the obligations of the VCCR and require state remedies for failure to comply fully with the notification provision. Such actions raise none of the democratic or sovereignty concerns implicated when nonbinding foreign or international law is invoked in interpreting in-

449 Breyer, *supra* note 23, at 267–68.

450 *See* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1480–94 (2003) (distinguishing between "good" American exceptionalism emanating from historical, cultural and political distinctions that result in exemplary U.S. human rights performance from "bad" exceptionalism under which the United States remains outside the international legal fold).

451 *See supra* Part IV.B.

dividual rights under the Constitution.[452] Indeed, short of acceding to international commitments to abolish capital punishment, the VCCR norm portal may represent the most effective and democratically defensible means through which to help nudge U.S. human rights practice toward the international standard.

452 *See* Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1598–1606 (2006).