INTERNATIONAL LAW, CRIME AND POLITICS

AN AMERICAN DILEMMA

INTERNATIONAL LAW, CAPITAL PUNISHMENT, AND FEDERALISM

Mary Welek Atwell

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International Law, Crime, and Politics

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Published by Palgrave Macmillan

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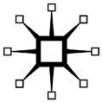

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First published in 2015 by
PALGRAVE MACMILLAN®
in the United States—a division of St. Martin's Press LLC,
175 Fifth Avenue, New York, NY 10010.

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ISBN 978-1-349-66999-8 ISBN 978-1-137-27037-5 (eBook)
DOI 10.1057/9781137270375

Library of Congress Cataloging-in-Publication Data

Atwell, Mary Welek, 1943– author.
An American dilemma : international law, capital punishment, and federalism / by Mary Welek Atwell.
pages cm
Includes bibliographical references and index.
1. Capital punishment—United States. 2. Federal government—United States. 3. International law. I. Title.

KF9227.C2A98 2015
345.73'0773—dc23 2014049911

A catalogue record of the book is available from the British Library.

Design by Newgen Knowledge Works (P) Ltd., Chennai, India.

First edition: June 2015

10 9 8 7 6 5 4 3 2 1

For David

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Introduction

On July 7, 2011, Humberto Leal Garcia was executed in Texas. Given that Texas leads the United States in the number of executions, there is little that is remarkable about Leal's death—except that as he was a Mexican national, his execution drew attention and comment from the international community, from diplomats and senators, and from the United Nations High Commissioner for Human Rights. Leal was tried and sentenced to death without being informed of his right to confer with the consulate of his country, a right the United States promised to foreign nationals when it signed the Vienna Convention on Consular Relations over 40 years ago. American citizens traveling abroad frequently rely on the provisions of the Vienna Convention to provide access to advice and assistance if they run afoul of local authorities. Yet, resisting both international and domestic pressure to forego the execution of foreign nationals who were not informed of their rights is only a recent example of how American policies regarding capital punishment put it at odds with much of the world.

The United States stands virtually alone among developed democratic countries in continuing to permit the use of capital punishment. The nations of Europe, the former British Commonwealth countries, the nations created from the former Soviet Union, most of Central and South America, and many African nations have abolished the death penalty—either completely or for offenses less serious than treason or war crimes (ordinary crimes). Meanwhile, the United States finds itself in the company of retentionist countries, including Afghanistan, China, the Democratic Republic of the Congo, Iran, North Korea, Pakistan, Saudi Arabia, and Zimbabwe, whose traditions and records on human rights are less than admirable. As this book will argue, asserting a leadership role in the international endeavor to advance human rights at the same time persisting in the use of capital punishment places the United States in a most contradictory position. As much of the rest of the world trends toward abolition, the United

States must engage in fancy footwork to justify its ongoing use of the death penalty, especially in the face of international treaties and rulings from the International Court of Justice (ICJ). America finds itself an outlier, deviant in an atmosphere where capital punishment is viewed as a human rights issue, not simply one among many acceptable options in dealing with crime.

However, even domestically within the United States, both the popularity and the use of capital punishment have declined from their high points in the 1990s. Thirty-five people were executed in 2014, compared to 98 executions in 1999.[1] In 2013, nine states were responsible for 39 executions. In 2014, all executions occurred in only seven states. It is clear that capital punishment is not a national practice in the United States, but rather a much more local phenomenon. A report from the Death Penalty Information Center released in 2013 found that only 2 percent of the counties in the nation were responsible for all the death sentences that year. Conversely, 85 percent of the counties in the United States have not had a single case that resulted in an execution since 1976.[2]

The number of death sentences also continued a downward trend, from 315 in 1996 to 79 in 2013. Reduced public support for capital punishment became apparent through several developments. In the Gallup Poll, which asks only a global question about support for the death penalty, 61 percent of those surveyed responded positively. This percentage had declined from 67 in 2000 to 80 in 1994. More significantly, a CNN poll showed that when offered alternatives to capital punishment, 50 percent chose a life sentence.[3] In more concrete developments, in 2013, Maryland became the eighteenth state to abolish the death penalty, and the Governor of Oregon declared an end to executions during his term. Since 2007, six states—New Jersey, New York, New Mexico, Illinois, Connecticut, and Maryland—have ended their use of the death penalty.

Observers advance a number of explanations for this lessened support. Some cite the publicity surrounding exonerations of innocent people condemned to death, others cite the availability of life without parole as an alternative, while some point out the cost of using capital punishment during a time when state budgets are under strain. Perhaps the most vivid demonstration of problems with capital punishment has come with a number of botched executions during the last two years. As European manufacturers have stopped supplying drugs for use in lethal injections, states have improvised with untested and unregulated mixtures. In Ohio and in Oklahoma, inmates have suffered lingering and obviously painful deaths.

The uneven use of the most drastic sanction in certain sections of the country (mostly in the South) and even more disproportionately in a few states (only Texas, Florida, and Oklahoma saw more than five executions in 2013) suggests that the administration of the death penalty remains subject to local considerations and risks the arbitrariness that led the Supreme Court to find it unconstitutional in *Furman v. Georgia* in 1972.[4] Scholars often cite systemic problems with the application of capital punishment: racial and ethnic disparities that involve the race of the victim and of the offender; the prevalence of mental illness among those sentenced to death; the lack of adequate legal representation at various stages of the process, a problem often correlated with the poverty of the defendant. Additionally and forming the major focus of this book, is the matter of the execution of foreign nationals. American use of the death penalty not only stands in contrast to human rights treaties and human rights standards subscribed to by much of the international community, in a number of cases, the execution of foreign nationals has occurred in violation of the 1963 Vienna Convention on Consular Relations. That agreement binds signatories to notify the appropriate consulate as soon as one of their citizens is charged with a crime. Yet in the United States, not only have numerous foreign nationals been denied access or remained uninformed of their right to contact their consulate, 31 such individuals have been executed since the treaty was ratified in 1969. A recent count showed 138 foreign nationals currently on state and federal death rows.[5]

The rights of foreign nationals accused of serious crimes in the United States may well be compromised by the failure of local criminal justice agencies to carry out obligations under the Vienna Convention. The reluctance of individual states and localities to comply with treaty commitments has been exacerbated by conflicting judgments from the ICJ and the US Supreme Court, as well as by contradictory positions within the executive branch. Questions regarding legal remedies for those foreign nationals not informed of their rights have not been resolved. In addition, as with all death penalty issues, the question of executing foreign nationals becomes enmeshed in partisan politics at the state and national levels. In the following chapters, an examination of American conformity with and resistance to its international obligations under the Vienna Convention will constitute a case study that highlights a number of key questions. How does the persistent use of the death penalty isolate the United States in its relationships with the world community? How does it serve as an example of a particular kind of American "exceptionalism," one that calls the US

claim to being a model of human rights into question? The discussion of cases where American criminal procedures and policies in conflict with the Vienna Convention were brought before the ICJ brings into sharp focus the difficulty of enforcing international obligations within a federal structure. In the cases examined in *An American Dilemma*, it becomes clear that commitments made by the executive branch of the government and ratified by the Congress may be ignored by the states and muddled by decisions of the Supreme Court.

Chapter 2 centers on a discussion of American exceptionalism and sets the stage for the political and cultural environment in which the United States approaches issues of human rights. Various students of politics have defined exceptionalism as, on the one hand, a positive commitment to democratic values and, on the other hand, a sense that the United States by virtue of its greater strength may enjoy an exemption from rules applied to the rest of the world. This sense of being exceptional often clouds American adherence to international agreements and organizations, including, in this instance, the provisions of the Vienna Convention applying to criminal procedure.

Chapter 3 examines the legal framework that provides the context for the application of capital punishment in the United States. After finding the death penalty as applied unconstitutional in 1972, the Supreme Court reinstated the policy four years later. The new laws passed in the 1970s were intended to make the use of capital punishment less arbitrary and more consistent. During the last four decades, the court has "tinkered with the machinery of death"[6] and created a complex structure of laws. Whether, after these decisions, the death penalty remains cruel and unusual punishment is a matter of debate. The chapter also provides an introduction to the issue of state procedural rules and the constitutional application of capital punishment.

The critical issue in this book is how the interpretation of the rights of foreign nationals sentenced to death in the United States intersects with their rights under the Vienna Convention. The Vienna Convention, sometimes called "the international golden rule," attempts to ensure reciprocity among nations whose citizens are detained abroad. Article 36, the part of the treaty most relevant to this study, describes the duties of law enforcement in the host country when a foreign national is arrested or significantly detained. It requires law enforcement officers to inform those arrested or detained "without delay" of their right to have their consulate notified of their detention.

In 1969, the Nixon administration supported the ratification of the Vienna Convention. Secretary of state William Rogers claimed it would add to the development of international law and contribute to

the orderly and effective conduct of consular relations among nations. Many would argue that the provisions of the Vienna Convention are binding on the federal, state, and local officials in the United States based on Article VI of the Constitution (the supremacy clause), which states, "All Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding."[7] The US Justice Department adopted regulations requiring that federal law enforcement officials and immigration officials were obliged to tell foreign nationals of their right to communicate with their consul. However, no federal law or regulation required state and local law enforcement officials to meet the same standards. Whether or not such specific legislation was necessary, the Supreme Court has said that the Vienna Convention is not "self-executing."

Three important cases involving foreign nationals sentenced to death in violation of their rights under the Vienna Convention are the subject of chapters 4–6. Angel Breard, a Paraguayan citizen, was executed for attempted rape and murder in Virginia in 1998. Paraguay attempted to sue on Breard's behalf in Virginia and in the ICJ. Breard also raised claims that were denied by the US Supreme Court. The next year, Joseph Stanley Faulder, a citizen of Canada, was executed in Texas for a murder in the course of a home robbery. The Canadian government, the US State Department, and numerous international bodies appealed to Governor George W. Bush who denied a stay of Faulder's execution. Two brothers, Karl and Walter LaGrand, German citizens, were sentenced to death in Arizona for murder in the course of a bank robbery. Although Germany appealed to the ICJ and the International Court issued a Provisional Measures Order (PMO) asking for a delay, the LaGrands were put to death. The ICJ ruled that the United States was in violation of the Vienna Convention and that the United States must provide defendants with an opportunity to challenge convictions if they were not provided consular access. The ICJ also held that procedural default rules in the states prevented the rights conferred by Article 36 of the Vienna Convention from taking full effect. Thus, the International Court's opinion set the stage for further confrontations with the working of the American criminal justice system.

Chapter 7 deals with the *Avena* case where Mexico claimed in the ICJ that the United States was in violation of the Vienna Convention on Consular Relations based on the detention, trials, convictions, and sentencing of 51 Mexican nationals who had been sentenced to death and were currently awaiting execution. Some had never been formed

of their right to consular access; others were informed belatedly. The United States argued that although some of the inmates had been prosecuted without consular access, the United States should be able to address the problem through "means of its own choosing," such as executive clemency. The ICJ's 14–1 ruling held that the United States must provide a *judicial* remedy—that American courts must review the convictions and sentences of foreign nationals who had not been provided with consular access. One such case arrived at the Supreme Court in 2008 when Jose Ernesto Medellin appealed his death sentence based on the local Texas authorities' failure to notify him of his right to contact the Mexican consulate. Chapter 7 also examines the conflict embodied in determining how the ICJ's *Avena* decision would be carried out within the federal structure of the United States through an analysis of the major case that followed it—the case of Jose Ernesto Medellin who was ultimately executed in Texas. Medellin's appeal was rejected by the Supreme Court. Even though they recognized a failure to abide by the terms of the Vienna Convention, by a 6–3 margin, the court held that the treaty was not "self-executing," and that *Avena* had no domestic legal effect. It could not preempt the procedural default rule of Texas. In other words, the states were free to follow or to ignore the treaty's provisions and had no obligation to abide by the rulings of the ICJ. As Governor Rick Perry stated, the International Court had "no standing in Texas."

Chapter 8 uses Texas to provide a case study of the issues involved in upholding international rules against a backdrop of a federal system and within a political climate characterized by an extreme states' rights position, a harsh criminal justice system, and governors with national electoral ambitions. It offers a paradigm of how constitutional questions or treaty obligations may become embedded in local and state politics. Three of the cases examined in this book—Faulder, Medellin, and Leal—came out of Texas, the state with by far the most executions since the reinstatement of the death penalty. There one can observe how politicians find little or no advantage in adhering to international obligations and consequently looking "soft on crime" to their constituents. Unlike the structure in other democracies, the national government cannot use its power to compel a state to comply with a treaty or an ICJ ruling. This chapter looks both at the attitudes that support such resistance to international concerns and at the possibility that changing demographics in the United States, and particularly the growing Hispanic population in Texas, may influence the climate in which the execution of foreign nationals is carried out and may lead to greater respect for opinion outside the United States.

The final chapter examines the most recent high-profile execution of a foreign national, the death of Humberto Leal Garcia in 2011. Again, the urging of international diplomats, military leaders, the United Nations, and some on both sides of the political aisle that failure to abide by the Vienna Convention jeopardized the protection of US citizens abroad did not deter Texas from carrying out Leal's execution. Domestic politics clearly overrode any concern for world opinion.

The conclusion offers some possibilities for reducing the isolation of the United States with regard to capital punishment. The need for international cooperation regarding economic and security issues may serve as an impetus to resolve the controversy regarding the execution of foreign nationals and perhaps afford an opportunity to reframe the debate over the death penalty. There are several ways in which the United States could address the application of the Vienna Convention. The State Department could step up its existing efforts to educate state and local law enforcement officers concerning their obligations under the convention. Courts could make procedures for consular notification mandatory, as part of a Miranda-type warning. Congress could pass legislation spelling out requirements to conform to the Vienna Convention or they could amend the Antiterrorism and Effective Death Penalty Act (AEDPA) to allow federal habeas appeals to include a review of claims under the Vienna Convention. The prospect of some of these reforms seems especially unlikely in the current fractured and stalemated political climate. However, they offer an alternative to the current division among the branches of government and between the federal government and the states. One might also note that the future application of the Vienna Convention, at least in the most serious cases, is linked to the larger debate over the future of the death penalty in the United States—a future that, although unpredictable, may involve a continuation of the trend of fewer executions, fewer death sentences, and more states abolishing capital punishment. By placing the death penalty in the context of international law, there is a possibility that the debate will shift from the practical arguments about applying the sanction to more consideration of the death penalty as a matter of human rights.

2

American Exceptionalism

In 2001, before George W. Bush set out on his first European visit as president, a group of senior American diplomats sent him an open letter. They pointed out to the president, who, as Texas Governor, had a reputation for presiding over a record number of executions, that he should be aware that nations in the European Union viewed the United States as an international outlier. The practice of capital punishment, they warned, damaged the international reputation of the United States. It provided a negative example of American exceptionalism.

It is conceivable that one reason the United States stands apart from most other modern nations in the practice of capital punishment is found in the tradition of American exceptionalism. The notion that the United States enjoys a unique role in the world is not new. It has long been a theme in American political discourse. Numerous observers and scholars have attempted to identify the nature of the differences that may set the United States apart as well and to explain the roots of these differences. Often a discussion of this exceptionalism has involved an exploration of positive American characteristics such as a commitment to democratic forms of government. Others have framed the question in terms of the lack of a genuine political left in the United States. However, one might also argue that its sense of distinctiveness has a bearing on the current US willingness to stand outside the international community on matters such as human rights and capital punishment.

In what sense is there such a phenomenon as "American exceptionalism"? If it exists, how is it reflected in domestic policy and in the nation's relationships with the rest of the world? Most relevantly for this study, how is exceptionalism a factor in the arguments over American adherence to its capital punishment regime in the face of negative world opinion and conflicting treaty obligations?

Some trace the concept of American exceptionalism to Jonathan Edwards's statement that the earliest Puritan settlers of the

Massachusetts colony were founding "a city on a hill," one that would stand as an example to the rest of the nations, a place where the corruption of the Old World would be unwelcome. Daniel Bell identifies traditional American exceptionalism with the view that the United States is a "providential nation, a redeemer nation," one whose dedication to liberty and to the worth of individuals would provide the foundation of a new and more moral society.[1] Byron Shafer finds the notion of exceptionalism associated with the aspirations of those who founded a new land "to escape the institutionalized vice" of Europe.[2] Clearly the historical definitions of exceptionalism involve a comparative view, where America's virtues stand in contrast to the failings of older countries. Alexis de Tocqueville provided a classic expression of the concept in *Democracy in America* when he wrote of the uniqueness of America's development, which involved neither a history of feudalism nor a history of violent class antagonism. He tied this development to a sense of egalitarianism.[3]

Seymour Martin Lipset, who is often identified with reinvigorating the concept of exceptionalism in the late twentieth century, finds essential distinctiveness in the American ideology. The distinctiveness includes antistatism, individualism, populism, and egalitarianism. He notes "chronic antagonism to the state" dating from the American Revolution, established in the constitutional separation of powers and the federal structure, an "internally conflicted form of government" intended to reduce the ability of the state to interfere in the lives of citizens.[4] Likewise, he describes the American people as "utopian moralists" who have attempted to "institutionalize virtue, to destroy evil people, and to eliminate wicked institutions and practices." Such moral absolutism, Lipset argues, is based on the millennialism of some American Protestant sects who have tended to follow moral dictates in making public policy and who have admitted of no gray areas.[5]

Although he finds the "uniqueness of the American experience" to be a subjective myth, Godfrey Hodgson notes that a culture of rights has prevailed in the United States and its scope has expanded through the nation's history.[6] Yet as Shafer states, the notion that the American model of individual rights stands in contrast to the reality of other comparable nations has become less accurate as the differences have lessened.[7] Sometimes, as in the case of capital punishment, the United States differs from other modern states in its definition of the right to life. Especially in the years after World War II, the notion of respecting a right to life has, for most democratic nations, served as a normative objective rather than a limit on the state's right to kill.[8] While members of the European Community hold that the right to

life is sacrosanct and that the state *never* has the right to take a life, American concerns with that right often focus on issues related to abortion and the right to be born. While other nations define the right to life as a protection of citizens from the state, many Americans see it as a sort of protection of a fetus from its mother in which the state represents the interests of the unborn. Such differences constitute a form of American exceptionalism, but a form that diverges significantly from the belief that the United States sets a model of human rights that other countries might aspire to.

This chapter considers theoretical definitions of American exceptionalism and contemporary applications of that notion, especially uniquely American ways of viewing human rights. It explores how the pursuit and protection of those rights may relate to national sovereignty, and finally how the retention of capital punishment, both the justification for it and its symbolic role in the United States, constitute a particular version of American exceptionalism.

Robert Bellah finds the theme that Americans had an "obligation to carry out God's work on earth" deeply embedded in the nation's tradition. Americans tended to believe that "God's work was our own." In this view, the United States had the task of building a new social order that would be a light to all nations.[9] Yet, the United States, in Bellah's view was at the same time, profoundly provincial, unwilling to learn much about the rest of the world and convinced that "the world would be a better place if people in other countries were more like Americans."[10] Thus, exceptionalism carried with it a proud, even arrogant, missionary impulse, but not a sense of cultural reciprocity. Even the American tradition of anti-imperialism involved a sense that the nation was a "unique and universal model" for other countries to imitate. Thus, much of the twentieth-century foreign policy embodied the contradictions of the Wilsonian model that remaking the world in the US image was, somehow, not a form of cultural domination, and at the same time considering that Americans need not try to develop the ability to see things from others' perspective.[11] This version of the story, which justified empire by an intention to extend liberty, Christianity, and the (exceptional) blessings of American life, whether others wanted those things or not, required an ethical "nimbleness."[12] A similar nimbleness is required to reconcile current US policies that criticize other nations for their failures to live up to international standards with the sense that its own breaches of human rights are outside the jurisdiction of the world community and, in particular, the unilateral rejection by the United States of the view that capital punishment is a violation of human rights.

But an expansive definition of its own national sovereignty is integral to American exceptionalism. As Michael Ignatieff explains, when it comes to human rights, the United States is both a leader and outlier. In some periods, American exceptionalism has involved promoting human rights as an extension of its own core values, while other administrations "emphasized the superiority of American values over international standards."[13] In either case, the willingness or unwillingness to conform to external principles relates to a perception of national self-interest, rather than to the principles themselves. Harold Koh argues that in the twenty-first century, the United States has been deeply committed to double standards in order to preserve American hegemony, moving from an architect in constructing an edifice of human rights to an outlier.[14] In this view, American policy holds that standards regarding human rights (e.g., in the matter of torture or capital punishment) may apply to others, but not to the US government. Or at least the United States will not be held accountable in international forums for the violation of those rights. Such a position is the antithesis of the historical American claim that human rights are integral, inalienable, and universal.

How does one account for such a double standard, a claim that Americans should be given selective immunity from universal norms? An explanation comes more readily than a justification. On the one hand, there is an argument that Americans have nothing to learn from other nations about human rights. This position follows from the premise that the United States sets an example as it safeguards its citizens' rights through the democratic process. International conventions that may or may not bear the imprimatur of democratic ratification should be regarded with skepticism as compared to rights guarantees that emerge through the domestic process. And if the United States does become a party to such conventions, there is no central instrument to "harmonize" US law with international law. Thus, as this book will argue, there is a high bar to incorporate treaties and multinational agreements into the American legal system. As Ignatieff states, conservatives, who enjoy dominance in American politics, like to reassert nationalist and exceptionalist rhetoric and policy.[15] In such a climate, conformity with human rights standards as defined by the United Nations or by treaty or by an international court is unlikely to play well in domestic politics when set against claims of national sovereignty.

If the United States sees itself as a defender of human rights, and yet it can be demonstrated to be a major violator of those rights, there are clearly two sides to the American record and deeper questions to

ask about American exceptionalism, in both its positive and negative dimensions. Many Americans cling to the view of their country as a beacon and bastion of respect for human rights, yet they are surprisingly reluctant to have their record subjected to international scrutiny. Domestic politics provide a significant part of the answer to this paradox as does the federal structure of government in the United States. The distribution of powers between the federal government and the states makes it much more difficult to enforce uniformity of policies, especially in the area of criminal law, than it would be in nations with a more unitary governmental structure.

In the political realm where no office seeker wants to be accused of revealing national weaknesses, there are those who would argue that acknowledging shortcomings in the area of human rights would diminish American authority on the world stage and involve a compromise of sovereignty. Joseph P. Nye, on the other hand, proposes that American foreign policy objectives are negatively affected by "unilateralism, arrogance, and parochialism."[16] He makes the argument that national interests would be better served by paying proper respect to the opinion of other nations and incorporating a broad conception of justice into domestic and international policy. He claims it is well known to both friends and foes that the United States leads the world in a number of less desirable measures—rates of homicide and incarceration, gaps between the rich and poor, and the costs of health care. Such deficiencies are costly to asserting "soft power" (the kind of leadership by example historically identified with American exceptionalism). In fact, in Nye's analysis, American soft power is significantly eroded by policies such as the persistence of capital punishment or the lack of gun control, and by the "failure to pay proper respect to the opinion of others."[17] He notes the role of partisan politics. Both Democrats and Republicans have "responded largely to domestic special interests and treated foreign policy as a mere extension of domestic politics."[18] Yet, Nye concludes that America's world leadership would be not only morally improved but also more effective if the United States were sensitive to other nations' concerns regarding human rights. Rather than being a show of weakness or a compromise of national sovereignty, Nye considers conformity to international human rights treaties and norms as effective demonstrations of American (soft) power.

Regardless of such arguments, however, especially since the attacks of September 11, 2001 and the assertion of a "war on terrorism," the US policy has reflected a need to manifest its "hard power," through military engagements and through the affirmation

of unilateral dominance. In such an atmosphere, arguments about the need to keep its own house in order when with respect to human rights have often been drowned out by arguments for the demonstrations of "strength" in a dangerous world where threats are omnipresent. Stanley Hoffman is one scholar who finds a "new" American exceptionalism based almost exclusively on military domination, on "being, remaining, and acting as the only superpower."[19] Such a "bizarre" world view is, he claims, enforced by a mentality of government by "sheriffs" suspicious of diplomacy and relying on force. In addition, it is supported by an interpretation that the US Constitution excludes acknowledgment of any superior international law or the transfer, pooling, or delegation of sovereignty to an international body.[20] If Hoffman's analysis is accurate, it describes how it is possible to claim that human rights issues may be ignored in the interest of national security. Hodgson also sees the US response to the 2011 terrorist attacks—the declaration of a global "war on terror" and the encouragement to "go shopping" and spend money—as growing from a misperception of its role in the world. He argues that Americans felt impotent after 9/11, that a sense emerged that "wherever thwarted and by whomsoever, the United States must assert itself more vigorously."[21] Certainly the perception of a nation threatened and under siege from amorphous, unidentified enemies who "hate us because of our freedom" intensified the political saliency of American exceptionalism. One might argue that in the post-9–11 world, the United States became even more committed to defending its own human rights record from outside scrutiny, even as it became more outspoken in judging the human rights records of some other nations. Congress frequently referred to "internationally recognized human rights," such as freedom from torture, degrading treatment or punishment, and condemned "flagrant denials of the right to life, liberty, or the security of persons" in citing the record of, for example, Sadaam Hussein's Iraq.[22] Yet, public figures apparently shrank from applying such "internationally recognized" standards to American domestic policy. It is hard to maintain that such exceptionalism or exemptionalism can continue indefinitely. As Stephanie Grant contends, "the political culture of Texas is no more exempt from human rights scrutiny that that of Tehran or Baghdad."[23]

This apparently contradictory sense that American behavior should be exempt and not be eligible for criticism by other nations on the basis of its human rights record reflects a shifting and contested definition of sovereignty. It is one that asserts US immunity from international accountability and defends the autonomy of its domestic

institutions, but allows American criticism of the rights failure of others. Carol Streiker uses the term "new sovereignism" to describe an attitude that the United States may pick and choose among international conventions, laws, and standards it wishes to abide by.[24] Alan Clark and Laurelyn Whitt contrast this with a European view of sovereignty, which, they note, is not to be regarded as a cover for human rights abuses, but involves an obligation to criticize the human rights records of other nations. This interpretation of sovereignty differs from the American point of view. It sees the notion that human rights issues are "purely domestic" as insupportable and argues that rights issues transcend geography and borders. But it also rejects military intervention to address perceived human rights abuses and relies on treaties and international courts to "enshrine obligations" for adherence to rights principles.[25] Here then, American exceptionalism takes on yet another shade of meaning as it applies to the intersection of sovereignty and the domestic compliance with rights.

The choice between unilateralism and the assertion of national sovereignty and compliance with international human rights obligations is often based on political calculation. In the United States, when politicians feel they must weigh the cost versus the benefit of following international law, they often end up in an ambivalent position. Andrew Moravisik argues that an outspoken conservative minority in the United States is the most important factor influencing the domestic reaction to claims of international law that might create limits on American sovereignty. The same concentrated, active conservatives who reject the role of government in implementing egalitarian domestic social outcomes tend to be opponents of international human rights standards.[26] And although they may assert that their objections are procedural (they see constitutional objections to conforming with international law), Moravisik believes these objections are informed by exclusionary racial, class, and religious values. Although many scholars connect US hostility to human rights norms to the "legacy of the anti-majoritarian United States Constitution, the federal structure, two centuries of Southern overrepresentation in US politics, and conservative influence in the judiciary," Moravisik contends that a political and cultural aversion to human rights arguments is almost indistinguishable from a formal substantive commitment against them.[27] In other words, the United States is the only country in which all of the following factors exist: great geopolitical power, a stable democratic tradition, a powerful conservative minority, and decentralized political institutions. Those factors explain how America can go it alone and remain outside the international

consensus regarding many human rights matters.[28] Thus in the modern world, American exceptionalism can take the form of less respect for the opinions of mankind.

Ignatieff elaborates on the way that American institutions contribute to this "legal isolationism." Courts in the United States, including some very vocal members of the Supreme Court, deny the jurisprudence of other courts. Perhaps they think the United States has nothing to learn from foreign tribunals or perhaps they consider foreign judicial attitudes too liberal (especially regarding questions like capital punishment). For the most part, the American judiciary stands apart from comparative legal problem solving, although there are surely benefits to be gained from examining how other constitutional governments have approached problems. But deference to transnational judicial authority is, in general, "unthinkable in the United States."[29] If the habit of eschewing the work of other judicial bodies—national and international—is so deeply embedded in American conduct, it is not difficult to see how US courts can reject the decisions of the International Court of Justice when it rules against the United States. Denying the authority and the jurisdiction of the International Court qualifies as another example of American exceptionalism–exemptionalism.

It is not surprising that such behavior leads to accusations of hypocrisy against the United States. Stephen Walt asserts that because of their unquestioning faith in American exceptionalism, many in the United States find it hard to understand why other people are not enthusiastic about American dominance or why they accuse the United States of bad faith. In his view, Americans take too much credit for global human rights progress and too little blame for counterproductive policies. He sees the United States "talking a good game" on the subject of international law, but at the same time refusing to sign many human rights treaties, refusing to accept the International Criminal Court, and "cozying up" to dictators.[30] Koh also points out hypocrisy and a double standard by the United States as it allies itself with "horrid bedfellows" for strategic purposes, yet criticizes others' human rights abuses. At the very least, such activities weaken the nation's moral authority (the soft power mentioned earlier).[31]

John Torpey connects American exceptionalism with its sense of being "the elect," dating back to the Puritan foundations, which has led to a sense of "messianism" in foreign policy. That sense, sharpened by the frontier experience, has inspired the nation to act with the "violence of a moralistic, avenging loner."[32] In his view, American exceptionalism should not be defined as superiority but includes two

conflicting images: the United States as defender of human rights and the United States as a leading violator of those rights.[33]

Ultimately a discussion of American exceptionalism as a factor in its relationship with international law must include the notion, accepted by many Americans, that transnational protections for human rights are good for the nations who need them, but that the United States does not require those protections because its own legal structure reflects the will of the sovereign people. Acquiescence to the global order would break the connection between popular sovereignty and the rule of law.[34]

On the other hand, the very existence of democracy within the United States must imply that there are internal differences, that many policies are contested, and that overgeneralizations about American exceptionalism can obscure such a variety of positions. Within the federal structure many decisions that affect the nation's human rights reputation are left to the individual states. To a great extent, the federal structure and the tradition of popular sovereignty may provide major explanations of why the United States retains capital punishment at a time when state executions are regarded as human rights violations by most democratic nations. Sanguin Bae notes that the death penalty is the ultimate expression of power by a government over its citizens and thus is often used in dictatorships and repressive states.[35] Given that connection, she attempts to explain why some nations (including the few exceptional democratic countries) retain capital punishment. Even in the countries that have abolished the death penalty, surveys often show that a majority of citizens support it. Thus, public opinion is not a reliable determinant of retention or abolition. In Western Europe and elsewhere, abolition has usually occurred under the leadership of an elite who manage the passage of such legislation. Sometimes the policy change is accompanied by grassroots anti-death penalty support and sometimes it is not. In some cases, international and regional forces have created pressures for ending the death penalty, as the European Union requires abolition as a condition for membership. Crime rates, on the other hand, seem to have little to do with a decision to eliminate capital punishment. Most significant, in Bae's view, are traditions of social equality and exclusion in retentionist countries and domestic governmental structures, such as federalism.[36]

The United States is the only country where federalism means that individual states have "full criminal legislative power." It is also the country with the most elected officials with criminal justice responsibilities.[37] Decisions to maintain and to practice capital punishment are made

closer to home and are more subject to the expression of public opinion. Thus democratic electoral practices are, at least in the United States, in some respects consistent with maintaining the death penalty. One need only think of the thousands of sheriffs, district attorneys, state legislatures, governors, and state judges—all popularly elected and all of whom feel they must be receptive to popular impulses. It is not surprising that in the United States, there is a greater tendency to interpret human rights as they are expressed through public opinion rather than as they are expressed in international laws and principles. In such a context, it is safe to argue that ending capital punishment is much more difficult than it would be in a more centralized state where officials were subject to less pressure from the electorate. As Austin Sarat points out, the attachment to the death penalty in the United States is, paradoxically, a result of an attachment to popular sovereignty. At the same time, capital punishment, democratically administered where citizens officially approve the killing of other citizens is contrary to respect for all persons, which is an "enduring value of democratic politics."[38] In a democracy, as opposed to an autocratic state, the death penalty is transformed from an instrument of political terror to "an instrument used by some of us against others."[39] William E. Connally also offers an explanation of how capital punishment may persist in a democratic state, especially one in which cultural values are contested. In his view, the death penalty ratifies the choices of those who practice the difficult virtue of self-restraint and confirms a legal retribution against those who apparently do not. It offers a vicarious participation in the legal killing of murderers and deflects attention from governments' failures to respond to other grievances (economic or social). An execution serves as a theatrical demonstration of the power of the state.[40] Thus, even if there is little evidence to show that the death penalty serves any crime-reducing purpose, it may accomplish a cathartic objective for its supporters and that may serve to extend its life. Christian Boulanger and Austin Sarat also note the symbolic purpose of the death penalty and its cultural life. With many citizens feeling insecurity and resentment, often related to economic problems, for those who have lost confidence in the state's ability to provide security, a "tough on crime" stand can deflect discontent. They also argue that in the United States, the death penalty serves as a symbol of struggles between the states and the federal government, between the political center and the periphery.[41]

Franklin Zimring acknowledges that the persistence of capital punishment in America is often regarded as a consequence of diffused authority to determine criminal justice policy. But he asserts

that capital punishment is a fundamental political issue, not just one punishment option among many and therefore it should be subjected to federal and constitutional scrutiny rather than left to the vagaries of state politics. He would share the view he attributes to Europeans who claim that Americans are willfully blind and perverse in refusing to confront the basic human rights issues of the permissibility of the death penalty.[42] But the refusal to confront these basic issues takes us back to the matter of American exceptionalism where capital punishment is concerned. Carol Streiker points out that the United States was once in the vanguard of abolishing the death penalty. Prior to the Supreme Court's decision in *Furman v. Georgia*,[43] it appeared that executions were disappearing from the American scene. In the aftermath of *Furman*, however, the majority of the states not only passed new capital laws that met the Court's constitutional objections, the number of executions increased each year from 1977 until the late 1990s. As Zimring points out, the death penalty was seen as merely a matter of criminal justice policy, its use to be determined by the seriousness of the crime and the culpability of the offender. Whether to legalize capital punishment was left up to the individual states, and a decision either to reinstate it or not was permissible. Such decisions would generally be made based on an analysis of costs and benefits and in consideration of public opinion. Matters of human rights would not be included in the debate.[44] In other words, as David Garland notes, during the last thirty years, the United States has moved in the opposite direction from the rest of the democratic world on the subject.[45] This divergence between American practice and abolition in most of the other modern democratic countries came at the time when international law was becoming more and more influential. Thus, the American position stands out in glaring opposition to the majority of nations.

At the same time, international attitudes toward death as a sanction for crime had evolved to include the use of international law to restrict capital punishment and ultimately to abolish it. While other countries are refusing to extradite offenders when they might face the death penalty and raising challenges to capital punishment in the International Court of Justice, the United States often seems to be moving on a different trajectory—making appeals more difficult and restricting the opportunity to challenge sentences on the basis of international law.[46] Clarke and Whitt maintain that, based on those policies, the United States enjoys a negative form of exceptionalism, nearly complete isolation in the matter of state executions. The refusal to acknowledge international pressure to end the death penalty results

in political costs to the United States. Nation states no longer enjoy complete autonomy (if they ever did), but rather experience mutual dependency. Their sovereignty is not absolute as demonstrated by the refusal of other nations to acknowledge the right to take the life of citizens as punishment for a crime.[47] Evi Girling comments that Europeans in particular have been especially interested in the condition and the conduct of the "punisher," the United States, the nation that executes its citizens. Anti-death penalty views are embedded in European discourse, especially as certain cases capture the imagination of Europeans. Individual Americans marked for execution, for example, Joseph O'Dell in Virginia, have been named honorary European citizens. Walter and Karl LaGrand, who were German citizens, also received major attention in the European press. They were among those denied the right to confer with their consulate at the time they were arrested, contrary to the Vienna Convention. News outlets in Europe noted that this lapse of human rights concern in the United States was especially onerous as the LaGrands were poor and they were not provided with adequate legal representation. Assistance from their consulate may well have made a major difference in their trials and in the decision to sentence them to death.[48] Such cases revealed the "fear of Americanization" in Europe—a resistance to practices such as the death penalty and the high level of incarceration associated with the United States.[49] Those were practices many in Europe wanted to reject. Viewing capital punishment as a human rights issue—one that should be governed by human rights standards not by domestic politics—many in Western Europe would argue that there was no case where capital punishment was justified. Therefore, the fundamental issue was one of the limits of the power of ANY government to legally prescribe death in return for ANY crime, no matter what the procedures or the politics involved.[50] American failures to follow commitments under the Vienna Convention only exacerbated the problem.

However, as they live in a death penalty retentionist country, defenders in the United States, argue that carrying out the death penalty is a matter of national sovereignty. Abolitionists argue that it belongs in the same category as slavery and torture—unacceptable among civilized people. The difference—and the crux of exceptionalism in this matter—is that while slavery and torture are illegal, capital punishment enjoys legal status in the United States. Therefore, the exceptionalist argument is that what is permissible (legal and constitutional) should be protected from international criticism because such sovereign immunity is central to the rights of nation states.

Such a notion of sovereign immunity is not only a description of how power is used, but an attempt to justify it. But subscribing to the concept of sovereign immunity in defense of the continuing support of the death penalty raises a number of questions, domestically as well as internationally. Many Americans, especially Republicans and Libertarians, claim to want to restrict the power of the state. Their suspicion of government contradicts the notion that state sovereignty is absolute; yet allowing a state to kill its citizens acknowledges its ultimate power.[51] However, as will be discussed in chapter 8, the federal structure helps to account for this paradox. Apparently, a significant number of those who support the death penalty see it not as an exercise in absolute governmental power, but instead as an expression of a community's retribution in the name of a victim against the criminal. When such a retributive temper is expressed through the democratic process, retentionists are often able to reconcile executions with skepticism about the legitimate powers of government. In Hodgson's view, such views are associated with the current face of American exceptionalism, which he sees as having shifted from a liberal consensus to the ascendency of conservatism. This version of exceptionalism relies on the prowess of American arms, virtually equates capitalism with democracy, reflects a particular notion of evangelical Christianity, and emphasizes "freedom" more than equality. He argues that Americans are now proud of being "exceptionally conservative."[52] In this definition of the conservatism of American culture, Hodgson finds "another exceptionalism" that falls below international standards. He cites the punitive temper that results in the incarceration of huge numbers of people, the rejection of the notion of global warming by many in public life, the refusal to cooperate with international law and international organizations, as well as the support for guns and capital punishment.[53] These policies, unpopular in the rest of the democratic industrialized world, are included in Hodgson's notion of America's current exceptionalism.

As Boulanger and Sarat propose, an understanding of capital punishment must be based on its cultural life, its "embededness in discourses and symbolic practices in specific times and places." The culture gives any punishment its meaning and legitimacy. At the same time, "punishment helps to define the culture and its sociopolitical identities. It provides vivid symbols in cultural battles." Punishment, especially capital punishment, helps to draw cultural boundaries between the self and others.[54] It defines criminals as outsiders, "not like us." Therefore, considering Hodgson's definition of the current notion of American exceptionalism, one may look at capital punishment as it fits

into that discourse. It serves to draw a distinction not only among citizens, between the law abiding and the law breaking, but it also serves to draw a distinction between the United States and other nations. Depending on which side of that divide one stands, the United States is exceptional either as an upholder of principle or as a law breaker who defies international law.

Capital punishment does draw a cultural boundary between respect and disdain for human rights. To much of the world, American retentionism sets it on the wrong side of that boundary.

3

The Legal Framework: Capital Punishment Law and the Rights of Foreign Nationals

Institutions, as Robert Garland has written, are the result of historical developments and are influenced by the political, social, and cultural environment. Those institutions, in turn, help to shape the environment. "Punishment," Garland states, "is a social institution composed of interlinked processes of law-making, conviction, sentencing, and the administration of penalties. It involves discursive frameworks of authority and condemnation, ritual procedures of imposing punishment, a repertoire of penal sanctions, institutions and agencies for the enforcement of sanctions, and a rhetoric of symbols, figures, and images by means of which penal policy is represented to its wider audiences."[1] In the United States, the social institution that is capital punishment sets the nation apart from many comparable nations. Judith Randle contends that the death penalty is a cultural artifact that "reflects and reproduces contemporary American requisites and constructions of the social world" with deeper social and personal significance. She is critical of how support for capital punishment is "fueled by a nasty underbelly of fear, vengeance, and disregard for criminals' lives," feelings created from images of evildoers as unredeemable.[2] Perhaps because of the practice of dehumanizing offenders and unlike the conversation about the death penalty in many other countries, the American debate has seldom included recognizing it as a violation of human rights. Rather, much of the discussion has centered on procedure.

The ways in which the legal framework developed in the United States in the last century supports this example of American exceptionalism is one subject of this chapter. It examines the Supreme Court rulings that have defined the ritual procedures, the enforcing institutions, and agencies. The second topic involves the provisions of the Vienna Convention on Consular Rights, the "golden rule" designed

to protect foreign nationals who become involved in an unfamiliar criminal justice system and who, in some instances, confront the US capital punishment regime.

In the years after World War II, the United States perceived itself and was often seen by people around the world as a leader in the definition and protection of human rights. Through the United Nations and a series of international agreements, it seemed that many nations, especially in the West, had developed a consensus about basic guarantees designed to secure justice. The 1949 Universal Declaration of Human Rights (UDHR), the foundation document in the creation of international protections of human rights, was vague on the subject of the death penalty. Like several other international covenants adopted in the postwar years, the UDHR included an absolute declaration of the right to life. Exceptions to this right were only implicit. But at the time, a number of nations were narrowing the scope of their death penalty laws, applying the punishment to fewer crimes and excluding some categories of persons, such as children, from its scope.

The meaning of the right to life was continuously evolving. Originally the phrase applied to protection from arbitrary state action, a position that indirectly allowed for capital punishment if due process was provided. The European Convention on Human Rights (1955), the International Covenant on Civil and Political Rights (ICCPR, 1976), and the American Convention on Human Rights (1978) followed the same approach. All treated the death penalty as a "carefully worded exception to the right to life" which could not be imposed without rigorous procedural safeguards.[3] The ICCPR stated that "in countries which have not abolished the death penalty, the sentence of death may be imposed only for the most serious crimes . . . by law in force at the time of the crime . . . pursuant to a final judgment by a competent court."[4] The United States ratified the ICCPR in 1992, but only with reservations that allowed for the execution of juveniles (despite the international ban) and that refused to eschew cruel and unusual punishment except as prohibited by the Fifth, Eighth, and Fourteenth Amendments of the US Constitution.[5]

Gradually, many other nations came to see the right to life as prohibiting any state execution and the trend toward universal abolition of the death penalty accelerated. In 1990, the Organization of American States adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty. Although the United States did not ratify the document, the signatories agreed that member states should abstain from the use of the death penalty. The only exception was for "extremely serious" wartime crimes. The United

Nations Commission on Human Rights in 1998 asked all retentionist countries to consider suspending executions with a view to abolishing capital punishment altogether. By this point, many nations no longer regarded the death penalty as only an internal criminal procedural issue to be justified by historical or religious or cultural defenses, but rather as a practice inconsistent with the values of international justice.[6] The Catholic Church too, along with many international Christian denominations, moved toward an anti-capital punishment position. The religious debate changed from justifying a state's right to kill to focusing on the individual's right to live. If the right to live is the foundation of all other human rights, the death penalty is a usurpation of God's power and a distant point on the continuum of state injustice.[7]

The United States was an outlier on the issue—refusing to sign some agreements and supporting others only with reservations. Michael Ignatieff sees these behaviors as one variety of American exceptionalism that involved not American isolationism but as a type of unilateralism that accepted some treaties only with reservations, refused to ratify others after negotiations, or, in some cases, failed to abide by treaties after they were signed and ratified.[8] William Schabas points out that such behaviors have had the effect of isolating the United States, as the reservations regarding international agreements prohibiting the death penalty were rejected by international agencies and considered a violation of international law.[9] In Joseph Nye's view, those who insisted upon resisting perceived threats to American autonomy and denied the importance of the "international community of opinion" were "sovereignists."[10] They apparently believed that the United States could ignore the international norms and rules either because no other nation could force the United States to conform or maybe because its norms and rules were superior to the rest of the world. He argues that the price of such disregard for world opinion is high.[11]

While world opinion on capital punishment evolved in the late twentieth century, within the United States, the Supreme Court was crafting a complex body of law on the subject. Under the leadership of Chief Justice Earl Warren in the 1950s and 1960s, the court embarked on the process of incorporating the provisions of the Bill of Rights to the states. Included among the court's rulings were decisions that required the states to adhere to the Eighth Amendment's ban on cruel and unusual punishment. Because the terms "cruel and unusual" are difficult to define objectively, the court has had to provide concrete meanings for those words and to develop guidelines for

punishments that conform to the Constitution. In *Trop v. Dulles*,[12] the court ruled that if punitive measures violated "evolving standards of decency," those sanctions were unconstitutional.

Although not a death penalty case, in *Trop*, the court found that "the basic concept underlying the Eighth Amendment is the dignity of man." The words "cruel and unusual" are not precise, "their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[13]

In 1972, the court first applied those standards to address the question of whether capital punishment itself was constitutional.

FURMAN AND GREGG: THE MODERN FOUNDATION

Between 1967 and 1977, the United States was in the mainstream of the movement away from capital punishment. During those years, not one person was executed in the United States. It was generally known that the Supreme Court was likely to accept a case that raised the issue of the death penalty's constitutionality. In 1972, they heard three death penalty cases grouped under the name, *Furman v. Georgia*.[14] Furman, who was black, had shot a white home owner during a botched robbery. The murder was apparently an accident occurring while Furman tried to flee. The other two cases from Texas and Georgia involved African American men sentenced to death for allegedly raping white women. Neither victim had been injured, aside from the rape. These cases raised the question of whether the death penalty was unconstitutional as a violation of the Eighth Amendment's ban on cruel and unusual punishment. Each justice in *Furman* wrote a separate opinion, but five of the nine agreed that the death penalty as it was being administered was unconstitutional. Their reasoning differed, ranging from the view that capital punishment itself was unconstitutional to the position that the penalty is flawed when its use is random and discriminatory.

Justices William Brennan and Thurgood Marshall both held that the death penalty was inherently unconstitutional. Brennan emphasized that it violated human dignity. In taking lives, the state treated some people as less than human, "as objects to be toyed with and discarded." Furthermore, capital punishment served no legitimate purpose, it was unnecessarily severe, and there was strong evidence of its arbitrary and biased use. Justice Marshall wrote that if the American people were fully informed, if they knew the death penalty burdened the "poor, ignorant, and underprivileged and members of minority

groups least able to make their complaints" the public would not tolerate the system. Marshall noted the disparities of both race and gender that characterized the application of capital punishment.

Justice William O. Douglas also commented on disparities. He believed that the death penalty persisted because those who faced execution were outcasts, members of unpopular groups "whom society is willing to see suffer though it would not countenance general application of the same penalty across the board." Justices Byron White and Potter Stewart focused more narrowly on the randomness with which death sentences were handed out. Stewart contended that the penalty was "wantonly and freakishly imposed," "cruel and unusual in the same way that being struck by lightning is cruel and unusual." His words came to characterize what was wrong with capital punishment.

The decision in *Furman* meant that the death penalty, as it was being applied, was unconstitutional. The five member majority of the court agreed that the arbitrary way in which courts made their decisions about who would live and who would die did not meet the standards of decency that the Eighth Amendment required.

Most states responded to the ruling by rewriting their capital statutes in ways they hoped would conform with the *Furman* holding. They chose two major approaches to address the issue of arbitrary application of the death penalty—either the punishment could be made mandatory for every first degree murder or courts could be provided with statutory guidelines that clearly defined the criteria regulating its use. The court handed down rulings on both types of laws on the same day in 1976. In *Gregg v. Georgia*,[15] they upheld laws providing guided discretion. In *Woodson v. North Carolina*,[16] they found the mandatory sentence for murder unconstitutional.

The court addressed two questions in *Gregg*. Was the death penalty itself unconstitutional? The majority of the justices answered that it was not. They believed that it served two legitimate penal purposes, retribution and deterrence. Did the Georgia law provide sufficient guidance to judges and juries to prevent its arbitrary application to only a "capriciously selected random handful?" The majority believed that it did. Acknowledging that "death is different," and that the penalty required careful attention to its application, they endorsed several features of the Georgia law. These became models for other states' capital statutes. The trial was divided into two phases, one to determine guilt and one to decide on the sentence. During the latter phase, the state had the opportunity to present aggravating factors, while the defense could offer mitigating information that might help

to explain the defendant's role in the crime. In addition to the bifurcated trial, the court approved Georgia's specificity concerning which crimes qualified for capital punishment; the provision that the state Supreme Court would automatically review every death sentenced case; and the requirement that the State Supreme Court review all such cases for proportionality and consistency. *Gregg* asserted that the Georgia law and others like it successfully addressed the court's concerns about arbitrariness. However, in a troubling statement, Justices White, Rehnquist, and Chief Justice Burger acknowledged that "mistakes will be made and discriminations will occur which will be difficult to explain." They seemed prepared to accept an undefined rate of error in death sentences as a collateral cost of maintaining the policy.

Justice Brennan in his dissent described a fundamental moral concept, respect for basic human rights, which he believed underpinned the Eighth Amendment, "the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings." He found the "calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity." Rather than providing justice for an offense against society, he argued that the death penalty "adds instead a second defilement to the first." It did not so much even the score as create a second deficit. The other dissenter, Justice Thurgood Marshall reiterated that the American people knew little about the realities of the death penalty, and that "the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty." He further took issue with the justification that some murderers "deserved" death. Such a rationale had "as its very basis the total denial of the wrongdoer's dignity and worth."[17]

Brennan and Marshall raised difficult questions about dehumanizing offenders in the capital process—a practice commonly seen in the cases discussed in this book. However, in the aftermath of *Gregg v. Georgia*, the court has never again considered the constitutionality of capital punishment itself. They have not revisited the question of whether all state supported executions violate the Eighth Amendment. They have focused their attention instead on its application.

While the *Gregg* majority upheld the Georgia procedures, in rejecting mandatory death sentences for capital murder in *Woodson*, the court held that the "respect for human dignity underlying the Eighth Amendment requires consideration of aspects of the character of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of imposing the

ultimate punishment of death."[18] The process proposed by North Carolina was faulty because it "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty."[19] In the *Woodson* decision and especially in *Lockett v. Ohio*,[20] the court suggests that the Constitution requires that sentencers be offered a full picture of the defendant. They should see him or her as a human being, not as "faceless," "subject to the blind infliction of the death penalty." Yet it may be argued that in a number of cases discussed here, the failure of attorneys to present evidence in mitigation deprived juries of just such humanizing information about the person on trial for his life. After *Gregg* and *Woodson*, it seemed that the Constitution demanded both individualized sentencing and consistency—a true challenge to courts.

Furthermore, as Franklin Zimring argues, the structure of federalism led to a conflict over which level of government, state or federal, would decide when the death penalty should be carried out. He observed that post-*Furman* there would be huge variations in policy, procedural complications, and delays, and a "commingling of issues of capital punishment with politics of localism and states' rights rhetoric."[21] And, as Dow asserts, in the states where judges were elected—including Texas, the leader in executions—for political reasons judges were likely to care more about implementing the death penalty than about protecting the rights of inmates. Governors too knew that concern for the rights of convicted murderers would risk their political future.[22] All in all, since the death penalty was reinstated in *Gregg v. Georgia*, the United States and other Western nations have moved in opposite directions. The United States has attempted to combine extensive procedural safeguards with execution as the outcome of the process.[23] Meanwhile, other Western democracies have abandoned the practice of capital punishment altogether.

Lockett and *Strickland*: Mitigation and Representation

Following the court's approval of the bifurcated trial separating the determination of guilt from sentencing, it became clear that the conduct of the punishment phase was critically important. Here the offender could be presented as a human being rather than as a dehumanized killer. What evidence would a defendant be allowed to produce at this stage of the proceedings? What was a lawyer expected to do to save his or her client's life?

In *Lockett v. Ohio*,[24] the court reviewed the Ohio law that limited the defendant's opportunity to present mitigating evidence to only three factors: the victim was partially responsible; the offender was under duress; or the offender suffered from psychosis or mental deficiency. They held that the capital process should not preclude the sentencing judge or jury from considering "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Unless the law allowed the sentencer to consider all aspects of the defendant's story, there was a risk that death might be wrongly imposed. "When the choice is between life and death, such risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." The majority opinion repeats the claim that "death is different" and therefore "the need for treating each defendant in a capital case with the degree of respect due to the uniqueness of the individual is far more important than in noncapital cases."[25]

Lockett seems to make it clear that the Constitution requires that death sentences be based on respect for the individual defendant and on assurances that the judge and jury know the accused person's full life story and circumstances. Yet, the only way a jury will know anything positive about the defendant in a murder trial is if that person's attorney puts the information before them. The prosecution will have devoted its efforts to describing the horrors of the crime and the monstrosity of the person accused. If the jury has found him or her guilty during the first phase of the trial, the defense attorney must offer them a compelling humanizing story in the sentencing phase—or a death sentence will result. Thus, the value of allowing evidence in mitigation is contingent on having an attorney with the ability, the will, and the competence to put that evidence before a jury. The court addressed the issue of adequate representation in death cases in *Strickland v. Washington*.[26] It seemed they would permit almost unlimited latitude in attorney performance without finding a constitutional violation.

In *Strickland,* the defendant David Washington claimed he had been denied effective assistance of counsel when his court-appointed attorney failed to request a psychiatric evaluation, to investigate, or to present any character witnesses at the sentencing phase. In other words, no mitigating evidence was introduced. Given the court's *Lockett* ruling, that mitigating evidence was vitally important, it seems logical that attorneys would be expected to present such information. However, *Strickland* suggests otherwise.

According to what became known as the Strickland standard, there are several prongs to a claim of ineffective assistance of counsel. The

defendant must show that the attorney's performance was deficient and that the deficient performance was so prejudicial that he or she was denied a fair trial. Given the court's definitions, both prongs are difficult, perhaps virtually impossible, to prove. A deficient performance is one that "falls below an objective standard of unreasonableness," based on "counsel's perspective at the time." Did the lawyer think his defense was reasonable? Few attorneys would say they did not. Sleeping during the trial, arriving drunk at court, financial dealings that created a conflict of interest with the client's defense, never meeting with a client—all could be rationalized. All have been excused as "reasonable."

Even defendants who could prove that an attorney failed to provide a "reasonably" adequate level of representation would then be required to demonstrate that it was this performance that led to the outcome of the trial. This prong of the test was also extremely difficult to prove. Was it the defense attorney's failures or the strength of the prosecution's case that led to the result? The Supreme Court held further that an appellate court could first determine whether the proceedings in general were fundamentally fair before evaluating the performance of defense counsel. In other words, they could decide that, in general, the trial was not too unfair and if that was the case, the attorney's poor showing was irrelevant. Yet, as David Dow argues, the lawyer's performance is literally a matter of life and death. He asserts that half of those on death row had crucial constitutional violations at trial. Many of those would not be on death row if they had better lawyers.[27] *Strickland* and the cases that followed seemed to doom constitutional claims of ineffective assistance of counsel, even the exceptionally deficient work of defense lawyers in some of the cases discussed in the following chapters.

Defendants with a Disadvantage: Ford, Penry, and Atkins

Additional questions have been raised in the modern era concerning whether the Constitution prohibits capital punishment for certain categories of defendants. Do the evolving standards of decency reject the execution of the insane or the retarded? *Ford v. Wainwright*[28] concerned the constitutionality of putting an insane person to death. The issue of sanity may be critical at several stages in a criminal proceeding. Persons who are too mentally ill to assist in their own defense would be found incompetent to stand trial. Those found not guilty because they were insane at the time of the crime would be sent to a treatment facility rather than to prison. In a capital case, mental illness is typically

considered a mitigating factor, but juries may or may not feel sympathy with a defendant who displays psychotic behavior. The court has never ruled on whether a mentally ill person may be condemned to death. They did, however, determine in *Ford v. Wainwright* that it was unconstitutional to put someone to death who was insane at the time of execution.

Justice Marshall wrote for the majority that such a death violated evolving standards of decency. It did not serve the purpose of retribution as the person executed would not understand his punishment. It did not serve as a deterrent to the competent. It offended basic notions of humanity. However, clarification of the level of insanity that would prohibit execution remained for the state courts to decide.

On several occasions, the court has addressed the matter of whether the Constitution permits the execution of the mentally retarded. In *Penry v. Lynaugh*,[29] the majority ruled that it was not unconstitutional to put a retarded person to death. However, they did insist that Texas courts must allow juries to be told that mental retardation was a mitigating factor. In 2002, they reversed *Penry* in *Atkins v. Virginia*, which held that execution of mentally retarded persons violated contemporary standards of decency and was therefore unconstitutional. They found that retarded defendants were more likely to make false confessions, less likely to make "a pervasive showing of mitigation . . . less able to give meaningful assistance to their counsel, [they] are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." In addition, the execution of those with mental retardation violated international standards of decency.[30]

In *Roper v. Simmons*, the court held that executing an individual who was under the age of 18 at the time of the crime was unconstitutional.[31] Many of the reasons given for prohibiting the execution of those with mental retardation were also relevant to the cases of juveniles. Justice Kennedy, writing for the majority, also cited international law. He noted the "stark reality" that the United States was the only country in the world that gave "legal sanction to the juvenile death penalty." He mentioned the United Nations Convention on the Rights of the Child and the "overwhelming weight of international opinion."[32]

These cases were exceptional in mentioning international standards. As Frank Michelman points out, the United States has usually stood aloof from international human rights judgments. The opinion of Justice Scalia might be seen as typically "parochial" in its disregard for developments outside the United States[33] Often American courts

interpreted human rights issues as a one-way street. The United States should influence others but acknowledge little international influence in return.[34]

Coleman: The Issue of Procedural Default

In 1991, the Supreme Court issued a ruling in *Coleman v. Thompson* that became the foundation for the interpretation of procedural default that would determine the fate of many whose Vienna Convention rights were not observed.[35] Justice Sandra Day O'Connor famously began the majority opinion with the statement "This is a case about federalism."[36] David Dow has noted that every challenge to the constitutional administration of the death penalty is about federalism.[37] But for Roger Coleman, who had been convicted of the rape and murder of his sister-in-law and sentenced to be executed in Virginia, the case was also about life and death. Coleman's lawyers had missed a filing deadline established in state law and therefore he had not had the opportunity to raise a number of constitutional claims. The State Supreme Court denied his appeal and the federal courts, including the Supreme Court, affirmed that ruling. The majority found that Coleman's appeals had been denied based on "independent and adequate state law" and that therefore the federal courts would not contradict that holding. The state law in question here was one which set a 30-day deadline for a prisoner to file a notice of appeal. Coleman's notice had arrived on the thirty-third day. For Justice O'Connor and the court majority, permitting Coleman to file a habeas petition under the circumstances would allow prisoners "an end run around the limits of the court's jurisdiction and a means to undermine the State's interest in enforcing its laws."[38] Several times, the court expressed the concern that without procedural default, the state would not have the opportunity to address and correct any violations of the prisoner's rights. Such deference to the state was "grounded in principles of comity."[39] And, in addition to comity, the court was concerned about finality. A cost of the writ of habeas corpus was the cost to finality in criminal litigation. But procedural default was one way to bring about finality. "We now recognize the important interest in finality served by state procedural rules and the significant harm to the States that results from the failure of federal courts to respect them."[40] O'Connor spelled out the rule: "We now make it explicit: in all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas

review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."[41] To demonstrate a "fundamental miscarriage of justice," essentially the inmate would need to prove that he was actually innocent.

But suppose the reason the constitutional claims were not raised in state court or the state procedures were not followed was due to the incompetence of the defense attorney? Here the court referred to *Strickland v. Washington*. As long as the lawyer met the Strickland standard (his performance was not constitutionally ineffective), there was no inequity in requiring the defendant to "bear the risk of attorney error that results in a procedural default."[42] Coleman and countless other defendants fell into that category—their attorneys failed to raise issues in state court and the unfortunate inmates had no recourse.

Justice Blackmun wrote a strong dissent, in which he was joined by Justices Marshall and Stevens. Much of it was a discourse on federalism which, he points out, has "no inherent normative value." Instead, it should "secure to citizens the liberties that derive from the diffusion of sovereign power." He asserts that federal habeas review of state judgments is not an invasion of state sovereignty. Rather "it is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law."[43] Here Justice Blackmun describes the very issue at the heart of many cases discussed in the chapters of this book where individuals petitioned the federal courts to hear their claims under the Vienna Convention, a treaty included in the provisions of the Supremacy Clause, against state procedural bars to raising those claims.

Justice Blackmun also had something to say about the failure of attorneys. "To permit a procedural default caused by an attorney error egregious enough to constitute ineffective assistance of counsel to preclude federal habeas review of a state prisoner's federal claims in no way serves the State's interest in preserving the integrity of its rules and proceedings. The interest in finality, standing alone, cannot provide a sufficient reason for a federal court to compromise its protection of constitutional rights."[44] The dissenters seemed distressed that the majority were on a "crusade to erect petty procedural barriers" to federal review. They were "creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights."[45] Many of those who were denied the rights to consular notification, but were unaware that such rights even existed, would agree.

Herrera and AEDPA: The Issue of Innocence

What could possibly be accomplished if the state puts an innocent person to death? Retribution requires that the guilty person bear the price of his crime. Who would be deterred by watching the criminal justice system make a serious mistake and fail to do its job? Yet the court's ruling in *Herrera v. Collins*[46] and the enactment of the 1996 AEDPA make it more difficult for innocent men or women to reopen capital cases.

Herrera was convicted in the killing of two Texas police officers and sentenced to death. After ten years, he claimed to have new evidence that would prove him innocent. In a 6–3 decision, the Supreme Court refused to hear Herrera's appeal. They found that his initial trial had been fair, that the Texas law prohibiting the introduction of new evidence more than 30 days after sentencing did not deny him due process, and that he could take his claims of innocence to the governor and ask for clemency. Because the criminal justice system needs "finality," the court held that a defendant must have a very persuasive claim of innocence to get judicial attention.

Three justices who signed onto the majority opinion, Justices O'Connor, Kennedy, and White, stated that the execution of an actually innocent person would be "constitutionally intolerable." But they also wrote that "at some point in time the State's interest in finality must outweigh the prisoner's interest in another round of litigation." But of course it is the state which determines that point. What if it arrives before the person has an opportunity to raise a proper claim of innocence? What if that point occurs sooner rather than later because the defendant was represented by an incompetent attorney? What if the state has destroyed the evidence the defendant needs to prove innocence? The latter may seem outrageous but it has happened in cases in both Texas and Virginia.

The idea of putting an innocent person to death seemed not to bother Justices Scalia and Thomas. In *Herrera*, they claimed there was no constitutional right to "demand judicial consideration of newly discovered evidence of innocence brought forward after conviction." Their cavalier attitude seems to suggest that the occasional execution of an innocent person is less important than an efficient system.

The three justices who dissented in *Herrera* wrote a strong indictment of the implication that "finality" was more important that accuracy. "Just as an execution without adequate safeguards is unacceptable, so too is an execution when the condemned prisoner

can prove he is innocent. The execution of such a person . . . comes perilously close to simple murder." The dissenters also challenged the idea that the innocent could rely on executive clemency as a remedy for their wrongful convictions. Constitutional rights should not be dependent on the "unreviewable discretion or an executive officer or an administrative tribunal." Aside from the danger that "unreviewable discretion" is exactly what *Furman* tried to eliminate from the death penalty system, the likelihood of a Governor actually granting clemency in the modern era is almost nonexistent. Most state executives have learned, as George Bush demonstrated in the James Stanley Faulder case, that the long-term political benefits of being "tough on crime" far outweigh the short-term pressures to spare the convict's life. One can see that pattern played out in almost every case discussed in this book. Political considerations always seem to take precedence over questions of due process or ever over questions of innocence.

Three years after the court handed down its decision in *Herrera*, Congress passed the AEDPA, which further curtailed the appeals process for those on death row. Perhaps because many politicians claimed that "excessive" appeals in the federal courts interfered with efficiency in punishing crime, AEDPA permitted successive habeas corpus petitions only if the Supreme Court had made a new rule and stated that the rule was retroactive. Furthermore, a petitioner would need to establish that his case involved a constitutional violation, that the violation could not have been discovered before, that without the violation, *no* reasonable juror would have voted to convict or to sentence him.[47] In other words, the standard for review was virtually impossible to meet.

The law raised the standard for federal courts to consider claims of actual innocence from "clear and convincing evidence" to "probable" evidence of innocence. It also required that the federal courts of appeals show more deference to the decisions of state courts unless the state court had committed an unreasonable violation of federal law or an unreasonable determination of facts. It was not enough for the state court to be wrong in its decision; it had to be *unreasonably* wrong. The law also set a time limit of one year for federal appeals.[48] The deadline may be especially hard for prisoners in states where there is no guarantee of the right to an attorney for habeas appeals. The clock will tick toward the deadline while he waits to see if a lawyer will volunteer to represent him.

In effect, AEDPA reduces the docket of the federal appeals courts by cutting off the routes available to prisoners who have claims of actual innocence as well as those who raise due process issues. It is

especially damaging to those who are in that predicament because of incompetent or inadequate representation. Such persons are disadvantaged because their claims, such as those invoked under the Vienna Convention, were not raised properly in the state courts or because their putative advocate failed to meet the deadlines for appeals. Tushnet argues that, as Justice Blackmun noted, the court lost sight of the "animating principles of federalism" in *Coleman*. He believes they ratified that loss in AEDPA.[49]

Vienna Convention on Consular Rights

In 1963, 92 nations at the Vienna Conference adopted the Convention on Consular Relations (VCCR) along with the Optional Protocol, which provided for the settlement of disputes arising under the treaty. These documents codified international common law on the subject of consular relations and constituted "undoubtedly the single most important event in the entire history of consular relations."[50] At the heart of the agreement was Article 36, which stated that when a foreign national is detained, the appropriate authorities must inform him "without delay" of his right to notify the consul of his home nation. The consul then could "converse and correspond with him . . . and arrange for his legal representation." The treaty further provides that the rights of the foreign national "shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."[51]

Before the VCCR was signed, the United States had signed 28 bilateral treaties regarding consular access and made a number of claims to ensure consular contact with American citizens abroad, asserting that "a foreigner, not familiar with the laws of the country where he temporarily resides, should be given this opportunity" (to have access to his consul in case of arrest or detention).[52] The Nixon Administration encouraged the Senate to ratify the Vienna Convention, noting that it was "widely accepted as the standard of international practice in civilized nations."[53] In testimony before the Senate Foreign Relations Committee, a State Department representative stated that the treaty was "entirely self-executive [*sic*] and does not require any implementing or complementing legislation." In other words, under the Supremacy Clause (Article VI) of the Constitution, if provisions of the treaty were in conflict with federal or state laws, the Vienna Convention would govern.

Senators acknowledged the need for consular notification and requested that the Nixon administration notify state and local jurisdictions of their obligations to foreign nationals.[54] In 1973, the State Department produced a memorandum stating that Article 36 of the Vienna Convention involved issues "of the highest order and should not be dealt with lightly." The obligation to notify consulates "without delay" when a foreign national was arrested, it meant the notification should occur as quickly as possible and not more than a few days after the arrest.[55] The State Department believed that rights under the Vienna Convention were "not privileges to be doled out by the host country, but rather basic legal rights that must be protected in a world governed by international law."[56]

In promoting the Vienna Convention, the United States was aware of the reciprocal obligations under the agreement. American diplomats abroad were instructed that to perform their proper function, it was "essential that consul receive prompt notification whenever a U.S. citizen is arrested." The American consul was told to file a formal protest if notification did not take place within 72 hours.[57] Their instructions read: "Our most important function as consular officers is to protect and assist U.S. citizens or nationals travelling or residing abroad. Few of our citizens need that assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail."[58]

Reciprocity was important to the State Department who viewed the United States as both a sending and receiving state mindful of protecting Americans abroad and of protecting foreign nationals within the United States. Other agencies at the federal level also took steps to carry out the provisions of the VCCR. After the treaty was ratified, both the Department of Justice and the Immigration and Naturalization Service issued implementing regulations, ordering their agents to inform detainees of the right to contact their consulate.[59]

However, most criminal cases are processed at the state level. The challenge to applying the Vienna Convention would involve requiring a similar level of compliance by state and local authorities. Like most treaties, the VCCR does not deal with the consequences of violation.[60] Yet, the role of the consul can be critical to the foreign national. He may have little understanding of US legal procedures, little knowledge of how to prepare for trial, sentencing, and appeal. Foreign nationals often face harsher penalties in the United States than they would at home, including, most significantly, the death penalty. In a capital trial, the sentencing phase is critical as an opportunity for the defendant to offer mitigating evidence. The consul can assist

with language skills and with the knowledge of how to find appropriate records in the home country. In addition, the involvement of the consulate may encourage the local government to follow the rules and to minimize discrimination.[61] However, the subdivisions of the federal government, for a variety of reasons ranging from ignorance to defiance, may not follow the rules set out in the Vienna Convention. As Ronan Doherty states, "As long as states administer the criminal law and impose the death penalty, they possess the power to embroil the nation in diplomatic and international legal disputes."[62] The federal structure and federal foreign affairs powers may pull in opposite directions. As the many examples in this book will demonstrate, although the federal courts have the power to prevent violations of international law, they "rarely seize the opportunity to do so." States avoid "federal arm-twisting" and the federal government is powerless "to control how the states implicate international responsibilities and strain diplomatic relationships."[63] Nor do pleas from the home nations of detained foreigners have much effect. In fact, state officials, such as Texas governors Ann Richards, George W. Bush, and Rick Perry, have been unwilling to meet or talk with delegations from those countries.[64] But as Margaret Vandiver writes, US failure to follow the Vienna Convention weakens international law, damages the concept of reciprocity, and raises the possibility that other nations will follow the American example of defiance.[65] It is hard to see how the United States can flaunt the Vienna Convention without danger to its citizens abroad. As Alan Clarke and Laurelyn Whitt state, its noncompliance with the VCCR causes the United States to be seen as a scofflaw. Although subsequent chapters will explain how American courts have used procedural default to "trump" the rights of foreign nationals, other nations see that explanation as simply an excuse to avoid international obligations and to continue with its exceptional commitment to capital punishment.[66]

4

The Execution of a Foreign National: The Case of Angel Breard

The vigorous use of the death penalty in the United States in the 1990s and international opposition to capital punishment collided rather dramatically over the issue of the execution of foreign nationals. The failure of those involved in the American criminal justice system to inform noncitizens of their rights under the Vienna Convention first became a widely discussed and adjudicated issue in 1998 in the case of Paraguayan national, Angel Breard. In the eyes of some observers, the case set a precedent allowing state criminal procedures to trump treaties and international law. Some would argue that the execution fit snugly into a pattern of assertions of American exceptionalism in the latter decades of the twentieth century.

Facts of the Case

Breard was convicted in 1993 of the attempted rape and murder of his neighbor, Ruth Dickie. Dickie's body, with her clothing roughly ripped off, was found in her apartment in Arlington, Virginia, on February 17, 1992. She had been stabbed to death and was apparently the victim of an attempted rape. Six months later, after he tried to rape another woman, Breard was arrested and charged with Dickie's murder. This time the police had answered screams from Jeanine Yvonna Price who was being attacked in Breard's apartment.[1] The arresting authorities found Breard's Paraguan passport and on that basis knew that he was a citizen of Paraguay, but they did not notify him of his right to contact the Paraguan consulate.[2]

There was strong physical evidence against Breard. Hair, blood, and bodily fluid samples found at the scene of the Dickie murder were subjected to DNA analysis and were found to match his type.

But even with this evidence and with several attempted rape charges, the Commonwealth's Attorney offered Breard a plea bargain—life in prison in exchange for a guilty plea. Against the advice of his court-appointed attorneys, Breard chose to reject the offer and insisted on waiving his Fifth Amendment protection against self-incrimination and testifying at his trial. He admitted to the rapes but claimed that he was acting at the time under a satanic curse, placed on him by his former father-in-law. Breard further stated that since his arrest, he had been "born again" and was now saved and freed from the curse.[3] He apparently believed that his lack of responsibility for his actions (performed under a curse) along with his confession would lead to greater leniency by the court. He further believed that his current status as "saved" would persuade the jury to acquit him. To no one's surprise except Breard's, his assumptions proved wrong and he was found guilty of murder and attempted rape in the death of Ruth Dickie, a capital offense.[4]

In the sentencing phase of the trial, the state argued that Breard should receive the death penalty based on two factors: the vileness of the murder of Ruth Dickie and his future dangerousness. The latter argument stemmed from a pattern of sex offenses—the attempted rape of Jeanine Price and another sexual assault on Celia Gonzales three weeks prior to Dickie's murder. Mitigating evidence included testimony from a prison missionary about Breard's religious conversion. In addition, his mother testified that her son had sustained a number of injuries as a result of a car accident when he was five years old and another accident when he was eighteen. She further stated that his failed marriage had contributed to his excessive drinking.[5] Persuaded by the state's case, the jury sentenced Breard to death. His execution was originally set for February 17, 1994, but was stayed pending appeals.

After exhausting his direct appeals at the state and federal level, Breard filed a motion for habeas corpus in US District Court in April 1996 where he claimed that his rights under the Vienna Convention had been violated because he had not been informed of his right to contact the Paraguan consul. Nor had the Paraguan consul been aware of Breard's arrest until 1996. Breard argued that he had not known of his rights under the Vienna Convention, that the Virginia authorities had not informed him of those rights, and therefore he could not invoke them earlier in the proceedings against him. He was not provided with a lawyer familiar with international law until the habeas phase of his appeals and his attorney had only learned of the Vienna Convention after the Fifth Circuit ruled in *Faulder v. Johnson*.[6] The district court

denied relief,[7] although they noted "concern" for Virginia's refusal to abide by the Vienna Convention.[8] Breard then appealed to the Fourth Circuit Court of Appeals. That court also rejected his appeal for relief based on Virginia's denial of his rights under the Vienna Convention, holding that Breard's claim was procedurally defaulted because he had not raised it in his state proceedings. In other words, even though Breard could argue that he did not raise the Vienna Convention claim because he did not know about the Vienna Convention, the Fourth Circuit said that "a reasonably diligent attorney would have discovered the applicability of the Vienna Convention to a foreign national defendant."[9] They also noted that the Vienna Convention claim could only be successful if Breard was able to demonstrate that the violation had caused "actual prejudice." He would, in the Fourth Circuit's opinion, need to prove that his case would have had a different outcome had he been able to avail himself of the advice and assistance of the Paraguan consulate. But of course, without a reexamination of the evidence, it would be impossible to make such a determination.

Although the Fourth Circuit ruled against Breard's claim, the court expressed concern about Virginia's refusal to abide by the Vienna Convention. One member of that court, Judge Butzer wrote a concurring opinion that drew attention to the Vienna Convention. He noted that it was a self-executing treaty, providing rights to individuals. Its language was "mandatory and unequivocal," and as a treaty, under the Supremacy Clause of the Constitution, the Vienna Convention was binding on the states. The freedom and safety of Americans traveling abroad were jeopardized by failure to honor the Convention. Its importance, he wrote, "cannot be overstated. It should be honored by all nations that have signed the treaty and all states of this nation."[10]

Meanwhile, the Republic of Paraguay, its ambassador to the United States, and its consul general in the United States raised a separate claim against Virginia Governor George Allen in the US District Court. They asked the court for a statement that Virginia had violated the Vienna Convention and continued to do so, that Breard's conviction be vacated, and that Virginia be enjoined against future violations of the Vienna Convention.[11] The district court dismissed the case, although they agreed that Paraguay did have standing to sue. In their view, the Eleventh Amendment, which protects states from suits by foreign nations, meant that federal courts lacked subject matter jurisdiction in this case. The exception to the prohibition on claims against states is a "continuing violation." Paraguay had argued that the ongoing incarceration and anticipated execution of Breard was just such a continuing violation of their rights under the Vienna Convention.[12]

The court admitted to being "disenchanted by Virginia's failure to embrace and abide by" the Vienna Convention. However, they found that the only relief Paraguay sought was "quintessentially retrospective," the voiding of Breard's conviction and sentence. They disagreed that his incarceration was a "presently experienced harmful consequence of a past conflict."[13]

The State Department also became involved in the debate over the application of the Vienna Convention in Breard's case. They acknowledged that the Vienna Convention had been breached and issued an apology to the government of Paraguay. However, the department found essentially that Breard had not been harmed by the lack of consular assistance. They based their conclusion on a series of factors: Breard had contact with his family and they were involved in his defense; he had lived in the United States for six years prior to his arrest and had been briefly married to an American citizen; he had "good command of English" and would not have needed consular assistance to interpret; he was represented by experienced criminal defense attorneys; he decided to testify at his trial and to reject a plea bargain against the advice of his attorneys who knew the American system better than any consular official; his mother agreed with his attorneys, so Breard's obstinacy could not be a case of cultural misunderstanding; he was unquestionably guilty based on the evidence; and he had the "full protection of the criminal justice system."[14] The points listed by the State Department, however, blur the issues. If a defendant was protected without the consular notification required by the Vienna Convention, then presumably the treaty was unnecessary.

Dissatisfied with the response of the State Department, Paraguay determined to approach the ICJ in February 1998. In its application to the World Court, Paraguay contended that the United States had been guilty of violating the Vienna Convention and asked for a retrial for Breard. Paraguay further argued that the Vienna Convention required consular assistance, that no showing of prejudice was necessary to establish a violation. However, they argued that without consular assistance, Breard had made several "objectively unreasonable decisions during the criminal proceedings against him, which were conducted without translation." The defendant did not understand the fundamental differences between the US and Paraguayan justice systems and therefore refused the plea bargain offered.[15] Nor, in Paraguay's view, was the provision of counsel a substitute for consular assistance to a foreign national. The further claim was that no domestic legal doctrine, such as procedural default, should take precedence over the rights included in the Vienna Convention. They asked for

reestablishment of the "status quo ante," that Breard's criminal conviction be voided and further that the United States guarantee that there would be no further infringements of the Vienna Convention.[16] In addition, Paraguay asked that the ICJ issue a provisional ruling and indicate that the United States should not allow Breard's execution to proceed until the ICJ had an opportunity to reach a final decision on the case. The provisional ruling and the directive to the United States involved great urgency as the state of Virginia had scheduled Breard's execution on April 14, 1998.

Public hearings at the World Court were held on April 7, only a week before the date set to put Breard to death. In its defense, the United States raised several points. The United States maintained that the lack of consular notification in Breard's case was not intentional and that an apology to Paraguay was the appropriate response. But, the United States argued, he had admitted his guilt (a point not in dispute), and Breard had had appropriate legal assistance during his trial. Consular notification would not have changed the outcome. In other words, Breard was not harmed by the failure to honor the Vienna Convention. In addition, they noted that, based on an informal survey, no nation had a policy of reversing convictions based on Vienna Convention violations. Finally, the US position was that a stay of execution could only be ordered by the Supreme Court or by the governor of Virginia.[17]

On April 9, the ICJ issued a provisional ruling stating that the dispute between Paraguay and the United States was valid and asking that the United States "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings." Because capital punishment was a hot button issue in the international sphere, the court specifically denied any intention of interfering with the "entitlement of federal states in the United States to resort to the death penalty" or of acting as a court of criminal appeal.[18] They confined their interest to resolving differences between signatories of international treaties. However, the stay of execution was necessary if Paraguay's claims were not to be moot and if relief was not to be impossible.

There were a number of responses to the ICJ ruling in the United States. Secretary of State Madeline Albright sent a letter to Virginia Governor James Gilmore. The Department of Justice offered an amicus brief to the Supreme Court claiming that a provisional order from the ICJ was not binding. On April 14, in *Breard v. Greene* the Supreme Court by a vote of 6 to 3 denied both Paraguay's appeal of its claim against Virginia and Breard's habeas claim.[19]

Breard v. Greene

As Christopher Van der Waerden notes, in *Breard*, the Supreme Court considered the positions of five major players: Breard, the defendant in the criminal case; Paraguay; the state of Virginia; the Clinton administration whose Justice and State Departments had taken two apparently contradictory positions; and the ICJ.[20] In a per curium opinion, five members of the court (Chief Justice Rehnquist, Justices O'Connor, Scalia, Kennedy, and Thomas), with a concurrence by Justice Souter, rejected the claims of Breard, Paraguay, and the ICJ. They held that Breard was "not entitled to relief on any theory offered," and that the Supreme Court had no power to delay his execution, which was scheduled to take place only hours after the decision was announced.[21] The majority ruled that Breard had procedurally defaulted his claim under the Vienna Convention by failing to raise the issue in state court. Noting that the US high court should "give respectful consideration to the interpretation of an international treaty rendered by an international court," they nonetheless maintained that the "procedural rules of a forum State govern the implementation of the treaty in that State." Further, they wrote that "it is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas."[22] This point suggested that the Supreme Court was helpless to override state procedural rules, regardless of their consequences. The court further argued that although the Vienna Convention was assuredly a treaty and that the constitution provided that treaties were the supreme law of the land, treaties stood on the same legal footing as acts of Congress. As the two types of enactments enjoyed legal parity, the one most recently passed should prevail. In this case, Congress had passed the AEDPA in 1996, long after ratifying the Vienna Convention. That law provided that habeas claims based on treaty violations (such as Breard's) would not be heard in federal court if the petitioner had "failed to develop the factual basis of [the] claim in State court proceedings."[23] In other words, Breard and other foreign nationals were not allowed to have a hearing in federal court to find out if the violation of Vienna Convention rights had prejudiced their original trials because (not knowing of the violation) they had failed to raise the issue in state court. Even claiming that Vienna Convention claims were so novel that Breard or his attorneys would not have discovered them earlier did not persuade the court. Yet, the majority justices went on to state that even if Breard had raised his Vienna Convention claim at the proper time, it *probably* would not have had an effect on the trial. The reason—Breard had rejected the plea bargain and testified at his trial.

The court assumes that he would have done that even with Consular assistance. But of course, they had no way of knowing that.

As far as Paraguay's suits against the state of Virginia, the Supreme Court found no basis in the Vienna Convention allowing a foreign nation to ask American courts to set aside a criminal conviction. Further, the Eleventh Amendment providing that "States, in the absence of consent, are immune from suits brought against them . . . by a foreign State" would prevail in this case.[24] In effect, they rejected Paraguay's argument of an exception to the Eleventh Amendment because Virginia was committing a continuing violation of the Vienna Convention. Instead, the court said that the violation had "occurred long ago and had no continuing effect."[25] They seemed able to divorce Breard's ongoing incarceration and imminent execution from Virginia's violation of his rights under the Vienna Convention.

The Supreme Court nodded to the proceedings before the ICJ and its provisional ruling, but denied any authority to carry out the ICJ's request for a delay in Breard's execution. The Justices pointed out that the Executive Branch could engage in diplomatic discussions with Paraguay (presumably to settle the claims made by the Paraguan government) and that the Secretary of State had requested that the governor of Virginia stay the execution. In a statement of great deference to the power of state executives under the federal structure, the court stated that "If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him."[26] It seems, as several commentators have noted, that the Supreme Court in its focus on federalism either failed to notice or chose not to notice the international significance of the case.[27]

The dissenters in the case, Justices Stevens, Ginsburg, and Breyer, seemed troubled at the haste with which the court handed down its ruling. As Justice Stevens wrote, the court was deprived of the amount of time it would normally have to review a petition for a writ of certiorari by Virginia's decision to set an early execution date (April 14, only five days after the ICJ's ruling). If the court had granted a stay of execution, it would have allowed time to consider more thoroughly the international aspects of the case. Instead they had made a "decision to act hastily rather than with the deliberation that is appropriate in a case of this character."[28] Justice Ginsburg agreed that a stay would have been appropriate, while Justice Breyer expanded on the notion that Breard's claims were original enough to create a "watershed rule of criminal procedure."[29] He too commented on the haste with which Virginia moved to carry out the execution. Justice Breyer

could find no reason it was necessary "to truncate the period of time that the court's Rules would otherwise make available."[30] The concern expressed by the dissenting justices was that there were good arguments for a fuller review of Breard's case, while there were not very good arguments to end consideration of the his claims along with those of Paraguay and the request of the ICJ. "What could be lost by a postponement of the execution?" they asked.

It was no surprise that Governor Jim Gilmore of Virginia (who had succeeded George Allen in 1997) ordered that Breard's death sentence be carried out only two and one half hours after the Supreme Court's ruling. A statement issued by Gilmore's press office set out the governor's reasons for denying a stay and ignoring the request of the secretary of state and the International Court. He referred to the latter body as "a foreign tribunal" and noted that their proceedings in dealing with the claims of Paraguay under the Vienna Convention "could take years to reach conclusion."[31] In any case, the governor felt quite free to ignore any ruling coming from the ICJ. Gilmore cited the position of the US Department of Justice which "argued forcefully that the rulings of the International Court of Justice are not enforceable by the courts of the United States and that the International Court of Justice has no authority to intervene in the criminal justice system of the Commonwealth of Virginia."[32] He acknowledged that Secretary of State Albright has expressed concerns about the international implications of the case and the possible negative consequences for American citizens traveling or living abroad. Nonetheless, Gilmore found other considerations that took precedence in his decision to go ahead with the execution. His first duty, he noted, was to "ensure that those who reside within our borders . . . may conduct their lives free from the fear of crime." It must have seemed to him that their safety would somehow be threatened by continued existence of Angel Breard, even for a few months, within the maximum security of Virginia's death row. More credible, perhaps, was Gilmore's position that if he were to wait for a final ruling by the ICJ, they might rule against the United States and hold that the execution should not be carried out at all. It would be difficult, he stated, "to then carry out the jury's sentence despite the ruling [of] the International Court."[33] In addition, Gilmore cited that position of the Department of Justice who argued that the ICJ had "no authority to interfere with our criminal justice system."[34] The governor thus chose to adhere to the Exceptionalist arguments raised by the Department of Justice rather than the somewhat more internationalist concerns raised by the State Department. And, regardless of the procedural and diplomatic issues involved, Gilmore concluded

that essentially Angel Breard deserved to die for committing a "heinous and depraved murder, his guilt being unquestioned . . . I find no reason to interfere with his sentence."[35]

Gilmore's handling of the Breard case—claims based on an interpretation of federalism that allowed little oversight of state criminal justice procedures, that denied that concern for international agreements and norms could affect domestic policy, and a simplistic position that crime and punishment could follow a simple calculus—was typical of the way most governors responded to Vienna Conventions questions raised by sentencing foreign nationals to capital punishment.

The Implications of Breard: Was the ICJ Ruling Binding?

Some scholars have been outspoken in assessing the importance of the Breard case. Henry Richardson, for example, states that the United States violated international law when Breard was executed on April 14, 1998. That event amounted to an assertion that American exceptionalism superseded international law, including international standards of human rights.[36] If that analysis is correct, how exactly do experts believe the United States violated international law?

In Richardson's view, Article 94 (1) of the United Nations Charter obliges member states to comply with decisions of the ICJ. They cannot plead internal legal requirements to evade international law obligations.[37] The United States had ratified the Vienna Convention and also the Optional Protocol that provided for "compulsory jurisdiction of the ICJ over disputes arising out of the interpretation or application of the convention."[38] Even after the United States withdrew from ICJ compulsory jurisdiction over treaty and international law matters after an unfavorable ruling in a dispute with Nicaragua in 1986, the nation still maintained adherence to the Optional Protocol.[39] Thus, rulings by the ICJ regarding the Vienna Convention should have been binding, even when its ruling required enforcement involving the criminal justice system at the state and local level. The United States was aware of those requirements when the Senate ratified the Vienna Convention.[40]

In the Breard matter, the ICJ had issued a provisional ruling, anticipating that additional arguments would be made and a final decision would be offered months later. Their provisional judgment was necessary to preserve the rights that were in dispute. Otherwise, the entire procedure would be meaningless, once Breard had been put to death. Nonetheless, some argued that because the ruling in April 1998 was

"provisional," it was not binding and the United States was free to ignore it or to deflect responsibility for ignoring it onto the governor of Virginia. But Sanja Djajic and others maintain that the provisional ruling was a necessary part of the two-step process and that both steps had binding force and that although ICJ decisions had force in the international sphere, they also had to be enforced outside the international sphere, within the domestic system of the appropriate state. The respondent state (nation) was, in the eyes of the international court, an indivisible entity, not as the United States argued, a collection of states with procedures that might nullify the ICJ directive. Enforcement of the ICJ ruling was not optional, but the nation had to decide *how* to carry out the ruling.[41] At this point, the United States had simply been asked to delay the execution pending a final ruling. Ignoring the ICJ undermined the authority of the World Court and raised doubts about US compliance with international law.

It does seem significant that the Breard case was the first ICJ consideration of an American death penalty case.[42] Perhaps because the sensitive matter of capital punishment was involved, the United States was even less likely to appear to be compliant with an international court. In any event, *Breard* and subsequent ICJ cases such as *LaGrand* and *Avena*, would show persistent and systemic violations by the United States of international rulings, especially when its domestic criminal justice system was involved.

Curtis Bradley is one scholar who defends the American response to the ICJ and finds it completely consistent with legal precedent. He describes two approaches to the relationship of international law to domestic law. "Monism" sees both as part of the same order and considers that international law has been incorporated into domestic law. With this view, state and federal courts must give effect to international law. They are obliged to see that it is enforced. "Dualism" considers international and domestic law as distinct and allows nations to decide how much deference to give to international law.[43] A nation might choose whether or not to attend to or to ignore the rulings of international tribunals. Bradley sees dualism as the traditional American approach and the Breard case as a "reaffirmation of dualism,"[44] although such dualism contradicted the position of many experts who advised that disregarding the ICJ ruling would cause "incalculable and irreparable damage on the international plane."[45] That position would have allowed the ICJ order to take precedence over concerns about federalism. Bradley maintains that all arguments that international law supersedes domestic law raise federalism issues and, in this case, such claims ignored Virginia's arguments about the

sovereignty of its criminal justice process. The dualism argument, as made by all the government actors in *Breard*, meant that while they expressed "dismay" at violations of the Vienna Convention, the outcome of the case must rest on procedural default rules and the application of the Eleventh Amendment. Furthermore, as the Department of Justice argued, the federal government could not interfere with a state's criminal justice system and even international obligations could not outweigh federalism. Observers should not have been surprised that the Supreme Court found that domestic law determined the applicability of international law and that the court preserved the primacy of state criminal procedure, especially as all branches of the US government had recently been more sensitive to federalism.[46] Thus, Bradley sees the American posture of dualism regarding international law as not only consistent but appropriate.

Eric Luna partially agrees with Bradley about the dualistic tradition in American law. He notes that American judges tend to be hostile to international law when it concerns criminal justice. Luna cannot cite one defendant in an American criminal justice case who has been afforded a remedy based on international law. Rather procedural or institutional considerations have trumped international law.[47]

Conversely, other noted scholars of international law take the position that the United States was bound by the order of the ICJ and should not have seen any option but to carry it out. Louis Henkin maintains that the provisional ruling had the same status as treaty obligations. It was addressed to the United States and in international communications "United States" refers to the president. It is his constitutional duty to see that the laws are faithfully executed and to instruct his subordinates accordingly. However, the solicitor general acted as though the order was not addressed to him as did the Department of Justice in briefs filed with the Supreme Court. The Supreme Court took no responsibility for carrying out the ICJ order as it was not addressed to them. Secretary of State Albright wrote a polite and diffident letter "requesting" that Governor Gilmore consider delaying the execution. Gilmore felt no need to honor Albright's request. In fact, Henkin finds that the US government, rather than giving effect to the World Court's directive, actually helped to assure Breard's execution.[48]

Henkin contradicts the pro-dualist perspective, noting that even with more attention to states' rights in the late twentieth century, states remain bound by treaties signed by the US government.[49] He found the governor of Virginia "especially unaware of, or indifferent to, U.S. international obligations and U.S. foreign policy."[50] Some

would argue that the United States flouted international law, but others would contend that Gilmore flouted the authority of the United States.[51] Here he would find himself in the company of the governors of Arizona and Texas when subsequent ICJ opinions challenged capital cases in their states.

Djajic also criticizes the dualist perspective evident in the Breard case. She notes that the United States seems to only respect ICJ decisions that are favorable to its interests, otherwise it sees the court's rulings as not binding. However, she finds that the rationale for disregarding the ICJ was an example of provincialism. The Supreme Court held that a subsequent law passed by Congress (AEDPA) that did not mention the Vienna Convention nonetheless took precedence over it. Further, she believes that the refusal to comply with the World Court on procedural grounds may have been simply an excuse to avoid expressing dislike for the substance of the decision.[52] But by focusing on procedural matters, the American courts in Breard ignored human rights issues. If the conviction of Breard lacked procedural safeguards (the failure to honor the Vienna Convention), then it was a violation of due process and required strict scrutiny. Although the legality of the death penalty in international law was not the issue, how the death penalty is imposed does raise human rights concerns. Djajic goes so far as to argue that the violation of consular protections is not just a treaty violation but a "denial of justice" that would be unacceptable even if no treaty existed.[53]

The interests to be balanced in Breard were globalism versus provincialism or American exceptionalism. US arguments had been based on the needs of its domestic legal system, especially a strong interest in punishing crime. Breard's execution was justified on claims of his guilt and of the need for an effective criminal justice process. These arguments favored procedure over the substantive human rights protections embodied in international law.[54]

While Djajic argues that the United States should have accepted the ICJ order as binding based on human rights considerations, Ann-Marie Slaughter states that the Supreme Court should have honored the ICJ request for a stay of execution for Breard pending their final order on the basis of judicial comity. Courts, she contends, should respect each other as courts and interact in a cooperative way, acknowledging their ability to settle disputes and to apply laws.[55] She quotes Justice Sandra Day O'Connor who mentioned the Supreme Court's need to draw on the awareness of "jurisprudence of other jurisdictions."[56] In *Breard*, the Supreme Court had only been asked to *wait*, to preserve the ultimate rights of all the parties to the litigation,

until the ICJ could have its final views considered by all the parties. If it had treated the ICJ holding as binding, "the Supreme Court had little to lose, but much to gain."[57]

In issuing its preliminary ruling, asking only for a stay of the execution of Breard, the ICJ was not acting as an international court of criminal appeals nor was it asking that Breard be released. To paraphrase Slaughter, the United States had nothing to gain by executing Breard and nothing to lose by delaying his death.[58] As Howard Schiffman writes, a stay would not have fixed the earlier violations of international law, but going ahead with the execution aggravated the problem. Nations comply with international law to ensure reciprocity and to protect the interests of their citizens. But they also want to be seen as responsible members of the world community. By treating the ICJ ruling as negligible, the US certainly was not leading by example.[59]

Van der Waeden summarizes the arguments that the ICJ provisional order was mandatory and should have been respected by the United States. He cites judicial comity and reciprocity as considerations. He also notes that the Supreme Court's attitude in ignoring the ICJ ruling suggested that the US domestic law is superior to international law. Such an attitude undermines American claims to take treaties seriously. The World Court had not asked the US judicial system to renounce its power to punish convicted offenders, but only asked for a temporary delay to consider more complete arguments.[60] If foreign nations cannot bring actions in American courts because of Eleventh Amendment prohibitions and if the United States is either free to ignore or helpless to give effect to rulings of the World Court, there is no judicial remedy for foreign nations with grievances against the United States. Such a state of affairs seems contrary to a regime of international law and cooperation and suggests a troubling posture of unilateralism and American exceptionalism.

The Implications of Breard: Judicial Precedents

The Supreme Court decision in *Breard v. Greene* would set precedents for American jurisprudence regarding both international and domestic matters. The ICJ had asked for a postponement of Breard's execution until it could issue a final ruling, Breard and Paraguay had asked the court to honor Breard's claim that the violation of his rights under the Vienna Convention required that his conviction and sentence be reversed. In rejecting all of those arguments, the court was perhaps

signaling some significant directions for the future. The court rejected the notion that it grant a stay of execution because the ICJ requested it. They might have done so based on judicial comity, as Slaughter argued, or based on their own rules as Justices Stevens, Ginsburg, and Breyer argued in dissent. Had the court simply stated that it needed more time to consider the important questions raised by the case, they might have emphasized the national interest in adjudicating treaty issues and obligations. With such an approach, they would not have left the interests of the United States before the ICJ in the hands of the governor of Virginia. As Lori Damrosch suggests, the court should not have allowed itself to be rushed to hand down a ruling on a timetable set by Governor Gilmore. Instead, the case should have been subjected to "searching scrutiny," because the outcome could have significant political consequences for the nation.[61]

The fact that the Clinton administration argued against following the ICJ's ruling, against Paraguay's claims, and against Breard's treaty claims may have carried weight with the court. Traditionally, the justices have interpreted treaty claims rather liberally, but by 1998, they had become more restrictive, especially when treaty matters coincided with criminal justice proceedings. Both the court and the administration may have been sensitive to domestic political considerations.[62] The Rehnquist court frequently issued rulings that some described as restoring a balance between the federal government and the states. In *New York v. United States* and in *Printz v. United States*, they invalidated parts of federal laws that the justices said "commandeered" state officials to help enforce national laws.[63] In *United States v. Lopez*, they stuck down a federal law banning guns near schools by stating that it involved an unlawful expansion of Congress's power under the Commerce clause.[64] All were decisions that struck down legislation that imposed obligations on the states or that involved creating federal criminal penalties. Although these rulings all fell under the court's interpretation of Congress's power to regulate interstate commerce, while *Breard* involved a narrow interpretation of a treaty, all the decisions could be seen as a statements in support of federalism.[65]

Eric Luna and Douglas Sylvester see the Breard decision not only as an endorsement of federalism and consistent with rulings limiting the power of the federal government but also as consistent with decisions regarding and limiting the rights of the accused. In opposition to those who would argue that a violation of Vienna Convention protections is comparable to a Miranda violation (where a detained person would not be informed of his right to remain silent and his right to an attorney), Luna and Sylvester contend that rights based

on treaties do not enjoy the same status as constitutional rights.[66] Instead a treaty is comparable to a federal statute and its violation should only have a bearing on a conviction or a sentence if the defendant could establish that the violation prejudiced the outcome of the case.[67] Jan Klabbers, on the other hand, finds the requirement that a Vienna Convention violation must be shown to prejudice the case and to harm the defendant "the most amazing argument in *Breard*." He argues that how the violation of the treaty affected the outcome is not the point. The point is that following the Vienna Convention instills "obligations of the highest order." He would insist that respect for procedure (in this case, informing the accused of his consular rights) is necessary to guarantee that the substantive matters are decided correctly.[68] Klabbers wrote that it would be wise to treat *Breard* as an aberration. Otherwise, if the United States were to challenge and defy the ICJ again, it would lead to a greater loss of faith in international law.[69] Rather than an aberration, however, the Breard case was a precedent for the way courts would deal with Vienna Convention claims and the way the Supreme Court would respond to orders from the ICJ. In the future, the court would uphold state claims to be immune from international legal action because of the Eleventh Amendment, claims that defendants procedurally defaulted their protections under the Vienna Convention, even when they were unaware of those protections, claims that their appeals were disallowed under the AEDPA, and claims that only state governors could act to postpone or cancel the execution of a foreign national.

The Clinton Administration and Breard

The American response in the Breard case is inseparable from domestic policy and politics. As Vazquez suggests, the administration construed it authority "extremely narrowly" in the matter.[70] The Department of Justice filed an amicus curiae brief arguing that provisional measures issued by the ICJ were not binding. They essentially took the position that Paraguay's claims were not eligible for settlement in US courts because of the Eleventh Amendment and procedural default. On the other hand, they also argued that Paraguay had no case before the ICJ. There was "no dispute" according to the administration because the United States had admitted to a violation of the Vienna Convention and thus the dispute had been settled. So according to the Executive branch, Paraguay's and Breard's claims were not justiciable in either domestic courts or the World Court.[71] If there were no issues, there could be no responsibility to abide by any decision the ICJ handed

down. But the solicitor general also made the argument that there was nothing in the Vienna Convention that provided for remedies of past violations through judicial action or by vacating the conviction of the defendant. In the US view, the treaty makers would not have anticipated that violations would lead to the invalidation of criminal convictions. Nor, it was argued, could Paraguay cite a single country that would overturn criminal convictions on the basis of failure to abide by the Vienna Convention.[72] Finally, the administration claimed that the decision to abide by the ICJ's order rested exclusively with the governor of Virginia. All in all, they seemed unusually unwilling to claim or make use of executive power.

Yet Djajic states that a better response to the ICJ ruling might have led the solicitor general to argue before the Supreme Court that Breard's case was a matter of the highest importance because American foreign policy was implicated. It involved possible "imminent danger and injury to United States treaty obligations" and therefore, that the ICJ request for a stay should be honored in the national interest.[73] It would have been possible to maintain that as Virginia, the Supreme Court, the Department of Justice, and the Department of State were all agencies of the US government and that the United States was responsible for maintaining its international obligations, the ICJ order applied to all of those arms of the government.[74]

Carlos Manuel Vazquez notes particular irony in the Clinton administration's position that the federal government was helpless to require a state to postpone an execution. On the one hand, the Supreme Court orders stays almost routinely. Yet looking at a bigger trend in the shift of power, the court had, by 1998, issued several decisions that moved to place limits on the authority of the national government. But the administration had, for the most part, resisted these limits. It was especially noteworthy if they accepted restrictions on federal power in the area of foreign policy, a place where the Founding Fathers had held firmly that authority should not be left to the states. It is difficult to see how the president and his subordinates could believe their only course was to "beseech" a governor to consider a delay. They could have insisted, instead, that an order of the ICJ required compliance and that the governor was therefore required not to execute Breard. The president could have issued an Executive Order that the execution be postponed. If Governor Gilmore had rejected the order, the federal courts would have had the authority and duty to hold him accountable and to give effect to treaty-based obligations.[75] It would also have been possible, if there were real doubt about the binding nature of an ICJ provisional order, for the administration to ask Congress

for the power to execute it. Vazquez concludes that "if the courts lacked the authority to require states to comply (as the administration argued), then the president had the authority. Either he mistakenly (and uncharacteristically) thought he lacked it or he declined to use if for reasons he preferred not to disclose."[76] One can conjecture what those reasons might have been. It is likely that they were embedded in domestic political considerations. The administration acted on the fear of being considered "soft on crime," especially if political adversaries could spin the case as being overly solicitous of a convicted murderer. Or they might have been motivated by the unwillingness to antagonize Clinton's implacable partisan enemies who were eager to find cause to discredit the administration. Although being portrayed as bowing to international law would not have the same lurid appeal as the Monica Lewinsky scandal, it could have been played to create a diversion from Clinton's more serious agenda.

Indeed conforming to treaty obligations and acknowledging the influence of the ICJ might have been ill suited to the mood of the 1990s. The period was characterized by a sense of "victor capitalism" and notions of a "superpower victory" in the post–Cold War era. If the United States stood alone at the pinnacle of world power, why should the nation be held captive by the restrictions of international law? The "penurious interpretation" of international obligation by both the executive and judicial branches, in addition to right-wing pressures in Congress, contributed to a pattern of assertions of American exceptionalism—a pattern reinforced by the administration's position in the Breard case.[77]

Virginia's Interests

In 1998, 68 inmates were executed in the United States. Virginia ranked second only to Texas in the number of people put to death. And with a much smaller population, Virginia was, by some measures, even more vigorous than the Lone Star State in its use of the death penalty. A study of Virginia executions by the Joint Legislative and Review Committee (JLARC) of the state legislature found that the strict application of procedural default rules accounted for much of the efficiency with which condemned men moved from trial to death. Those very rules clearly entered into the final disposition of the case of Angel Breard.

Slaughter noted that if all parties to the ICJ ruling had done as the World Court asked and delayed carrying out Breard's sentence, no one's rights would have been compromised except for Virginia's

right "to execute its inmates as quickly as possible."[78] Allowing for a bit of sarcasm, much of the debate about the final disposition of the case does involve the matter of the state's prerogatives to manage its criminal justice system when contrasted with the national and international interests in adhering to treaties and international law. While Linda Malone contends that the dual system of state and federal authority over criminal cases was only "an excuse" for refusing to consider Breard's and Paraguay's claims in the ICJ,[79] others note that in arguments at both the World Court and the US Supreme Court, the federal branches were unanimous in the position that Virginia's interests took precedence over foreign policy issues. Curtis Bradley and Jack Goldsmith write that the federal structure, with powers reserved to the states, was not irrelevant to the exercise of foreign relations powers and they note that the Supreme Court grounded its decision in *Breard* in federalism. The constitution, because it was designed, in their view, to create a more perfect *domestic* union, allocated powers between the central and subnational governments. The federal branches get to decide "when a state act has sufficiently adverse effects on foreign relations to require preemption."[80] In this case, both the executive and the judicial branches seemed to think neither Virginia's failure to enforce Vienna Convention rights nor its imminent execution of Breard would have such an effect on foreign relations. Others would argue that giving individual states precisely such scope to affect foreign policy contradicted the will of the constitution's framers who knew from experience that the federal government needed to exercise the power to compel states to meet international obligations. The Breard case may thus be seen to create an impossible conundrum. The federal government may not require a state to act (or, in this case, not act to carry out an execution), they may only "humbly ask" the governor to consider clemency. Additionally, under the Eleventh Amendment, states are too sovereign to be sued by foreign governments. So while sovereignty permits states to ignore both the national government and foreign claims against them, they are not sovereign enough to be sued in the ICJ. Under such an interpretation, states are both too sovereign for domestic accountability and not sovereign enough for international accountability.[81]

Despite such an apparent contradiction, the final outcome of the Breard case rested in the hands of Governor Gilmore. A conservative Republican in his first year in office, Gilmore was perhaps the only actor with something to gain from executing Breard. In his case, political considerations—a strong law and order platform and national ambitions—influenced not only his decision but his rhetoric

in responding to the ICJ ruling and Secretary of State Albright's letter asking him to consider a stay of execution. Although his answer to the Albright might be termed "token deference," his public statement made it clear that he had little respect for the international court.[82] He referred to the ICJ as a "foreign tribunal," noting that its rulings were not enforceable by the courts of the United States and that it had no authority to "intervene in the criminal justice system of the Commonwealth of Virginia or any other state."[83] Although some might think that a governor's first responsibility is to uphold the constitution, Gilmore stated that his first duty was to see the residents of Virginia were able to "conduct their lives free from the fear of crime." A stay of execution for Breard would apparently have an impact on "the safety of those residing in the Commonwealth of Virginia." For that reason and because the ICJ did not share the governor's responsibility for the public safety of Virginians, Gilmore felt free to disregard the request to postpone the execution. Besides, he noted, if the ICJ resolved the matter "in Paraguay's favor, it would be difficult, having delayed the execution so that the International Court could consider the case, to then carry out the jury's sentence."[84] In other words, if the World Court issued a formal finding that the United States (and Virginia) violated international law, it would be more difficult to flout such a decision and execute Breard in the future. Better, the governor believed, to go ahead before things got more complicated. Finally, the governor, with a clear focus on his domestic audience, averred that Breard had "committed a heinous and depraved murder, his guilt [was] unquestioned and the legal issues [were] resolved against him." Therefore there was "no reason to interfere with his sentence."[85] One commentator noted wryly that Gilmore "overlooked the fact that no one had asked him to put Breard back on the street,"[86] or even to reduce his sentence. Like many other governors when asked to consider clemency or a stay of execution, Gilmore cast the decision as if the only two alternatives were an immediate death for Breard or endangering the citizens and rendering the state impotent by releasing a vicious murderer. Such a clear choice placed Gilmore squarely on the side of the public good and against both coddling criminals and succumbing to a "foreign tribunal."

Apparently lost in the last minute politics of the case was the fact that Virginia had definitely violated the Vienna Convention which required that its laws "enable full effect" to the purposes for which the consular rights were intended. In 1991, the year before Ruth Dickie was murdered by Angel Breard and two years before his trial, the Department of State had sent notices to state and local law

enforcement agencies stating "If you have detained a foreign national, Read This Notice." These instructions followed. "The arresting officer should in all cases immediately notify the foreign national of his right to have his government notified concerning the arrest/detention." The appropriate consul should be notified "without delay."[87] Whether this notice from the State Department had ever been read by its intended recipients, it had certainly not been incorporated into the normal procedures of local law enforcement agencies. It is notable that even the Arlington, Virginia police department, in the suburbs of Washington, DC with its large number of foreign residents, ignored the Vienna Convention requirements. Given the subsequent defensive postures of both the state and federal governments, there would seem little incentive for law enforcement agencies to make a serious effort to require that the Vienna Convention be implemented in their jurisdictions. As Malone comments, the federal government cannot compel states to bear the burden of either federal laws or of the treaties, yet the United States was creating problems for itself not putting pressure on states to enforce the Vienna Convention. She suggests that in addition to ensuring that state and local officials are informed of the Vienna Convention rights, the federal government could withhold some federal funding for states that refuse to comply. Perhaps her most relevant suggestion is that the federal government should stop defending states that fail to comply with the treaty obligations.[88] Such a position would at least require state officials such as Governor Gilmore to assume the responsibilities as well as the privileges of sovereignty.

After Breard

Once Angel Breard had been put to death on April 14, 1998, a number of observers turned their attention to better ways to protect the rights provided to foreign nationals in the Vienna Convention. If the precedents in Breard were to stand, it would seem that foreign nationals arrested in the United States enjoyed a right without a remedy. The United States apologized to Paraguay and provided assurances that compliance with the Vienna Convention would improve. But how would such compliance become the norm? In the Fourth Circuit, Judge Butzer wrote a concurring opinion in *Breard v. Pruett.* "The Vienna Convention," he wrote," is a self-executing treaty. It provides rights to individuals rather than merely setting out the rights of signatories . . . the text emphasizes that the right to consular notice and assistance is the citizen's. The provisions are binding on the states.

The language is mandatory and unequivocal."[89] If Judge Butzer's statement is correct, foreign nationals should expect that their right to be in contact with their consulate should be routinely respected and implemented by the states. However, in reality as long as states did not devise ways to insist that law enforcement inform arrestees of their Vienna Convention rights, it was likely that Breard's case would be repeated. The American Bar Association (ABA) recommended in 1998 that law enforcement be required to issue information about consular rights in a way similar to a Miranda warning. The ABA noted that at the time the "enforcement of these rights is a rare occurrence."[90] Malone also argued that the consular rights should be treated similarly to Miranda rights as both stemmed from similar concerns. The Vienna Convention was intended, among other things, to protect detainees from self-incrimination because of inaccurate cultural perceptions. Some foreign nationals might be deceived by the police, they might fear torture or retaliation directed toward their families. Based on such misperceptions, they might incriminate themselves unwittingly, as Breard's defenders claimed he had done. Malone further claims that the detainee's right to consular notification should not be honored only if he can show that its absence prejudiced his case. Instead, it should be an absolute safeguard, like a Miranda warning.[91]

Legal scholars also devised a number of possible remedies should a person's right to consular notification be violated. The most vigorous remedy would be to apply the exclusionary rule—not permitting any statements made in the absence of consular notification to be introduced in court. Other possible responses could include an instruction to the jury explaining that the defendant had not been fully apprised of his rights or including the failure of consular notification among mitigating evidence at the time of sentencing. After Breard, it seemed that the courts were putting responsibility for raising issues of Vienna Convention violations on defense counsel. If an attorney failed to raise the matter in timely fashion, that failure could be part of a claim of inadequate counsel.[92] Even so, it seems the defendant would be the one to suffer for the failures of either law enforcement or his attorney.

For their part, after Breard the State Department mailed pocket cards outlining the requirements under the Vienna Convention to law enforcement agencies. State also provided assurances that when they received a complaint about a Vienna Convention violation, they would take "appropriate action." That action might include discussion with and apologies to foreign governments and more literature sent to states and localities. They also pointed out that many other countries

violated the Vienna Convention.[93] Luna notes that throughout the proceedings, the State Department approached the issue from the perspective that Breard was guilty and therefore the criminal justice system must be allowed to function, rather than from the perspective that the case might ultimately jeopardize US citizens. Thus their response, described as a "massive effort" to assure compliance with the Vienna Convention seems rather half-hearted. It consisted of seminars, pocket cards, and a handbook mailed to local law enforcement. Luna too raises the question why the government thought that effort would work after Breard when there were no negative consequences for states or localities who failed to observe the suggestions.[94] But, Luna contends, that even if Breard did not hurt US foreign policy and even if an apology was enough to soothe Paraguay, the thousands of Americans who were annually arrested abroad might well feel repercussions from the US behavior. Thus, he thought policy changes were more significant than the "massive effort" needed. He suggests that a violation of the Vienna Convention be treated as presumptively prejudicial to the defendant and that the prosecution should be required to establish that it was not prejudicial. He also suggested that capital punishment be foreclosed as an option in cases where there was a Vienna Convention violation.[95] Luna raises the very significant point that the potential for the execution of a foreign national changes the US government's interest in the process. There will be more scrutiny, more criticism, and more "disgust" from foreign governments if the death penalty is involved along with a treaty violation.[96] Given the international opposition to capital punishment, the stakes for foreign complaints against the United States will be much greater when death is involved. Luna seems correct in noting that the world's attention focuses negatively on the United States when a foreign national is executed and the disapproval is greatly heightened if a violation of international law is involved. But the question becomes how such modifications of capital punishment procedure might be accomplished as they would require changes in the laws of the very states who reject the importance of international opinion.

Changes in AEDPA might open the door to rectifying some neglect of Vienna Convention rights if Congress amended AEDPA to exempt cases arising out of the treaty from procedural default restrictions. Currently, however, legislation to broaden the rights of defendants is unlikely to have much traction in Congress.[97]

Some negative consequences for the United States did stem from *Breard*. There were protests in Paraguay and strained relations with some Latin American nations in the immediate aftermath of the

case. One could argue that claims of Vienna Convention violations by Americans abroad were weakened and that the United States lost credibility in alleging that other nations failed to follow international law. American disrespect for the ICJ could very well mean less success for American claims when the United States needed to call upon the ICJ. As Djajic comments, an effective international order is important per se, but it is also important to individual states. The achievement of such international stability is not helped when nations "play fast and loose with treaty commitments."[98]

But such disregard for treaty commitments and international law persisted in the wake of the Breard case. Only eight days after the Supreme Court ruled against Breard and Virginia put him to death by lethal injection, the State Department refused to ask Arizona to halt the execution of Jose Roberto Villafuente, a Honduran national who had not been informed of his Vienna Convention rights. The State Department acknowledged the violation and asked the Arizona Board of Clemency to "consider the violation." The execution went on as scheduled on April 22, 1998.[99]

5

The Execution of a Foreign National: The Case of Joseph Stanley Faulder

While the Breard case was making its way through the US courts and the ICJ, two similar cases, both involving violations of the Vienna Convention, were developing in Texas and Arizona. Each litigation strained relations between the United States and a significant ally. The Faulder case in Texas centered on a Canadian citizen, while the LaGrand case in Arizona involved the capital sentences of two brothers who held German citizenship. Neither legal action turned out well for the men accused and convicted of capital offenses and both drew international attention to the use of the death penalty in the United States.

Facts of the Case

Joseph Stanley Faulder was convicted twice for the murder of Inez Phillips, a prominent resident of Gladewater, Texas, a small town in the eastern part of the state. The elderly woman was the widow of the former mayor of Gladewater and "the matriarch of a wealthy and influential Texas oil family."[1] With one or two cohorts, Faulder attempted to rob Mrs. Phillips at her home. According to testimony from the accomplices, Faulder hit Phillips several times with a blackjack and bound her with tape. His associate, Linda "Stormy" McCann, fired at least one shot that went awry. The would-be robbers ransacked the house and took a few valuable items, but they did not find the safe, the original target of the home invasion, hidden below the floor. However, when Faulder saw that Phillips was still conscious despite the head injury, he allegedly stabbed her with a knife from her kitchen just before he and McCann fled from the scene of the crime.[2]

The case against Joseph Stanley Faulder was riddled with irregularities. Jack Phillips, the victim's son, offered a reward of $50,000 for information about the crime. McCann, a former prostitute, was arrested in short order. She minimized her role in the crime and accused Faulder of planning the robbery and of committing the murder. Faulder was arrested for theft two years later in Colorado and extradited to Texas to face the murder charge. The Canadian Consulate was not notified of his detention as required by the Vienna Convention. However, officials in Texas did contact Canadian law enforcement to check on Faulder's criminal history. Thus it was clear that they knew of his Canadian citizenship but failed to provide him with the assistance mandated by the Vienna Convention. Instead, Faulder was interrogated for four days during which his request for an attorney was ignored. Finally, Faulder signed a "confession" admitting to the murder.[3]

The alleged confession served as the main item of state's evidence at Faulder's first trial for capital murder. McCann, who was charged only with conspiracy to commit burglary, did not testify. Nonetheless, Faulder was convicted and sentenced to death despite the lack of physical evidence against him.

In an unusual decision, the TCCA overturned Faulder's conviction in 1979.[4] They found that his confession had been obtained illegally. Thus the state of Texas was deprived of its main piece of evidence. However, Jack Phillips, the victim's son, was determined to continue with the prosecution and to prevent the state from offering Faulder a plea bargain. He hired two private prosecutors, Odis Hill, a former district attorney who had prosecuted Faulder in the first trial, and Phil Burleson, another former prosecutor. Hill allegedly offered his services to the current district attorney and the latter accepted.[5]

The new prosecutors determined that, in the absence of any other evidence, the testimony of Linda McCann would be necessary to convict Faulder. To ensure her cooperation, Jack Phillips paid her $15,000 (euphemistically called "relocation expenses"). And, even though she was eligible for a capital charge herself, the state offered her immunity on the murder charge. However, the testimony of a coconspirator is insufficient without collaboration. Ernie McCann, Linda's motorcycle gang member husband, was persuaded to provide that support by claiming that his wife had told him the same story about Faulder's guilt. Phillips paid Ernie $2,000.[6] Phillips paid over $100,000 to the special prosecutors, in addition to the payments to the McCanns. Some have claimed that it was a "private vendetta launched by a wealthy person against an indigent defendant."[7]

If the odds against Faulder were not already great enough, his court-appointed attorney, Vern Solomon, offered no defense. Not only did he fail to call any witnesses to challenge the state's case on Faulder's behalf, but he also failed to investigate his client's background. Had he conducted even a cursory examination, he could have learned that Faulder was from Canada and he could have contacted family members there. Even more damaging, Solomon offered absolutely nothing in mitigation during the sentencing phase of the trial, claiming incredibly that he did not know that presentation of evidence was allowed during sentencing. He asserted that lack of knowledge "even though he was board certified in criminal law and was a state criminal defense attorney for approximately four years."[8] He did not challenge the testimony of Dr. James Grigson, the notorious "Dr. Death," who regularly provided capital prosecutors with "evidence" that the defendant would be a threat to society in the future.[9] Grigson, after a 15-minute interview with Faulder, declared that the latter was a sociopath who "had killed and would kill again." A second state-appointed psychiatrist, who had never met Faulder and provided no medical evidence, testified to the same diagnosis.[10] To no one's surprise, Faulder was again convicted and sentenced to death in July 1981. This time, despite many appeals and delays, his sentence would ultimately be carried out.

Post-Conviction Appeals

Faulder filed his direct appeal, which was denied by the TCCA in 1987. He alleged that his counsel failed to call any witnesses or present any evidence in either the guilt or the sentencing phase of his trial. Despite these failings, the court found no reversible errors. About ten years after his conviction, Faulder was appointed an attorney from the Texas Resource Center, "a federally funded agency providing legal assistance to poor people on death row."[11] Sandra Babcock, a recent graduate of Harvard Law School, would handle his remaining appeals. Before his death in 1999, she won nine stays of execution for Faulder. She is believed to be the first attorney in the United States to raise the Vienna Convention issue for a foreign national facing capital punishment.[12] In Faulder's case, that was only one of a number of claims that challenged the fairness of the proceedings against him.

After Babcock was appointed to pursue Faulder's appeals, she learned of his Canadian nationality and contacted the Canadian Consulate in Dallas. They had no information about Faulder. His name had never appeared on the lists they received annually from Texas law

enforcement, supposedly providing the names of all Canadian citizens and intended to facilitate consular visitation.[13] This omission occurred even though the police who arrested Faulder had known of his citizenship and contacted Canadian law enforcement to check on his prior convictions.

Babcock got in touch with Faulder's family in Canada and learned that for the last 14 years, they had believed him to be dead.[14] If they had known of his arrest and trial, they would have provided mitigating testimony, establishing that Faulder was kind and nonviolent. They could have asserted that he had sustained a head injury as a child and that the injury affected his behavior. His original trial lawyer had made no attempt to look into Faulder's history, but with the information from his family, Babcock filed new appeals and won six stays of execution in the process.[15]

In 1992, at an evidentiary hearing, six new witnesses were called to challenge the picture of "Stan" Faulder that had emerged during his trial. His older sister, Pat Nicholl, told of his happy, loving nature, his intelligence, and his ability to concentrate prior to an accident that happened just before his fourth birthday. The accident injured both sides of his head and led to a change in personality. Faulder became hyperactive, he suffered mental blackouts, and slept for prolonged periods. As a child, he was treated by a brain surgeon at the University of Alberta who diagnosed probable epilepsy and noted that during the blackouts Faulder would have no knowledge of what went on around him. Nicholl also reported that their mother required an appendectomy when she was three months pregnant with Stan. Dr. Faye Sultan, a clinical psychologist who had interviewed Faulder on three occasions, each time for five to six hours, also explained that Faulder's head injury left many effects on his personality. She cited depression, feelings of hopelessness, and deep emotional insecurities. He revealed, Dr. Sultan stated, a lack of confidence and a real sense of discomfort. Despite his head injury, he showed above average mental ability but his thinking was not under control. He seemed a "person always in need of help."

Alcoholism was another part of his behavior. In other words, he suffered an organic mental disorder, which had been exacerbated by alcoholic substance abuse. His conduct in prison was consistent with her diagnosis—sometimes Faulder was unable to awaken from a sound sleep, some days he refused to shave, but there was no indication of violence. She also noted that the poetry Faulder wrote while incarcerated revealed religiosity, remorse, and an understanding of his need for help.[16] Dr. Sultan's analysis directly contradicted Dr. Grigson's

testimony at trial. The latter had been based on one short conversation. Even worse was Dr. Hunter's trial testimony described as "more sociopathic nonsense with no interviews of the inmate ever."[17]

Another clinical psychologist, Dr. Murphy, also examined and interviewed Faulder for five to six hours. He agreed with Sultan that the severe head injury had caused damage to the right frontal lobe. Although Faulder's IQ was high (approximately 130), the brain damage interfered with his ability to make judgments. Murphy further testified that Faulder's history of blackouts and deep sleeps were related to his head injury as was "automatism," a lack of understanding of what he did or why he did it. Alcohol or stress could set off partial seizures.[18] The brunt of his testimony supported that rather than being a "sociopath," Faulder suffered from an organic mental disorder.

Faulder's 28-year-old daughter told the hearing that she had loving memories of her father from early in her childhood. He would, she remembered, sing her to sleep, cook with her, work with her in the garden, and let her help him fix cars. He often babysat his daughters. Friends testified to Stan's loyalty and honesty and his strong work ethic. According to one witness, Faulder treated his children with affection but also disciplined them when necessary. But the friend also told of mild seizures when Faulder's attention seemed to slip for a time before he could resume what he was doing. Another friend who testified to Stan's pleasant nature remembered witnessing seizures and blackouts and observing the family "trying to wake him after one of his long sleeps."[19]

Many other affidavits from doctors, friends, and family submitted at the hearing challenged the notion that Faulder was a sociopath. They supported the notion that he had long suffered from brain damage and seizures.

After all of this testimony, the court determined that Faulder's attorney was inadequate in not presenting this information at trial, but concluded that the information would not have altered the outcome. Even knowing of Faulder's history and his brain injury, Judge Gary Stephens was able to decide that the failure to present the mitigating evidence was simply a "harmless" error.

Shortly after the evidentiary hearing, Faulder's sister Pat Nicholl wrote to Texas Governor Ann Richards asking that the governor commute her brother's sentence. Nicholl expressed her concern that investigations conducted by Texas officials and judgments based on those investigations would not be impartial. She reiterated the history of Faulder's case—the failure to abide by the Vienna Convention and notify the Canadian Consulate for 15 years after her brother's arrest.

Had the consulate been informed, Faulder's family would have provided mitigating evidence at trial. "Aside from that, too, is the unnecessary anguish and heartache Stan suffered alone in prison; and similar emotions were being experienced by his family here in Canada, as we conducted searches to find him—to no avail!"[20]

Nicholl also mentioned the damaging testimony of Dr. Grigson and the other psychiatrists at Faulder's trials. Several of them "had never even laid eyes on Stan!!" and none bothered to check his medical records to learn of his head injury. Nicholl wrote, "I could understand a situation like this arising in Iraq, or some other third wold (sic) country, but not in the U.S., which is constantly touting HUMAN RIGHTS (sic)."[21]

Nicholl described at length her brother's kindly, loving nature. She further noted that after his divorce and separation from his children he suffered a deep depression, began drinking heavily, and "wandered down to Texas." There he committed what was probably his only act of violence, "when he hit Inez Phillips as she and Linda McCann struggled with a gun." Nicholl suggested "I would be willing to bet that, at that point, Stan went into a seizure and passed out."[22] She further suggested that there were many violations of due process in Faulder's case besides the failure to abide by the Vienna Convention, including his coerced confession and the payments to Linda McCann. Finally, Nicholl reminded the governor that there was evidence to prove that the death penalty did not reduce the crime rate. Individuals from all over the world had signed petitions asking that Faulder's sentence be reduced to life imprisonment. They saw the death penalty as "barbaric and inhumane. I'm sure you realize that the death penalty is not carried out in Canada!"[23] There is no record of a reply from Governor Richards.

After Faulder's state appeals were denied he sought a writ of habeas corpus from the federal courts. There were several grounds for the appeal and some additional arguments on behalf of the condemned man. Faulder claimed that the use of special prosecutors at his trial was a violation of due process; that Linda McCann had lied; that his counsel had been ineffective; and that his rights under the Vienna Convention had been violated.[24] In April, 1996, the Fifth Circuit Court of Appeals affirmed the lower federal court's denial of his petition for a writ of habeas corpus on all grounds.

As for the use of privately hired special prosecutors, the court found no constitutional violation. They dismissed Faulder's claim that "the use of special prosecutors raises concerns that the prosecutor's loyalty to the person who pays . . . may override the interests of society

in justice and a fair trial for the accused." In his case the Fifth Circuit disagreed that the special prosecutor had controlled the case—made prosecutorial decisions, selected whom to prosecute, organized the investigation, determined the sanctions to seek, or the immunities to grant. Instead, they found the benign explanation that the hired attorneys had merely offered to assist the overburdened district attorney, who had both personal and professional distractions to interfere with his handling of a major capital case. Although the victim's son paid for the fees and expenses of the special prosecutors and although they took the lead in handling Faulder's trial, the court insisted that District Attorney Robert Foster had actually been in charge of the proceedings, despite his absence from any visible role. The Fifth Circuit rejected Faulder's claim that the use of special prosecutors caused "arbitrary and capricious imposition of the death penalty" because defendants who kill wealthy victims are more likely to receive the death penalty because their cases are more vigorously prosecuted by special prosecutors hired by family and friends of the victim."[25] Here Faulder was making an argument straight from the reasoning of the Supreme Court in *Furman v. Georgia* where the justices found capital punishment unconstitutional if inappropriate considerations determined who would be sentenced to death. But the appellate court found no merit in Faulder's claims.

A second consideration was that Linda McCann had testified falsely at Faulder's trial but that the prosecution did not correct her statements. Defense counsel had asked McCann whether she was being paid by the victim's son for her testimony. She denied the promise of any money, eventually conceding that she would be provided with "relocation expenses by the victim's son to protect McCann from Faulder should he be released." As the court saw the matter, Faulder would only have been denied due process if he could show that McCann's testimony was actually false. Apparently, because he could not prove that McCann did not spend the $15,000 she received on "relocation," the untrue testimony was allowed to stand and the prosecution was absolved of its obligation to correct it.[26]

As for the issue of inadequate assistance of counsel based on the fact that Faulder's lawyer had offered no mitigating evidence at trial, the Fifth Circuit applied the Strickland standard. They agreed with the first prong in the Strickland test—Faulder's attorney's performance was deficient in that he claimed not to know that it was possible for the defense to present evidence at sentencing. But, examining the second factor in Strickland, they apparently determined that the failure to provide *anything* by way of mitigation did not harm Faulder. They

even cited that things that would not have helped Faulder to persuade the jury not to sentence him to death—his childhood brain injury and its resulting organic brain disorder, which contradicted the "diagnosis of sociopathy," his record as a peaceable prisoner, the testimony of family and friends as to his loyalty and loving. None of this, the court determined would have challenged the testimony of two "authorities" who had spent a total of 15 minutes with the defendant and declared him to be a sociopath. "We are unpersuaded," the judges said, "that had all this evidence been introduced, a different sentence is a reasonably likely result."[27]

Finally they considered the violation of the Vienna Convention. There was no evidence that Faulder had been advised of his rights under the treaty. But rather than addressing this violation, the Fifth Circuit Court simply decided that Faulder had not been harmed by the failure. They chose not to see a due process issue but simply stated that had the Canadian authorities been informed of Faulder's arrest, they would have obtained evidence "merely the same as or cumulative of evidence defense counsel had or could have obtained."[28] The fact that defense counsel obtained not a shred of evidence about Faulder's past seemed not to matter to the court. He could have obtained such information. He did not and the state of Texas failed to provide Faulder with the rights guaranteed under the Vienna Convention. Nonetheless, "the violation . . . does not merit reversal."[29]

Faulder appealed to the US Supreme Court for a writ of certiorari in 1998, asking for a stay of execution so the justices could consider the matter of consular notification as well as other irregularities in the Texas case against him. His petition argued that the execution should be postponed to prevent a fundamental miscarriage of justice.

One issue concerned a *Brady* violation, a claim that the prosecution had withheld exculpatory information from the defense and hidden it at trial. Faulder's petition alleged that one of the private prosecutors had knowledge of a statement by Linda McCann that her husband Ernie was involved in planning the crime. If that was true, it meant that Ernie's testimony at Faulder's trial was inadmissible (as another conspirator) and useless to the prosecution. In addition, if he had lied about only hearing about the crime after it was committed, Ernie and Linda were both guilty of perjury. There was no case against Faulder without the testimony of the McCanns, but the exculpatory memo was not revealed to Faulder's defense attorney at trial. In other words, Faulder could make a claim of actual innocence.[30]

Sandra Babcock, Faulder's attorney, made an extensive argument in the petition asking the Supreme Court to provide relief based on the

denial of his rights under the Vienna Convention. She made a number of innovative points about the application of the treaty: that state procedural rules could not supersede treaty rights and obligations; that because Texas had admitted to violation of the Vienna Convention, Faulder was entitled to a remedy; that the Vienna Convention was self-executing and therefore it provided personal rights enforceable by individuals; and that someone suffering a violation of his Vienna Convention rights need not show that he was harmed by the violation, only that it had occurred.[31] The petition noted that there were hundreds of cases pending in the United States where states officials had failed to notify foreign nationals of their rights under the Vienna Convention. Local officials were "at best ignorant and at times openly contemptuous of their obligations under the treaty."[32] Some political figures, like Texas governor George W. Bush, had boasted "the state of Texas is not a signatory to the Vienna Convention,"[33] bluntly asserting a policy that ignored the basic constitutional assignment of foreign policy to the national government.

Faulder's plea to the Supreme Court extended the argument about the importance of recognizing rights under the Vienna Convention. Because aliens are especially vulnerable when facing an unfamiliar legal system in a foreign country and because prosecutors may treat nonnative defendants more harshly than Americans, respect for Vienna Convention guarantees are needed to protect them against discrimination based on national origin. According to the Supreme Court precedent, discrimination based on race or nationality is never harmless. Thus, foreign defendants should not be required to prove that they were harmed by violations of their rights under the Vienna Convention. In addition, efforts by appellate courts to decide whether a defendant suffered harm based on a violation of his rights are only exercises in speculation. Like the assistance of adequate counsel, consular assistance could change the entire dynamic of a prosecution and trial. Thus Faulder, like any defendant denied consular assistance, should not be required to demonstrate that he was prejudiced by the denial. But despite such a claim, Faulder could assert that he was harmed by the failure of Texas to honor the Vienna Convention in his case. At the very least, consulate assistance would have helped to secure a competent attorney for Faulder's trial. In addition, information from his relatives would have portrayed him as nonviolent and offered some information in mitigation of the state's case against him. Finally, "in a case fueled by the wealth of the victim's family, the involvement of the Canadian Consular officers would have helped equalize the disparity between the defense and the prosecution."[34]

Indeed the victim's family continued to play a role in the case. The son of victim Inez Phillips also contacted Governor Bush. Jack Phillips encouraged the governor to go ahead with the execution. He reminded Bush that "We have met on two occasions." The involvement of Phillips throughout the case—his hiring of the private prosecutors, his payments to Linda and Ernie McCann, and his importuning of the governor, all raise questions of the overall influence a prominent family may be able to exercise in the dispensing of justice.[35]

While Faulder's petition for cert awaited the response of the Supreme Court, the case took on international implications and garnered attention around the world.

Last Ditch Efforts

The government of Canada filed a series of amicus briefs supporting Faulder's appeals. They noted that 15 years and capital trials had passed before Faulder was informed of his rights under the Vienna Convention, although the treaty required that a foreign national be given the opportunity to contact his consul "without delay."[36] They further argued that local laws do not supersede treaties and Texas authorities were not allowed to decide whether or not Faulder would have wanted consular assistance at the time of his arrest. The consular office could have explained his legal rights, verified that he received adequate treatment, helped find him a qualified lawyer, monitor the legal proceedings for compliance with international law, and contacted his family. In Faulder's case, the Canadian government would have raised questions about the conduct of the private prosecutor. The brief also noted the international implications when a country such as the United States ignored its obligations under the Vienna Convention. Such behavior set a precedent. It condoned noncompliance. As the Vienna Convention was based on the idea of reciprocity, US violation had worldwide implications for other citizens arrested outside their home countries. The government of Canada listed the irregularities in Faulder's case—the inexperienced counsel, his coerced confession, the actions of the privately funded prosecutor, the lack of mitigating evidence, and the differential treatment of Linda McCann, a US citizen. How could the courts declare that the failure to notify the Canadian consulate was "harmless"? Instead, the court should provide a remedy, either a new trial or a new sentencing hearing.[37]

Not only the Canadian government, but many Canadian individuals both private citizens and public officials, wrote to Governor Bush asking clemency for Faulder. Several members of the Canadian Parliament

and the Canadian minister of foreign affairs wrote, as did Faulder's sister and his daughter, the leadership of the Canadian Labor Congress, and a number of bishops and abolitionist groups. International figures including the pope, Archbishop Desmond Tutu of South Africa, and former first lady Rosalynn Carter pleaded for Faulder's life, as did the Leadership Conference of Women Religious, the Conference of Major Superiors of Men, the American Bar Association, the Organization of American States, and the International Commission on Human Rights.[38]

Lloyd Axworthy, the Canadian minister of foreign affairs, wrote to the US secretary of state Madeline Albright on behalf of Faulder. Specifically, Axworthy expressed his concern about the failure of Texas authorities to abide by the Vienna Convention and voiced related concerns that the process by which Texas considered clemency for Faulder had a predetermined outcome. Albright then wrote to Bush reminding him of prior cases where she and the State Department had drawn his attention to lapses in following the Vienna Convention.[39] She noted that the consular notification issues in Faulder's case were "sufficiently troublesome that they may provide sufficient grounds for according discretionary relief." Specifically, she cited the failure of Texas officials to include Faulder's name on the list of prisoners provided to the Canadian consulate general. Had this policy been followed, the Canadian government may have provided assistance and such assistance could likely have gotten Faulder a better lawyer than the one whose performance was "deficient" at his second trial. Albright also pointed out that as secretary of state she was concerned with the safety of Americans abroad, "including over 300 Texans imprisoned last year." The US ability to assist them was heavily dependent on Americans honoring their obligations under the Vienna Convention. She offered to send State Department legal experts to Texas to discuss the case. She asked that Bush grant Faulder a 30-day reprieve to give the BPP time to consider the clemency request.

Secretary Albright also wrote to Victor Rodriguez, the chairman of the Texas Board of Pardons and Paroles.[40] In that letter, Albright reiterated her concern over Texas's failure to advise Faulder of his right to consular notification and her fear that other Texas procedures had not served the purposes of the VCCR. She noted the deficiencies of Faulder's attorney and the inability of his family to provide assistance. "We believe this is a case in which consular notification issues may provide sufficient grounds for according clemency relief." Albright noted that it was the first time the State Department had asked for clemency based on a VCCR violation. In support of the request, she

included a nine-page summary of "Observations concerning the failure of consular notification in the case of Joseph Stanley Faulder," which detailed the ways in which Faulder's trial and sentence might have been affected by the communication with the Canadian consulate required by the Vienna Convention. Finally, she reminded Rodriguez that the United States could not have a double standard. They could not expect other countries to scrupulously observe the consular notification requirements when dealing with Americans abroad if US authorities themselves failed to comply.[41]

While Bush and Rodriquez may or may not have seriously considered Albright's requests, two other developments occurred. On December 10, 1998, the Supreme Court granted Faulder a stay of execution. Also, Faulder had joined other inmates on death row in filing a class action suit against the Texas BPP.[42] The suit alleged that the BPP denied convicts due process as its proceedings were secret. The board did not meet openly, it maintained no records of deliberations and, if it met at all, it met behind closed doors. The inmates' effort failed as the Texas court found that the BPP met minimal standards of due process. Texas, it was noted, had standards and rules for deciding on clemency. If the board did not choose clemency, it effectively took no action and therefore it needed to provide no reasons for its decisions. Besides, the court noted, petitioners have no interest in the reasons for refusing clemency. Furthermore, Texas law did not require that the BPP hold any meetings. If it did not require meetings, how could it require open meetings? Therefore, the court in Texas's 98th Judicial District ruled that the BPP's procedures were not a violation of due process. When this decision was handed down on January 8, 1999, Texas attorney general Alberto Gonzales wrote to George Bush, "We won!"[43] The governor later explained in a press release that the BPP had denied Faulder's request for commutation by a vote of 18–0. He reported that there was no doubt of Faulder's guilt and that the other issues—consular notification and inadequate representation by his lawyer—could only be resolved by the courts.

Shortly before Faulder's last execution date, Canadian minister of foreign affairs Axworthy wrote to Bush noting that in addition to the diplomatic concerns regarding the Vienna Convention there were serious questions regarding the procedures of the BPP. According to Axworthy's letter, fourteen of the eighteen members of the BPP had voted against clemency before even receiving, much less considering, the letter from secretary of state Albright. Axworthy implored Bush to reconsider.[44] Instead, Bush's general counsel replied that the question was moot, as the Fifth Circuit of Appeals had considered the matter of

the Vienna Convention and ruled against Faulder. She did not address the procedures of the BPP, apparently because the state court had found them acceptable.[45]

The Supreme Court lifted their stay and Faulder's tenth execution date was set for June 17, 1999. There was no chance of clemency from the BPP and no chance of a reprieve from the governor. Sandra Babcock attempted one last appeal to the Supreme Court alleging that Faulder's 22 years on death row and his nine prior execution dates constituted torture and cruel and unusual punishment in violation of international legal norms. The appeal was rejected without comment and Faulder was executed by lethal injection on June 18, 1999. His attorney Sandra Babcock and the Canadian consul from Dallas witnessed the execution.[46] A spokeswoman for Governor Bush said the international ramifications of the case were a matter for the courts. And, rather evasively, she added "Canada is a friend and neighbor of the United States and we hope Canadians understand that Governor Bush has taken an oath to uphold the laws of Texas, including the death penalty."[47] Of course no one had asked the governor to violate the laws of Texas, only to take heed of an obligation stemming from a treaty. But perhaps Bush would simply reiterate his earlier statement, that Texas had not signed the Vienna Convention.

Implications of the Faulder Case

Comments on the Faulder case and its meaning for US–Canadian relations and for capital law appeared in a number of law journals. Adele Shank and John Quigley wrote of the possible disadvantages non-American defendants might experience in a trial, especially a capital trial. Echoing some points raised by Sandra Babcock in briefs for Faulder, they noted that like racial prejudice "bias based on the accused's status as a foreigner may be subtle, but it undoubtedly colors criminal proceedings on occasion."[48] They point out that the process of "death qualification," where potential jurors must express a willingness to apply a death sentence, "poses a particularly serious threat to a fair trial when the accused differs in some significant way from the majority of the jurors, as when the accused is a member of a racial minority or is a foreigner."[49] They suggest the importance of consular notification to counteract such possible bias. "A consul can counteract that potential bias by informing the prosecutor and judge early in the process that the consul's government is interested in the proceedings."[50] In Faulder's case would dealing with the Canadian government might diminished the zeal of the Phillips family and the

private prosecutors? It is impossible to know. But there is an argument that the involvement and resources of the consulate may have served to level the playing field.

Mark Warren claims that the Faulder case, "the discovery of a forgotten Canadian on death row in Texas and the international treaty violation at the heart of his case that would revolutionize consular policy in both countries and ultimately alter Canadian attitudes as no other capital case had ever done."[51] Warren credits Babcock for alerting the international community to the legal implications of Faulder's case. With her involvement in the litigation and the publicity for the violation of the Vienna Convention, "an unlikely coalition of attorneys, consular officers, academics, and human rights activists" took an interest in pursuing the appeals, "united by a shared concern over the violation of a crucial international treaty protected the rights of all imprisoned foreigners."[52] Attention to Faulder's plight revealed that there were a great many violations of terms of the Vienna Convention, even in capital cases in the United States. On the other hand, the United States "invariably insisted on full compliance whenever its own citizens were detained abroad."[53] The Canadian government followed every avenue of appeal and the opposition party even urged that the United States be informed that Canada "will not rest until the decision to execute him is reversed."[54] As noted earlier, Secretary of State Albright offered forceful support for the messages from the Canadian government, but her pleas were ignored by officials in Texas. In fact, the BPP did not even show the courtesy of meeting to discuss the issue. Nor was the BPP even shown the thousands of letters in support of Faulder. Many members of the board had already faxed in their votes against Faulder before Albright wrote to their chairman.[55] That episode made it clear that the BPP was less interested in gathering full information about an inmate than in going through the formality of concluding their assignment and endorsing the death sentence. It also illustrated the tension between the role of the federal government in carrying out its international obligations and the role of a state in implementing its criminal justice policies. That tension lies at the heart of every case discussed in this book. It also explains why the herculean efforts of the Canadian government to save Faulder's life ended in failure. Warren describes "a series of innovative missions targeting Texas authorities" by Canadian officials in the last days of Faulder's life.[56] The Canadian consul general met with state officials; multiparty delegations of members of the Canadian Parliament as well as former prime ministers appealed for clemency. The Governor and members of the Texas administration

either pleaded helplessness to stop the execution or reiterated their obligation to follow the state's laws and procedures. But as Warren argues, Canada's actions served as an example to other nations whose citizens' rights under the Vienna Convention had been violated. Mexico pursued the issue before the ICJ. Ironically, after becoming president, George W. Bush awoke to the necessity for the nation to fulfill its international treaty obligations. He called for state courts to "give effect" to the rights of foreign nationals.

In Canada, support for the death penalty "plummeted" after the Faulder case, especially among younger people. Canadian officials were told to intervene before capital trials in cases where their nationals were involved. It is likely that such intervention was able to gain a plea bargain and avoid a death sentence for a young man from Saskatchewan charged in Arizona. It may be argued "that intervention could not have happened but for the Faulder campaign."[57]

Faulder's was also one of the cases (along with Breard and the LaGrands) that prompted the State Department to issue a new handbook in 1998. The manual was distributed to all law enforcement agencies and listed proper procedures to follow when detaining a foreign national. It explained that consular notification is mandatory, whether or not the individual wished to exercise that right. It also provided a statement, which police could read to an accused individual as they do the Miranda warning. "Because of your nationality, we are required to notify your country's consular representatives here in the United States that you have been arrested or detained. After your consular officials are notified, they may call or visit you. You are not required to accept their assistance, but they may be able to help you obtain legal counsel and may contact your family and visit you in detention, among other things. We will be notifying your country's consular officials as soon as possible."[58] Ironically, all the State Department could do was request that law enforcement agencies pass along the handbooks to their officers. In another example of the federal dilemma, the federal government could claim it was discharging its obligations under the Vienna Convention by promoting the manual. Meanwhile, the states might or might not encourage consular notification. Many would continue to plead ignorance of the requirement.

In arguments before international tribunals, the United States would often seem to be evading responsibility. Although the federal government is theoretically responsible for failures to meet treaty obligations, if the breach takes place at the state level, there are difficulties in forcing compliance. "The nature of the international system is such

that, in a federal state, the federation is responsible at the international level even if, as in the United States, the constituent entities of the federation enjoy substantial powers. The constituent entities are bound by a treaty, even though they had no part in its ratification."[59] But suppose the state government refuses to acknowledge that requirement? Repeatedly, in many other examples as in the Faulder case, the federal and state institutions reached that impasse.

6

The Execution of Two Foreign Nationals: The Case of Karl and Walter LaGrand

The tension between implementation of criminal justice policy and national treaty commitments arose again when Arizona convicted two brothers of German nationality and sentenced them to death. Germany took the case of Karl and Walter LaGrand, specifically the denial of their rights under the Vienna Convention, to the ICJ. As Howard Schiffman notes, *Breard*, *Faulder*, and *LaGrand* all highlight the conflict between US law and practice and the nation's treaty obligations and international law.[1] Even more importantly, he described the LaGrand case as a "dispute of international magnitude," and predicted that its legacy would affect death penalty cases in both domestic and international law where the VCCR is applicable.[2] LaGrand raised, in the ICJ, the meaning of Article 36 of the Vienna Convention, including whether the rights identified there applied to individual defendants or only to the sending state and its representatives. The LaGrand case before the ICJ further addressed the matter of what remedies were appropriate if the Vienna Convention was violated. Should individuals have recourse in the courts or was an apology between the nations involved a sufficient response?

Facts of the Case

Walter LaGrand, born in Germany in 1962, and his brother Karl, who was born there a year later, moved to the United States with their mother when they were young children. They visited Germany only once for six months in 1974. Later both were adopted by an American family, but neither ever became a naturalized American citizen. On January 7, 1982, the brothers drove from their home

in Tucson, Arizona, to Marana, Arizona, where they attempted, and failed, to rob the Valley National Bank. In the process, the bank manager, Ken Hartsock, was stabbed and killed. Dawn Lopez, another bank employee, was also wounded but she survived and identified the brothers as the robbers.[3] The entire episode would have been a comedy of errors had it not taken the life of an innocent man and caused the suffering of an innocent woman and ultimately led to the execution of the two brothers.

The LaGrands arrived in Marana around 8:00 a.m., some time before the bank was scheduled to open. They drove around for a while and stopped at a taco restaurant where Walter found out from an employee, Ronald Schunk, that his drive-in would not open until 9:00 a.m. Schunk was later able to describe the car the men were driving as "white with a chocolate covered top" and to identify Walter LaGrand as the man who had spoken with him. Dawn Lopez drove into the bank parking lot shortly after 8:00 a.m. She noticed a white car with a brown top and the bank manager's truck parked there. She saw Hartsock talking with a strange man, who later turned out to be Karl LaGrand, near the front door. When she walked past the brown and white car, Walter asked her what time the bank opened. By this time, Karl, wearing a coat and carrying a briefcase, was inside the bank with Hartsock. Karl opened his coat and showed a pistol. Walter came into the bank and ordered Hartsock to open the vault. The manager claimed he could not open it as he had only one part of the combination. The brothers then moved the two employees into Hartsock's office, bound their wrists with tape, and gagged them with bandanas. Walter also threatened Hartsock with a letter opener.

A third bank employee arrived in the parking lot. She became suspicious when she saw a strange car parked there and called the town marshall. Meanwhile, the brothers struggled with Hartsock. According to Dawn Lopez, Karl was holding him from behind and Walter was in front. She testified that Walter stabbed her and then she heard someone say in reference to Hartsock, "Just make sure he's dead." The LaGrands left and drove back to Tucson, having taken no money from the bank. Lopez called for help. Police and medical personnel found that she had been stabbed multiple times while Hartsock had died from 24 stab wounds.

The police had the license plate number of the white and brown car the LaGrands had been driving. They traced the car and arrested the LaGrand brothers. At the apartment where they had been staying, officers found a steak knife similar to the one used for the stabbings at the bank. They also found a briefcase containing a toy gun (the one

Karl had displayed to Lopez), black electrical tape as had been used to bind the victims, and a red bandana. Karl's fingerprints were also found at the bank. All of this physical evidence tied the brothers to the attempted robbery and murder.

After they were arrested, Walter made no statement but Karl confessed and claimed that Walter had no part in the stabbings. Nevertheless, both were tried for capital murder and both were sentenced to death. Following their direct appeal in 1987, the Arizona Supreme Court affirmed their convictions and sentences. All of their first round of appeals, including state habeas corpus petitions, were denied. In 1998, the Ninth Circuit Court of Appeals rejected their petitions for federal habeas corpus. At that time, the LaGrands raised the issue of consular notification. Neither had been advised of their rights as German citizens under the Vienna Convention and neither knew of those rights until many years after their arrest and detention.[4]

It is not clear when Arizona authorities became aware that the LaGrands were German but the brothers were not aware of the implications of their citizenship until at least ten years after their arrest. The state claimed that the brothers had the demeanor and speech of Americans, neither seemed to speak German, and they "appeared in all respects to be native citizens of the United States."[5] However, the Arizona officials also admitted that they were aware of their German nationality by 1983 or 1984. Because no one informed the LaGrands, the issue was not raised at any of their first round of trials and appeals. When, in 1992, the LaGrands learned of their right to consular assistance from other sources (not the responsible authorities in Arizona), they contacted the German consulate. At that point, they initiated their third round of appeals, and raised the issue of consular notification. At no previous time did anyone from the United States government or any official from Arizona make their right to consular notification known to the LaGrand brothers.[6]

In their federal habeas petition, the LaGrands claimed that the failure to inform them of their right to contact the German consulate violated their constitutional rights. The Ninth Circuit Court of Appeals acknowledged that the Vienna Convention required the arresting authorities to notify foreign nationals of their right to communicate with their consul "without delay." But, the court disposed of the matter by declaring that because the claim had not been raised in state proceedings, it was procedurally defaulted. They went on to state that procedural default could be overcome if the petitioner could show cause for the default and if he could show that the violation caused actual prejudice to his case. The LaGrands claimed that the issue had

not been raised earlier due to inadequate assistance of counsel. In other words, their attorneys should have known to bring up the lack of consular notification. The fact that the lawyers were ignorant of the Vienna Convention was proof of their inadequacy. The Ninth Circuit refused to accept that reasoning. Nor, according to the court, was there a miscarriage of justice, leading to the conviction of innocent persons. It was not enough to claim that, had the German consul been involved, they would have been able to show additional arguments for mitigation, such as background information about their abusive childhoods. The court's opinion stated that only if the German consulate could have provided evidence that disqualified their crimes for the application of the death penalty would the "miscarriage of justice" argument overcome the procedural default rule.[7]

Although Karl and Walter had based their appeal on a number of other matters—the aggravating factors in their case, the constitutionality of Arizona's felony murder statute, their disproportionate sentence compared to similar cases, that both lethal gas and lethal injection were cruel and unusual methods of execution, and a number of examples of inadequacy on the part of Karl's counsel—none of these arguments persuaded the appellate court. The judges rejected their petitions on January 16, 1998.[8]

Almost exactly a year later, on January 15, 1999, the Arizona Supreme Court set the date for carrying out Karl LaGrand's sentence for February 24 and Walter's for March 3, 1999. The German consul was informed of the scheduled executions on January 19. At that point, various representatives of the German government swung into action to try to prevent the deaths of the two citizens.

GERMAN INVOLVEMENT

The German foreign minister contacted Secretary of State Madeleine Albright and the minister of justice wrote to Attorney General Janet Reno on January 27. At the same time, the German chancellor and the president of the Federal Republic of Germany wrote to President Bill Clinton. The chancellor also sent a message to Arizona governor Jane Dee Hull. All of those missives described the strong opposition to capital punishment in Germany and asked for consideration for the LaGrands. Oddly, none of the communications mentioned consular notification. That issue was finally discussed in a letter from the foreign minister to Secretary Albright on February 22.[9] However, the German diplomatic efforts did no good for Karl LaGrand, who was put to death by lethal injection on February 24, after the Supreme

Court rejected his last appeal. The violation of the Vienna Convention was among his eleven claims, but none prevailed.

On March 2, only hours before Walter LaGrand was scheduled for execution, Germany filed a motion with the ICJ. They asked the ICJ for a provisional order requiring that the United States delay Walter's execution. The ICJ granted the provisional order on March 3. It directed the US government to ensure that Walter was not executed and to refrain from any action that would interfere with the matters subject to dispute before the ICJ. In other words, the federal government was told to do everything necessary to delay LaGrand's death until the ICJ could conduct a full hearing on the violation of the Vienna Convention.[10] Meanwhile, the German foreign minister again wrote to Secretary Albright asking her to urge the Arizona governor to postpone the execution. The Arizona Board of Executive Clemency, no doubt aware of the case's international implications, took the unprecedented step of recommending that the governor grant a 60-day reprieve.

But rather than giving effect to the ICJ's provisional order, the solicitor general, the federal government's advocate before the US Supreme Court, argued that provisional measures were not binding on the recipients. The Supreme Court refused Germany's request to grant Walter LaGrand a stay of execution, claiming that the United States had not waived its sovereign immunity, and that the Eleventh Amendment prohibited a foreign government from making a claim against an American state. Justices Souter and Ginsburg joined in the decision, stating that they were persuaded by the solicitor general's argument that provisional measures did not require a mandatory response. Justices Breyer and Stevens dissented, holding that the issues were sufficiently weighty to justify a stay until the ICJ could hold full hearings.[11] As Schliffman argues, the majority of the Supreme Court was influenced by the "unilateral interpretation of the US government" regarding the effect of a provisional measure.[12] They were unwilling to wait to hear a full airing of the arguments but agreed to let the execution move ahead.

Secretary Albright's only response to the provisional order was to transmit it, without comment, to the governor of Arizona. For her part, Governor Hull echoed the words of Virginia Governor Jim Gilmore when she ordered that the execution proceed "in the interest of justice and with the victims in mind."[13] Like Gilmore, she seemed to believe that justice demanded that the punishment must take place immediately (even though 17 years had passed since the crime) rather than be postponed for an additional two months.

Walter LaGrand was the last person to be put to death in a gas chamber in the United States. He had filed a last appeal arguing that the Eighth Amendment ban on cruel and unusual punishment prohibited the use of lethal gas as a method of death. Although Walter had earlier chosen lethal gas over lethal injection, in his final argument, he asked the court to declare its use unconstitutional. The Supreme Court rejected his claim, on part based on the doctrine of procedural default.[14]

The International Court Rules on Germany v. United States

Two years after the execution of Karl and Walter LaGrand, the ICJ issued a ruling on the case, *Germany v. United States*, on June 27, 2001.[15] The decision addressed several issues: was a provisional ruling by the ICJ binding on the parties; did the Vienna Convention protect the rights of individuals or was it a guarantee that governments have access to their citizens; how did the domestic policy of procedural default in American law affect the obligation to enforce the provisions of a treaty; and what assurances of future adherence to the Vienna Convention were necessary on the part of the United States.

First of all, Germany based its argument that the ICJ had jurisdiction in the LaGrand case on Article I of the Optional Protocol, which read, "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the ICJ and may accordingly be brought before the court by an application made by any party to the dispute being a party to the present protocol."[16] As both the United States and Germany were signatories of the Vienna Convention and the Optional Protocol, the ICJ's jurisdiction seemed clear. Next, in order to determine whether the United States had violated the earlier ruling of the ICJ by its response to the 1999 order, the court had to determine if a provisional measure was binding on the parties. After the 1999 ruling on the Walter LaGrand case, the solicitor general of the United States had advised the Supreme Court that provisional orders were not binding. The Supreme Court had accepted his interpretation, treated the ICJ's ruling as merely advisory, and refused to grant LaGrand a stay of execution. The Arizona governor had also ignored the ICJ's provisional order. Before the ICJ, the US submission stated that it would have been impossible to follow the provisional order to delay Walter La Grand's execution due to the short time involved and because of the "character of the United States as a federal republic with divided powers."[17] In other words,

the American position was that interim orders from the ICJ were not binding on the parties or, if they were binding, the federal structure of the US government made it impossible to implement them. They also argued that provisional measures were "contrary to the interests of the states who were parties to the VCCR and the international community as a whole." Michael Addo suggests that the United States may see provisional rulings as "insufficiently in conformity with due process rules," and that perception may account for the "abysmal record of compliance" by the United States.[18]

In any event, the ICJ's 2001 ruling rejected such reasoning. Thirteen of the 15 judges in the International Court held that provisional orders are binding. In the face of imminent action, the provisional order may be necessary to protect fundamental rights (such as someone's life) and that violation of such an order may cause irreparable harm (as it did to Walter LaGrand).[19] As the ICJ noted, interim measures must be binding. If the court could not issue mandatory injunctions to preserve its ability to render final judgments, "then the ability to render final, binding judgments would be illusory."[20] In other words, the subject of the interim ruling could become moot before the final ruling. In such a case, the power to hand down a final judgment would be meaningless. Therefore, as the provisional ruling required that the United States do all it could to prevent the execution of Walter LaGrand, and in the ICJ's view this ruling did not ask the federal government to "exercise any powers it did not have,"[21] the failure of the United States to delay the execution was a violation of a binding ICJ order. As Addo notes, the provisional order of the ICJ was unprecedented but was based on the urgency of the situation with Walter LaGrand's execution immanent. It seemed the most effective way to secure LaGrand's rights and Germany's rights under the Vienna Convention. He states that the ICJ issued the provisional order in the "absence of credible evidence that the United States authorities would show good will and delay the execution" to allow time for full argument before the ICJ. And as the execution was carried out despite the court's order to "take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision," distrust of the United States in the international community was confirmed.[22] Given that perception, the ICJ's insistence on the binding nature of provisional orders seemed to be designed to prevent such rejections of its rulings in the future.

The ICJ ruled that the failure to inform the LaGrands of their rights under the Vienna Convention was the fault of the American authorities. Germany alleged that the omission of consular notification

"prevented Germany from exercising its rights and violated the individual rights of the detainees." The United States, while admitting to the lapse in implementing the Vienna Convention provisions, charged that Germany itself sometimes failed to notify foreign nationals of their consular rights. The ICJ found no evidence to support this allegation. The United States further argued that even if the LaGrands had been in contact with the German consul, such assistance would not have changed the outcome of their trials. The ICJ found that reasoning "immaterial." They rejected the American argument that a rights violation must cause "harm" to be recognized. In the court's eyes it was sufficient that the Vienna Convention conferred rights and that Germany and the LaGrands were prevented from exercising those rights, had they so chosen, by a breach of US action.[23] The ICJ focused exclusively on the actions of the United States in determining a violation of Article 36 of the Vienna Convention. The issue was not whether the LaGrands would have sought consular assistance or whether Germany would have provided assistance or whether the assistance would have led to a different verdict. It was not necessary to focus on the results to determine that a violation had occurred.[24]

Another significant and related question concerned whether the Vienna Convention conferred rights on individual foreign nationals or if the treaty only applied to the rights of a government and its representatives. In other words, whose rights were at stake—the German consulate's or the LaGrands'? The US position was that although Germany had the right to seek a judgment from the ICJ, the International Court could not address violations of individual rights. They objected that the ICJ was not "the ultimate court of appeals in criminal proceedings."[25] But the ICJ held that the Vienna Convention created individual rights, which may be invoked by the state of the detained person and which had been violated in this case. They quoted Article 36 1 (b) of the Vienna Convention, "Authorities shall inform the person concerned without delay *of his rights* (italics in original opinion) under this subparagraph." The court stated "The clarity of these provisions, viewed in their context, admits of no doubt."[26]

Commentators on the decision suggest that although the ICJ described Article 36 rights as individual rights and important procedural safeguards, they did not go so far as labeling them as basic human rights. They did contend that the individual rights protected under the Vienna Convention serve the critical purpose of helping to ensure fair trials and just sentences for foreign nationals. If Vienna Convention rights are not, strictly speaking, human rights, they serve to protect such human rights as the right to life.[27]

Another major point of argument in the case of *Germany v. United States* was the impact of the procedural default rule on the exercise of rights guaranteed by the Vienna Convention. In the LaGrands' case, as in others discussed here, the fact that Vienna Convention violations were not raised in court until late in the process meant that the defendant had effectively "defaulted" those claims. According to the doctrine of procedural default, the person on trial is held responsible for objecting if the state fails to play by the rules of due process. If he (or his attorney) does not object to due process violations in state court, they are believed to have forfeited the right to object in later proceedings. Such was the case with the LaGrands who only claimed their right to consular notification in federal habeas corpus petitions.

The German position was that the US domestic law of procedural default undermined rather than implemented the right to consular notification. It prevented giving "full effect" to the purposes of the Vienna Convention. There was a question of responsibility. The United States rejected the contention that Germany only found out about the detention of the LaGrands in 1999, while the Arizona authorities knew they were German citizens as early as 1982. Their German nationality was referred to in the presentence reports compiled in 1984. Their case should have been familiar to the German consulate before 1999 if German consular assistance were as vigorous and effective as claimed. So the United States argued to the ICJ.[28] Presumably this was an argument to support that idea that the LaGrands should have raised the issue of consular notification at trial. And, the United States stated, the failure of their lawyers to raise the issue is imputable to the clients. "The state is not accountable for errors or mistaken strategies by lawyers." Germany responded that prior to 1992 the LaGrands were unaware of their rights under the Vienna Convention, not through their fault or the fault of the German representatives, but due to the failure of US authorities.[29] Their position was that the brothers were punished for not knowing the law and prevented from seeking justice by the formality of procedural default. The LaGrands had been "undeniably prejudiced by the lack of consular assistance," and "ultimately their death sentences were due to breaches of Article 36 (1)."[30] Instead of rectifying the omission, the American government merely apologized to the government that represented the hapless defendants. Germany argued for a system that "does not automatically reproduce violation after violation of the Vienna Convention only interrupted by apologies by the United States government."[31]

The ICJ agreed with the thrust of the German argument. They found the United States in breach of its Vienna Convention responsibilities by

upholding the domestic law (procedural default) that made it impossible to rectify Article 36 violations. They found that the rule prevented the LaGrands from "attaching any legal significance" to violations of the Vienna Convention and thwarted Germany from assisting them with legal counsel and assisting with their defense. Procedural default prevented "full effect being given to purposes for with rights accorded under the article are intended."[32] The rule deprived the LaGrands of a "forum to raise the issue of treaty violations once counsel with support of Germany was working on their behalf."[33]

To some extent, the ICJ conceded the US point that, despite the problems with the application of the procedural default rule, the Vienna Convention did not require the creation of new criminal law for the purpose of allowing for claims under the treaty. The International Court did not state that there was an absolute right to have any judgment reversed. However, they did indicate that a remedy for treaty violations was necessary. Presumably either a judicial remedy or executive clemency might suffice.

Germany sought assurances from the United States that there would be no violations of the Vienna Convention in the future. The United States responded that the ICJ should limit itself to the consideration of the LaGrand case. They argued that the court could not require absolute guarantees regarding the application of American domestic law. Such rulings would be "unprecedented . . . [and] would exceed the Court's authority and jurisdiction."[34] The ICJ acknowledged that the United States was making serious efforts to educate local and state law enforcement officers about the Vienna Convention. As the United States promised, "the Department of State was working intensively to improve understanding and compliance with consular notification." They had published a booklet in 1998 (as referenced in the chapter on the Faulder case); 60,000 copies of the booklet had been made available and 400,000 small reference cards had been distributed to arresting officers. In addition, police training programs at all levels—local, state, and federal—included information on consular notification.[35] However, also looking to the future, the court indicated that apologies would not be enough should further violations occur. They held that it was "incumbent on the United States" to allow review and reconsideration of convictions and sentences where Vienna Convention issues were involved. The choice of means for ensuring such reconsideration would be left to the United States.[36]

The decision left the United States with a legal duty to take positive measures to protect the rights of both states and individuals under the Vienna Convention. Christian Tams sees the requirement for future

action as moving the discussion of consular notification rights from bilateral remedies, such as apologies or reparations, to multilateral considerations that would show a respect for international law by preventing future violations. He argues that as a state has the duty to adapt laws and regulations, it becomes more difficult to uphold the fiction that an apology is enough. Optimistically, he predicted that even if the LaGrand case before the ICJ did not protect Karl and Walter LaGrand, it might help to solve future cases with less confrontation.[37]

Consequences of the LaGrand Case

Many legal scholars commented on the meaning of the LaGrand case, noting that the ICJ had provided "an authoritative interpretation of international law with significant implications for the United States domestically and internationally." The decision was intended to impel American courts and the executive branch to grant review and reconsideration of future cases arising under the Vienna Convention. And, following the ruling, the United States should have been compelled to comply with provisional orders of the ICJ in the future.[38] In response to the court's order, the United States maintained it had "energetically embarked" on a "vast and detailed program" in an effort to ensure that officials at all levels were aware of their obligations under the Vienna Convention on Consular Rights. But an effective remedy for Vienna Convention violations would require "belated attention to the purposes for which Article 36 rights were conferred."[39] The United States must acknowledge that the treaty was intended to provide more than simply a formality of consular notification but that its core purpose was to ensure "a fair criminal trial and sentencing, not just procedural rights of information and access."[40] To make those promises a reality meant giving substance to the rights of foreign nationals even as those rights might contradict some provisions and practices of the American system.

After LaGrand, it was no longer possible for the United States to claim that "persuasion" was its only tool to ensure compliance with the VCCR.[41] The ICJ had told the United States that it must afford review and reconsideration to defendants whose Vienna Convention rights had been violated. This could mean closer scrutiny of those issues when governors considered executive clemency; more attention from parole boards; allowing Vienna Convention claims in habeas corpus petitions and motions for resentencing; and federal legislation recognizing Vienna Convention rights.[42] Schiffman also suggested that the AEDPA, which often stood as a bar to raising the issue in habeas petitions, should be interpreted to allow for consideration of those

claims. The AEDPA prohibits successive habeas petitions unless they involve "a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable." To make a VCCR claim fit that definition, the Supreme Court would have to recognize that those claims had constitutional standing and they would need to declare that standing as retroactive.[43] These efforts at review and reconsideration would require action by both executive and judicial branches, an outcome some observers found to be unlikely.

John Quigley asserts that the LaGrand case had little impact on the practice of American courts, which continued to deny any remedy for Vienna Convention claims. Most had not altered their analysis of the issue or responded to the ruling in LaGrand. Instead, the courts said that the State Department had told them that Article 36 afforded rights that could be invoked by foreign nationals, but that those were not constitutional rights and therefore did not require that convictions be reversed. He contends that US courts "deprecate the importance of consular assistance." Some say it would be useless, others demand that defendants demonstrate that they were harmed by the failure. Quigley finds such reluctance to respect treaty rights inconsistent with the Supremacy Clause of the Constitution.[44]

William Aceves also notes that it is unlikely that US courts would "accord significant weight to the ICJ ruling" in LaGrand, even though in *Breard* the Supreme Court had said that courts "should give respectful consideration to the interpretation of international treaties and of an international court with jurisdiction to interpret it." Instead, American courts had accorded LaGrand "little, if any, value."[45] All efforts to implement remedies to avoid Vienna Convention violations in the future were problematic due to statutory restrictions such as the AEDPA, and to doctrines such as the harmless error standard and procedural default. It was also unlikely that governors would give weight to those claims when considering clemency.[46]

The American Society for International Law held a panel discussion in 2001 entitled "Consular Rights and the Death Penalty after LaGrand."[47] Although many legal scholars were troubled that the future of compliance with the ICJ decision in *Germany v. United States* looked dim, the State Department alleged that they were making progress through their information program. But, Catherine Brown, a legal adviser from the Department of State, also cited the difficulty of educating hundreds of thousands of law enforcement officers in 14,000 different jurisdictions about Vienna Convention protocols. She asserted that it was difficult to get police to ask suspects about

their nationality, partly because officers felt it was insensitive to inquire or because they feared being accused of ethnic stereotyping. It was, according to Brown, "a terribly difficult challenge."[48] She did point out that the State Department asked governors to consider Vienna Convention violations when considering clemency. Those requests, however, were ignored in the Breard, Faulder, and LaGrand cases. And, as Aceves had noted, there was little reason to believe that other governors would pay more attention in the future. In fact, Bruno Simma, a German professor of international law, pointed out that after LaGrand, German authorities chose not to pursue Vienna Convention claims with state or local governments, but to invoke the ICJ's ruling with federal officials in Washington.[49] They believed the danger of recurring violations was great and apparently did not believe state agencies would take them seriously.

Sir Nigel Rodley, a member of the United Nations Human Rights Commission, suggested that international observers saw LaGrand in the broader context of the question of the death penalty in the world. The use of capital punishment was an irritant in US dealings with countries where its abolition was established, such as the members of the European Union. They considered LaGrand as a part of the mounting pressure on the two remaining democracies "who continue to apply this uncivilized form of punishment to join the rest of the free and democratic world and abolish the death penalty once and for all."[50]

Others tied the LaGrand case to a broader discussion of capital punishment. Monica Tinta observes that it was impossible to separate the two issues. The provision of consular notification has a bearing on the right to due process and "ultimately on the right to life in the context of the death penalty."[51] She states that LaGrand illustrates "how relations fundamentally affecting states (such as consular notification) can no longer be separated from their effects on individuals." Rather, individual rights "intrude on the bilateral relations of states."[52] Germany had argued that the right to information regarding consular assistance was an individual human right, among the minimum needed to adequately prepare a defense and ensure a fair trial, considerations that were surely imperative in a death penalty case. If consular assistance was part of a guarantee of due process, then its violation was a violation of the right to life, a direct injury of an individual.[53] LaGrand was an example of how international law protects individual rights, not just relations among nations.

Fitzpatrick also tied the LaGrand proceedings in the ICJ to the application of capital punishment in the United States. It brought an international audience, she maintained, to the "dirty little secret"

about the death penalty. It was "largely restricted to marginalized elements in the community." Furthermore, the "basic rights of capital defendants were often significantly violated in the investigative and trial phases."[54] As in many other capital cases, trial counsel failed to raise timely objections. And here too, the failure of the US courts to remedy violations was "traceable in part to the airtight system of procedural forfeitures that now governs the availability of federal habeas corpus relief." In other words, the LaGrands suffered the fate of many other poor and uneducated defendants—their rights were violated and their court-appointed lawyers failed to object during their trials. The procedural default rules, now ubiquitous in the US legal system, prevent justice from being done. And, Fitzpatrick maintains, the US response to the ICJ exposes "the weakness of reciprocity in shaping the current behavior of the world's sole remaining hegemon."[55] In her view, the case surely exemplifies an instance of American exceptionalism.

In the future, the United States must be more respectful of ICJ orders and not "dismissive" in its response. Unless the federal government is more proactive to ensure compliance (presumably even in the face of opposition from states), the nation could both lose its credibility with other nations and contend with more exposure before the ICJ.[56] And it was not only a matter of credibility. As a signatory to the United Nations Charter, Article 94, the United States agreed to abide by ICJ decisions. Therefore, the nation must act to remedy its breach, as would be consistent with established principles of treaty law.[57]

The question of how the United States was to comply with the International Court's ruling in the future gave rise to ongoing discussion. Proposals from legal scholars to give effect to the LaGrand decision were not lacking. Quigley argues that the federal government could sue states to demand compliance with the treaty. The attorney general has successfully sued states when they taxed the property of foreign diplomats in violation of treaty agreements. The attorney general could, if he or she so chose, sue states to enforce Article 36.[58] Most would find little willingness to do so. Schiffman points out that the Justice Department could request a writ of mandamus in federal court directed to a governor or at the head of the corrections department who had custody of the Vienna Convention claimant. Such an action would force the issue with state officials if a state criminal justice system violated US obligations under treaties or international law. But, Schiffman concedes, given the "sensitivity to states' rights," federal courts would be reluctant to issue such a writ.[59]

Quigley also suggests that the Supreme Court should "entertain full argument" regarding the importance of consular notification.

They could provide a remedy that would apply even without proof that consular assistance would have changed the outcome of the case. In other words, they could reject the notion that a defendant must show prejudice to make a Vienna Convention claim. The court could also adopt the view that procedural default rules were "inapplicable" if they created a violation of a treaty obligation.[60] Another option would be for courts to reconsider the "later in time" rule, which they had used to say that the AEDPA (passed in 1996) with its limitations on habeas corpus procedures supersedes the rights under the Vienna Convention (ratified in 1969). Both enjoy equal constitutional status, but traditionally the court has said it must defer to the provisions of the more recent law. However, Schiffman argues that using AEDPA to nullify consular notification rights has led to negative results for the United States by undermining the purposes of the Vienna Convention. The Supreme Court could decide that the "later in time" rule did not apply as there is no evidence that the Congress, who passed the AEDPA, intended for it to prevail over the Vienna Convention.[61]

A final remedy, often suggested in law journals and other commentaries, is that Congress could pass a law making a statement of consular notification rights mandatory for someone subject to custodial interrogation, just as the Miranda warning is mandatory. If such a law were to exist, it would make it possible for defendants to raise the issue more successfully in appeals and in clemency and commutation hearings. Under those circumstances, the responsibility of the law enforcement would be clear and unequivocal. Such a federal law would not solve the problem of poor representation by unskilled attorneys and it would not solve the problem of procedural default. But it would be a clear signal that Congress saw the significance of treaty obligations and expected states to follow through their criminal justice systems. To date, Congress has not given such a signal. In fact, it could be argued that despite directives from the ICJ and assurances given there, the LaGrand case had little effect on the daily workings of the criminal justice apparatus in the United States.

It would require another case before the ICJ, known as *Avena*, to draw significant attention to wholesale violations of the Vienna Convention. Ironically, it would be George W. Bush, the governor who had claimed that Texas had not signed the treaty and was therefore not bound by it, who pleaded with states to honor their obligations under the international agreement.

7

Avena: Mexico v. United States and the Case of Jose Medellin

After the LaGrand case was decided and the LaGrand brothers were executed, a complicated series of events and legal proceedings brought the United States back before the ICJ and led to another conflict over the implementation of that court's judgment. Both the American judicial system and the executive branch became involved in the response to the case brought to the ICJ by Mexico and known as *The Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*,[1] often referred to as *Avena*. Because the developments in this litigation are unusually complex, this chapter begins with a brief chronology.

Jose Ernesto Medellin was arrested in 1993 for the gang-related murder of Jennifer Ertman and Elizabeth Pena in Houston, Texas. Although Medellin was a citizen of Mexico, he was not advised of his right to consular notification under the Vienna Convention.

In 2003 in *Avena*, Mexico argued before the ICJ on behalf of 51 of its citizens sentenced to death in the United States. All of them had experienced violations of their Vienna Convention rights. Medellin was one of the defendants mentioned. The ICJ reiterated its ruling in LaGrand, noting that the individuals were entitled to have their cases reviewed and reconsidered in US courts.

Medellin appealed his conviction based on the *Avena* ruling. When the Fifth Circuit Court of Appeals denied relief, Medellin appealed to the US Supreme Court. Although the Supreme Court originally granted certiorari, in 2005 it dismissed his petition. The court's action allowed state courts in Texas to hear Medellin's newest appeal, which was based in part on a directive ordered by the Bush administration. After the TCCA rejected Medellin's second appeal, the Supreme

Court again granted cert. They issued a ruling in *Medellin v. Texas* on March 25, 2008.

As Medellin's case proceeded through the courts, several developments influenced the outcome. In early 2005, following the *Avena* ruling, the United States withdrew from the Optional Protocol (the international agreement giving the ICJ jurisdiction over Vienna Convention claims). Almost simultaneously, President George W. Bush sent a memo to the attorney general directing states to review cases of foreign nationals not advised of their consular rights. In 2006, the Supreme Court considered the case of *Sanchez-Llamas v. Oregon*.[2] Although it did not directly involve the *Avena* defendants, *Sanchez-Llamas* laid out the court's reasoning on the application of the Vienna Convention. They relied on that rationale in their *Medellin* decision.

Avena

After the International Court's ruling in LaGrand declaring that US courts must review and reconsider sentences handed down when Vienna Convention guarantees had been disregarded, few changes actually occurred. American judges continued to assert that the Vienna Convention did not confer any individual rights that could be raised in US courts, that claims were invalidated by procedural default rules, or that even if consular rights had not been respected, no remedy was available.[3] In other words, the LaGrand decision seemed to have fallen on deaf ears and the rights of foreign nationals continued to go unrecognized. Although ICJ cases do not set a precedent and provide a rule that is binding only in the particular case, if the same issue came back to the World Court repeatedly (as the Vienna Convention violations did), the cases took on significance.[4] A pattern emerged.

The issue of consular notification made headlines when Texas executed Mexican citizen Javier Suarez Medina in August 2002. The largest number of foreign nationals facing the death penalty in the United States came from Mexico. Like many of his countrymen, Suarez Medina was not notified of his right to contact his consulate under the Vienna Convention. Based on that problem and several other irregularities about the case, Texas governor Rick Perry received numerous requests to stay the execution. Perry refused. In response, Mexican president Vincente Fox cancelled a trip to Washington, DC where he had been scheduled to meet with President George W. Bush. The cancellation was symbolic. Mexico saw itself as standing up for human rights in the face of American barbarism expressed in

the use of the death penalty.[5] The cancellation was an embarrassment to President Bush and the United States, although there were many who agreed with Perry and resented foreign "intrusions" in American criminal proceedings.[6]

On January 9, 2003, in the case known as *Avena*, Mexico took the matter to the ICJ asking the court to find the United States in violation of the Vienna Convention in the matter of 54 Mexican nationals on death row. In addition, Mexico asked the ICJ to issue a provisional order that none of its nationals be executed pending a final decision of the court.[7] Although all 54 individuals had been sentenced to death and three of them were weeks or months away, none faced an immediate execution. Thus *Avena* differed from *Breard* and *LaGrand* in that time remained for the ICJ to rule and for its ruling to take effect in the United States. Without the drama of a last-minute attempt to forestall an execution, American courts could, if they so chose, implement the decision of the International Court.

In response to arguments from Mexico alleging that the United States had violated treaty commitments under the Vienna Convention and requesting that the United States ensure that no Mexican citizen was executed pending a final judgment, the ICJ issued a PMO on February 3, 2003. They specifically told the United States to take measures to ensure that Cesar Roberto Fierro Reyna, Roberto Moreno Ramos, and Osvaldo Torres Aguilera would not be put to death until they had made a decision in *Avena*. The United States had argued against the provisional measures, claiming that they would constitute "a sweeping prohibition on capital punishment for Mexican nationals in the United States," and "would drastically interfere with the United States sovereign rights and implicate important federalism interests." They further argued that such a provisional order from the ICJ—asking for a delay in three executions while the treaty rights of the defendants were litigated—would transform the court into "a general criminal court of appeal."[8] These were virtually the same arguments the United States had made when the ICJ ruled in the LaGrand case. Again the court held that they were not ruling on the right of the United States to practice capital punishment, but rather on an international legal dispute growing out of the interpretation of an international convention.

One tangential but interesting point included in the provisional measures ruling was a statement by the ICJ that the number of Mexican nationals involved in the case had decreased since the filing from 54 to 51. The governor of Illinois had issued a moratorium on executions in that state. The three Mexican nationals on Illinois death

row thus had their sentences reduced to life in prison and were no longer included in the *Avena* proceedings.[9]

Although the PMO addressed only three individual cases pending the ICJ's final judgment on Mexico's claims, a spokesman for Texas governor Rick Perry stated "there is no authority for the federal government or this World Court to prohibit Texas from exercising the laws passed by our legislature."[10] However, as Macina argues, the LaGrand order, which established the weight of PMOs, should have given the federal government the political power to compel states to halt executions.[11] In addition, the language in the Avena PMO, stating that the United States "shall take all measures" to delay the deaths was stronger than the statement in LaGrand that the United States "should take all measures." It was not clear, however, exactly what constituted "all measures." What exactly could the federal government do in the face of such intransigence as expressed by the governor of Texas? Fortunately, that matter was not put to the test as no Mexican citizens were executed before the ICJ issued its final judgment in *Avena* on March 31, 2004.

The two countries presented oral arguments in December 2003. Mexico asked the ICJ to rule that the United States had violated international obligations "by failing to inform without delay" the Mexican nationals of their right to consular notification and had deprived Mexico of its right to provide consular protection.[12] Thus, they made the argument that both the individual defendants and the nation, which was a party to the Vienna Convention, had been denied treaty protections. They further stated that the United States had failed to provide "meaningful review and reconsideration" of the convictions and sentences of the defendants; that clemency proceedings were not an adequate response; and that procedural default rules prevented attaching legal significance to treaty violations.[13] In reparation for those injuries, Mexico requested *restitutio in integrum* (a return to the situation before the nationals were arrested or convicted, annulment of all the convictions and sentences). Mexico further asked the ICJ to insist that the United States cease its violations of the Vienna Convention and provide guarantees that it would ensure compliance in the future.[14]

The United States argued first of all that Mexico's case should be dismissed because it had fixed the problem of notification after *LaGrand*. Of course this claim was contradicted by the large number of law enforcement agencies who continued to fail to inform foreign nationals of their right to consular notification. The United States further argued that the ICJ did not have jurisdiction because the court would be required to inquire into the operation of the American

criminal justice system. They also challenged the ICJ's jurisdiction on the grounds that the Vienna Convention did not dictate the process of arrest or conviction for foreign nationals, but only provided for notification. A third objection to the ICJ's jurisdiction relied on the argument that the remedy suggested by Mexico, *restitutio in integrum*, was beyond the ICJ's power. And a final jurisdictional objection was that the court did not have the authority to determine whether or not consular objection qualified as a "human right." The court denied all of the challenges to its jurisdiction, noting that every point the United States had raised in that context was actually something to be decided on the merits of the case, not an objection to hearing the case at all. Other objections raised by the United States included the notion that Mexico was asking the ICJ to act as a "court of criminal appeal" and that some of the named defendants had not exhausted the legal remedies available to them in American courts. Some of them might not even be Mexican nationals, the Americans contended. Finally, the United States noted that Mexico itself was guilty of breaches of the Vienna Convention and therefore should not be criticizing the United States. All of these objections were denied.[15]

The ruling in *Avena* echoed many of the ICJ's holdings in *LaGrand*. The court addressed the meaning of "without delay" in the Vienna Convention. When does the right to consular notification take effect? The judges found that the obligation to inform the arrested individual without delay occurs "once it is realized that the person is a foreign national or once there are grounds to think the person is probably a foreign national." In *Avena*, the United States admitted that in 47 cases, the defendants were *never* notified of their rights under the Vienna Convention. But they argued that consular notification "cannot possibly be fundamental to the criminal justice process."[16] Mexico claimed that to the contrary consular assistance could include aggressively seeking evidence in mitigation, explaining legal rights to detainees, providing better lawyers and expert witnesses.[17] All of these were certainly fundamental to due process.

The ICJ found that "because of the failure of the United States to act in conformity with" the Vienna Convention, Mexico was precluded from assisting its nationals. It was immaterial whether the assistance would have changed the outcome of the case, "it is sufficient that the Convention conveyed those rights."[18] The point reveals a fundamental difference of interpretation. The United States wanted to argue that the way to measure the denial of rights was by determining whether the violation had a negative impact on the final result (a consequence almost impossible to measure). Mexico and the court

took the position that no matter what the effect, denying the right was the infraction.

In *LaGrand*, the ICJ had ordered the United States to provide "meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of [the Vienna Convention]." But according to Mexico's argument, the United States had failed to meet that obligation. The doctrine of procedural default continued to serve as a barrier to prevent review, even for defendants who could not know or whose attorneys did not know that they should raise the issue at their trials. The Unites States replied that errors at trial could be reviewed and corrected "through a combination of judicial review and clemency." The ICJ reiterated its comments about procedural default. The rule itself did not violate the Vienna Convention, but as it was applied it "prevented counsel…to effectively challenge their convictions and sentences." The rule was not revised after *LaGrand*, "nor has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial."[19]

The court then turned its attention to a remedy for the "internationally wrongful acts" by the United States. Again, they held that review and reconsideration of the cases by the US courts "with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant."[20] As they had suggested in *LaGrand*, the ICJ took a different view of prejudice than the US courts. While the latter required a showing of prejudice or harm before a defendant could bring an appeal, the International Court suggested that the hearing was required to find out whether or not harm had occurred as a result of the Vienna Convention violation. In other words, American courts held that the process must be as follows: (1) establish prejudice and (2) hold a hearing. The International Court advocated a procedure whereby the purpose of the hearing would be to find out whether harm had been done. The ICJ rejected Mexico's request for annulment of all the convictions and sentences, ruling instead that each case should be considered separately on its own merits.

Although in *LaGrand* the ICJ had written that the United States had a choice of means to carry out the necessary review and reconsideration, the choice was not without qualification. They rejected the American suggestion that clemency proceedings would serve to vindicate the rights at issue. They seemed to accept Mexico's contention that the American clemency process was "standardless, secretive,

and immune from judicial oversight."[21] Indeed clemency proceedings vary from state to state. They are quite discretionary as the governor gets to decide what evidence to consider and how to consider it. The process is often secretive and seldom open to observation.[22] The review and reconsideration the ICJ mandated should "guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account." The ICJ believed that the judicial process was best suited to the task.[23] Indeed, scholars have agreed that a judicial remedy was crucial. The United States should have developed a procedure that "guarantees that full weight is given to rights set forth in the Vienna Convention whatever may be the outcome of such review and reconsideration."[24]

In conclusion, the court stipulated that the United States had been making "considerable efforts" to ensure that law enforcement authorities would provide appropriate consular information to arrested persons. However, they also noted that although the *Avena* case concerned Mexican nationals, the same principles would apply to other foreign nationals. And the ICJ ended its opinion by issuing a reminder that even though it was explicitly stated in the preliminary order, the United States had not permitted the review and reconsideration of the cases of Cesar Roberto Fierro Reyna, Roberto Moreno Ramos, and Osvaldo Torres Aguilera.[25]

Mexico had taken its case to the ICJ because it was extremely frustrated with the inability of diplomacy to alter American failures to conform to the requirements of the Vienna Convention. They asked repeatedly to have the cases of Mexican nationals on death row reviewed; they protested executions as when President Fox cancelled his visit to the United States. They received nothing in return but formal apologies.[26] One scholar has noted that *Avena* could be considered a "necessary evil because these cases strain US relations with normally friendly countries."[27] Because the issue of executing foreign nationals without consular notification could affect trade, immigration, and other joint US–Mexican interests, it should have been to their mutual benefit to resolve the problem amicably. All of the *Avena* defendants were still alive when the ICJ decision was handed down. Their fate depended upon how the United States would choose to respond to the ruling. However, as President George W. Bush would be reminded and as his predecessors had learned, the federal structure made it difficult to put international law and diplomatic interests above the insistence on local control of the criminal justice system. Ironically, it was Bush's own home state of Texas where most of the resistance to ICJ directives would be manifested.

THE CASE OF JOSE MEDELLIN

On June 24, 1993, Jose Ernesto Medellin, along with several other members of the "Black and White Gang," participated in the rape and murder of 14-year-old Jennifer Ertman and 16-year-old Elizabeth Pena near Houston, Texas. The girls were taking a shortcut home through the woods when they came upon six gang members engaged in an initiation ritual. The teenage boys had been drinking and "jumping in" Raul Villereal. The ritual required Villereal to fight all the other gang members until he lost consciousness.[28] Medellin apparently tried to start a conversation with Elizabeth. She started to run away but was tackled by Medellin while his fellow gang members grabbed Jennifer. It is widely reported that the girls were gang raped for over an hour and then murdered to prevent the identification of their assailants. They were choked, beaten, and kicked to death. Medellin was held responsible for strangling one of the girls with her own shoelace.[29] Their bodies were buried in some dense brush along a railroad track but found four days later following a tip from the brother of one of the gang members.

Medellin was arrested the next day. After he received the Miranda warning, he signed a detailed written confession.[30] He informed the arresting officers that he had been born in Mexico and that he was not a US citizen. He also told Pre-trial Services for Harris County about his citizenship. But Medellin was never informed of his right to contact or to seek assistance from the Mexican consulate.[31] Two of the young men, Peter Cantu and Sean O'Brien, were tried and sentenced to death in March 1994. Medellin's younger brother Venancio, who was 14 at the time, received a 40-year sentence. The remaining three defendants, Villereal, Efrain Perez, and Medellin were tried simultaneously but with separate juries. All were found guilty of capital murder and sentenced to death. Media coverage of the case was intense and one lawyer stated that there had been too much publicity to have a fair trial. During jury selection, about 80 percent of those in the jury pool were familiar with the case.[32]

The TCCA denied Medellin's direct appeal in 1997. About a month later, he wrote to the Mexican consular authorities from death row. After that, lawyers provided by Mexico began to assist in the appeals process. When he filed for state habeas relief, Medellin raised the issue of violation of his right to consular notification under the Vienna Convention. The state court ruled that the claim was procedurally defaulted as Medellin had failed to raise the issue at trial. They further found that Medellin had "failed to show that any non-notification of

the Mexican authorities impacted on the validity of his conviction or punishment."[33] The Texas court reached that conclusion despite an affidavit from the consul general of Mexico in Houston stating that Mexico would have provided immediate assistance, had they been informed of Medellin's arrest.[34] The TCCA affirmed the decision. It was a textbook example of the issues raised in *Avena*—both the state's failure to notify Medellin of his right to consular notification, the invoking of the procedural default rule, and the Texas court's insistence that the claim had no merit unless the defendant could prove how the failure of notification had harmed his defence.

In 2003, Medellin filed a petition for habeas corpus in the Federal District Court. That court also denied relief, based on the notion that the Vienna Convention claim had been procedurally defaulted. The next step for Medellin was to file for a certificate of appealability (COA) in the Fifth Circuit. While he waited for a verdict, the ICJ ruled in *Avena*, where Medellin was one of the 51 named appellants. Both the Fifth Circuit and the Fifth Circuit Court of Appeals refused a COA. The latter court rejected the argument that the *Avena* decision should have an impact on Medellin's case. They held that the Vienna Convention only applied to relations between nations and involved no "individually enforceable rights." They also decided that, citing *Breard* and the Antiterrorism and Effective Death Penalty Act, his Vienna Convention claim had been procedurally defaulted.[35]

Medellin appealed to the US Supreme Court who granted certiorari in *Medellin v. Dretke* (2005). Among those who had urged the court to hear the case was the National Association of Criminal Defense Lawyers. They hoped the justices would decide whether denial of a right under a treaty was comparable to denial of a constitutional right in seeking a COA, whether the Vienna Convention conferred a judicially enforceable right to foreign nationals in criminal cases, and whether the *Avena* decision must have an effect on Medellin's case.[36]

After the court had granted cert but before it heard oral arguments, President Bush issued a memorandum to the attorney general laying out the administration's response to *Avena*.

The Bush Administration Enters the Fray

On February 28, 2005, the president sent a statement to Attorney General Alberto Gonzales providing "I have determined pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International

Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."[37] The memo was issued on the same day that the Departments of Justice and State filed their *amicus* briefs in the Medellin case and was attached to the brief from the Justice Department. Attorney Sandra Babcock who had represented Mexico in the *Avena* case stated "The law is on our side. The president is on our side. I keep having to slap myself."[38] Others were less trusting of the president's motives. Because states would be more likely to comply with a decision that they must review and reconsider Vienna Convention claims if the order came from the Supreme Court, one might wonder at Bush's rush to issue a memo. That directive was narrowly written to indicate that he was the "sole arbiter of *Avena*'s enforceability."[39]

A few days later on March 9, 2005, a week before oral arguments were to begin in *Medellin v. Dretke*, Secretary of State Condoleezza Rice announced that the United States was withdrawing from the Optional Protocol. That document provided that disputes arising out of the Vienna Convention "shall lie within the compulsory jurisdiction of the International Court of Justice." Such disputes could be brought before the ICJ "by any party to the dispute being a Party to the present Protocol." Among other things, the withdrawal meant that no other nation would be able to sue the United States for noncompliance with the Vienna Convention after *Avena*. The American withdrawal from the Optional Protocol seemed ironic as they had been the first nation to benefit from a compulsory settlement when the ICJ ruled against Iran during the hostage crisis of the 1970s. In the view of Alan Clarke and Laurelyn Whitt, the Bush administration's action was an example of the United States attempting to keep up the appearance of lawfulness while actually reneging on its obligations.[40] Mani Sheik noted that it seemed the administration intended "to comply only as a matter of grace in this one instance, but not to follow what the ICJ has determined to be a requirement under the Vienna Convention."[41] As Joshua Newcomer described it, Bush's *Avena* order coupled with the withdrawal from the Optional Protocol was a stopgap measure intended to "prevent noncompliance with a single ICJ decision in the interim period before the President shielded the United States from future ICJ decisions."[42] Bush knew all too well that a single state could render the United States noncompliant. He was after all the former governor of Texas who had responded to the Clinton administration's request not to execute a foreign national by saying "No one is going to threaten the governor

of the state of Texas.... We're not going to let people come into our state, commit capital murder, and get away with it."[43] Bush's hostility to the obligations of international treaties when he was governor was no secret. However, as president he needed to be more aware of his responsibility to reduce tensions with Mexico, recognize the nation's international duty under the Vienna Convention, and protect Americans abroad.[44]

Both the president's memo and the withdrawal from the Optional Protocol affected how the Supreme Court would view Medellin's case. His attorney asked the court to delay oral arguments until the Texas court could act on his claim. Bush's directive would have provided that the state courts "give effect" to the *Avena* decision and review and reconsider Medellin's appeal. On the other hand the Texas attorney general issued a statement challenging the president's authority to "dictate" how state courts conducted business.[45] The Texas spokesman went on to say, "We respectfully believe the executive determination exceeds the constitutional bounds for federal authority." The Texans promised to fight the Bush directive and filed a brief arguing that the president was "trying to impose on the sovereign state of Texas not only his will but that of a foreign court."[46]

Oral arguments in *Medellin v. Dretke* did proceed before the Supreme Court. Several justices, O'Connor and Ginsburg among them, suggested that the court could declare that the Vienna Convention granted individual rights and then leave the cases to be litigated in state courts. Texas Solicitor General Ted Cruz wanted the justices to simply declare that Medellin's claim was procedurally defaulted—a ruling that would ignore both the *Avena* holding and the president's memo. Arguing for the United States, Deputy Solicitor General Michael Dreeben made the case for a dismissal on the grounds that the writ had been "improvidently granted," and that the state courts should handle the cases as the president asked. He also argued, however, that if the Supreme Court accepted Medellin's claim and recognized the ICJ as a source of international law, they would be robbing the president of his power to interpret treaties.[47]

It seems that the court had several options. They could ignore the questions of international law, as Cruz suggested, and simple reiterate that the claim was procedurally defaulted. They could agree that the president had the power under the supremacy clause to order the states how to comply with a treaty. They could recognize that *Avena* was binding on federal and state courts, to which the Vienna Convention granted individual rights. Or they could make the choice that they did—issuing a *per curium* opinion dismissing Medellin's appeal as

improvidently granted.[48] In effect, Medellin's case would return to the Texas courts and ultimately to the Supreme Court in 2007. Before a decision came in 2008, the court issued a ruling in *Sanchez-Llamas v. Oregon*. And in the meantime, the membership of the high court changed. Chief Justice Rehnquist and Justice O'Connor were replaced by Chief Justice John Roberts and Justice Samuel Alito—both seemingly even more protective of states' rights to control their criminal justice systems and less open to the application of rulings by the international court.

SANCHEZ-LLAMAS V. OREGON

On June 28, 2006, the Supreme Court handed down a 6–3 decision in *Sanchez-Llamas v. Oregon*.[49] Some felt hopeful that the court would find a way to implement *Avena* after the questions raised by the justices before they dismissed Medellin's appeal.[50] They would be disappointed. Others regarded *Sanchez-Llamas* as an example of the United States' continuing defiance of rulings by international tribunals. In fact, the case might be seen as validating that defiance.[51] Where the ICJ had repeatedly insisted that there must be a judicial remedy for violations of Article 36 of the Vienna Convention and that courts must review and reconsider cases where such violations existed, in *Sanchez-Llamas* the Supreme Court ruled out several possible remedies.

The case combined the petitions of two defendants. Neither had been sentenced to death. Moises Sanchez-Llamas, a Mexican citizen (but not one of the Avena defendants) was charged with attempted murder. He was arrested and given the Miranda warnings. He was not told of his right to contact the Mexican consulate. Sanchez-Llamas made incriminating statements to the police but at his trial he moved to suppress those statements because the authorities had not complied with the Vienna Convention. The courts in Oregon, including the state supreme court, denied his appeal. They held that the Vienna Convention did not create individual rights that are enforceable in a judicial proceeding.[52] A second case, included in the ruling, was *Bustillo v. Johnson*. A Honduran national, Mario Bustillo, was arrested for murder in Virginia. He did not raise the issue of consular notification until his state habeas appeal. Virginia rejected his claim as procedurally defaulted.

The Supreme Court addressed three questions. Did the Vienna Convention create individual rights enforceable in US courts? If a defendant is not notified of his right to consular notification, is suppression

of his confession the appropriate remedy? May states invoke procedural default rules to bar subsequent claims under the Vienna Convention? Simma and Hoppe believe that the court's answers to those questions undermined the ICJ's expectation that courts would give "full effect" to its interpretation of the Vienna Convention.[53]

Chief Justice Roberts wrote for the majority, which included Justices Scalia, Kennedy, Thomas, and Alito. Justice Ginsburg concurred in the judgment. Regarding the matter of individual rights conferred by the treaty, the majority "assumed, with deciding, that Article 36 does grant Bustillo and Sanchez-Llamas such rights."[54] They noted however, that the US government in its amicus brief argued against this interpretation (even after the *LaGrand* and *Avena* rulings). The US position argued that treaties should be enforced through political and diplomatic channels rather than through the courts. In other words, they continued to argue that an apology to the offended government would be an appropriate response to a violation of a foreign national's rights to consular notification.

The court went on to consider whether applying the exclusionary rule to Sanchez-Llamas's statements was an appropriate remedy for the violation. They determined that it was not. In fact, it would be "startling" if the Vienna Convention required suppression as a remedy. Suppression was an extreme remedy, they noted, available only for "wrongs of constitutional dimension" such as breaches of the Fourth or Fifth Amendment. The federal courts should not be imposing such a burden on the states to give full effect to the Vienna Convention, especially when other remedies—diplomatic avenues—were open to defendants. It is not at all clear exactly where these diplomatic avenues would lead. The United States, having withdrawn from the Optional Protocol, would no longer be subject to a ruling from the ICJ. Would Sanchez-Llamas have no other remedy other than an apology delivered to the government of Mexico?

As for whether in Bustillo's case, state procedural default rules prevented his raising a Vienna Convention claim in habeas proceedings, the court cited its decision in *Breard* as precedent. Although they noted that the ICJ had criticized the application of procedural default and they held that the World Court's interpretation deserved "respectful consideration," they asserted their own overriding judicial authority. Quoting Chief Justice John Marshall in *Marbury v. Madison*, and noting that the judicial power extended to the interpretation of treaties, the court recalled Marshall's statement that such determination "is emphatically the province and duty of the judicial department" headed by the "one Supreme Court."[55] The ICJ's decisions, on the

other hand, have "no binding force except between the parties and in respect of that particular case."[56] Thus their holdings in *LaGrand* and *Avena* regarding procedural default had no relevance to the case of Bustillo. The court also discovered something of a slippery slope in the requests for remedies of Vienna Convention violations. If procedural default rules could be disregarded, then why not other procedural rules such as statutes of limitations and prohibitions against filing successive habeas petitions? Such an outcome was unthinkable.

Ultimately the court cited the language in the Vienna Convention that stated Article 36 rights "shall be exercised in conformity with the laws and regulations of the receiving state."[57] They concluded, "Although these cases involve the delicate question of the application of an international treaty, the issues in many ways turn on established principles of domestic law. Our holding in no way disparages the importance of the Vienna Convention. [But] the relief petitioners request is, by any measure, extraordinary."[58]

The dissent, written by Justice Breyer and joined by Justices Stevens and Souter and in part by Justice Ginsburg, saw things differently. In answer to the questions posed by the case, Breyer would decide in the affirmative that the Vienna Convention does allow a defendant to raise a claim in state court. He would avoid blanket rulings on suppression and procedural default. Instead the dissenters argued that suppression *sometimes* provided an appropriate remedy and that *sometimes* state procedural default rules could be overcome. The dissent maintained that there must be an affirmative effort to give full effect to the Vienna Convention rights, that giving full effect meant providing some legal remedies. Breyer noted that according to settled principles of international law, a treaty violation must have a remedy and that according to the ICJ, Vienna Convention violations required judicial remedies.

The question of individual rights under the Vienna Convention had been raised hundreds of times in lower courts. It was important for the Supreme Court to decide the issue. For Breyer, the question was answered because the Vienna Convention was a self-executing treaty, "one that operates of itself without the aid of any legislative provision."[59] The two defendants, Bustillo and Sanchez-Llamas wanted to find in the Convention legal principles that would apply in their cases. There were many precedents for the Court to recognize that "1) a treaty obligated the U.S. to treat foreign nationals in a certain manner; 2) the obligation had been breached by the Government's conduct; and 3) the foreign national could therefore seek redress in a judicial proceeding, even though the treaty did not specifically mention

judicial enforcement of its guarantees or even expressly state that its provisions were intended to confer rights on the foreign national."[60]

So if the rights existed and their violation required a remedy, what about procedural default? Breyer found a partial answer in the treaty's language stating that the rights "shall be exercised in conformity with the laws and regulations of the receiving state" but that the laws "must enable full effect to be given to the purposes for which the rights are intended." Thus he would rule that procedural default rules would apply unless the defendant's failure to raise the violation occurred because the state had failed to inform him and the state law did not provide any other way to raise the issue.[61] Breyer's exception to the procedural default rule would place the onus on those who violated the treaty provision, not on those defendants who were unaware of its existence. He also addressed the slippery slope described in the majority opinion—the notion that if one procedural rule could sometimes be set aside, all procedural rules were fair game under the Vienna Convention. Neither the ICJ nor the dissenters intended such a thing. Rather procedural default would be precluded "only where the defendant's failure to bring his claim sooner is the result of the underlying violation."[62]

Likewise, Breyer was open to the possibility that suppression might be the only effective remedy in some Vienna Convention cases. The treaty itself does not recommend particular remedies but rather leaves those up to the signatory nations. Their criminal justice systems differ and therefore the only stipulation is that every nation give "full effect" to the purposes of the Convention. Such a meaning was consistent with the federal system in the United States. It would allow states to apply their own judicial remedies as long as they gave the promised full effect. The majority, however, seemed to reject that there was any requirement to provide relief for treaty violations. In Breyer's view, "that approach risks weakening respect abroad for the rights of foreign nationals, a respect that America, in 1969, sought to make effective throughout the world. And it increases the difficulties faced by the United States and other nations who would, through binding treaties, strengthen the role that law can play in assuring all citizens, including American citizens, fair treatment throughout the world."[63]

The Court's ruling in *Sanchez-Llamas* effectively anticipated what they would do when Medellin's case returned for their consideration. That case differed from *Sanchez-Llamas* in that Medellin was one of the 51 petitioners named in the *Avena* ruling. However, given the narrow way in which the justices viewed the idea of "full effect" and their deference to state criminal procedure as well as the decisions

of state courts, the prospects for Medellin's argument seemed dim. Nonetheless, many observers waited anxiously to see how the Supreme Court would rule.

Medellin v. Texas

As the opinion in *Medellin v. Texas* notes, Jose Ernesto Medellin had most recently applied for a writ of habeas corpus in Texas state court. He relied on the *Avena* decision and President Bush's memorandum as grounds for his appeal. His petition was denied by the TCCA as an abuse of the writ because he had neglected to raise his Vienna Convention rights "in a timely manner." In other words, they ruled that the issue had been procedurally defaulted and that no further review was necessary. The Supreme Court granted certiorari to deal with two questions. Was the *Avena* judgment directly enforceable as domestic law in state courts? Did the president's memorandum independently require that the state courts provide review and reconsideration of *Avena* claims, despite state procedural default rules?[64]

A number of individuals and groups filed *amicus curiae* briefs in the case. The United States submitted a statement arguing, somewhat halfheartedly it seems, for the authority of the president's memo. The brief noted that although the president disagreed with *Avena*, he was bound to comply. He, therefore, issued the memo in an attempt to resolve competing considerations, to fulfill treaty obligations but to intrude on state authority no more than was necessary. The brief challenged the TCCA's decision, which attempted to decide a fundamental question of federal law regarding the president's authority to carry out treaty obligations. If the TCCA ruling was allowed to stand, the United States would be on a course to violate international law; the US–Mexican dispute would remain unresolved; and the president's judgment that foreign policy interests would be served by compliance would be frustrated. But the brief also pointed out the United States withdrawal from the Optional Protocol, which meant "no more Avenas."[65]

A group of American diplomats and citizens identified as beneficiaries of the Vienna Convention submitted a brief making the case that consular assistance was a vital safeguard for Americans abroad. If the United States defied the *Avena* ruling, such travelers could be adversely affected. They noted that the ability of the United States to take a moral and legal position demanding compliance from others depended on the willingness to comply "at home." In addition, American honor and integrity would be impugned if its commitment to abide by ICJ decisions was "reduced to a nullity."[66]

Likewise a group of experts on the ICJ presented an amicus brief arguing that Medellin had a right to review and reconsideration of his sentence because the ICJ judgment was binding on all US courts. State courts were required to apply the treaty in accordance with the ruling; procedural default could not be used to foreclose the exercise of treaty rights. They maintained that because the United States consented to the ICJ process, the result was binding on the nation as a whole, including the state courts. It was the US government who was a party to the ICJ case and they represented all the interests of the nation. Texas, along with other subdivisions of the country was compelled to "give way" to federal policy as a matter of international and constitutional law.[67] The experts urged the Supreme Court to "ensure that the actions and omissions of the state of Texas are remedied by the courts of that state as the proper organs to bring compliance with the *Avena* judgment.[68]

Mexico submitted an amicus brief responding to the argument that more negotiations were needed to ensure that each sovereignty was represented and heard. They noted that before the ICJ, the United States had 16 lawyers from the State Department, the Department of Justice, and as well as professors from eminent law schools. Mexico had been represented by 15 equally distinguished lawyers. Both had agreed to be bound by the ICJ decision. They further pointed out that Mexico had 47 consulates in the United States, the most extensive network of any nation. These individuals were well qualified to assist any nationals who were arrested in the United States. Often the court appointed attorneys assigned to Mexican nationals were inadequate. They tended to lack experience and resources to put up a vigorous defense. Most did not speak Spanish or enjoy access to Spanish-speaking experts or investigators. Often defendants' families are not fluent in English. Language difficulties could be an impediment to developing issues of mitigation or getting records from Mexico. All of these problems would be minimized if Mexican citizens were put in touch with their consulate. Finally the Mexican brief quoted a 1975 declaration of the US State Department "All of us regard consular protection as an inherent right of every citizen. That right is not affected by evidence or finding of guilt."[69]

The ABA also submitted a brief urging the Supreme Court to uphold *Avena* and require state courts to give effect to the judgment. The ABA expressed concern about the poor quality of representation some defendants had, especially in death penalty cases. Such representation might explain why their Vienna Convention claims were not raised and were thus procedurally defaulted. The ABA advocated

guidelines for lawyers representing foreign nationals to ensure that their right to consular notification was not forfeited. They further distinguished *Medellin* from *Sanchez-Llamas*, as the former was named in *Avena*, while the latter was not. Finally, they asserted that carrying out the ICJ ruling would be a minimal burden on the states, outweighed by the United States need for uniformity among the states in international matters. Thus, a treaty should always take precedence over state procedural default rules.[70]

Texas submitted a brief in response. In many ways, the court's opinion echoed the arguments advanced by the respondent. The brief included a long and fairly graphic description of the crime for which Medellin had been sentenced to death. Perhaps it seemed necessary to remind the justices of the facts of the case, although the decision before them was far removed from the events of June 1993. Whatever the rationale for that section of the document, Texas noted that the court would need to address several major questions: was the president's memo binding federal law and was *Avena* a judgment enforceable by private individuals in American courts? A subsidiary question concerned whether Texas courts had already provided review and reconsideration to Medellin as the ICJ required. The Texas brief used the word "unprecedented" several times to describe Bush's memo. The directive, in this view, "intruded on the independent power of the judiciary" and "improperly" permitted the ICJ to interfere with and determine US domestic law.[71] Therefore, the president's "unprecedented, unnecessary, and intrusive exercise of power over the Texas court system cannot be supported by the foreign policy authority conferred on him by the US Constitution." Bush had tried to "commandeer" state judges into the service of the federal executive. "Our Federalism allows no such dictates." Furthermore, the presidential memo had been superseded by the court's decision in *Sanchez-Llamas*, which upheld the use of procedural default to dispose of Vienna Convention claims. Medellin's "review and reconsideration" had already taken place when the Texas courts applied that doctrine. Therefore, his claim was moot.[72]

There are many references to federalism in the Texas brief, which asserts that "even the federal government as a whole may not alter the structure of state government or commandeer a state judiciary in order to implement federal policy." The founders "reposed in the states the suppression of crime and the vindication of its victims." Neither the president's foreign affairs power nor the Supremacy Clause of the Constitution allow an attempt to "force Texas to enlarge the jurisdiction of its courts" to honor treaty-based decisions. The brief

seems to make an argument for almost complete autonomy of state courts as it contends that the president cannot tell the state courts to reconsider or ignore the grounds for a previous decision. In fact, the Texas brief is not without its slippery slope assertion. It found that the US position defending Bush's memo opened the door to future extensions of presidential power, making him a tyrant comparable to King George III![73]

Perhaps a bit more temperately the respondent's brief also made the argument that the Constitution required "interbranch cooperation" between the president and Congress before an ICJ decision could be domestic law. Here they seemed to foreshadow the court's position that the Vienna Convention, as it stood, was not a self-executing treaty but that it would require an act of Congress to apply its provisions to domestic law.

The Supreme Court handed down its ruling in *Medellin v. Texas* on March 25, 2008. They answered the two major questions raised by the case deciding that the *Avena* decision was not directly enforceable as domestic law in US courts and that the president's memorandum did not require the states to provide review and reconsideration of the *Avena* cases without regard to state procedural default rules.[74] Putting it simply, they determined that the federal government was powerless to require the states to comply with the order of the ICJ.

Again Chief Justice Roberts wrote for the majority, which included Justices Scalia, Kennedy, Thomas, and Alito. Justice Stevens concurred in the judgment. The court reaffirmed its holding in *Sanchez-Llamas* that the Vienna Convention did not preclude the application of state procedural default rules. They followed the argument made by Texas that the provisions of the Vienna Convention would not become part of domestic law without enabling legislation from the Congress. In other words, they found that the Convention was not "self-executing." They further decided that the Optional Protocol only created a mechanism for bringing disputes to the ICJ. It did not address the enforcement of those decisions. Rather the obligation to comply with ICJ rulings was included in the Article 94 of the United Nations Charter. That provision stated that each member would "undertake to comply" with the decisions of the World Court. The US Supreme Court read "undertake to comply" as a suggestion to try to comply rather than as an obligation. They interpreted the phrase to mean that a nation could decide whether or not to comply. The recourse for noncompliance would be for the injured party to raise the issue before the UN Security Council. As the *Avena* judgment did not have the power to create domestic law, it could not displace state procedural default rules.

In response to the second issue, the court held that the president did not have the authority to enforce the *Avena* ruling in state courts through his memorandum to the attorney general. "When the President asserts the power to 'enforce' a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate.... He may not rely on a non-self-executing treaty to 'establish binding rules of decision that pre-empt contrary state law."[75]

In an interesting concurring opinion, Justice Stevens agreed that the president lacked the authority to require states to comply with the ICJ. However, he found the question to be "closer" than the majority suggested. The lack of presidential power to "legislate unilaterally does not absolve the United States from its promise to take the actions necessary to comply with the ICJ's judgment." The costs of ignoring the World Court's ruling were significant. "When the honor of the Nation is balanced against the modest cost of compliance, Texas would do well to recognize that more is at stake than whether judgments of the ICJ and the principled admonitions of the President of the United States trump state procedural rules in the absence of implementing legislation."[76] Of course to those who spoke for Texas, the costs of compliance were far from modest. They involved a compromise of the very sovereignty that they so treasured.

Justice Breyer wrote the dissenting opinion. He was joined by Justices Souter and Ginsburg. Much of the argument relied on the Supremacy Clause of the Constitution and maintained that it required Texas to carry out the judgment of the ICJ. Breyer would hold that a treaty that bound the United States entered its domestic law and therefore bound the states and the courts. The Vienna Convention was such a treaty. By agreeing to the Optional Protocol, the United States had accepted the ICJ's jurisdiction. And by agreeing to the UN Charter whose signatories would "undertake to comply," in Breyer's view the United States had taken on an obligation to abide by the World Court's ruling. Carrying out the *Avena* decision was not an option that it could reject. That obligation was judicially enforceable and therefore the Supreme Court should choose the means to carry out the ICJ's directive to review and reconsider the *Avena cases*. Breyer would have the Texas courts revisit Medellin's claim to determine whether the Vienna Convention violation had prejudiced his case. The dissenters also distinguished *Medellin* from *Sanchez-Llamas*. The former was not about a general question of procedural default because Medellin had been named in *Avena*. Rather it concerned whether Texas must comply with a specific judgment issued

by a tribunal with undisputed jurisdiction to adjudicate the rights of named individuals.

The dissent also took issue with the majority's determination that the Vienna Convention was not self-executing because the text of the treaty did not so state. As Breyer pointed out, the decision would create a difficult precedent if the issue of self-execution was raised about every treaty and commercial agreement to which the United States was a party. The dissenting opinion also touched upon the question of the President's authority to supersede state law. Breyer chose not to address that matter, although he did find it difficult to believe that under Article II of the Constitution the President *never* had the authority to set aside a state provision. If that were true, it would immensely complicate the President's ability to carry out foreign policy.[77]

Responses to *Medellin*

The court's holding was much praised in some circles. Ted Cruz who had argued the case before the Supreme Court as solicitor general of Texas believed it was "a significant victory for U.S. sovereignty, for separation of powers, and for federalism."[78] Among other things, Cruz's article is interesting for its definition of the issues. He states that Medellin was "technically" a Mexican citizen—not a distinction recognized by the ICJ. In Cruz's view, the "central issue" was US sovereignty because a "foreign tribunal attempted to bind the U.S. justice system and disturb final criminal convictions." It was a matter of "who makes the laws that bind the citizens of the United States."[79] Another point of view might note that the United States had, through its constitutional process, agreed to abide by the rulings of this "foreign court." George W. Bush's memorandum also contradicted Cruz's version of reality. Cruz repeatedly asserts that the rulings of the ICJ were never intended to affect domestic law or to be enforceable in US courts. In such a world, the United States was never accountable to international law. If that were true, what would be the point of agreeing to any treaties that related to human rights? Where Justice Stevens said the cost to Texas of revisiting Medellin's case would be "modest," to Cruz and those who agreed with him, the results would be apocalyptic. "The President could overturn any law at any time in the name of enforcing any vague, aspirational obligation the United States might have ratified."[80] And the matter of federalism, the sovereignty of the states, was also at stake. Cruz was pleased to note that under *Medellin* the Supreme Court preserved the constitutional

structure that "secures the States' authority as sovereigns to order the processes of [their] own governance." Because the states were not "mere political subdivisions" the federal government could not "commandeer the machinery of state government to implement federal policy." Rather the Constitution "recognizes and preserves the autonomy and independence of the States."[81] Cruz's analysis is far removed from the views of Justice Breyer and those who emphasized the Supremacy Clause. Indeed, for those who took the extreme view of state sovereignty, it seems the Supremacy Clause barely existed.

For some who had hoped to see a different result in *Medellin*, one that would uphold the nation's international obligations under the Vienna Convention, there were few positive prospects. Margaret McGuinness believed that the decision might be "democracy enhancing," by leaving to Congress to determine national rules concerning "when and how state criminal laws can be supplanted by an international rule or practice to which the United States has acceded." She further notes, however, that Congress's power to pass such laws could be constrained by federalism.[82] She pointed out that if in *Sanchez-Llamas* the court suggested that "international law will be applied in the United States against the backdrop of the usual constitutional, procedural, and remedial doctrines that govern the domestic legal system," then in *Medellin* the court provided "an even stronger rebuke to efforts to incorporate international law through federal jurisprudence."[83] Janet Levit stated that *Medellin* had "sent a shockwave through the international legal community."[84] But she also predicted that a goal of the litigation surrounding the Vienna Convention was "timely implementation of consular notification rights." She believed that the attention to the issue over the last decade meant that local practice regarding informing foreign nationals of their rights was improving. Also, the State Department through its Outreach Division was responsible for educating more than 700,000 local law enforcement officers on consular notification matters as well as distributing more than one million pieces of instructional material on the subject.[85] State attorneys general were aware of the issue, even in Texas, where that office produced a Magistrate's Guide to the Vienna Convention on Consular Notifications. Public defenders too were becoming more sensitive to consular notification or its absence as were private defense attorneys who were familiar with the ABA's Guidelines for Defense Counsel in Death Penalty Cases. Likewise, Mexico continued its efforts to protect its nationals and to protest violations of their consular rights.[86] She concludes, optimistically, that although *Medellin* "closed the courthouse door to many Vienna convention claims,"

consular notification continued to happen "whether the Supreme Court demands it or not." The case "will not reverse all that has solidified in the underbrush—from police department checklists to consular notification functionality in law enforcement databases. For the most part, officials now notify foreign nationals of consular rights."[87] If Levit is correct, *Medellin* could be mostly a matter of historic interest, although certainly not for those on death row for whom litigating the issue became virtually impossible.

Texas executed Jose Ernesto Medellin on August 5, 2008, the day that his state and federal appeals were finally rejected. There had been many requests to Governor Perry that he postpone the execution—from the ICJ, from members of the House of Representatives, President Bush, the attorney general, the State Department, and the government of Mexico. Probably to no one's surprise, Perry ignored all those efforts.[88] His spokesperson was quoted in the *New York Times.* Those pleas "[didn't] change anything. This is an individual who brutally gang raped two teen age women. We don't really care where you are from; you can't do that to our citizens."[89]

Simma and Hoppe summarized the United States' response to the ICJ and *Avena* as "marked by ignorance and neglect as well as express opposition." *Medellin* showed that the ICJ rulings were "too burdensome for the majority of the Supreme Court," a reaction the authors believed was "deplorable." The court "adds the judicial *imprimatur* to the disquieting tendency of the United States in recent years to increasingly isolate itself from international governance in more and more sectors."[90] Certainly after the maneuvering that surrounded the *Avena* and *Medellin* cases, the likelihood that the United States would subscribe to the principles of international law seemed both judicially and politically remote.

8

Sovereignty and Federalism: Texas as a Case Study

In his concurring opinion in *Medellin v. Texas*, Justice Stevens wrote, "The cost to Texas of complying with *Avena* would be minimal . . . the costs of refusing to respect the ICJ's judgment are significant."[1] If he was correct, as many commentators who studied the case agree, why was Texas so adamant about going ahead with the execution rather than providing review and reconsideration of Medellin's sentence? Why was the issue cast in terms of state sovereignty versus international intervention? How did the constitutional structure of federalism undermine American obligations to abide by its international responsibilities? How does federalism intersect with American exceptionalism?

During the 1990s, the Supreme Court under Chief Justice William Rehnquist gave new life to the concept of federalism in a series of decisions that limited federal power to regulate or to compel state action. The Tenth Amendment took on new life as the Rehnquist Court emphasized the powers retained by the states.[2] In *Printz*, *Lopez*, and *Morrison*,[3] the court laid the basis for a "federalist revolution," restricting Congress's power to legislate under the Commerce Clause. A complementary part of the federalist revolutionary process involved identifying areas where state regulation, rather than federal authority, was so important that the national government must stay out and allow the states to carry out their own policies. As Rehnquist wrote in *Morrison*, the Constitution required a separation between what was truly national and what was truly local.

One of the areas the court defined as "truly local" was ordinary criminal law and criminal procedure.[4] But as we have seen, some international agreements, notably the Vienna Convention, intersect with the functioning of criminal law. At the center of the controversy over the application of the Vienna Convention was the confluence between

the US government's commitment to international law, its obligation to abide by treaty agreements, and states' rights to conduct their criminal justice systems free from outside interference. As Louis Henkin writes, the division of power between the central government and the states gives the latter an opportunity to influence foreign policy—but not necessarily in a constructive way. It can be state actors who violate US obligations under international law, for example, by denying rights to foreign nationals, but it is the federal government that is answerable under the treaty.[5] Likewise, the United States has signed on to some human rights agreements in a way that included "federalism" understandings, which allowed states to essentially opt out of treaties if they infringed on constitutionally protected state powers.[6] Such an approach means that federalism has complicated US compliance with international human rights efforts and with the application of international law. In the eyes of some, the federal government has abdicated its responsibilities in the face of international standards that hold the central government responsible for the actions of its constituent parts.[7] Certainly the United States has been more immune to the enforcement of international law because state governments are often resistant to and distant from international norms and pressures. State criminal justice systems are typically intertwined with politics, elections, and partisanship, which means local issues may outweigh larger human rights concerns.[8] Godfrey Hodgson mentions xenophobia as an element in contemporary American exceptionalism, along with "obeisance to a nationalist and anti-internationalist creed." He finds a new intolerance and a "new demand for an uncritical assertion of national superiority."[9] These characteristics, perhaps aggravated by real and imagined concerns with immigration and the political climate in some states mean that appeals to international norms and treaties have less political resonance and generate more resistance. For those reasons, governors could afford to ignore the ICJ and they could do so under the banner of preserving their state's sovereignty. As Governor Rick Perry stated, there was "no authority for the federal government or the ICJ to prohibit Texas from exercising the laws passed by our legislature." Virginia Governor Jim Gilmore made a similar comment at the time of the Breard case. If he had stayed that execution he would be "transferring the responsibility from the courts of the Commonwealth and the United States to an international court."[10]

It is one thing for a governor to defy the World Court and another for the US Supreme Court to endorse that position as it did in *Medellin*. At that point, federalism and American exceptionalism came together to justify US resistance to the principles of international law.

Peter Spiro describes what he terms "internationalism a la carte," a notion that "the United States could pick and choose the international conventions and laws that serve its purpose and reject those that do not."[11] The attitude involves three "flawed lines of attack," that international law is "vague, illegitimately intrusive on domestic affairs," that the international law-making process is not accountable, and that the US can withdraw from its international commitments based on its power, legal rights, or constitutional duties. There is fear that international law may "trespass on domestic authority," even the powers reserved to the state governments. A "linchpin" of this perspective is the notion that the United States has the power to opt out of international norms and that often the government claims a constitutional duty to do so, as the Supreme Court did in *Sanchez-Llamas* and *Medellin*. Spiro believes this was a formalistic reading of the Constitution. Such an interpretation actually revealed a conviction that America does not have to play by the rules "because nobody can make it play by them," and also because it has its own more important rules, such as its commitment to the powers reserved to the states in a federal system.[12] Spiro terms this view as the "new Sovereigntism."[13]

Robert Hogue makes a similar point when he asserts that *Medellin* "marks an epochal period in weakening international law as a means of strengthening federalism."[14] The case built upon the "theme that the state's retention of broad sovereignty fulfills an intrinsic role in a democratic republic."[15] In his view, *Medellin* was part of a trend by the Supreme Court that tarnished international law to strengthen federalism, a trend that "may serve to propagate the perception of American exceptionalism and disengagement from the broader international community."[16] For Sovereigntists, the "importation of foreign law into American jurisprudence represents a force that threatens democracy."[17] Sovereigntists and internationalists work from different paradigms. For the former, the integration of international law by American courts "compromises the democratic values of horizontal separation of powers and vertical federalism."[18] Sovereigntists and their conservative allies in the various branches of government seemed to believe that incorporation of international law by the courts "arrogates judicial discretion and imposes foreign values . . . which are devoid of constitutional legitimacy" on domestic law.[19] The majority of the Supreme Court reflected this view in their *Medellin* holding.

It was not always so. For much of its history, the Supreme Court did not require legislative action to determine that treaties had the force of domestic law. They were also deferential to the political branches regarding international commitments, regardless of the effect on the

states. For decades the court subscribed to the view that Justice Oliver Wendell Holmes stated in *Missouri v. Holland* when he wrote, "Valid treaties are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States."[20] But as John Murphy points out, recently the scope of international law has expanded to include human rights, criminal law and punishment, economic issues, public health, and the environment. In the United States many of those issues had traditionally been matters to be decided by the states not the federal government. The resistance of states to international "penetration into their criminal justice systems is an example of increasing signs of rebellion at the state level" against restrictions imposed by international law.[21] This resistance is clear as several other states joined Texas to argue federalist issues in *Medellin*. These amici agreed that the president does not have the power to unilaterally order state courts to "give effect" to judgments by the World Court. The Supreme Court endorsed this position. Chief Justice Roberts stated that the arguments in favor of complying with the ICJ ruling were "plainly compelling." He noted that the reasons for doing so included ensuring reciprocity in the application of the Vienna Convention and protecting Americans abroad, a commitment to international law, and the need to protect American foreign relations. But acknowledging these propositions did not take the court beyond "lip service" to the ICJ's authority. None of the arguments in favor of giving effect to *Avena* outweighed Texas's interest in protecting procedural default. Cindy Bays asserts that the court could have taken a more nuanced view of the federalism interests in the case. They could have made a distinction between applying procedural default when the state was responsible for the breach of the Vienna Convention and applying the procedural default rule when the defendant was responsible. She maintains that procedural default should not weigh as heavily when the state itself helped to create the problem.[22] Had the Supreme Court taken such a position—upholding the state's authority to employ procedural default but holding Texas responsible in this instance for its failure to carry out its responsibilities under the Vienna Convention, they might have both respected the ICJ's authority and maintained deference to the state's criminal procedures. Instead, as long as the Supreme Court provided no remedy for violations of the right to consular notification, states had little reason to comply with their treaty obligations.

Bay's suggestion is close to the position taken by the dissent in *Sanchez-Llamas* and in *Medellin* when Justice Breyer indicated that in certain instances international obligation could override a state's

procedural laws. Breyer proposed that Medellin did not seek "a private right of action infringing upon the sovereignty of Texas but rather a substantial, individual right that happens to intersect with the state's rules of criminal procedure."[23] In his view, the court was presented with an instance when the state could follow through with the process of review and reconsideration without sacrificing its essential sovereignty. Justice Breyer's dissent reflected the internationalists' paradigm—a fear that the "fate of an international promise made by the United States" would be "place[d] in the hands of a single State."[24]

But for the majority of the court in *Medellin*, the first priority seemed to be protecting the state's reserved powers. The decision preserved the rights of the states to "default from human rights norms."[25] It illustrated the US dualist approach to law, where international and domestic law existed on separate planes, "in separate spheres."[26] *Medellin* was a blow to the influence of international law but for sovereigntists and American exceptionalists upholding the federal structure allayed their worst fear, "the loss of sovereignty and the decline of the nation state at the expense of an . . . international entity."[27]

An area where many international entities take issue with American policy concerns the use of the death penalty, a practice that increasingly isolates the United States from other democratic and industrialized nations. Some have suggested that much of the litigation over the application of the Vienna Convention was actually an argument over capital punishment. Murphy asserts that the ICJ cases were "part of the worldwide campaign against the death penalty."[28] In the United States, except where constitutional questions are concerned, decisions about criminal penalties are left largely to the states. At this writing, 32 states still have laws allowing for capital punishment, but only 8 states have performed any executions in the last two years. Texas, however, remains the leading state in the number of inmates put to death with over one-third of all executions since 1977. Europeans generally understand that individual states are responsible for the death penalty. Nations which are members of the European Union frequently direct protests to state government. They also engage in the use of economic pressure and shaming campaigns. Most recently chemical manufacturers in Western Europe have refused to export chemicals used in lethal injections. Mexico, too, which has abolished capital punishment, focused its protests on the repeated executions of its citizens by its northern neighbor, Texas.

The intersection of federalism and capital punishment is a relevant issue in an analysis of the Vienna Convention litigation. Scholars have written about the links between a vigilante mentality and the

contemporary use of the death penalty, asserting that it is "the first cousin of lynching."[29] The states where lynching was most common—the former Confederacy—are also the states that perform the most executions and which, for the most part, make the strongest claims against subordination to the federal government. Alexis de Toqueville pointed out the "subtle dialectic of freedom and restraint" in American society. He may have been thinking of the link between claims for local and state autonomy and the use of severe punishments. He found an ironic connection between political liberty and penal discipline, which was part of the wider culture, "shaping and being shaped by it."[30] The modern use of capital punishment is deeply associated with the South—an area also bearing a history of racism and violence. Texas is constantly identified as the death penalty capital, a designation that is a negative description to some, but which serves as a point of pride to many Texans.[31] Consider the smugness with which Governor Rick Perry announced during his 2011 campaign for the US presidency that he had never lost any sleep over the 234 executions he had presided over at that time, a record number for any US governor.[32]

The connection between federalism, insistence on state's rights, and partiality toward capital punishment bears further investigation. Alan Clarke and Laurelyn Whitt propose that just as the nations with the death penalty tend to be the worst abusers of human rights, the states, which execute most often, tend to have the worst civil rights record and a history of lynching.[33] Carol Streiker talks of "criminal justice populism" as an explanation for the attachment to capital punishment. She cites the role of lay juries, elected prosecutors and other politicians who campaign at the local and state level on their support for the death penalty as a tool against crime. Once elected, those officials feel they have a mandate to use it.[34] They tend to claim that "the people," their highest authorities, demand the use of the death penalty. As an example, the Houston district attorney challenged "outsiders" who thought his record of capital sentences was rabid and overzealous, "Those folks need to come down here and listen to these voters."[35] Furthermore, federalism with its decentralization of criminal law inhibits efforts for coordinated reform. As we have seen, coming from certain states, some politicians with national ambitions have no reason to oppose the use of capital punishment and may actually promote it, as Governors Gilmore, Bush, and Perry did when resisting pressure from the ICJ.

Franklin Zimring has examined the issue of state's rights and capital punishment at great length. He is particularly interested in exploring why the states in the South and the Southwest, where suspicion

of government is the most deeply engrained, are the places where the death penalty is the most popular. In other words, why are people who want to minimize government control willing to allow their state government the greatest possible power—the right to take human life? He concludes that capital punishment has been "degovernmentalized" in the United States. It has been presented as a service to the victim's family rather than as a manifestation of state power.[36] Since the 1970s, Zimring claims, the rationale for execution has changed from deterrence to an act of personal service by the state actors who want to provide the survivors with justice and healing. Following *Payne v. Tennessee*,[37] which permits the use of victim impact statements in capital sentencing hearings, the penalty phase is presented as a zero-sum competition between private parties—the victim and the murderer. Such a version of a capital case obscures the fact that it is the government at work.[38] The contemporary death penalty, Zimring states, is cast as a service to victims. Vengeance may not be good, but closure and assuaging the grief of relatives provides a public service. This perspective emphasizes the American tradition of local community based punishment. It humanizes the decision to execute.[39] Places with a vigilante tradition tend to lead in contemporary executions. Both vigilante justice and executions can claim to reflect the will of the community. Both may reflect hostility to outside legal controls.[40] With the vigilante mindset, criminals are clearly identifiable. They are enemies and aliens, not members of the community. But the community has a right to defend itself from them. And, if criminals are easy to identify and to convict, then due process and lengthy appeals only delay the administration of justice.[41] One might suggest that this approach is especially powerful if the criminal is an actual alien—a foreign national.

The particular kind of federalism at play in capital punishment Zimring identifies as "negative federalism." It involves a commitment to states' rights as a way to limit national power. He cites the states' reactions to *Furman v. Georgia*[42] as an example of this negative federalism. When the Supreme Court declared in 1972 that the death penalty as applied was unconstitutional, the majority of states were furious at that incursion into their justice systems. They quickly set about restoring capital punishment through state legislation designed not only to meet constitutional muster but also to reassert their control over their own punishment regimes. Likewise, the states' objections to the ruling of the ICJ asserted their resistance to outside interference—to both the ICJ and to the president's memo directing state courts to implement the ruling.

If Zimring's analysis of the ways in which federalism is related to the use of capital punishment is correct, it sheds light on additional reasons why Texas was so resistant to what it perceived as the ICJ interference in its criminal justice system. The sense of community power over crime and punishment was severely threatened by a body not only outside the state but also outside the nation. The nature of the institutions that enforce the criminal laws reveals the character of the jurisdiction responsible for those laws. Garland writes that punishment is a social institution, "embodying and condensing a range of purposes and stored up historical meaning." The interlinked process of lawmaking, conviction, sentencing, and penalty "involves discursive frameworks of authority and condemnation, ritual procedures of imposing punishment, a repertoire of penal sanctions, institutions and agencies for the enforcement of sanctions, and a rhetoric of symbols, figures, and images by which the penal process is represented to various audiences."[43] Garland notes elsewhere that in the late twentieth-century conservative politicians used the death penalty to "condense racial fears, states' rights, and fundamentalist values into a single coded issue."[44] In places where the use of capital punishment was most prevalent it could take on a type of symbolism to reassure the public that they were being protected from threats, both native and alien, by strong and forceful leaders. Thus Governors Bush and Perry insisted that their choice to ignore the International Court stemmed from their need to carry out the popular will and to protect their citizens. As former Texas governor Mark White proclaimed during his 1990 campaign, "Only a governor can make an execution happen. I can and I will."[45]

Texans and Texas politicians of both political parties have crafted a capital punishment regime that some have labeled "inexorable," and that works efficiently to carry out the death penalty with relatively few obstacles. Capital punishment in Texas has a history that fits with Zimring's analysis. He noted that places with a vigilante tradition and a high rate of capital punishment tended to have a sense that criminals were easy to identify and tended to feel impatient with any oversight of their process. Texas juries have historically returned capital verdicts at a high rate. Many observers have connected this outcome with the lack of quality defense provided to those accused of death-eligible crimes. Medellin who was tried in Houston is a case in point. As an indigent defendant, he was provided with a lawyer who was suspended by the bar at the time of the investigation and trial. The attorney did not strike jurors whose answers during voir dire suggested bias. He did not call a single witness at trial to challenge the prosecution.

During the sentencing phase, he put a psychiatrist who had never met Medellin on the stand.[46]

The poor quality of defense lawyers in Texas capital cases is well known. The ABA assessed the state's capital representation in 2013 and found it only partially met the ABA standards. In the two most active death penalty jurisdictions, Dallas and Houston, attorneys are still appointed by the trial judge from a list of supposedly qualified counsel. The issue of qualifications is complicated by the fact that there are no statewide criteria to assess attorneys' fitness and the appointments are left up to the elected judges. According to David Dow, one-quarter of inmates on Texas death row were represented by lawyers who had been reprimanded, put on probation, or suspended.[47] The accused may be assigned two lawyers, but only one of them needs to have any capital experience. And even then the experience may involve having sent several clients to death row. No special training is required and no agency monitors defense attorneys to ascertain whether they have pursued continuing education to keep up with the evolution of capital law. There are few, if any, consequences for the incompetent counsel, the consequences seem totally reserved for their unfortunate clients. The ABA report notes that "no formal mechanism exists for lodging complaints against attorneys providing representation in capital cases short of alleging professional misconduct."[48] There is no doubt that the dubious quality of legal representation for indigent defendants meant that most of the foreign nationals who were sentenced to death in Texas likely had lawyers who were unaware of the Vienna Convention or who failed to consider the importance of raising the issue at trial.

The ABA report highlighted other factors that might well affect the fate of defendants who were foreign nationals. Compensation for indigent defense is low and more generous for hours spent in court than for out-of-court services. Consequently, attorneys may choose to limit the time they spend preparing a case (including such things as looking into a defendant's history or ethnicity) or they may choose to go to trial rather than negotiating a plea agreement. Additionally, as the ABA document explains, "qualified counsel may opt not to represent capital defendants out of concern that their considerable efforts will not be fairly compensated."[49]

Another matter may have special significance for foreign nationals whose right to consular notification is not respected. In Texas, a judge must approve funds for investigations, expert witnesses, and mitigation specialists. He or she may choose to deny this funding. The ABA reports states, "such a responsibility complicates the judge's role as

neutral arbiter, as well as invites uneven treatment in capital cases."[50] One might compare this potentially arbitrary funding for support services with the willingness of the Mexican consulate to find mitigating witnesses, investigate the defendant's background in Mexico, and contact friends and relatives outside the United States.

Furthermore, the ABA draws a connection between elected judges and the Texan attachment to capital punishment. As Zimring has argued, the contemporary death penalty is often viewed as a reflection of the community's involvement in administering justice. An elected judge may find that his political future is related to his handling of capital cases. Implicitly he or she may tend to avoid actions that could be seen as too helpful to the defendant.[51]

If there are potential problems at the trial stage in Texas, there is little chance that such matters will be reversed on appeal. David Dow, an experienced capital defense attorney, notes that the TCCA upholds death penalty cases on direct appeal 98% of the time, usually by a vote of 9 to 0.[52] The next stage, the state habeas corpus procedure, may offer a new lawyer the chance to examine the trial for fairness. The TCCA has stated that the lawyer in state habeas proceedings must be "competent." But in Dow's view, their definition of competent is "licensed and alive."[53] It is at this point that the issue of procedural default becomes, in some cases, a matter of life and death. An inmate is not permitted to file a second state habeas petition if an issue could have been presented at an earlier stage. The courts have assumed that the failure of consular notification could have been raised at trial or in the first habeas plea. (Here the issue of attorney competence meets procedural default.) In general, federal courts are not permitted to address issues not raised in state court. The goal of this policy is to reduce friction between the levels of courts, to give state courts the opportunity to fix constitutional violations, and to provide finality.[54] However, should a defendant be assigned an incompetent lawyer during the state habeas phase (one who is merely licensed and alive), he is unlikely to be eligible for any legal relief in either the state or the federal courts. And, most importantly for the subjects of this book, the incompetence is not likely to be grounds to override procedural default.[55]

The ABA report outlines a number of other difficulties with state habeas procedures in Texas. Even if the TCCA determines that there was a constitutional error in the case, they will only grant relief if the defendant can prove by a preponderance of the evidence that the error was not harmless. "By placing this burden on the inmate," the ABA finds, "Texas sacrifices fairness to ensure the finality of judgment."[56]

The issue of fairness is especially troubling when state habeas is the first opportunity to raise a claim before the TCCA. They can uphold a death sentence "simply because of an inmate's inability to raise the claim any earlier, even though—in some cases—the very information undermining the reliability of the proceeding was in the possession of another party and not the inmate."[57] The ABA might well have been thinking of Faulder or Medellin and the numerous foreign nationals where important information about their Vienna Convention rights was "in the possession of another party and not the inmate." Indeed, the application of the procedural default rule seemed to value finality over fairness.

To date, Texas has executed 508 men and women since 1977. During this period, Texas governors have granted clemency to two individuals. Yet in its arguments before the ICJ, the United States contended that clemency was a reasonable way to deal with violations of the Vienna Convention. The ICJ fairly rejected that suggestion, agreeing with the Mexican position that clemency in the United States was "standardless, secretive, and immune from judicial oversight."[58] When a condemned prisoner requests clemency, the governor of Texas will inevitably announce that he or she does not have the power to grant clemency, but that only the BPP can make such a decision. Members of the BPP are chosen by the governor. No particular qualifications are required. The ABA commented on the special problems with the clemency process in Texas. "Unnecessary procedural rules place unnecessary obstacles in the paths of those who seek pardon and commutation." Inmates seeking clemency are not guaranteed the assistance of counsel. Texas is the only state where the BPP makes such life or death decisions without meeting or discussion. They get whatever information the BPP staff prepares for them and phone in or fax their decisions into the governor's office. The process is characterized by minimal review and high denial rates as the BPP and the governor seem to assume that the merits of the case have been reached by the courts. The ABA said in an understatement, "It does not appear that clemency decisions are sufficiently isolated from political considerations or impacts in Texas."[59] It certainly does not appear that the clemency process would serve as a forum to resolve violations of the Vienna Convention.

There is general agreement among observers that the unique features of the American federal structure account for the dominance of both capital punishment and sovereigntist attitudes in some places and opposition to them in others. Garland indicates that in the United States, the "deployment of capital punishment is distinctive"

and "persists in regionalized, attenuated form." Its persistence is "explained by the country's institutional terrain and the political and cultural struggles that have taken place on it." The institutional forms and cultural practices of today's death penalty are "used to meet needs, to serve purposes and to affirm values . . . reconnecting them with ongoing political and cultural struggles and advancing the interests of specific groups and individuals."[60] From these struggles, Andrew Moravcsik sees a correlation between domestic political positions and attitudes toward internationalism. He argues that those who support international human rights policies also support domestic reforms such as abolition of the death penalty, gender equality, and reduced incarceration. Meanwhile, those with more conservative views tend to feel the need to defend national sovereignty, to believe certain substantive goals are better served by local government, and to be less enthusiastic about human rights and, it would seem, more favorably disposed toward the use of capital punishment.[61] They fear that powerful nations such as the United States will suffer a loss of bargaining in international human rights forums. Moravcsik would argue that these conservative and sovereigntist values have become embedded in public opinion and constitutional procedure.[62] *Medellin* exemplifies the dominance of this view.

Spiro concedes that *Medellin* was a victory for the international law "skeptics" as it "put a brake on the incorporation of international law" in the United States. However, he has come to the conclusion that the Vienna Convention cases were "backward looking." They concerned US failure to comply with the treaty at a time when the Vienna Convention was "unknown to front-line law enforcement." Since *Medellin*, the treaty requirements have become a greater part of police training. In some places, people in custody are informed of their right to consular notification just as they are informed of their Miranda rights.[63] Although once alarmed about sovereigntists, Spiro has become convinced that massive material changes, such as economic globalization, "will inevitably overwhelm sovereigntist defenses, which notwithstanding their constitutional pedigree and apparent gravity, are in the end incapable of stemming the tide." He finds that as international law is "insinuating itself into United States law through many channels," the Constitution will inevitably adapt.[64]

The future may see more of a "patchwork implementation" of the Vienna Convention as some states embrace its requirements and others reject it. California has incorporated consular notification into its state law. Texas has resisted that requirement. Florida has passed legislation that "affirmatively flouts" human rights norms by specifying

that failure to observe Vienna Convention rights is not a grounds for appeal. Spiro may be correct that the Constitution will inevitably adapt to international law requirements, but state action remains critical because the states remain the jurisdiction where most crimes are charged.[65] As Henkin observes, the process by which America participates in making and changing international law is complicated. Congress, state legislatures, state officials, and courts all contribute to "practice by the United States which makes international law." This chapter has examined examples of how the powers reserved to the states in a federal system can complicate the observance of international law and norms. The final chapter will discuss several cases that followed *Medellin* and consider how conflict over the application of the Vienna Convention might play out in the future.

9

The Execution of a Foreign National: Humberto Leal Garcia and After

Although the controversy surrounding the International Court's judgment in *Avena* and the Supreme Court's denial of the resulting claims in *Medellin* marked the high point of the debate over the US application of the Vienna Convention, the story did not end there. Among the condemned men included in the *Avena* judgment, several remain on death row in Texas, one serves a life sentence without parole in Oklahoma, and several have been executed. The case that drew the most attention involved Humberto Leal Garcia, put to death in Texas in 2011. The matters at issue in the Leal case will be the central focus of this chapter. However, the fate of a few others named in *Avena* is worth considering.

At the time Mexico filed its *Avena* case with the ICJ, it asked that provisional measures be issued to postpone the death of three men whose executions might be imminent. Roberto Moreno Ramos and Cesar Fierro Reyna were on death row in Texas. Osbaldo Torres Aguilera faced execution in Oklahoma. Mexico contacted the local district attorneys and all three prosecutors agreed to defer setting execution dates until the ICJ had a chance to rule. All three remain alive today. Moreno is still on death row in Texas. Fierro, about whom many questions have been raised concerning his coerced confession and his actual innocence, has developed severe mental illness during his lengthy time awaiting death.[1]

The case of Osbaldo Torres remains unique among those affected by the ICJ ruling, as the state of Oklahoma decided his fate after consideration of the International Court's holding.[2] After receiving the request from Mexico, Oklahoma attorney general Drew Edmondson asked and the Oklahoma Court of Criminal Appeals (OCCA) agreed

to postpone setting a date for Torres's execution until after the ICJ case was settled. Once the *Avena* decision was handed down, Torres filed a petition for clemency with the Oklahoma BPP and a postconviction appeal with the OCCA. In both he argued that *Avena* was binding on US courts. Torres was granted a clemency hearing before the BPP. Unlike in Texas where the board does not hold meetings or reveal its deliberations, the Oklahoma board met openly and heard, among other things, testimony from the Mexican ambassador to the United States. The board voted three to two to recommend clemency to the governor. They based their recommendation on both the belief that the failure to notify the Mexican consulate had prejudiced Torres's case and on a concern that violations of the Vienna Convention would threaten the reciprocal treatment of Americans abroad. The recommendation for clemency was sent to Governor Brad Henry, a strong proponent of capital punishment. Henry then agreed to meet with counsel for Torres. Although the governor remained noncommittal at the time, he asked probing questions about America's obligation to adhere to a ruling from the ICJ.

Torres's execution was scheduled for May 13, 2004. Four days before, the OCCA issued a stay. In a concurring opinion, one member of the court wrote that "this Court is bound by the Vienna Convention and the Optional Protocol . . . [t]his is a matter of contract. A treaty is a contract between sovereigns. The notion that contracts must be enforceable against those who enter into them is fundamental to the Rule of Law."[3] Two hours later, Governor Henry commuted Torres's sentence to life imprisonment without the possibility of parole. Although Torres did not receive the full judicial review and reconsideration ordered in *Avena*, both the executive branch and the Oklahoma court did give effect to the ICJ judgment.

This case stands in contrast to proceedings against Jose Medellin and Humberto Leal in Texas where the state courts and the governor refused to recognize the authority of a treaty, a judgment from the ICJ, or the appeals of the president of the United States that foreign policy interests were implicated in decisions to execute foreign nationals. Or, if they did recognize those interests, they placed state sovereignty and politics ahead of international obligations.

Humberto Leal Garcia

In 1994, Humberto Leal, a citizen of Mexico, was arrested for the brutal rape and murder of 16-year-old Adria Sauceda in San Antonio. He was not informed of his right to contact the Mexican consulate.

His court-appointed lawyer, who failed to challenge some of the evidence against Leal, also failed to raise the issue of consular notification at trial. Although witnesses admitted that Sauceda was gang-raped at a party where she was heavily intoxicated, none of the other rapists was charged. Only Leal was brought to trial. There is little doubt that he was responsible for Sauceda's death—either intentionally as the state claimed or unintentionally as Leal admitted. In any event, Leal was convicted of capital murder and sentenced to death. He first raised the claim that his Vienna Convention rights were violated in his 1998 appeal to the Texas Court of Criminal Appeals. One argument made by the Mexican government in support of Leal is that they would have provided him with a better lawyer who would have challenged the state's case against him. In 1998, his original appeal was denied on the basis that his claim was procedurally defaulted.[4] But as a named petitioner in the *Avena* case, Leal filed another appeal as his execution approached. That appeal for a stay of execution was rejected by the Supreme Court on July 7, 2011. Leal was put to death only hours after the court handed down its ruling. The Obama administration had urged to justices to delay Leal's execution while Congress considered legislation to implement the Vienna Convention, but the court's opinion rebuffed the president's efforts.

In many ways, the Leal case picked up the argument about consular notification where *Medellin* had left it. In 2008, Medellin's lawyers attempted to win a last minute stay of execution. They argued that the court's opinion in *Medellin v. Texas* had held that Congress had to act for the *Avena* judgment to be applied in the states. Days before Medellin was to be put to death, such legislation had been introduced. With Medellin's execution immanent, Congressman Howard Berman, a California Democrat, proposed a bill that would give effect to the ICJ ruling. However, in the case referred to as *Medellin II*, the court ruled that the execution could proceed because the chance of legislative action was "too remote" to warrant a stay.[5]

As Leal's execution approached, his attorneys argued that the prospects for Congressional action had greatly improved, especially as the Obama administration backed legislation introduced by Senator Patrick Leahy, the chair of the Senate Judiciary Committee. In the petition for a writ of certiorari, Leal's lawyers laid out the arguments for postponing the execution until Congress had time to act on the Leahy bill. The *Avena* ruling had stated that the named petitioners were entitled to the judicial review and reconsideration of their cases. Leal had not had that review in the Texas courts or in the federal

courts. If Leahy's bill passed, Leal would have the opportunity to raise the issue of consular notification. His petition for cert stated that his right to due process entitled him to remain alive until Congress had a chance to pass the law and implement *Avena*.[6]

Leal argued that in *Medellin* the Supreme Court had acknowledged that the United States has an "international law obligation" to abide by the ICJ ruling but because there was no binding federal law that preempted state restrictions on successive habeas corpus petitions, Congress must take action before *Avena* could be implemented. After Medellin was executed, the ICJ ruled that the United States had violated another international obligation and that its ongoing commitments must be met within a reasonable period of time. They reiterated the position that Leal should not be executed without a process of review and reconsideration.[7] But the state of Texas had scheduled Leal's execution for July 7, 2011. He would die without such a review unless he was able to persuade the Supreme Court to order a stay of execution. "No one—not this Court, not the Executive, not Congress, not Texas—disputes the United States 'plainly compelling' interest in complying with the international obligation reflected in *Avena*," his petition argued. The Department of Justice, the State Department, business and diplomatic leaders all agreed that Leal's execution would have grave consequences. Leal maintained that one state should not be able to undermine American foreign policy. If Texas proceeded and deprived Leal of a remedy for the violation of his Vienna Convention, it would force the United States into an "irreparable breach of its treaty obligations." Failing to allow for Congressional action meant that "Texas will effectively usurp the institutional prerogative of the federal political branches." The court should not "allow Texas to subvert Mr. Leal's constitutional rights and the compelling interests of Congress and the Executive in a race to execution."[8] Texas's rush to execution would deprive the political branches of a decision the Supreme Court had plainly left to them. Additionally, if Texas were to be allowed to break the US promise to comply with the ICJ and its treaty commitments, the welfare of Americans traveling abroad and of American soldiers would be jeopardized. A group of retired military leaders had told the Texas Board of Pardons and Paroles, "The preservation of consular access is especially important for United States military personnel, who when serving our county overseas are at greater risk of being arrested by foreign governments."[9] In a letter to Secretary of State Hillary Clinton, the Mexican ambassador wrote that President Calderon and President Obama had developed an "unprecedented level of cooperation "that

would assist in fighting organized crime and drug trafficking and in their commitment to a secure border. That alliance could be jeopardized if Texas were allowed to execute Leal.[10]

Leal's arguments effectively turned the federalism discussion around from the focus on the sovereignty of a state and its right to follow its criminal procedures to the threat that a single state could both weaken the nation's foreign relations and appropriate the prerogatives of the federal government.

His petition for certiorari also reminded the court of the threat to American citizens if the country failed to move toward respect for international law. According to many experienced diplomats, the United States cannot maintain a double standard where it vehemently protests if its citizens are denied consular access but fails to remedy its own identical violations. "We cannot realistically expect other nations to continue to comply with consular treaty commitments that we refuse to uphold." Delaying Leal's execution would be a sign of good faith by the United States.[11]

Leal further claimed that going ahead with his execution before Congress acted on the Leahy bill would be unlawful because it would deprive him of the right to due process. His advocates stated the Congress had been "moving steadily" to create legislation to give effect to Vienna Convention rights and to provide review and reconsideration when those rights were violated as ordered in *Avena*. Leal's case was distinguished from Medellin's last appeal because the president and other executive branch departments had fully endorsed Senator Leahy's proposal, the Consular Notification Compliance Act (CNCA). That legislation would authorize the federal courts to review the merits of a Vienna Convention violation. Even with state procedural default rules, a foreign national would have recourse in the federal courts. Additionally, raising a Vienna Convention claim would not be considered a successive habeas corpus application and would not be barred under the AEDPA.[12] Leal would be deprived of due process if he were put to death while Congress was in the process of ensuring that his Vienna Convention rights had a remedy. Congress had already voted to establish the right when the Senate ratified the Vienna Convention, the Optional Protocol, and the United Nations Charter.[13] They simply needed to tie up the loose end of ensuring a mechanism to provide a remedy when the right was violated. His petition for cert maintained that the Supreme Court had long held that as a matter of law they should decide cases assuming that Congress intends to see the United States comply with treaties. The court's endorsement of Congressional action—allowing Congress adequate

time to carry out the treaty obligation—would carry weight with Congress. Thus, Leal asked the Supreme Court to delay his execution. The Obama administration joined the request in a 30-page amicus brief asking for a stay until January 2012.

The Court ruled against Leal in *Leal Garcia v. Texas*, a 5–4 per curium decision, on July 7, 2011.[14]

They reviewed their holding in *Medellin* reiterating that neither the *Avena* judgment nor President Bush's memo would be considered binding federal law. The court majority found no merit in the argument, made by both the administration and Leal, that his due process rights would be violated if the execution proceeded while Congress considered the Leahy bill. "The Due Process clause does not prohibit a state from carrying out a lawful judgment in light of unenacted legislation that might someday authorize an attack on that judgment."[15] The justices rejected the suggestion that that they should postpone the judgment of a lower court in the circumstances. "Our task is to rule on what the law is, not what it might eventually be."[16] Even if there were circumstances when it would be appropriate for the court to issue a stay based on proposed legislation, the current case was not one of them. The court seemed to believe that if Congress were serious about a law to implement *Avena*, they had waited seven years since *Medellin* to take action. They also rejected the argument that Leal's execution would have serious international consequences. In fact they summarily dismissed the president's appeal as "free-ranging assertions of foreign policy consequences . . . unaccompanied by a persuasive legal claim." Finally, the court asserted that the government did not argue that Leal had been prejudiced by the failure to provide consular notification. In a rather stinging rebuke, they noted, "We decline to follow the United States' suggestion of granting a stay to allow Leal to bring a claim based on hypothetical legislation when it cannot even bring itself to say that his attempt to overturn his conviction has any prospect of success."[17] Here again the ruling seems to create a conundrum. No one knows whether or not Leal's Vienna Convention claim has merit because it was never considered. Yet the court finds that there is no reason to delay his execution so his claim might be reviewed to determine whether or not it had merit. In a sense, the opinion seems to suggest that if Congress does not care about violations of the Vienna Convention and the judgment from the ICJ, then neither does the Supreme Court.

Once again Justice Breyer wrote the dissent. He was joined by Justices Ginsburg, Sotomayor, and Kagan. Breyer offered a number of reasons why Leal should be given a stay of execution. First of all,

going ahead with the execution would place the nation in "irreparable breach" of its international obligations. He noted that Leal was included in the *Avena* ruling and that ruling was handed down while the United States was still bound by the Optional Protocol. Neither Texas nor any other "judicial authority" had offered Leal a review and reconsideration to find out whether his Vienna Convention violation was a harmless error, as mandated in *Avena*. The dissent also acknowledged that, as the Executive Branch and the government of Mexico had argued, there were serious foreign policy implications in the US refusal to honor its treaty commitments. They further pointed out that the court typically gave "significant weight" and deference to the president's position in matters of foreign affairs. Breyer would grant the stay of execution and wait to take up the matter during the court's regular term, which would begin with conferences in late September and the new session beginning the first Monday in October. "A brief stay . . . when the Court could consider the matter in the ordinary course, would put Congress on clear notice that it must act quickly." Even if Texas claimed an interest in putting Leal to death immediately, "[it] is difficult to see how the State's interest in the immediate execution of an individual convicted of capital murder 16 years ago can outweigh the considerations that support additional delay, perhaps only until the end of the summer." In summary, Justice Breyer believed the court was wrong to ignore the president's views regarding a matter of foreign policy, to assert its own view of the likelihood of legislative action over those who had consulted with Congress, and to deny the request of the four dissenters to hold the matter over until "the Court can discuss the matter at conference in September."[18]

Only about an hour after the court's opinion was handed down, Texas executed Humberto Leal Garcia. As Lyle Denniston described it, the holding was a "serious rebuff to the President's powers as the nation's diplomat-in-chief."[19] They refused to accept his statement that there would be significant foreign policy consequences following from the execution and the additional rebuff to the ICJ. In Andrew Cohen's view, the court went "out of its way" to let Texas proceed with the execution, despite the fact that there would be only minimal harm from waiting months or even years to carry out the death sentence and despite arguments from the other two branches of government that there would be harm to US interests abroad. Through their decision they compounded rather than solved a major legal problem.[20] Leal Garcia was not going anywhere. He was firmly ensconced on Texas's death row. The court could have stayed his

execution as Justice Breyer suggested but, in Cohen's view, they not only turned their backs on Leal, they abdicated "their solemn judicial responsibility not to make a bad situation worse." He believed the decision was "one of the most ignoble acts of the Court in recent memory," a reminder of the hostility of the court majority to the workings of the real world.[21]

Other legal scholars agreed that, in the real world, the decision was a major setback to the US–Mexican relations. According to Courtney Karnes, if *Medellin* "dented" the relations between the two nations, "*Leal Garcia v Texas* nearly destroyed relations completely."[22] She argued that the court could have ruled based on its "potential jurisdiction," preserving its right to rule if Congress passed the Leahy bill. They could have waited to act on Congress's actual intent, rather than on their "divination of Congress's intent."[23] In other words, rather than assuming that Congress had no intention of passing legislation to give effect to the rights of foreign nationals under the Vienna Convention, the court could have waited a few months to see what Congress would do when presented with a bill and a deadline. If Leahy's bill had passed, Texas courts would have been required to review Leal's case. If they had refused to do so there would have been a remedy in the federal court for Leal and others whose Vienna Convention rights had been violated. In either case, the United States would have been carrying out its obligation under international law and preventing a breach in diplomatic relations with Mexico.

Instead *Leal Garcia v. Texas* demonstrated the limits imposed by the constitutional separation of powers and the "significance of political constraints." As Paul Stephan writes, the president cannot intervene "on behalf of the United States in state criminal proceedings even if he has international law on his side." And due to political constraints, the unpopularity of capital murderers and the lack of sympathy for the ICJ among Americans, neither Bush nor Obama "spent political capital" to pressure Congress to pass enabling legislation to carry out ICJ rulings. Bush tried to go around Congress with his memorandum and the Obama administration "limited itself to what it surely knew was a quixotic gesture in the form of an ill-fated amicus brief [in the Leal case]."[24] Stephan seems to question the Obama administration's commitment to importance of international law. He notes that as a candidate for president, Obama "railed against Bush's human rights policy," but later the courts have "continued to narrow the scope of human rights litigation without serious resistance from the Executive."[25] He asserts that the administration did nothing to

encourage compliance with *Avena* while Texas moved to execute foreign nationals. Obama did not seek legislation implementing the ICJ order even when Democrats controlled both houses of Congress.[26] Perhaps realizing there was little political benefit from actual support of international law and human rights efforts, the Obama administration only made the gesture of providing an amicus brief for Leal. They did not actually invest political capital in working to bring American policy into conformity with the judgment of the international court. Other priorities took precedence over the fate of convicted murderers, regardless of the salience of the argument that the nation could be putting both its reputation and its citizens abroad at risk.

Rebecca Sklar emphasizes the discretion that allows the Supreme Court to decide whether or not to grant a stay of execution, noting that Leal's fate "depended more on the discretion of the Justices than on the law itself."[27] She argues that the court could have taken the time to inquire about the likelihood of the CNCA passing Congress.[28] In fact, the Senate Judiciary Committee did hold hearings on the legislation after Leal's execution, although there was no real movement toward passage. Perhaps had there been a stay, the Congress might have been aware that an individual life hung in the balance. They may have felt a greater urgency to act on the law. In any event, as Sklar writes, there is no uniform method by which the court evaluates petitions to delay executions. They may make their decision based on whether there is a substantial constitutional question involved, whether any further appeals by the petitioner have a likelihood of success, whether the execution is adverse to the public interest, whether the delay will serve a "good cause," or whether there is a risk of substantial harm to the other party (in this case, the state of Texas).[29] In other words, one factor that may influence the court's decision to grant a stay or to go ahead with the execution is the state's interest, based on the model of federalism.

Attentive to federalism, the court may weigh considerations of comity, "the respectful recognition of judgments from other [state] tribunals," as well as finality, "the efficient execution of sentences."[30] They are likely to show deference to state courts and to rule based on the presumption that state courts are competent. But, as Sklar warns, the history of American law and the use of habeas corpus "reflect adherence to the notion that concerns for the constitutionality of convictions and detentions should supersede principles of finality."[31]

Some who commented on the Leal decision thought favorably of the court's concern for federalism. As J. Richard Broughton stated, the case implicated issues of international law and human rights but

also the structure of American government and "tensions often created in criminal cases by our scheme of federalism."[32] He approved that the ruling showed deference to Texas and found implicit the idea that constitutional priorities other than national interest "assumed primacy." He praised the decision as it showed respect for the criminal judgment of a sovereign state and a prudential limit on judicial authority.[33] Those arguments based on political theory seem reasonable, although some might disagree about where the line between national and state sovereignty lies. However, Broughton goes further in rationalizing the positive aspects of the Leal decision. He claims that the state's interest in bringing its criminal judgment against Leal deserved "greater weight than the President's assertion of the damage that could be done to American foreign policy."[34] Putting aside questions of both domestic and international law, he claims that the harm to the victim rightly carried the greatest weight in determining the outcome of the case. In other words, Broughton seems to be arguing that if the crime is gruesome and horrible enough, the rights of the accused under the law do not matter. He writes that the "strength of the state's guilt and punishment case was too much for Leal's legal claims and the government's political claim to overcome."[35] He says that the grisly facts of the case—16-year-old Adria's nude body, her bloody face and head wound, a bloody stick that was an instrument of rape—these things caused the guilty verdict and the death sentence.[36] The harm to the victim was "too significant even for the President's assertion of foreign policy interests." The case amounted to the "community condemnation of Leal's brutal act."[37] David Dow notes that the strategy of deploying gruesome facts can serve as a distraction to avoid the issue of the defendant's rights. The shocking details of the crime can overwhelm a commitment to constitutional values and treaty obligations.[38]

Broughton's defense of the Leal case provides an excellent illustration of the principles Zimring described to explain why generally conservative states where people resist government power are willing to give their state governments the ultimate power over life and death.[39] Zimring argues that the contemporary death penalty is portrayed as a service to victims. It is a form of local community-based punishment. He makes the case that states with a vigilante history are the contemporary leaders in capital punishment. Both vigilante justice and executions are presented as the will of the community. Both reflect hostility to outside legal controls.[40] Certainly Broughton's analysis of the Leal decision reflects this perspective. He further defends the doctrines of harmless error and procedural default which, he says, are "designed to

promote federalism by protecting the state's interest in enforcing and administering its own criminal law. This is what Texas sought and the Court preserved in *Leal*."[41]

Broughton acknowledges that the case also reveals an interesting intersection of constitutionalism and politics. In other words, high principles meet political expediency. He writes that conservatives are generally comfortable with deference to the president in foreign policy matters. But they changed their position in both *Medellin* and *Leal*. There "deference to the President would have meant permitting a federal court to interfere with the execution of a lawful sentence imposed by a sovereign state's criminal justice system under circumstances where the legal violation made no difference to the outcome of the criminal case,[42] a notion largely incompatible with the legal right's commitment to a robust system of federalism."[43] And along with the conservative dedication to the principle of federalism, one could not overlook the partisan political reality that Texas governor Rick Perry who defended the death sentences of both Medellin and Leal "had become a leading candidate to unseat the President."[44]

Even if Perry did not become that "leading candidate" in 2012, standing firm against both President Obama and the International Court would reap benefits for him among the Republican base. Megan Carpentier wrote in *The Guardian* that there were "zero downsides" for Perry in the Leal execution. In Texas, "bowing to pressure from a Democratic administration, an international court, or a foreign government would be worse than executing an innocent person."[45] Carpentier declared that the ICJ was less popular in Texas, especially among Republicans, than the death penalty. Rapist–murderers are not sympathetic characters in public debate. One might note that immigrants enjoyed little popular support. All in all, the execution would not hurt Perry's career, it might even help it.[46]

The court apparently agreed that Texas's interest in executing Leal was more important than the federal government's interest in ensuring comity and respect in international relations. Many commentators were amazed and appalled at this decision. Cohen contends that the Supreme Court "blew off" the solicitor general who warned on an "irreparable breach" of international law. They also "blew off" the United Nations High Commissioner, diplomats, and law enforcement officers who recognized that the decision sent a destructive message to the world.[47] As Steve Charnovitz described the court's opinion, it "reads out" the executive and judiciary from any role in remedying noncompliance with a treaty. Rather Texas and other states would be free to opt out of US commitments unless ordered otherwise by

Congress.[48] In effect, subnational law was allowed to put the United States in violation of treaty commitments. As TCCA judge Tom Price wrote, as the court interpreted it, the Vienna Convention provided "an apparent right under international law without an actual remedy under domestic law."[49]

If there were international repercussions from the Leal execution, Texas should bear a lot of the blame for undermining the US reputation as a law-abiding nation, for the country's "scofflaw status."[50] Texas was asked to exercise statesmanship and to delay the execution. As indicated, the governor had no reason to choose statesmanship over political considerations. It came as no surprise that the damage to the country's good name, the "scofflaw status," did not register with Texas politicians.

Those more concerned with international relations, however, saw long-term negative consequences. Charnovitz remarked that after *Medellin* and *Leal Garcia*, the United States was "no longer one nation when it comes to honoring constitutional commitments because the rights received by foreign nationals can depend on the state where the individual is apprehended." He further contended that there is no incentive for other countries to make treaties with the United States if they would exchange "a binding commitment for an essentially worthless promise from Washington to see what it can do to obtain the voluntary compliance of the fifty states."[51] Karnes provides a similar point of view, noting the possible repercussions of the version of federalism the court upheld in *Leal Garcia*. "A rule that nullifies treaties as domestic law allows the United States to sign international agreements and purport to support individual rights, while simultaneously divesting those agreements of any ability to actually give rights to individuals."[52] *Leal Garcia* could be the first step of a "descent down a very slippery slope," where the United States could sign treaties but hide behind the Constitution when it did not wish to follow through. The country is a superpower but "continued intransigence regarding international commitments will undermine foreign relations and impact its credibility and influence."[53] Such unreliability would not only damage American prestige and authority in diplomatic matters but,[54] as the United Nations Human Rights Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions stated, it could also be damaging to business and the economy. "Why would foreign corporations, relying in part on treaty protections, invest in a state such as Alabama or Texas if they risked being told that the treaty bound only the U.S. government but was meaningless at the state level?"

At the very least, the case of Humberto Leal Garcia, culminating in his execution, exemplified the outlier status of the United States in its devotion to capital punishment. And the seeming rigidity with which the current court majority chooses to interpret state criminal procedures stands in contrast to the broader international perspective generally reflected in Justice Breyer's dissents. James Madison wrote that if a treaty does not supersede state law, the treaty would be ineffective. "To counteract it by the supremacy of state laws would bring upon the Union the just charge of national perfidy and involve us in war."[55] The execution of Leal was, in the words of the United High Commissioner for Human Rights, a "breach of international law."[56] It did not, as Madison feared, involve the United States in war but many would agree that the nation could justly be charged with "national perfidy."

Is There a Way Forward?

The Vienna Convention requires consular access for foreign nationals detained in another signatory country. By mandating the notification, it seems clear that those who made the treaty assumed it was important and useful to the individual. This entire study has examined the implications of failure to comply with the treaty's provisions. It seems clear that a violation of a foreign national's rights under the Vienna Convention place him at a disadvantage, otherwise why would those rights be the subject of an international agreement? But even if one stipulates that harm can come to a defendant if he is not notified of his rights, the issue of a remedy is difficult and complex. Some have argued that if the right of consular access is violated, the only appropriate remedy is to restore the status quo ante—to return the detainee to the position he enjoyed at the time of his arrest. Luke T. Lee and John Quigley would accept this idea as they explain, "Given that the commission of an internationally wrongful act required restoration of the prior-existing situation, it would seem that when a receiving state has failed to comply with VCCR Article 36 obligations, any adverse consequence of that violation is invalid," they wrote. "In view of the broad range of functions of a consul, practically any adverse event that occurs for a foreign national must be viewed as related to the receiving state's violation. If a conviction is entered without compliance with consular access, the situation should be restored to a time when the receiving state should have complied, namely to the time of arrest."[57] Mexico requested this outcome in its *Avena* petition, although the ICJ rejected that suggestion. Instead, they directed the

United States to provide judicial review and reconsideration of the conviction and sentence in cases where a foreign national's Vienna Convention rights had been breached. The outcome of such review was not specified, but if it were carried out, presumably the courts would try to determine whether and how the defendant's case had been harmed by the violation.

The remedy prescribed in *Avena* was a retrospective one; it would attempt to fix a situation after a failure to abide by the Vienna Convention. Finding a retrospective solution has been difficult, as this book describes because both the Supreme Court and the states have been reluctant to adopt remedies that conflict with state criminal procedures. Thus, if there is to be a satisfactory response to the Vienna Convention problem, it may be most useful to think in terms of prospective solutions.

The State Department has been responsible for the education of state and federal officials about their responsibilities under the Vienna Convention. Their early efforts were small and inadequate as they concentrated mostly on informing government personnel in New York City and Washington DC. Until the Breard case drew some attention to the issue, the major State Department effort had been a letter sent to the mayors of cities describing the obligation to notify detainees of their right to consular access but without mentioning that this was a right provided under a treaty signed by the United States. What individual mayors chose to do with such letters is a matter of speculation. After 2001, the State Department improved its instruction in VCCR protocols by sending out agents to inform local agencies and by distributing pamphlets and pocket cards outlining the process of consular notification. On a state and local basis, agencies added material about the VCCR to their police and magistrate training. By 2005, knowledge of the rights of foreign nationals under the Vienna Convention was required for law enforcement agencies seeking national accreditation. At the very least, it was a topic to be covered as part of their professional education.[58] Likewise, the ABA has included information in its guidelines for defense counsel indicating that defense attorneys have an affirmative duty to inform their clients of their rights to consular access.[59] With such voluntary efforts by organizations, which regulate the criminal justice professions, it is likely that the most conscientious police officers and lawyers will be aware of their obligations to notify foreign nationals of the provisions of the Vienna Convention. If such notification becomes the norm, the problems that have arisen with procedural default would become a thing of the past. It may be unrealistic, however, to assume that the

practice will be universally observed, especially without a Supreme Court directive comparable to the Miranda requirement.

In fact a number of scholars have suggested that the Vienna Convention notification be incorporated into the standard practice of reading every suspect his or her Miranda rights before any custodial interrogation begins. Such a practice would relieve the police officer of trying to figure out whether an individual was a foreign national or not. If the rights were read to everyone, there would be no chance of a mistake of omission. Although this idea has great appeal, it would seem that only the Supreme Court or an act of Congress could make such notification mandatory. At present there are no such prospects.

A related suggestion is that judges be responsible for informing defendants of their right to consular access. A judge would provide that information at the first court appearance. If he or she failed to do so, the defendant could cite that failure as grounds for appeal.[60] Again, ensuring that judges complied with such a responsibility would require a ruling from the Supreme Court or legislation to amend judicial procedures.

Some have suggested that Congress pass laws to ensure compliance with the Vienna Convention and to provide redress to those whose rights were violated, as the Leahy bill would have done. Charnowitz puts forward the idea of a "framework statute." Rather than addressing the Vienna Convention issue directly, he thinks a law giving the president authority to comply with a ruling of the ICJ might be more effective. A different option would establish a mechanism for "fast track" approval by Congress of any legislation needed to comply with an ICJ ruling.[61] Another proposal would induce states to implement the Vienna Convention by making some grant funding contingent on compliance. This proposal, called the Avena Act, would require states to direct their law enforcement officers to read Vienna Convention rights to those arrested, to notify the consulate that one of their nationals was in custody, and to allow the consulate to contact the national. Essentially, they would be following the procedures included in the treaty. If law enforcement failed to carry out the notification, state courts would be required to provide a hearing to determine if the defendant had experienced prejudice. The AEDPA would not be interpreted to preclude a hearing in federal court in such a case. With this proposal, Justice Assistance Grants would provide the carrot and the stick. The funding to support law enforcement would be available for states who adopted the provisions. If they failed to do so, they would not be eligible for the grant money. This proposal would address some federalism concerns, as

states would not be "commandeered" into any behavior. They would have the option not to comply and to forego the funding. Likewise, Congress could show its support for the nation's international obligations by appropriating the money for the grants. As Edward Duffy states, the Avena Act would join "abstract legal obligations" to material support.[62] Members of Congress, many of whom seem unmoved by appeals to human rights issues, might be persuaded to adopt legislation if they considered the issue of reciprocity. "If the U.S. does not provide VCCR rights to Mexican nationals in US jails, the US nationals in Mexican jails will be in jeopardy."[63]

Is there any prospect that the Supreme Court will become more friendly to the application of international law within the United States? Certainly several justices, notably Justice Scalia and Justice Thomas, have expressed hostility to any attempts to consider international human rights issues or to take notice of the decisions of non-US courts. It is interesting that the justices who are most likely to refer to the original intent of the founders do not attend to the references to international law and treaties in Article III and Article VI. John King Gamble and Christine Guiliano write that the "Constitution was constructed anticipating the need to deal with international law within a stare decisis common law framework."[64] The relationship between US law and "the corpus of international law" can be "complicated and sometimes strained." They suggest that the Vienna Convention cases are "best viewed in the context of this long-term relationship."[65] On the current court, the justices who are most concerned about obligations under international law are generally in the minority. However, some members of the Court have apparently been quite comfortable considering the relevance of international law and human rights issues in domestic cases including *Atkins v. Virginia*,[66] *Lawrence v. Texas*,[67] and *Roper v. Simmons*.[68] It should be noted, however, that there was a backlash against such acknowledgment of international norms when 50 members of the House of Representatives signed onto a nonbinding resolution stating that "judicial decisions may not be based on foreign laws or court decisions in death penalty or gay rights cases."[69]

One scholar has provided an original idea for litigating death penalty cases involving foreign nationals that does not directly invoke the rulings of the ICJ. Linda Malone suggests appealing cases where foreign nationals have been denied their Vienna Convention rights under the Eighth Amendment ban on cruel and unusual punishment. In *Atkins v. Virginia* and *Roper v. Simmons*, the court found that the execution of both people suffering from mental retardation and

juveniles violated evolving standards of decency and constituted cruel and unusual punishment. Their reasoning was that both groups, the mentally handicapped and children, were more likely to make false or coerced confessions, less likely to be able to assist in their own defense, more likely to exhibit a lack of remorse. All of those same behaviors might be true of foreign nationals, especially if they did not speak English fluently, were ignorant of the US justice system, and had few friends and family members to support them. Thus it could be argued that foreign nationals, deprived of access to the services of their country's consul, would find themselves in the same unfair position as the mentally handicapped and juveniles.[70] Malone's strategy is original. If effective, it might save the lives of some foreign nationals but without actually applying the Vienna Convention.

If he were so motivated, the president could have been a strong advocate for adhering to the US obligations under the Vienna Convention. President Bush issued his memorandum asking state courts to give effect to *Avena* but his respect for international law and the VCCR had to be questioned after he chose to ignore the very same treaty when he was governor of Texas. In addition, the decision to withdraw from the Optional Protocol meant that the United States would never again subject itself to a similar judgment from the ICJ. On the other hand, the withdrawal also meant that the United States could not bring a country that violated the Vienna Convention rights of American citizens before the ICJ. That problem has not yet arisen, but one wonders if there is a strategy in place to deal with such an eventuality.

Although President Obama often criticized Bush's human rights record, especially when he was a candidate in 2008, after taking office Obama did not seek legislation to implement the Vienna Convention nor did he choose to rejoin the Optional Protocol. The administration did file an amicus brief in the 2011 Leal case and offered support for the Leahy bill in the Senate. President Obama also strengthened procedures for federal law enforcement to notify foreign nationals of their rights to consular notification.[71] But as most criminal cases occur at the state level (all the Vienna Convention violations that became international incidents occurred there), changing procedures for federal law enforcement will not address the real problem. Likewise, Obama has not mentioned *Avena*, the Vienna Convention, or the ICJ in speeches.[72] He may well have had other priorities—health care, the economy, international terrorism to name a few—but the overall impression is that the issue of compliance with international law can safely be left on the back burner.

Since the death penalty was reinstated in 1976, 34 foreign nationals have been executed in the United States. About two-thirds of them have claimed violations of their right to consular notification.[73] Most observers concerned about US conformity to the requirements of the Vienna Convention are fairly pessimistic about future remedies. Sandra Babcock who has represented a number of Mexican nationals finds a modest basis for optimism in that the high-profile cases—Breard, Faulder, LaGrand, Medellin, and Leal—have brought more awareness of the issue. She is hopeful that greater awareness will bring better compliance.[74]

The angry tone of American politics, the seemingly insuperable divide between the political parties and between the branches of government, the hostility to virtually all government embodied by groups like the Tea Party—all make the notion that the United States will find a way to be a better world citizen and a champion of human rights seem like wishful thinking. On the other hand, with regard to capital punishment, one area where American exceptionalism has been quite obvious and controversial, a definite shift has occurred in the last decade. In 2014, 32 men and women were executed in the United States, compared to the 98 executions in 1999. The number of death sentences in 2013 was 79, down from 294 in 1998. Even Texas, still the state that leads in the executions, put "only" 10 men and women to death in 2014—the lowest number in decades.[75] Support for the death penalty as measured by opinion polls has declined from 80 percent in the 1990s to about 63 percent in 2014. The number approving of capital punishment declines even more when respondents are given the alternative of life without the possibility of parole. Six states have abolished the death penalty since 2008. Although 32 states have laws that permit executions, fewer than 20 states actually put people to death.[76]

It is difficult to answer Ignatieff's question about whether American exceptionalism is transient or permanent. The signs point both ways. He notes that the United States stays within the "framework of human rights law but on its own terms"—a type of exceptionalism.[77] That is certainly true of the American experience with the Vienna Convention. But on the other hand, with respect to capital punishment, pressures from the world community have apparently had an effect. In response to citizens, European pharmaceutical firms have refused to sell execution drugs to states that use them to put people to death. The shortage of these drugs and the uncertainty of substitutes have brought the issue of the human cost of capital punishment to the forefront and slowed down somewhat the pace of executions in the

United States.[78] Refusal to export drugs used in capital punishment has demonstrated that the death penalty "has not fit well with the European idea of American ideals."[79] And, one could argue that in many ways, the decline in the popularity and usage of capital punishment in the United States moves it closer to the general human rights point of view.

American exceptionalism and resistance to being subject to international law are not likely to disappear anytime soon, especially in places like Texas that delight in their independence and autonomy from "outside" control. Nonetheless, there is some reason to hope that because the discussion of human rights is not a one-sided conversation but a matter of interaction among nations, the United States will gradually join the international consensus about capital punishment, even as it does so on its own terms and in its own time.

Notes

1 Introduction

1. Most statistical information is found through the Death Penalty Information Center, which regularly compiles reports on the administration of the death penalty. www.deathpenaltyinfo.org
2. *The Death Penalty in 2013: Year End Report*. Death Penalty Information Center, December 2013.
3. *The Death Penalty in 2011: Year End Report*. Death Penalty Information Center, December 2011.
4. *Furman v. Georgia,* 408 U.S. 238 (1972).
5. Mark Warren, "Consular Rights, Foreign Nationals, and the Death Penalty," Death Penalty Information Center, February 2014.
6. *Callins v. Collins*, 510 U.S. 1141 (1994). Justice Harry Blackmun in dissent.
7. U.S. Constitution, art. 6, sec 2.

2 American Exceptionalism

1. Daniel Bell, "The 'Hegelian Secret': Civil Society and American Exceptionalism," in *Is America Different? A New Look at American Exceptionalism*, ed. Byron E. Shafer (Oxford: Clarendon Press, 1991), 56.
2. Shafer, *Is America Different?,* vii.
3. Alexis de Tocqueville, *Democracy in America,* trans. Arthur Goldhammer (New York: Library of America, 2004), Chapter 3.
4. Seymour Martin Lipset, "American Exceptionalism Reaffirmed," in *Is America Different? A New Look at American Exceptionalism*, ed. Byron E. Shafer, (Oxford: Clarendon Press, 1991), 8.
5. Ibid., 63.
6. Godfrey Hodgson, *The Myth of American Exceptionalism* (New Haven: Yale, 2009), 8.
7. Shafer, *Is America Different?,* vii.
8. Sangmin Bae, *When the State No Longer Kills: International Human Rights Norms and the Abolition of Capital Punishment* (Albany: State University of New York Press, 2007), 2.
9. Robert Bellah and Steven M. Tipton, eds., *The Robert Bellah Reader* (Durham, NC: Duke University Press, 2006), 229–233.
10. Ibid., 353.

11. Thomas Bender, "The American Way of Empire," *World Policy Journal* Spring (2006): 58–59.
12. Ibid., 49.
13. Michael Ignatieff, "Introduction," in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (Princeton, NJ: Princeton University Press, 2005), 1–2.
14. Harold Hongju Koh, "America's Jekyll and Hyde Exceptionalism," in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff, (Princeton, NJ: Princeton University Press, 2005), 129.
15. Ignatieff, "Introduction," 11–18.
16. Joseph S. Nye Jr., *The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone* (New York: Oxford University Press, 2002), xii.
17. Ibid., 137.
18. Ibid., xii.
19. Stanley Hoffman, "American Exceptionalism: The New Version," in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (Princeton, NJ: Princeton University Press, 2005), 228–229.
20. Ibid., 230.
21. Hodgson, *The Myth of American Exceptionalism*, 168.
22. David P. Forsythe, *Human Rights and U.S. Foreign Policy: Congress Reconsidered* (Gainesville: University of Florida Press, 1988), 5.
23. Stefanie Grant, "A Dialogue of the Deaf? New International Attitudes and the Death Penalty in America," *Criminal Justice Ethics* 17, no. 2 (Summer/Fall 1998): 69.
24. Carol S. Streiker, "Capital Punishment and American Exceptionalism," in *American Exceptionalism and Human Rights*, ed. Michael Ignateiff (Princeton, NJ: Princeton University Press, 2005), 84.
25. Alan W. Clark and Laurelyn Whitt, *The Bitter Fruit of American Justice: International and Domestic Resistance to the Death Penalty* (Boston: Northeastern University Press, 2007), 18–23.
26. Andrew Moravisik, "The Paradox of U.S. Human Rights Policy," in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (Princeton, NJ: Princeton University Press, 2005), 150–51, 165.
27. Ibid., 165.
28. Ibid., 150–51.
29. Ignatieff, "Introduction," 8–12.
30. Stephen M. Walt, "The Myth of American Exceptionalism," *World News Daily Information Clearing House*, accessed October 12, 2011, www.informationclearinghouse.info.
31. Koh, "America's Jekyll and Hyde Exceptionalism," 114–18.
32. John Torpey, "The Problem of American Exceptionalism Revisited," *Journal of Classical Sociology* no. 9 (2009): 155.
33. Ibid., 145.
34. Paul W. Kahn, "American Exceptionalism, Popular Sovereignty, and the Rule of Law," in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (Princeton, NJ: Princeton University Press, 2005), 201–02.

35. Bae, *When the State No Longer Kills*, 12.
36. Ibid., 15–19.
37. Ibid.
38. Austin Sarat, "Capital Punishment as a Legal, Political, and Cultural Fact: An Introduction," in *The Killing State: Capital Punishment in Law, Politics, and Culture*, ed. Austin Sarat (New York: Oxford University Press, 1999), 4–5.
39. Ibid., 5.
40. William E. Connolly, "The Will, Capital Punishment, and Cultural War," in *The Killing State: Capital Punishment in Law, Politics, and Culture*, ed. Austin Sarat (New York: Oxford University Press, 1999), 199–200.
41. Christian Boulanger and Austin Sarat, "Putting Culture into the Picture: Toward a Comparative Analysis of State Killings," in *The Cultural Lives of Capital Punishment: Comparative Perspectives*, eds. Austin Sarat and Christian Boulanger (Stanford, CA: Stanford University Press, 2005), 8–9.
42. Franklin E. Zimring, "The Executioner's Dissonant Song: On Capital Punishment and American Legal Values," in *The Killing State: Capital Punishment in Law, Politics, and Culture*, ed. Austin Sarat (New York: Oxford University Press, 1999), 138–40.
43. *Furman v. Georgia*, 408 U.S. 238 (1972).
44. Franklin E. Zimring, *The Contradictions of American Capital Punishment* (New York: Oxford University Press, 2003), 44–45.
45. Torpey, "The Problem of American Exceptionalism Revisited," 160.
46. Grant, "Dialogue of the Deaf."
47. Clarke and Whitt, *The Bitter Fruit of American Justice*, 3.
48. This case will be discussed at length later in the book.
49. Evi Girling, "European Identity and the Mission against the Death Penalty in the United States," in *The Cultural Lives of Capital Punishment: Comparative Perspectives*, eds. Austin Sarat and Christian Boulanger (Stanford, CA: Stanford University Press, 2005), 113–124.
50. Zimring, *The Contradictions of American Capital Punishment*, 25–27.
51. Clarke and Whitt, *The Bitter Fruit of American Justice*, 13–15.
52. Hodgson, *The Myth of American Exceptionalism*, 99–100.
53. Ibid., 129, 133.
54. Boulanger and Sarat, "Putting Culture into the Picture," 1–2.

3 THE LEGAL FRAMEWORK: CAPITAL PUNISHMENT LAW AND THE RIGHTS OF FOREIGN NATIONALS

1. Quoted in Austin Sarat and Christian Boulanger, *The Cultural Lives of Capital Punishment: Comparative Perspectives* (Stanford, CA: Stanford University Press, 2005), 11.
2. Judith Randle, "The Cultural Lives of Capital Punishment in the United States," in *The Cultural Lives of Capital Punishment: Comparative*

Perspectives, eds. Austin Sarat and Christian Boulanger (Stanford, CA: Stanford University Press, 2005), 93, 95.

3. William A. Schabus, *The Abolition of the Death Penalty in International Law*, 2nd ed. (Cambridge, UK: Cambridge University Press, 1997), 6–7.
4. William A. Schabus, "The United Nations and the Abolition of the Death Penalty," in *Against the Death Penalty: International Initiatives and Implications*, ed. Jon Yorke (Surrey, England: Ashgate Press, 2008), 12.
5. Sangmin Bae, *When the State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment* (Albany: State University of New York Press, 2007), 2–6.
6. Ibid., 4–5.
7. See James J. Megivern, *The Death Penalty: An Historical and Theological Survey* (Mahwah, NJ: Paulist Press, 1997).
8. Michael Ignatieff, "Introduction," in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (Princeton, NJ: Princeton University Press, 2005), 4–7.
9. Schabas, *The Abolition of the Death Penalty in International Law*, 307.
10. Joseph S. Nye Jr., *The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone* (New York: Oxford University Press, 2002), 54.
11. Ibid., 164.
12. *Trop v. Dulles*, 356 U.S. 86 (1958).
13. Ibid.
14. *Furman v. Georgia*, 408 U.S. 238 (1972).
15. *Gregg v. Georgia*, 428 U.S. 153 (1976).
16. *Woodson v. North Carolina*, 428 U.S. 280 (1976).
17. *Gregg v. Georgia*.
18. *Woodson v. North Carolina*.
19. Ibid.
20. *Lockett v. Ohio*, 438 U.S. 586 (1978).
21. Franklin E. Zimring, *The Contradictions of American Capital Punishment* (New York: Oxford University Press, 2003), 71.
22. David R. Dow, *Executed on a Technicality: Lethal Injustice on America's Death Row* (Boston: Beacon Press, 2005), 42.
23. Zimring, *Contradictions of American Capital Punishment,* 5.
24. *Lockett v. Ohio.*
25. Ibid.
26. *Strickland v. Washington*, 446 U.S. 668 (1984).
27. David R. Dow, "Introduction," in *Machinery of Death: The Reality of America's Death Penalty Regime*, eds. David R. Dow and Mark Dow (New York: Routledge, 2002), 5.
28. *Ford v. Wainwright*, 477 U.S. 399 (1986).
29. *Penry v. Lynaugh*, 492 U.S. 302 (1989).
30. *Atkins v. Virginia*, 536 U.S. 304 (2002).
31. *Roper v. Simmons*, 543 U.S. 551 (2005).
32. Ibid.

33. Frank I. Michelman, "Integrity-Anxiety?" in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (Princeton, NJ: Princeton University Press, 2005), 241.
34. Frederick Schauer, "The Exceptional First Amendment," in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (Princeton, NJ: Princeton University Press, 2005), 51.
33. *Coleman v. Thompson*, 501 U.S. 722 (1991).
36. Ibid.
37. David R. Dow "How the Death Penalty Really Works," in *Machinery of Death: The Reality of America's Death Penalty Regime*, eds. David R. Dow and Mark Dow (New York: Routledge, 2002), 31.
38. *Coleman v. Thompson*.
39. Ibid.
40. Ibid.
41. Ibid.
42. Ibid.
43. Ibid.
44. Ibid.
45. Ibid.
46. *Herrera v. Collins*, 506 U.S. 390 (1993).
47. Dow, *Executed on a Technicality*, 39–40.
48. Ibid.
49. Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (New York: W.W. Norton, 2005), 276.
50. Quoted in Jonathan L. Rudd, "Consular Notification and Access: The 'International Golden Rule,'" *FBI Law Enforcement Bulletin*, January 2007, 23.
51. Michael John Garcia, *Vienna Convention on Consular Relations: Overview of U.S. Implementation and International Court of Justice Interpretation of Consular Notification Requirements* (Washington, DC: Library of Congress, 2004), 3.
52. Luke T. Lee and John Quigley, *Consular Law and Practice*, 3rd ed. (New York: Oxford University Press, 2008), 141–42.
53. Quoted in Gregory Dean Gisvold, "Strangers in a Strange Land: Assessing the Fate of Foreign Nationals in the United States by State and Local Authorities," *Minnesota Law Review* 78 (1993–1994): 779.
54. William J. Aceves, "The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies," *Vanderbilt Journal of Transnational Law* 31, no. 2 (March 1998): 268.
55. Ibid., 270.
56. Margaret Vandiver, "'An Apology Does Not Assist the Accused': Foreign Nationals and the Death Penalty in the United States," *Justice Professional* 12, no. 2 (September 1999).
57. Aceves, "The Vienna Convention on Consular Relations," 272.
58. Quoted in Lee and Quigley, "Consular Law and Practice," 147.
59. Gisvold, "Strangers in a Strange Land," 794.

60. Lee and Quigley, "Consular Law and Practice," 162.
61. Vandiver, "Apology Does Not Assist the Accused."
62. Ronan Doherty, "Foreign Affairs v. Federalism: How State Control of Criminal Law Implicated Federal Responsibility under International Law," *Virginia Law Review* 82 (1996): 1345.
63. Ibid.
64. Ibid., 1328.
65. Vandiver. "Apology Does Not Assist the Accused."
66. Alan W. Clarke and Laurelyn Whitt, *The Bitter Fruit of American Justice: International and Domestic Resistance to the Death Penalty* (Boston: Northeastern University Press, 2007), 55.

4 The Execution of a Foreign National: The Case of Angel Breard

1. *Breard v. Virginia*, 445 SE 2nd (1994). Jonathan I. Charney and W. Michael Reisman, "AGORA: *Breard*," *American Journal of International Law* 92 (1998): 666.
2. Franklin E. Zimring, "Too Sovereign but Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations?" *Harvard Law Review* 166 (2002–2003): 2661.
3. *Breard v. Pruett*, 134 F. 3rd (4th Cir), 1998.
4. Linda A. Malone, "From *Breard* to *Atkins* to *Malvo*: Legal Incompetency and Human Rights Norms on the Fringes of the Death Penalty," *William and Mary Bill of Rights Journal* 13 (2004–2005): 370. Karen A. Glasgow, "What We Need to Know about Article 36 of the Vienna Convention," *New England International and Comparative Law Journal* 6 (2000): 120.
5. *Breard v. Pruett.*
6. *Faulder v. Johnson*, 81 F. 3d 515 (5th Cir). Also see Malone, "From *Breard* to *Atkins*," 371.
7. *Breard v. Netherland*, 949 F. Supp.
8. William J. Acevas, "The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies," *Vanderbilt Journal of Transnational Law* 31, no. 2 (March 1998): 281–82.
9. *Breard v. Pruett.*
10. Ibid. Malone, "From *Breard* to *Atkins*," 372.
11. *Republic of Paraguay v. Allen, 949 F. Supp. (1996).*
12. Malone, "From *Breard* to *Atkins*," 376.
13. *Paraguay v. Allen.* Glasgow, "What We Need to Know about Article 36 of the Vienna Convention," 123. Aceves, "Vienna Convention on Consular Relations," 284–85.
14. Charney and Reisman, "AGORA," 667.
15. Christopher Van der Waerden, "Death and Diplomacy: *Paraguay v. United States* and the Vienna Convention on Consular Relations," *Wayne Law Journal* 45 (1999–2000): 1638.

16. Charney and Reisman, "AGORA," "670. Malone," "From *Breard* to *Atkins*," 383.
17. Charney and Reisman, "AGORA," 670. Malone, "From *Breard* to *Atkins*," 382.
18. Charney and Reisman, "AGORA," 671.
19. *Breard v. Greene*, 523 U.S. 371 (1998).
20. Van der Waerden, "Death and Diplomacy," 1641.
21. *Breard v. Greene*.
22. Ibid.
23. Ibid.
24. Ibid.
25. Ibid.
26. Ibid.
27. See, for example, van der Waerden, "Death and Diplomacy," 1646.
28. *Breard v. Greene*.
29. Ibid.
30. Ibid.
31. Commonwealth of Virginia, Office of the Governor, Press Office, Statement by Governor Jim Gilmore Concerning the Execution of Angel Breard (April 14, 1998) in "AGORA," 674–675. Hereinafter, Gilmore Statement.
32. Ibid.
33. Ibid.
34. Ibid.
35. Ibid.
36. Henry J. Richardson, III, "The Execution of Angel Breard by the United States: Violating an Order of the International Court of Justice," *Temple International and Comparative Law Journal* 12 (1998): 121.
37. Ibid., 127.
38. Zimring, "Too Sovereign but Not Sovereign Enough," 2656.
39. Ibid., 2656–57.
40. Ibid., 2657.
41. Sanja Djajic, "The Effect of International Court of Justice Decisions on Municipal Courts in the United States: *Breard v. Greene*," *Hastings International and Comparative Law Review* 23 (1999–2000): 42.
42. Ibid., 29–30.
43. Curtis A. Bradley, "*Breard*, Our Dualist Constitution, and the Internationalist Conception," *Stanford Law Review* 51 (1998–1999): 530.
44. Ibid., 556.
45. Ibid., 558.
46. Ibid., 563–66.
47. Ibid., 530.
48. Louis Henkin, "Provisional Measures, U.S. Treaty Obligations, and the States," *American Journal of International Law* 92 (1998): 680–81.
49. Ibid., 682.
50. Ibid., 683.

51. Ibid.
52. Djajic, "The Effect of International Court of Justice Decisions on Municipal Courts in the United States," 63–64.
53. Ibid., 89–91.
54. Ibid., 100–01.
55. Ann-Marie Slaughter, "Court to Court," *American Journal of International Law* 92 (1998): 709.
56. Ibid., 711.
57. Ibid., 712.
58. Jan Klabbers, "Executing Mr. Breard," *Nordic Journal of International Law* 67 (1998): 360.
59. Howard S. Schiffman, "*Breard* and Beyond: The Status of Consular Notification and Access under the Vienna Convention." *Cordozo Journal of International and Comparative Law* 8 (2000): 59.
60. Van der Waeden, "Death and Diplomacy," 1646–1648.
61. Lori Fisler Damrosch, "The Justicability of Paraguay's Claim of Treaty Violation," *American Journal of International Law* 92 (1998): 703.
62. Glasgow, "What We Need to Know about Article 36 of the Vienna Convention," 128.
63. *New York v. United States,* 505 U.S. 144 (1992); *Printz v. United States,* 521 U.S. 898 (1997).
64. *United States v. Lopez,* 514 U.S. 549 (1995).
65. Zimring, "Too Sovereign but Not Sovereign Enough," 2558.
66. Luna and Sylvester, "Beyond *Breard*," 153–56.
67. Ibid., 181.
68. Klabbers, "Executing Mr. Breard," 362–63.
69. Ibid.
70. Carlos Manuel Vazquez, "*Breard* and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures," *American Journal of International Law* 92 (1998): 689.
71. Damrosh, "Justicability of Paraguay's Claim," 697–98.
72. Glasgow, "What We Need to Know about Article 36 of the Vienna Convention," 129–30.
73. Djajic, "The Effect of International Court of Justice Decision on Municipal Courts in the United States," 77.
74. Ibid., 82.
75. Vazquez, "*Breard* and Federal Power," 683–89.
76. Ibid., 691.
77. Richardson, "Execution of Angel Breard," 128–29.
78. Slaughter, "Court to Court," 711.
79. Malone, "From *Breard* to *Atkins*," 365.
80. Curtis A. Bradley and Jack L. Goldsmith, "The Abiding Relevance of Federalism to U.S. Foreign Relations," *American Journal of International Law* 92 (1999): 677.
81. Zimring, "Too Sovereign but Not Sovereign Enough," 2664–65.
82. Klabbers, "Executing Mr. Breard," 707.

83. Charney and Reisman, "AGORA," 674.
84. Ibid.
85. Ibid., 675.
86. Klabbers, "Executing Mr. Breard," 707.
87. Malone, "From *Breard* to *Atkins*," 367–68.
88. Ibid., 389.
89. Quoted in Schifferman, "*Breard* and Beyond," 41.
90. Van der Waeden, "Death and Diplomacy," 1662.
91. Malone, "From *Breard* to *Atkins*," 369.
92. Schifferman, "*Breard* and Beyond," 46.
93. Glasgow, "What We Need to Know about Article 36 of the Vienna Convention," 136.
94. Luna and Sylvester, "Beyond *Breard*," 188.
95. Ibid., 189–90.
96. Ibid., 191.
97. Mani Sheik, "From *Breard* to *Medellin*: Supreme Court Inaction or ICJ Activism in the Field of International Law," *California Law Review* 94 (2006): 572.
98. Djajic, "The Effect of International Court of Justice Decisions on Municipal Courts in the United States," 108. Van der Waeden, "Death and Diplomacy," 1652.
99. Glasgow, "What We Need to Know About Article 36 of the Vienna Convention," 124.

5 The Execution of a Foreign National: The Case of Joseph Stanley Faulder

1. "Adding Insult to Injury: The Case of Joseph Stanley Faulder," *Amnesty International Newsletter*, November, 1998.
2. This account of the crime is taken from the Confidential Memo to Governor George W. Bush from Stuart Bowen, June 17, 1999. Faulder Execution Files, Texas State Archives.
3. "Adding Insult to Injury."
4. The TCC rarely finds significant flaws in the workings of the Texas trial courts. For example, they have frequently refused to find that drunk or sleeping lawyers failed to provide adequate assistance to their clients.
5. *Faulder v. Johnson,* 81 F.3rd 515 (5th Cir. 1996).
6. "Adding Insult to Injury."
7. Ibid.
8. *Faulder v. Johnson*.
9. Dr. James Grigson ("Dr. Death") testified in hundreds of death penalty cases. He invariably stated "with 100% accuracy" that the defendant would kill again if given the chance. He was often able to reach this conclusion without a single meeting with the person on trial. He

was reprimanded twice and ultimately expelled by both the American Psychological Association and the Texas Society of Psychiatric Physicians. See Mike Tolson, "Effect of 'Dr. Death' and His Testimony Lingers," *Houston Chronicle*, June 17, 2004.

10. Notes from Evidentiary Hearing in Longview, Texas, July 6, 1997. Faulder Execution Files, Texas State Archives.
11. Nancy Waring, "Death in Texas: Sandra Babcock Pioneers Use of International Law in Capital Punishment Appeal," *Harvard Law Bulletin*, Spring 2000.
12. Ibid.
13. "Adding Insult to Injury."
14. Gregory Dean Gisvold. "Strangers in a Strange Land: Assessing the Fate of Foreign Nationals in the United States by State and Local Authorities." *Minnesota Law Review* 78 (1993–1994), 802.
15. "Adding Insult to Injury."
16. Notes from Evidentiary Hearing, July 6, 1997.
17. Ibid.
18. Ibid.
19. Ibid.
20. Letter from Pat Nicholl to Governor Ann Richards, August 13, 1992. Texas State Archives.
21. Ibid.
22. Ibid.
23. Ibid.
24. *Faulder v. Johnson*.
25. Ibid.
26. Ibid.
27. Ibid.
28. Ibid.
29. Ibid.
30. Petition for Writ of Certiorari, 1998. Faulder Execution Files, Texas State Archives.
31. Ibid.
32. Ibid.
33. Ibid.
34. Ibid.
35. Letter from Jack Phillips to George W. Bush, March 22, 1997. Faulder Execution Files, Texas State Archives.
36. Amicus brief filed by Canada, May 23, 1997, Faulder Execution Files, Texas State Archives.
37. Ibid.
38. Letters on file at the Faulder Execution Files, Texas State Archives.
39. Letter of Secretary of State Madeleine K. Albright to Governor George W. Bush, November 27, 1998. Faulder Execution Files, Texas State Archives.
40. Letter of Secretary of State Madeleine K. Albright to Victor Rodriguez, November 27, 1998. Faulder Execution Files, Texas State Archives.
41. Ibid.

42. *Faulder et al. v. Texas Board of Pardons and Paroles*, January 8, 1999. Faulder Execution Files, Texas State Archives.
43. Ibid.
44. Letter from Minister of Foreign Affairs Lloyd Axworthy to George W. Bush, May 18, 1999. Faulder Execution Files, Texas State Archives.
45. Letter from Mary Wilson to Lloyd Axworthy, June 4, 1999. Faulder Execution Files, Texas State Archives.
46. Barbara Whitaker, "Texas Executes Canadian Killer Despite International Pleas," *New York Times*, June 18, 1999. Waring, "Death in Texas."
47. Ibid.
48. S. Adele Shank and John Quigley, "Foreigners on Texas's Death Row and the Right of Access to a Consul." *St. Mary's Law Journal* 26 (1995), 741.
49. Ibid., 743.
50. Ibid., 744.
51. Mark Warren, "Bordering on Discord: The Impact of the Death Penalty on U.S.-Canadian Relations," *Journal of the Institute of Justice and International Studies* 6 (2006), 88.
52. Ibid., 89.
53. Ibid.
54. Ibid.
55. Ibid.
56. Ibid., 91.
57. Ibid., 92.
58. Quoted in Kelly Trainer, "The Vienna Convention on Consular Relations in the United States Courts." *The Transnational Lawyer* 13 (2000), 252.
59. Shank and Quigley, "Foreigners on Texas's Death Row," 747.

6 The Execution of Two Foreign Nationals: The Case of Karl and Walter LaGrand

1. Howard S. Schiffman, "The *LaGrand* Decision: The Evolving Legal Landscape of the Vienna Convention on Consular Relations in U.S. Death Penalty Cases," *Santa Clara Law Review* 42 (2001–2002), 1105.
2. Ibid., 1099.
3. Most of the description of the crime is included in *LaGrand v. Stewart*, 133 F. 3d 1253 (CA 9 1998).
4. Ibid.
5. International Court of Justice, *Germany v. United States* (June 27, 2001). 40 ILM 1069 (2001).
6. Ibid.
7. *LaGrand v. Stewart* (1998).
8. Ibid.
9. ICJ, *Germany v. U.S.*
10. Ibid.
11. *Federal Republic of Germany et al v. United States et al.* 526 U.S. 111 (1999).

12. Schiffman, "*LaGrand* Decision," 1112.
13. ICJ, *Germany v. U.S.*
14. *Stewart v. LaGrand*, 526 U.S. 115 (1999).
15. ICJ, *Germany v. U.S.*
16. Ibid.
17. Schiffman, "*LaGrand* Decision," 1116–1117.
18. Michael K. Addo, "Vienna Convention on Consular Relations: Application for Provisional Measures," *International and Comparative Law Quarterly* 48 (1999), 679–680.
19. Tim Stephens, "The LaGrand Case (*Federal Republic of Germany v. United States of America*): The Right to Information on Consular Assistance under the Vienna Convention on Consular Relations: A Right for What Purpose?" *Melborne Journal of International Law* 3, no. 1 (May 2002), 161.
20. John Quigley, "LaGrand: A Challenge to the U.S. Judiciary," *Yale Journal of International Law* 27 (2002), 439.
21. Schiffman, "*LaGrand* Decision," 1118.
22. Addo, "Vienna Convention on Consular Relations," 675–679.
23. ICJ, *Germany v. U.S.*
24. William J. Aceves, "*LaGrand*: Germany v. United States," *American Journal of International Law* 96, no. 1 (January 2002), 216.
25. Stephens, "LaGrand Case," 149.
26. ICJ, *Germany v. U.S.*
27. Stephens, "LaGrand Case," 164.
28. ICJ, *Germany v. U.S.*
29. Ibid.
30. Quoted in Stephens, "LaGrand Case," 154.
31. ICJ, *Germany v. U.S.*
32. Stephens, "LaGrand Case," 154.
33. Schiffman, "*LaGrand* Decision," 1115.
34. ICJ, *Germany v. U.S.*
35. Ibid.
36. Ibid.
37. Christian J. Tams, "Recognizing Guarantees and Assurances of Non-Repetition: LaGrand and the Law of State Responsibility, *Yale Journal of International Law* 27 (2002), 441.
38. Schiffman, "*LaGrand* Decision," 1125–1126.
39. Stephens, "LaGrand Case," 163.
40. Ibid., 155.
41. Franklin E. Zimering, "Too Sovereign but Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations?" *Harvard Law Review* 116 (2002–2003), 2655.
42. Schiffman, "*LaGrand* Decision," 1122.
43. Ibid., 1124.
44. John Quigley, "Remarks," *American Society of International Law Proceedings* 96 (2002), 315–317.
45. Aceves, "*LaGrand*: Germany v. United States," 218.

46. Ibid., 217.
47. American Society of International Law, "Consular Rights and the Death Penalty after LaGrand," *American Society of International Law Proceedings* 96 (2002).
48. Catherine Brown, "Remarks," *American Society of International Law Proceedings* 96 (2002), 313.
49. Bruno Simma, "Remarks," *American Society of International Law Proceedings* 96 (2002), 312.
50. Sir Nigel Rodley, "Remarks," *American Society of International Law Proceedings* 96 (2002), 319.
51. Monica Firia Tinta, "Due Process and the Right to Life in the Context of the Vienna Convention on Consular Rights: Arguing the *LaGrand* Case," *European Journal of International Law* 12, no. 2 (2001), 363.
52. Ibid., 365.
53. Ibid., 366.
54. Joan Fitzpatrick, "Remarks," *American Society of International Law Proceedings* 96 (2002), 309.
55. Ibid., 310.
56. Schiffman, "*LaGrand* Decision," 1133.
57. John Quigley, "LaGrand: A Challenge to the U.S. Judiciary," *Yale Journal of International Law* 27 (2002), 435.
58. Quigley, "Remarks," 317.
59. Schiffman, "*LaGrand* Decision," 1127–1128.
60. Quigley, "LaGrand: A Challenge," 435.
61. Schiffman, "*LaGrand* Decision," 1132–1133.

7 *AVENA*: MEXICO V. UNITED STATES AND THE CASE OF JOSE MEDELLIN

1. *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America),* 2004 I.C.J. 128 (March 31). Hereinafter referred to as *Avena*.
2. *Sanchez-Llamas v. Oregon,* 548 U.S. 331 (2006).
3. Bruno Simma and Carston Hoppe, "The LaGrand Case: A Study of Many Miscommunications," in *International Law Stories*, ed. John E. Noyes, Laura A Dickinson, and Mark W. Janis (New York: Foundation Press, 2007), 390.
4. Ibid., 388.
5. Patrick Timmons, "Seed of Abolition: Experience and Culture in the Desire to End Capital Punishment in Mexico," in *The Cultural Lives of Capital Punishment: Comparative Perspectives*, edited by Austin Sarat and Christian Boulanger (Stanford, CA: Stanford University Press, 2005), 70.
6. Alan Clarke and Laurelyn Whitt, *The Bitter Fruit of American Justice: International and Domestic Resistance to the Death Penalty* (Boston: Northeastern University Press, 2007), 63–65.

7. *Avena*.
8. *Avena*, Provisional measures, February 3, 2003.
9. Ibid.
10. Quoted in Alan Macina, "*Avena and Other Mexican Nationals:* The Litmus Test for *LaGrand* and the Future of Consular Rights in the United States," *California Western International Law Journal* 34 (2003–2004), 138.
11. Ibid.
12. *Avena*. Summary of the Judgment, March 31, 2004.
13. Ibid.
14. Ibid.
15. Ibid.
16. Ibid.
17. Clarke and Whitt, "Bitter Fruit of American Justice," 60–61.
18. Ibid.
19. Ibid.
20. Ibid.
21. Ibid.
22. Adrienne M. Tranel, "The Ruling of the International Court of Justice in *Avena and Other Mexican Nationals:* Enforcing the Right to Consular Assistance in U.S. Jurisprudence," *American University International Law Review* 20 (2004–2005), 445–46.
23. Ibid.
24. Luke T. Lee and John Quigley, *Consular Law and Practice*, 3rd ed. (New York: Oxford University Press: 2008), 174.
25. These cases will be discussed in Chapter 9.
26. Tranel, "The Ruling of the International Court of Justice," 426.
27. Macina, "Avena and Other Mexican Nationals," 140.
28. "Jose Medellin," *The International Justice Project* at www.international justiceproject.com
29. *Medellin v. Texas*, 552 U.S. 491 (2008).
30. Ibid.
31. "Medellin," *International Justice Project*.
32. Ibid.
33. *Medellin v. Texas*.
34. "Medellin," *International Justice Project*.
35. Jack King, "President Tries to Moot Texas Death Row Case: Withdraws from Treaty Provision," *National Association of Defense Lawyers: The Champion* 29 (May 2005), 6.
36. Ibid.
37. Quoted in *Medellin v. Texas*.
38. King, "President Tries to Moot Death Row Case."
39. Mani Sheik, "From *Breard* to *Medellin:* Supreme Court Inaction or ICJ Activism in the Field of International Law?" *California Law Review* 94 (2006), 562.
40. Clarke and Whitt, "Bitter Fruit of American Justice," 53.

41. Sheik, "From *Breard* to *Medellin*," 562.
42. Joshua J. Newcomer, "Messing with Texas? Why President Bush's Memorandum Order Trumps State Criminal Procedure." *Temple Law Review* 79 (2006), 1055.
43. Ibid., 1030.
44. Ibid., 1055.
45. King, "President Tries to Moot Death Row Case."
46. Sheik, "From *Breard* to *Medellin*," 563.
47. Ibid.
48. *Medellin v. Dretke*, 544 U.S. 600 (2005).
49. *Sanchez-Llamas v. Oregon*.
50. Simma and Hoppe, "The LaGrand Case," 374.
51. Mark Kadish and Charles C. Olsen, "*Sanchez-Llamas v. Oregon* and Article 36 of the Vienna Convention on Consular Relations: The Supreme Court, the Right to Consul, and Remediation," *Michigan Journal of International Law* 27 (2005–2006), 1192–1193.
52. *Sanchez-Llamas v. Oregon*.
53. Simma and Hoppe, "The LaGrand Case," 397.
54. *Sanchez-Llamas v. Oregon*.
55. Ibid.
56. Ibid.
57. Ibid.
58. Ibid.
59. Ibid.
60. Ibid.
61. Ibid.
62. Ibid.
63. Ibid.
64. *Medellin v. Texas*.
65. Brief for the United States as Amicus Curiae in *Medellin v. Texas*.
66. Brief for Diplomats and American Citizens Who Benefitted from the Vienna Convention as Amicus Curiae in *Medellin v. Texas*.
67. Brief for International Court of Justice Experts as Amicus Curiae in *Medellin v. Texas*.
68. Ibid.
69. Brief for Mexico as Amicus Curiae in *Medellin v. Texas*.
70. Brief for the American Bar Association as Amicus Curiae in *Medellin v. Texas*.
71. Brief for the Respondent in *Medellin v. Texas*.
72. Ibid.
73. Ibid.
74. *Medellin v. Texas*.
75. Ibid.
76. Ibid.
77. Ibid.

78. Ted Cruz, "Defending U.S. Sovereignty, Separation of Powers, and Federalism in *Medellin v. Texas,*" *Harvard Journal of Law and Public Policy* 33 (Winter 2010), 35.
79. Ibid., 28.
80. Ibid., 32.
81. Ibid., 33–34.
82. Margaret E. McGuinness, *"Medellin v. Texas," The American Journal of International Law* 102 (2008), 627.
83. Ibid., 626.
84. Janet Koven Levit, "Does Medellin Matter?" *Fordham Law Review* 77 (2008–2009), 617.
85. Ibid., 625.
86. Ibid., 627–629.
87. Ibid., 629.
88. Lucy Reed and Ilmi Granoff, "Treaties in US Domestic Law: *Medellin v. Texas* in Context," *The Law and Practice of International Courts* 8 no.1 (March 2009), 16.
89. Quoted in James C. McKinley Jr., "Texas Executes Mexican Despite Objections from Bush and International Court," *New York Times,* August 6, 2008.
90. Simma and Hoppe, "The LaGrand Case," 402.

8 SOVEREIGNTY AND FEDERALISM: TEXAS AS A CASE STUDY

1. *Medellin v. Texas*, 552 U.S. 491, (2008).
2. The Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited to the States, are reserved to the States respectively, or to the people."
3. *Printz v. United States,* 521 U.S. 898 (1997); *United States v. Lopez,* 514 U.S. 549 (1995); *United States v. Morrison,* 529 U.S. 598 (2000).
4. Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (New York: W. W. Norton, 2005), 255.
5. Louis Henkin, *Foreign Affairs and the U.S. Constitution* 2nd ed. (Oxford: Clarendon Press, 1996), 167.
6. Peter J. Spiro, "The States and International Human Rights," *Fordham Law Review* 66 (1997–1998), 575.
7. Ibid., 567.
8. Sangmin Bae, *When the State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment* (Albany: State University of New York Press, 2007), 102.
9. Godfrey Hodgson, *The Myth of American Exceptionalism* (New Haven: Yale University Press, 2009), xiii.
10. Mark Kadish and Charles C. Olson, "*Sanchez-Llamas v. Oregon* and Article 36 of the Vienna Convention on Consular Relations: The Supreme Court, the Right to Consul, and Remediation," *Michigan Journal of International Law* 27 (2005–2006), 1231.

11. Peter J. Spiro, "The New Sovereigntists: American Exceptionalism and its False Prophets," *Foreign Affairs* 79 (2000), 9.
12. Ibid., 13.
13. Ibid., 10.
14. Robert Shawn Hogue, "*Medellin v. Texas:* The Roberts Court and the New Frontiers of Federalism" *Miami Inter-American Law Review* 41 (2009–2010), 277.
15. Ibid., 272.
16. Ibid., 257.
17. Ibid., 258.
18. Ibid., 260.
19. Ibid., 266.
20. *Missouri v. Holland* 252 U.S. 416 (1920).
21. John F. Murphy, "*Medellin v. Texas*: Implications of the Supreme Court's Decision for the United States and the Rule of Law in International Affairs" *Suffolk Transnational Law Review* 31 (2007–2008), 275.
22. Cindy Galway Bays, "The United States Supreme Court Misses the Mark: Toward Better Implementation of the United States International Obligations *Connecticut Journal of International Law* 24 (2008–2009), 62–66.
23. Hogue, "*Medellin v. Texas*," 279.
24. *Medellin v. Texas.*
25. Martha F. Davis, "Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era" *Fordham Law Review* 77 (2008–2009), 424.
26. Murphy, "*Medellin v. Texas*," 251.
27. Hogue, "*Medellin v. Texas*," 275.
28. Murphy, "*Medellin v. Texas*," 264.
29. Bae, *When the State No Longer Kills,* 94.
30. Quoted in David Garland, *Punishment and Modern Society: A Study in Social Theory* (Chicago: University of Chicago Press, 1990), 11.
31. Judith Randle, "The Cultural Lives of Capital Punishment in the United States," in *The Cultural Lives of Capital Punishment: Comparative Perspectives* ed. Austin Sarat and Christian Boulanger (New York: Oxford University Press, 2005), 105.
32. Amanda Marcotte, "Rick Perry Executes Justice, Texas Style," *The Guardian* (September 13, 2011).
33. Alan W. Clarke and Laurelyn Whitt, *The Bitter Fruit of American Justice: International and Domestic Resistance to the Death Penalty* (Boston: Northeastern University Press, 2007), 29.
34. Carol S. Streiker, "Capital Punishment and American Exceptionalism," in *American Exceptionalism and Human Rights* ed. Michael Ignatieff (Princeton, NJ: Princeton University Press, 2005), 77.
35. David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Cambridge, MA: Belknap Press, 2010), 68.
36. Franklin E. Zimring, *The Contradictions of American Capital Punishment* (New York: Oxford University Press, 2003), 14.

37. *Payne v. Tennessee,* 501 U.S. 808 (1991).
38. Zimring, *Contradictions of American Capital Punishment,* 57.
39. Ibid., 62.
40. Ibid., 89.
41. Ibid., 120.
42. *Furman v. Georgia,* 408 U.S. 238 (1972).
43. Garland, *Punishment and Modern Society,* 17.
44. Garland, *Peculiar Institution*, 292.
45. Quoted in Ibid.
46. Camille Cancio, "The United States' International Obligations and the Impact on Federalism: *Medellin v. Dretke* and the Force of *Avena* in American Courts," *Whittier Law Review* 27 (2005–2006), 1075.
47. David R. Dow, *Executed on a Technicality: Lethal Injustice on America's Death Row* (Boston: Beacon Press, 2005), 83.
48. American Bar Association, *Texas Capital Punishment Assessment Report: An Analysis of Texas Death Penalty Laws* (American Bar Association, 2013), xxxi.
49. Ibid.
50. Ibid., xxxii.
51. Ibid., xli.
52. Dow, *Executed on a Technicality*, 57.
53. Ibid., 75.
54. Ibid., 70–71.
55. Ibid., 79.
56. ABA, *Texas Capital Punishment,* xxxvi.
57. Ibid.
58. Clarke and Whitt, *Bitter Fruit of American Justice,* 60–61.
59. ABA, *Texas Capital Punishment,* xxxviii.
60. Garland, *Peculiar Institution,* 309.
61. Andrew Moravcsik, "The Paradox of U.S. Human Rights Policy," in *American Exceptionalism* ed. Michael Ignatieff, (Princeton, NJ: Princeton University Press, 2005), 151–161.
62. Ibid., 197.
63. Peter J. Spiro, "Sovereigntism's Twilight," *Berkeley Journal of International Law* 31 no. 1 (2013), 316.
64. Ibid., 307.
65. Davis, "Upstairs, Downstairs," 433.

9 The Execution of a Foreign National: Humberto Leal Garcia and After

1. See David Dow, *Executed on a Technicality: Lethal Injustice on America's Death Row* (Boston: Beacon Press, 2005), Chapter 2. Margaret Vandiver, "'An Apology Does Not Assist the Accused': Foreign Nationals and the Death Penalty in the United States," *Justice Professional* 12, no. 2 (September 1999). Sandra Babcock, "The Limits of International

Law: Efforts to Enforce Rulings of the International Court of Justice in U.S. Death Penalty Cases," *Syracuse Law Review* 62 (2012), 188–189.
2. Babcock includes a detailed account of Torres's case in "The Limits of International Law," 189–192.
3. Quoted in Ibid., 191.
4. Wade Goodwyn, "Texas Urged to Stop Mexican National's Execution," July 7, 2011, at www.npr.org. See also Adam Liptak, "Texas Is Pressed to Spare Mexican Citizen on Death Row," *New York Times*, June 28, 2011.
5. *Medellin v. Texas*, 552 U.S. 491 (2008) (*Medellin I*); *Medellin v. Texas*, 554 U.S. 759 (2008) (*Medellin II*). Steve Charnowitz, "Correcting America's Continuing Failure to Comply with the *Avena* Judgment" *American Journal of International Law* 106 (2012), 577.
6. Humberto Leal Garcia v. State of Texas, Petition to the United Supreme Court for Writ of Certiorari, June 27, 2011.
7. Ibid.
8. Ibid.
9. Ibid.
10. Ibid.
11. Ibid.
12. Ibid.
13. Ibid.
14. *Leal Garcia v. Texas*, 564 U.S. ____ (2011).
15. Ibid.
16. Ibid.
17. Ibid.
18. Ibid.
19. Lyle Denniston, "The President Rebuffed: Mexican Executed," July 7, 2011, SCOTUS blog, at www.scotusblog.com.
20. Andrew Cohen, "Humberto Leal Garcia: The Supreme Court Makes a Bad Situation Worse," *The Atlantic* at www.theatlantic.com/poltics/archive2011
21. Ibid.
22. Courtney C. Karnes, "*Leal Garcia v. Texas*: A Foreign National's Fight with Federalism," *Miami Inter-American Law Review* 44 (2012–2013), 377.
23. Ibid., 380.
24. Paul B. Stephan, "The Limits of Change: International Human Rights under the Obama Administration," *Fordham International Law Journal* 35 (2011–2012), 505.
25. Ibid., 489.
26. Ibid., 504.
27. Rebecca R. Sklar, "Executing Equity: The Broad Judicial Discretion to Stay the Execution of Death Sentences," *Hofstra Law Review* 40 (2011–2012), 787.
28. Ibid., 794.
29. Ibid., 777–778.

30. Ibid., 798–800.
31. Ibid., 801.
32. J. Richard Broughton, "Federalism, Harm, and the Politics of *Leal Garcia v. Texas*," *Syracuse Law Review* 62 (2012), 199.
33. Ibid., 207.
34. Ibid.
35. Ibid., 204.
36. Ibid., 204–205.
37. Ibid., 201.
38. Dow, *Executed on a Technicality*, xxvi.
39. See discussion of Zimring's work in chapter 8. Franklin E. Zimring, *The Contradictions of American Capital Punishment* (New York: Oxford University Press, 2003).
40. Ibid., 62.
41. Broughton, "Federalism, Harm, and Politics," 207.
42. Of course the whole point of the *Avena* ruling was that the harm or lack thereof resulting from Vienna Convention violations had never been judicially determined.
43. Broughton, "Federalism, Harm, and Politics," 200.
44. Ibid.
45. Megan Carpentier, "Humberto Leal's Execution, Rick Perry's Ambition," *The Guardian,* July 8, 2011, at www.guardian.com
46. Ibid.
47. Cohen, "Humberto Leal Garcia."
48. Steve Charnovitz, "Correcting America's Continuing Failure to Comply with the *Avena* Judgment," *American Journal of International Law* 106 (2012), 576.
49. Ibid., 575.
50. Ibid., 576.
51. Ibid., 575.
52. Karnes, "*Leal Garcia v. Texas*," 365,
53. Ibid., 387.
54. Quoted in Leal Cert petition.
55. Quoted in Charnovitz, "Correcting America's Continuing Failure," 572.
56. Ibid., 273.
57. Luke T. Lee and John Quigley, *Consular Law and* Practice, 3rd ed. (New York: Oxford University Press, 2008), 176–177.
58. Mark J. Kadish and Charles C. Olson, "*Sanchez-Llamas v. Oregon* and Article 36 of the Vienna Convention on Consular Relations: The Supreme Court, the Right to Consul, and Remediation," *Michigan Journal of International Law* 27 (2005–2006), 1224–1228.
59. Adrienne M. Tranel, "The Ruling of the International Court of Justice in *Avena and Other Mexican Nationals*: Enforcing the Right to Consular Assistance in U.S. Jurisprudence," *American University International Law Review* 20 (2004–2005), 460.

60. See Vandiver, "Apology." Gregory Dean Gisvold, "Strangers in a Strange Land: Assessing the Fate of Foreign Nationals in the United States by State and Local Authorities," *Minnesota Law Review* 78 (1993–1994), 801. Ronald L. Hanna, "Consular Access to Detained Foreign Nationals: An Overview of the Current Application of the Vienna Convention in Criminal Practice," *Southern Illinois University Law Journal* 25 (2000–2001), 178. Michael Candela, "Judicial Notification: A Simple Solution to Ensure Compliance with the Vienna Convention on Consular Relations," *Pace International Review* 18 (2006), 368–69.
61. Charnowitz, "Correcting America's Continuing Failure," 558–559.
62. Edward W. Duffy, "The Avena Act: An Option to Induce State Implementation of Consular Notification Rights After *Medellin*," *Georgetown Law Journal* 98 (2009–2010), 809–810.
63. John King Gamble and Christine M. Guiliano, "U.S. Supreme Court, *Medellin v. Texas:* More than an Assiduous Building Inspector?" *Leiden Journal of International Law* 22 (2009), 165.
64. Ibid., 152.
65. Ibid., 166.
66. *Atkins v. Virginia*, 536. U.S. 304 (2002).
67. *Lawrence v. Texas*, 539 U.S. 558 (2003).
68. *Roper v. Simmons*, 543 U.S. 551 (2005).
69. Linda A. Malone, "From *Breard* to *Atkins* to *Malvo*: Legal Incompetency and Human Rights Norms on the Fringes of the Death Penalty," *William and Mary Bill of Rights Journal* 13 (2004–2005), 411–412.
70. Ibid., 393–394,
71. Charnowitz, "Correcting America's Continuing Failure," 580.
72. Ibid., 581.
73. Mark Warren, "Foreign Nationals Executed Since 1976," Death Penalty Information Center at www.deathpenaltyinfolorg
74. Babcock, "The Limits of International Law," 185–187.
75. Death Penalty Information Center, "Factsheet," November 2014, at www.deathpenaltyinfo.org
76. Ibid.
77. Michael Ignatieff, "Introduction: American Exceptionalism and Human Rights," in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (Princeton, NJ: Princeton University Press, 2005), 23.
78. Sylvie Kauffmann, "U.S. Execution, European Abolition," *New York Times*, November 3, 2014.
79. Ibid.

Bibliography

Aceves, William J. "*LaGrand*: Germany v. United States." *American Journal of International Law,* 96: no. 1 (January 2002), 210–218.

———. "The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies." *Vanderbilt Journal of Transnational Law,* 31: no. 2 (March 1998), 257–324.

Addo, Michael K. "Vienna Convention on Consular Relations: Application for Provisional Measures." *International and Comparative Law Quarterly.* 48 (1999), 673–681.

American Bar Association. *Texas Capital Punishment Assessment Report: An Analysis of Texas Death Penalty Laws, Procedures, and Practices.* American Bar Association, 2013.

Amnesty International. "Adding Insult to Injury: The Case of Joseph Stanley Faulder." *Amnesty International Newsletter*, November 1998.

Aralica, Edwin Lee. "The Inherent Conflict: Vienna Convention on Consular Relations and United States Domestic Law." *Gonzaga Journal of International Law*. 7 (2003–2004), 1–23.

Bae, Sangmin. *When the State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment.* Albany, NY: State University of New York Press, 2007.

Babcock, Sandra L. "Domestic and International Developments Relating to the Death Penalty." *American Society of International Law Proceedings.* 99 (2005), 67–71.

———. "The Limits of International Law: Efforts to Enforce Rulings of the International Court of Justice in U.S. Death Penalty Cases." *Syracuse Law Review*. 62 (2012), 183–197.

Bakken, Gordon Morris, ed. *Invitation to an Execution: A History of the Death Penalty in the United States.* Albuquerque: University of New Mexico, 2010.

Banks, Christopher P. and John C. Blakeman. *The U.S. Supreme Court and the New Federalism: From the Rehnquist to the Roberts Court.* Lanham, MD: Rowman & Littlefield, 2012.

Bays, Cindy Galway. "The United States Supreme Court Misses the Mark: Toward Better Implementation of the United States' International Obligations." *Connecticut Journal of International Law*. 24 (2008–2009), 39–76.

Bell, Daniel. "The 'Hegelian Secret': Civil Society and American Exceptionalism," in *Is America Different? A New Look at American Exceptionalism*, edited by Byron E. Shafer, 46–70. Oxford: Clarendon Press, 1991.

Bellah, Robert and Steven M. Tipton, eds. *The Robert Bellah Reader*. Durham, NC: Duke University Press, 2006.

Bender, Thomas. "The American Way of Empire." *World Policy Journal*, Spring 2006, 45–61.

Boulanger, Christian and Austin Sarat, "Putting Culture into the Picture: Toward a Comparative Analysis of State Killings." in *The Cultural Lives of Capital Punishment: Comparative Perspectives*, edited by Austin Sarat and Christian Boulanger, 1–48. Stanford, CA: Stanford University Press, 2005.

Bradley, Curtis A. "*Breard*, Our Dualist Constitution, and the Internationalist Conception." *Stanford Law Review*. 51 (1998–1999), 529–566.

Bradley, Curtis A. and Jack L. Goldsmith. "The Abiding Relevance of Federalism to U.S. Foreign Relations." *American Journal of International Law*. 92 (1998), 675–679.

Breyer, Stephen. *Making Our Democracy Work: A Judge's View*. New York: Alfred A Knopf, 2010.

Broughton, J. Richard. "Federalism, Harm, and the Politics of *Leal Garcia v. Texas*." *Syracuse Law Review*. 62 (2012), 199–210.

Brown, Catherine. "Remarks." *American Society of International Law Proceedings*. 96 (2002), 312–315.

Cancio, Camille. "The United States' International Obligations and the Impact on Federalism: *Medellin v. Dretke* and the Force of *Avena* in American Courts." *Whittier Law Review*, 27 (2005–2006), 1047–1076.

Candela, Michael. "Judicial Notification: A Simple Solution to Ensure Compliance with the Vienna Convention on Consular Relations." *Pace International Review*, 18 (2006), 343–371.

Carpentier, Megan. "Humberto Leal's Execution, Rick Perry's Ambition," *The Guardian* (July 8, 2011) at Guardian.com

Charney, Jonathan I. and W. Michael Reisman. "AGORA: *Breard:* The Facts." *American Journal of International Law*. 92 (1998), 666–675.

Charnovitz, Steve. "Correcting America's Continuing Failure to Comply with the *Avena* Judgment." *American Journal of International Law*. 106 (2012), 572–581.

Clarke, Alan W. and Laurelyn Whitt. *The Bitter Fruit of American Justice: International and Domestic Resistance to the Death Penalty*. Boston: Northeastern University Press, 2007.

Cohen, Andrew. "Humberto Leal Garcia: The Supreme Court Makes a Bad Situation Worse." *The Atlantic* at www.theatlantic.com/politics/archive 2011/07

Connolly, William E. "The Will, Capital Punishment, and Cultural War." in *The Killing State: Capital Punishment in Law Politics, and Culture*, edited by Austin Sarat, 187–205. New York: Oxford University Press, 1999.

Cooke, Rachel L. "Consular Notification and Access." *Corrections Today*, February 2002, 42–44.

Cruz, Ted. "Defending U.S. Sovereignty, Separation of Powers, and Federalism in *Medellin v. Texas*." *Harvard Journal of Law and Public Policy*. 33: no. 1 (Winter 2010), 25–35.

Damrosch, Lori Fisler. "The Justiciability of Paraguay's Claim of Treaty Violation." *American Journal of International Law*. 92 (1998), 697–704.

Davis, Martha F. "Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era." *Fordham Law Review*. 77 (2008–2009), 411–438.

Denniston, Lyle. "World Court seeks to block 5 U.S. executions." (July 16, 2008) at www.scotusblog.com

Djajic, Sanja. "The Effect of International Court of Justice Decisions on Municipal Courts in the United States: *Breard v. Greene*." *Hastings International and Comparative Law Review*. 23 (1999–2000), 27–108.

Doherty, Ronan. "Foreign Affairs v. Federalism: How State Control of Criminal Law Implicated Federal Responsibility under International Law." *Virginia Law Review*. 82 (1996), 1281–1345.

Donnelly, Jack. *Universal Human Rights: In Theory and Practice*. 3rd ed. Ithaca, NY: Cornell University Press, 2013.

Dow, David R. and Mark Dow, eds. *Machinery of Death: The Reality of America's Death Penalty Regime*. New York: Routledge, 2002.

Dow, David R. "How the Death Penalty Really Works." in *Machinery of Death: The Reality of America's Death Penalty Regime*, edited by David R. Dow and Mark Dow, 11–35. New York: Routledge, 2002.

———. "Introduction." in *Machinery of Death: The Reality of America's Death Penalty Regime*, edited by David R. Dow and Mark Dow, 1–8. New York: Routledge, 2002.

———. *Executed on a Technicality: Lethal Injustice on America's Death Row*. Boston: Beacon Press, 2005.

Duffy, Edward W. "The Avena Act: An Option to Induce State Implementation of Consular Notification Rights after *Medellin*." *Georgetown Law Journal*. 98 (2009–2010), 795–825.

Fitzpatrick, Joan. "Consular Rights and the Death Penalty after *LaGrand*." *American Society of International Law Proceedings*. 96 (2002), 309–310.

Forsythe, David P. *Human Rights and U.S. Foreign Policy: Congress Reconsidered*. Gainsville: University of Florida Press, 1988.

Gamble, John King and Christine M. Guiliano. "US Supreme Court, *Medellin v. Texas:* More than an Assiduous Building Inspector?" *Leiden Journal of International Law*. 22 (2009), 151–169.

Garcia, Michael John. *Vienna Convention on Consular Relations: Overview of U.S. Implementation and International Court of Justice Interpretation of Consular Notification Requirements*. Washington, DC: The Library of Congress.

Garland, David. *Peculiar Institution: America's Death Penalty in an Age of Abolition*. Cambridge, MA: Belknap Press, 2010.

Garland, David. *Punishment and Modern Society: A Study in Social Theory.* Chicago: University of Chicago Press, 1990.

Girling, Evi. "European Identity and the Mission Against the Death Penalty in the United States." in *The Cultural Lives of Capital Punishment: Comparative Perspectives*, edited by Austin Sarat and Christian Boulanger, 112–128. Stanford, CA: Stanford University Press, 2005.

Gisvold, Gregory Dean. "Strangers in a Strange Land: Assessing the Fate of Foreign Nationals in the United States by State and Local Authorities." *Minnesota Law Review*. 78 (1993–1994), 771–803.

Glasgow, Karen A. "What We Need to Know about Article 36 or the Consular Convention." *New England International and Comparative Law Annual.* 6 (2000), 117–138.

Grant, Stefanie. "A Dialogue of the Deaf? New International Attitudes and the Death Penalty in America." *Criminal Justice Ethics.* 17: no. 2 (Summer/ Fall 1998), 19–32.

Hammel, Andrew. "Jousting with the Juggernaut." in *Machinery of Death: The Reality of America's Death Penalty Regime*, edited by David R. Dow and Mark Dow, 107–126. New York: Routledge, 2002.

Hanna, Ronald L. "Consular Access to Detained Foreign Nationals: An Overview of the Current Application of the Vienna Convention in Criminal Practice." *Southern Illinois University Law Journal.* 25 (2000–2001), 163–178.

Henkin, Louis. *Foreign Affairs and the US Constitution*. 2nd ed. Oxford: Clarendon Press, 1996.

———. "Provisional Measures, U.S. Treaty Obligations, and the States." *American Journal of International Law*. 92 (1998), 679–683.

Hodgson, Godfrey. *The Myth of American Exceptionalism*. New Haven: Yale University Press, 2009.

Hoffman, Stanley. "American Exceptionalism: The New Version." in *American Exceptionalism and Human Rights*, edited by Michael Ignatieff, 225–240. Princeton, NJ: Princeton University Press, 2005.

Hogue, Robert Shawn. "*Medellin v. Texas*: The Roberts Court and the New Frontiers of Federalism." *Miami Inter-American Law Review*. 41 (2009–2010), 255–288.

Hood, Roger and Carolyn Hoyle. *The Death Penalty: A Worldwide Perspective.* New York: Oxford, 2008.

Hoppe, Carston. "A Question of Life and Death—the Request for Interpretation of *Avena* and Certain Other Mexican Nationals Before the International Court of Justice." *Human Rights Law Review,* 9: no.3 (2009), 455–466.

Ignatieff, Michael, ed. *American Exceptionalism and Human Rights.* Princeton, NJ: Princeton, 2005.

———. "Introduction: American Exceptionalism and Human Rights." in *American Exceptionalism and Human Rights*, edited by Michael Ignatieff, 1–26. Princeton, NJ: Princeton University Press, 2005.

Kadish, Mark J. and Charles C. Olson. "*Sanchez-Llamas v. Oregon* and Article 36 of the Vienna Convention on Consular Relations: The Supreme Court,

the Right to Consul, and Remediation." *Michigan Journal of International Law*. 27 (2005–2006), 1186–1237.

Kahn, Paul W. "American Exceptionalism, Popular Sovereignty, and the Rule of Law." in *American Exceptionalism and Human Rights*, edited by Michael Ignatieff, 198–222. Princeton, NJ: Princeton University Press, 2005.

Karnes, Courtney C. "*Leal Garcia v. Texas*: A Foreign National's Fight with Federalism." *University of Miami Inter-American Law Review*. 44 (2012–2013), 365–387.

Kaufman, Natalie Hevener. *Human Rights Treaties and the Senate: A History of Opposition*. Chapel Hill: University of North Carolina Press, 1990.

King, Jack. "President Tries to Moot Texas Death Row Case: Withdraws from Treaty Provision." *The Champion*. 29 (May, 2005), 6.

Klabbers, Jan. "Executing Mr. Breard." *Nordic Journal of International Law,* 67 (1998), 357–364.

Koh, Harold Hongju. "America's Jekyll and Hyde Exceptionalism." in *American Exceptionalism and Human Rights*, edited by Michael Ignatieff, 111–143. Princeton, NJ: Princeton University Press, 2005.

———. "Paying 'Decent Respect' to World Opinion on the Death Penalty." *UC Davis Law Review*. 35: no. 5 (June 2002), 1085–1130.

Lee, Luke T. and John Quigley. *Consular Law and Practice*. 3rd ed. New York: Oxford University Press, 2008.

Lee, Luke T. "Vienna Convention on Consular Relations." *International Conciliation*. 37 (1967–1969), 41–76.

Levit, Janet Koven. "Does *Medellin* Matter?" *Fordham Law Review*. 77 (2008–2009), 617–633.

Lipset, Seymour Martin. *American Exceptionalism: A Double-Edged Sword*. New York: W. W. Norton & Company, 1996.

———. "American Exceptionalism Reaffirmed." in *Is America Different? A New Look at American Exceptionalism*, edited by Byron E. Shafer, 1–45. Oxford: Clarendon Press, 1991.

Lott, Stephen D. "*Gandara v. Bennet*: Does the Eleventh Circuit's Decision Presage the Future of Article 36 in American Jurisprudence?" *Florida Journal of International Law*. 22: no. 1 (2010), 145–153.

Luna, Eric G. and Douglas J. Sylvester. "Beyond Breard." *Berkeley Journal of International Law*. 17: no. 2 (1999), 147–192.

Macina, Alan. "Avena and Other Mexican Nationals: The Litmus Test for *LaGrand* and the Future of Consular Rights in the United States." *California Western International Law Journal.* 34 (2003–2004), 115–143.

Malone, Linda A. "From *Breard* to *Atkins* to *Malvo*: Legal Incompetency and Human Rights Norms on the Fringes of the Death Penalty." *William and Mary Bill of Rights Journal,* 13 (2004–2005), 363–416.

Marquart, James W, Sheldon Ekland-Olson, and Jonathan R. Sorenson. *The Rope, The Chair, and The Needle: Capital Punishment in Texas, 1923–1990.* Austin: University of Texas, 1994.

Martin, Mary K. "*Breard v. Greene.*" *Capital Defense Journal.* 11: no. 1 (1998–1999), 39–46.

———. "Breard v. Pruett." *Capital Defense Journal,* 10: no. 2 (1997–1998), 15–20.

Marvotte, Amanda. "Rick Perry Executes Justice, Texas Style." *The Guardian*, September 13, 2011.

McGinnis, John O. "*Medellin* and the Future of International Delegation." *Yale Law Journal.* 118 (2008–2009), 1712–1760.

McGuinness, Margaret E. "*Medellin v. Texas.*" *American Journal of International Law*. 102 (2008), 622–628.

Megivern, James J. *The Death Penalty: An Historical and Theological Survey.* Mahwah, NJ: Paulist Press, 1997.

Michelman, Frank I. "Integrity-Anxiety?." in *American Exceptionalism and Human Rights*, edited by Michael Ignatieff, 241–276. Princeton, NJ: Princeton University Press, 2005.

Moravcsik, Andrew. "The Paradox of U.S. Human Rights Policy." in *American Exceptionalism and Human Rights*, edited by Michael Ignatieff, 147–197. Princeton, NJ: Princeton University Press, 2005.

Murphy, John F. "*Medellin v. Texas:* Implications of the Supreme Court's Decision for the United States and the Rule of Law in International Affairs." *Suffolk Transnational Law Review*. 31 (2007–2008), 247–277.

Nath, Priya. "Case Note: *Avena*." *Capital Defense Journal.* 15 (Spring 2003), 553–557.

Newcomer, Joshua J. "Messing with Texas? Why President Bush's Memorandum Order Trumps State Criminal Procedure." *Temple Law Review*. 79 (2006), 1029–1076.

Nye, Joseph S., Jr. *The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone*. New York: Oxford University Press, 2002.

Parrish, Michael E. *The Supreme Court and Capital Punishment: Judging Death*. Washington, DC: CQ Press, 2010.

Parry, John T. "Response: Rewriting the Roberts Court's Law of Treaties." *Texas Law Review*. 88 (2009–2011), 65–77.

Perry, Michael J. *Human Rights in the Constitutional Law of the United States.* New York: Cambridge University Press, 2013.

Quigley, John. "LaGrand: A Challenge to the U.S. Judiciary." *Yale Journal of International Law*. 27 (2002), 435–440.

———. "Remarks." *American Society of International Law Proceedings.* 96 (2002), 315–317.

Randle, Judith. "The Cultural Lives of Capital Punishment in the United States." in *The Cultural Lives of Capital Punishment: Comparative Perspectives*, edited by Austin Sarat and Christian Boulanger, 92–111. New York: Oxford University Press, 2005.

Reed, Lucy and Ilmi Granoff. "Treaties in US Domestic Law: *Medellin v. Texas* in Context." *The Law and Practice of International Courts and Tribunals.* 8: no. 1 (March 2009), 1–26.

Richardson, Henry J. III. "The Execution of Angel Breard by the United States: Violating an Order of the International Court of Justice." *Temple International and Comparative Law Journal*. 12 (1998), 121–131.

Rodley, Sir Nigel. "Remarks." *American Society of International Law Proceedings*. 96 (2002), 318–319.

Rose, Richard. "Is American Public Policy Exceptional?" in *Is America Different? A New Look at American Exceptionalism*, edited by Byron E. Shafer, 187–221. Oxford: Clarendon Press, 1991.

Rudd, Jonathan L. "Consular Notification and Access: The 'International Golden Rule.'" *FBI Law Enforcement Bulletin*, January 2007, 22–32.

Ruggie, John Gerard. "American Exceptionalism, Exemptionalism, and Global Governance." in *American Exceptionalism and Human Rights*, edited by Michael Ignatieff, 304–338. Princeton, NJ: Princeton University Press, 2005.

Sarat, Austin. "Capital Punishment as a Legal, Political, and Cultural Fact: An Introduction." in *The Killing State: Capital Punishment in Law, Politics, and Culture*, edited by Austin Sarat, 3–23. New York: Oxford University Press, 1999.

Sarat, Austin, ed. *The Killing State: Capital Punishment in Law, Politics, and Culture*. New York: Oxford University Press, 1999.

Sarat, Austin and Christian Boulanger, eds. *The Cultural Lives of Capital Punishment: Comparative Perspectives*. Stanford, CA: Stanford University Press, 2005.

Schabas, William A. *The Abolition of the Death Penalty in International Law*. 2nd ed. Cambridge, UK: Cambridge University Press, 1997.

———. "The United Nations and Abolition of the Death Penalty." in *Against the Death Penalty: International Initiatives and Implications*, edited by Jon Yorke, 9–42. Surrey, England: Ashgate Press, 2008.

Schauer, Frederick. "The Exceptional First Amendment." in *American Exceptionalism and Human Rights*, edited by Michael Ignatieff, 29–56. Princeton, NJ: Princeton University Press, 2005.

Schiffman, Howard S. "*Breard* and Beyond: The Status of Consular Notification and Access under the Vienna Convention." *Cordozo Journal of International and Comparative Law*, 8 (2000), 27–60.

———. "The *LaGrand* Decision: The Evolving Legal Landscape of the Vienna Convention on Consular Relations in U.S. Death Penalty Cases." *Santa Clara Law Review*. 42 (2001–2002), 1099–1140.

Sewell, Sarah B. and Carl Kaysen, eds. *The United States and the International Criminal Court*. Lanham, MD: Rowman & Littlefield Publishers, 2000.

Sewell, Sarah B., Carl Kaysen, and Michael P. Scharf. "The United States and the International Criminal Court: An Overview." in *The United States and the International Criminal Court*, edited by Sarah B. Sewell and Carl Kaysen, 1–27. Lanham, MD: Rowman & Littlefield Publishers, 2000.

Shafer, Byron E. ed. *Is America Different? A New Look at American Exceptionalism*. Oxford: Clarendon Press, 1991.

———. "What Is the American Way? Four Themes in Search of Their Next Incarnation." in *Is America Different? A New Look at American Exceptionalism*, edited by Byron E. Shafer, 222–261. Oxford: Clarendon Press, 1991.

Shank, S. Adele and John Quigley. "Foreigners on Texas's Death Row and the Right of Access to a Consul." *St. Mary's Law Journal*. 26: no. 3 (1995), 719–753.

Sheik, Mani. "From *Breard* to *Medillin*: Supreme Court Inaction or ICJ Activism in the Field of International Law?" *California Law Review*. 94 (2006), 531–573.

Simma, Bruno and Carsten Hoppe. "The *LaGrand* Case: A Study of Many Miscommunications." in *International Law Stories*, edited by John E. Noyes, Laura A. Dickinson, and Mark W. Janis, 371–404. New York: Foundation Press, 2007.

Simma, Bruno. "Remarks." *American Society of International Law Proceedings.* 96 (2002), 310–312.

Simon, Jonathan and Christina Spaulding. "Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties." in *The Killing State: Capital Punishment in Law, Politics, and Culture,* edited by Austin Sarat, 81–113. New York: Oxford University Press, 1999.

Sklar, Rebecca R. "Executing Equity: The Broad Judicial Discretion to Stay the Execution of Death Sentences." *Hofstra Law Review*. 40 (2011–2012), 770–809.

Slaughter, Ann-Marie. "Court to Court." *American Journal of International Law*. 92 (1998), 708–712.

Spiro, Peter J. "The New Sovereigntists: American Exceptionalism and Its False Prophets." *Foreign Affairs*. 79 (2000), 9–17.

———. "Sovereigntism's Twilight." *Berkeley Journal of International Law*. 31: no. 1 (2013), 307–322.

———. "The States and International Human Rights." *Fordham Law Review,* 66 (1997–1998), 567–596.

Stephan, Paul B. "The Limits of Change: International Human Rights under the Obama Administration." *Fordham International Law Journal,* 35 (2011–2012), 488–509.

Stephens, Tim. "The LaGrand Case (Federal Republic of Germany v. United States of America): The Rights to Information on Consular Assistance under the Vienna Convention on Consular Relations: A Right for What Purpose?" *Melborne Journal of International Law*. 3: no. 1 (May 2002), 143–164.

Stewart, David P. "Introductory Note to the Supreme Court: *Garcia v. Texas*." *International Legal Materials*. 51 (2012), 44–48.

Streiker, Carol S. "Capital Punishment and American Exceptionalism." in *American Exceptionalism and Human Rights*, edited by Michael Ignatieff, 57–89. Princeton, NJ: Princeton University Press, 2005.

Sunstein, Cass R. "Why Does the American Constitution Lack Social and Economic Guarantees." in *American Exceptionalism and Human Rights*,

edited by Michael Ignatieff, 90–110. Princeton, NJ: Princeton University Press, 2005.

Tams, Christian J. "Recognizing Guarantees and Assurances of Non-Repetition: LaGrand and the Law of State Responsibility." *Yale Journal of International Law*. 27 (2002), 441–444.

Thornberry, Chad. "Federalism vs. Foreign Affairs: How the United States Can Administer Article 36 or the Vienna Convention on Consular Relations Within the States." *McGeorge Law Review*. 31 (1999–2000), 107–145.

Timmons, Patrick. "Seed of Abolition: Experience and Culture in the Desire to End Capital Punishment in Mexico." in *The Cultural Lives of Capital Punishment: Comparative Perspectives*, edited by Austin Sarat and Christian Boulanger, 69–91. Stanford, CA: Stanford University Press, 2005.

Tinta, Monica Firia. "Due Process and the Right to Life in the Context of the Vienna Convention on Consular Rights: Arguing the *LaGrand* Case." *European Journal of International Law*. 12: no. 2 (2001), 363–366.

Torpey, John. "The Problem of American Exceptionalism Revisited." *Journal of Classical Sociology*. 9 (2009), 143–168.

Trainer, Kelly. "The Vienna Convention on Consular Relations in the United States Courts." *Transnational Law*. 13 (2000), 227–271.

Tranel, Adrienne M. "The Ruling of the International Court of Justice in *Avena and Other Mexican Nationals*: Enforcing the Right to Consular Assistance in U.S. Jurisprudence." *American University International Law Review*. 20 (2004–2005), 403–465.

Tushnet, Mark. *A Court Divided: The Rehnquist Court and the Future of Constitutional Law*. New York: W. W. Norton, 2005.

Uribe, Victor M. "Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice." *Houston Journal of International Law*. 19 (1996–1997), 375–424.

Van der Waerden, Christopher. "Death and Diplomacy: *Paraguay v. United States* and the Vienna Convention on Consular Relations." *Wayne Law Journal*, 45 (1999–2000), 1631–1664.

Vandiver, Margaret. "'An Apology Does Not Assist the Accused': Foreign Nationals and the Death Penalty in the United States." *Justice Professional* 12: no. 2 (September 1999), 223–246.

Vazquez, Carlos Manual. "Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures." *American Journal of International Law*. 92 (1998), 683–691.

———. "Treaties as Law of the Land: The Supremecy Clause and the Judicial Enforcement of Treaties." *Harvard Law Review*. 122 (2008–2009), 599–695.

Walt, Stephen M. "The Myth of American Exceptionalism." *World News Daily Information Clearing House*. www.informationclearinghouse.info, October 12, 2011.

Waring, Nancy. "Death in Texas: Sandra Babcock Pioneers Use of International Law in Capital Punishment Appeal." *Harvard Law Bulletin* (Spring 2000).

Warren, Mark. "Bordering on Discord: The Impact of the Death Penalty on U.S.-Canadian Relations." *Journal of the Institute of Justice and International Studies.* 6 (2006), 79–98.

Weiland, Sandra J. "The Vienna Convention on Consular Relations: Persuasive Force or Binding Law? *Denver Journal of International Law and Policy.* 33 (2004–2005), 675–687.

Whitman, James Q. *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe.* New York: Oxford, 2003.

Wildavsky, Aaron. "Resolved, that Individualism and Egalitarianism be Made Compatible in America: Political-Cultural Roots of Exceptionalism," in *Is America Different? A New Look at American Exceptionalism*, edited by Byron E. Shafer, 116–137. Oxford: Clarendon Press, 1991.

Yorke, Jon, ed. *Against the Death Penalty: International Initiatives and Implications.* Surrey, England: Ashgate Press, 2008.

Zimring, Franklin E. *The Contradictions of American Capital Punishment.* New York: Oxford University Press, 2003.

———. "The Executioner's Dissonant Song: On Capital Punishment and American Legal Values," in *The Killing State: Capital Punishment in Law, Politics, and Culture,* edited by Austin Sarat, 137–147. New York: Oxford University Press, 1999.

———. "Too Sovereign But Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations?" *Harvard Law Review.* 116 (2002–2003), 2654–2677.

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