

IGNORING THE OBLIGATION TO PROVIDE CONSULAR  
NOTIFICATION: HOW THIS NATION’S APPROACH TO  
TREATIES DEPRIVES CRIMINAL DEFENDANTS OF  
PROCEDURAL SAFEGUARDS

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I. INTRODUCTION

The United States has a nasty habit of ignoring its treaty obligations. As many would have us believe, this habit leaves our nation vulnerable to retribution. And it only makes sense, right? In contract, in life, and in

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international law, the basic principle is that “a deal is a deal,”<sup>1</sup> and when you give your word, it is foul play to go back on it. Yet the current state of our nation’s law sets us up, time and again, to do just that—make and break promises. Texas has certainly done its part in goading the international community. Three years ago, Texas outraged Mexico, and perhaps the world, by executing José Medellín.<sup>2</sup> Now, just a few years later, Texas has done it again with Humberto Leal Garcia, Jr.<sup>3</sup> But is it really problematic to punish a man for an open and shut case of horrendous brutality? Is Mexico even that concerned about this nation’s *hubris*?

Although the international repercussions and political problems arising from the United States’ approach to treaties have been widely addressed by legal scholars, what has been given less attention is the impact of this convoluted area of the law on criminal defendants. This comment will attempt to illustrate, through the *Garcia* case, how disregarding this nation’s obligations under the Vienna Convention on Consular Relations (VCCR) violates criminal defendants’ procedural rights. To set up this discussion, the comment will give a brief overview of how treaties are currently enforced in the United States. It will then turn to the Court’s holding in *Medellín v. Texas* to reveal how that case informs the holding in *Garcia v. Texas*. Then, this comment will examine the *Garcia* opinion itself and consider the consequences of that opinion on individual criminal defendants.

The comment will argue that the manner in which the United States’ judiciary approaches treaties is harmful not only to our relations with other nations, but also to the procedural fairness of our criminal system. It will conclude by suggesting that courts should take a good faith approach to treaty interpretation and be more willing to uphold the spirit and purpose of each treaty. It will also argue that the distinction between self-executing and non-self-executing treaties leads to inequities for criminal defendants. Specific to the VCCR, the comment will suggest that once a criminal defendant meets his initial burden of showing that he did not know about his right to consular notification and would have availed himself of it had he known, the burden should shift to the prosecution to prove that the error was harmless. In the event that the prosecution fails to prove harmless error, courts should provide more comprehensive remedies. And finally, in the absence of a more effective judicial approach, prosecutors, public

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1. *Evans v. Chicago*, 10 F.3d 474, 483 (7th Cir. 1993) (Cudahy, C.J., dissenting) (explicating the customary international law principle of *pacta sunt servanda*).

2. Allan Turner & Rosanna Ruiz, *Medellín Executed for Rape, Murder of Houston Teens*, HOUSTON CHRONICLE, Aug. 5, 2008, available at <http://www.chron.com/news/houston-texas/article/Medellin-executed-for-rape-murder-of-Houston-1770696.php>.

3. Adam Liptak, *Mexican Citizen is Executed as Justices Refuse to Step In*, N. Y. TIMES, July 7, 2011, [http://www.nytimes.com/2011/07/08/us/08execute.html?\\_r=2&partner=rss&emc=rss](http://www.nytimes.com/2011/07/08/us/08execute.html?_r=2&partner=rss&emc=rss).

defenders, and court appointed defense counsel should at least be trained in international law as it relates to the rights of criminal defendants.

## II. THE CONTEXT OF THE *GARCIA V. TEXAS* DECISION

To set up the discussion of treaty obligations, it will be helpful to summarize international norms and domestic law concerning the enforcement of treaties. As applied in the international context and as codified in the Vienna Convention on the Law of Treaties (VCLT), the principle of *pacta sunt servanda* states that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>4</sup> The treaty goes on to state that a country “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>5</sup> Although the United States is not a party to the VCLT, United States courts have recognized that the VCLT is the codification of customary international law governing international agreements and is an authoritative guide that the United States must follow.<sup>6</sup>

Indeed, these principles are echoed by our own judicial decisions. For example, in 1942, the Supreme Court held in *United States v. Pink* that “state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty.”<sup>7</sup> The Court reasoned that the power of a state to refuse to uphold a treaty based on policy contrary to that of the forum state “must give way before the superior Federal policy evidenced by a treaty.”<sup>8</sup> The Court found that upholding the law of the state “would collide with and subtract from the Federal policy,” would impair the friendly relations the treaty sought to establish, and would preserve “a source of friction” the treaty intended to remove.<sup>9</sup> Recognizing the importance of these considerations, the Court acknowledged the delicacy of international relations.<sup>10</sup> Warning of the serious consequences which might occur if state action were allowed to “defeat” or “alter” foreign policy,<sup>11</sup> the Court avowed that “power over external affairs is not shared by the States; it is

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4. Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331.

5. *Id.* at art. 27.

6. *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2000). *See also* *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 156 (2004) (recognizing the respect due to customary international law principles and cautioning “courts to assume that legislators take account of other nations’ legitimate sovereign interests when writing American laws”); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (“The ‘law of nations,’ or customary international law, includes limitations on a nation’s exercise of its jurisdiction to prescribe . . . Congress is generally presumed not to have exceeded those customary international law limits.”).

7. *United States v. Pink*, 315 U.S. 203, 230-31 (1942).

8. *Id.* at 231.

9. *Id.*

10. *Id.*

11. *Id.*

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vested in the national government exclusively.”<sup>12</sup> Finally, the Court emphatically declared that “[i]n respect of all international negotiations and compacts . . . state lines disappear.”<sup>13</sup>

While *Pink* dealt with a treaty addressing economic affairs, the Court’s reasoning is even more persuasive in the context of criminal law and the possible international repercussions of a death penalty sentence imposed on a foreign national in violation of procedural safeguards established by a multilateral treaty.

Further, the Supreme Court has also recognized a strong presumption in favor of enforcing each individual provision of a treaty to the maximum extent possible.<sup>14</sup> A striking example of this presumption is elucidated in *Clark v. Allen*, a case decided in the midst of the United States’ conflict with Germany during World War II.<sup>15</sup> In that case, despite ongoing hostilities, the Court found that any provision of the treaty between the two nations that was not incompatible with a state of war should be upheld, regardless of whether the rest of the treaty stood or fell.<sup>16</sup>

The reasoning of *Clark* should hold more sway with courts today when determinations are made about whether and how to uphold, enforce, and provide remedies for violations of treaty obligations. In *Clark*, the Court recognized that even in the face of war between the signatory nations, compelling policy considerations support upholding treaty provisions.<sup>17</sup> Scholars and the Supreme Court alike have recognized that the United States must protect relations with foreign governments, demonstrate commitment to international law and commerce, and be able to count on the reciprocal observance of treaty provisions.<sup>18</sup> With these policy considerations as a foundation, this comment will now turn to a discussion of how treaties are interpreted in the United States.

*a. The Self Executing/Non-Self-Executing Distinction and Why It Matters*

The analysis of a treaty is a complex matter. Existing precedent establishes a distinction between self-executing and non-self-executing treaties for purposes of domestic enforceability.<sup>19</sup> That is to say, if a treaty is self-

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12. *Pink*, 315 U.S. at 233.

13. *Id.*

14. *Clark v. Allen*, 331 U.S. 503 (1947).

15. *Id.*

16. *Id.* at 517.

17. *Id.*

18. *Id.* See also Carlos Manuel Vazquez, *Treaties As Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008); Leonie W. Huang, *Which Treaties Reign Supreme? The Dormant Supremacy Clause Effect of Implemented Non-Self-Executing Treaties*, 79 FORDHAM L. REV. 2211 (2011).

19. *Medellín v. Texas*, 552 U.S. 491 (2008) (citing *Foster v. Neilson*, 27 U.S. 253 (1829)).

executing, it is immediately binding on United States courts.<sup>20</sup> However, if a treaty is non-self-executing, it is not binding and therefore is not domestically enforceable.<sup>21</sup> A self-executing treaty is domestically enforceable because it “is placed on the same footing” with, and gives rise to, the same obligations as an act of the legislature.<sup>22</sup> A self-executing treaty and an act of Congress occupy an equal position as the supreme law of the land and neither can have a superior effect over the other.<sup>23</sup> Indeed, a self-executing treaty is immediately enforceable in domestic courts as soon as it is ratified.<sup>24</sup>

In order to be considered self-executing, a treaty must contain stipulations that “require no legislation to make them operative.”<sup>25</sup> The Supreme Court has stated that mandatory language is immediately binding upon domestic courts, whereas permissive language is “a commitment . . . to take future action through [the] political branches to comply” with the treaty.<sup>26</sup> A significant problem with this approach is that it assumes that the Executive Branch has unlimited power in drafting international treaties. Such an assumption is nonsensical, given that treaties are pacts between numerous nations and necessarily embody compromises between a myriad of possible choices of wording.

In cases where a treaty is found to be non-self-executing, the lack of legislation to implement the treaty—termed “implementing legislation”—means that the provisions of the treaty are unenforceable domestically.<sup>27</sup>

Because of the importance of the distinction between self-executing and non-self-executing, the Court has developed a complicated and nuanced process to determine whether a treaty is self-executing. This process leads to substantial delay. First, the Judiciary must determine whether each individual provision of the treaty is self-executing or not.<sup>28</sup> Then, if the Judiciary has found that the treaty, or a portion of it, is non-self-executing, the Legislature must act before the treaty can be domestically enforced.<sup>29</sup>

The complexity does not end with the self-executing/non-self-executing distinction. Under current law, for a criminal defendant like Garcia to bring a successful claim on the basis of a notification violation, the court must find all of the following things: (1) that the VCCR is self-executing; (2) that the VCCR creates an individual right which confers

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20. *Medellín*, 552 U.S. at 491.

21. *Id.* at 491.

22. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

23. *Whitney*, 124 U.S. at 194.

24. *Medellín*, 552 U.S. at 491.

25. *Whitney*, 124 U.S. at 194.

26. *Medellín*, 552 U.S. at 507.

27. *Lidas, Inc. v. United States*, 238 F.3d 1076 (9th Cir. 2001).

28. *Air France v. Saks*, 470 U.S. 392, 396-397 (1985).

29. *Medellín*, 552 U.S. at 491.

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standing on a criminal defendant to bring suit; (3) that the VCCR explicitly details a remedy for a violation of this individual right;<sup>30</sup> and (4) that the claim is not barred by state procedural default rules.<sup>31</sup>

The following discussion centers on the Vienna Convention on Consular Relations and the rights arising from its notification provisions. It then turns to the conclusions reached by the International Court of Justice (ICJ) in the *Avena* decision and the Supreme Court's analysis in *Medellín v. Texas* of the United States' obligations to comply with that opinion.

The self-executing distinction comes into play in the *Garcia* case because, although the VCCR is a wholly self-executing treaty,<sup>32</sup> and the notification provision arguably does give rise to an individual right,<sup>33</sup> courts have consistently held that it fails the third prong of the test, in that it provides no personal remedy to a criminal defendant.<sup>34</sup> For these reasons, both *Medellín* and *Garcia* were forced to rely on the ICJ's judgment in *Avena*, which purported to provide such an individual remedy.<sup>35</sup> Accordingly, the analysis in both *Medellín* and *Garcia* turns on whether the judgment of the ICJ is domestically enforceable since that court's jurisdiction arises out of treaties such as the Optional Protocol, ICJ Statute, and U.N. Charter, all of which are deemed non-self-executing treaties. In both cases, the Supreme Court proclaimed that there could be no domestic remedy for the failure to provide consular notification.

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30. See, e.g., *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (2006) (noting that neither the VCCR nor the Court's precedents permit suppression of defendant's statements to the police).

31. See, e.g., *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam) (refusing to stay the execution to allow the International Court of Justice to consider the case where the defendant has procedurally defaulted on his VCCR claim).

32. Vienna Convention on Consular Relations, S. Exec. Doc. No. 91-9, at 5 (1969) (statement of J. Edward Lyster, Deputy Legal Adviser, State Dep't). Moreover, even today, the State Department's official policy on consular notification and access provides that: "The obligations of consular notification and access are not codified in any federal statute. Implementing legislation is not necessary (and the VCCR and bilateral agreements are thus 'self-executing') because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers." See also *Medellín*, 552 U.S. at 531 (Stevens, J., concurring in judgment) ("[T]he Vienna Convention on Consular Relations 'is itself self-executing and judicially enforceable.'").

33. *Breard*, 523 U.S. 371. See also *United States v. Minjares-Alvarez*, 264 F.3d 980 (10th Cir. 2001); *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000); Sital Kalantry, *The Intent to Benefit: Individually Enforceable Rights Under International Treaties*, 44 STAN. J. INT'L L. 63, 84-91 (2008) (arguing that individually enforceable rights could exist under treaties because treaties are akin to contracts and therefore could provide for such rights under the intent-to-benefit approach).

34. *Sanchez-Llamas*, 548 U.S. at 341-42 (concluding that *Sanchez* and *Bustillo* were not entitled to any relief); *United States v. Li*, 206 F.3d 56, 61-66 (1st Cir. 2000) (en banc) (concluding that "irrespective of whether [the treaty] create[d] individual rights," the requested remedy was not available).

35. Case Concerning *Avena* and Other Mexican Nationals (Mex.-U.S.), 2004 I.C.J. 12 (Judgment of Mar. 31).

*b. The Vienna Convention on Consular Relations (VCCR)*

The Vienna Convention on Consular Relations (VCCR), codified in 1963, addresses an array of important consular relations issues and is widely considered to be a codification of customary international law to which all nations, not merely the parties, should conform.<sup>36</sup>

The consular notification provision of the VCCR seeks to ensure that foreign nationals charged with a violation of domestic law obtain access to an official representative of their native country.<sup>37</sup> This representative is charged with the duty of explaining the national's rights to him as a criminal defendant in the United States.<sup>38</sup> Some of the most notable rights of which a defendant should be notified are the right to legal counsel and the right to remain silent.<sup>39</sup>

However, domestic courts have held that violating the right to consular notification provided by the VCCR does not implicate fundamental constitutional rights.<sup>40</sup> Moreover, in order to obtain any relief at all, a foreign national must prove that he suffered prejudice as a result of the violation of his right to consular notification.<sup>41</sup>

Federal regulations have been enacted to implement the notification requirement of the VCCR.<sup>42</sup> The relevant federal provision states: "In every case in which a foreign national is arrested[,] the arresting officer shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given."<sup>43</sup> This law requires United States Attorneys to notify the appropriate consul unless the foreign national requests that no notification be given.<sup>44</sup>

Despite the simple mandate of this federal law, it is not very effective for foreign national defendants. That is because currently there is no practical remedy for a violation of a defendant's right to consular notification.<sup>45</sup> Courts have consistently declined to suppress a foreign national's statements or to dismiss a case against a foreign national based on a viola-

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36. Yury A. Kolesnikov, Comment, *Meddling with the Vienna Convention on Consular Relations: The Dilemma and Proposed Statutory Solutions*, 40 MCGEORGE L. REV. 179.

37. 175 A.L.R. Fed. 243 (2002).

38. *Id.*

39. *Id.* See also U.S. v. Tapia-Mendoza, 41 F. Supp. 2d 1250 (D. Utah 1999).

40. See Polanco v. U.S., 2000 WL 1072303, \*6 (S.D.N.Y. 2000) ("[A] violation of the Vienna Convention's consular notice provision does not constitute a constitutional violation or a fundamental defect in the conduct of [defendant's] trial."); See also U.S. v. Bin Laden, 132 F. Supp. 2d 168 (S.D.N.Y. 2001); U.S. v. Rodrigues, 68 F. Supp. 2d 178 (E.D.N.Y. 1999); Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997).

41. See, e.g., U.S. v. Hongla-Yamche, 55 F. Supp. 2d 74 (D. Mass. 1999); U.S. v. Kevin, 1999 WL 194749 (S.D.N.Y. 1999); Fauldner v. Johnson, 81 F.3d 515 (5th Cir. 1996); U.S. v. Chanthadara, 230 F.3d 1237 (10th Cir. 2000).

42. 28 C.F.R. § 50.5(a)(1).

43. *Id.*

44. *Id.*

45. 175 A.L.R. Fed. 243 (2002).

tion of the VCCR.<sup>46</sup> Indeed, the State Department of the United States has even asserted that the remedies for failure to notify a consul are limited to diplomatic and political remedies existing under international law.<sup>47</sup> In short, under current law, a foreign national whose VCCR rights are trampled is, for all practical intents and purposes, out of luck.

*c. The Avena Decision and The Foundational Precedent:  
Medellín v. Texas*

The International Court of Justice (ICJ), established by the United Nations Charter to adjudicate disputes between member states, is “the principal judicial organ of the United Nations.”<sup>48</sup> In 2004, the ICJ issued a judgment on a claim brought against the United States by Mexico.<sup>49</sup> The tribunal determined that the United States had violated the provisions of the Vienna Convention by failing to notify the Mexican consulate of criminal charges against fifty-one Mexican nationals.<sup>50</sup> As a result of these violations, the ICJ held that these nationals were entitled to reconsideration and review of their convictions obtained in state courts.<sup>51</sup> Such reconsideration was to take the form of a hearing to decide whether the violation amounted to harmless error.<sup>52</sup> A hearing of this nature would have been in violation of state and federal procedural rules. However, in response to the *Avena* decision, President George W. Bush issued a Memorandum to the Attorney General which commanded that state courts abide by the decision in order to “discharge [the nation’s] international obligations.”<sup>53</sup>

Petitioner José Medellín, who was convicted of murder and sentenced in Texas state court, was one of the fifty-one named Mexican nationals in the *Avena* decision.<sup>54</sup> He filed an application for writ of habeas corpus in

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46. *Id.* See also *Li*, 206 F.3d 56; *U.S. v. Raven*, 103 F. Supp. 2d 38 (D. Mass. 2000); *U.S. v. Page*, 232 F.3d 536 (6th Cir. 2000). *But cf.* *U.S. v. Juarez-Yepez*, 202 F.3d 279 (9th Cir. 1999) (unpublished table disposition) (holding that evidence obtained in violation of the VCCR may be suppressed where defendant shows that: (1) he did not know of his right to consult with consular officials; (2) that he would have availed himself of the right if he had known of it; and (3) that it is likely that contact would have assisted the defendant).

47. See *Rodriguez*, 68 F. Supp. 2d at 186 (“According to the State Department, all signatory countries remedy breach of [the] notification provision through traditional diplomatic, not judicial, channels.”); *Lombera-Camorlinga*, 206 F.3d at 887 (“The State Department indicates that it has historically enforced the Vienna Convention itself, investigating reports of violations and apologizing to foreign governments and working with domestic law enforcement to prevent future violations when necessary.”).

48. United Nations Charter, Art. 92, 59 Stat. 1051, T.S. No. 993 (1945).

49. Case Concerning *Avena* and Other Mexican Nationals (Mex.-U.S.), 2004 I.C.J. 12 (Judgment of Mar. 31).

50. *Id.*

51. *Id.*

52. *Garcia v. Texas*, 131 S. Ct. 2866, 2869 (U.S. 2011) (Breyer, J. dissenting).

53. *Memorandum for the Attorney General* (Feb. 28, 2005), available at [http://brownwelsh.com/Archive/2005-03-10\\_Avena\\_compliance.pdf](http://brownwelsh.com/Archive/2005-03-10_Avena_compliance.pdf).

54. *Medellín*, 552 U.S. 491.

state court in reliance on the ICJ's decision and the President's Memorandum.<sup>55</sup> The Supreme Court granted certiorari to determine whether the ICJ's judgment constituted directly enforceable domestic law and whether the President's Memorandum independently required the states to review the claims of the named nationals.<sup>56</sup> The Court noted that at the time of the *Avena* judgment, the United States was voluntarily subject to the specific jurisdiction of the ICJ with regard to claims arising under the Vienna Convention.<sup>57</sup>

Medellín argued that the ICJ's judgment was binding on both state and federal courts by virtue of the Supremacy Clause.<sup>58</sup> The Court relied heavily on its decision in *Foster v. Neilson* to distinguish self-executing treaties from non-self-executing treaties.<sup>59</sup> Sweepingly categorizing a treaty as "primarily a compact between independent nations,"<sup>60</sup> the Court also quoted Alexander Hamilton, contrasting binding laws with "mere treat[ies], dependent on the good faith of the parties."<sup>61</sup> Emphasizing federalism concerns, the Court reiterated that "where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own."<sup>62</sup>

The Court likewise dismissed the argument that the President's Memorandum obliged state courts to comply with the judgment, stating: "the President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them."<sup>63</sup>

The Court vested sole responsibility for enforcement in Congress, and implicitly chided the Legislature for its failure to act.<sup>64</sup> Ironically, given the majority's adherence to an approach that renders treaty provisions unenforceable based on the nuances of a single word, phrase, or omission, the Court reprimanded the dissenting opinion's approach as creating too much uncertainty.<sup>65</sup> The Court chastened the dissent, saying "[i]t is hard to believe that the United States would enter into treaties that are sometimes enforceable and sometimes not. Such a treaty would be the equivalent of writing a blank check to the judiciary."<sup>66</sup>

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55. *Id.* (citing *Ex parte Medellín*, 223 S.W.3d 315, 322-323 (Tex. Crim. App. 2006)).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* (citing *Foster v. Neilson*, 27 U.S. 253, 315 (1829)).

60. *Medellín*, 552 U.S. at 499.

61. *Id.* (quoting *The Federalist* No. 33, p. 207 (J. Cooke ed. 1961 (A. Hamilton))).

62. *Id.* (quoting *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 347 (2006)).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Medellín*, 552 U.S. at 515.

Unfortunately, this seems to be exactly the result rendered by the current approach to treaty interpretation. Courts across the nation are exercising judicial discretion to disregard international obligations and individual rights conferred by these commitments. The very result the Court seeks to avoid is indeed at hand. Against this backdrop, the discussion will now turn to the *Garcia v. Texas* opinion, the Court's most recent statement on the VCCR, which is as brief as it is dismissive of the recourse defendant Garcia sought.

### III. THE *GARCIA V. TEXAS* OPINION

#### *a. The Facts*

On the final night of sixteen-year-old Adrea Saucedá's life, she was seen leaving a party in San Antonio, Texas in twenty-three year old Garcia Leal's car.<sup>67</sup> She was visibly intoxicated, but conscious.<sup>68</sup> Approximately thirty minutes later, Garcia's brother arrived at the party in hysterics. He screamed, "What the hell happened!"<sup>69</sup> and yelled that Garcia had come home with blood on him claiming that he had killed a girl.<sup>70</sup> When some of the revelers went looking for the girl, they found her naked body lying face up in a dirt road near the site of the party.<sup>71</sup> Her head had been bashed in and was bleeding.<sup>72</sup> When police arrived on the scene, they noted an asphalt rock twice the size of the victim's head lying partially on her left arm.<sup>73</sup> A huge hole extended from the corner of the girl's right eye to the center of her head.<sup>74</sup> A broken stick with a screw at the end of it protruded from her vagina.<sup>75</sup>

When the police questioned Garcia about the incident, he gave two voluntary and contradictory statements.<sup>76</sup> First, he stated that the victim began hitting him while he was driving which caused him to hit a curb.<sup>77</sup> He said that he tried to calm her down, but she leapt from the car and ran away.<sup>78</sup> He claimed to have waited for her for about ten to fifteen minutes before driving home.<sup>79</sup> After giving this statement, he was informed of his

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67. Leal v. Dretke, 428 F.3d 543, 545 (5th Cir. 2005).

68. *Id.*

69. *Id.* at 546.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Leal*, 428 F.3d at 546.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Leal*, 428 F.3d at 546.

brother's contradictory statement.<sup>80</sup> He then changed his story, claiming that he followed the victim when she ran away.<sup>81</sup> He said that she attacked him, whereupon he pushed her and she fell to the ground.<sup>82</sup> Garcia claimed that the fall knocked her unconscious and he tried to wake her, but became scared when he saw bubbles coming out of her nose.<sup>83</sup> He said he went home and told family members what had happened, saying that it was just an accident, and then he began to pray beside his mother's bed.<sup>84</sup>

*b. The Procedural History*

In July of 1995, Petitioner Garcia was convicted of capital murder and sentenced to death.<sup>85</sup> The Texas Court of Criminal Appeals affirmed the conviction and sentence in an unpublished opinion.<sup>86</sup> The United States Supreme Court denied Garcia's petition for writ of certiorari following the affirmance.<sup>87</sup> Garcia then launched a series of unsuccessful state habeas petitions.<sup>88</sup> He subsequently turned to the federal courts for habeas relief, where he was also denied.<sup>89</sup> During this time, Garcia was named as one of the fifty-one Mexican nationals in the *Avena* case, where the ICJ found that the United States had violated its VCCR obligations to Garcia and the fifty other Mexican nationals named in the complaint.<sup>90</sup>

While Garcia's appeal was pending on his second federal habeas petition, the Supreme Court decided *Medellín v. Texas*, holding that neither the *Avena* decision nor the President's Memorandum constituted "binding domestic law capable of preempting state procedural requirements."<sup>91</sup> In the wake of this decision, Garcia continued his appeals, arguing that under the Fifth and Fourteenth Amendments, he possessed "a due process right to remain alive until the proposed *Avena* legislation becomes law."<sup>92</sup> The Fifth Circuit disagreed and denied his third habeas petition.<sup>93</sup>

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80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. The trial court's opinion is unpublished; however, the graphic facts of the kidnapping, sexual assault, and homicide underlying the conviction are discussed extensively in several opinions. *See Leal*, 428 F.3d at 545-47; *Leal v. Dretke*, 2004 WL 2603736, at \*16 (W.D. Tex. 2004).

86. *Leal v. State*, No. 72,210 (Tex. Crim. App. 1998).

87. *Leal v. Texas*, 525 U.S. 1148 (1999).

88. *See Ex parte Leal*, App. No. WR-41, 743-01 (Tex. Crim. App. 1999).

89. *See Leal*, 2004 WL 2603736, at \*834.

90. *Id.* at \*90, 106.

91. *Garcia v. Thaler*, 2011 WL 2582880, slip. op. at 2 (referencing *Medellín*, 552 U.S. 491 (2008)).

92. *Thaler*, slip op. at 3.

93. *Id.* (finding that *Medellín* established conclusively that neither *Avena* nor the President's Memorandum could "require states the set aside procedural rules and limitations in favor of hearing successive habeas corpus petitions."). *See also Garcia*, 2011 WL 2479912, at \*16 (explaining that the mere proposal of legislation that could create a new right did not alter "the legal landscape in which

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On the criminal side of the case, the Texas Court of Criminal Appeals denied both petitioner's application for post-conviction relief and his motion for stay of execution.<sup>94</sup> Petitioner then filed for writ of certiorari and stay of execution to the Supreme Court of the United States.<sup>95</sup> The Court issued a 5-4 per curiam opinion rejecting Garcia's request for a stay of execution. Justice Breyer filed a dissenting opinion, in which Justices Ginsburg, Sotomayor, and Kagan joined.<sup>96</sup>

*c. The Per Curiam Opinion*

The Court tipped its hand with the first sentence of the opinion: "Petitioner Humberto Leal Garcia is a Mexican national who has lived in the United States since before the age of two."<sup>97</sup> From the outset, the Court made clear that it found no prejudice in the denial of Leal's consular notification rights under the treaty.<sup>98</sup> Relying on *Medellín v. Texas*, the Court ruled that neither the *Avena* decision nor the President's Memorandum constituted directly enforceable domestic law.<sup>99</sup> Both Garcia and the United States asked for a stay, but advanced two separate theories in support of the request.<sup>100</sup>

Garcia proceeded under the theory that the Due Process Clause forbade executing him while legislation implementing the *Avena* decision was under consideration.<sup>101</sup> The Court rejected this argument summarily, holding that "[t]he Due Process Clause does not prohibit a State from carrying out a lawful judgment in light of unenacted legislation that might someday authorize a collateral attack on that judgment."<sup>102</sup>

The United States pursued a slightly more convoluted theory, asking for the stay on the basis of the Court's "future jurisdiction to review the judgment in a proceeding' under this yet-to-be enacted legislation."<sup>103</sup> The Court expressed doubt that it could ever be appropriate to stay a lower court decision based upon speculative, unenacted legislation.<sup>104</sup> With a punchy one-liner, the Court dismissed the United States' argument, saying

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[the court] must evaluate the merits" of Leal's petition).

94. *Ex parte Leal*, 2011 WL 2581917 (Tex. Crim. App. 2011).

95. *Garcia v. Texas*, 131 S. Ct. 2866 (2011). Although the Fifth Circuit denied petitioner's request for a certificate of appealability (COA), the court granted him leave to proceed in forma pauperis (IFP).

96. *Id.* at 2868 (Breyer, J., dissenting).

97. *Id.* at 2867.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Garcia*, 131 S. Ct. at 2867.

102. *Id.*

103. *Id.* (quoting Brief for United States as *Amicus Curiae* 2-3, n.1).

104. *Id.*

“[o]ur task is to rule on what the law is, not what it might eventually be.”<sup>105</sup>

*d. The Dissenting Opinion*

The dissenting opinion, authored by Justice Breyer, with whom Justices Ginsburg, Sotomayor, and Kagan joined, put forth the typical argument for upholding treaties: international relations implications.<sup>106</sup> The dissent quoted the brief for the Solicitor General, warning that the execution of Garcia “would cause irreparable harm [to] foreign-policy interests of the highest order”<sup>107</sup> and would lead to “serious repercussions for United States foreign relations, law-enforcement and other cooperation with Mexico, and the ability of American citizens traveling abroad to have the benefits of consular assistance in the event of detention.”<sup>108</sup>

The opinion also noted that the remedy put forth by the ICJ is the proper procedural response to a notification violation.<sup>109</sup> The dissent implicitly approved the ICJ’s judgment that the defendant should be granted a separate hearing to determine whether the notification violation “amounted in effect to harmless error.”<sup>110</sup> The dissent went on to argue that the President’s views on matters of foreign affairs should be given deference by the Court, and that the Court has authority to issue a stay pending future legislative action under its “potential jurisdiction”<sup>111</sup> and the All Writs Act.<sup>112</sup>

IV. PROPOSED SOLUTIONS

While it would be impossible to deny the atrocities committed against Adrea Saucedo, or the overwhelming evidence pointing to Garcia as her murderer, the horror of the crime cannot eviscerate the legal implications of this case or the necessity of procedural safeguards for all criminal defendants. Although the outcome in this case likely would have been the same regardless of the Court’s analysis of the treaties involved, the outcome of other cases past, present, and future are not so certain. The notification requirement applies equally to all foreign nationals who are arrested, be the offense DUI, possession of narcotics, illegal entry, or mur-

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105. *Id.*

106. *Id.* at 2869 (Breyer, J., dissenting).

107. *Garcia*, 131 S. Ct. at 2869 (Breyer, J., dissenting) (quoting Brief for the United States as *Amicus Curiae* 1, 11 [hereinafter U.S. Brief]).

108. *Id.* (quoting U.S. Brief at 12).

109. *Id.*

110. *Id.* (citing *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 61-64).

111. *Id.* (citing *Fed. Trade Comm’n v. Dean Foods Co.*, 384 U.S. 597, 603 (1966)).

112. *Id.* (citing All Writs Act, 28 U.S.C. § 1651).

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der.<sup>113</sup> While not all of these defendants will be equally guilty of the crime with which they are charged, they will all be equally incapable of obtaining a remedy for the violation of their right to consular notification.

*a. Abolish the Distinction Between Self-Executing and Non-Self-Executing Treaties*

The Court's opinion in *Garcia* recognized the problems inherent in a judicial approach proceeding on the basis of law that might exist in the future but is not in current effect. While the opinion was well decided on the basis of the law as it stands, and the dissent's open-ended approach is clearly problematic in that it calls for a significant level of judicial activism, the dilemma presented by this case would never have arisen if the Court adhered to a straightforward, good faith approach to treaty interpretation.

Many prominent legal scholars have addressed the problems that arise from creating an artificial distinction between self-executing and non-self-executing treaties.<sup>114</sup> Indeed, there is strong support for the argument that the Supremacy Clause requires states to respect and enforce all international treaties and to treat them equally as immediately binding domestic law.<sup>115</sup> Although, undoubtedly, there are valid concerns and legal arguments on both sides of the issue, the adverse effect of the distinction as applied to this particular treaty and to this category of criminal defendants weighs in favor of abolishment. The *Garcia* case clearly illustrates the inherent unreliability of this method and the inequitable results produced by such a complex and exacting system of interpretation.

*b. The Prejudice Test: Shift the Burden to the Prosecution to Prove Harmless Error*

By signing and ratifying the VCCR, this nation's leaders recognized that the criminal prosecution of foreign nationals implicated procedural concerns. To address these concerns, they pledged to provide notice to the foreign consuls of all signatory nations whenever one of these nation's citizens was charged with a crime. The purpose of this notice was to give the consul an opportunity to provide legal counsel possessing specific

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113. See Nathan Koppel, *Serbia Intervenes to Try to Block Nevada Execution*, WALL STREET J., (August 12, 2011, 9:59 AM), <http://blogs.wsj.com/law/2011/08/12/serbia-intervenes-to-try-to-block-nevada-execution/> (reporting on Serbia's intervention on behalf of Avram Nika, claiming that he could not speak English at the time of his arrest and was denied translation and consular services by Nevada authorities, and thus could not participate effectively in his trial or offer any mitigating evidence).

114. Vazquez, *supra* note 18; Huang, *supra* note 18.

115. See, e.g., Vazquez, *supra* note 18; Huang, *supra* note 18.

knowledge of the legal issues arising from the defendant's status as a foreign national and to apprise him of his rights in his own native language. Unfortunately, the Judiciary's approach to treaty interpretation frustrates this aim.

Where a defendant's right to consular notification is violated, courts have found there is no presumption of prejudice, due to the fact that a right arising from a treaty is not considered a fundamental right.<sup>116</sup> Thus, "those federal courts that have recognized the existence of an individually enforceable right have put the burden on the defendant to show actual prejudice."<sup>117</sup>

A majority of courts have adopted a three-part test to determine whether prejudice resulted from the failure to notify.<sup>118</sup> This test, first announced in *United States v. Villa-Fabela*, places the burden on the defendant to prove that: "(1) he did not know of his right; (2) he would have availed himself of the right had he known of it; and (3) there was a likelihood that the contact [with the consulate] would have resulted in assistance to him."<sup>119</sup> Additionally, many courts impose a requirement that the defendant show "that the outcome of the case could or would have been different . . . as a result of the . . . violation."<sup>120</sup> In cases where this additional hurdle is imposed, criminal defendants are virtually never able to prove that a procedural defect caused a substantive harm so grave that it substantially altered the jury's determination.<sup>121</sup>

The *Garcia* dissent recognized this approach as incorrect. Policy considerations also weigh against imposing this burden on defendants, as such an approach utterly fails to deter bad conduct by United States attorneys, district attorneys, and police forces by providing no incentive to notify foreign consuls. It also leads courts to dismiss out of hand the fundamental concerns the Executive Branch and Congress had in mind in ratifying the VCCR: namely, that foreign nationals need counsel who are skilled in matters of international law and who can explain the law in the defendant's native language.

The current approach is inequitable, and this comment proposes several changes to the Judiciary's approach to the VCCR assuming that the self-

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116. *State v. Lopez*, 633 N.W.2d 774, 783 (Iowa 2001).

117. *Id.*

118. *Id. See, e.g.*, *United States v. Raven*, 103 F. Supp. 2d 38, 41 (D. Mass. 2000); *United States v. Alvarado-Torres*, 45 F. Supp. 2d 986, 990 (S.D. Cal. 1999); *United States v. Tapia-Mendoza*, 41 F. Supp. 2d 1250, 1254 (D. Utah 1999); *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1126 (C.D. Ill. 1999).

119. *Lopez*, 633 N.W.2d at 783 (quoting *Villa-Fabela*, 882 F.2d 434 (9th Cir. 1989), *rev'd on other grounds by U.S. v. Proa-Tovar*, 975 F.2d 592 (9th Cir. 1992)).

120. *Torres*, 120 P.3d at 1187.

121. *See, e.g.*, *Raven*, 103 F. Supp. 2d at 41; *Alvarado-Torres*, 45 F. Supp. 2d at 99; *Tapia-Mendoza*, 41 F. Supp. 2d at 1254; *Chaparro-Alcantara*, 37 F. Supp. 2d at 1126.

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executing/non-self-executing distinction remains a part of the Court's jurisprudence.

First, the three-part test for showing prejudice should be tweaked in one important respect. The first two prongs should remain intact, with the defendant being required to prove both that he did not know of his right to contact the consulate and that he would have availed himself of the right had he been aware of it. The change is required with regard to the third prong, which currently requires criminal defendants to show that the consul would have been able to aid them in some meaningful way. Such a burden is unreasonable in that it calls for a defendant to prove an entirely speculative matter. It is impossible that a layperson, unschooled in the intricacies of the law, could reliably predict what sort of aid could be rendered by a foreign consulate in his defense.

The better approach—once the defendant has proven the first two prongs—is to merge the current third prong of the prejudice test with the requirement imposed by some courts of showing that the aid of the consulate would have had a material impact on the outcome of the trial. This may be done either by influencing the verdict or reducing the sentence, then shifting the burden to the prosecution to show that the failure to notify the consul constituted harmless error.

Such a burden shift is consistent with the *Avena* decision,<sup>122</sup> which was endorsed by the dissent in *Garcia*.<sup>123</sup> The *Avena* holding espoused the harmless error standard and found that failure to give consular notice should trigger an independent hearing.

Moreover, shifting the burden to the prosecution is consistent with Supreme Court precedent, as the Court has historically placed the burden of proving that an error was not harmless with the State.<sup>124</sup> Shifting the burden to the prosecution in such cases would also be consistent with the well-settled principle that the side which stands to benefit from the error should have the burden of proving it harmless.<sup>125</sup>

By adopting this approach and using the modified prejudice test suggested above, courts would enable this nation to better comply with its international obligations and would provide meaningful procedural safeguards to foreign nationals. However, if the courts continue to deny defendants' rights to an independent hearing, on the basis that state and federal law preclude such a remedy, courts should at least apply the correct standard to a defendant's claim of prejudice.

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122. *Avena*, 2004 I.C.J. 12.

123. *Garcia*, 131 S. Ct. at 2869 (Breyer, J., dissenting).

124. *Chapman v. California*, 386 U.S. 18 (1967).

125. *See, e.g.*, *Kotteakos v. United States*, 66 S. Ct. 1239 (1946); *U.S. v. Rivera*, 900 F.2d 1462 (10th Cir. 1990); *State v. Dyess*, 370 N.W.2d 222 (Wis. 1985); *State v. Knight*, 734 P.2d 913 (Utah 1987).

*c. Provide Appropriate Remedies to Individual Foreign Nationals*

Although many courts deny having the authority to provide a remedy even where the defendant proves prejudice, a few courts have imposed remedies. For instance, in *United States v. Rangel-Gonzales*, the court held that the defendant had successfully proven prejudice resulting from the violation of the notification provision, such that the indictment against him for illegal entry after deportation was due to be dismissed.<sup>126</sup>

Unfortunately, *Rangel-Gonzales* is in the minority, with most courts declining to provide a remedy, either citing the defendant's failure to prove prejudice, finding that the outcome of the case would not have differed regardless of the showing of prejudice, or simply denying that the court possesses the authority to provide a remedy regardless of any prejudicial effect.<sup>127</sup>

Where the defendant has successfully proven that he was prejudiced by the failure to provide consular notification, and the prosecution has not met its burden of proving harmless error, courts should abandon their reluctance to provide appropriate remedies. Although many courts have expressed concerns about judicial activism, where the VCCR establishes such a clear individual right, it is inequitable and procedurally unfair to refuse to provide any form of relief. Accordingly, courts should impose remedies befitting the harm, including suppressing evidence, dismissing the indictment, and ordering a new trial or hearing.

*d. Train Prosecutors and Defense Attorneys Concerning Rights of Foreign Nationals*

The VCCR was intended by both the Legislative and Executive Branches to create the procedural safeguard of consular notification for foreign nationals brought up on criminal charges. When the Judiciary found this treaty gave rise to no individual judicial remedies, it created a landslide of repercussions for criminal defendants. Chief of these is the conversion of consular notification from a right to a privilege. Now, depending on the police force and the particular United States Attorney's office, a criminal defendant may or may not gain access to the consul. Depending on the knowledge and skill of his appointed counsel, he may or may not ever find out that he was entitled to such access. If he does eventually find out, it will as often as not be too late. Indeed, courts have effectively shifted the notification obligation to public defenders and ap-

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126. *United States v. Rangel-Gonzales*, 617 F.2d 529, 533 (9th Cir. 1980).

127. *See, e.g., United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000) (determining that suppression is not an appropriate remedy regardless of whether defendant could show prejudice); *United States v. Duarte-Acero*, 296 F.3d 1277 (11th Cir. 2002).

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pointed counsel to ensure defendant's rights are vindicated. Where counsel representing the defendant does not raise the notification issue in state court, it is forever lost and cannot form the basis for habeas relief.<sup>128</sup>

To address this problem, prosecutors' offices should implement training programs to alert their attorneys to their obligations under international law. Likewise, continuing legal education and training programs should be offered to criminal defense attorneys providing them with a better understanding of the remedies available to their foreign national clients. In states with high immigrant populations, these measures are particularly vital.

#### CONCLUSION

In the wake of *Garcia*, the Judiciary should rethink its position on how treaties should be interpreted and enforced in the United States. Specifically, the Judiciary must reconsider its interpretation of the VCCR, as the current approach creates procedural defects in the criminal trials of foreign nationals. More broadly, the Judiciary must consider whether finding some treaties to be non-self-executing, and thus domestically unenforceable, undermines this nation's "interest in upholding and expanding the reign of law in international relations."<sup>129</sup> Courts must put aside reluctance to impose remedies where a treaty clearly intends to provide protection for a class of individuals. Rather than splitting hairs over whether a treaty creates an individually enforceable right, courts would do well to remember that "[i]nsofar as international law is observed, it provides us with stability and order and with a means of predicting the behavior of those with whom we have reciprocal legal obligations."<sup>130</sup> We must protect the citizens of other nations so that they will protect ours; we must provide criminal defendants with maximum protection under the law. No procedural safeguard is insignificant.

*Alyssa L. Enzor\**

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128. *Breard*, 523 U.S. at 375 (1998) (per curiam) (citing *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977)).

129. SENATOR J. WILLIAM FULBRIGHT, *THE ARROGANCE OF POWER* (1966).

130. *Id.*

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