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FOREIGNERS ON TEXAS'S DEATH ROW AND THE RIGHT OF ACCESS TO A CONSUL

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I. INTRODUCTION

The treatment of foreigners arrested on criminal charges persists as a crucial issue in human rights protection. A foreigner operates at a disadvantage in mounting a criminal defense. This disadvantage is particularly acute in a capital case, in which the accused may lose his life because of an inability to respond effectively to the charges.

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

Although U.S. courts strive to prevent bias against an accused based on alienage, discrimination does occur. In capital cases the disadvantages are even more apparent. In the sentencing phase of capital proceedings the accused is allowed great latitude to present mitigating evidence.[1] Mitigating evidence typically relates to the

1. *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (stating that "any aspect of a defendant's character or record" is admissible); *see also* Johnson v. Texas, 113 S. Ct. 2658, 2669 (1993) (upholding sentence when jury was informed it "could consider all the mitigating evidence that had been presented during the guilt and punishment phases"); Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (requiring that sentencer must not only hear, but also be able to consider and give effect to mitigating evidence); Hitchcock v. Dugger, 481 U.S. 393, 398–99 (1987) (overturning death sentence because sentencing judge and advisory jury failed to consider evidence of mitigating circumstances); Skipper v. South Carolina, 476 U.S. 1, 8 (1986) (asserting that evidence showing defendant would not pose continuing threat if incarcerated is mitigating evidence and should be considered); Eddings v.

accused's character, background, reputation, and physical or mental disabilities that might explain his conduct.[2] For a foreigner, gathering mitigating evidence may prove impossible if the source of the information is in his home country rather than the United States.

To minimize the disadvantages experienced by accused foreigners, international law guarantees the right of consular access.[3] Under internationally accepted norms applicable in the United States,[4] an accused foreigner is entitled to contact his home-state consulate office for assistance. If properly implemented, the right of consular access can significantly compensate for the difficulties confronting an accused foreigner. Furthermore, the mere involvement of a consul may encourage local government to follow procedural norms and minimize discrimination against a foreigner.

Because a foreigner may be unaware of the right of consular access or afraid to demand it, international norms require police and prosecutors to inform the accused of this right.[5] Three recent capital cases in Texas addressed this issue after courts imposed death sentences on foreigners who were not apprised of their right of consular access.

This Article explores the right of consular access and its application to capital cases, focusing on the recent Texas cases. These cases, however, are not unique; they illustrate pervasive difficulties in the U.S. criminal justice system's treatment of foreigners. Remedial measures should be taken by both the U.S. government and the governments of the several states.

Oklahoma, 455 U.S. 104, 113–14 (1982) (stating that sentencer may not refuse to consider relevant mitigating evidence and that state may not statutorily prohibit sentencer from considering such evidence).

2. *See Penry*, 492 U.S. at 318 (recognizing that state could not "prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty"); *Lockett*, 438 U.S. at 604 (acknowledging Supreme Court's conclusion that sentencer should not be kept from considering, "as a mitigating factor, 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").

3. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36 (1)(a), 21 U.S.T. 77, 100–01; 596 U.N.T.S. 261, 292 [hereinafter Vienna Convention].

4. The United States ratified the Vienna Convention on November 24, 1969. Vienna Convention, *supra* note 3, 21 U.S.T. at 77.

5. Vienna Convention, *supra* note 3, art. 36 (1)(b), 21 U.S.T. at 101, 596 U.N.T.S. at 292.

II. The Texas Cases

Three cases illustrate the problems that arise when consular access is not properly afforded to foreign defendants. In two cases,[6] the lack of consular access arguably created difficulty for the accused in presenting mitigating evidence at the penalty phase of his trial. In the third instance, the lack of consular access arguably facilitated the extraction of an involuntary confession from the accused.[7]

A. *The* Santana *Case*

In *Santana v. State*,[8] the denial of consular access precluded the presentation of mitigating evidence on behalf of the accused foreigner. A Texas state court sentenced Carlos Santana, a Dominican Republic national,[9] to death for complicity in an armed robbery in which a victim was shot and killed.[10] After several unsuccessful appeals,[11] Santana was executed in 1993.[12]

At the penalty phase of Santana's trial, his attorneys presented no mitigating evidence.[13] The lack of such evidence was so unusual that, in argument to the jury, the prosecuting attorney remarked that the total absence of mitigating evidence constituted sufficient justification for imposition of the death penalty.[14]

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6. Faulder v. State, 745 S.W.2d 327 (Tex. Crim. App. 1987); Santana v. State, 714 S.W.2d 1 (Tex. Crim. App. 1986).

7. *See* Fierro v. State, 706 S.W.2d 310, 315 (Tex. Crim. App. 1986) (questioning voluntariness of defendant's confession).

8. 714 S.W.2d 1 (Tex. Crim. App. 1986).

9. The term "national" is used in this Article to mean "citizen." In international practice, "national" refers to citizenship, not to an individual's ethnic identity.

10. *Santana*, 714 S.W.2d at 2–3.

11. *See id.* at 15 (affirming conviction and death sentence); *see also* Santana v. Texas, 113 S. Ct. 1629 (1993) (denying certiorari and stay of execution); Santana v. Texas, 113 S. Ct. 1630 (1993) (denying petition for rehearing); Santana v. Collins, 979 F.2d 1534 (5th Cir. 1992) (denying post-conviction relief and stay of execution), *cert. denied*, 113 S. Ct. 1573 (1993).

12. Response of the United States of America at 1, Case No. 11.130, Inter-Am. C.H.R. (Mar. 11, 1993) (on file with the *St. Mary's Law Journal*) (dating Santana's execution at March 23, 1993).

13. *See Santana*, 714 S.W.2d at 5 (summarizing evidence presented during punishment phase of trial).

14. Statement of Facts, vol. XX, at 443–44, State v. Santana, No. 333491 (179th Dist. Ct. Harris County, Tex., Oct. 20, 1981) (statement of prosecutor Mike Wilkerson). Portions of the statement of facts read as follows: "Did you ever hear one good thing about Carlos Santana . . . ? Did you hear any family, any friends, any prior employers come in

During his childhood and early adulthood, Santana resided in a small town in his native Dominican Republic, surviving poverty and a physically abusive father.[15] Despite these difficulties, he remained devoted and helpful to his handicapped mother and enjoyed a reputation as both a good student and hard worker in his small community.[16] He also offered charitable assistance to the less fortunate of the town.[17]

Texas authorities did not inform Santana of his right to contact the Dominican Republic consulate either at the time of arrest or during trial. According to an affidavit he wrote shortly before his execution, Santana was not, at the time of his arrest or trial, aware that he had a right to contact a Dominican consulate.[18] As a result, he did not contact anyone at the Dominican consulate office.

Like the consular officials of most countries, Dominican consuls are instructed by their government to protect the rights of detained nationals.[19] The Dominican Republic offered consular services in the United States at the time of Santana's trial.

Not until shortly before his scheduled execution, when Santana's counsel realized he had been denied his right of consular access, was the matter was raised as error.[20] During the same time period, Santana's counsel received affidavits from a number of Dominican Republicans who made favorable statements about Santana and averred that they would have testified at his trial.[21] Had the Dominican Republic consulate been involved in the case at the trial stage, it could have arranged for the collection of mitigating evidence from sources in the Dominican Republic.

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here and tell you one good thing about him . . . ? You didn't hear a word about him from any of those people. Not a word." *Id.*

15. *See* Affidavits of Julia Leonardo at 2, Case 11.130, Inter-Am. C.H.R. (Mar. 11, 1993) (on file with the *St. Mary's Law Journal*) (discussing Santana's childhood and character).

16. *Id.*

17. *Id.*

18. *See* Application for Post-Conviction Writ of Habeas Corpus at 12–13, *Ex parte* Santana (No. 68,930) (Tex. Crim. App. Mar. 19, 1993).

19. LUKE T. LEE, CONSULAR LAW AND PRACTICE 126 (2d ed. 1991).

20. Response of the United States of America at 1, Case 11.130, Inter-Am. C.H.R. (Mar. 11, 1993) (on file with the *St. Mary's Law Journal*).

21. Affidavits of Julia Leonardo at 2, Case 11.130, Inter-Am. C.H.R. (Mar. 11, 1993) (on file with the *St. Mary's Law Journal*); Affidavit of Dr. Leonardo G. Bienvenido at 2, Case 11.130, Inter-Am. C.H.R. (Mar. 11, 1993) (on file with the *St. Mary's Law Journal*).

B. *The* Faulder *Case*

Faulder v. State[22] also involved a foreigner who gathered no mitigating evidence because he was not informed of his right of consular access. Joseph Stanley Faulder, a Canadian, was convicted in a Texas state court and sentenced to death for a robbery-murder.[23] As of this writing, Faulder is on Texas's death row.

At the time of Faulder's arrest and trial, Texas authorities did not tell him that he had a right to contact a Canadian consul.[24] Faulder made no contacts in Canada in preparation for trial and presented no mitigating evidence at the penalty phase of his trial.[25] Faulder's family in Canada was unaware of the Texas proceedings and apparently believed that he was dead.[26]

As with *Santana*, attorneys realized during the post-conviction proceedings several years after the trial that Faulder had been denied his right of consular access. Faulder's attorneys ascertained that he was a much-beloved member of his family and that a number of his relatives would have provided assistance in gathering mitigating evidence for the penalty phase of his trial.[27] According to family members, Faulder had been a highly responsible parent to his two daughters.[28] These relatives would have testified that Faulder was not a violent man and that he had never been convicted or even accused of violent acts.[29] More importantly, they would have provided information about a severe childhood injury that left Faulder with organic brain damage and problems that

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22. 745 S.W.2d 327 (Tex. Crim. App. 1987).

23. *See* Faulder v. State, 745 S.W.2d 327, 329–30 (Tex. Crim. App. 1987) (affirming appellant's conviction and subsequent death sentence); *see also* Gregory D. Griswold, Note, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 MINN. L. REV. 771, 771–72 & n.4 (1994) (recognizing complications Faulder faced in protecting himself within U.S. legal system).

24. Petition for Writ of Habeas Corpus at 88, Faulder v. Collins (No. C-92-CV755) (E.D. Tex. Dec. 2, 1986) (noting authorities' failure to notify Faulder of right to contact consulate).

25. *Faulder*, 745 S.W.2d at 329.

26. Petition for Writ of Habeas Corpus at 93, Faulder v. Collins (No. C-92-CV755) (E.D. Tex. Dec. 2, 1986).

27. *Id.*

28. *Id.*

29. *Id.*

plagued his life.[30] Information about this injury was not presented to the jury that sentenced Faulder to death.

Canadian consuls, like those of the Dominican Republic, routinely provide consular services to detained nationals. Canadian consuls have "a mandate to protect and assist Canadians who live and travel abroad and to respond promptly when they find themselves in distress. This consular function is one to which the government attaches a high priority."[31] Had the Canadian consulate been involved at the trial stage of Faulder's case, it might have contacted Faulder's family and arranged for collection of mitigating evidence, especially that relating to his childhood injury.

C. *The* Fierro *Case*

Fierro v. State[32] concerned a Mexican national from Ciudad Juárez who was convicted by a Texas state court and sentenced to death for the murder of a taxicab driver.[33] Police officers arrested Cesar Fierro five months after the murder based on the tip of a sixteen-year-old with a history of mental problems.[34] The informant said he had been in the taxi with Fierro and witnessed the driver's murder.[35] The police did not find the murder weapon and had no other physical evidence to connect Fierro to the crime, even though they recovered the taxi and were able to inspect it.[36] While in custody, however, Fierro confessed to El Paso police.[37]

Because of the absence of physical evidence and the weakness of the sixteen-year-old's testimony, Fierro's confession constituted critical evidence at trial. The circumstances of the confession, however, were suspect. Fierro confessed shortly after an El Paso police detective informed him that his mother and stepfather were in the

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30. *See* Gregory D. Griswold, Note, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 MINN. L. REV. 771, 772 & n.5 (1994) (noting that Faulder's attorney could have obtained substantial and favorable testimony from members of Faulder's family).

31. CANADIAN CONSULAR MANUAL § 3.4.3, *reprinted in*, CANADIAN DEP'T OF EXTERNAL AFFAIRS, 1990–91 ANNUAL REPORT.

32. 706 S.W.2d 310 (Tex. Crim. App. 1986).

33. *Fierro*, 706 S.W.2d at 311–12.

34. *See id.* at 312 (explaining facts surrounding Fierro's arrest).

35. *Id.*

36. *Id.*

37. *Fierro*, 706 S.W.2d at 315.

custody of Ciudad Juárez police.[38] Ciudad Juárez police had arrested Fierro's mother and stepfather to interrogate them regarding Fierro. The detective offered to allow Fierro to speak by telephone with a Ciudad Juárez police officer in charge of the detention of Fierro's relatives.[39]

The conversation with the Ciudad Juárez police officer convinced Fierro that his mother and stepfather would not be released until he confessed to the murder of the taxi driver.[40] Fierro feared that the Ciudad Juárez police, who had a reputation for brutal interrogations, might torture his mother and stepfather.[41]

Testimony at pre-trial proceedings suggested that Fierro's fears had merit.[42] The El Paso and Ciudad Juárez police had cooperated in the investigation, and a Ciudad Juárez officer notified an El Paso officer after arresting Fierro's mother and stepfather.[43] The stepfather testified that, as he was being released from the Ciudad Juárez jail, an officer told him that he and his wife could be released because Fierro had confessed in El Paso.[44] No criminal charges were filed against the mother and stepfather.

The El Paso police did not inform Fierro that he had a right to contact a Mexican consul.[45] Mexico maintained a consulate in El Paso and provided consular services to its nationals there. Had Fierro been informed of this right at the time of his arrest and exercised it, he could have asked the consul about his parents' situation in Ciudad Juárez. A consul could have contacted Ciudad Juárez police and ensured that they would not be abused.[46] Thus, a consul

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38. *Id.* at 315–16.

39. *Id.* at 315.

40. *Id.* at 316.

41. *See Fierro*, 706 S.W.2d at 315 (noting that confession was given shortly after phone conversation with Ciudad Juárez police); Amended Application for Postconviction Writ of Habeas Corpus at 33, *Ex parte* Fierro (No. 71,899) (Tex. Crim. App. July 26, 1994).

42. *Fierro*, 706 S.W.2d at 316.

43. *See id.* (recounting testimony by Fierro's stepfather that police had arrested Fierro's mother shortly after Fierro's arrest).

44. *See id.* at 315–16 (setting release of Fierro's parents at time shortly after confession was given).

45. Amended Application for Postconviction Writ of Habeas Corpus at 75, *Ex parte* Fierro (No. 71,899) (Tex. Crim. App. July 26, 1994).

46. *Id.* at 78–79. The affidavit of Francisco Molina Ruiz, Attorney General of the State of Chihuahua, Mexico, outlined steps he would have taken if he had been informed that police had unlawfully detained family members of a Mexican citizen incarcerated in the United States. *Id.* at 79–80.

could have allayed Fierro's fears and left him to decide what statement to make to El Paso police without fear of consequences to his relatives.

III. The Right of Consular Access Under the Vienna Convention

The *Santana*, *Faulder*, and *Fierro* cases illustrate the importance of consular access in capital cases. A lack of consular access may lead to the conviction of a person who otherwise might be acquitted, as in *Fierro*. Apart from the question of guilt, a lack of consular access may result in a death sentence for a person who might otherwise be sentenced to life imprisonment.

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

Courts must protect the right of consular access because it is guaranteed by a multilateral treaty to which the United States is a party, the Vienna Convention on Consular Relations (Vienna Convention).[47] The Vienna Convention is the major worldwide treaty on the topic of consular relations. Drafted at the United Nations, the Convention regulates all aspects of the relationship of consuls to a host government and sets the framework for a consul's activities.[48]

One duty performed by consuls is the protection of nationals of the consul's home country in a variety of activities, such as tourism and commerce.[49] One important type of consular protection is

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47. Vienna Convention, *supra* note 3, art. 36(1)(a), 21 U.S.T. at 101, 596 U.N.T.S. at 292.

48. Vienna Convention, *supra* note 3, 21 U.S.T. at 77, 596 U.N.T.S. at 262. The Vienna Conference, which resulted in the Vienna Convention, was the culmination of a series of international conferences called by the United Nations General Assembly. Representatives from 92 countries attended the Conference. G.E. do Nascimento e Silva, *The Vienna Conference on Consular Relations*, 13 Int'l & Comp. L.Q. 1214, 1214 (1964). The Conference set upon the task of codifying consular functions while maintaining the differences between consular immunities and diplomatic immunities. Curtis J. Milpaupf, Note, *The Scope of Consular Immunity Under the Vienna Convention on Consular Relations: Towards A Principled Interpretation*, 88 Colum. L. Rev. 841, 843 (1988).

49. Daniel Antokoletz, 2 Tratado Teórico y Práctico de Derecho Diplomatico y Consular 176 (1948).

assistance to nationals who are arrested by the authorities of the host government.[50] This issue is addressed by the Vienna Convention's Article 36, which gives a consul and a detainee mutual rights of access to each other and, in addition, requires the detaining authorities to inform the detainee of the right of consular access. Article 36 reads:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (a) consular officials shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
>
> (c) consular officials shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.[51]

The United States, as a party to the Vienna Convention, invokes Article 36 when its nationals are detained abroad and are not afforded the right to contact a U.S. consul. For example, the United States cited Article 36 when it protested to El Salvador in 1977

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50. *Id.*

51. Vienna Convention, *supra* note 3, art. 36, 21 U.S.T. at 100–01, 596 U.N.T.S. at 292.

after Salvadoran authorities detained two U.S. missionaries for photographing a security-related installation and did not inform the American citizens of their right of consular access.[52] In its protest to El Salvador, the United States stated:

> [The two missionaries] were detained by officers of the National Police in Santa Ana on May 19 for having photographed the police station/jail of that city. . . . At no time were they informed of their rights to contact the United States Consulate under article 36(b) of the Vienna Convention on Consular Relations of 1963.
>
> The Embassy has the honor to refer to a note in a similar situation addressed to His Excellency the Minister of Foreign Relations on April 11 of this year regarding Father . . . and Mr. . . . , also United States citizens, protesting the lack of notification of right of consular access under the Vienna Convention in these cases.
>
> . . . .
>
> The Embassy requests His Excellency to elaborate expeditiously upon the following points: Why the [first mentioned] two United States citizens were not informed of their right to contact the Consulate as provided under article 36 of the Vienna Convention on Consular Relations of 1963; and why the Consulate was not officially informed of the detention of two United States citizens until approximately 28 hours afterwards.[53]

Article 36 imposes three separate obligations on the detaining state to facilitate contact between a detainee and a consul: (1) a detainee's right to contact a consul; (2) a consul's right to contact the detainee; and (3) a detainee's right to be informed by the detaining authorities of the right to contact a consul.[54] Of these three interrelated rights, the third is the one most frequently ignored by detaining authorities both in the United States and abroad. During the conference at which the Vienna Convention was drafted, some delegates argued that whenever a national of the sending state is incarcerated, the detaining authorities should automatically notify

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52. Consular Officers and Consulates, 1977 DIGEST § 2, at 290. The United States also protested to Nicaragua in 1985 after two U.S. citizens were detained on their yacht, demanding in a diplomatic note that the United States be allowed access to the pair. John N. Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43, 121 n.320 (1986).

53. Consular Officers and Consulates, 1977 DIGEST § 2, at 290 (alterations in original).

54. Vienna Convention, *supra* note 3, art. 36, 21 U.S.T. at 100–01, 596 U.N.T.S. at 292.

a consul of the sending state.[55] Other states objected that a detainee might not want his detention to be known to officials of his state of nationality.[56] Other delegates replied, however, that if a duty to notify a consul arose only upon a request by the detainee, the receiving state could claim that the detainee had not requested access.[57] Thus, the drafters decided to write a provision that required the detaining authorities to inform every detained foreign national of the right of consular access.[58]

IV. Enforceability of Consular Access in the Courts

Ratification and use of the Vienna Convention indicates that the courts must implement and enforce the right of consular access and the right to be informed of that access.[59] The matter, however, has not been extensively litigated. *United States v. Calderon-Medina*,[60] the only reported case on the application of Article 36 of the Vienna Convention, did not involve a criminal arrest, but instead concerned the detention of a foreigner whose immigration status was irregular.[61] In *Calderon-Medina*, the U.S. Immigration and Naturalization Service (INS) detained a Mexican national for possible deportation and did not inform him that he had a right, under Article 36 of the Vienna Convention, to contact a Mexican consul.[62] Deportation proceedings followed, and the INS ordered the man deported.[63]

The Mexican national challenged the deportation order in federal court on the ground that immigration authorities failed to inform him of his right to contact a Mexican consul.[64] The Ninth Circuit Court of Appeals remanded to the district court for factual findings on the issue of prejudice to the Mexican national's due

55. Luke T. Lee, Vienna Convention on Consular Relations 107–14 (1966).

56. *Id.* at 110.

57. *Id.* at 111–12.

58. *Id.* at 113–14.

59. *See* U.S. Const. art. VI, cl. 2 (including treaties as "supreme Law of the Land").

60. 591 F.2d 529 (9th Cir. 1979).

61. *See Calderon-Medina*, 591 F.2d at 531 n.6 (surmising that federal immigration regulation at issue was intended to comply with Article 36 of Vienna Convention).

62. *Id.* at 530.

63. *Id.*

64. *Id.*

process interests.[65] The district court held deportation was not precluded.[66] Upon further review, in a companion case, the Ninth Circuit explained that a prima facie case for annulling a deportation order would be created under the following circumstances: (1) the man did not know of his right to contact a consul; (2) he would have contacted a consul had he known of his right; and (3) consular assistance might have improved his chance of avoiding deportation.[67] Although the INS introduced rebuttal affidavits, the court determined that the evidence was incompetent and voided the deportation order.[68] Thus, the detaining authorities' failure to comply with the obligation to notify the detainee of his right of consular access nullified the action taken against him.

The Ninth Circuit's decision to apply Article 36 was consistent with the Supremacy Clause of the United States Constitution, which requires that treaties be applied as law by federal and state court judges.[69] Under the Supremacy Clause, treaties represent a part of "the supreme Law of the Land"[70] and are on par with an act of Congress.[71] If a treaty provision affords protection to an individual, the individual may base a cause of action on the provision,[72] and a court will give appropriate judgment in favor of the individual.[73] The courts deem such provisions to be "self-executing,"

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65. *See Calderon-Medina*, 591 F.2d at 532 (requiring showing of specific harm to support annulment of deportation order).

66. *See* United States v. Rangel-Gonzales, 617 F.2d 529, 530 (9th Cir. 1980) (discussing disposition of *Calderon-Medina* case on remand from court of appeals).

67. *See id.* at 531, 533 (laying down three factors for prima facie case in companion case to *Calderon-Medina*).

68. *Id.* at 533.

69. U.S. CONST. art. VI, cl. 2.

70. *Id.*

71. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). Courts have applied other provisions of the Vienna Convention when they have been relevant. *See, e.g., In re* Civil Rogatory Letters, 640 F. Supp. 243, 243–44 (S.D. Tex. 1986) (permitting transmission of "letters rogatory" from consulates to courts); *In re* D.A., No. 63,956, 1990 Kan. App. LEXIS 453, at *9 (Kan. Ct. App. June 29, 1990) (recognizing that international treaties would override state law, but finding no inconsistency); Commonwealth v. Jerez, 457 N.E.2d 1105, 1107 (Mass. 1983) (granting immunity to diplomat involved in "consular functions").

72. *See* 28 U.S.C. § 1331 (1988) (giving district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

73. *See* Asakura v. Seattle, 265 U.S. 332, 343–44 (1924) (holding that Japanese subject is entitled to operate pawnshop under terms of 1911 treaty between Japan and United States).

meaning that they operate in and of themselves to create rights, without any implementing legislation by Congress.[74] As the court implicitly found,[75] Article 36 of the Vienna Convention is a self-executing provision because it provides a right to an individual.[76]

The courts have not held all treaty provisions to be judicially enforceable. A treaty provision will be enforced, however, if it grants a right to the person relying on it, if the provision is capable of judicial enforcement, and if the parties to the treaty intended the provision to be judicially enforceable.[77] One aspect of applying a provision is to permit a private litigant to rely upon it as the basis for a cause of action.[78] As explained in the *Restatement (Third) of Foreign Relations Law of the United States*, "agreements that can be readily given effect by executive or judicial bodies, federal or State, without further legislation, are deemed self-executing, unless a contrary intention is manifest."[79]

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74. *See* TransWorld Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) (explaining that self-executing treaty requires no domestic legislation to give treaty force of law in United States).

75. *See Calderon-Medina*, 591 F.2d at 531 (finding that "[v]iolation of a regulation renders a deportation unlawful only if the violation prejudiced interests of the alien which were protected by the regulation").

76. *See* United States v. Percheman, 32 U.S. (7 Pet.) 51, 87 (1833) (explaining that treaties are enforceable in courts even in absence of subsequent legislative act). The *Percheman* Court expressed that, "[a]lthough the words 'shall be ratified and conformed,' are properly the words of contract, stipulating for some future legislative act; they are not necessarily so." *Id.* The language "shall be ratified and confirmed" may be interpreted by force of the instrument alone. *Id.*; *see also* Foster & Elam v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (stating that treaties are regarded as equivalent to legislative act).

77. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporter's note 4 (1987) (illustrating that treaties sometimes confer rights). In general, treaties are binding on states from the moment they "come into force." *Id.* at reporter's note 5; *see* Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 702–03 (1878) (providing that, when treaty proscribes certain limits or restrictions, contracting parties shall not disregard them).

78. *See Foster & Elam*, 27 U.S. at 314 (finding that "[o]ur Constitution declares a treaty to be the law of the land" and that "[a treaty] is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision").

79. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporter's note 5 (1987).

V. The Right of Consular Access Under Customary Law

U.S. courts must provide the right of consular access, even apart from the Vienna Convention, because the right is a norm of customary international law.[80] International custom includes legal norms that have developed through states' practice and which states recognize as binding.[81] Practices that states consistently follow and deem required are considered binding norms of customary international law.[82]

That states deem consular access to be required is indicated by the interaction between states on this issue. By affording access between a detained national and a consulate, the states of the world have over the years created an expectation that this access will be provided. When states refuse such access, the state of the detained national, as in the cited protest by the United States to El Salvador,[83] may file a diplomatic protest, and host state governments do not deny their obligation to afford access. This process of protest and response indicates the development of a customary norm of consular access.[84]

Consular protection enjoys a long history in international practice. According to one authority, it is the oldest function of the institution of consuls, and a consul may call the attention of the local authorities to any irregularity or abuse suffered by his fellow nationals.[85] If a national's rights under the local law are violated, the consul may make appropriate representations to the host government.[86]

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80. *See In re* The Paquete Habana, 175 U.S. 677, 694 (1900) (explaining how known customs develop into international legal norms).

81. *See id.* at 701 (discussing recognition of established practices in international law); *see also* Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad 437 (1925) (discussing accepted duty of consuls to support imprisoned nationals).

82. *The Paquete Habana*, 175 U.S. at 701.

83. Consular Officers and Consulates, 1977 Digest § 2, at 290.

84. Luke T. Lee, Consular Law and Practice 136 (2d ed. 1991).

85. *See* Daniel Antokoletz, 2 Tratado Teórico y Práctico de Derecho Diplomatico y Consular 176 (1948) (stating that protective function is "la función más antigua de la Institución Consular," and that "[u]n Cónsul puede llamar la atención de las autoridades locales sobre cualquier irregularidad o abuso que sufran sus connacionales").

86. *Id.* at 179.

From its inception, the United States has demanded access to U.S. nationals detained abroad.[87] The United States has often protested what came to be called a "denial of justice" when foreign courts treated U.S. nationals with less than due process. The United States and Mexico formalized this process by establishing arbitral procedures to deal with violations of the rights of each other's nationals in criminal cases before their courts.[88]

In 1925, police in Chile detained a U.S. national and did not inform him of his right to contact a U.S. consul.[89] The U.S. government protested to Chile, stating that "the Department [of State] holds that American citizens arrested in foreign countries . . . should be allowed to communicate with diplomatic or consular representatives of this country."[90] In making this protest, the United States did not refer to any treaty, but rather asserted that as a customary practice a detained foreigner must be informed of the right to contact a consul.[91]

In another case, Romania detained a U.S. citizen in Bucharest in 1959 on a criminal charge and did not inform her of her right to contact the Legation of the United States of America.[92] The Legation protested, citing no treaty, but instead stating that "the right of communication of foreign nationals with local representatives of their country is a generally accepted principle of international intercourse."[93]

Protection of detained nationals is a consular function long accepted by the states of the world. However, until the Vienna Convention, no general treaty specifying protection of nationals or other consular functions existed. One exception was a regional treaty concluded in 1911 between Bolivia, Colombia, Ecuador, Peru, and Venezuela.[94] This treaty gave consuls the right

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87. GRAHAM H. STUART, AMERICAN DIPLOMATIC AND CONSULAR PRACTICE 324 (1936).

88. FREDERICK S. DUNN, THE DIPLOMATIC PROTECTION OF AMERICANS IN MEXICO 199–228 (1933).

89. Consuls: Powers and Duties, 4 Hackworth DIGEST § 441, at 830.

90. *Id.*

91. *Id.*

92. Consular Offices and Consulates: Functions of Consuls, 7 Whiteman DIGEST § 8, at 649.

93. *Id.*

94. Accord Between Bolivia, Colombia, Ecuador, Peru, and Venezuela Relative to the Functions of the Respective Consuls in Each of the Contracting Republics [Caracas

> [t]o address the authorities of the district of their residence . . . in regard to all abuses committed by the authorities against individuals of the country whose interests they protect; they may act in such a way that justice may be rendered such individuals without delay and that they may be judged and condemned by the competent tribunals conformably to the laws of the country.[95]

Even if one might conclude that no customary norm on consular access existed prior to the Vienna Convention, widespread adherence to the Convention constitutes strong state acceptance of the issue. Customary norms can be created by widespread adherence to a treaty, at least when, as in the case of Article 36, states in their subsequent practice follow the norm. Importantly, 154 states have ratified the Vienna Convention.[96] Because of this broad adherence, the Convention is regarded as reflecting customary international law on the subject of consular access.[97]

Because consular access is a right based in customary international law, police and prosecutors in the United States must provide for it. Courts in the United States have taken the position that state and federal executive agencies must follow customary international law, just as they must follow treaties. Customary law is deemed to be part of established federal law in the United States, binding on both federal and state courts.[98] Thus, if a foreign na-

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Convention], July 18, 1911, *reprinted in Codification of International Law Part II: The Legal Position and Functions of Consuls*, 26 AM. J. INT'L L. 381, 381–83 (Supp. 1932).

95. *Id.* at art. IV, 26 AM. J. INT'L L. at 382. Another treaty on consular relations, the Convention on Consular Agents, between Brazil, Colombia, Cuba, the Dominican Republic, Ecuador, El Salvador, Haiti, Mexico, Nicaragua, Panama, Peru, the United States, and Uruguay, regulated the appointment and immunities of consuls, but did not cover their functions. Convention on Consular Agents, Feb. 20, 1928, *reprinted in Codification of International Law Part II: The Legal Position and Functions of Consuls*, 26 AM. J. INT'L L. 378, 378–81 (Supp. 1932).

96. UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL: STATUS AS AT 31 DECEMBER 1993, at 68–69, U.N. Doc. ST/LEG/SER.E/11 (1994).

97. *See* LUKE T. LEE, CONSULAR LAW AND PRACTICE 26 (2d ed. 1991) (stating that Vienna Convention is treated like international law even by countries not party to Convention).

98. *See The Paquete Habana*, 175 U.S. at 700 (indicating that international law is part of federal law and must be administered by courts when applicable). *But see* Garcia-Mir v. Meese, 788 F.2d 1446, 1454–55 (11th Cir.) (holding that if President, by executive decision, decides to ignore customary norm in particular situation, courts will honor President's position and will follow decision rather than customary norm of international law), *cert. denied*, 479 U.S. 889 (1986). Except for a cursory reference in *The Paquete Habana*, the

tional is not informed of his right of consular access, a court should find, as in the *Calderon-Medina* immigration case,[99] that his rights have been abridged.

VI. How Consuls Protect Detainees

A consul can protect detained nationals in a variety of ways that may be critical to a fair trial. According to instructions issued to U.S. consuls by the U.S. Department of State, consuls must (1) maintain lists of local attorneys to recommend to detained U.S. nationals, (2) provide instruction on judicial procedures in the receiving state, (3) determine whether the detainee has been physically abused while in custody, and (4) ensure the adequacy of the physical conditions of detention.[100] Gaining contact with a detained national is obviously crucial to the performance of these functions. The State Department instructions to consuls read:

> In order for the consular official to perform the protective function in an efficient and timely manner, it is essential that the consul obtain prompt notification whenever a United States citizen is arrested. Prompt notification is necessary to assure early access to the arrestee.[101] Early access in turn is essential, among other things, to receive any allegations of abuse [and] to provide a list of lawyers and a legal system fact sheet to prisoners.[102]

The instructions continue: "Upon receiving notification that an American citizen is being detained, it is absolutely essential that the post achieve timely access to the detainee. . . ."[103]

U.S. consular officials are further instructed to inform the detained American in detail about the processes they face:

United States Supreme Court has not addressed the question of whether such an exception exists to the application by courts of customary norms.

99. *See* United States v. Calderon-Medina, 591 F.2d 529, 531 (9th Cir. 1979) (stating that violating regulation intended to guarantee compliance with Vienna Convention may prejudice foreign national's interests and would render deportation unlawful).

100. *See* Luke T. Lee, Consular Law and Practice 165–67 (2d ed. 1991) (delineating U.S. Department of State instructions to U.S. consuls upon notification of American citizen's detention); *see also id.* at 124–29 (explaining services consul may provide to detainee).

101. *See* Consular Officers and Consulates, 1980 Digest § 2, at 360 (recognizing importance of prompt notification for proper protection).

102. *Id.* at 361–64.

103. *Id.* at 362.

> Posts should prepare an information packet covering initial arrest, remand procedure, trial procedure, appeal process, and penal conditions and rules. The purpose of this material is not to usurp the function of legal counsel or encourage a "do it yourself" approach. Rather, it serves the purpose of helping arrestees understand what is happening to them and provides a yardstick against which they can measure attorney performance. Such informational material should be updated regularly.[104]

These instructions reflect the practice of other states as well. Foreign states provide roughly these same services to their nationals who are arrested in the United States.[105] These services can be critical to an accused foreigner in obtaining a fair trial in the United States.

Equality before the law requires that all those who appear before the courts be afforded the same opportunity to present their cases.[106] Just as the state must balance the inequities between those who have money and those who do not by providing an attorney free of charge, so too must the state balance the scales when a foreign national is prosecuted. A state may not treat a foreigner less favorably in its courts than a citizen. A foreign national may not be placed in a position that makes him less able to defend himself than a citizen or that places him at a disadvantage due to alien status.

VII. CONSULAR ACCESS FOR FOREIGNERS DETAINED IN THE UNITED STATES

In principle, the United States recognizes an obligation to allow consuls of other states to protect foreigners detained on criminal

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104. *Id.* at 364.

105. *See* JULIUS I. PUENTE, THE FOREIGN CONSUL: HIS JURIDICAL STATUS IN THE UNITED STATES 81 (1926) (asserting that foreign states have duty to ensure that their citizens receive protection due to them pursuant to treaties and public law). In exercising consular protection, the first step is to demand that the local government provide the full protection of its laws, treaties, and principles of justice. *Id.*; *cf.* Christopher A. Donesa, Note, *Protecting National Interests: The Legal Status of Extraterritorial Law Enforcement by the Military*, 41 DUKE L.J. 867, 868 (1992) (discussing Supreme Court case which held that some constitutional protections are not applicable overseas when government takes action against foreign nationals).

106. *See* U.S. CONST. amend. XIV, § 1 (declaring that no state may "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

charges. In 1936, Italy responded to the arrest of an Italian national in the United States by inquiring whether consular notice was mandatory.[107] The State Department informed Italy that, "while it was not the general practice to notify the consular representatives of a foreigner who is placed under arrest, such notification would promptly be made upon request therefor by the arrested person."[108]

Although the United States has protested when other governments have failed to afford the right of consular access to detained U.S. nationals,[109] the record of compliance by the United States is unsound. Congress has not initiated any legislative mandate requiring federal law enforcement officials to follow Article 36 of the Vienna Convention. The only official document concerning consular access is a set of instructions the federal government issued to the INS requiring compliance with Article 36 when the INS detains foreign nationals on immigration matters.[110] The instructions require the INS to inform a foreign national of the right to contact a consular official.[111]

Apart from the immigration instructions, no other federal administrative directive pertaining to consular access for foreigners in the United States exists. The U.S. Department of Justice provides no written instructions to U.S. attorneys to inform foreigners arrested on federal criminal charges of their right of consular access. In contrast, the United Kingdom has issued instructions to police that detained foreigners, regardless of their states of nationality, "may communicate at any time" with their consulate and that they must be asked if they wish the police to inform their consulate of their detention.[112]

Similarly, no legislation or administrative regulations exist at the state or municipal levels in the United States to require implementation of the right of consular access for a foreigner arrested on a

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107. LUKE T. LEE, CONSULAR LAW AND PRACTICE 137 (2d ed. 1991).

108. *Id.*

109. *See* Consular Officers and Consulates, 1977 DIGEST § 2, at 290 (relating U.S. response in 1977 to San Salvador's denial of rights guaranteed to two U.S. citizens by Vienna Convention).

110. 8 C.F.R. § 242.2(e) (1979).

111. *Id.*

112. *See* LUKE T. LEE, CONSULAR LAW AND PRACTICE 146–47 (2d ed. 1991) (requiring that foreigner held more than 24 hours be given opportunity to contact consul).

criminal charge. Police training in arrest procedures does not cover the Vienna Convention.

Despite this absence of regulations or procedures to implement consular access, a foreigner detained in the United States by federal, state, or local authorities is typically permitted to contact persons of their choice for assistance with their representation. If a detained foreigner knows that he has a right to contact his consulate, he may make contact. Police will not usually prevent a detainee from contacting a consul.

The current process, however, does not comply with Article 36 of the Vienna Convention. Article 36 is designed to ensure that a detainee is made aware of the right of consular access. In addition, a detainee might fear that initiating consular contact will be regarded as a hostile act by the detaining authorities and, therefore, may result in harsh consequences. One purpose of the requirement that police inform the individual of the right to make consular contact is to allay the fear that initiating such contact will bring negative repercussions.[113]

The pattern in the United States, at all three levels of government, is that officials are ignorant of the Article 36 right of a detained foreigner. Consequently, no procedures exist for its implementation and foreign detainees are not afforded this right. The United States, as a result, violates its international obligation to the state of which the foreigner is a national. Courts have not stepped in to enforce the right to consular access by requiring police and prosecutors to implement the right. The courts' inaction is, however, attributable in large measure to the failure of defense attorneys to raise the issue on behalf of their clients.

VIII. Discrimination Based on Alienage

Apart from the issues of mitigating evidence and coercion of confessions, a detainee's status as a foreigner may affect the proceedings in a capital case in other ways. Considerable discretion, particularly in capital cases, rests with the prosecutor, judge, and jury, and that discretion is only lightly controlled.[114] Exercise of that discretion may determine whether the accused receives a life

113. Luke T. Lee, Vienna Convention on Consular Relations 113–14 (1966).

114. *See* Dave Bruck, *Decisions of Death: The Lottery of Capital Punishment is Rigged by Race*, New Republic, Dec. 12, 1983, at 18, *available in* LEXIS, Newslibrary,

sentence or the death penalty. If the accused is the object of discrimination on any basis, the risk of capital punishment is greater.[115] In addition, if there is any bias towards the accused as a foreigner, the chances of being convicted of the crime are increased.[116]

Discretion exercised by a number of actors in the criminal process affects the outcome of a capital case. Of all persons convicted of murder in the United States, only three percent are sentenced to death.[117] Legislatures determine which persons are eligible for the death penalty.[118] Prosecutors decide whether to ask for the death penalty, and when they do, a judge or jury decides which persons will be executed. Governors, sometimes with the aid of a parole board, decide whether to grant clemency.[119]

Prosecutors do not seek the death penalty in most cases in which it is allowed by statute as a possible penalty.[120] Prosecutors vary considerably with respect to how frequently they seek the death penalty, and the criteria that control a prosecutor's decision are unclear.[121]

Persons convicted of capital offenses have challenged the death penalty on the ground that the prosecutor's decision to seek the death penalty was arbitrary. In *Gregg v. Georgia*,[122] before the United States Supreme Court, the accused argued "that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies."[123] Justice White, however, responded in a con-

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ASAP II File (explaining that process through arrest, sentence, and appeal execution is determined by race or luck rather than objective criteria).

115. *See* Graham v. Collins, 113 S. Ct. 892, 915 (1993) (noting role discrimination may play in capital punishment cases).

116. McCleskey v. Kemp, 481 U.S. 279, 308 (1986) (considering role of discrimination in application of death penalty).

117. Dave Bruck, *Decisions of Death: The Lottery of Capital Punishment is Rigged by Race*, NEW REPUBLIC, Dec. 12, 1983, at 18, *available in* LEXIS, Newslibrary, ASAP II File.

118. *See* Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 23 (1980) (noting that state must define who may die before jury or judge decides who will die).

119. *See* KATHLEEN D. MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST 4–5 (1989) (describing types and effect of clemency).

120. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY 29 (1987).

121. *See* Becky W. Donaldson, Note, *Discriminatory Prosecution as a Defense to a Capital Crime*, 9 CRIM. JUST. J. 325, 326–28 (1987) (listing factors considered by prosecutor in making decision to seek death penalty).

122. 428 U.S. 153 (1976).

123. *Gregg*, 428 U.S. at 225–26 (White, J., concurring).

curring opinion that this argument was "unsupported by any facts."[124] A plurality of the *Gregg* Court acknowledged that a prosecutor has "unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them."[125]

In *McCleskey v. Kemp*,[126] the Supreme Court reiterated that prosecutors enjoy wide discretion in charging decisions.[127] The Court further stated that the fact that similarly situated suspects were not charged with a death specification is no bar to the prosecution of one so charged.[128] However, studies of prosecutorial practice in several jurisdictions found a racial disparity in charging decisions, with prosecutors charging African-Americans more readily than similarly situated Caucasians.[129] Studies have also shown a disparity depending on the race of the victim; prosecutors in the United States more frequently seek the death penalty when the victim is Caucasian than when the victim is African-American.[130]

Bias based on the accused's status as a foreigner may be subtle, but it undoubtedly colors criminal proceedings on occasion. For example, two Italian immigrants, Nicola Sacco and Bartolomeo Vanzetti, were executed in Massachusetts for murder[131] following a trial widely viewed as having been skewed by bias against the two men based on their alienage.[132]

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124. *Id.* at 225. *But see* Roberts v. Louisiana, 428 U.S. 325, 348–49 (1976) (White, J., dissenting) (stating that Louisiana death penalty was plagued by prosecutorial discretion).

125. *Gregg*, 428 U.S. at 199.

126. 481 U.S. 279 (1987).

127. *See McCleskey*, 481 U.S. at 296 (expressing concern that policy considerations behind prosecutorial discretion advise against requiring prosecutors to defend their death sentence decisions).

128. *Id.* at 306–07.

129. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY 30–31 (1987).

130. *See* U.S. GEN. ACCOUNTING OFFICE, DOC. NO. GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990) (analyzing studies of race as factor in death sentencing and indicating that, when victim is white, prosecutors more frequently seek death penalty than when victim is black).

131. Commonwealth v. Sacco, 158 N.E. 167 (Mass.), *cert. dismissed*, 275 U.S. 574 (1927).

132. *See* Michael A. Musmanno, *The* Sacco-Vanzetti *Case*, 11 KAN. L. REV. 481, 481 (1963) (noting that such distinguished individuals as Justice Felix Frankfurter, John Dewey, Alf Landon, Walter Lippman, George Bernard Shaw, and Albert Einstein believed that Sacco and Vanzetti were unjustly convicted).

Despite efforts by the courts to ensure rationality and uniformity in capital sentencing, Justice Blackmun stated that "race continues to play a major role in determining who shall live and who shall die."[133] Justice Blackmun further explained that "the decision whether a human being should live or die is so inherently subjective" that it is "rife with all life's understanding, experiences, prejudices, and passions. The death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake."[134]

Another source of potential bias against foreigners in capital cases is the procedure used to seat a jury. In capital cases, special procedures are employed for jury selection. Potential jurors are questioned about their opinions on the death penalty. Those who say that they could not impose the death penalty are excused from jury service. This procedure is called "death qualification" of a jury.[135]

The purpose of death qualification is to exclude potential jurors who would never impose the death penalty and thus would undermine the application of the capital punishment statutes.[136] At the same time, however, death qualification excludes from juries that

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133. Callins v. Collins, 114 S. Ct. 1127, 1135 (1994) (Blackmun, J., dissenting).

134. *Id.* at 1134–35.

135. Buchanan v. Kentucky, 483 U.S. 402, 414 (1987); *see* Robert M. Berry, *Death-Qualification and the "Fireside Induction,"* 5 U. ARK. LITTLE ROCK L.J. 1, 3 (1982) (tracing origins of death-qualification to when conviction for capital offense automatically resulted in death penalty). "Since a finding of guilt implied death, opposition to the death penalty conceivably could interfere with the determination of guilt. Death-qualified juries were therefore considered essential to the enforcement of the criminal law." *Id.*; *see also* Samuel R. Gross, *Determining the Neutrality of Death-Qualified Juries*, 8 LAW & HUM. BEHAV. 7, 7 (1984) (explaining death-qualification process); Stanton D. Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 IND. L.J. 617, 626 (1989) (explaining that remaining jurors only represent views of population that condones death penalties for murderers). *See generally* Romualdo P. Eclavea, Annotation, *Voir Dire Examination of Prospective Jurors Under Rule 24(a) of Federal Rules of Criminal Procedure*, 28 A.L.R. FED. 26, 114–16 (1976) (highlighting several examples in which no reversible error was found upon voir dire examination concerning prospective jurors' attitudes towards capital punishment).

136. Witherspoon v. Illinois, 391 U.S. 510, 513–14 (1967); *see* Robert M. Berry, *Death-Qualification and the "Fireside Induction,"* 5 U. ARK. LITTLE ROCK L.J. 1, 6 (1982) (stating broad assumption that proponents of death penalty are conviction-prone, while opponents to death penalty are acquittal-prone); Stanton D. Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 IND. L.J. 617, 626 (1989) (noting that, in cases in which death penalty may be imposed, states may challenge jurors for cause based on their inability to sentence defendant to death); Walter E. Oberer, *Jury Selection, the Death Penalty, and Fair Trial*, 71 CASE & COM. 3, 3 (1966)

segment of the community most likely to rise above ethnic or national origin biases.[137] Death qualification poses a particularly serious threat to a fair trial when the accused differs in some significant respect from the majority of the jurors, as when the accused is a member of a racial minority or is a foreigner. Those excluded via the death-qualification procedure are typically persons who are more likely than the average person to be able to put aside negative feelings about the accused as a foreigner.[138]

The exclusion of this segment of the community is significant, because the judgments jurors make in capital cases are peculiarly vulnerable to the influence of bias.[139] Jurors may need to determine the credibility of witnesses, including the accused as a witness. If the accused is a foreigner, he may speak English with an accent, or he may speak through an interpreter. Prosecuting witnesses are typically U.S. citizens, and a juror may, as a result, identify more readily with the prosecuting witness, finding that witness more credible. Those who remain on a jury after death qualifica-

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(demonstrating difficulty involved in empaneling death-qualified jury when "mere hesitance to vote for a death verdict is sufficient to disqualify a prospective juror").

137. *See* Rick Seltzer et al., *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example*, 29 How. L.J. 571, 576 n.24 (1986) (explaining that qualified jurors are "underrepresentative of communities from which they are drawn"). The mere process of juror selection for death penalty cases violates safeguards. *Id.* at 572; *see also* Neil Vidmart & Phoebe Ellsworth, *Public Opinion and the Death Penalty*, 26 Stan. L. Rev. 1245, 1258–59 (1974) (citing psychological studies indicating racial intolerance of those who favor death penalty); Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 Mich. L. Rev. 1, 71 (1982) (concluding that persons favoring death penalty are generally more conservative in their social, legal, and political views).

138. *See* James A. Carr, Note, *At* Witt's *End: The Continuing Quandary of Jury Selection in Capital Cases*, 39 Stan. L. Rev. 427, 455 (1987) (proposing that capital sentencing deliberations hinge on "jury's visceral moral reaction to an individual" rather than factual findings). In addition, it appears that a positive correlation exists between the jury's likelihood of returning a guilty verdict and the death qualification. *Id.* at 436.

139. *See* Furman v. Georgia, 408 U.S. 238, 250–55 (1971) (Douglas, J., concurring) (stating that discretionary nature of death penalty enables juries to apply it selectively to those individuals in society who are poor or disliked). *But see* Spinkellink v. Wainwright, 578 F.2d 582, 593–94 & nn.15–16 (5th Cir. 1978) (finding no conclusive proof that death-qualified juries are necessarily "prosecution-prone"), *cert. denied*, 440 U.S. 976 (1979). However, at least one commentator has noted that some evidence exists to support the idea that death-qualified jurors are more prone to convict. Welsh S. White, *Death-Qualified Juries: The Prosecution Proneness Argument Reexamined*, 41 U. Pa. L. Rev. 353, 356 (1980).

tion are more likely to be swayed in this fashion than are those excluded from the jury.

As a result of the discretionary decisions made in a capital case, a foreigner may be the victim of bias, placing him at a serious disadvantage. 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. For example, in the *Santana* case, the prosecutor, in closing argument to the jury during the sentencing phase of the trial, misstated the name of Santana's country of nationality and referred to Santana's nationality in a uncertain fashion.[140] This prosecutor may have been playing up what he perceived to be a prejudice among the jurors against Santana based on his nationality. Had a Dominican Republic consul been present in the courtroom, the prosecutor may not have made the comments.

Persons excluded from the jury via death qualification may view the crime in a light more sympathetic to the accused, since those who oppose the death penalty are typically more inclined to believe that crime is a product of social conditions and upbringing rather than the product of a malevolent personality.[141] They are more likely to view extenuating circumstances seriously. Those who pass the death-qualification process are more likely to take a "law and order" approach to criminal law issues and to feel a need for retribution against one who has committed a serious crime.[142] Thus, in a capital case, the jury of peers becomes a jury skewed toward conservatism.

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140. In *Santana*, the prosecutor referred to the defendant's country of nationality, the Dominican Republic, as "the Dominican of the Republic." *See* Statement of Facts, vol. XX, at 443–44, State v. Santana, No. 33,491 (179th Dist. Ct., Harris County, Tex., Oct. 20, 1981) (statement of prosecutor Mike Wilkerson). Further, the prosecutor stated that Santana was from "the Dominican of the Republic or from Cuba." *Id.*

141. The idea that crime is more the result of surrounding social conditions than of an individual's personality is a less abstract version of the doctrine of determinism. *See* John L. Hill, Note, *Freedom, Determinism, and the Externalization of Responsibility in the Law: A Philosophical Analysis*, 76 GEO. L.J. 2045, 2049 (1988) (stating that determinism doctrine rests on idea that all events are result of antecedent causal conditions); *cf.* Maria M. Homan, Note, *The Juvenile Death Penalty: Counsel's Role in the Development of a Mitigation Defense*, 53 BROOK. L. REV. 767, 782 (1987) (opposing death penalty for juveniles and noting that juveniles' upbringing helps to explain why they kill).

142. *See* Neil Vidmart & Phoebe Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1257 & nn.55–57 (1974) (noting that belief in death penalty often stems from desire for retribution).

Furthermore, the very process of questioning potential jurors about the death penalty may predispose them to think, before they have heard any evidence, that the accused is a serious offender and should be executed. A controlled experiment that involved death-qualifying subjects revealed that persons who are asked questions about their views on the death penalty prior to hearing evidence are more likely to convict.[143] As Justice Thurgood Marshall asserted, the "very process of death qualification . . . focuses attention on the death penalty before the trial has even begun" and as a result "predispose[s] the jurors that survive it to believe that the defendant is guilty."[144]

In *Lockhart v. McCree*,[145] a case challenging the death-qualification procedure, the United States Supreme Court "assume[d] that 'death qualification' . . . produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries."[146] The Court held, however, "that the Constitution does not prohibit the States from 'death qualifying' juries in capital cases."[147] Dissenting, Justice Marshall stated that death-qualified jurors have a "proprosecution bias"[148] and are "more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defense, more mistrustful of defense attorneys, and less concerned about the danger of erroneous convictions."[149]

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143. *See* Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121, 126–28 (1984) (indicating that experiments showed persons who were subjected to death-qualification process to be more likely to convict and to sentence to death).

144. Lockhart v. McCree, 476 U.S. 162, 188 (1986) (Marshall, J., dissenting).

145. 476 U.S. 162 (1986).

146. *McCree*, 476 U.S. at 173.

147. *Id.*; *see also* Witherspoon v. Illinois, 391 U.S. 510, 518 (1968) (recognizing that Supreme Court was not prepared "to announce a *per se* constitutional rule requiring the reversal of every conviction returned by a jury selected" in this manner).

148. *McCree*, 476 U.S. at 188 (Marshall, J., dissenting); *see also* William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95, 103 (1984) (illustrating that persons who are eligible on basis of their beliefs to serve on capital jury construe evidence more favorably to prosecution than those who are ineligible).

149. *McCree*, 476 U.S. at 188 (Marshall, J., dissenting); *see also* Phoebe C. Ellsworth et al., *The Death-Qualified Jury and the Defense of Insanity*, 8 LAW & HUM. BEHAV. 81, 88–89 (1984) (citing experiment showing that persons who would be eligible on basis of their beliefs to serve on capital jury are substantially less likely to accept plea of insanity than those who would be ineligible).

The death-qualification process may influence a jury's decision to recommend a death sentence. Death-qualified jurors may be more inclined to consider the aggravating evidence presented by the prosecution in the sentencing phase and less inclined to believe the mitigating evidence presented by the defense.[150] In the context of potential bias based upon the accused's foreign status, a death sentence could result because the death-qualified jurors, exercising their discretion, are more inclined than the average person to punish.

IX. Proceedings to Challenge Denial of Consular Access

Litigation in the United States challenging denial of the right of consular access has been sparse. The three Texas cases recounted above have not led to definitive rulings. In *Santana*, the United States said it was unable to confirm that Texas authorities knew Santana was a Dominican Republic national.[151] According to Texas investigations, Santana had informed the detaining authorities that he was Puerto Rican. However, Santana's attorney indicated references in the trial transcript to Santana's nationality. The Texas court accepted the investigation and denied Santana's petition claiming a denial of the right of consular access.[152]

The Embassy of the Dominican Republic, once it became aware that Santana had been denied consular access, made representations on the matter to the U.S. State Department and to Texas authorities. A petition raising the denial of consular access was filed for Santana with the Inter-American Commission on Human Rights, the rights-enforcement mechanism of the Organization of American States.[153] The Commission asked Texas to delay Santana's execution pending its hearing of the case. Nevertheless,

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150. James Luginbuhl & Kathi Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 Law & Hum. Behav. 263, 279 (1988).

151. Response of the United States of America, Case 11.130, Inter-Am. C.H.R. (Mar. 11, 1993) (on file with the *St. Mary's Law Journal*).

152. *Id.*

153. Individual Complaint to the Inter-American Commission on Human Rights Against the United States of America on Behalf of Carlos Santana, Case 11.130, Inter-Am. C.H.R. (Mar. 11, 1993) (on file with the *St. Mary's Law Journal*).

Texas authorities executed Santana.[154] In the *Fierro* case, a petition was similarly filed with the Inter-American Commission on Human Rights claiming the denial of consular access.[155]

Petitions at the international level, such as those before the Inter-American Commission on Human Rights, pose difficulties for the United States because the federal government is responsible for any breach of international standards, even when the action in question was taken at the state government level. 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.[156] If Texas or any other state violates a treaty provision, the federal government answers.

Thus, in *Santana*, it was the State Department, not the Texas Attorney General, that defended the United States before the Inter-American Commission of Human Rights. Neither the State Department nor any federal executive department had any connection or previous involvement with the case. The State Department had to approach the Texas Attorney General for information to use in responding to the arguments made on Santana's behalf.

In *Santana*, the Texas Attorney General told the State Department, as it had told the Texas courts, that police and prosecutors had not been aware that Santana was a foreigner.[157] The State Department accepted and repeated that position before the Inter-American Commission on Human Rights.[158]

Petitioners filing on Santana's behalf responded by introducing into evidence documents from the trial and from Texas penal institutions showing that Santana's Dominican nationality had been

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154. As of this writing, the case is still pending before the Inter-American Commission on Human Rights, which continued proceedings even after Santana's execution on March 23, 1993. *Id.*

155. Individual Complaint to the Inter-American Commission on Human Rights Against the United States of America on Behalf of Cesar Fierro, Case 11.331, Inter-Am. C.H.R. (July 21, 1994) (on file with the *St. Mary's Law Journal*).

156. *See* U.S. CONST. art. 6, cl. 2 (binding every state to "supreme law[s]" ratified by the United States).

157. Response of the United States of America at 1–2, Case 11.130, Inter-Am. C.H.R. (Mar. 11, 1993) (on file with the *St. Mary's Law Journal*).

158. *Id.*

known to Texas authorities.[159] The State Department, again forced to rely on the Texas Attorney General, was hard pressed to respond to this documentation.

The futility of the State Department's attempt to defend actions violating the Vienna Convention, and thus the rights of foreigners, indicates the need for a system to ensure that the United States complies with the Vienna Convention.

X. Directions for Corrective Action

The three Texas cases in which police and prosecutors failed to inform a foreign detainee of the right of consular access are not atypical. Telephone calls by the authors to a number of major-city police departments indicated little awareness of the Vienna Convention and an absence of any procedure to inform foreign nationals of their right of consular access. Even at the federal level, the Justice Department apparently has no procedure for informing detained foreigners of their right of consular access.

The United States should take affirmative steps to implement Article 36 of the Vienna Convention. The matter is more difficult, however, for the United States because the policing and prosecuting functions in the United States are decentralized. In many countries of the world, the police and prosecutors fall under a central ministry that controls them at the local level.

Nonetheless, the federal government has a role to play. First, it must ensure compliance with the right of consular access by federal authorities. The Justice Department could readily institute procedures whereby the U.S. attorneys would routinely provide information about the right of consular access to foreigners detained on federal criminal charges.

The federal government should initiate a program informing state and local prosecutorial and police authorities of their duty to meet international obligations by ensuring disclosure of the right of consular access. State and local authorities should also implement such programs. Police training should include instruction on the

159. *See* Statement of Facts, vol. XX, at 443–44, State v. Santana, No. 333491 (179th Dist. Ct. Harris County, Tex., Oct. 20, 1981) (statement of prosecutor Mike Wilkerson) (showing prosecutor's reference to Santana's nationality).

right to consular access, particularly in cities and counties with high concentrations of foreign nationals.

The Vienna Convention does not expressly dictate the time and manner for disclosing the right of consular access. Article 36, however, indicates that the detainee needs this information to make immediate decisions such as those concerning retention of counsel.[160] A suspect in custody quickly makes decisions that shape the proceedings against him. A consul may assist in providing an attorney, whose advice at an early stage may be critical to the accused. Thus, if Article 36 is to be implemented effectively, detaining authorities must inform a detainee of the right of consular access immediately upon detention.

The automatic and immediate advising of the right of consular access is also important because the detainee may not want his nationality known. Many foreign nationals who are arrested in the United States have not regularized their status in the United States and fear deportation if their true nationality is discovered. As a result, a detainee may conceal his nationality. Thus, if the detaining authorities disclose the right of consular access only after learning that a detainee is a foreigner, many foreigners would not be informed of the right. A detainee should be informed of his right of consular access as a matter of course, and he may then decide whether to exercise that right.

Apart from concern about immigration status, a detainee may determine for a variety of reasons not to contact a consul. A detainee may be a political dissident at home and may fear more from his own government than from the detaining authorities. The detainee may have committed undiscovered crimes at home and may fear their discovery, or the detainee may be a fugitive from justice in his home state. Apart from such considerations, a detainee might believe that consular access will not benefit him, either because he views himself as having no defense to the charge or because he perceives no issues on which a consul might help him.

Article 36 creates an option for a detainee to contact a consul, but not an obligation. A detainee may at first be reluctant to communicate with a consul, but later, perhaps upon realizing the seri-

160. Vienna Convention, *supra* note 3, art. 36, 21 U.S.T. at 100–01, 596 U.N.T.S. at 292.

ousness of the charges he faces, decide differently. Whenever the detainee decides to initiate communication, the detaining authorities are required to facilitate it.[161]

A detainee in the United States has no obligation to speak in response to questioning.[162] Revealing his nationality might, in some circumstances, incriminate a detainee.[163] He might in such a situation decide not to contact a consul, but he should be informed of the right of consular access without having to reveal his nationality.

Article 36 requires the detaining authorities, upon the detainee's request, to notify the consulate "without delay."[164] The U.S. Department of State has said that notification should be effected "as quickly as possible and, in any event, no later than the passage of a few days."[165] If a detainee desires to telephone a consulate, the police are required to permit that contact immediately.[166]

Article 36 does not specify whether privacy must be provided for a meeting in jail between the detainee and a consul. In instructions to U.S. consuls, the State Department has expressed that Article 36 implies confidentiality since the right of communication with a consul

> may only be enjoyed in a meaningful way if the consular officer is allowed the benefit of privacy with the national to whom he is extending consular protection. For example, the right to arrange for legal representation of the national and the corollary right to discuss relevant legal issues involved in connection with the detention could

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161. Vienna Convention, *supra* note 3, art. 36, 21 U.S.T. at 100–01, 596 U.N.T.S. at 292.

162. U.S. CONST. amend. V; *see* Miranda v. Arizona, 384 U.S. 436, 460 (1966) (stating that privilege against self-incrimination is substantive right of individuals).

163. *See Miranda*, 384 U.S. at 460 (providing that person accused of crime need not provide self-incriminating information).

164. Vienna Convention, *supra* note 3, art. 36, § 1(b), 21 U.S.T. at 100–01, 596 U.N.T.S. at 292; *see also* Consular Officers and Consulates, 1980 DIGEST § 2, at 361 (noting that some bilateral treaties require notification to consulate regarding detention even in absence of request from detainee).

165. Consular Officers and Consulates, 1973 DIGEST § 2, at 161. In protest to El Salvador, the United States objected that its consul was notified 28 hours after the beginning of the detention. Consular Officers and Consulates, 1977 DIGEST § 2, at 290.

166. Vienna Convention, *supra* note 3, art. 36, § 1(b), 21 U.S.T. at 100–01, 596 U.N.T.S. at 292.

> not be exercised effectively if the receiving state authorities had the right to monitor the contents of the conversation.[167]

Privacy would seem to be essential to meaningful contact with a consul. Supervised contact would defeat the purpose of the right.

Police, upon arrest, routinely inform a detainee of the right to remain silent, the right to be represented by an attorney, at state expense if necessary, and that statements made to the police may be used as evidence in court.[168] Given this procedure for automatic notification of rights, advising a detainee of a foreigner's right to consul would cause no great inconvenience.

In addition to an oral notification, detaining authorities should maintain at places of detention a listing of all consular offices accredited by the United States. This list should be available to all detainees. In this way, a detainee could determine, without revealing his nationality, whether to initiate consular contact.

A final issue in implementing the right of consular access is the standard by which a court should determine violations of the right. In particular, a court may have to determine whether the suspect was prejudiced in some tangible fashion by the denial of consular access.

In the three Texas cases, the suspects all argued they had been prejudiced by their lack of consular access.[169] The Ninth Circuit Court of Appeals, in the *Calderon-Medina* immigration case, said that it would nullify the action taken against the foreigner only if he could show prejudice.[170] That standard would seem too strict to comply with Article 36, which specifies that the right of consular access is an absolute right.[171] Nothing in the text of Article 36 suggests that relief for a foreign detainee should depend on whether he can show prejudice. Moreover, requiring a showing of prejudice would often defeat the right.

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167. Consular Officers and Consulates, 1973 DIGEST § 2, at 162.

168. *Miranda*, 384 U.S. at 444 (stating that detainee must be advised of right to remain silent, right against self-incrimination and right to counsel prior to any questioning).

169. Petition for Writ of Certiorari at 45–46, Santana v. Texas, 714 S.W.2d 1 (Tex. Crim. App. 1986) (No. 68,930); Petition for Writ of Habeas Corpus at 88, Faulder v. Collins (No. C-92-CV755) (E.D. Tex. Dec. 2, 1992); Amended Application for Postconviction Writ of Habeas Corpus at 75, *Ex parte* Fierro (No. 71,899) (Tex. Crim. App. July 26, 1994).

170. United States v. Calderon-Medina, 591 F.2d 529, 531 (9th Cir. 1979).

171. Vienna Convention, *supra* note 3, art. 36, 21 U.S.T. at 100–01, 596 U.N.T.S. at 292–93.

XI. CONCLUSION

Death penalty cases call for scrupulous observance of rights. In the United States, a number of procedures peculiar to capital cases have been devised to ensure that the ultimate penalty is not wrongly imposed.[172] In light of this practice, it is curious that the federal, state, and local governments have been so cavalier in ignoring a right basic to a suspect's criminal defense when the accused is a foreigner.

International standards for rights have assumed great importance in the era of the United Nations. Some of the most important rights are those that attach in criminal cases. These important rights must be recognized to prevent the discrimination that foreigners often face and to alleviate their typically disadvantaged ability to prepare an effective defense. In this context, the right of consular access assumes a key role.

If a foreign detainee is denied that right, the proceedings may be tainted and the suspect convicted unjustly. The foreigner may also be convicted of a crime more serious than that actually committed, or he may be given a sentence higher than otherwise would be appropriate. Thus, the right of consular access is a linchpin for the effectuation of other rights in the criminal process.

A foreigner is typically less able than a citizen to take advantage of the possibilities for presenting a defense that are guaranteed in human rights instruments. The rights guaranteed by human rights law are in jeopardy when the accused is a foreigner. A counterweight is provided by the institution of consular access.

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172. In some jurisdictions, a lawyer must be specially qualified to be appointed as defense counsel in a capital case. *E.g.*, OHIO CT. C.P.R. 65 (requiring at least two attorneys to be appointed by court in capital case, at least one of whom must have office in Ohio and experience with criminal trial practice in Ohio). The trial is split between a guilt phase and a penalty phase, so that derogatory information relevant to sentencing will not be introduced when guilt is yet to be determined, and so that the accused will have a full opportunity to present mitigating evidence. *See* Johnson v. Texas, 113 S. Ct. 2658, 2669 (1993) (noting that jury can consider all mitigating evidence presented during both guilt and punishment phases). Appeal to the state supreme court is automatic in some jurisdictions, and some state supreme courts conduct a so-called proportionality review to ensure that death in a particular case is in line with death sentences previously imposed in the state. *See* Gregg v. Georgia, 428 U.S. 153, 206 (1976) (noting that proportionality review in Georgia was designed to reduce chance that person will receive death penalty because of aberrant jury).

In the United States, the right of consular access is not enforced effectively. This omission leads to substantial injustice. To correct the situation, legislative, administrative, and judicial action should be taken to enforce Article 36 of the Vienna Convention, which encompasses the right of consular access.

The United States has long defended the rights of its own nationals when charged with a crime in another country. The United States must comply with the same international standards it seeks to impose on others.