DIAMOND IN THE ROUGH: MINING ARTICLE 36(1)(B) OF THE VIENNA CONVENTION ON CONSULAR RELATIONS FOR AN INDIVIDUAL RIGHT TO DUE PROCESS

BRITTANY P. WHITESELL

> Thou shalt neither vex a stranger, nor oppress him: for ye were strangers in the land of Egypt.[1]

INTRODUCTION

The Vienna Convention on Consular Relations—a multilateral treaty signed by the president and ratified by the Senate[2]—delineates the rights of nations to conduct consular relations.[3] Consular relations are the means by which nations protect the interests of their citizenry abroad, especially their nationals who are arrested for violating other nations' criminal laws.[4] The right to assist citizens charged with crimes abroad appears in Article 36 of the Vienna Convention. Article 36(1)(a) provides that countries may access and communicate with their citizens,[5] and Article 36(1)(b) provides that, upon detention, foreign nationals must be informed that their consuls may assist them.[6] Foreign nationals have contended that the Article 36(1)(b)

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1. Exod. 22.21 (King James).

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

3. *See generally id*.

4. U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS: INSTRUCTIONS FOR FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICIALS TO ASSIST THEM 42 (n.d.), *available at* http://travel.state.gov/pdf/CNA_book.pdf.

5. Article 36(1)(a) provides: "[C]onsular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State." Vienna Convention, *supra* note 2, art. 36(1)(a), 21 U.S.T. at 101, 596 U.N.T.S. at 292.

6. Article 36(1)(b) provides:

> [I]f 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

language bestows upon them an individual right to consular notification.[7] Foreign nationals have generated voluminous litigation in United States federal courts and international tribunals, invoking Article 36(1)(b) to argue that their convictions should be overturned because American law enforcement authorities never informed them that they could receive assistance from their consuls.[8]

These legal challenges turn on whether Article 36(1)(b), as a treaty provision, confers rights upon individual foreign nationals or only upon consuls. Beyond the "individual right" versus "consular right" determination, the legal challenges also hinge on the scope of the purported individual right. The Article 36(1)(b) right could be a fundamental right that, if violated, would flaw convictions and mandate their reversal.[9] Alternatively, the Article 36(1)(b) right could

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> 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.

Id.

7. *See infra* notes 63–69, 75–96 and accompanying text.

8. *See, e.g.*, Torres v. Mullin, 124 S. Ct. 562, 562 (2003) (refusing to hear a foreign national's claim that his death sentence should be overturned because of a Vienna Convention violation); Breard v. Greene, 523 U.S. 371, 373 (1998) (considering whether a foreign national's execution should be stayed because he had not been notified about the Vienna Convention); United States v. Jimenez-Nava, 243 F.3d 192, 194–95 (5th Cir. 2001) (considering a foreign national's Vienna Convention claim); United States v. Emuegbunam, 268 F.3d 377, 385 (6th Cir. 2001) (same); United States v. Lombera-Camorlinga, 206 F.3d 882, 883 (9th Cir. 1999) (same); United States v. Esparza-Ponce, 193 F.3d 1133, 1138–39 (9th Cir. 1999) (same); Standt v. City of New York, 153 F. Supp. 2d 417, 422 (S.D.N.Y. 2001) (same); United States v. Hongla-Yamche, 55 F. Supp. 2d 74, 75 (D. Mass. 1999) (same); United States v. Briscoe, 69 F. Supp. 2d 738, 740 (D.V.I. 1999) (same); LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466, 471–74 (June 27) (considering Germany's claim that its citizens' rights under the Vienna Convention were violated); Memorial of Mexico (Mex. v. U.S.), I.C.J. Pleadings (Avena and Other Mexican Nationals) 1 (June 20, 2003) [hereinafter Memorial of Mexico] (same), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm.

9. Some fundamental rights violations may not mandate automatic reversals of convictions. Under American law, this remedy is unavailable when violations so insignificantly impact cases that the convictions may stand consistently with the United States Constitution. Chapman v. California, 386 U.S. 18, 22 (1967). The Constitution only requires automatic reversals of convictions when the violations of fundamental rights harm the defendants. *Id.* Defendants must show some prejudice—but presumably less prejudice than required when a nonfundamental right is violated—to trigger automatic reversals of their convictions. *See id.* This prejudice standard also applies indirectly in international law: when a country violates a fundamental right, that country's own standards of review and reconsideration supply the remedy. *See LaGrand*, 2001 I.C.J. at 514 ("I]t would be incumbent upon the United States to allow the review and reconsideration . . . by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must

be a nonfundamental right that, if violated, would mar convictions only if the violations prejudiced the defendants. These inquiries into whether Article 36 confers an individual right and, if so, whether the right is fundamental are the focus of Article 36(1)(b) litigation.[10]

These are also the focus of this Note. This Note argues that Article 36(1)(b) does create an individual right that foreign nationals may invoke to challenge their convictions,[11] and this right *may* be fundamental under domestic law. In other words, this Note maintains that the right to consular notification is a strong candidate for fundamental status and that violation of this right should prompt a demanding substantive due process inquiry,[12] which courts and commentators have thus far been reluctant to conduct.

In suggesting that Article 36(1)(b) creates an individual right that may be fundamental, the Note proceeds in three Parts. Part I examines Article 36 jurisprudence from international tribunals and the United States federal courts, highlighting disagreements about the existence of an individual right in Article 36(1)(b) and agreement about the nonfundamental nature of the purported individual right. Part II undertakes a conventional treaty interpretation of Article 36(1)(b) to argue that the provision creates an individual right. Part III considers the scope of this individual right, arguing that, under a substantive due process analysis, the right to consular notification should merit recognition as fundamental. Specifically, this Part marshals evidence about the history of consular relations in the United States to show that the right to consular notification could survive on the history, tradition, and practice prong of the substantive due process inquiry. Part III also presents alternative arguments that litigants could make to demonstrate that the right to consular notification is implicit in society's modern conception of liberty.

I. ARTICLE 36(1)(B) JURISPRUDENCE

Article 36(1)(b) claims have been litigated in domestic and international courts. Section A of this Part discusses interpretations of Article 36(1)(b) by international tribunals, namely the International Court of Justice (ICJ) and Inter-American Court of Human Rights

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be left to the United States."). Therefore, international law provides that the domestic convictions of foreign-national defendants will be reversed only with a showing of prejudice.

10. *See infra* Part I.

11. *See infra* Part II.

12. *See infra* Part III.

(IACHR). Section B discusses interpretations by United States federal courts.

A. The Interpretation of Article 36 by International Tribunals

Nations whose citizens have been detained by other countries without notification that they could contact their consulates for assistance have brought Vienna Convention claims before international tribunals, alleging violations of both their own right to provide and their citizens' right to receive consular assistance.[13] These claims succeeded on both counts: the ICJ and the IACHR found violations of the nations' and their citizens' rights when the arresting state failed to notify the detained foreign nationals that Article 36(1)(b) permitted them to seek aid from the consuls of their home countries.[14] By equating the failure to notify foreign nationals that they could contact their consulates with a Vienna Convention violation, the ICJ and the IACHR read Article 36(1)(b) to provide detained foreign nationals an individual right to consular notification. Both tribunals considered the contours of this individual right but reached different conclusions.[15] The ICJ twice refused to define the scope of the individual right to consular notification,[16] whereas the IACHR opined that the right's parameters were coterminous with the parameters of the right to due process.[17] This Section focuses first on the ICJ's interpretations of Article 36(1)(b) and then turns to the interpretations of the IACHR.

1. *The International Court of Justice*. The ICJ, the "the principal judicial organ of the United Nations,"[18] has heard two cases raising

13. Avena and Other Mexican Nationals (Mex. v. U.S.), para. 49 (Mar. 31, 2004) [hereinafter Avena Judgment], *available at* http://www.icj-cij.org/icjwww/idecisions.htm; LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27); The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Oct. 1, 1999, Inter-Am. C.H.R. (Ser. A) No. 16 (1999) [hereinafter Advisory Opinion].

14. *See infra* notes 23–35, 37–44, 54–61.

15. *See infra* notes 54–58 and accompanying text.

16. *See infra* notes 37–47 and accompanying text.

17. *See infra* notes 54–58 and accompanying text.

18. U.N. Charter, art. 92; Statute of the International Court of Justice, June 26, 1945, art. 1, 59 Stat. 1055, 1060, http://www.icj-cij.org/icjwww/ibasicdocuments/Basetext/istatute.htm.

Article 36(1)(b) claims.[19] These claims were brought by states—Germany[20] and Mexico[21]—because the ICJ does not have jurisdiction to hear cases brought by individuals.[22] Nonetheless, in deciding these state-to-state disputes, the ICJ defined the rights of individuals: because detained foreign nationals benefit from consular relations, the ICJ's interpetation of how consular relations should be conducted under the treaty necessarily implicated a definition of foreign nationals' rights.

The ICJ considered whether Article 36(1)(b) confers an individual right upon foreign nationals or merely a right upon nations and their consuls in *LaGrand*.[23] *LaGrand* involved two German nationals charged with murder, convicted, and sentenced to death in Arizona without ever being informed that they could contact the German consulate, even though the arresting authorities knew their nationality.[24] In *LaGrand*, the ICJ held that foreign nationals possess an individual right to information about the Vienna Convention's consular protections.[25] The ICJ found this right in the express language of Article 36(1)(b), which provides that "[t]he [law enforcement] authorities shall inform the [foreign national] without delay of *his rights* under this subparagraph."[26] By its language, Article 36(1)(b) requires countries that arrest foreign nationals to notify the detainees about the possibility of receiving assistance from their consulates.[27] The right to notification and, by extension, the right to obtain consular assistance rise to the level of individual rights,

19. Int'l Court of Justice, List of Cases Brought Before the Court Since 1946, *at* http://www.icj-cij.org/icjwww/idecisions.htm (last visited Jan. 9, 2005) (on file with the *Duke Law Journal*).

20. LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

21. Avena Judgment, *supra* note 13, at para. 49.

22. Int'l Court of Justice, General Information—The Court at a Glance, *at* http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html (last visited Jan. 9, 2005) (on file with the *Duke Law Journal*).

23. LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

24. Memorial of Germany (F.R.G. v. U.S.), I.C.J. Pleadings (LaGrand) 9 (Sept. 16, 1999), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm.

25. *LaGrand*, 2001 I.C.J. at 494 ("Article 36, paragraph 1, creates individual rights . . . .").

26. *Id.* (quoting Vienna Convention, *supra* note 2, art. 36(1)(b), 21 U.S.T. at 101, 596 U.N.T.S. at 292).

27. The referenced subparagraph details countries' rights to assist their nationals detained abroad. *See id.* ("The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.").

according to the ICJ, because the text of Article 36(1)(b) explicitly defines the rights as such.[28]

Furthermore, the ICJ found additional evidence in the text of Article 36 confirming that Article 36 bestows an individual right on foreign nationals.[29] Under Article 36(1)(c), foreign nationals must consent before their consulates can be notified about their arrests.[30] Consequently, nations cannot exercise their rights to assist their nationals arrested abroad unless their nationals give them permission to do so.[31] The ICJ deemed foreign nationals' control over the operation of Article 36 to corroborate the existence of an individual right to consular notification.[32]

Having concluded that "[t]he clarity of these provisions, viewed in their context, admits of no doubt" that Article 36 grants an individual right to foreign nationals,[33] the ICJ did not define the nature of this right[34]—finding no need to define the right after determining that the right existed and had been breached by the United States.[35] Consequently, the nature of the right that Article 36 confers upon foreign nationals remained undefined under international law when the ICJ considered its next Vienna Convention case, *Avena and Other Mexican Nationals*.[36]

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28. *See LaGrand*, 2001 I.C.J. at 494. ("Significantly, this subparagraph ends with the following language: 'The said authorities shall inform the person concerned without delay of *his rights* under this sub-paragraph.'" (quoting Vienna Convention, *supra* note 2, art. 36(1)(b), 21 U.S.T. at 101, 596 U.N.T.S. at 292)).

29. *Id*.

30. *Id*.

31. *Id*.

32. *See id*. (finding that Article 36(1)(c)'s consent proviso, in conjunction with the "his rights" language in Article 36(1)(b), confers an individual right on foreign nationals).

33. *Id*.

34. *See id.*:

> Germany further contended that the right of the individual to be informed without delay under Article 36, paragraph 1, of the Vienna Convention was not only an individual right but has today assumed the character of a human right . . . . The Court having found that the United States violated the rights accorded by Article 36, paragraph 1, to the LaGrand brothers, it does not appear necessary to it to consider the additional argument developed by Germany in this regard.

35. *Id*. at 475–76, 494.

36. Avena and Other Mexican Nationals (Mex. v. U.S.), para. 49 (Mar. 31, 2004), *available at* http://www.icj-cij.org/icjwww/idecisions.htm.

Defining the nature of this right was the primary issue presented to the ICJ by *Avena*.[37] In *Avena*, Mexico brought a claim against the United States on behalf of fifty-four Mexican nationals sentenced to death in the United States.[38] All of the prisoners maintained that American authorities had never informed them that they could contact the Mexican consulate for assistance in their criminal proceedings, and that their convictions were fatally flawed as a result.[39] Although *LaGrand* bound only Germany and the United States in that particular case, and although the ICJ does not operate on the principle of stare decisis,[40] both Mexico and the United States ascribed persuasive value to *LaGrand* in litigating *Avena*.[41] Agreeing that Article 36 confers an individual right, the parties clashed over whether the right should be deemed a fundamental right,[42] or even a

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37. *See* Memorial of Mexico, *supra* note 8, at 126 (arguing that "The Deprivation of Consular Notification and Assistance Renders Criminal Proceedings Fundamentally Unfair"); Counter-Memorial of the United States (Mex. v. U.S.), I.C.J. Pleadings (Avena and Other Mexican Nationals) 121 (Nov. 3, 2003) [hereinafter Counter-Memorial of the United States] (arguing that the Vienna Convention "Does Not Compel State Parties to Treat Article 36(1) as Creating Rights That Are Fundamental to Due Process"), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm.

38. Memorial of Mexico, *supra* note 8, at 1.

39. *Id.* at 38–39, 125.

40. *See* Int'l Court of Justice, A Guide to the History, Composition, Jurisdiction, Procedure and Decisions of the Court: The Decision, *at* http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookframepage.htm (last visited Oct. 25, 2004) (on file with the *Duke Law Journal*) ("Since a decision of the Court affects the legal rights and interests solely of the parties to the case and only in that particular case, it follows that the principle of *stare decisis* (the binding nature of precedents) as it exists in Common Law countries has no place in international law.").

41. *See* Memorial of Mexico, *supra* note 8, at 93 ("Although the *LaGrand* judgment is binding only between the United States and Germany, the Court's holding with respect to the 'obligations of the United States in cases of severe penalties imposed on [*sic*] German nationals' who were not accorded their rights under Article 36 has clear relevance for Mexico, as well." (quoting LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466, 517 (June 27))); Counter-Memorial of the United States, *supra* note 37, at 57 ("The *LaGrand* judgment sets forth the principles applicable to the dispute presented to the Court.").

42. A fundamental right under international law is a right that countries must afford foreign nationals to comply with the minimum international standard—the international law equivalent of due process. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 256 (7th rev. ed. 1997). The minimum international standard requires nations to treat foreign nationals within their territories in a civilized manner by adhering to myriad legal rules. *Id.* at 256, 260. Because the legal rules have attained varying degrees of acceptance from the international community, the content of the minimum international standard is disputed. *Id.* at 261. In general, however, countries fall below the minimum international standard by unlawfully violating foreign nationals' physical integrity or by subjecting them to "the maladministration of justice." *Id.* Specifically, and most germane to this Note, countries violate the minimum international standard by following judicial procedures

human right,[43] under international law.[44] Even though Mexico's contentions directly presented to the ICJ the scope issue that the court had avoided in *LaGrand*, the ICJ again skirted the issue of whether "the right to consular notification . . . under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings."[45] The ICJ maintained that the scope of the Vienna Convention right "[was] not a matter that this Court need[ed to] decide."[46] In dicta, however, the ICJ noted that the *travaux préparatoires*, text, object, and purpose of the Vienna Convention suggest that the Convention's right to consular notification is not fundamental to due process.[47]

2. *The Inter-American Court on Human Rights*. In an advisory opinion, the IACHR also weighed in on the interpretation of Article 36(1)(b). The IACHR is a judicial organ created by the Organization of American States (OAS) to implement the American Convention on Human Rights,[48] which created substantive human rights and procedures for effectuating them.[49] To implement the American Convention, the IACHR was imbued with adjudicatory[50] and advisory jurisdiction.[51] All members of the OAS,[52] including the

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that disadvantage foreign nationals. *Id*. Thus, the minimum international standard gives foreign nationals a fundamental right to fair judicial proceedings. *See id*. (noting ways to violate the minimum international standard through the "maladministration of justice").

43. A human right under international law is a fluid and evolving concept; the term encompasses civil, social, and political rights, as well as constitutional rights recognized by Western democracies, such as the United States. *Id.* at 209–10. As a result, human right cannot be precisely, or coherently, defined. *Id*. Instead, the prevailing definition is little more than the statement of a theoretical ideal: human rights are inalienable and legally enforceable rights held by individuals that protect them from state interference and governmental power abuses. *Id*. at 209.

44. *See* Memorial of Mexico, *supra* note 8, at 124–46 (arguing that Article 36(1)(b) creates a fundamental, or even a human, right under international law); Counter-Memorial of the United States, *supra* note 37, at 121–40 (arguing that Article 36(1)(b) does not create a right fundamental to due process under international law).

45. Avena Judgment, *supra* note 13, at para. 49.

46. *Id*.

47. *Id*.

48. American Convention on Human Rights, Nov. 22, 1969, art. 33, 1144 U.N.T.S. 123, 153. The United States, though a member of the OAS, is not a party to the Convention.

49. *Id.* arts. 3–25, 1144 U.N.T.S. at 145–51.

50. *Id*. arts. 61–63, 1144 U.N.T.S. at 159.

51. *Id*. art. 64, 1144 U.N.T.S. at 159–60.

52. *Id*. art. 64, 1144 U.N.T.S. at 160.

United States,[53] can seek advisory opinions about any treaty implicating human rights. Mexico exercised this right in requesting the IACHR to issue an advisory opinion on the Vienna Convention. Mexico asked the IACHR specifically to consider whether international conceptions of due process encompassed a right to consular notification.

The IACHR was presented with the same facts that were before the ICJ in *Avena*—fifty-four Mexican nationals were sentenced to death in the United States and were never informed by the authorities that they could seek assistance from the Mexican consulate[54]—but the IACHR reached a different conclusion.[55] In considering whether Article 36(1)(b) confers a fundamental right—a question that the ICJ avoided[56]—the IACHR concluded that it does.[57] The IACHR opined that consular notification enables foreign nationals to defend themselves better in criminal proceedings and that, because consular notification enhances their defenses, the right to consular notification is implicit in due process under international law.[58]

Although the United States correctly stated that no other tribunal, domestic or international, had held that the right to notification about consular assistance "must be recognized and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial,"[59] the IACHR advisory opinion lends credence to the argument that international due process requires foreign nationals to receive notification about the Vienna Convention.[60] The opinion also reflected international sentiment about the nature of the Article 36 individual right, given that seven

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53. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 2394, 119 U.N.T.S. 48, 48.

54. Advisory Opinion, *supra* note 13, para. 2.

55. *See id.* paras. 117, 122.

56. *See id.* para. 122 (defining the scope of the right to consular notification: classifying the right "among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial").

57. *See id*. paras. 121–22 (asserting that due process under international law requires consular notification because foreign-national defendants are at a disadvantage in alien criminal justice systems).

58. *Id*.

59. Counter-Memorial of the United States, supra note 37, at 126–27.

60. *See* Memorial of Mexico, *supra* note 8, 124–45 (arguing that Article 36(1)(b) creates a fundamental, or even a human, right).

countries submitted amici curiae briefs urging the IACHR to accord a foreign national's Article 36(1)(b) right fundamental status.[61]

B. The Interpretation of Article 36 by the United States Federal Courts

Vienna Convention claims also have worked their way through the United States federal courts. Criminal defendants have raised Vienna Convention claims in district courts, in appeals to circuit courts, and in petitions for writs of certiorari to the Supreme Court. Although interpreting these claims in contradictory manners, courts have consistently refused to grant criminal defendants relief on the basis of Article 36(1)(b). This Section first details the Supreme Court's treatment of Article 36(1)(b) claims and then considers relevant decisions of the lower federal courts.

1. *The Supreme Court*. In a federal habeas corpus case antedating *LaGrand*,[62] the United States Supreme Court conspicuously left open the question of whether Article 36(1)(b) creates an individual right under American law.[63] In *Breard v. Green*,[64] the Supreme Court, per curiam, denied a petition for certiorari from Paraguay and Breard, a Paraguayan national awaiting execution in Virginia.[65] Because the Supreme Court denied the petition on procedural grounds, the Court never reached the Vienna Convention claims raised by Paraguay and Breard.[66] The Court did state in dictum, however, that "[t]he Vienna Convention . . . arguably confers on an individual the right to consular assistance following arrest."[67] Although the Supreme Court did not definitively recognize that foreign nationals possess individual rights to consular notification, the Court's statement indicated its inclination to do so when presented with a case requiring the resolution of the issue.

The Supreme Court, however, denied itself the opportunity to act on this inclination by denying certiorari in a case brought by a

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61. Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Paraguay submitted amici curiae briefs. Advisory Opinion, *supra* note 13, para. 26.

62. *See supra* notes 23–35 and accompanying text.

63. United States v. Emuegbunam, 268 F.3d 377, 390 (6th Cir. 2001).

64. 523 U.S. 371 (1998).

65. *Id.* at 378–79.

66. *Id.* at 375.

67. *Id.* at 376.

Mexican national convicted of murder in the United States without notification that the Vienna Convention made consular assistance available to him.[68] In its Fall 2003 term, the Court refused to hear the Vienna Convention claim of Osbaldo Torres, one of the fifty-four Mexican nationals involved in the *Avena* case, because he had not raised his Vienna Convention claim in the trial court.[69] Thus, the procedural default rule, which holds that defendants waive and

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68. *See* Torres v. Mullin, 124 S. Ct. 562, 562 (2003) (refusing to hear a foreign national's claim that his death sentence should be overturned because of a Vienna Convention violation). Although the Court avoided rendering its own interpretation of Article 36(1)(b), the Court granted certiorari in *Medellin v. Dretke* to decide whether to adhere to the ICJ's interpretations of the provision. 321 F.3d 270 (5th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (Dec. 10, 2004) (No. 04-5928). In the Spring of 2005, the Court may decide whether to import the ICJ's interpretations of Article 36(1)(b) by determining the effect on domestic law of the ICJ judgments in *LaGrand* and *Avena*. *See* Medellin v. Dretke, 321 F.3d 270 (5th Cir. 2004), *petition for cert. filed*, 2004 WL 2851246 (Aug. 18, 2004) (No. 04-5928) (presenting questions about whether the ICJ judgments should be treated as rules of decision or recognized under principles of comity and uniform treaty interpretation). Giving domestic effect to the ICJ's interpretations of Article 36(1)(b) would equate to the domestic recognition of an individual right to consular notification. *See* Avena Judgment, *supra* note 13, at para. 49 (recognizing an individual right under Article 36(1)(b)); LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466, 494 (June 27) (same). But the scope of the Article 36(1)(b) right will remain undefined because the ICJ failed to classify the right to consular notification as fundamental or nonfundamental under international law. *Id*. Furthermore, even if *LaGrand* or *Avena* had pronounced the scope of the right to consular notification under international law, the ICJ's taxonomy would not determine the right's scope under domestic law. Fundamental status under international law, although suggestive of the right's importance to society, does not activate domestic constitutional protections. *See infra* Part III. Therefore, the scope of the Article 36(1)(b) right in domestic law will await definition even if the Court gives domestic effect to the ICJ judgments in *Medellin*. 321 F.3d 270 (5th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (Dec. 10, 2004) (No. 04-5928).

The prospect that *Medellin* will lead to the importation of international law created a domestic furor. In response to the grant of certiorari, President Bush withdrew the United States from the Optional Protocol that commits all disputes arising under the Vienna Convention to the compulsory juridiction of the ICJ. Adam Liptak, *U.S. Says It Has Withdrawn From World Judicial Body*, N.Y. TIMES, Mar. 10, 2005, at A16. As a result, the United States can no longer sue or be sued for Vienna Convention violations in the ICJ although the United States remains a party to the treaty. *Id*. The withdrawal from the Optional Protocol effectively prevents future cases like *Avena* and restricts foreign nationals whose Article 36(1)(b) rights were violated by the United States to domestic fora.

In addition to withdrawing the United States from the Optional Protocol, President Bush issued an unprecedented memorandum instructing state courts to conduct the review and reconsideration required by the *Avena* judgment. *Id*. If the states follow President Bush's order, the fifty-one Mexican nationals who were entitled to review and reconsideration under the ICJ judgment will receive new hearings to determine whether Vienna Convention violations led to their convictions.

69. *Id*.; Application Instituting Proceedings (Mex. v. U.S.), I.C.J. Pleadings (Avena and Other Mexican Nationals) 39 (Jan. 9, 2003), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iapplication_20030109.PDF.

cannot raise on appeal any legal claims that they failed to raise in the trial court, provided the Court with an excuse for avoiding the Article 36(1)(b) issue.[70]

Given that the Court has not yet recognized an individual right under Article 36(1)(b), it certainly has not pronounced the scope of such a right. The *Breard* Court did not intimate whether it would categorize the right that it indirectly acknowledged as fundamental or nonfundamental under domestic law.[71] The Court did imply that the harmless error doctrine would apply to properly raised Vienna Convention claims[72]—that is, a court could reverse convictions for failure to inform foreign nationals of their right to consular assistance only if the nationals proved that such failure had contributed to their convictions.[73] This intimation, however, did not at all suggest the

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70. *See Breard*, 523 U.S. at 375–76:

> By not asserting his Vienna Convention claim in state court, [the defendant] failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia. Having failed to do so, he cannot raise a claim of violation of those rights now on federal habeas review.

Given the procedural default rule, the determination of whether Article 36(1)(b) confers an individual right may be distant: foreign nationals not informed about the Vienna Convention are unlikely to have sufficient knowledge to raise a Vienna Convention claim at trial and litigate it through the courts, which will permit the Supreme Court to use the procedural default rule to avoid deciding whether the Convention confers an individual right to consular notification. If the Supreme Court relies on the procedural default rule to avoid considering the issue on the merits, the Court will contravene Article 36(2) of the Vienna Convention, *supra* note 2, 596 U.N.T.S. at 292–94, and the ICJ's judgments in *LaGrand* and *Avena*. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. at para. 49; LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27). Article 36(2) prohibits a state from applying its domestic law in a manner that denies full effect to the rights provided by the treaty, Vienna Convention, *supra* note 2, 596 U.N.T.S. at 292–94, and the ICJ held in *LaGrand* that application of the procedural default rule violates Article 36(2). *See* 2001 I.C.J. at 497 (holding that the application of the procedural default rule to the specific facts violated Article 36(2)). Based on this breach, the ICJ held in *Avena* that the procedural default rule cannot bar review and reconsideration of convictions obtained in violation of the right to consular notification. 2004 I.C.J. at 51–52. Whether the Court will adhere to the ICJ's judgments or follow domestic precedents that require application of the procedural default rule should be determined when the Court decides the effect of ICJ judgments on domestic law in *Medellin v. Dretke*. 321 F.3d 270 (5th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (Dec. 10, 2004) (No. 04-5928).

71. *See Breard*, 523 U.S. at 376 (acknowledging that the treaty may confer an individual right but failing to delineate the right's parameters).

72. *See* Chapman v. California, 386 U.S. 18, 22 (1967) ("[T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.").

73. *See Breard*, 523 U.S. at 377 ("Even were Breard's Vienna Convention claim properly raised and proved, it is extremely doubtful that the violation should result in the overturning of

parameters of a right to consular notification: the harmless error doctrine can apply regardless of whether rights are fundamental or nonfundamental.[74]

2. *The Lower Federal Courts*. Left without guidance from the Supreme Court about how to interpret the Vienna Convention, the lower federal courts have diverged on the meaning of Article 36. Some courts have interpreted the provision to create only consular rights, whereas others have held that it creates individual rights.[75] Part A of this section discusses cases that typify the position that Article 36(1)(b) does not create an individual right, whereas Part B discusses cases that typify the position that an individual right is created. Despite this split, the courts uniformly agree that such a right, if it does indeed exist, is not fundamental.[76]

a. The Vienna Convention Does Not Confer an Individual Right. The interpretation of Article 36(1)(b) that denies the existence of an individual right is typified by *United States v. Jimenez-Nava*[77]—an appeal brought by a Mexican national who was convicted of possessing counterfeit immigration documents.[78] Reasoning from principles of treaty law and interpretation, the Fifth Circuit held that the Vienna Convention bestows rights to conduct consular relations only on nations.[79] The court explained that, because treaties must be interpreted consistently across the domestic laws of their signatories, international law presumes that treaties do not create individual

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a final judgment of conviction without some showing that the violation had an effect on the trial.").

74. *Id.* at 377.

75. *Compare* United States v. Emuegbunam, 268 F.3d 377, 394 (6th Cir. 2001) (holding that Article 36(1)(b) does not confer an individual right), *with* United States v. Hongla-Yamche, 55 F. Supp. 2d 74, 78 (D. Mass. 1999) (holding that Article 36(1)(b) does confer an individual right). Additionally, a third group of federal courts refuses to address the individual right issue directly; instead, they assume that Article 36(1)(b) creates an individual right only as an intermediate step in deciding Vienna Convention cases on harmless error grounds. *See, e.g.*, United States v. Salameh, 54 F. Supp. 2d 236, 279 (S.D.N.Y. 1999) (assuming that Article 36(1)(b) creates an individual right for the purpose of reaching a decision on the merits, and citing cases).

76. *See, e.g.*, United States v. De La Pava, 268 F.3d 157, 165 (2d Cir. 2001) (joining three other courts of appeals in disqualifying consular notification as a fundamental right).

77. 243 F.3d 192 (5th Cir. 2001).

78. *Id.* at 193.

79. *Id.* at 198.

rights.[80] The Fifth Circuit looked to the plain language of the Vienna Convention for indications that Article 36(1)(b) was drafted to rebut this presumption by creating an individual right.[81] According to the Fifth Circuit, the express language of the Convention's preamble—which states that the treaty "is *not to benefit individuals*"—barred any rebuttal of the presumption against finding the existence of individual rights.[82] Based on this language and because the treaty's purpose does not directly correspond to an individual right, the Fifth Circuit concluded that Article 36(1)(b) confers no individual right.[83] The court reached this decision notwithstanding evidence that "the State Department's manual on the treatment of foreign nationals advises arresting officers to inform detainees of their right to consular communication."[84] Although recognizing that "[t]he State Department's view of treaty interpretation is entitled to substantial deference,"[85] the court regarded the State Department manual's suggestion that arresting officers should inform detainees of their right to consular notification as an expression of "laudable determination to abide by the [Vienna Convention]," not as an acknowledgement that individuals may enforce the treaty in court.[86]

b. The Vienna Convention Does Confer an Individual Right. The opposite conclusion was reached by the United States District Court for the Southern District of New York when it considered *Standt v. City of New York*.[87] *Standt* involved a section 1983 suit brought against police officers by a German national arrested for driving while intoxicated and without a driver's license.[88] The German national's claim was premised on the Vienna Convention because the

80. *See id.* at 195 ("Treaty construction is a particularly sensitive business because international agreements should be consistently interpreted among the signatories. . . . [Consequently,] they do not generally create rights that are enforceable [by individuals] in the courts.").

81. *See id.* at 196–97 (examining the language of the preamble and Article 36).

82. *See id.* at 196 ("This language would appear to preclude any possibility that individuals may benefit from [the Vienna Convention] when they travel abroad . . . .").

83. *See id.* at 196–97 (reasoning that the plain language of Article 36 and the purpose of the Vienna Convention—establishing consular rights—indicate that Article 36 does not confer an individual right).

84. *See id.* at 198 ("[T]he implementation of the treaty by the federal government is wholly different from the implication that it may be enforced in court by individual detainees.").

85. *See id.* at 197 (citing United States v. Li, 206 F.3d 56, 63–66 (1st Cir. 2000)).

86. *Id.* at 198.

87. 153 F. Supp. 2d 417 (S.D.N.Y. 2001).

88. *Id.* at 419–21.

police never informed him that he could contact the German consulate.[89] The district court's decision in this case is representative of the judgments recognizing an individual right under Article 36(1)(b).[90]

Reviewing the plain language of the Vienna Convention, the district court expressed that it was "difficult to imagine '. . . language that more unequivocally establishe[d] that the protections of Article 36(1)(b) belong to the individual national, and that the failure to promptly notify him/her of these rights constitutes a violation of these entitlements by the detaining authority.'"[91] Like the ICJ in *LaGrand*, the district court based its conclusion on the reference to "his rights" in Article 36(1)(b).[92] Continuing its plain language interpretation, the district court dismissed the section of the preamble that the Fifth Circuit found dispositive in *Jimenez-Nava*. The district court concluded that the preamble merely clarified that the Convention's consular relations rights belonged to states rather than their individual consular officers and that this clarification had no effect on individual foreign nationals' rights under the treaty.[93] The treaty's drafting history and its application since ratification confirmed the district court's conclusion that the Vienna Convention confers an individual right to consular notification:[94] the treaty's drafters had been immensely concerned about individual rights[95] and, since ratification, the United States and other nations had recognized an individual right in practice.[96]

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89. *Id.* at 421.

90. *E.g.*, United States v. Hongla-Yamche, 55 F. Supp. 2d 74, 78 (D. Mass. 1999).

91. *Standt*, 153 F. Supp. 2d at 425 (quoting United States v. Li, 206 F.3d 56, 72 (1st Cir. 2000)).

92. *See id*. ("This 'text emphasizes that the right of consular notice . . . is the citizen's.'" (quoting Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998), *cert. denied sub nom.* Breard v. Green, 523 U.S. 371 (1998))).

93. *See id.* ("[W]hen taken in the context of the treaty as a whole, the Preamble's reference to 'individuals' is best understood as referring to consular officials rather than civilian foreign nationals.").

94. *See id*. at 425 ("[The *travaux préparatoires* and the treaty's operation in practice] affirm[] the interpretation that the [Vienna Convention] was intended to confer individual rights.").

95. *See id*. at 425–26 ("[C]ommittee and plenary meeting debates on the [Vienna Convention] reflect widespread concern with the question of individual rights.").

96. *See id.* at 426–27 (providing examples of other nations' interpretations of the Vienna Convention and explaining compliance procedures established in the United States).

c. The Vienna Convention Does Not Confer a Fundamental Right: Some Agreement among the Federal Courts. Despite the disagreement about whether Article 36 confers an individual right, the federal courts concur about the scope of the right if it does exist. They agree that the right is equivalent to a right created by federal statute,[97] which means that the right is not a fundamental right. The Fourth Circuit explained that, even if Article 36 confers an individual right, it is not a constitutional right:

> [E]ven if the Vienna Convention on Consular Relations could be said to create individual rights (as opposed to setting out the rights and obligations of signatory nations), it certainly does not create *constitutional* rights. Although states may have an obligation under the Supremacy Clause to comply with the provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty provisions (regardless whether those provisions can be said to create individual rights) into violations of *constitutional* rights. Just as a state does not violate a constitutional right merely by violating a federal statute, it does not violate a constitutional right merely by violating a treaty.[98]

This statement reflects the weight of authority in American law about the nature of the Article 36(1)(b) right. The federal courts maintain that, although the ratification of the Vienna Convention imported Article 36(1)(b) into the supreme law of the United States, the right to consular communication does not achieve constitutional status.

II. AN INDIVIDUAL RIGHT

Federal courts have interpreted Article 36(1)(b) contradictorily. Some courts have concluded that this provision gives detained foreign nationals a right to notification that they can contact their consuls for assistance,[99] whereas other courts have determined that the treaty only gives consuls a right to assist their detained foreign nationals.[100] These inconsistent interpretations stem from the nature of the document being interpreted. Treaties are contracts among national governments enforceable against the governments through political

97. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) ("Our constitution declares a treaty . . . . to be regarded in courts of justice as equivalent to an act of the legislature . . . .").

98. Murphy v. Netherland, 116 F.3d 97, 100 (4th Cir. 1997).

99. *See supra* notes 91–94 and accompanying text.

100. *See supra* notes 77–86 and accompanying text.

and diplomatic channels.[101] As such, treaties generally do not grant rights to individuals.[102] Self-executing treaties, however, are an exception to this general rule.[103] Self-executing treaties, which do not require Congress to pass additional legislation for implementation and go into force immediately upon ratification, may confer individual rights.[104] The Vienna Convention is indisputably a self-executing treaty,[105] and it may fit into the individual right exception.

To determine whether the Vienna Convention falls into the individual right exception, this Part interprets Article 36(1)(b) according to canons of treaty interpretation. Section A examines the plain language of Article 36(1)(b), which is the first step in all treaty interpretation.[106] Although the plain language of Article 36(1)(b) seemingly provides a definitive meaning, Section B proceeds to the next step in treaty interpretation and explores the Vienna Convention's *travaux préparatoires*—the treaty equivalent of legislative history.[107] Finally, Section C completes the interpretive analysis by considering how the United States and other countries have implemented the Vienna Convention. Evidence is adduced that, along with the recognition that a self-executing treaty may create individual rights, strongly suggests that Article 36(1)(b) confers an individual right to consular notification. This analysis of the Vienna Convention's plain language, legislative history, and practical implementation—together with the recognition that a self-executing treaty may create individual rights—strongly suggests that Article 36(1)(b) confers an individual right to consular notification.

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101. *See* United States v. Jimenez-Nava, 243 F.3d 192, 195 (5th Cir. 2001) (characterizing treaties as contracts enforced by the nations that are parties to them).

102. *See, e.g.*, United States v. Gengler, 510 F.2d 62, 67 (2d Cir. 1975) ("[E]ven where a treaty provides certain benefits for nationals of a particular state[,] . . . it is traditionally held that any rights arising out of such provisions are, under international law, those of the states and . . . individual rights are only derivative through the states.").

103. Erik G. Luna & Douglas J. Sylvester, *Beyond* Breard, 17 BERKELEY J. INT'L L. 147, 155 (1999).

104. *Id*.

105. Vienna Convention, *supra* note 2, 21 U.S.T. at 185, 596 U.N.T.S. at 376 (proclaiming entry into force on December 24, 1969); Torres v. Mullin, 124 S. Ct. 562, 564 (2004) (Breyer, J., dissenting); *Hearing Before the Senate Comm. On Foreign Rel.*, S. Exec. Rep. No. 90–9, 91st Cong. at 5.

106. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 341.

107. *See id*. art. 32, 1155 U.N.T.S. at 340 (explaining the circumstances under which it is appropriate to consider the *travaux préparatoires*).

A. Plain Language

The Vienna Convention's plain language indicates that an individual right exists under Article 36(1)(b). This provision contains a reference to "his rights,"[108] which appears nowhere else in the treaty. The use of this special language signals that the purpose of this provision differs from that of the rest of the treaty. The conspicuous addition of this language belies the argument that Article 36(1)(b) only effectuates a consulate's right to assist its foreign national. The rights of the consul could have been provided for in the treaty without using the "his rights" language.[109] The standard "consular post,"[110] "sending state,"[111] and "receiving state"[112] language that appears in Article 36(1)(b) would have sufficed. The addition of the "his rights" language, in the context of the entire treaty and by its own terms, is strong evidence that Article 36(1)(b) creates an individual right.[113]

The "his rights" language of Article 36(1)(b) is not necessarily undone by the Vienna Convention's preamble in the way that the Fifth Circuit maintained.[114] The preamble states that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States.[115] Instead of indicating that the Vienna Convention does not give foreign nationals an individual right, this language likely means that the "privileges and immunities" bestowed on consular officers are the means of effecting consular responsibilities, not mere personal benefits.[116] This caveat is necessary to justify the Vienna Convention's tax exemptions and special

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108. Vienna Convention, *supra* note 2, art. 36(1)(b), 21 U.S.T. at 101, 596 U.N.T.S. at 292.

109. *Id*.

110. *Id*.

111. *Id*.

112. *Id.*

113. *See supra* notes 26, 92 and accompanying text.

114. Vienna Convention, *supra* note 2, pmbl., 21 U.S.T. at 79, 596 U.N.T.S. at 262; *see supra* notes 77–86 and accompanying text.

115. Vienna Convention, *supra* note 2, pmbl., 21 U.S.T. at 79, 596 U.N.T.S. at 262.

116. *See* United States v. Rodrigues, 68 F. Supp. 2d 178, 182 (1999) ("[I]t appears that the purpose of [the preamble] is not to restrict the individual notification rights of foreign nationals, but to make clear that the Convention's purpose is to ensure the smooth functioning of consular posts in general, not to provide special treatment for individual consular officials."); *see also* Emily Deck Harrill, Note, *Exorcising the Ghost: Finding a Right and a Remedy in Article 36 of the Vienna Convention on Consular Relations*, 55 S.C. L. REV. 569, 578 (2004) ("The preamble, viewed in context, simply recognizes that consuls are not afforded the immunities outlined in the treaty as personal benefits.").

protections for consular officers.[117] Nothing in the treaty's plain language indicates that the preamble's reference to individuals is not intended to encompass foreign nationals detained abroad. In fact, the actual operation of the Vienna Convention suggests otherwise. Benefits to individual foreign nationals are necessary byproducts of consular relations; when a country negotiates visa rights for its citizens or visits a national in jail, these individuals will necessarily derive benefits from the conduct of consular relations.[118] Consequently, the preamble to the Vienna Convention cannot logically be interpreted to deny benefits to foreign nationals. Irrespective of the "no individual benefit" language in the preamble, Article 36(1)(b) likely confers an individual right.

B. Drafting

The Vienna Convention's *travaux préparatoires* underpin Article 36(1)(b)'s plain language.[119] The records of the International Law Commission[120] and the Vienna Conference[121] show that the treaty's drafters sought to draft a provision that would "adequately safeguard[] individual freedom and the exercise of consular functions."[122] The Vienna Conference delegates adopted the final version of Article 36(1)(b) believing that "the right given to

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117. *See, e.g.*, Vienna Convention, *supra* note 2, art. 32, 21 U.S.T. at 98, 596 U.N.T.S. at 288 (taxation); *id.* art. 31, 21 U.S.T. at 97, 596 U.N.T.S. at 288 (inviolability of consular premises).

118. *See, e.g.*, *id.* art. 5(d), 21 U.S.T. at 83, 596 U.N.T.S. at 268 (explaining the consular function of issuing visas); *id.* art. 36(1)(c), 21 U.S.T. at 101, 596 U.N.T.S. at 292 ("[C]onsular officers shall have the right to visit a national . . . who is in prison, custody or detention . . . .").

119. *See Summary Records of the 13th Session*, [1961] 1 Y.B. Int'l L. Comm'n 33, U.N. Doc. A/CN.4/SER.A/1961 ("The consul's freedom to communicate with his nationals, and their right to communicate with their consul, constituted the cornerstone of the whole structure of consular relations.").

120. The Internal Law Commission—thirty-four international lawyers elected by the United Nations General Assembly as representatives of the world's principal legal systems—codifies customary international law and promotes its progressive development. MALANCZUK, *supra* note 42, at 61. The Commission drafts treaties and prepares reports that summarize international law. *Id*.

121. The Vienna Conference convened in March 1963 pursuant to United Nations General Assembly Resolution 1685. G.A. Res. 1685, U.N. GAOR, 16th Sess., Supp. No. 9, at 61–62, U.N. Doc. A/4843 (1961). The Secretary-General convoked the Conference of plenipotentiaries to consider the articles on consular relations drafted by the International Law Commission and to adopt a consular convention based upon them. *Id*. The Vienna Convention resulted. *See supra* note 2 and accompanying text.

122. 1 United Nations Conference on Consular Relations: Official Records, at 82, U.N. Doc. A/Conf. 25/16, U.N. Sales. No. 63.X.2 (1963) [hereinafter Official Records].

consulates implied a corresponding right for nationals."[123] The proponents of Article 36(1)(b) drafted the "his rights" language to establish consular notification as an individual right.[124] The passage of the provision indicates that a majority of delegates either sought to confer an individual right or at least acquiesced to doing so. The *travaux préparatoires* demonstrate that one of the reasons for adopting Article 36 in its present form was to give foreign nationals an individual right to consular notification. This is compelling evidence that the courts should recognize an individual right.

The debates preceding the adoption of another provision—Article 36(1)(c)—also suggest that the drafters of the Vienna Convention wanted to provide an individual right. The drafters debated whether Article 36(1)(c) would require notification of consuls automatically upon the arrest of foreign nationals or only upon a detainee's request.[125] Notably, the American delegate opposed an automatic notification provision because such a provision "[would] not recognize the freedom of action of the detained person."[126] Because "[t]he object . . . was to protect the rights of the national concerned,"[127] the delegates ultimately chose to draft a discretionary Article 36(1)(c).[128] Under the provision, an arresting state must notify a detained foreign national's consul only if the foreign national requests notification. Concomitant with the right to notification is the right to know that consular assistance is available: foreign nationals can exercise their right to ask arresting states to contact their consulates only if they are aware of this right.[129] It follows that the

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123. *Id*. at 333.

124. *See id.* at 83–84:

> The language of the [first-mentioned proposal] was unacceptable as it stood, because it could give rise to abuses and misunderstanding. It could well make the provisions of article 36 ineffective because the person arrested might not be aware of his rights. . . . For those reasons . . . it was essential to introduce a provision to the effect that the authorities of the receiving State should inform the person concerned without delay of his rights . . . .

125. *Id*. at 337 (debating between "[t]he absolute and unconditional obligation of the authorities of the receiving State to notify the sending State's consul if a national of that State was . . . detained" and "the idea . . . that consuls should be notified only when the person concerned so requested").

126. *Id*. at 38.

127. *Id*. at 337.

128. Vienna Convention, *supra* note 2, art. 36(1)(c), 21 U.S.T. at 101, 596 U.N.T.S. at 292.

129. *See* Official Records, *supra* note 122, at 84 ("[I]t was essential to introduce a provision to the effect that the authorities of the receiving State should inform the person concerned without delay of his rights . . . .").

drafters' adoption of Article 36(1)(c) conferred upon foreign nationals the right to learn from arresting states that they may ask for their consuls' aid.[130] Therefore, the history of Article 36(1)(c), when taken together with that of Article 36(1)(b), strongly indicates that foreign nationals hold an individual right to learn from arresting states that they may contact their consuls for assistance.

C. Practice

Nations' implementation of Article 36(1)(b) further supports the conclusion that Article 36(1)(b) confers an individual right. In practice, the United States has never denied that foreign nationals possess an individual right under Article 36(1)(b).[131] The State Department acknowledges the foreign national's "*right* to have his consular officials notified of his arrest or detention."[132] The State Department incorporates this right into its domestic policy, undertaking efforts to insure that it "advise[s] the foreign national of *this right of his*."[133] These efforts include federal regulations[134] and official missives to the states.[135] These domestic initiatives cannot be dismissed as mere efforts to comply with the treaty because the position taken by a federal agency charged with effectuating a given right is owed special deference.[136] Furthermore, the State Department's domestic policy counters its opposition to challenges brought by foreign nationals under Article 36(1)(b) because "the litigation position of the State Department may not be entitled to as great weight as its nonlitigation policy approach to interpreting the [Vienna Convention]."[137] Thus, the State Department's domestic

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130. *Id*.

131. *See* Standt v. City of New York, 153 F. Supp. 2d 417, 426 (S.D.N.Y. 2001) (discussing the State Department's efforts to comply with the Vienna Convention).

132. William H. Taft IV, U.S. Dep't of State Legal Advisor, Remarks to the National Association of Attorneys General (Mar. 20, 2003) (emphasis added), *available at* http://usinfo.org/wf-archive/2003/030321/epf516.htm.

133. *Id*. (emphasis added).

134. Notification of Consular Officers upon the Arrest of Foreign Nationals, 28 C.F.R. § 50.5 (2005); Apprehension, custody, and detention, 8 C.F.R. § 236.1(e) (2005).

135. *See generally* U.S. DEP'T OF STATE, *supra* note 4 ("This booklet contains instructions and guidance relating to the arrest and detention of foreign nationals. . . . The instructions and guidance herein should be followed by all . . . state[] and local government officials, whether law enforcement, judicial, or other.").

136. United States v. Li, 206 F.3d 56, 63–66 (1st Cir. 2000).

137. *See Standt*, 153 F. Supp. 2d at 427 n.6 (noting that nonlitigation policy should be accorded more weight than conflicting litigation policy).

initiatives weigh heavily in favor of recognizing an individual right under Article 36(1)(b).

Other signatory nations also recognize, at least at the policymaking level, an individual right to consular notification under Article 36(1)(b), as evidenced by the amici curiae submissions to international tribunals and U.S. courts.[138] In litigation in which they had no vested interest, eighteen European nations and eight Central and South American countries proclaimed that their domestic laws recognize an individual right under Article 36(1)(b).[139]

This recognition by other signatories and parties to the treaty presses the United States also to recognize an individual right. Without effectuating foreign nationals' Article 36(1)(b) right, the United States cannot continue to use the Vienna Convention to further the interests of its citizenry abroad.[140] Reciprocity demands that the United States recognize an individual right under Article 36(1)(b). This compelling policy consideration, along with the Vienna Convention's plain language and its drafting and implementation histories, indicates that foreign nationals hold what should be a judicially cognizable right.

III. A FUNDAMENTAL RIGHT

The inquiry into whether Article 36(1)(b) confers an individual right begs the additional question of whether the right, if it exists, is fundamental in scope. In American jurisprudence, fundamental rights are those rights that have "a value . . . essential to individual liberty in our society."[141] They "comprise a subset, or special part, of the

138. *See id.* at 426 (noting that Argentina, Canada, Mexico, and Paraguay submitted amici curiae briefs); Advisory Opinion, *supra* note 13, para. 336 (same).

139. *See id.* (noting that Argentina, Paraguay, Canada, and Mexico submitted amici curiae briefs); *see also* Memorial of Mexico, supra note 8, at 140–41 (noting that eighteen states, through the European Union and the European Commission, submitted amici curiae briefs in five death penalty cases in the United States); Advisory Opinion, *supra* note 13, para. 336 (noting that Mexico, Costa Rica, El Salvador, Guatemala, Honduras, Paraguay, and the Dominican Republic submitted amici curiae briefs).

140. *See* Linda J. Springrose, Note, *Strangers in a Strange Land: The Rights of Non-Citizens Under Article 36 of the Vienna Convention on Consular Relations*, 14 GEO. IMMIGR. L.J. 185, 197 (1999) (noting that the Vienna Convention's reciprocal nature could imperil the protection of U.S. citizens if the U.S. government failed to meet its obligations under the Vienna Convention).

141. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.7, at 433 (6th ed. 2000).

concept of liberty."[142] Rights recognized as fundamental include the right to counsel, the right against self-incrimination, the right to a speedy trial, the right to confront adverse witnesses, and the right "to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized."[143] These fundamental rights are, of course, anchored in the Bill of Rights. Nonetheless, not all fundamental rights are enumerated in the Bill of Rights; they may have "no specific textual basis in the Constitution."[144] Cases such as *Roe v. Wade*,[145] *Griswold v. Connecticut*,[146] *Griffin v. Illinois*,[147] and, arguably, *Lawrence v. Texas*[148] recognize as fundamental certain rights that are merely implied or derived from rights enumerated in the Bill of Rights. Therefore, even in the absence of a perfect fit with the Bill of Rights, a fundamental right may be recognized under standards articulated by the Supreme Court:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . ." "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society."[149]

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142. *Id*. § 11.5.

143. Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

144. NOWAK & ROTUNDA, *supra* note 141, § 11.7.

145. 410 U.S. 113 (1973) (right to abortion).

146. 381 U.S. 479 (1965) (right to marital privacy).

147. 351 U.S. 12 (1956) (right to obtain a court transcript without cost to qualify for appellate review).

148. 123 S. Ct. 2472 (2003) (right to private sexual conduct). *Lawrence v. Texas* is arguably a fundamental rights case. The Court recognized a protected liberty interest under the substantive due process rubric. The Court merely stopped short of labeling the right to private sexual conduct as a fundamental right.

149. *Griswold*, 381 U.S. at 493–94 (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Powell v. Alabama, 287 U.S. 45, 67 (1932); Poe v. Ullman, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting) (alterations and omissions in original)).

The Supreme Court has never considered whether the individual right conferred by Article 36—which this Part assumes to exist—is fundamental under these standards.[150] The lower federal courts have concluded that the right is not fundamental in scope,[151] reasoning summarily that the Supremacy Clause places treaty rights on par with statutory rights, not constitutional ones.[152]

But the parity between rights created by treaty and by statute does not automatically mean that the right to consular notification is not fundamental. The right may nevertheless be fundamental if it is "deeply rooted in this Nation's history and tradition"[153] and 'implicit in the concept of ordered liberty."[154] Substantive due process could sweep in the right to consular notification and classify it as a fundamental right if society's collective sense of liberty required that foreign nationals receive greater safeguards than the criminal justice system provides to American defendants. Whether society's sense of due process encompasses the right to consular notification is unknown, however, because no federal court has ever analyzed the right to consular notification within the substantive due process rubric.[155]

The federal courts' refusal to perform the substantive due process inquiry may result from the federal judiciary's retrenchment of substantive due process: substantive due process is out vogue.[156] Likewise, the literature has used the courts' curtailment of substantive due process to dismiss summarily the fundamental rights argument; legal scholarship has shied away from substantive due process analysis because of a perception that courts are hesitant to recognize new rights as fundamental.[157]

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150. *See supra* Part I.B.1.

151. *See supra* notes 97–98 and accompanying text.

152. *Id*.

153. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)). *Glucksberg* outlines the two-step substantive due process analysis.

154. *Id*. (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969)).

155. *See supra* Part I.B.

156. *See* Joshua A. Brook, Note, *Federalism and Foreign Affairs: How to Remedy Violations of the Vienna Convention and Obey the U.S. Constitution, Too*, 37 U. MICH. J.L. REFORM 573, 595–96 n.108 (2004) ("Some have even argued that consular rights should be deemed 'fundamental rights' implied by the Bill of Rights but it is doubtful the Court would accept this argument given its general retreat from substantive due process.").

157. *See id.* (same).

This reticence is unjustified: the "general retreat from substantive due process" is more perceived than real.[158] In *Moore v. City of East Cleveland*,[159] the Supreme Court affirmatively denied that it was retreating from substantive due process;[160] Justice Powell emphasized that the excesses of the *Lochner* era counseled only "caution and restraint," not the "abandonment" of substantive due process.[161] In *Washington v. Glucksberg*,[162] the Court reiterated that it "must . . . 'exercise the utmost care whenever [it is] asked to break new ground in this field,'"[163] but at no time has the Court signaled a complete departure from substantive due process. Undoubtedly, "the United States Supreme Court still follows the doctrine when determining unenumerated rights issues."[164]

Because substantive due process remains a viable legal doctrine, it should be applied to the right to consular notification. This Part explores whether constitutionally protected liberty should include the right to consular notification. Section A considers the history, tradition, and practice of consular notification in the United States, and Section B looks beyond history and tradition to determine if society's modern conception of due process includes the right to consular notification. These Sections together demonstrate that the right to consular notification is a candidate for constitutional protection.

A. History, Tradition, and Practice

The starting point[165] of a substantive due process analysis is an examination of the history, tradition, and practice behind the right to consular notification.[166] The point in time from which courts must

158. *Id*.

159. 431 U.S. 494, 502 (1977).

160. *Id*.

161. *Id*.

162. 521 U.S. 702 (1997).

163. *Id.* at 720 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

164. Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 181 (2003).

165. The substantive due process analysis also requires "a 'careful description' of the asserted fundamental liberty interest." *Washington*, 521 U.S. at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)). This prong can be omitted from the analysis here because a careful description of the right to consular notification is easy—foreign nationals' right upon arrest to notification that they may contact their home countries' consulates for assistance.

166. *See supra* notes 153 and accompanying text.

trace this history, tradition, and practice is unclear, although Justice Scalia characterized it as a demanding inquiry in his *Lawrence* dissent.[167] In *Ingraham v. Wright*,[168] the majority charted the history of corporal punishment all the way back to Blackstone and the American Revolution,[169] but, in *Lawrence*, the majority focused on the history of sodomy laws since 1961.[170] The Supreme Court has not established a historical benchmark for constitutional protection. Without a standard for measuring history, tradition, and practice, one can only make an informed guess about whether the right to consular notification is so culturally and legally established that the Supreme Court should incorporate it into due process.

A survey of the history and tradition of consular notification suggests that the right could meet any of the historical standards that the Supreme Court previously has employed in substantive due process inquiries. "[C]onsular relations have been established between peoples since ancient times,"[171] and the State Department has identified consular notification as a "basic obligation" of conducting consular relations.[172] Because consular notification is such an integral part of consular relations, one can readily assume that the history of consular relations and the history of consular notification are coterminous. This shared history is quite long, as the preamble to the Vienna Convention acknowledges.[173] Even before the Vienna Convention provided for consular notification, the norms of customary international law required countries to initiate some sort of consular communication when they detained foreign nationals, either by giving foreign nationals the option of contacting their consulates or by contacting the consulates directly.[174] The United States subscribed to these norms long before it accepted the consular notification requirement by ratifying the Vienna Convention.[175] In

167. *See* Lawrence v. Texas, 123 S. Ct. 2472, 2489 (2003) (Scalia, J., dissenting) ("*[O]nly* fundamental rights which are 'deeply rooted in this Nation's history and tradition' qualify for anything other than rational-basis scrutiny . . . ." (quoting *Washington*, 521 U.S. at 721)).

168. 430 U.S. 651 (1977).

169. *Id.* at 659–63.

170. *Lawrence*, 123 S. Ct. at 2481.

171. Vienna Convention, *supra* note 2, pmbl., 21 U.S.T. at 79, 596 U.N.T.S. at 262.

172. U.S. DEP'T OF STATE, supra note 4, at 44.

173. Vienna Convention, *supra* note 2, pmbl., 21 U.S.T. at 79, 596 U.N.T.S. at 262.

174. *See* U.S. DEP'T OF STATE, *supra* note 4, at 42 ("The [Vienna Convention] to a large extent codified customary international law . . . .").

175. *See id.*

addition to subscribing to the consular notification norms in customary international law,[176] the State Department negotiated bilateral consular relations treaties that provided for reciprocal consular notification.[177] These agreements were typically friendship, commerce, and navigation treaties through which the United States formalized the consular relations that it had established under customary international law.[178] The United States' strong historical commitment to consular notification is best evidenced by mandatory notification agreements (MNA).[179] An MNA is a treaty under which the United States commits to notify another country's consulate whenever it detains one of the other country's foreign nationals.[180] The United States had such a treaty with Belgium as early as 1880.[181] The MNAs' automatic consular notification provisions attest to the importance of the assistance that consulates can offer to detained foreign nationals, and the United States' historic use of these treaties attests to the long history of consular notification in this country.

This history strongly suggests that the boundaries of due process should expand to encompass the right to consular notification. It is a history at least as compelling as the history underpinning the Supreme Court's holding in *Lawrence*. And the ancient roots of consular relations are not unlike the archaic origins of corporal punishment.[182] The Supreme Court is willing to grant constitutional protection to rights deeply embedded in this nation's history.[183] Ultimately, only the Supreme Court can determine what constitutes embedment, but the practice of notifying foreign nationals about consular assistance or contacting the consulate directly extends throughout United States history to the earliest interactions among the peoples of sovereign states. This history at least merits

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176. *Id*.

177. *Id*.

178. U.S. Dep't of State, Founding of the Department of State, 1789, *at* http://www.state.gov/r/pa/ho/time/nr/14316.htm (last visited Jan. 30, 2005) (on file with the *Duke Law Journal*).

179. U.S. DEP'T OF STATE, supra note 4, at 43.

180. The International Justice Project, Foreign Nationals: Bilateral Mandatory Notification Treaties, *at* www.internationaljusticeproject.org/nationals_bil.cfm (last visited Feb. 1, 2005) (on file with the *Duke Law Journal*).

181. *Id*.

182. *See* Ingraham v. Wright, 430 U.S. 651, 659–63 (1977) (reviewing the history of corporal punishment).

183. *See* Griswold v. Connecticut, 381 U.S. 479, 488 (Goldberg, J., concurring) (1965) (noting that the Framers recognized rights beyond those specified in the Bill of Rights).

consideration by the federal courts, which should recognize the right as a possible fundamental right and conduct a thorough substantive due process analysis.

B. Modern Conceptions of Liberty

Analyzing the history, tradition, and practice that underlie a right is only the first prong of the substantive due process analysis.[184] "History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[185] Therefore, the substantive due process analysis also requires consideration of society's modern conceptions of due process—what rights should now be included in the constitutional conception of liberty.[186] Before the right to consular notification can qualify as fundamental, its place in society's modern vision of due process must be examined. The Supreme Court alternatively has described this second prong of the substantive due process inquiry as a determination of whether the right is so "implicit in the concept of ordered liberty"[187] that "neither liberty nor justice would exist if [it was] sacrificed,"[188] or whether it "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[189] These are iterations of the same basic question: Must this right be recognized as fundamental to maintain the American conception of constitutional freedom?

This question may be answered affirmatively even if the right can be recognized as fundamental only by implication.[190] The Supreme Court has recognized fundamental rights—such as the right to privacy[191] and the right to raise one's child as one sees

184. *See* Lawrence v. Texas, 123 S. Ct. 2472, 2480 (2003) (noting that history and tradition should be the starting, but not the ending, point (citing County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))).

185. *Id.* (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

186. *See id*. at 571–72 ("[W]e think that our laws and traditions in the past half century are of most relevance here.").

187. Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

188. *Id.* at 326.

189. Griswold v. Connecticut, 381 U.S. 479, 493 (Goldberg, J., concurring) (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932) (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926))).

190. *See id*. at 482–83 ("Without those peripheral rights the specific rights would be less secure.").

191. *See id.* (recognizing the right to privacy).

fit[192]—that are only derivative of express constitutional protections;[193] fundamental rights need not be explicitly guaranteed by the Bill of Rights.[194]

Along these lines, courts could derive a fundamental right to consular notification from the Bill of Rights.[195] Arguably, notions of privacy and autonomy should provide constitutional protection to the right to consular notification even though this right is not expressly within the Constitution's ambit. This argument depends on the disadvantages faced by foreign nationals in the American criminal justice system[196] and on the idea that peripheral constitutional rights must be recognized to make enumerated constitutional rights more secure.[197] *Griswold* and *Roe* lend precedential support—a protectable right to privacy must exist in a free society.

But reliance on the right-to-privacy cases may be misplaced. These cases recognize a right to privacy rooted in individual liberty and autonomy—a right that the Supreme Court has been careful to contain.[198] This right, which has had little generative effect in recent years,[199] may be a shaky constitutional basis for implying a right to consular notification. The relationship between a right to consular notification and notions of autonomy and liberty is too attenuated: although the right to consular notification does implicate foreign nationals' autonomy, deprivations of the right to consular notification restrain foreign nationals' physical liberty more than their freedom of choice. Furthermore, Justice Scalia suggested in his *Lawrence* dissent that *Glucksberg* has eroded the *Griswold* line of cases.[200]

A better argument would rely on "emanations [from] specific [constitutional] guarantees,"[201] namely, the Sixth Amendment.[202] The

192. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (recognizing parents' right to raise their children as they see fit).

193. *See Griswold*, 381 U.S. at 483–84 (explaining the penumbras of guaranteed rights).

194. *See id.* (explaining how "various guarantees create zones of privacy" beyond specific Bill of Rights provisions).

195. *See* Springrose, *supra* note 140, at 199–203.

196. *See infra* notes 209–218 and accompanying text.

197. *Griswold*, 381 U.S. at 482–83.

198. *See* Washington v. Glucksburg, 521 U.S. 702, 723–28 (1997) (declining to derive from the right to privacy a right to commit suicide or to assist another to commit suicide).

199. *Id*.

200. *See supra* note 167 and accompanying text.

201. Poe v. Ullman, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting).

202. U.S. CONST. amend. VI.

Supreme Court has suggested in criminal procedure cases that rights can be implied from the existing right to counsel under the *Palko v. Connecticut*[203] standard: rights are fundamental if they are "implicit in the concept of ordered liberty,"[204] such that "neither liberty nor justice would exist if they were sacrificed."[205] In *Griffin*, the Court noted that the Constitution does not mention any right to a free transcript for appellate review, but the Court recognized the right as fundamental, stating, "[O]ur own constitutional guaranties . . . allow no invidious discriminations between persons and different groups of persons. . . [A]ll people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'"[206] A *Palko* argument was also made by the dissenters in *Betts v. Brady*,[207] who rightly argued that "[a] practice cannot be reconciled with 'common and fundamental ideas of fairness and right,' which subjects innocent men to increased dangers of conviction merely because of their poverty."[208]

This argument may be equally applicable in the cases of foreign nationals. To use the language of the *Betts* dissenters, "[a] . . . practice [may not be reconcilable] with 'common and fundamental ideas of fairness and right,' which subjects innocent men to increased dangers of conviction merely because of their"[209] alienage. Like indigents, foreign nationals may face "increased dangers of conviction"[210] because of a cultural gap.[211] This cultural gap, characterized by language differences and an alien criminal justice system, may prevent foreign nationals from fully understanding their legal rights, when arresting authorities explain their legal rights to them.[212] For instance, foreign nationals, unfamiliar with the American adversary system, may not appreciate that they are "not required to make any

203. 302 U.S. 319 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

204. *Id.* at 325.

205. *Id.* at 326.

206. Griffin v. Illinois, 351 U.S. 12, 17 (1956) (quoting Chambers v. Florida, 309 U.S. 227, 241 (1940)).

207. 316 U.S. 455 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

208. *Id.* at 476 (Black, J., dissenting) (quoting the majority opinion at 473).

209. *Id.* (Black, J., dissenting) (quoting the majority opinion at 473).

210. *Id.* (Black, J., dissenting).

211. *See* Springrose, *supra* note 140, at 195–96 (explaining that cultural differences sometimes lead foreign nationals unwittingly to jeopardize their own defenses).

212. *See* John Cary Sims & Linda E. Carter, *Representing Foreign Nationals: Emerging Importance of the Vienna Convention on Consular Relations as a Defense Tool*, THE CHAMPION, Sept.–Oct. 1998, at 30.

statement to the police or prosecutors"[213] or that they cannot be compelled to testify.[214] Instead, foreign nationals may follow practices from their home countries, which are incompatible with the United States' adversary system. The Paraguayan national in *Breard*, for example, confessed to rape and murder, in spite of his Fifth Amendment rights, because the courts of his home country offered leniency for confessions.[215]

For several reasons, the American right to counsel cannot always correct such misunderstandings of the legal system. First, many foreign nationals may not know that they have a right to an attorney. Furthermore, even if foreign nationals have attorneys appointed for them, the attorneys may not be able to bridge the cultural gap on their own. Foreign nationals simply may not trust their appointed attorneys enough to cooperate in an effective defense.[216] This scenario is especially likely when foreign nationals do not understand the attorney-client privilege.[217] Similarly, the other protections of criminal due process may fail to bridge the cultural gap because the safeguards themselves are undermined by cultural differences.[218] Consequently, only "[a]n interested consul can provide the bridge"[219] to close the cultural gap effectively. Consular assistance is needed to effectuate due process for foreign nationals and to place them on par with other criminal defendants. Only consular assistance will ward off the increased dangers of conviction faced by foreign nationals, which qualifies the right to consular notification for fundamental status under the *Palko-Betts* analysis.[220] The right to consular notification should be recognized as fundamental because allowing foreign nationals to stand trial without consular assistance to help them overcome their cultural disadvantages does not square with society's common and fundamental ideas of fairness and right.[221]

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213. *Id*.

214. *Id*.

215. *See* Springrose, *supra* note 140, at 195–96 (explaining the impact of culture on the events of *Breard*).

216. Sims & Carter, *supra* note 212.

217. *Id*.

218. *Id*.

219. *Id*.

220. *See supra* notes 201–19 and accompanying text.

221. Betts v. Brady, 316 U.S. 455, 476 (1942) (Black, J., dissenting) (quoting the majority opinion at 473), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

The *Palko-Betts* analysis provides a strong constitutional basis for the right to consular notification. The right could be implied from a specific constitutional provision—the Sixth Amendment—which gives it the strength of textual support. Furthermore, there is a strong connection between the Sixth Amendment and the right to consular notification because they are both assurances of fairness in the criminal justice system. Given the existence of a textual basis from which to imply a fundamental right to consular notification, there is no need to resort to the individual autonomy argument,[222] which is not as strong as a textual implication argument based directly on the Sixth Amendment.

What is most significant for the purposes of this Note is that there exist two plausible arguments for implying a fundamental right to consular notification. The mere existence and viability of these arguments suggest that the right to consular notification is a contender for fundamental status. Whether it deserves constitutional protection should be determined through a comprehensive substantive due process analysis.

CONCLUSION

Article 36(1)(b) most likely grants individual foreign nationals a right to notification that their consuls may assist them. Even though treaties do not generally create individual rights, profuse evidence suggests that the Vienna Convention is an exception to this general rule. As a self-executing treaty, the Vienna Convention is capable of granting individual rights, and the treaty's language and drafting history indicate that it does so. The treaty explicitly references an individual, and the drafting history indicates that the drafters intended to vest an individual right in foreign nationals. The strength of this evidence should lead to a uniform recognition of an individual right by the American courts and the criminal justice system. Moreover, the judicial system should consider recognizing the individual right as a fundamental right. Fundamental rights can be derivative of or implied from enumerated constitutional protections if the rights are sufficiently underpinned by history, tradition, and practice and conform to society's modern conceptions of due process. Strong historical evidence suggests that consular notification could meet any historical benchmark established for fundamental rights.

222. *See supra* notes 195–200 and accompanying text.

Consular notification is consistent with society's modern conceptions of liberty because it is a fairness guarantee in the criminal justice system. Given that Article 36(1)(b) was intended to protect foreign nationals in alien criminal justice systems and that the concept of consular notification extends throughout American history, the right in Article 36(1)(b) should at least merit recognition as a potential fundamental right, and violations of this right should prompt an exacting substantive due process inquiry. Foreign nationals facing convictions and punishments in the United States deserve a careful consideration of the right that the Vienna Convention arguably gives.