No Remedy for This Wrong? Analyzing the Appropriate Remedy for Violations of California Penal Code § 834c

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Abstract

Article 36(1)(b) of the Vienna Convention on Consular Relations provides that a foreign national of a state-party has the right to have her consulate notified of her arrest upon detention. Many United Supreme Court and other federal courts have grappled with issues stemming from that right, including whether the treaty creates privately-enforceable rights. However, California was unique in that it enacted California Penal Code § 834c, which codifies as state law the right to consular notification.

While this codification precludes much discussion about privately-enforceable rights, the statute is, however, silent on what remedy should be applied if law enforcement violate the § 834c's commands. The issue of a remedy most often comes up when a foreign national has been arrested and makes a confession without having been notified of her right to consular notification. She often then seeks suppression of that confession in order to remedy that violation. Courts have split several ways on the appropriate remedy, and this paper explores four approaches taken by courts in dealing with failures to notify. The author also delves into the legislative history of § 834c to ascertain the most appropriate remedy for violations of the section. Lastly, the benefits and disadvantage of five approaches are explored, ending with the unfortunate conclusion that the Victims' Bill of Rights in the California Constitution essentially works to preclude a state-level suppression remedy. Therefore, given the current state of federal law regarding Article 36(1)(b), criminal defense attorneys should seek to include the failure to notify in the overall voluntariness inquiry when attempting to suppress a confession on due-process grounds under the Fifth or Fourteenth Amendments.

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A nation's commitment to the rule of law is measured by its willingness to subject its own government to it. The Vienna Convention requires the United States law enforcement officers to inform arrested foreign nationals of their right to have their respective consulates notified of the arrest. It further requires that this right be exercised in accordance with the laws of the arresting country. These obligations were not conjured by the judiciary: they were negotiated by the President and ratified by the United States Senate.¹

I. Introduction

The United States ratified the Vienna Convention on Consular Relations on December 24, 1969.² Article 36(1)(b) of that treat provides for a right to consular notification, meaning that when a foreign national of a state-party is detained in, for example, the United States, law enforcement must notify her that she has a right to have her consulate contacted regarding her detention.³ The United States operates under a “dualistic” system, meaning that treaties generally need implementing legislation by Congress before they can be enforceable as domestic law.⁴ However, in 1999, the California Legislature unanimously adopted Penal Code § 834c, which

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¹ United States v. Lombera-Camorlinga, 206 F.3d 882, 895-96 (9th Cir. 2000) (Thomas, Circuit Judge, dissenting).
² CONSULAR NOTIFICATION AND ACCESS, DEPARTMENT OF STATE (3d ed. 2010) [hereinafter “CNAN”].
⁴ See Rebecca Croootof, Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon, 120 YALE L.J. 1784, 1786 (2011).
implements the right to consular notification in California and mandates that California law enforcement carry out that right.⁵

Recognizing the right is only half the battle, however. Dispute has arisen in the California courts over how to remedy a violation of the right to consular notification under the Penal Code provision. This article will discuss the remedies that have been applied by courts, including no remedy at all, and will then discuss the pros and cons of five possible remedies. The article will conclude with the rather disheartening realization that the California Constitution dramatically limits the remedies available for such violations, and therefore the most legally appropriate remedy is to consider a violation of the right in the overall due-process voluntariness inquiry when determining whether a confession was obtained through police misconduct.

II. Background on the Vienna Convention and California Penal Code § 834c

A. Vienna Convention on Consular Relations

The Vienna Convention on Consular Relations (“VCCR”) was signed on April 24, 1963 in Geneva, Switzerland and entered into force on March 19, 1967.⁶ While the entire treaty contains seventy-nine articles,⁷ perhaps none has received more attention and engendered as much international controversy as Article 36, which is titled “Communication and contact with nationals of the sending State.”⁸ Subsection 1(b) of that article provides,

With a view to facilitating the exercise of consular functions relating to nationals 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

⁷ VCCR, supra note 3.
⁸ Id. at art. 36.
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 sub-paragraph . . . .

Essentially, this subsection provides a right of consular notification when law enforcement officials of one state arrest a foreign national of another. Though the subsection begins with “if he [the foreign national who is detained] so requests . . . ,” some state-parties require mandatory notification of consular officials when one of their nationals is detained. The Article’s command seems simple enough: if a foreign national is detained, she must be advised that she has the right to have her state’s consular officials notified. However, the real problem is what to do when state-parties fail to live up to this international obligation. Courts across the globe have split on such issues as whether the article creates personal rights that an arrestee may enforce in municipal courts, and, if so, what remedy, if any, should be applied to cure such violation.

The United States ratified the VCCR on December 24, 1969. Thus, pursuant to the Supremacy Clause of the United States Constitution, the VCCR is the “supreme law of the land” in the United States, meaning that both federal and state authorities are bound to respect it. However, the United States has a “dualistic” system when it comes to international law, which means that treaties must be implemented by Congress through separate legislation or they must

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9 Id. at art. 36(1)(b).
10 See id.
11 Id.
12 Those states are Antigua and Barbuda, Armenia, Azerbaijan, The Bahamas, Barbados, Belarus, Belize, Brunei, Bulgaria, China, Costa Rica, Cyprus, Czech Republic, Dominica, Fiji, The Gambia, Georgia, Ghana, Grenada, Guyana, Hong Kong, Hungary, Jamaica, Kazakhstan, Kiribati, Kuwait, Kyrgyzstan, Malaysia, Malta, Mauritius, Moldova, Mongolia, Mongolia, Nigeria, Philippines, Poland, Romania, Russia, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Seychelles, Sierra Leone, Singapore, Slovakia, Tajikistan, Tanzania, Tonga, Trinidad and Tobago, Turkmenistan, Tuvalu, United Kingdom, U.S.S.R., Uzbekistan, Zambia, Zimbabwe. Cal. Pen. Code § 834c (West 2011).
13 See VCCR, supra note 3, at art. 36(1)(b).
14 CNAN, supra note 2.
15 U.S. CONST., art. VI, cl. 2.
be self-executing.\textsuperscript{16} There is no implementing legislation for the VCCR, however, so the issue of whether, as a matter of federal law, the VCCR is self-executing is not entirely settled. The Ninth Circuit thought it was, as it said, “There is no question that the Vienna Convention is self-executing. As such, it has the force of domestic law without the need for implementing legislation by Congress.”\textsuperscript{17} Another issue that has arisen at the federal level is whether the VCCR creates private rights that can be enforced in domestic U.S. courts. Since “[a] treaty is primarily a compact between independent nations,”\textsuperscript{18} there is a presumption in the United States against a treaty creating private rights.\textsuperscript{19} The United States Supreme Court has “assume[d], without deciding, that Article 36 does grant [private rights].”\textsuperscript{20} At the international level, the International Court of Justice concluded, “Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person.”\textsuperscript{21} That issue of whether or not the right to consular notification under Article 36(1)(b) is a private right is basically a non-issue in California because of Penal Code § 834c:\textsuperscript{22} the section implements Article 36(1)(b) in California, thus precluding a court from visiting the issue of whether or Article 36(1)(b), standing alone, creates a private right that could be enforceable in United States domestic courts.

\textsuperscript{17} Cornejo v. County of San Diego, 504 F.3d 853, 856 (9th Cir. 2007).
\textsuperscript{18} Edye v. Robertson (Head Money Cases), 112 U.S. 580, 598 (1884).
\textsuperscript{19} United States v. Li, 206 F.3d 56, 60 (1st Cir. 2000).
\textsuperscript{21} LaGrand Case (Germany v. USA), 2001 I.C.J. 466, 494; see also Case Concerning Avena and Other Mexican Nationals (Mexico v. USA), 2004 I.C.J. 12, 35 (Mar. 31, 2004).
\textsuperscript{22} Cal. Pen. Code § 834c (West 2011); see also infra Part II(B).
According to former Justice O'Connor, “[T]he individual States' (often confessed) noncompliance with the treaty has been a vexing problem.”\textsuperscript{23} Interestingly, noncompliance is such a prominent problem in the United States that the Department of State’s Foreign Affairs Manual contains an entry on how foreign service personnel should handle situations where other governments fail to comply after pointing to noncompliance by the U.S.\textsuperscript{24} One recommended retort is, “Two wrongs do not make a right.”\textsuperscript{25} One cannot know for sure why exactly states of the United States often routinely commit “wrongs” by failing to notify foreign nationals of their right to consular notification. Perhaps one reason is unfamiliarity with the treaty or at least the treaty’s enforceability in the United States. To partly solve this “vexing problem,” the United States Department of State continues to engage in a domestic outreach program designed to raise awareness of the international obligations of the United States in the context of consular notification.\textsuperscript{26} According to the State Department, it “has held approximately 450 training classes, briefings, presentations, meetings and other events about this important issue in 40 U.S. states and territories . . .” for all levels of law enforcement personnel and judicial officials.\textsuperscript{27} The flagship of the program is the \textit{Consular Notification and Access} manual, now in its third edition.\textsuperscript{28} The manual’s purpose is to help ensure that foreign governments can extend appropriate consular services to their nationals in the United States and that the United States complies with its legal obligations to such governments. . . . The instructions and guidance contained in this manual must be followed by all federal, state, and local government officials, whether law enforcement, judicial, or other, insofar as they pertain to foreign nationals subject to the officials’ authority or to matters within the officials’ competence. Compliance with these instructions and guidance will also help ensure that the United States can insist

\begin{itemize}
\item\textsuperscript{23} Medellin v. Dretke, 544 U.S. 660, 674 (2005) (O'Connor, J., dissenting).
\item\textsuperscript{24} \textit{See} 7 FOREIGN AFFAIRS MANUAL 421.
\item\textsuperscript{25} \textit{Id}.
\item\textsuperscript{26} \textit{See} Outreach by the State Department, Department of State, http://travel.state.gov/law/consular/consular_2244.html (last visited Jun. 15, 2012).
\item\textsuperscript{27} \textit{Id}.
\item\textsuperscript{28} CNAN, \textit{supra} note 2.
\end{itemize}
upon rigorous compliance by foreign governments with respect to U.S. nationals abroad, and will help prevent both international and domestic litigation.\textsuperscript{29} The general rule, according to the manual, is consular notification: “Whenever you [a law enforcement officer] arrest or detain a foreign national in the United States, you must inform the foreign national, without delay, that he or she may communicate with his or her consular officers.”\textsuperscript{30} However, the “special rule” is that for nationals of the fifty-seven states that require mandatory notification,\textsuperscript{31} the appropriate consulate must be contacted regardless of the foreign national’s wishes.\textsuperscript{32} The manual’s section on consular notification provides an extensive question and answer section regarding many issues that may arise concerning law enforcement’s implementation of the right to consular notification.\textsuperscript{33} As far as the consequences of noncompliance, the manual says that notification is always “‘better late than never,’”\textsuperscript{34} and remedies vary by jurisdiction.\textsuperscript{35} Per the manual, “The most significant consequence, however, is that the United States will be seen as a country that does not take its international legal obligations seriously.”\textsuperscript{36} Thus, the tone of the \textit{Consular Notification and Access} manual does fairly short shrift to the issue of the remedy, if any, to which an individual is entitled when law enforcement violates Article 36(1)(b). This is to be expected though given that the manual is just that – a manual, not primary law.

\textbf{B. California Penal Code § 834c}

While issues like what remedy, if any, should be applied as a matter of federal law when police fail to comply with Article 36(1)(b) have bounced back and forth in the United States

\begin{itemize}
\item \textsuperscript{29} \textit{Id.} at I.
\item \textsuperscript{30} \textit{Id.} at 7.
\item \textsuperscript{31} \textit{See} Cal. Pen. Code § 834c(d).
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} \textit{See id.} at 11-37.
\item \textsuperscript{34} \textit{Id.} at 30.
\item \textsuperscript{35} \textit{Id.} at 31.
\item \textsuperscript{36} \textit{Id.}
\end{itemize}
Supreme Court, California paved the way to establishing an enforceable right to consular notification by statute – or has it? Penal Code § 834c was first introduced in the California Senate by then-State Senator Joe Baca on February 2, 1999 as Senate Bill 287. The bill passed unanimously at every step of the way on its journey through the California Legislature. Finally the bill was signed into law on August 30, 1999. The purpose of the bill was to give[] effect to the Vienna Convention treaty obligation by requiring a peace officer to inform a suspected foreign national that he or she can contact a consular official. This bill ensures that a legal right granted to foreign nationals by treaty will be honored. This bill also ensures that a conviction and sentence that in all respects meets the demands of due process will not be successfully attacked on the ground that the foreign national was not informed of the right to contact a consular officer. Protecting valid convictions from this type of attack is worth the delay that will take place by informing a foreign national of the right to contact a consular official. There is also a potential subsidiary benefit that Americans travelling abroad may receive the same courtesy from their hosts.

This statement of purpose can be boiled down to basically two points: California wants to make sure that its law enforcement officials live up to their consular-notification obligations, and the state wants to ensure the integrity of criminal convictions. The statement does not say that the bill expressly creates a new right for foreign nationals to enforce but rather recognizes that a right already exists. This silences any discussion, therefore, of whether or not Article 36(1)(b) is enforceable as a private right. Also noticeably absent is any indication that the legislature intends for there to be some specific remedy or remedies to be applied when the bill (now statute) is violated by law enforcement. However, the law in California is that “[u]nder

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37 See infra Part [II...].
39 See id.
40 Id.
42 See id.
43 Id.
44 See Part II(A) infra.
45 See id.
fundamental legal principles, a statute may not be construed as creating a right without a remedy."46 And of course there is the maxim, long-since cemented in statute, that “[f]or every wrong there is a remedy.”47

Another bill analysis does raise the issue of what remedy, if any, should apply:

It is not clear what the impact will be if an officer fails to follow this statutory mandate. Proposition 8 [Victims’ Bill of Rights] as adopted by the people of California in June of 1982 in part intended to make the federal Constitution the sole basis of exclusion of illegally obtained evidence. Thus, it is not clear that a violation of this statute would have any real impact on the outcome of a case.48

Thus, if one thing is clear from a review of the rather sparse legislative history, it is that the California Legislature never expressly provided a remedy and nor did it seem to be much concerned with one. But that does not mean that no remedy can ever be judicially-created, as “[i]t is a well-established principle that where a statute creates a new right and prescribes no remedy, any appropriate remedy may be used . . . .”49 According to the California Commission on Peace Officer Standards and Training (POST), “Failure of peace officers to comply with the treaty obligations makes protection of Americans abroad more difficult and may subject officers to civil liability based on Fourteenth Amendment prisoner protections.”50 While compliance with treaty obligation is listed as a reason for enacting the statute,51 the tone of the legislative history suggests that ensuring the integrity of criminal convictions was the more pressing concern of the California Legislature. The argument, one would assume, goes a bit like this: if law enforcement

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46 Bermite Powder Co. v. Franchise Tax Bd. of Cal., 242 P.2d 9, 11 (Cal. 1952).
49 1A CAL. JUR. 3D ACTIONS § 50.
properly notified a foreign national-defendant of her right to consular notification then there is no basis for the defendant to complain on appeal that such right has been violated. With no standing to complain, the conviction would stand so long as there were no other legal issues outstanding. If this was the thought process of the legislature then implicit in this logic is the premise that consular notification is a private right with which law enforcement must comply. Thus, by enacting the section, the California Legislature made “double sure” that police lived up to the commands of Article 36(1)(b).

The problem lies with the remedy, however. As mentioned in the Senate Committee Bill Analysis, the Victims’ Bill of Rights presents an obstacle to any exclusionary-type remedies in California. The Truth-in-Evidence provision of the Victims’ Bill of Rights states,

Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

The California Supreme Court interpreted this provision to mean that evidence may not be excluded in a criminal case in California unless required by the Federal Constitution or unless the legislature provides so by a two-thirds vote of both houses. There is no indication in the text of Penal Code § 834c that the legislature intended to override the Victims’ Bill of Rights. Thus,

52 Senate Committee, supra note 46.
54 In re Lance W., 694 P.2d 744, 753 (Cal. 1985).
55 See Cal. Pen. § 834c.
what exactly should be the remedy for violations by law enforcement of § 834c is very much an open issue.  

C. Code of Federal Regulations

The Code of Federal Regulations contains a provision along the same lines as California Penal Code § 834c. One regulation “is designed to establish a uniform procedure for consular notification where nationals of foreign countries are arrested by officers of [the Department of Justice] on charges of criminal violations. It conforms to practice under international law and in particular implements obligations undertaken by the United States pursuant to treaties with respect to the arrest and detention of foreign nationals.” The relevant consular notification subsection provides that “[i]n every case in which a foreign national is arrested the arresting officer shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given. . . .” So California was not so much of an anomaly in enacting Penal Code § 834c. It is also interesting that, given that this regulation is a part of federal law, the Supreme Court gave such a lukewarm reception to the VCCR-remedy issue in cases like *Sanchez-Llamas v. Oregon*.

III. Into the Jurisprudential Confusion: Remedies That Have Been Applied

As discussed above, the California Legislature in enacting Penal Code § 834c essentially foreclosed any discussion in California of whether or not consular notification is a private right stemming from the international obligation of the United States. Recognizing the right, however, is merely half (or even less) of the battle. The issue of what remedy to apply when a foreign national is detained and not advised of her right to consular notification often manifests in the
context of suppression of a confession the detainee has made. This context will be the focus of this paper. Since California delved into the VCCR issue in 1999 with the enactment of Penal Code § 834c, the issue of what remedy should be judicially applied to cure a violation by law enforcement of a detainee’s right to consular notification may take either of two separate, but not always parallel, tracks: a remedy under the VCCR itself (an issue of federal law per the Supremacy Clause\(^{60}\)) or a remedy under Penal Code § 834c (a state law issue). This section will explore how courts throughout California, the United States, and the rest of the world have handled both. Though courts do not always classify themselves, review of the relevant cases reveals that there are four basic remedies that have been applied or proposed: no suppression of the confession, \textit{Miranda}-style automatic suppression due to noncompliance, a “prejudice” test, and civil relief only.

\textbf{A. No Suppression}

One of the main routes courts have taken when faced with proven noncompliance with consular notification in a particular case is to not suppress the confession, i.e., to basically apply no remedy whatsoever. Easily the most well-known means of suppressing a confession in the United States is the prophylactic rule of \textit{Miranda v. Arizona}, which provides that law enforcement officials are required to inform a person of the now famous “\textit{Miranda rights}” if that person is subjected to “custodial interrogation.”\(^{61}\) Criminal defendants have sought to borrow the bright-line framework of \textit{Miranda} for use in the VCCR context, but many courts have resisted.\(^{62}\) According to the First Circuit, “Article 36 of the Vienna Convention, and the complementary Article 35 of the Bilateral Convention, do not create—explicitly or otherwise—fundamental

\textsuperscript{60} See U.S. CONST., art. VI, cl. 2.


\textsuperscript{62} See, e.g., United States v. Li, 206 F.3d 56, 61 (1st Cir. 2000).
rights on par with the right to be free from unreasonable searches, the privilege against self-incrimination, or the right to counsel,” and thus *Miranda*-style suppression should not be applied. Of course this statement does not address the jurisprudential reality that, whether or not the right to consular notification is “fundamental” like the privilege against self-incrimination enshrined in the Fifth Amendment, the VCCR is still the “supreme law of the land” due to the Supremacy Clause. This statement also assumes that a necessary condition for bright-line suppression a la *Miranda* is that the right to be protected be “fundamental.” While perhaps it is wise to limit such bright-line rules to protecting only certain weighty rights, the necessity of that right being “fundamental” is by no means established. What is more, the First Circuit’s statement implicitly deems violation of Article 36(1)(b) – a binding, international obligation – not “fundamental.” The 172 other parties to the Convention might be quite surprised to hear that.

Other courts have conflated the VCCR with *Miranda*, holding that if *Miranda* rights were given, then such a warning cures any noncompliance with consular notification. In one habeas corpus case, a federal court summed up its view: “[The defendant] was fully advised of his constitutional rights under *Miranda v. Arizona* . . . before the police took his statement. In these circumstances, there is no reason to believe [the defendant] would have acted differently if advised of his right to contact a consulate.” This conclusion may seem to follow logically: *Miranda* protects a right more fundamental than that protected by the VCCR, so if *Miranda* rights are given, the greater covers the lesser. The difficulty, however, arises in whether *Miranda* and Article 36(1)(b) protect the same interests. If they do not, then one legal provision cannot cover the other. Along a similar vein, another federal district court held that the exclusionary rule

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63 Id.
64 See U.S. CONST., amend. V.
65 See id. art. VI, cl. 2.
was inapposite in the consular-notification context because “[i]t is well established that the exclusionary rule is applied generally to deter the police from violating a person’s constitutional rights.” However, deterrence is one goal for any remedy, so just because the exclusionary rule is employed in one context of constitutional violations does not mean that it is “used up” and cannot be applied in other contexts, such as violations of international law. Such an argument also assumes that Miranda is somehow jurisprudentially “above” the VCCR. One certainly cannot downplay the vital importance of the Fifth Amendment, and that is in no way the author’s intention. However, such weighing of importance is by no means a simple issue. Rather, it invokes what is certainly an ongoing issue, namely the entire discussion of how the United States should treat international law domestically. That discussion will likely continue long into the future and should not be dealt with through casual assumptions on the relative importance of domestic legal provisions vis-à-vis international ones.

In one of the most significant non-Supreme Court cases to address noncompliance with the VCCR, United States v. Lombera-Camorlinga, the Ninth Circuit held that suppression of confessions is not an appropriate remedy. The court strained to point out several differences between Miranda and the VCCR. First, Article 36(1)(b) is not expressly linked with police interrogation. Second, the right to assistance of counsel and the privilege against self-incrimination “are by no means universally recognized or enforced,” and Miranda had not yet

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68 United States v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir. 2000).
69 Id. at 888.
70 Lombera-Camorlinga, 206 F.3d at 886.
71 Id.
been decided when the VCCR was first signed.\textsuperscript{72} Finally, \textit{Miranda} is a “uniquely American right[].”\textsuperscript{73} The ultimately court held,

The language of the Vienna Convention and its operation over the last 30 years support the government's position that a foreign national's post-arrest statements should not be excluded solely because he made them before being told of his right to consular notification. We therefore affirm the judgment of the district court on the ground that it properly refused to exclude Lombera–Camorlinga's statements. We do not decide whether a violation of Article 36 may be redressable by more common judicial remedies such as damages or equitable relief.\textsuperscript{74}

The leading California-state-court case is \textit{People v. Corona}, where the Court of Appeal simply issued a wholesale adoption of the reasoning and holding of \textit{Lombera-Camorlinga}, i.e., that suppression is not appropriate for noncompliance with consular notification.\textsuperscript{75} Another California appellate court echoed \textit{Corona} and its no-exclusion holding.\textsuperscript{76} That court reasoned, “[Section 834c] specifies no remedy for a violation of its provisions. It is extremely improbable the Legislature intended, by its silence, to imply a remedy of exclusion of evidence, especially where exclusion has been deemed an inappropriate remedy for violation of the treaty upon which section 834c is based.”\textsuperscript{77} The interesting problem that arises by these opinions is that they interpret the teeth out of § 834c, that is, render violations thereof a wrong with no remedy. This is inconsistent with the “fundamental legal principle[] [that] a statute may not be construed as creating a right without a remedy.”\textsuperscript{78}

\textsuperscript{72} \textit{Id.}
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} Id. The issue of civil remedies will be discussed below. \textit{See infra} Part III(D).
\textsuperscript{78} \textit{Bermite Powder Co. v. Franchise Tax Bd. of Cal.}, 242 P.2d 9, 11 (Cal. 1952). \textit{See also} Cal. Civil Code § 3523 (West 2011) (“For every wrong there is a remedy.”).
Another California Court of Appeal expressly rejected not only *Miranda*-style suppression but also the prejudice test. The court rested its decision on four considerations:

1. The failure of the treaty to specify such a remedy,
2. The lack of any connection between the notification provision and police interrogation, which the treaty does not require to cease after a request for consular assistance,
3. The lack of reciprocal rights for American nationals in other countries, and
4. The general rule that suppression is not a remedy for the violation of statutory and treaty, as opposed to constitutional, rights.

The most interesting addition from this opinion to the reasons against suppression is the third one: the lack of reciprocal rights for American nationals abroad. The court does not elaborate on what it means here. Certainly the court cannot intend to say that American nationals do not benefit from consular notification when within the territory of other state-parties; those parties are similarly bound by international law. Any violations of the treaty by other state-parties can be redressed through appropriate means. Also, even the Foreign Affairs Manual advises against this argument, which its two-wrongs-don’t-make-a-right retort.

In yet another unpublished California appellate court case, the Court of Appeal opined that, given the ICJ’s decision in *LaGrand*, “[I]t remains an open question whether article 36 of the Vienna Convention creates legally enforceable individual rights that a foreign criminal defendant may assert in the United States in a state criminal proceeding such as the one at issue in the instant appeal.” This is a perplexing point, as the ICJ in *LaGrand* expressly holds “that Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person.”

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79 The “prejudice test” is a term created by the author. See Part III(C) for a discussion of the test.
81 Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).
82 See 7 FOREIGN AFFAIRS MANUAL 421.
84 LaGrand Case (Germany v. USA), 2001 I.C.J. 466, 494 (emphasis added).
more, it certainly is not within the jurisdiction of the ICJ to dictate how rights derived from international law are to be implemented in the municipal courts of state-parties.  

The court continued,

In stating that the individual rights created by article 36, paragraph 1, of the Vienna Convention “may” be invoked in “this Court by the national State of the detained person,” the ICJ in LaGrand appears to have limited the enforcement of those rights to a judicial proceeding in the ICJ and not by the detained person, but by the “national State” of that person and at the discretion of such state.

However, this is really just a statement of how the jurisdiction of the ICJ works: “Only states may be parties in cases before the Court.” As for Penal Code § 834c, the court said, “Section 834c also does not undermine the analytical underpinnings of Corona. That section contains no provision indicating the Legislature intended that exclusion of evidence be a remedy for a violation of its provisions.” Again, as discussed above, legislative silence on a remedy just means that there is room for, and a requirement of, judicial interpretation.

An Australian case also rejected the exclusionary rule. In R v Abbrederis, the court rejected exclusion as a remedy, reasoning that Article 36(1)(b) is completely unrelated to police interrogation. The court noted, “The article is dealing with freedom of communication between consuls and their nationals. It says nothing touching upon the ordinary process of an investigation by way of interrogation.”

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85 See UN CHARTER, art. 2(7).
87 Ontiveros, 2006 WL 1725906 at *12.
90 Id.
One of the most significant decisions of the United States Supreme Court in the VCCR context is *Sanchez-Llamas v. Oregon.* Mr. Sanchez-Llamas was arrested in Oregon after an exchange of gunfire that left one police officer injured. He was advised of his *Miranda* rights and made incriminating statements when interrogated by police. The defendant moved before trial to suppress the statements for failure to notify him of his right to consular notification under Article 36(1)(b). The trial court, appellate court, and Oregon Supreme Court all rejected suppression. For the purposes of deciding the case, the Court assumed without deciding that the VCCR creates individual rights. Chief Justice Roberts writing for the Court noted that the exclusionary rule is a “uniquely American legal creation.” He noted that Sanchez-Llamas would not, according to the Court, be able to benefit from the exclusionary rule in the territory of any other state-party. It is ironic that the Chief Justice mentions this, as immediately before this he writes that “the question of the availability of the exclusionary rule for Article 36 violations is a matter of domestic law.” Thus, it is self-contradictory to even mention how other state-parties handle the exclusionary rule. Importantly, the case arose from proceedings in domestic state courts, and the Court emphatically stated, “To the extent Sanchez–Llamas argues that we should invoke our supervisory authority, the law is clear: ‘It is beyond dispute that we do not hold a supervisory power over the courts of the several States.’” Chief Justice Roberts’s point here raises an interesting conundrum. The Court ultimately holds that “suppression is not an

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92  *Id.* at 339.
93  *Id.* at 340.
94  *Id.*
95  *Id.*
96  *Id.* at 343.
97  *Id.*
98  *Id.* at 344.
99  *Id.* at 343.
100  *Id.* at 345.
appropriate remedy for a violation of Article 36,“\textsuperscript{101} yet the Court disclaims any ability to impose a remedy on state courts. Indeed, the Court even says, “But where a treaty does not provide a particular remedy, either expressly or implicitly, \textit{it is not for the federal courts to impose one on the States through lawmaking of their own}.”\textsuperscript{102} This internal contradiction seems to render the entire opinion advisory and thus not binding on state courts. Therefore, the precedential value of \textit{Sanchez-Llamas} is severely in doubt.

\section*{B. \textit{Miranda}-Style Suppression}

Defendants often argue for a bright-line suppression remedy for violations of Article 36(1)(b) and/or Penal Code §834c, that is, if a foreign national is not advised that she has a right to have her consulate notified of her detention then any statement she makes should be suppressed. Unfortunately, courts have issued a wholesale rejection of such a remedy, which was partially touched upon above. Nonetheless, it does not seem at this time that one can say that a bright-line exclusionary rule would never be an appropriate remedy.

The exclusionary rule for confessions made by criminal defendants is said to have its origins in an eighteenth-century King’s Bench case. In \textit{King v. Warickshall}, the court explained the policy behind excluding coerced confessions:

\begin{quote}
A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.\textsuperscript{103}
\end{quote}

\textsuperscript{101} \textit{Id.} at 337.
\textsuperscript{102} \textit{Id.} at 347 (emphasis added).
Of course, one does not need much convincing that Article 36 is concerned with consular notification and not necessarily coerced confessions. But then again, as will be discussed below, the two may not always be mutually exclusive.

While “[i]t is well established that the exclusionary rule is applied generally to deter the police from violating a person's constitutional rights,”\(^\text{104}\), the exclusionary rule is not the exclusive province of such violations. As the Ninth Circuit noted, “We do not limit the exclusionary rule to use as a remedy for constitutional violations alone.”\(^\text{105}\) The court continued,

Our court has occasionally permitted evidence to be excluded as a remedy in cases involving certain statutory violations. See United States v. Doe, 170 F.3d 1162, 1168 (9th Cir.1999) (violation of the Juvenile Delinquency Act's parental notification provision); United States v. Van Poyck, 77 F.3d 285, 288 (9th Cir.1996) (violation of Fed.R.Crim.P. 5); United States v. Negrete–Gonzales, 966 F.2d 1277, 1283 (9th Cir.1992) (violation of Fed.R.Crim.P. 41); United States v. Soto–Soto, 598 F.2d 545, 550 (9th Cir.1979) (violation of 19 U.S.C. § 482).\(^\text{106}\)

Thus, it would not be such a jurisprudential anomaly to apply the exclusionary rule in a non-constitutional context, e.g., in the context of Article 36(1)(b) or Penal Code §834c. What is more, even though courts like the First Circuit declined to apply the exclusionary rule to violations of consular notification because the right was not a “fundamental” one like those rights protected by the Constitution,\(^\text{107}\) “it was not until Brown v. Mississippi that the Court fully embraced the Constitution as its primary basis for excluding improperly obtained confessions. In short, the application of exclusionary rule to confessions has been firmly established in American jurisprudence from the beginning of the Republic, long before its Constitutional dimension was

\(^{104}\) United States v. Torres-Del Muro, 58 F. Supp. 2d 931, 933 (C.D. Ill. 1999).

\(^{105}\) United States v. Lombera-Camorlinga, 206 F.3d 882, 886 (9th Cir. 2000).

\(^{106}\) Id. at 887; see also United States v. Blue, 384 U.S. 251, 255 (1966).

\(^{107}\) See, e.g., United States v. Li, 206 F.3d 56, 61 (1st Cir. 2000).
explored by the courts.”\textsuperscript{108} Therefore it is dubious to suggest that suppression should only be limited to violations of constitutional provisions as a matter of precedent.

The ICJ was presented in \textit{Avena} with the chance to rule on whether or not violations of Article 36(1)(b) require suppression as a remedy, but instead it chose to pass the judicial hot potato in favor of a case-by-case examination of the appropriate remedy.\textsuperscript{109} Continuing in the international vein, another Australian case is worthy of note. The country’s Crimes Act contains a provision similar to that of Penal Code § 834c; section 23P of the Act provides,

Right of non-Australian nationals to communicate with consular office

(1) Subject to section 23L, if a person who is under arrest or a protected suspect is not an Australian citizen, an investigating official must, as soon as practicable:

(a) inform the person that if he or she requests that the consular office of:

(i) the country of which he or she is a citizen; or

(ii) the country to which he or she claims a special connection;

be notified that he or she is under arrest or a protected suspect (as the case requires), that consular office will be notified accordingly; and

(b) if the person so requests--notify that consular office accordingly; and

(c) inform the person that he or she may communicate with, or attempt to communicate with, that consular office . . . .\textsuperscript{110}

Also similar to § 834c, in \textit{Tang Seng Kiah v The Queen}, the court noted that “[t]he Crimes Act says nothing as to the impact upon the admissibility of evidence obtained in circumstances where those sections have been breached.”\textsuperscript{111} Nonetheless, the court concluded, “However, it is clear that when a person is arrested and not dealt with in accordance with the law, the subsequent detention is unlawful and statements or admissions of the arrested person may be excluded in the exercise of a discretion . . . .”\textsuperscript{112} Thus, in Australia, courts at least have discretion whether or not

\begin{itemize}
\item \textsuperscript{108} United States v. Lombera-Camorlinga, 206 F.3d 882, 892 (9th Cir. 2000) (dissenting opinion) (internal citation removed).
\item \textsuperscript{109} \textit{Avena}, 2004 I.C.J. 12, 61.
\item \textsuperscript{110} \textit{Crimes Act 1914} (Cth) s 23P (Austl.).
\item \textsuperscript{111} \textit{Tang Seng Kiah v The Queen} (2001) 160 F.L.R. 26, 37 (Austl.).
\item \textsuperscript{112} \textit{Id.}
\end{itemize}
to apply the exclusionary rule for violations of section 23P of the Crimes Act. That is certainly better than nothing.

C. “Prejudice” Test

The next remedy that courts have applied is a middle-ground remedy, as it lays somewhere between the exclusionary rule and no suppression. In brief, the prejudice test provides that if a defendant can prove that he was prejudiced by the violation of her right to consular notification then her confession will be suppressed. One federal district court remarked, “Most courts that have considered the appropriate remedy for an Article 36 violation have first required the foreign national to show that he suffered prejudice as a result of the violation.”113 At least one appellate court in California accepted the prejudice test. That court held, “We decide only that suppression, if available, is nonetheless not an appropriate remedy when there is no prejudice shown. We believe this holding is in accord with the current stance of the Supreme Court and the ICJ.”114 The problem with that opinion was that the court went on to find that the defendant had not shown that he would not have confessed had he been appropriately advised of his right to consular notification.115 This is intriguing to say the least. It is difficult to imagine how a defendant could ever show that he would not have confessed had he had been advised of his consular-notification right. In a sense, this line of reasoning faults a person for not being a fortune teller. Surely that cannot be the correct answer. Another federal district court in an ironically-named case held, “[T]he Court follows the majority of jurisdictions and holds that a

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115 Id. at *4.
criminal defendant must establish prejudice resulting from a violation of his or her rights under the Convention before obtaining a remedy for such violation.”

Even the United States Supreme Court considered the prejudice test. In *Breard v. Greene*, Breard had been convicted of capital murder and sentenced to death in Virginia. He did not raise the consular-notification issue until he filed his federal habeas corpus petition. That claim was rejected as procedurally defaulted, i.e., it was not a valid issue for appeal because it had not been raised in state court. Paraguay, Breard’s home state, ultimately filed suit against the United States in the ICJ. The ICJ issued provisional measures requesting that Breard’s execution be delayed until the ICJ case could be resolved. The Supreme Court ultimately denied a writ of certiorari, noting that ICJ decisions are only entitled to “respectful consideration” in interpreting international agreements. Interestingly, the Court added, “Even were Breard's Vienna Convention claim properly raised and proved, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial,” thus possibly paving the way for future acceptance of the prejudice test.

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117 523 U.S. 371 (per curiam).
118 *Id.* at 373.
119 *Id.*
120 *See id.*
121 *Id.* at 374.
122 *Id.*
123 *Id.* at 375.
124 *Id.* at 377.
The ICJ implicitly accepted the prejudice test in *Case Concerning Avena and Other Mexican Nationals*. After determining that the United States violated the consular-notification rights of scores of individuals, the ICJ concluded,

> It follows that the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals’ cases by the United States courts . . . with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.

The prejudice test is applied in an area quite similar to consular notification under Article 36(1)(b). 8 C.F.R. § 242.2(e) provides, “Every detained alien shall be notified that he may communicate with the consular or diplomatic officers of the country of his nationality.” The Ninth Circuit held that deportation of an alien would be unlawful only if a defendant could show that he was prejudiced by the government’s violation of the regulation. In fact, this regulation is so similar to Article 36(1)(b) that they both stem from the same source: the VCCR.

**D. Civil Relief**

The concept of a civil remedy, either damages or equitable relief, seems like an odd fit for the criminal context. Indeed it would be a strange day when a judge would award a defendant cash for the police violating, for example, her *Miranda* rights. But dicta in some cases in the consular-notification context suggests that a civil remedy might be all that is left after some courts trim away other potential remedies. For example, the Ninth Circuit left the issue of a civil remedy open: “We do not decide whether a violation of Article 36 may be redressable by more

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125 2004 I.C.J. 12, 61.
126 *Avena*, 2004 I.C.J. 12, 60.
127 8 C.F.R. § 242.2(e) (West 2011).
128 United States v. Calderon-Medina, 591 F.2d 529, 531 (9th Cir. 1979); see also United States v. Lombera-Camorlinga, 206 F.3d 882, 890-91 (9th Cir. 2000) (dissenting opinion).
129 *Calderon-Medina*, 206 F.3d at 531 n.6.
common judicial remedies such as damages or equitable relief."\textsuperscript{130} This possibility was emphatically rejected by the dissent.\textsuperscript{131} Another federal court noted, “[S]uppression is not the only remedy available or permitted to be used to return Defendant to his ‘status quo ante.’ Defendant might theoretically be able to seek monetary damages for the violation of his notification rights through a \textit{Bivens} action.”\textsuperscript{132} But both of those are just dicta. The success of a civil action is doubtful. The Ninth Circuit held that a violation of Article 36(1)(b) could not be the subject of a § 1983 claim.\textsuperscript{133}

\section*{IV. The Most Legally-Appropriate Remedy: Analysis of Possible Remedies}

Although California Penal Code § 834c essentially codifies the existing federal law of Article 36(1)(b) of the VCCR, whatever remedy, or lack thereof, that is established under federal law solely for the VCCR is not necessarily dispositive of the remedy available for a violation of the Penal Code section. Theoretically a defendant could bring a motion to suppress a confession or otherwise vindicate a violation by law enforcement of both VCCR Article 36(1)(b) and Penal Code § 834c. The focus of this article is not on the VCCR broadly but on the Penal Code provision. In considering what remedy should apply for the latter, there are two guiding maxims, firmly established in California law, to bear in mind. First, “Under fundamental legal principles, a statute may not be construed as creating a right without a remedy.”\textsuperscript{134} Second, “For every wrong there is a remedy.”\textsuperscript{135} Thus, as a preliminary matter, it would seem that there \textit{should} be a remedy for violations by law enforcement of Penal Code § 834c. Of course the § 834c is silent

\footnotesize{\begin{itemize}
\item \textsuperscript{130} United States v. Lombera-Camorlinga, 206 F.3d 882, 888 (9th Cir. 2000).
\item \textsuperscript{131} See \textit{id}. at 895 (dissenting opinion).
\item \textsuperscript{132} United States v. Torres-Del Muro, 58 F. Supp. 2d 931, 934 (C.D. Ill. 1999).
\item \textsuperscript{133} Cornejo v. County of San Diego, 504 F.3d 853, 864 (9th Cir. 2007).
\item \textsuperscript{134} Bermite Powder Co. v. Franchise Tax Bd. of Cal., 242 P.2d 9, 11 (1952).
\item \textsuperscript{135} Cal. Code Civ. P. § 3523 (West 2011).
\end{itemize}}
on a remedy. The Penal Code section codifies the treaty as state law and mandates that law enforcement officers inform foreign nationals that they have a right to have their consulates notified of their arrest. But the California Legislature did not prescribe a specific remedy. However, that legislative silence is but an invitation for judicial interpretation. Indeed, “It is a well-established principle that where a statute creates a new right and prescribes no remedy, any appropriate remedy may be used . . . .” In the statement of that last principle, the word “appropriate” cannot be overlooked. This would seem to mean that just throwing in a remedy for brochure value hardly comports with principles of statutory interpretation. The elephant in the room, though, is the Truth-in-Evidence constitutional amendment. As discussed above, this provision limits suppression of illegally obtained evidence to that which is required by the Federal Constitution unless the California Legislature provides for a suppression remedy by a two-thirds vote of each house. Thus, it would also appear that suppression in the context of violations of Penal Code § 834c would be limited by the California Constitution.

A. No Suppression

The first remedy that has gained momentum is simply to deny any suppression remedy for confessions based on violations of either Article 36(1)(b) of the VCCR or Penal Code § 834c. The various reasons courts have argued for this position were discussed above. Essentially, however, applying this no-suppression position deprives the defendant of any remedy for a violation of her rights under § 834c. This certainly is not consistent with the principles of statutory interpretation where all wrongs should be remedied. Interestingly the

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136 See § 834c.
137 Id.
138 1A CAL. JUR. 3D ACTIONS § 50.
140 Id.
141 See, e.g., United States v. Lombera-Camorlinga, 206 F.3d 882, 888 (9th Cir. 2000).
California cases that discuss the VCCR and/or the Penal Code section do not mention the Victims’ Bill of Rights when discussing whether there should be a suppression remedy. However, the California Legislature did contemplate that Truth in Evidence might have an effect on remedying violations of § 834c.142 Regarding the effect of Truth in Evidence (albeit in the search and seizure context), the California Supreme Court had this to say:

The explicit language of section 28(d) [Truth-in-Evidence provision] providing that “relevant evidence shall not be excluded in any criminal proceeding” with limited, enumerated, exceptions to that command, coupled with the explanation of the Legislative Analyst that unlawfully seized evidence would become admissible except to the extent that the federal Constitution forbids its use, supports the People's argument that in the absence of express statutory authority therefor courts may not exclude evidence seized in violation of either the state or federal Constitution unless exclusion is compelled by the federal Constitution.143

In 1998, the Court assessed the effect of Truth in Evidence on suppression of confessions. The Court held, “[S]tatements taken in violation of Miranda are to be excluded from evidence at trial in this state only to the extent required by the United States Constitution.”144 Finally, four years later, the Court issued a blanket interpretation of the Victims’ Bill of Rights: “With the passage of Proposition 8 [Victims’ Bill of Rights], we are not free to exclude evidence merely because it was obtained in violation of some state statute or state constitutional provision.”145 This statement in McKay is extremely troubling for criminal defendants and defense counsel, as it essentially eviscerates any protection offered by the California Constitution or any of the state codes. Though extreme, police officers are free to violate the State constitution and laws enacted thereunder so long as they curb their actions in conformity with the United States Constitution. For Penal Code § 834c, this result essentially means that if there is no suppression remedy (or

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143 In re Lance W., 694 P.2d 744, 753 (1985).
145 People v. McKay, 41 P.3d 59, 64 (2002).
any other remedy for that matter) required by the Federal Constitution, then § 834c is truly a right with no remedy – a mere form of words.

_Sanchez-Llamas_ did not entirely end the suppression battle.\textsuperscript{146} The United States Supreme Court declined to “invoke [its] supervisory authority . . .,” arguing that it had none over state courts.\textsuperscript{147} Further, the Court left the remedy issue to the states: “[W]here a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.”\textsuperscript{148} This puts the VCCR issue (and therefore the Penal Code §834c issue) into an eternal loop of jurisprudential buck-passing. Section 834c is silent on a remedy,\textsuperscript{149} but the Legislature contemplated that Truth in Evidence might affect whether a remedy is available at all.\textsuperscript{150} Truth in Evidence provides that evidence is not to be suppressed, though illegally obtained, unless required by the Federal Constitution.\textsuperscript{151} Federal law, post-_Sanchez-Llamas_, leaves the suppression issue to the Several States.\textsuperscript{152} Following the legal chain is a bit like the ever-annoying “The Song That Never Ends”\textsuperscript{153} – some people started following the legal chain, not knowing what it was, and they’ll continue following it forever just because this is the legal chain that never ends.

But then again, childhood songs are best left to children. The law, on the other hand, has to find an end. If federal law leaves the appropriate remedy for Article 36(1)(b) violations to the states, and California law does not allow a remedy _unless_ federal law provides one, then logic

\textsuperscript{147} Id. at 345.
\textsuperscript{148} Id. at 347.
\textsuperscript{149} See § 834c.
\textsuperscript{151} Cal. Const., art. I, § 28(d).
\textsuperscript{152} _Sanchez-Llamas_, 548 U.S. at 345, 47.
dictates that the “remedy” is to afford no remedy at all. If the Supreme Court contemplated that states could decide the appropriate means of vindicating VCCR violations, then surely it contemplated that states might decide that no remedy would be provided at all. When the dust settles, that, unfortunately, seems to be the result for § 834c.

**B. Miranda-Style Suppression**

Given that the California cases discussing how to remedy violations of the VCCR and/or Penal Code § 834c do not cite to Truth in Evidence, there is the possibility that California courts will simply provide a remedy notwithstanding the Victims’ Bill of Rights. One such remedy is *Miranda*-style suppression where law enforcement officers, per § 834c, are required to notify foreign nationals of their right to consular notification (or notify the appropriate consulate if the country requires mandatory notification), and if the officers fail to follow the statutory command, any subsequently-obtained confessions would be suppressed. The rule would operate just like *Miranda* in that regard.

As far as when courts apply the exclusionary rule, the United States Supreme Court explained,

> Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land. In a problem such as that before us now, two opposing concerns must be harmonized: on the one hand, the stern enforcement of the criminal law; on the other, protection of that realm of privacy left free by Constitution and laws but capable of infringement either through zeal or design. In accommodating both these concerns, meaning must be given to what Congress has written, even if not in explicit language, so as to effectuate the policy which Congress has formulated.\(^\text{154}\)

As far as the “over-riding public policy expressed in the Constitution or the law of the land,” that in the § 834c context would be the VCCR, which is, as a treaty, indeed “the law of the land”

pursuant to the Supremacy Clause.\textsuperscript{155} One pan on the judicial balance is occupied by the obligation of the United States to effectuate the commands of Article 36 (and the obligations of California law enforcement to follow the mandate of § 834c) and the need to remedy the violation of a foreign national’s right to consular notification. Also present are the international ramifications that might ensure if the United States fails to implement the VCCR. On the other side is the public policy interest in effective law enforcement, which would of course include the collection and use of all relevant evidence, including a foreign national’s confession. No one can pretend that balancing those two competing sides is an easy task. If the case at issue is a homicide for example and the foreign national has made a full confession, many judges might well be hesitant to exclude the confession on the grounds of a violation by law enforcement of a barely-known (much less understood) treaty obligation negotiated thousands of miles away by diplomats in a foreign land decades ago. But even if the crime at issue were just jaywalking, the judicial slant, in California or federally, seems to be toward no bright-line suppression. Thus, while it certainly would be a highly-effective remedy, it is not wise to argue for bright-line suppression.

**C. “Prejudice” Test**

Another possible remedy for violations of Penal Code § 834c is the “prejudice test.” The dissenting judge in *Lombera-Camorlinga* discussed how this test would work in practice:

> Upon a showing that the Vienna Convention was violated by a failure to inform the alien of his right to contact his consulate, the defendant in a criminal proceeding has the initial burden of producing evidence showing prejudice from the violation of the Convention. If the defendant meets that burden, it is up to the government to rebut the showing of prejudice.\textsuperscript{156}

\textsuperscript{155} See U.S. CONST., art. VI, cl. 2.

\textsuperscript{156} United States v. Lombera-Camorlinga, 206 F.3d 882, 891 (9th Cir. 2000) (dissenting opinion).
Another federal court said the prejudice test is the predominant test/remedy applied by courts.\textsuperscript{157} The prejudice test sounds easy enough: a defendant just has to show that she suffered prejudice from the violation of § 834c, and then it is up to the government to attempt to rebut that prejudice. However, showing prejudice proves to be a be a difficult – if not impossible – task, as it often involves proving that the defendant would not have made a statement had she been properly advised of her right to consular notification. In other words, a defendant has the initial burden of being a psychic, predicting what would have happened had something that did not occur actually occur. This quote from a federal district court provides one such example:

Furthermore, Keomanivong has failed to show prejudice. Keomanivong had spent time in the United States; he spoke English and had prior experience with the criminal justice system. He was fully advised of his constitutional rights under \textit{Miranda v. Arizona} before the police took his statement. In these circumstances, there is no reason to believe he would have acted differently if advised of his right to contact a consulate.\textsuperscript{158}

What would defendants like Keomanivong have to show in order to prove prejudice? If, for example, Keomanivong did not speak English and was not familiar with the U.S. criminal justice system, would that have been enough? This quote also shows an example of a court conflating the VCCR with \textit{Miranda}, another common occurrence in judicial opinions.\textsuperscript{159} One can scour the opinions of \textit{Miranda} and its progeny and one will not find any discussion of the VCCR, much less the right to consular notification. So if a defendant is told that she has the right to remain silent and to have an attorney present during any questioning, even if she cannot afford one on her own, how does this inform her that she has the right to have her consulate notified of her arrest? Quite frankly, it does not. And conflating consular notification with \textit{Miranda} is a judicial exercise in smoke and mirrors designed to deflect attention from that pesky treaty. Difficult

\begin{footnotes}
\footnote{United States v. Carrillo, 70 F. Supp. 2d 854, 860 (N.D. Ill. 1999); see also United States v. Miranda, 65 F. Supp. 2d 1002, 1006-07 (D. Minn. 1999).}
\footnote{See id.}
\end{footnotes}
though the task may be, smoke and mirrors are best left to Las Vegas magicians, not the judiciary.

Of course a defense attorney can subpoena a consulate employee to testify as to a particular consulate’s procedure for handling notification of an arrest of a foreign national. Perhaps that representative will testify that the consulate would provide a list of respected attorneys to the detainee, perhaps even attorneys that speak the detainee’s language. One federal district court addressed such a situation:

Even if the Court were to disregard *Teague* and consider Petitioner's claim on the merits, [the habeas corpus petition] would still be unsuccessful because Petitioner fails to demonstrate how being able to communicate with the British consulate would have altered his trial's outcome. Petitioner claims the British consulate possessed lists of attorneys on both sides of the Atlantic who could have tried his case more effectively than his appointed council. The Court finds such an argument unavailing. Even Petitioner himself admits his assertion “is totally argumentative as to what might or might not have happened.” As explained above, Petitioner’s counsel was competent and employed an informed and objectively reasonable legal strategy.\(^{160}\)

Even if the consular official testifies to an elaborate system that is triggered upon notification, that is most likely not going to prove that the defendant would not have made a statement had she been notified of her rights under § 834c. Linking a confession to a treaty which is, admittedly, unrelated to confessions specifically is at best an awkward fit. Then again, it is difficult to fashion another remedy that will effectively remedy the violation on a criminal level for the defendant. That is something that money simply will not do.\(^ {161}\) However, a representative from a consulate will at least provide a friendly face, an especially welcome sight to a foreign national who might well be unfamiliar with both the English language and the operation of the criminal justice system in this country. That is something that simply cannot be discounted and would have to be given real weight if a court were to adopt the prejudice test.


\(^{161}\) See Part IV(D) *infra*.
D. Civil Relief

Some courts in dicta have suggested that a civil remedy such as damages might apply in the event of violations by law enforcement of Penal Code § 834c.\textsuperscript{162} It is almost insulting though to tell a defendant, “We’re sorry for violating your right to consular notification. You’re going to stay in jail, but here’s $100 for your troubles.” Though slightly exaggerated, that is essentially how a civil damages remedy would work. The exaggeration actually assumes that the foreign national would have the time, freedom, and resources to prosecute a civil case against the State of California, which is surely the exception to the rule. Then again, if the Truth-in-Evidence provision of the California Constitution does what it says it does, then courts will have no choice but to jettison the exclusionary rule. This would mean essentially that there is no criminal remedy for violations of § 834c. A civil damages suit might be the proverbial better than nothing. Of course, if someone were to bring a civil suit for violation of her right to consular notification, courts would have to delve into that whole area and decide many issues, such as whether a civil suit is a viable option or not and issues of immunity. The Ninth Circuit concluded that alleged VCCR violations could not be the subject of a § 1983 suit.\textsuperscript{163} Given the judicial hostility toward the VCCR, success in civil suits is a long shot.

E. A Last Resort: Due Process Violations for Confessions

Of the ways to attack a confession allegedly given by a defendant during police interrogation on constitutional grounds, the Due Process Clauses of the Fifth and Fourteenth Amendments protect against coerced confessions.\textsuperscript{164} When a defendant’s will is “overborne” by the police in eliciting a confession, that confession is inadmissible in evidence against her as a violation of

\textsuperscript{162} See, e.g., United States v. Torres-Del Muro, 58 F. Supp. 2d 931, 934 (C.D. Ill. 1999).
\textsuperscript{163} Cornejo v. County of San Diego, 504 F.3d 853, 856 (9th Cir. 2007).
\textsuperscript{164} See U.S. CONST. amends. V, XIV.
due process. The United States Supreme Court explained in *Spano v. New York* that such confessions are excluded because of “the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.” The determination of whether a confession violates the Due Process Clauses is a fact-intensive inquiry depending on all the circumstances.

Of course, it is difficult to conflate a violation of either VCCR Article 36(1)(b) or Penal Code § 834c to the elicitation of a confession through physical violence, sleep deprivation, intimidation, and threats. However, since evaluating a confession for a possible due-process violation hinges so much on the totality of the circumstances, one such circumstance could and should be whether or not a foreign national was advised of her right to have her consulate notified of her arrest. It does not take much imagination to understand the fear and uncertainty that would go through a foreign arrestee’s mind if she is completely unfamiliar with the American justice system and perhaps even the language being spoken around her. Had she been advised of her right to consular notification, a member of the consulate staff might well have been able to guide her through the system, obtain an attorney who speaks her language and understands her situation, and generally just be a familiar face. Indeed, the Supreme Court in *Spano* considered the fact that the defendant “was a foreign-born young man” important in ultimately determining that his will was overborne by police misconduct. Thus, while it may not be a complete remedy to a violation by law enforcement of Penal Code § 834c, including

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166 *Id.* at 320-21.
168 *See Spano*, 360 U.S. at 321.
such violation in the consideration of the circumstances surrounding a confession is one step toward ameliorating the wrong that occurred.

What is more, if a confession is admitted and the case proceeds to trial, the defense may well wish to ask the trial judge for a jury instruction such as this one:

The defendant is a citizen of [country], and both [country] and the United States are parties to the Vienna Convention on Consular Relations, which provides in Article 36(1)(b) that each foreign national who is detained shall have the right to have his or her consulate notified of his or her arrest without delay. In this case, the police failed to notify the defendant of his/her right to consular notification. You may consider this fact in determining whether or not the defendant’s confession was voluntarily obtained. 169

Such a jury instruction would bring the jury’s attention to the violation and allow it the opportunity to consider it in determining whether the defendant’s will was overborne when he or she gave a confession, even if the trial judge had denied any motion in limine to exclude the confession on due-process or other grounds. Again, this may not be a complete remedy, but it is better than nothing.

V. Conclusion: No Remedy for this Wrong?

Having considered five possible remedies for violation by California law enforcement of Penal Code § 834c, if there is one thing that is readily apparent it is that there is no clear-cut remedy. The Truth-in-Evidence provision of the Victims’ Bill of Rights does indeed seem to have limited any exclusion of a confession from evidence to just what is required by the Federal Constitution. Given that the United States Supreme Court has given a cool reception to a separate exclusionary rule for Article 36(1)(b) violations, a defendant may well best succeed to remedy a violation of her right to consular notification through including the failure in the totality-of-the-circumstances inquiry in determining whether her will was overborne by police misconduct. If

169 This sample jury instruction was written entirely by the author.
the trial judge admits the confession into evidence, then she should ask for a jury instruction such as the one supplied above.

There is no changing the fact that the United States, as a state-party to the Vienna Convention on Consular Relations, has an international legal obligation to notify detained foreign nationals of their right to have their consulates notified of their arrests. Failure to so notify is a legal wrong begging for a remedy. The United States may be uncomfortable with having international law govern its internal operations, but let us not forget that this country is a member of the larger global community of 196 countries. Further, the California Legislature has decided that consular notification should be the law in this state. Laws are meant to be followed, and Penal Code § 834c is no exception.