MARY HOLPER*

Specific Intent and the Purposeful Narrowing of Victim Protection Under the Convention Against Torture

Jean Etienne, a native of Haiti, is a lawful permanent resident of the United States who was convicted for possession of marijuana with intent to distribute, a conviction that subjects him to both mandatory detention and deportation under U.S. immigration law.[1] He already served a sentence in the United States yet, in Haiti, he will face potentially indefinite detention in an overcrowded, dirty prison cell with little food or clean water.[2] The purpose for this detention is preventive[3]: the Haitian government wants to keep bad guys like Jean Etienne off the streets of the country and deter these offenders from committing future crimes.[4] Compounding his problem, Jean is HIV-

* Associate Professor of Law and Director of the Immigration Law Clinic, Roger Williams University School of Law. I would like to thank Evangeline Sarda and Amy Reichbach for reviewing numerous early drafts of this Article and supporting me throughout the writing process. Thanks also to Dan Kanstroom, Bob Bloom, Mike Cassidy, Ragini Shah, Rachel Rosenbloom, Amy Wax, and Ben Krass for their helpful comments. I also would like to thank Sean Smith and Mark Gordon for their valuable research assistance.

1 *See* 8 U.S.C. §§ 1101(a)(43)(B), 1226(c) (2006). Jean Etienne is a fictitious character; however, his story is based on the facts of a real case in which the author was involved.

2 Richard Chacon, *Imprisoned by Policy, Convicts Deported by US Languish in Haitian Jails*, BOSTON GLOBE, Oct. 19, 2000, at A1; Gary Marx, *New Life Is No Life for U.S. Ex-Cons in Haiti*, CHI. TRIB., May 17, 2007, at C1.

3 *See In re* J-E-, 23 I. & N. Dec. 291, 300 (B.I.A. 2002).

4 *Id.* at 300 (citing Letter from William E. Dilday, Dir. of Office of Country Reports and Asylum Affairs, U.S. Dep't of State, to Immigration Judge (Apr. 12, 2001); BUREAU OF DEMOCRACY, U.S. DEP'T OF STATE, HAITI: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2000 (2001), *available at* http://www.state.gov/g/drl/rls/hrrpt/2000/wha/795.htm); Amy Bracken, *Influx of Deportees Stirs Anger in Haiti: Some Believe US Policy Helped Boost Crime Rate*, BOSTON GLOBE, Mar. 11, 2007, at A6.

positive and relies on medications to survive; the Haitian officials will not provide him with these medications in detention.[5]

Jean Etienne can seek protection under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[6] which the United States ratified in 1998.[7] Article 3 protects someone like Jean Etienne from removal[8] to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture,"[9] regardless of the crimes that subjected him to removal.[10] However, in 2002, the Board of Immigration Appeals (BIA) decided that applicants like Jean Etienne, who fear imprisonment in such atrocious conditions upon their arrival in Haiti, could not seek such protection because they could not prove that the Haitian government *specifically intended* to cause them severe pain or suffering.[11] Under the BIA's definition of specific intent, such petitioners must prove that the Haitian government will detain them with the precise purpose of causing severe pain or suffering.[12]

Specific intent is a criminal law term.[13] So, why is it implicated when someone seeks protection under the CAT? The United States modified the definition of torture under the CAT by conditioning the

5 *See* ALTERNATIVE CHANCE, WHERE AM I?: A GUIDE TO ADJUSTING TO HAITI AGAINST YOUR WILL, SURVIVING DETENTION IN POLICE STATION HOLDING CELL AND HOW TO AGITATE FOR YOUR RELEASE (2007), http://www.alternativechance.org/WHERE-AM-I-A-Guide-to-Adjusting-to-Haiti-Against-Your-Will-Excerpt-.

6 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 114 [hereinafter CAT].

7 Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, tit. XXII, § 2242, 112 Stat. 2681, 2681–822 (1998). The implementing regulations are 8 C.F.R. §§ 208.16-208.18 (2009).

8 The 1996 reforms to the Immigration and Nationality Act discontinued the use of the term "deportation" and replaced it with "removal." *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, tit. III, § 301, 110 Stat. 3009-546, 3009-575.

9 CAT, *supra* note 6, art. 3, para. 1, at 114.

10 No exceptional circumstances justify expelling a person to a country where there would be danger of being subjected to torture. *See* 8 C.F.R. § 208.17 (2009); David Weissbrodt & Isabel Hörtreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1, 15 (1999).

11 *In re* J-E-, 23 I. & N. Dec. 291, 300 (B.I.A. 2002).

12 *Id.* at 301.

13 *See generally* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.2(e) (2d ed. 2003).

treaty's ratification upon an understanding that "intentionally inflicted" severe pain or suffering means that such pain or suffering must be "specifically intended."[14] The meaning of "specific intent," however, is not self-evident. The phrase is an antiquated criminal law term[15] that sometimes means only purposeful conduct,[16] other times means acting purposefully *or* knowing that the forbidden consequences are foreseeable,[17] or on occasion means acting with willful blindness to the foreseeable consequences.[18] In the decision *In re J-E-*, the BIA chose the most narrow definition, "purposeful," in its interpretation of the CAT and, in doing so, shifted the focus in CAT protection cases off the victim and onto the alleged torturer.[19]

In this Article, I argue that the BIA has adopted a misguided approach to CAT protection that creates an insurmountable obstacle to actually obtaining such protection.[20] As a solution, I propose that Attorney General Eric Holder, under the new Obama administration, adopt a revised definition of specific intent that includes "knowing that severe pain or suffering is foreseeable." Such a definition is consistent with the legislative history and purpose of the CAT and finds ample support in criminal law jurisprudence.[21] In addition, this definition of specific intent is used by the Office of Legal Counsel of the U.S. Department of Justice in its analysis of whether certain interrogation techniques would subject Central Intelligence Agency operatives to prosecution under the CAT.[22] An alternative solution is for U.S. courts to employ a "knowledge of foreseeable consequences" definition of specific intent in CAT protection cases. Courts can adopt this definition notwithstanding the principles of agency

14 S. COMM. ON FOREIGN RELATIONS, REPORT ON CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. REP. NO. 101-30, at 9 (1990) [hereinafter CAT REPORT].

15 United States v. Bailey, 444 U.S. 394, 403–04 (1980).

16 *See, e.g.*, United States v. Blair, 54 F.3d 639, 642 (10th Cir. 1995).

17 *See, e.g.*, United States v. Neiswender, 590 F.2d 1269, 1273 (4th Cir. 1979).

18 *See, e.g.*, United States v. Caminos, 770 F.2d 361, 365 (3d Cir. 1985).

19 *See In re* J-E-, 23 I. & N. Dec. 291, 298–99 (B.I.A. 2002).

20 *See* Zubeda v. Ashcroft, 333 F.3d 463, 474 (3d Cir. 2003).

21 *See infra* Parts II.A and III.B and cases cited therein.

22 Memorandum from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel, Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A to the Deputy Att'y Gen. (Dec. 30, 2004) [hereinafter Levin Memo], *available at* http://www.usdoj.gov/olc/18usc23402340a2.htm.

deference embodied in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (*Chevron*).[23]

Part I discusses the drafting of the CAT, the definition of "torture" under Article 1 of the treaty, and the two understandings that the U.S. Senate inserted during the ratification of the treaty: (1) that the definition of torture include a specific intent requirement and (2) that applicants for protection under Article 3 of the CAT prove they are more likely than not to suffer torture. Part II discusses the meaning of specific intent in domestic criminal law to give context to the Senate's specific intent understanding. Part III describes the BIA's interpretation of the "specific intent" and "more likely than not" understandings in its 2002 decision *In re J-E-*. This Part highlights problems with the BIA's approach, which ignores criminal law precedent on specific intent and, in selecting a narrow definition of specific intent, views Article 3 cases as prosecutions of a criminal defendant accused of torture, not as evaluations of the likely harm to the victim. Part IV illustrates these differing viewpoints of Article 3 protection by examining recent decisions by the U.S. Court of Appeals for the Third Circuit, which has analyzed the specific intent requirement of CAT protection in several cases in recent years. Part V proposes a "knowing of the foreseeable consequences" definition of specific intent, which is more consistent with the purpose of Article 3 protection and the legislative history of the treaty's U.S. ratification. This Part also argues that this definition of specific intent finds ample support in criminal law jurisprudence and in the 2004 Office of Legal Counsel memorandum regarding whether certain interrogation techniques would subject U.S. troops to prosecution under the CAT. Part VI proposes that the U.S. Department of Justice modify its definition of specific intent in CAT protection cases; in the alternative, courts should adopt this more generous reading of specific intent. Part VI also examines policy concerns that the U.S. Attorney General must address to implement this solution, and addresses how the doctrine of *Chevron* deference does not prevent courts from adopting a more equitable definition of specific intent.

[23] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

I
BACKGROUND

Torture and other cruel, inhuman, and degrading treatment or punishment is prohibited pursuant to several human rights instruments,[24] including the Universal Declaration of Human Rights.[25] In 1974, the United Nations (UN) General Assembly directed the UN Congress "'to give urgent attention to the question of the development of an international code of ethics for police and related law enforcement agencies'" and "'to include, in the elaboration of the *Standard Minimum Rules for the Treatment of Prisoners*, rules for the protection of all persons subjected to any form of detention or imprisonment against torture and other cruel, inhuman or degrading treatment or punishment.'"[26] One year later, the UN General Assembly adopted the Declaration on the Protection of All Persons Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[27] Subsequently, several bodies under the auspices of the United Nations drafted the CAT.[28] The CAT was adopted by the UN General Assembly on December 10, 1984.[29] Its principal aim was not to outlaw torture and other cruel, inhuman, or degrading treatment or punishment; the CAT is based upon the recognition that these practices are already outlawed under

[24] Prohibitions of torture and other cruel, inhuman, or degrading treatment or punishment are found in Article 7 of the 1966 International Covenant on Civil and Political Rights, Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 5 of the 1969 American Convention on Human Rights, Article 5 of the 1981 African Charter on Human and Peoples' Rights, Article 7 of the 1981 Universal Islamic Declaration of Human Rights, the 1949 Geneva Conventions concerning humanitarian law applicable to armed conflicts, and the 1955 U.N. Standard Minimum Rules for the Treatment of Prisoners. J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 11–12 (1988).

[25] Article 5 of the Universal Declaration of Human Rights states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Universal Declaration of Human Rights, G.A. Res. 217A, at 71, 73, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

[26] BURGERS & DANELIUS, *supra* note 24, at 14–15 (quoting a draft resolution of the 1974 UN General Assembly).

[27] *Id.* at 17.

[28] The UN General Assembly, the UN Commission on Human Rights, and working groups established by the Commission all contributed to the drafting of the CAT. *Id.* at 31.

[29] *Id.* at v.

international law.[30] Rather, its purpose was "to *strengthen* the existing prohibition of such practices."[31]

The United States, which engaged in seven years of negotiations regarding the CAT,[32] advocated for a limited definition of "torture," including only extreme forms of cruel, inhuman, or degrading treatment or punishment.[33] Despite other countries' attempts to expand the definition of "torture," the United States succeeded in defining torture as "severe" pain or suffering.[34] The United States also negotiated, unilaterally, to limit the definition of "torture" to acts "specifically intended."[35] However, the definition of torture ultimately included all "intentional" acts.[36]

The definition of "torture" under Article 1 of the CAT is:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[37]

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30 *Id.* at 1.

31 *Id.* As such, the CAT proposed to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world." CAT, *supra* note 6, preamble, at 113.

32 CAT REPORT, *supra* note 14, at 2.

33 AHCENE BOULESBAA, THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT 16–17 (1999); BURGERS & DANELIUS, *supra* note 24, at 40.

34 BOULESBAA, *supra* note 33, at 16.

35 "The U.S. was the only country that was not satisfied with the term 'intentionally.' No other State commented on it; it invited no serious discussion from the Working Group and the U.S.'s proposal was not adopted." *Id.* at 20. In addition, the United States sought to limit the definition of torture to acts that were "deliberately and maliciously inflicted on a person." BURGERS & DANELIUS, *supra* note 24, at 41.

36 CAT, *supra* note 6, art. 1, para. 1, at 113–14; BURGERS & DANELIUS, *supra* note 24, at 118 ("[T]orture must be an *intentional* act. It follows that where pain or suffering is the result of an accident or of mere negligence, the criteria for regarding the act as torture are not fulfilled."). "Torture" is defined in Article 1 of the CAT; Articles 1 through 16 contain the substantive provisions of the treaty. BURGERS & DANELIUS, *supra* note 24, at 1. Articles 17 through 24 contain the implementation provisions. *Id.*

37 CAT, *supra* note 6, art. 1, para. 1, at 113–14. While Article 1 relates to acts that amount to torture, Article 16 relates to the other acts of cruel, inhuman, or degrading treatment or punishment prevented by the CAT. Article 16 obligates signatories of the CAT to prevent the following in their own territories:

Article 3 of the CAT contains a protective feature that was inspired by international human rights instruments.[38] This protection prohibits signatories from expelling, returning, or extraditing a person to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[39]

A. The CAT in U.S. Immigration Law

On April 18, 1988, the United States signed the CAT and reserved the right to communicate, upon ratification, such reservations, interpretive understandings, or declarations as were deemed necessary.[40] President Ronald Reagan transmitted the CAT to the Senate for advice and consent in May 1988, proposing a list of reservations, understandings, and declarations, which were revised and resubmitted by President George H.W. Bush in January 1990.[41]

> other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Id. art. 16, para. 1, at 116. The drafters of the CAT recognized that, unlike defining torture, it was impossible to draft a precise definition of other "cruel, inhuman or degrading treatment or punishment." For this reason, the CAT could not impose legal obligations (i.e., preventing deportation under Article 16) on countries if the obligations stemmed from a vague concept like cruel, inhuman, or degrading punishment or treatment. BOULESBAA, *supra* note 33, at 8.

38 Article 3 has no equivalent in the 1975 Declaration on the Protection of All Persons Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. "The article had been inspired by the case-law of the European Commission of Human Rights with regard to article 3 of the *European Convention on Human Rights*." BURGERS & DANELIUS, *supra* note 24, at 125. The European Commission decided that "the prohibition of torture and inhuman or degrading treatment in article 3 of the *European Convention*" not only obligates countries to prevent torture within their own territories, but also to refrain from sending a person to a country where the deportee would face such treatment. *Id.* The original draft of Article 3 of the CAT referred only to expulsion and extradition; the reference to return or "refoulement" was added "with article 33 of the *Refugee Convention* as an obvious source of inspiration." *Id.* at 126.

39 CAT, *supra* note 6, art. 3, para. 1, at 114. Article 3 obligates countries to protect persons only from a return to a country where the deportees would suffer torture, but the law does not require that countries protect persons from return to a country where the deportees would be subjected to other cruel, inhuman, or degrading treatment or punishment. *See id.* The original draft proposed that there should be reasonable grounds for believing that the person would be subjected to torture; the term "substantial" was later substituted in order to make the wording more precise. BURGERS & DANELIUS, *supra* note 24, at 127. "The question as to whether or not such substantial grounds exist in a given case must be assessed in the light of the particular circumstances of that case." *Id.*

40 CAT REPORT, *supra* note 14, at 2–4.

41 *Id.* at 2, 7–11.

In August 1990, the Senate adopted a resolution of advice and consent that incorporated these reservations, understandings, and declarations;[42] President Clinton then deposited the instrument of ratification with the United Nations in October 1994.[43]

Because the CAT was not self-executing,[44] Congress adopted it into law through the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA)[45] and required the appropriate agencies to promulgate regulations within 120 days.[46] The U.S. Department of Justice (DOJ) promulgated these regulations in 1999,[47] creating two defenses to removal under the CAT: withholding of removal and deferral of removal.[48] Once an applicant for withholding or deferral of removal under Article 3 of the CAT proves the likelihood of torture in the country to which the applicant will be removed, the United States

[42] *Id.* at 1.

[43] BOULESBAA, *supra* note 33, at 12 n.2.

[44] The Senate's advice and consent to the ratification of the CAT was subject to the declaration that Articles 1 through 16 of the law were not self-executing. CAT REPORT, *supra* note 14, at 10.

[45] Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, tit. XXII, § 2242, 112 Stat. 2681, 2681-822 (1998). FARRA § 2242(a) states:

> It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

Id. § 2242(a), 112 Stat. at 2681–822.

[46] *Id.* § 2242(b), 112 Stat. at 2681–822.

[47] Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999).

[48] 8 C.F.R. § 208.18 (2009). Both withholding and deferral of removal under the CAT use the same definition of "torture." *See id.* A grant of deferral of removal under the CAT can be more easily revoked than a grant of withholding of removal. *See* 8 C.F.R. §§ 208.16, 208.17(d) (2009); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. at 8481–82.

> Under existing regulations, withholding can only be terminated when the government moves to reopen the case, meets the standards for reopening, and meets its burden of proof to establish by a preponderance of the evidence that the alien is not eligible for withholding. The termination process for deferral of removal is designed to be much more accessible, so that deferral can be terminated quickly and efficiently when appropriate.

Regulations Concerning the Convention Against Torture, 64 Fed. Reg. at 8482. Withholding of removal under the CAT, however, is not available to persons who have been convicted of a "particularly serious crime"; whereas deferral of removal under the CAT has no criminal bar. *See* 8 C.F.R. §§ 208.16(d)(2), 208.17.

may not send the applicant to that country.[49] These defenses are often the only available relief for noncitizens who cannot prove a case of asylum or nonrefoulement (nonreturn) under the United Nations Convention Relating to the Status of Refugees (Refugee Convention)[50] because these individuals cannot demonstrate a nexus between the harm feared and a protected ground.[51] In addition, deferral of removal under the CAT is often the only defense for applicants whose criminal record bars them from seeking other relief from removal.[52]

[49] Relief under Article 3 of the CAT is mandatory, not discretionary. *See* 8 C.F.R. § 208.16(c)(4) ("If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture.").

[50] The U.N. Convention Relating to the Status of Refugees is binding on the United States through its accession to the U.N. Protocol Relating to the Status of Refugees. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. Article 33 of the Refugee Convention prohibits refoulement (returning) of a refugee to territories if the refugee's life or freedom would be threatened. Refugee Convention, *supra*, art. 33.1, 189 U.N.T.S. at 176. The law regarding nonrefoulement, which is referred to as "withholding of removal," is codified at 8 U.S.C. § 1231(b)(3) (2006). Asylum, which may be granted in the Attorney General's discretion to anyone who meets the definition of a "refugee" under the Refugee Convention, was created through the Refugee Act of 1980. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 847–49 (6th ed. 2008). For the law relating to asylum, see 8 U.S.C. § 1158 (2006).

[51] Asylum seekers and applicants for the withholding of removal under 8 U.S.C. § 1231(b)(3) must demonstrate that the feared persecution is on account of their race, religion, nationality, political opinion, or membership in a particular social group. *See* 8 U.S.C. §§ 1101(a)(42)(A), 1158(b), 1231(b)(3) (2006); INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992). Applicants for protection under Article 3 of the CAT, however, need only demonstrate that they will face torture; the torture can be inflicted for any reason whatsoever. BURGERS & DANELIUS, *supra* note 24, at 125. For example, Haitian criminal deportees such as Jean Etienne have unsuccessfully argued that they would suffer persecution on account of their membership in a particular social group, i.e., Haitian criminal deportees. *See* Toussaint v. Att'y Gen. of the U.S., 455 F.3d 409, 418 (3d Cir. 2006); Elien v. Ashcroft, 364 F.3d 392, 397 (1st Cir. 2004). Such applicants could only seek protection under Article 3 of the CAT.

[52] For example, noncitizens who have been convicted of "particularly serious crimes" are not eligible for asylum or withholding of removal under 8 U.S.C. § 1231(b)(3). 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii) (2006); *see also In re* N-A-M-, 24 I. & N. Dec. 336, 342–43 (B.I.A. 2007) (describing the analysis used by the BIA for determining whether an offense is a "particularly serious crime"). An "aggravated felony" conviction is enough to disqualify an applicant from asylum. 8 U.S.C § 1158(b)(2)(B)(i). An "aggravated felony" conviction with a five-year sentence is enough to disqualify an applicant from withholding of removal under 8 U.S.C § 1231(b)(3)(B). The offenses that qualify as "aggravated felonies" can be as minor as a misdemeanor shoplifting crime with a suspended sentence of one year. *See* 8 U.S.C. § 1101(a)(43)(G) (2006). The BIA has also held that certain types of offenses (e.g., drug trafficking crimes) are per se

The Senate adopted an understanding that further defined the prohibition in Article 3 on expelling, returning, or extraditing a person to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[53] This understanding required that an applicant for protection under the CAT prove it is "more likely than not that he would be [tortured]."[54] This standard was already in use in U.S. law applying the Refugee Convention.[55] U.S. application of the nonreturn provisions of the Refugee Convention requires a showing that an applicant more likely than not will be persecuted on account of his race, religion, nationality, political opinion, or membership in a particular social group.[56] The U.S. Supreme Court has interpreted this standard in the context of the Refugee Convention and confirmed that the applicant must show a fifty-one percent likelihood of persecution.[57]

"particularly serious crimes" that will disqualify an applicant from asylum or withholding of removal. *See In re* Y-L-, 23 I. & N. Dec. 270, 274–77 (B.I.A. 2002). There is a "particularly serious crime" bar to withholding of removal under the CAT; however, there is no crime bar to deferral of removal. 8 C.F.R. §§ 208.16(d)(3); 208.17 (2009); Weissbrodt & Hörtreiter, *supra* note 10, at 16 (describing that the drafters of Article 3 of the CAT deliberately did not adopt the limitations on nonrefoulement included in other treaties, such as the "particularly serious crime" bar included in Article 33.1 of the Refugee Convention, because "no exceptional circumstances justify expelling a person to a country where she or he would be in danger of being subjected to torture"). Therefore, in many of the cases discussed in Part IV, *infra*, the applicant could only apply for deferral of removal under the CAT if the person was barred from asylum or withholding of removal due to a "particularly serious crime." *See, e.g.*, Lavira v. Att'y Gen. of the U.S., 478 F.3d 158, 161–62 (3d Cir. 2007) (discussing the phrase "particularly serious crime").

53 CAT, *supra* note 6, art. 3, para. 1, at 114.

54 CAT REPORT, *supra* note 14, at 10, 16.

55 Article 33 of the Refugee Convention prohibits a state from expelling or returning a refugee to territories where the refugee's life or freedom would be threatened. Refugee Convention, *supra* note 50, art. 33.1, 189 U.N.T.S. at 176.

56 *See* 8 U.S.C. § 1231(b)(3).

57 INS v. Cardoza-Fonseca, 480 U.S. 421, 447–48 (1987); INS v. Stevic, 467 U.S. 407, 429–30 (1984). While an applicant for asylum need only demonstrate a "well-founded fear" of persecution, which translates to a ten percent likelihood, an applicant for withholding of removal under 8 U.S.C. § 1231(b)(3) must demonstrate that persecution is "more likely than not" to occur, which translates to a fifty-one percent likelihood. *Cardoza-Fonseca*, 480 U.S. at 458 (Powell, J., dissenting). The United States adopted the more stringent "more likely than not" standard for relief under the CAT because the Reagan and Bush administrations regarded the nonreturn prohibition in Article 3 of the CAT as analogous to the mandatory withholding of removal under 8 U.S.C. § 1231(b)(3). *See Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 18 (1990) [hereinafter *CAT Hearing*] (statement of Mark Richard, Deputy Assistant Att'y Gen., U.S. Dep't of Justice) ("Because there is no discretion under Article 3, the lower standard that exists for asylum (*i.e.*, 'well founded fear of persecution,' 8 U.S.C. Sec. 1158) is simply inappropriate."); CAT REPORT, *supra* note 14, at 10.

Since the CAT regulations were promulgated in 1999, courts have interpreted claims for CAT protection in numerous cases.[58] The most important cases surround the "specific intent" requirement.

B. U.S. Definition of Torture Requires Specific Intent

The specific intent requirement originated with an understanding proposed by President Reagan;[59] the U.S. Senate adopted a version of Reagan's understanding,[60] which meant that U.S. obligations under

[58] For example, a CAT applicant must prove either that the torture will be inflicted at the hands of a government actor or that the government acquiesces in the torture. 8 C.F.R. § 208.18(a)(1) (2009); BURGERS & DANELIUS, *supra* note 24, at 119–20 ("[O]nly torture for which the authorities could be held responsible should fall within the article's definition. If torture is committed without any involvement of the authorities, but as a criminal act by private persons, it can be expected that the normal machinery of justice will operate and that prosecution and punishment will follow under the normal conditions of the domestic legal system."). Some courts hold that a showing of the government's willful blindness is needed to prove acquiescence. *See, e.g.*, Zheng v. Ashcroft, 332 F.3d 1186, 1196 (9th Cir. 2003) (holding that government acquiescence can be proved through a demonstration of willful blindness). *But see In re* S-V-, 22 I. & N. Dec. 1306, 1311–13 (B.I.A. 2000) (holding that willful blindness is not sufficient to prove the government acquiescence requirement under the CAT).

[59] President Reagan had submitted an understanding "that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering." CAT REPORT, *supra* note 14, at 15; Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. 100-20, at 4 (1988) [hereinafter Message from the President]. The summary and technical analysis of the CAT submitted by President Reagan to the Senate stated:

> [T]he requirement of intent to cause severe pain and suffering is of particular importance in the case of alleged mental pain and suffering, as well as in cases where unexpectedly severe physical suffering is caused. Because specific intent is required, an act that results in unanticipated and unintended severity of pain and suffering is not torture for purposes of this Convention.

CAT REPORT, *supra* note 14, at 13–14; Message from the President, *supra*, at 3. The Senate revised the Reagan administration's proposed understanding, which was criticized for setting too high a threshold of pain for an act to constitute torture. CAT REPORT, *supra* note 14, at 9.

[60] The understanding adopted by the Senate with reference to Article 1 was:

> The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or

the CAT became effective in domestic law subject to this understanding.[61] Because the executive branch and Senate saw the CAT as a codification of an international crime of torture,[62] their overriding concerns were to "be clear about what is going to be punished"[63] and "to guard against the improper application of the Convention to legitimate U.S. law enforcement actions."[64] The DOJ advocated for a specific intent requirement to solve the problem of an imprecise definition of torture in Article 1: "This definitional vagueness makes it very doubtful that the United States can, consistent with [c]onstitutional due process constraints, fulfill its obligation under the Convention to adequately engraft the definition of torture into the domestic criminal law of the United States."[65]

> application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

CAT REPORT, *supra* note 14, at 9. In light of this understanding, the Senate Committee on Foreign Relations noted that rough and deplorable treatment, such as police brutality, does not amount to torture. *Id.* at 13–14.

61 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES § 314 cmt. d (1986).

62 *CAT Hearing*, *supra* note 57, at 4 (statement of Hon. Abraham D. Sofaer, Legal Advisor, U.S. Dep't of State) ("The essential purpose of this convention is to codify international law regarding the crime of torture, and to require party states to deter and punish acts of torture pursuant to their domestic laws."). The State Department stated that the approach of the CAT "is more similar to the terrorism conventions than it is to the genocide convention." *Id.* at 5.

63 *Id.*; *see also id.* at 3 (statement of Sen. Larry Pressler) ("What happened to the requirement in American law . . . that no one can be subjected to trial and punishment under American law without a statute first having defined the crime and then provided for a specific punishment?").

64 CAT REPORT, *supra* note 14, at 15. Some Senators on the Senate Committee on Foreign Relations expressed concern both that several of the "worst violators of human rights" had already signed the CAT and that such countries could haul the United States before the International Court of Justice; a vague definition of "torture" would make unfounded prosecutions of the United States more likely. *See CAT Hearing*, *supra* note 57, at 1–4 (statements of Sen. Jesse Helms and Sen. Larry Pressler). The Assistant Attorney General for the Criminal Division of the U.S. Department of Justice expressed the same concern:

> The Convention places U.S. law enforcement officials, when traveling overseas, at risk of arrest and prosecution in foreign jurisdictions, or even extradition to a third country, for purported violations committed within the United States. . . .
>
> A related concern, flowing from the definitional problem, is that the Convention may be used by some unscrupulous foreign governments as a pretext for hostile actions against U.S. officials.

Id. at 16 (statement of Mark Richard, Deputy Assistant Att'y Gen., U.S. Dep't of Justice).

65 *CAT Hearing*, *supra* note 57, at 15–16 (statement of Mark Richard, Deputy Assistant Att'y Gen., U.S. Dep't of Justice).

The DOJ regulations tracked this understanding when describing who could seek protection from removal under the CAT. The regulation, located in 8 C.F.R. § 208.18(a), defines torture almost exactly as the term is defined by Article 1 of the CAT but added a specific intent requirement: "In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture."[66]

II
SPECIFIC INTENT IN CRIMINAL LAW: WHAT DID THE SENATE UNDERSTAND?

An examination of specific intent in domestic criminal law is necessary to understand the rationale for including a specific intent requirement in the CAT, which the executive branch and Senate viewed as an international codification of the crime of torture.[67] Criminal law was created to redress the harms that a person causes to society.[68] Because a defendant will receive punishment for producing this harm, courts interpreting criminal statutes favor injecting a mens rea, or guilty mind, requirement into every criminal statute.[69] This canon of statutory interpretation in criminal law, which is known as the presumption in favor of scienter, operates with the goal that the innocent actor who accidentally caused harm to society will not be punished.[70] Traditionally, legislatures defined a harm that they

[66] 8 C.F.R. § 208.18(a)(5) (2009). The DOJ also supplemented the Article 1 definition of torture by confining the definition to only extreme forms of cruel, inhuman, or degrading treatment or punishment. *See* 8 C.F.R. § 208.18(a)(2) ("Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.").

[67] *See CAT Hearing*, *supra* note 57, at 3 (statement of Sen. Larry Pressler); *id.* at 4 (statement of Hon. Abraham D. Sofaer, Legal Advisor, U.S. Dep't of State).

[68] *See* Bruce Ledewitz, *Mr. Carroll's Mental State or What Is Meant by Intent*, 38 AM. CRIM. L. REV. 71, 82 (2001) ("What we are seeking to punish in criminal law is sin, which sometimes is referred to by the less religious sounding term, 'moral desert.'" (footnote omitted) (quoting Michael S. Moore, *More on Act and Crime*, 142 U. PA. L. REV. 1749, 1751 (1994))).

[69] *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994); Staples v. United States, 511 U.S. 600, 618 (1994); Morissette v. United States, 342 U.S. 246, 252 (1952).

[70] Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 905 (1939) ("Deeply ingrained in human nature is the tendency to distinguish intended results from accidental happenings. 'I didn't mean to' is an explanation so frequently accepted that it is often one of the early acquisitions of small children."). Public welfare statutes, in which

sought to prevent yet allowed courts to decide what mens rea was appropriate for a certain punishment.[71]

At common law, courts separated culpability into two levels: specific and general intent. "[T]he most common usage of 'specific intent' is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime."[72] "Historically, 'general intent' referred to any offense for which the only *mens rea* required was a blameworthy state of mind; 'specific intent' was meant to emphasize that the definition of the offense expressly required proof of a particular mental state."[73] For some offenses, "specific intent" designates a heightened level of culpability, which demands a harsher punishment.[74] For other

the legislature deems that the harm to society is so great that an actor must be punished for causing such harm even if the causation was innocent, are an exception to this general presumption in favor of scienter. *See, e.g.*, United States v. Dotterweich, 320 U.S. 277, 280–81 (1943); United States v. Balint, 258 U.S. 250, 251–52 (1922).

71 *See* Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341, 343 (2001) ("Courts assume that legislatures have injected (or failed to inject) mens rea terms into statutory definitions of crimes with little thought to the precise implications of their actions; instead, it is the courts that should determine those implications, through construction of the terms used (or not used).").

72 LAFAVE, *supra* note 13, § 5.2(e); *see also* People v. Hood, 462 P.2d 370, 378 (Cal. 1969) ("When the definition [of a crime] refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent."). For example, at common law, larceny requires the taking and carrying away of property of another with the specific intent to steal the property. Similarly, common law burglary requires a breaking and entry into the dwelling of another with the specific intent to commit a felony therein. LAFAVE, *supra* note 13, § 5.2(e).

73 JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.06, at 147 (4th ed. 2006). For example, at common law, burglary was defined as "'breaking and entering of the dwelling of another in the nighttime with intent to commit a felony.'" *Id.* (quoting Mondie v. Commonwealth of Ky., 158 S.W.3d 203, 207 (Ky. 2005)). The requisite mens rea pertains to a future act, the intent to commit a felony, and therefore, the offense requires a specific intent. *Id.* at 147–48.

74 United States v. Bailey, 444 U.S. 394, 405 (1980). For example, the Supreme Court has discussed the meaning of specific intent in the context of whether the death penalty was an appropriate punishment; this level of punishment is only proportional to the crime if the defendant specifically intended to kill. *See* Enmund v. Florida, 458 U.S. 782, 801 (1982) (holding that the imposition of the death penalty in cases where a felony murderer did not intend to kill violates the Eighth Amendment's prohibition on cruel and unusual punishment); *see also* Tison v. Arizona, 481 U.S. 137, 156 (1987) ("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."). In *Tison*, the Supreme Court held that a felony murder defendant who substantially participated in a felony committed with reckless indifference to human life had the specific intent necessary to merit the death penalty. *Tison*, 481 U.S. at 158. This case is discussed in more detail in Part III.B, *infra*. Courts and commentators have also suggested that the

offenses, a specific intent mens rea is necessary to punish someone whose criminalized act does not reflect the harm that society ultimately sought to prevent.[75]

A. Different Definitions of Specific Intent

The terms "purpose" and "knowing" are often discussed when differentiating between specific and general intent.[76] Acting "purposefully" requires that the defendant consciously desire the forbidden result, whatever the likelihood of that result actually occurring from the conduct.[77] Acting "knowingly" requires that the defendant be aware that the result is practically certain to follow from the conduct, whatever the defendant's desire may be to bring about that result.[78] According to some scholars, "[t]he essence of the narrow distinction between these two culpability levels is the presence or absence of a *positive desire* to cause the result; purpose requires a culpability beyond the knowledge of a result's near certainty."[79]

Both state and federal courts have described the differences between specific and general intent with varying definitions of

distinction between specific and general intent evolved as a judicial response to the problem of the intoxicated offender; intoxication could negate specific intent but it could not negate general intent. *See* Montana v. Egelhoff, 518 U.S. 37, 46 (1996) ("Over the course of the 19th century, courts carved out an exception to the common law's traditional across-the-board condemnation of the drunken offender, allowing a jury to consider a defendant's intoxication when assessing whether he possessed the mental state needed to commit the crime charged, where the crime was one requiring a 'specific intent.'"); United States v. Twine, 853 F.2d 676, 679 (9th Cir. 1988) ("[D]iminished capacity, like voluntary intoxication, generally is only a defense when specific intent is at issue."); *Hood*, 462 P.2d at 377; Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 688 n.33 (1983).

[75] Batey, *supra* note 71, at 344 (citing OLIVER WENDELL HOLMES, JR., THE COMMON LAW 65–75 (1881)). For example, attempt is a specific intent crime. Because the actual harm was not completed, there would be no punishment without the concept of specific intent. *Id.* at 355. The uncertainty of whether a crime was actually committed is not present when the defendant has completed the underlying crime because the completed act is itself culpable conduct. *See id.*

[76] *See Bailey*, 444 U.S. at 405.

[77] United States v. U.S. Gypsum Co., 438 U.S. 422, 445 (1978).

[78] *Id.*

[79] Robinson & Grall, *supra* note 74, at 694; *see also* Miguel Angel Méndez, *A Sisyphean Task: The Common Law Approach to Mens Rea*, 28 U.C. DAVIS. L. REV. 407, 431–32 (1994) ("Purpose also entails conscious risk creation, but is distinguished from knowledge in that an awareness of the consequences that can ensue from the contemplated conduct is insufficient to establish liability. A desire to bring about the consequences is indispensable.").

specific intent.[80] For example, some courts have decided that the definition of specific intent should be limited to only purposeful conduct.[81] Other courts have decided knowing that a result is foreseeable is sufficient to prove specific intent.[82] Courts have also

[80] The Supreme Court discussed the various definitions of specific intent:

> Sometimes 'general intent' is used in the same way as 'criminal intent' to mean the general notion of *mens rea*, while 'specific intent' is taken to mean the mental state required for a particular crime. Or, 'general intent' may be used to encompass all forms of the mental state requirement, while 'specific intent' is limited to the one mental state of intent. Another possibility is that 'general intent' will be used to characterize an intent to do something on an undetermined occasion, and 'specific intent' to denote an intent to do that thing at a particular time and place.

Bailey, 444 U.S. at 403 (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 28, at 201–02 (1972)); *see also* Liparota v. United States, 471 U.S. 419, 423 n.5 (1985) ("We have also recognized that the mental element in criminal law encompasses more than the two possibilities of 'specific' and 'general' intent." (citing *Bailey*, 444 U.S. at 403–07)); *U.S. Gypsum Co.*, 438 U.S. at 444–45; United States v. Freed, 401 U.S. 601, 613 (1971) (Brennan, J., concurring); Commonwealth of Mass. v. Henson, 476 N.E.2d 947, 954 (Mass. 1985) (Hennessey, C.J., concurring) ("But 'specific intent' may not have clear meaning to all judges and lawyers."); *Hood*, 462 P.2d at 377 ("Specific and general intent have been notoriously difficult terms to define and apply, and a number of text writers recommend that they be abandoned altogether.").

[81] *See, e.g.*, Callahan v. A.E.V., Inc., 182 F.3d 237, 261 n.15 (3d Cir. 1999) ("Although harm to the plaintiffs may have been a probable ultimate consequence of the defendants' actions, we do not think they specifically intended to cause such harm."); United States v. Blair, 54 F.3d 639, 642 (10th Cir. 1995) ("In short, a specific intent crime is one in which the defendant acts not only with knowledge of what he is doing, but does so with the objective of completing some unlawful act."); Apodaca v. United States, 188 F.2d 932, 937 (10th Cir. 1951) (discussing that it was insufficient that the defendants may have had a general bad purpose in a prosecution for conspiracy; it was necessary for them to have the actual purpose of committing the act alleged in the indictment); Laws v. United States, 66 F.2d 870, 872 (10th Cir. 1933) (holding that jury instructions on specific intent were erroneous when the instructions stated that specific intent could be proved if the defendant intended the natural consequences of the knowingly committed wrongful act); State v. Daniels, 109 So. 2d 896, 899 (La. 1958) ("[S]pecific intent is present when from the circumstances the offender must have subjectively desired the prohibited result; whereas general intent exists when from the circumstances the prohibited result may reasonably be expected to follow from the offender's voluntary act, irrespective of any subjective desire to have accomplished such result."); Harris v. State, 728 A.2d 180, 183 (Md. 1999) ("A specific intent is not simply the intent to do the immediate act but embraces the requirement that the mind be conscious of a more remote purpose or design which shall eventuate from the doing of the immediate act." (quoting Smith v. State, 398 A.2d 426, 443 (Md. 1979))); State v. Orsello, 554 N.W.2d 70, 72 (Minn. 1996) ("[S]pecific intent requires that the defendant acted with the intention to produce a specific *result*, such as is the case in premeditated murder.").

[82] *See, e.g.*, Pettibone v. United States, 148 U.S. 197, 207 (1893) (interpreting a specific intent standard and stating "if the act in question is a natural and probable consequence of an intended wrongful act, then the unintended wrong may derive its character from the

defined specific intent as knowing of the virtual certainty of a result.[83] Still other courts have held that willful blindness[84] is sufficient to prove specific intent.[85]

B. The Model Penal Code: A Solution to the Specific and General Intent Conundrum

The Supreme Court commented on the task of distinguishing between specific and general intent at common law, stating that "[t]he administration of the federal system of criminal justice is confided to ordinary mortals, whether they be lawyers, judges, or jurors. This system could easily fall of its own weight if courts or scholars become obsessed with hair-splitting distinctions . . . ."[86] Because so much ambiguity existed in the lines drawn between specific and general intent, the drafters of the Model Penal Code (MPC) moved away from this traditional dichotomy of intent in the 1960s.[87] The MPC drafters

wrong that was intended"); United States v. Twine, 853 F.2d 676, 680 (9th Cir. 1988) (holding that to prove specific intent, "the level of culpability must exceed a mere transgression of an objective standard of acceptable behavior (e.g., negligence, recklessness)"); United States v. Neiswender, 590 F.2d 1269, 1273 (4th Cir. 1979) ("In our view, [to prove specific intent] the defendant need only have had knowledge or notice that success in his fraud would have likely resulted in an obstruction of justice. Notice is provided by the reasonable foreseeability of the natural and probable consequences of one's acts."); Commonwealth v. Richards, 293 N.E.2d 854, 860, 860 n.3 (Mass. 1973) (reasoning that specific intent to murder could be proved by showing an intent to kill or at least knowledge that there was a substantial chance of killing); People v. Lerma, 239 N.W.2d 424, 426 (Mich. Ct. App. 1976) ("[I]n order to commit a specific intent crime, an offender would have to subjectively desire or know that the prohibited result will occur, whereas in a general intent crime, the prohibited result need only be reasonably expected to follow from the offender's voluntary act . . . .").

83 *See, e.g.*, State v. Gaines, 873 A.2d 688, 693 (N.J. Super. Ct. App. Div. 2005) (reasoning that specific intent to murder can be proved through consciously causing death or knowing that death is practically certain to result).

84 "Willful blindness" is only different from positive knowledge in that the defendant made a calculated effort to avoid knowing the truth, but it "can almost be said that the defendant actually knew." United States v. Jewell, 532 F.2d 697, 700 n.7 (9th Cir. 1976) (quoting GRANVILLE L. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 57, at 159 (2d ed. 1961)).

85 *See, e.g.*, United States v. Schnabel, 939 F.2d 197, 203–04 (4th Cir. 1991); United States v. Hiland, 909 F.2d 1114, 1129–30 (8th Cir. 1990); United States v. Caminos, 770 F.2d 361, 366 (3d Cir. 1985).

86 United States v. Bailey, 444 U.S. 394, 406–07 (1980).

87 *Id.* at 403 n.4; *see also* Robinson & Grall, *supra* note 74, at 705 ("The Model Penal Code culpability scheme is a great improvement over 'the variety, disparity, and confusion' of judicial definitions of 'the requisite but elusive mental element' that existed prior to its advent." (footnote omitted) (quoting Morissette v. United States, 342 U.S. 246, 252 (1952))).

replaced the "ambiguous and elastic" term "intent" with a hierarchy of culpable states of mind.[88] The hierarchy includes, from highest to lowest degree of culpability, the following states: purposely, knowingly, recklessly, and negligently.[89] The MPC uses an "elemental" approach to criminal law, which requires the prosecution to prove each material ingredient of the certain offense with the corresponding state of mind. This approach allows for a separate mens rea to be used for each element of an offense.[90]

Following the passage of the MPC, specific intent is generally understood as an imbedded element of a criminal offense.[91] Other uses of specific intent, such as defining a heightened level of culpability in order to merit a harsher punishment, became obsolete as legislatures followed the MPC by defining the precise mens rea of a criminal offense.[92] Under the "modern view" of mens rea, "it is better to draw a distinction between intent (or purpose) on the one hand and knowledge on the other."[93] This contrasts with the traditional view, which defines specific intent in a way that includes purpose and knowledge.[94]

The Senate, which ratified the CAT subject to the specific intent understanding in 1994, years after the MPC's passage, never discussed using the MPC degrees of culpability to make the torture definition more precise.[95] It is possible that the Senate intended the

[88] *Bailey*, 444 U.S. at 404; *see also* MODEL PENAL CODE § 2.02, cmt. 2 (1962) (describing "specific intent" as an "awkward concept"); Méndez, *supra* note 79, at 430 ("A solution to the confusion the common-law terms have created is to adopt the mens rea terms conceived by the American Law Institute.").

[89] MODEL PENAL CODE § 2.02 (1962).

[90] DRESSLER, *supra* note 73, § 10.07, at 149.

[91] *See* LAFAVE, *supra* note 13, § 5.2(e), at 354.

[92] *See id.* § 5.2. However, despite this "modern view" of mens rea, courts still cling to the traditional notions of specific and general intent to define culpability. *See* People v. Burton, 558 N.E.2d 1369, 1378 (Ill. App. Ct. 1990) (Steigmann, J., concurring and dissenting) ("[R]egrettably the distinction [between general and specific intent] lives on because of the courts' reluctance to give it up."); *see also* Kenneth W. Simons, *Should the Model Penal Code's* Mens Rea *Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 179 (2003) ("Prior to the MPC, the prevailing mental state categories included general intent and specific intent, malice aforethought, and other concepts that were just as confusing. And in many states, these confusing and infinitely manipulable old concepts are still with us."). One scholar has commented that courts continue to define specific and general intent, even where states have adopted the MPC hierarchy, because it gives courts more flexibility in determining culpability. Batey, *supra* note 71, at 402–03.

[93] LAFAVE, *supra* note 13, § 5.2, at 340.

[94] *See id.*

[95] *See supra* Part I.B.

definition of torture to contain an implied element that required "purposeful" conduct because the torture definition requires the defendant to act with the *purpose* of obtaining a confession, punishing the victim, or intimidating the victim, or for any other reason based on discrimination of any kind.[96] However, the "purpose" language of the torture definition is relevant to motive, not intent.[97] It also is possible that the Senate inserted the specific intent requirement merely to clarify that an unintended causation of severe pain or suffering is not "torture."[98] The legislative history of the CAT ratification does not elucidate what definition of specific intent the Senate intended.[99] Thus, the BIA and the courts have grappled with this antiquated criminal law term and its various meanings.[100]

III

THE BIA'S MISGUIDED APPROACH TO CAT PROTECTION

The BIA first analyzed the definition of "torture" under the CAT in the 2002 *In re J-E-* case.[101] The BIA's approach to CAT protection, particularly its narrow definition of "specific intent," presents several problems, not the least of which is its disregard of established criminal law jurisprudence related to the meaning of specific intent. In choosing such a limited definition of specific intent, the BIA

[96] CAT, *supra* note 6, art. 1, para. 1, at 113–14; *see also* CAT REPORT, *supra* note 14, at 14 ("The requirement of intent is emphasized in Article 1 by reference to illustrate motives for torture . . . . The purposes given are not exhaustive . . . . Rather, they indicate the type of motivation that typically underlies torture, and emphasize the requirement for deliberate intention or malice.").

[97] Perkins, *supra* note 70, at 921 ("'Although sometimes confused, motive and intent are not synonymous terms.'" (quoting People v. Kuhn, 205 N.W. 188, 189 (1925))).

[98] *See* CAT REPORT, *supra* note 14, at 14 ("Because specific intent is required, an act that results in unanticipated and unintended severity of pain and suffering is not torture for purposes of this Convention."); *see also CAT Hearing*, *supra* note 57, at 10 (Statement of Hon. Abraham D. Sofaer, Legal Advisor, U.S. Dep't of State) (discussing the concern of the Justice Department about clarification of the crime of torture; he states, "We prepared a codified proposal which does not raise the high threshold of pain already required under international law, but clarifies the definition of mental pain and suffering, and maintains the position that specific intent is required for torture").

[99] *See supra* Part I.B.

[100] *See, e.g.*, *In re* J-E-, 23 I. & N. Dec. 291, 301 (B.I.A. 2002); *see also* Paul Pierre v. Att'y Gen. of the U.S., 528 F.3d 180, 189–91 (3d Cir. 2008); Franck Pierre v. Gonzales, 502 F.3d 109, 116–20 (2d Cir. 2007); Lavira v. Att'y Gen. of the U.S., 478 F.3d 158, 168–72 (3d Cir. 2007); Auguste v. Ridge, 395 F.3d 123, 139–48 (3d Cir. 2005); Zubeda v. Ashcroft, 333 F.3d 463, 473–75 (3d Cir. 2003). In this Article, the first names for petitioners Paul Pierre and Franck Pierre are used to distinguish their cases.

[101] *In re J-E-*, 23 I. & N. Dec. *passim*.

instituted an approach to Article 3 cases that resembles a prosecution of the alleged torturer, not an examination of the harm that the victim likely will suffer. This approach requires an Article 3 applicant to engage in the impossible task of proving a government's purpose through a forward-looking prosecution of its future acts. Thus, the specific intent understanding, which was intended to guard U.S. law enforcement actions against prosecution for torture, has effectively created an impossible hurdle to Article 3 protection.

A. In re J-E-

In *In re J-E-*, the BIA held that a Haitian man who faced prolonged detention in Haiti's National Penitentiary because of his status as a criminal deported from the United States could not obtain deferral of removal under the CAT.[102] The applicant presented evidence that the National Penitentiary was overcrowded and prisoners there were deprived of adequate food, water, medical care, sanitation, and exercise.[103]

The BIA held that the applicant could not prove the Haitian authorities specifically intended to inflict severe physical or mental pain or suffering on criminal deportees by placing them in prisons where they would be subjected to these conditions.[104] The BIA used general criminal law principles to distinguish between specific intent and general intent. "Specific intent" was "defined as the 'intent to accomplish the precise criminal act that one is later charged with' while 'general intent' commonly 'takes the form of recklessness . . . or negligence.'"[105] Applying this definition of the specific intent requirement under the CAT, the BIA found that Haitian authorities were intentionally detaining criminal deportees knowing that their detention facilities were substandard. However, that was not enough evidence to prove specific intent because there was "no evidence that they [were] intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture."[106]

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[102] *Id.* at 304.

[103] *Id.* at 293.

[104] *Id.* at 298, 300–01.

[105] *Id.* at 301 (alteration in original) (quoting BLACK'S LAW DICTIONARY 813–14 (7th ed. 1999)).

[106] *Id.* at 301. In a later decision, the Third Circuit clarified the BIA's statement in an opinion denying CAT relief to a similarly situated applicant. *See* Auguste v. Ridge, 395 F.3d 123, 146 (3d Cir. 2005). There, the Third Circuit held that it was not necessary for the government to intend to inflict torture; the government must only intend to inflict

The BIA reasoned that Haiti is an extremely poor country and, therefore, it was not the fault of the government if its prison conditions were deplorable.[107] This reasoning negated the applicant's argument that the government maintained these prisons in a horrible state with the specific intent to cause severe pain or suffering to the individuals detained.[108] The BIA also pointed to evidence demonstrating that the Haitian government was trying to improve the conditions in its prisons, further negating any specific intent to cause severe pain or suffering to its prisoners.[109]

The applicant also presented proof of instances of police brutality against prisoners, such as burning with cigarettes, choking, hooding, ear boxing, and electric shock.[110] The BIA held that the deliberate and vicious acts of police brutality against the prisoners, which may constitute torture, were isolated occurrences.[111] There were more common acts of rough treatment by the police, but these acts were not "severe" enough to rise to the level of torture.[112] Therefore, the applicant was unable to show a fifty-one percent chance of being tortured.[113]

severe pain or suffering. *See id.* ("Section 208.18(a)(5) only requires that the act be specifically intended to inflict severe pain and suffering, not that the actor intended to commit torture. The two are distinct and separate inquiries.").

107 *In re J-E-*, 23 I. & N. Dec. at 301.

108 *Id.* at 299. The BIA also reasoned that the Haitian government's policy of indefinite detention was a lawful sanction and, therefore, could not amount to torture under 8 C.F.R. § 208.18. *Id.* at 301. The BIA cited the legislative history of the United States's adoption of the CAT and reasoned that the illicit purpose requirement of torture emphasized the specific intent requirement. *Id.* at 298. To explain the Haitian authorities' motivation for such indefinite detention, the BIA stated that the policy was "designed 'to prevent the 'bandits' from increasing the level of insecurity and crime in the country.'" *Id.* at 300 (quoting BUREAU OF DEMOCRACY, U.S. DEP'T OF STATE, HAITI: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2000 (2001), *available at* http://www.state.gov/g/drl/rls/hrrpt/2000/wha/795.htm). The BIA also quoted a U.S. State Department official, who wrote that Haitian authorities detain criminal deportees "as a warning and deterrent not to commit crimes in Haiti." *Id.* (quoting Letter from William E. Dilday, Dir. of Office of Country Reports and Asylum Affairs, U.S. Dep't of State, to Immigration Judge (Apr. 12, 2001)).

109 *Id.* at 301. The BIA cited the Haitian government's allowance of groups such as the Red Cross to monitor prison conditions and assist prisoners with medical care, food, and legal aid. *Id.*

110 *Id.* at 301–02.

111 *Id.* at 302.

112 The BIA stated that "rough and deplorable treatment, such as police brutality, does *not* amount to torture." *Id.* at 298 (citing CAT REPORT, *supra* note 14, at 13–14).

113 *Id.* at 303. The BIA also interpreted the "more likely than not" standard of the CAT in the case *In re J-F-F-*, 23 I. & N. Dec. 912 (B.I.A. 2006). In *In re J-F-F-*, the BIA held

B. In re J-E- *Ignores Criminal Law Precedent on Specific Intent*

The BIA's narrow definition of specific intent in the *In re J-E-* decision disregarded significant criminal law jurisprudence on the meaning of specific intent. Many courts, including the Supreme Court, have decided that the definition of specific intent should not be limited to only purposeful conduct.[114] In the 1978 case *United States v. United States Gypsum Co.*,[115] the Court addressed whether the Sherman Antitrust Act required a mens rea for a conviction under the

that a Dominican man was ineligible for deferral of removal under the CAT because he could not show that he would more likely than not suffer torture. *Id.* at 921. The respondent argued that upon his return to the Dominican Republic, he might not be able to take his psychiatric medications, which would cause him to become "rowdy" and lead the Dominican police to arrest him; he then argued it was likely that he would be tortured in jail. *Id.* at 916–17. The BIA held that an applicant for protection under the CAT could not string together a series of suppositions to meet the burden of proof when the applicant could not show that each step in the hypothetical chain of events was more likely than not to occur. *Id.* at 921. Because the applicant in *In re J-F-F-* could not show a fifty-one percent likelihood that each event in the chain would result in his torture in jail, he was not granted CAT relief. *See id.*

114 *See, e.g.*, Tison v. Arizona, 481 U.S. 137, 157 (1987); United States v. U.S. Gypsum Co., 438 U.S. 422, 446 (1978); United States v. Silverman, 745 F.2d 1386, 1393 (11th Cir. 1984); United States v. Buffalano, 727 F.2d 50, 54 (2d Cir. 1984); United States v. Neiswender, 590 F.2d 1269, 1273 (4th Cir. 1979); *see also* United States v. Johnson, 24 M.J. 101, 105 (C.M.A. 1987) (interpreting specific intent in a sabotage case and stating that the "limited distinction between knowledge and purpose has not been considered important since 'there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results' . . . . In either circumstance, the defendants are consciously behaving in a way the law prohibits, and such conduct is a fitting object of criminal punishment." (internal citation omitted) (quoting LAFAVE & SCOTT, JR., *supra* note 80, § 28, at 197)). Scholars have also agreed that specific intent should not be limited to purposeful conduct. *See, e.g.*, DRESSLER, *supra* note 73, § 10.04, at 130 ("At common law, a person 'intentionally' causes the social harm of an offense if: (1) it is his desire (i.e., his conscious object) to cause the social harm; or (2) he acts with knowledge that the social harm is virtually certain to occur as a result of his conduct." (footnote omitted)); Batey, *supra* note 71, at 358, 368–69, 402 (commenting that specific intent is often equated with willful, knowing, or purposeful acts; whereas, general intent is commonly equated with recklessness, which means the perpetrator was aware of the risk of bringing about the result prohibited by the statute, but nevertheless chose to run that risk); Perkins, *supra* note 70, at 911 ("Intended consequences include those which (a) represent the very purpose for which an act is done (regardless of likelihood of occurrence), or (b) are known to be substantially certain to result (regardless of desire)."). In the criminal law treatise SUBSTANTIVE CRIMINAL LAW, which is frequently cited by courts, Wayne R. LaFave states: "Intent has traditionally been defined to include knowledge, and thus it is usually said that one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts." LAFAVE, *supra* note 13, § 5.2, at 340.

115 *U.S. Gypsum Co.*, 438 U.S. 422 (1978).

statute.[116] Having concluded that intent was a necessary element of a criminal antitrust violation,[117] the Court decided that the offense contained a specific intent mens rea,[118] which the prosecution could prove by demonstrating the defendant's knowledge of the anticipated consequences of various actions.[119] The Court held that "[a] requirement of proof not only of this knowledge of likely effects, but also of a conscious desire to bring them to fruition or to violate the law would seem . . . both unnecessarily cumulative and unduly burdensome."[120]

116 *Id.* at 434–43. The defendants were charged with violations of 15 U.S.C. § 1 for engaging in collusion and conspiracy to raise, fix, maintain, and stabilize the prices of their product and the terms and conditions of sale thereof, while also trying to adopt and maintain uniform methods of packaging and handling their product. *Id.* at 427.

117 *Id.* at 443.

118 *Id.* at 443 n.20, 444.

119 *Id.* at 446. Justice Stevens, concurring in part and dissenting in part, disagreed with this definition of specific intent, stating, "If I were fashioning a new test of criminal liability, I would require proof of a specific purpose to violate the law rather than mere knowledge that the defendants' agreement has had an adverse effect on the market." *Id.* at 474–75 (Stevens, J., concurring and dissenting).

120 *Id.* at 446. The Court reasoned that the limited distinction between knowledge and purpose is not important because "'there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results.'" *Id.* at 445 (quoting LAFAVE & SCOTT, JR., *supra* note 80, § 28, at 197). The Supreme Court affirmed its reasoning in *United States Gypsum Co.* in the 1979 *Sandstrom v. Montana* decision. 442 U.S. 510 (1979). In *Sandstrom*, the Court, deciding an appeal of a deliberate homicide conviction, held that a jury instruction indicating that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violated the Fourteenth Amendment due process requirement, which obligates the State to prove every element of a criminal offense beyond a reasonable doubt. *Id.* at 512, 522–26. The State argued that, because the jury was instructed to find that a person "intends" the ordinary consequences of his voluntary acts but was not provided with a definition of "intends," the jurors could have interpreted the intentional requirement as referring only to the defendant's "purpose" and would not have needed to rely upon the tainted presumption. *Id.* at 525. Rejecting this argument, the Court reasoned that

> we are not at all certain that a jury would interpret the word "intends" as bearing solely upon purpose. As we stated in [*United States Gypsum Co.*], "[t]he element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness."

Id. at 525–26 (quoting *U.S. Gypsum Co.*, 438 U.S. at 445); *see also* United States v. Neiswender, 590 F.2d 1269, 1274 (4th Cir. 1979) ("[A] rule focusing on foreseeable, rather than intended, consequences operates in sensible and fair fashion to deter the conduct sought to be avoided and to punish those whose actions are blameworthy, even though undertaken for purposes that may or may not be culpable.").

In 1987, in *Tison v. Arizona*,[121] the Court discussed the meaning of specific intent in the context of whether the death penalty was a proportional punishment for a felony murder defendant.[122] The Court stated that "[t]raditionally, 'one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts.'"[123] In *Tison*, the Supreme Court decided that the Eighth Amendment did not prohibit a state from imposing the death penalty on a defendant convicted of felony murder whose mental state was reckless indifference to human life.[124] The *Tison* Court addressed whether "reckless indifference" proved "specific intent to kill," which was required to justify the imposition of the death penalty under *Enmund v. Florida*, 458 U.S. 782 (1982). The *Tison* Court stated:

> *Enmund* held that when "intent to kill" results in its logical though not inevitable consequence—the taking of human life—the Eighth Amendment permits the State to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.[125]

The majority in *Tison* used a broader definition of specific intent notwithstanding its 1980 decision in *United States v. Bailey*,[126] where

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121 481 U.S. 137 (1987).

122 *Id.* at 149–50.

123 *Id.* at 150 (quoting LAFAVE & SCOTT, JR., *supra* note 80, § 28, at 196).

124 *Id.* at 158. The Court stated that "reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.'" *Id.* at 157.

125 *Id.* at 157–58. Several Justices in *Tison*, namely Justices Brennan, Marshall, Blackmun, and Stevens, disagreed, stating in a dissenting opinion both that specific intent could only be proved if the accused chose to kill and that anything less was merely reckless conduct, which would not merit the death penalty as punishment. *Id.* at 170–71 (Brennan, J., dissenting) (reasoning that a person who chooses to act recklessly and is indifferent to the possibility of fatal consequences often deserves serious punishment, but because that person has not specifically chosen to kill, the moral and criminal culpability is of a different degree than that of one who killed or intended to kill); *see also id.* at 172 ("Since I would hold that death may not be inflicted for killings consistent with the Eighth Amendment without a finding that the defendant engaged in conduct with *the conscious purpose of producing death*, these sentences must be set aside." (quoting Lockett v. Ohio, 438 U.S. 586, 628 (1978) (White, J., dissenting))).

126 444 U.S. 394 (1980). In *Bailey*, the Supreme Court decided whether the crime of escape under 18 U.S.C. § 751(a) was a general or specific intent crime. *Id.* at 408. In the case, the defense both presented evidence that the defendant had escaped from jail to avoid

the Supreme Court stated that "'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent."[127] Thus, the BIA's definition of specific intent, which is limited to only purposeful conduct, ignores significant Supreme Court precedent and a large body of criminal jurisprudence.[128]

C. The In re J-E- *Analysis Focuses on the Torturer, not the Victim*

In *In re J-E-*, the BIA's narrow definition of specific intent established an approach to Article 3 CAT protection cases that focuses on the intent of the government official, not the harm to the victim. The BIA's holding may have reflected a concern that an expansive reading of specific intent in an Article 3 case would later impact prosecutions of U.S. law enforcement officials under the criminal provisions of the CAT. Many provisions of the CAT address the prevention and prosecution of torture carried out by law enforcement,[129] which prompted the United States to include a

beatings and homosexual attacks and argued that the defendant did not have the specific intent to avoid confinement, as required by the statute. *Id.* The majority held that the prosecution need only prove general intent to convict under the escape statute, which the prosecution had accomplished in the case by proving that the escapee knew his actions would result in his leaving physical confinement without permission. *Id.* at 408–09.

[127] *Id.* at 405. The Supreme Court appeared to move away from the traditional specific intent definition, which previously included both "purposeful" and "knowing" conduct. *See id.* However, the *Bailey* Court stated that the line drawn between purpose and knowledge was "[p]erhaps the most significant, and most esoteric." *Id.* at 404. In 1994, the Supreme Court reasoned that "specific intent" means "a purpose to disobey the law" in *Ratzlaf v. United States*. 510 U.S. 135, 141 (1994). In *Ratzlaf*, the Supreme Court did not elaborate on the varying definitions of specific and general intent in criminal law jurisprudence. The Court, interpreting a statute that punished willful violations of an antistructuring provision, held that "willfulness" required "both 'knowledge of the reporting requirement' *and* a 'specific intent to commit the crime,' *i.e.*, 'a purpose to disobey the law.'" *Id.* (quoting United States v. Bank of New Eng., 821 F.2d 844, 854–59 (1st Cir. 1987)); *see also* United States v. Eisenstein, 731 F.2d 1540, 1543 (11th Cir. 1984).

[128] *See Tison*, 481 U.S. at 157; United States v. U.S. Gypsum Co., 438 U.S. 442, 446 (1978); United States v. Silverman, 745 F.2d 1386, 1393 (11th Cir. 1984); United States v. Buffalano, 727 F.2d 50, 54 (2d Cir. 1984); United States v. Neiswender, 590 F.2d 1269, 1273 (4th Cir. 1979).

[129] *See, e.g.*, CAT, *supra* note 6, art. 2, para. 1, at 114 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."); *id.* art. 4, para. 1, at 114 ("Each State Party shall ensure that all acts of torture are offences under its criminal law."); *id.* art. 9, para. 1, at 115 ("States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4 . . . ."). However, the history of the CAT indicates the UN General Assembly,

specific intent understanding.[130] Only Article 3 pertains to protecting a victim. The CAT also was the first human rights instrument to define "torture," although the prohibition of torture appears in several treaties and has developed into a rule of customary international law.[131] However, the drafters of the CAT did not wish this definition to be "understood as a definition in the strict sense of penal law . . . [Article 1] gives a *description* of torture for the purpose of understanding and implementing the *Convention* rather than a legal definition for direct application in criminal law and criminal procedure."[132] Nonetheless, the United States clearly saw the CAT as a codification of the crime of torture and the nation's primary concern was protecting its troops from prosecution.[133] This approach to the CAT trickled down to the BIA's interpretation of Article 3 of the treaty in *In re J-E-*, which effectively turned Article 3 protection hearings into trials of the alleged torturer.

In a criminal prosecution, the specific intent query focuses on the intent of the defendant, not the harm to the victim.[134] While this is an appropriate analysis for prosecuting torturers,[135] it does not consider the victim's viewpoint, which is an essential component of a human

when it requested the UN Congress to focus on the issue of torture, sought to develop a code of ethics for law enforcement agencies *in addition to* protecting prisoners from torture. BURGERS & DANELIUS, *supra* note 24, at 14–15.

130 *See* CAT REPORT, *supra* note 14, at 14–15.

131 *See* BURGERS & DANELIUS, *supra* note 24, at 10–12.

132 *Id.* at 122. The drafters were concerned that to define torture as "a crime by using an open-ended list of purposes might give rise to the objection that this definition would run counter to a strict application of the principle '*nullum crimen sine lege*' (no crime, no punishment without a previous law)." *Id.*

133 *See CAT Hearing*, *supra* note 57, at 1–4 (statements of Sen. Jesse Helms, Sen. Larry Pressler and Hon. Abraham D. Sofaer, Legal Advisor, U.S. Dep't of State); *id.* at 16 (statement of Mark Richard, Deputy Assistant Att'y Gen., U.S. Dep't of Justice).

134 In a "victim-centered approach" to criminal law, the victim's concerns often arise when determining the punishment for the crime, not when a court determines whether the defendant had the requisite mens rea to commit the offense. *See, e.g.*, Stacy Caplow, *What If There Is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1, 40 (1998) ("Victims' voices have been heard loudest at sentencing, although not without controversy."); Douglas J. Sylvester, *Myth in Restorative Justice History*, 2003 UTAH L. REV. 471, 505–10.

135 *See* Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179, 1228–30 (1994) (arguing that criminal law cases appropriately focus on the intent of the defendant because "'only conscious wrongdoing constitutes crime'"; whereas tort, antidiscrimination, and refugee law focus on providing a remedy for the victim (quoting 21 AM. JUR. 2D *Criminal Law* § 129 (1981))).

rights protection case.[136] Previous human rights instruments inspired Article 3 of the CAT;[137] these instruments both provide a set of rules for the relationship between the individual and the appropriate government and contemplate "that this relationship must . . . be based upon rights of the individual which entail obligations on the part of the government."[138] For example, the Refugee Convention should not be interpreted to be a criminal prosecution of the persecutor.[139] Because the rights of the individual are of utmost importance in human rights protection, the inquiry should be: What is the harm to the individual? The question should *not* be: Is the government official guilty of a crime?

The BIA also did not acknowledge an obvious parallel between Article 3 protection under the CAT and the Torture Victim Protection Act (TVPA) of 1991,[140] an entirely victim-focused piece of legislation that Congress debated and passed during the same time period it ratified the CAT.[141] The TVPA, which allowed victims of

136 *See* Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 328 (1994) (concluding that focusing on the alleged torturer and the tortious act draws attention away from the victim's suffering); Rebecca B. Schechter, *Intentional Starvation as Torture: Exploring the Gray Area Between Ill-Treatment and Torture*, 18 AM. U. INT'L L. REV. 1233, 1263 (2003) (arguing that a more accurate test for a court to employ to determine the pain or suffering requirement is to objectively measure the extent of the harm endured by the victim). Professor Karen Musalo highlighted this problem in U.S. interpretations of asylum law, which she labeled "intent-based," not "effects-based," because of the overriding focus on the motivation of the persecutor rather than on the harm to the victim. Musalo, *supra* note 135, at 1181–82. She stated:

> An intent-based analysis of the phrase 'on account of' would require a showing that the persecutor was motivated to harm the victim because of the victim's status or beliefs. An effects-based analysis would allow the victim to prevail upon a showing that he or she suffered because of his or her status or beliefs, *whether or not he or she could prove the persecutor's motivation.* The [BIA] . . . appeared to adopt an intent-based analysis almost from the outset.

Id. at 1186 (footnote omitted).

137 *See* BURGERS & DANELIUS, *supra* note 24, at 125–26.

138 *Id.* at 5.

139 The UN High Commissioner for Refugees has stated that "refugee status examiners are not called upon to decide the criminal guilt or liability of the persecutor, and refugee status is not dependent on such proof." Brief for the Office of the United Nations High Commissioner for Refugees as Amicus Curiae Supporting Respondent at 16, INS v. Elias-Zacarias, 502 U.S. 478 (1992) (No. 90-1342), 1991 WL 11003948.

140 Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (2006)).

141 *See id.*; *see also The Torture Victim Protection Act of 1991: Hearings and Markup on H.R. 1417 Before the H. Comm. on Foreign Affairs and the Subcomm. on Human Rights and Int'l Orgs.*, 100th Cong. (1988) [hereinafter *TVPA Hearings*].

torture, or their representatives residing in the United States, to bring a civil action in federal court against the torturer,[142] sought to carry out "obligations of the United States under the U.N. Charter, as well as other international agreements pertaining to the protection of human rights."[143] The TVPA used virtually the same definition of torture as the CAT, yet there was no specific intent requirement.[144] Congress therefore decided, during the same time it was ratifying the CAT, that victims of torture only needed to prove intentional causation of severe pain or suffering, not "specific intent."[145] Yet the BIA, when it interpreted Article 3, the only victim-based article in the CAT, seemingly forgot about victims and focused on prosecuting torturers.

To demonstrate this problem with the BIA's approach, a court interpreting Jean Etienne's case will focus on the Haitian officials' plans or motives when they detain him. His likely level of suffering in the Haitian prison will be irrelevant to his CAT protection case. Thus, despite the Haitian government's intentional imprisonment of

142 *TVPA Hearings*, *supra* note 141, at 1 (statement of Rep. Gus Yatron).

143 *Id.*

144 *See* § 3(b), 106 Stat. at 73–74. The legislative history of the TVPA indicates that the definition of "torture" was intended to include withholding food or water from prisoners. During a hearing on the TVPA, one Congressman stated:

> We know that hunger is often one of the choice weapons used in many of the prisons, particularly in the Soviet Union and elsewhere, including in Cuba. Would that fall in line with the definition [of torture] as stated by the legislation? . . . I do raise that because, again, one of the weapons used most often by the forced labor camps in the Soviet Union—and we have, I think, very good documentation on this—is lack of food or lack of water, but it is particularly lack of food. That, coupled with excessive work, causes very deleterious impact upon the people, very often leading to death. I would hope that that would be part of [the definition of torture].

TVPA Hearings, *supra* note 141, at 74 (statement of Rep. Chris Smith).

145 *See* §§ 2–3, 106 Stat. at 73–74. Under the TVPA torture definition, a government's acts such as starving, refusing medications, and providing inadequate toilet facilities to a prisoner can amount to torture; these acts were held to be torture when committed by the Iraqi government. *See* Daliberti v. Republic of Iraq, 146 F. Supp. 2d 19, 22–25 (D.D.C. 2001) (interpreting the TVPA definition of torture because it is incorporated into the Foreign Sovereign Immunities Act (FSIA), which "exempts from immunity foreign sovereigns where 'money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act'" (quoting 28 U.S.C. § 1605(a)(7) (2006))); *see also* Nikbin v. Islamic Republic of Iran, 471 F. Supp. 2d 53, 62–63 (D.D.C. 2007) (interpreting the TVPA definition of torture in a FSIA exemption case and stating "[d]etention can itself constitute torture," but yet holding that petitioner did not suffer torture because he did not allege that the conditions of confinement caused severe pain or suffering).

Etienne without food, water, or life-saving medication, he cannot win CAT protection solely by demonstrating that severe pain, suffering, and probable death will await him in the Haitian prison.

D. BIA's Specific Intent Definition Is Unworkable in a Forward-Looking Context

Another problem with the BIA's approach is that Article 3 applicants must prove the narrow definition of specific intent in a prospective case. Specific intent, as a criminal law concept, is usually proved in a criminal prosecution, during which the fact finder has the benefit of making inferences based on past conduct.[146] However, "it would be difficult, if not impossible, to prove specific intent in a prospective context."[147] The CAT applicant has no tools, such as depositions, interrogatories, or cross-examinations at trial, to ask the potential torturer about intent.[148] Rather, adjudicators must make predictions about future states of mind; the only guidance is a regulation that urges immigration judges to rely upon the type of information normally used to determine intent, such as evidence of past torture or other violations of human rights.[149] If evidence of past conduct is unavailable, an immigration judge must consider "'all evidence relevant to the possibility of future torture.'"[150]

Jean Etienne, who fears future torture yet has not been subjected to past torture, must act as a prosecutor of a future crime that he claims

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146 *See* Lavira v. Att'y Gen. of the U.S., 478 F.3d 158, 171 (3d Cir. 2007); *In re* J-E-, 23 I. & N. Dec. 291, 312–13 (B.I.A. 2002) (Rosenberg, dissenting).

147 *In re J-E-*, 23 I. & N. Dec. at 316 (Rosenberg, dissenting).

148 Professor Karen Musalo highlighted this problem of prospectively proving the motivation of a persecution in the asylum context. *See* Musalo, *supra* note 135, at 1202. CAT applicants have more of an uphill battle than asylum seekers, however, because CAT applicants must prove their government will specifically intend to cause them severe pain or suffering, while asylum seekers must only prove that a protected ground is a central reason for the persecution. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, div. B, § 101(a)(3), 119 Stat. 231, 303; *In re* J-B-N- & S-M-, 24 I. & N. Dec. 208, 211 (B.I.A. 2007) (confirming that noncitizens whose persecutors were motivated by more than one reason will continue to be protected despite the provisions of Public Law Number 109-13).

149 8 C.F.R. § 208.16(c)(3) (2009).

150 *Lavira*, 478 F.3d at 171 (quoting 8 C.F.R. § 208.16(c)(3) (2009)). Article 3 of the CAT also states that, for the purpose of determining whether there are substantial grounds for believing the applicant would be in danger of being subject to torture, "the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights." CAT, *supra* note 6, art. 3, para. 2, at 114.

will be committed against him. While human rights reports can be useful to prove past acts by his government, these reports are of limited assistance to Etienne, who must prove that Haitian officials will specifically intend to cause him severe pain or suffering by detaining him in atrocious prison conditions.[151]

IV

FEDERAL CIRCUIT COURTS TORTURE THE DEFINITION OF SPECIFIC INTENT IN CAT PROTECTION CASES

Because of the specific intent requirement, courts interpreting CAT protection have largely focused on criminal law jurisprudence.[152] There are no reported prosecutions under the criminal provisions of the CAT,[153] which are codified at 18 U.S.C. §§ 2340-2340A,[154] despite the addition of the specific intent language to clarify the definition of torture for such prosecutions.[155] However, there are numerous cases interpreting Article 3 of the CAT,[156] and, as

[151] Compounding the problem is the fact that applicants are often represented pro se because persons in removal proceedings do not have the right to a court-appointed attorney. 8 U.S.C. § 1229a(b)(4)(A) (2006). In addition, many CAT applicants are subject to mandatory detention because of their criminal offenses, which makes it difficult to obtain pro bono assistance. *See* 8 U.S.C. § 1226(c) (2006). These factors are exacerbated due to the shorter calendar for these cases, which gives a detainee even less time to prepare defenses to removal. *See, e.g.*, U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL § 9.1(e), at 121–22 (2008), *available at* http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij_page1.htm (noting that proceedings for detained noncitizens are expedited).

[152] *See, e.g.*, Paul Pierre v. Att'y Gen. of the U.S., 528 F.3d 180, 189–91 (3d Cir. 2008); Franck Pierre v. Gonzales, 502 F.3d 109, 116–20 (2d Cir. 2007); *Lavira*, 478 F.3d at 168–72; Auguste v. Ridge, 395 F.3d 123, 139–48 (3d Cir. 2005); Zubeda v. Ashcroft, 333 F.3d 463, 473–75 (3d Cir. 2003).

[153] The only reported decision discussing either statute is *United States v. Chanthadara*, in which the U.S. Court of Appeals for the Tenth Circuit decided that the definition of "torture" under 18 U.S.C. § 2340 did not apply to the definition of "torture" used in the jury instructions for death penalty cases under 18 U.S.C. 3592(c)(6). United States v. Chanthadara, 230 F.3d 1237, 1262 (10th Cir. 2000). The Office of Legal Counsel of the DOJ interpreted the specific intent requirement in several memos. *See infra* Part V.B.

[154] 18 U.S.C. § 2340A makes it a criminal offense for any person outside of the United States to commit or attempt to commit torture. 18 U.S.C. § 2340A (2006). 18 U.S.C. § 2340 defines an act of torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." 18 U.S.C. § 2340(1) (2006).

[155] *See CAT Hearing*, *supra* note 57, at 16 (statement of Mark Richard, Deputy Assistant Att'y Gen., U.S. Dep't of Justice); CAT REPORT, *supra* note 14, at 14–15.

[156] *See, e.g.*, *Paul Pierre*, 528 F.3d at 189–91; *Franck Pierre*, 502 F.3d at 116–20; *Lavira*, 478 F.3d at 168–72; *Auguste*, 395 F.3d at 139–48; *Zubeda*, 333 F.3d at 473–75.

discussed above, courts interpreting Article 3 have to grapple with "specific intent," an antiquated criminal law term with varying definitions.

Courts interpreting CAT protection have frequently shifted the focal point: in some cases, courts focus entirely on the intent of the torturer, but in others courts examine the harm the CAT applicant will suffer. As illustrated below, the U.S. Court of Appeals for the Third Circuit has been vacillating between these two focal points in recent years. Each time the court shifted focus, it would revise its definition of specific intent. The reasoning in these cases, in addition to other solutions created by courts, demonstrates courts' conflicting views of whether CAT protection should be interpreted through the eyes of the victim or the torturer.

A. The Third Circuit Alternates Viewpoints

Zubeda v. Ashcroft[157] illustrates a victim-focused analysis of the CAT. In the 2003 *Zubeda* opinion, the Third Circuit decided the case of a woman from the Democratic Republic of the Congo (DRC) who sought protection under the CAT, fearing that she would be detained by her government as a deportee and raped by prison guards.[158] The court reasoned that the specific intent requirement, as interpreted by the BIA in *In re J-E-*, would "impose insurmountable obstacles to affording the very protections the community of nations sought to guarantee under the Convention Against Torture."[159] The court stated that, "[a]lthough the regulations require that severe pain or suffering be 'intentionally inflicted,' we do not interpret this as a 'specific intent' requirement."[160] The court reasoned that the regulations distinguish suffering that is the accidental result of an intended act (not torture) from suffering that is purposefully inflicted or the foreseeable consequence of deliberate conduct (torture).[161]

157 *Zubeda*, 333 F.3d at 463.

158 The immigration judge had denied her asylum claim because of her inconsistent testimony regarding her past persecution, but the judge granted her relief under the CAT because of the likelihood of her detention in the DRC upon arrival and the possibility of rape at the hands of the detaining authorities. *Id.* at 470. The BIA overruled the immigration judge's ruling, citing *In re J-E-*. *Id.* at 475.

159 *Id.* at 474.

160 *Id.* at 473 (internal citation omitted).

161 *Id.* The court examined the specific intent requirement at 8 C.F.R. § 208.18(a)(5) and noted that this requirement is immediately qualified by the phrase "'[a]n act that results in unanticipated or unintended severity of pain and suffering is not torture.'" *Id.* (alteration in original) (quoting 8 C.F.R. § 208.18(a)(5) (2009)).

Therefore, the regulations exclude only pain or suffering that is the unintended consequence of an intentional act from torture.[162] According to the court's holding, foreseeable suffering from an intentional act would be torture under the CAT.[163]

While CAT applicants readily cited the court's reasoning in *Zubeda*, the Third Circuit decided, two years later, to look at the CAT as a treaty designed only to prosecute torturers.[164] In the 2005 *Auguste v. Ridge* decision, the Third Circuit denied CAT protection for a Haitian man who feared the prison conditions that he would suffer as a criminal deportee.[165] Reasoning that its specific intent language in *Zubeda* was merely dicta,[166] the court decided that, "in the context of the Convention, for an act to constitute torture, there must be a showing that the actor had the intent to commit the act as well as the intent to achieve the consequences of the act, namely the infliction of the severe pain and suffering."[167] The court clearly stated its focus when interpreting CAT protection: "Auguste's contention that the introduction of criminal law concepts into the standard for relief under the Convention was in error because the Convention is not about criminal prosecution, but rather about protecting the victims of torture, *is besides the point*."[168] Relying on one criminal law case and the BIA's reasoning in *In re J-E-*, the *Auguste* court defined specific intent as "expressly intend[ing] to achieve the forbidden act."[169]

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162 *Id.*; *see also* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 465, 486 (3d ed. 1999) (citing BURGERS & DANELIUS, *supra* note 24, at 41). For example, if severe pain or suffering is inflicted in the course of a fully justified medical treatment, this is not "torture" under the CAT. BURGERS & DANELIUS, *supra* note 24, at 119.

163 *Zubeda*, 333 F.3d at 473.

164 Auguste v. Ridge, 395 F.3d 123, 145 (3d Cir. 2005).

165 *Id.* at 154–55. When presented with facts more similar to *In re J-E-* (i.e., an applicant who was convicted of a crime, feared return to Haiti, and did not present himself as a vulnerable rape victim as in *Zubeda*), it appears that the Third Circuit was willing to backpedal from its specific intent reasoning. *See id.* at 145–48. *But cf. Zubeda*, 333 F.3d at 470–74 (detailing the Third Circuit's specific intent reasoning prior to *Auguste*).

166 *Auguste*, 395 F.3d at 148.

167 *Id.* at 145–46.

168 *Id.* at 145 (emphasis added).

169 *Id.* (citing Carter v. United States, 530 U.S. 255, 269 (2000)). In *Carter*, the Court decided whether 18 U.S.C. § 2113(b), which punished larceny from a bank, was a lesser included offense of 18 U.S.C. § 2113(a), which punished robbery from a bank. *Carter*, 530 U.S. at 258–59. The Court held that the larceny statute section had a specific intent mens rea and the robbery section contained only a general intent mens rea. *Id.* at 269–70. The petitioner argued that the Court should read in a specific intent mens rea to 18 U.S.C. § 2113(b), and thus, the elements of the two offenses would align, making the larceny

The Third Circuit again interpreted the CAT as a victim-centric human rights instrument in the 2007 *Lavira v. Attorney General of the United States* opinion.[170] Here, the court decided the case of a wheelchair-bound, above-the-knee amputee who suffered from AIDS and feared return to the horrendous prison conditions in Haiti that he would suffer as a criminal deportee.[171] An expert reported that the victim would not receive any meaningful medical treatment and would probably lose thirty pounds shortly after his incarceration, which would lead to death.[172] The court reasoned that severe pain was not a possible consequence that could result from placing him in the facility; it was the only foreseeable outcome.[173] Based on this record, the Third Circuit decided that Lavira had proved specific intent and merited CAT protection.[174] In *Lavira*, the court cited criminal law for a more generous definition of specific intent that would effectuate the goals of CAT protection and held that specific intent could mean "willful blindness."[175]

crime a lesser included offense of the robbery crime. *Id.* at 270. Despite this argument, the Supreme Court held that the presumption in favor of scienter in a statute demands that courts only read in a general intent requirement, not a specific intent requirement. *Id.* at 268. The Court cited a nontypical prosecution scenario to demonstrate the difference between specific and general intent. In this scenario, a person enters a bank and takes money from the teller at gunpoint, but the violator deliberately fails to make a quick getaway "in the hope of being arrested" to return to prison and be treated for alcoholism. *Id.* (citing United States v. Lewis, 628 F.2d 1276, 1279 (10th Cir. 1980)). The hypothetical criminal knowingly engages in the act of using force and taking money, so the general intent requirement is satisfied. However, the criminal does not intend to permanently deprive the bank of its money, so the requisite specific intent is not met. *Id.* The dissent noted that a defendant exhibiting this kind of "bizarre behavior" would probably have specific intent to steal and further noted that this sort of case is an anomaly because such indictments are brought no more than once a year. *Id.* at 283–84 (Ginsburg, J., dissenting) (quoting *Lewis*, 628 F.2d at 1278). Other than citing this nontypical scenario, the Supreme Court's decision in *Carter* has little value in determining the definition of specific intent.

170 478 F.3d 158 (3d Cir. 2007).

171 *Id.* at 159. The applicant's conviction for purchasing a ten-dollar bag of drugs for an undercover agent would classify him as a criminal deportee deserving of indefinite detention. *Id.* at 159, 170.

172 *Id.* at 170–71.

173 *Id.* at 170.

174 *Id.* at 170–72.

175 *Id.* at 171 (citing United States v. Caminos, 770 F.2d 361, 365 (3d Cir. 1985)); *see also* Thelemaque v. Ashcroft, 363 F. Supp. 2d 198, 215 (D. Conn. 2005) ("[A] mechanical application of the specific intent requirement might yield results at odds with the language and intent of CAT and . . . concepts such as deliberate indifference, reckless disregard or willful blindness might well suffice in certain circumstances to satisfy the specific intent requirement of the Convention.").

In 2008, an en banc panel of the Third Circuit adopted a strictly criminal prosecution view of the CAT in *Paul Pierre v. Attorney General of the United States*.[176] The applicant, who suffered from esophageal dysphagia, feared the Haitian prison conditions, in which he could not survive without his mandatory liquid diet administered through a feeding tube.[177] Holding that its reasoning in *Lavira* was merely dicta,[178] the court decided to define specific intent as narrowly as possible in CAT protection cases.[179] The court stated,

> Specific intent requires not simply the general intent to accomplish an act with no particular end in mind, but the additional deliberate and conscious purpose of accomplishing a specific and prohibited result. Mere knowledge that a result is substantially certain to follow from one's actions is not sufficient to form the specific intent to torture.[180]

Rather, the Third Circuit stated that "[k]nowledge that pain and suffering will be the certain outcome of conduct may be sufficient for a finding of general intent but it is not enough for a finding of specific intent."[181] The court refused to focus on the applicant's suffering, perhaps because the court found the petitioner unsympathetic,

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176 528 F.3d 180, 190–91 (3d Cir. 2008).

177 *Id.* at 183. The court stated it was an undisputed fact that Haitian prison officials would not be able to provide him with his liquid diet and regular medical attention. *Id.* at 183 n.3. The court also stated, "It is not clear from the record how long [Paul] Pierre would remain imprisoned once returned to Haiti." *Id.*

178 The Third Circuit explained that, in *Lavira*, the applicant had demonstrated he would be targeted and singled out by the prison guards in Haiti because of his HIV status. *Id.* at 188. The court characterized its own discussion about willful blindness proving specific intent in *Lavira* as mere dicta. *Id.* The concurring opinion in *Paul Pierre* noted that the court's decision in *Lavira*, which examined an applicant whom the majority agreed had proved all of the elements of a CAT claim, allowed for proof of specific intent "in the form of the prison official's knowledge that severe pain and suffering would certainly result." *Id.* at 191–92 (Rendell, J., concurring). Thus, the legal reasoning of the Third Circuit's decision in *Paul Pierre* did not comport with its decision to allow any portion of the *Lavira* holding on specific intent to stand. *See id.*

179 *See id.* at 190 (majority opinion).

180 *Id.* at 189.

181 *Id.* In *Franck Pierre*, the Second Circuit looked at the CAT entirely as a criminal prosecution treaty, yet the court left the door open for a broader reading of specific intent compared to the BIA's definition. Franck Pierre v. Gonzales, 502 F.3d 109 (2d Cir. 2007). Declining to the give "specific intent" a "counter-intuitive spin," the court examined the various definitions of "specific intent" in CAT protection cases and found a middle ground between *Lavira* and *Paul Pierre*: the Second Circuit reasoned that specific intent could be proved "if it is found on the record evidence that the actor is aware of a virtual certainty that such pain and suffering will result." *Id.* at 118 n.6; *see also id.* at 116–19.

referring to his physical ailment as "self-imposed."[182] The court stated that the lack of medical care and likely pain that Paul Pierre would experience was "an unfortunate but unintended consequence of the poor conditions in the Haitian prisons, which exist because of Haiti's extreme poverty. We find that this unintended consequence is not the type of proscribed purpose contemplated by the CAT."[183]

Many of the applicants for CAT relief have been Haitians, like Jean Etienne, who fear the severe pain or suffering that will result when they are detained as criminal deportees in Haiti.[184] Although the BIA and circuit courts did not want to open the floodgates by protecting criminal deportees from Haiti,[185] it became more difficult for adjudicators to imagine an applicant returning to Haiti, as they were exposed to the reality of conditions in the Haitian prisons, especially when that applicant seemed particularly vulnerable due to a medical ailment.[186] Also contributing to this trend is more thorough

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182 *Paul Pierre*, 528 F.3d at 182. In *Paul Pierre*, the Third Circuit was not presented with facts as sympathetic as the applicant in *Lavira*, the wheelchair-bound, double amputee, and HIV-positive Haitian CAT applicant with a minor criminal record, or *Zubeda*, the Congolese applicant who feared rape in the prison and had no criminal record. *See* Lavira v. Att'y Gen. of the U.S., 478 F.3d 158, 170 (3d Cir. 2007); Zubeda v. Ashcroft, 333 F.3d 463, 467, 470 (3d Cir. 2003). The applicant for CAT relief in *Paul Pierre* had repeatedly stabbed his ex-girlfriend with a meat cleaver and earned a conviction for attempted murder that rendered him removable. *Paul Pierre*, 528 F.3d at 183. His physical ailment, which the Third Circuit called "self-imposed," resulted from his attempt to commit suicide by swallowing battery acid after the stabbing. *Id.* at 182–83.

183 *Paul Pierre*, 528 F.3d at 189.

184 These Haitians may only seek relief from removal under the CAT because they cannot prove persecution "on account of" their race, religion, nationality, political opinion, or membership in a particular social group. Also, deferral of removal under the CAT is the only relief for which many are eligible because their criminal convictions bar them from seeking asylum or withholding of removal. *See* 8 U.S.C. § 1231(b)(3) (2006); *see also supra* notes 51–52.

185 The Third Circuit stated this concern in *Paul Pierre*:

> To the extent that the majority fears that such a holding would open the floodgates to CAT petitioners from places such as Haiti where the petitioner will likely be subjected to deplorable conditions, there remains an evidentiary burden of showing that would-be torturers in such places know of or desire the resulting infliction of severe pain and suffering.

Paul Pierre, 528 F.3d at 195 n.10 (Rendell, J., concurring).

186 *See, e.g.*, Jean-Pierre v. U.S. Att'y Gen., 500 F.3d 1315, 1318, 1325–26 (11th Cir. 2007) (remanding the matter to the BIA because a Haitian criminal deportee with mental illness presented a different set of facts than the petitioner in *In re J-E-* and, therefore, required a new CAT protection finding); *Lavira*, 478 F.3d at 159, 170–71; *cf. Franck Pierre*, 502 F.3d at 121 (rejecting a CAT claim when evidence showed either that the applicant's family in Haiti would likely bring him medicine or that he would be released in a timely fashion).

human rights documentation of the conditions in Haitian prisons,[187] which has proved valuable for convincing adjudicators that the Haitian government knows that severe pain or suffering will likely result for many criminal deportees.[188]

B. Courts Punt Humanitarian Decisions to the Prosecuting Agency

The cases described above demonstrate the Third Circuit's willingness to examine CAT protection through the eyes of the victim only when that victim has particularly compelling facts and a minor criminal record.[189] In a footnote in *Paul Pierre*, the Third Circuit attempted to find an alternative solution that appeased the consciences of all judges deciding these difficult CAT protection cases: if a case had compelling humanitarian factors, the U.S. Department of Homeland Security (DHS) could grant "deferred action."[190] Deferred

[187] Whereas the applicant in *In re J-E-* only presented some proof of the conditions, which included a U.S. State Department report and a *Miami Herald* article, applicants today call upon the expert testimony of Michelle Karshan, the director of Alternative Chance in Haiti, to give a detailed description of the conditions in the Haitian prisons. *In re* J-E-, 23 I. & N. Dec. 291, 293 (B.I.A. 2002); *see also* Alternative Chance/Chans Alternativ, http://www.alternativechance.org (last visited Apr. 10, 2010). Alternative Chance, which began as a prisoner reentry program for criminal deportees to Haiti, morphed into a human rights documentation organization to provide evidence of Haitian prison conditions for criminal deportees and advocate on behalf of the deportees. The director of Alternative Chance, Michelle Karshan, regularly testifies as an expert witness in Haitian CAT cases in immigration courts throughout the United States. *See In re J-E-*, 23 I. & N. Dec. at 293; *see also Jean-Pierre*, 500 F.3d at 1319; *Lavira*, 478 F.3d at 163.

[188] In addition, while the BIA could say that the Haitian government was attempting to fix the conditions for the deportees, as time has passed and no fix to either the policy or the conditions has come, adjudicators can now conclude that the Haitian authorities *do* specifically intend to cause severe pain or suffering to the deportees. Indeed, one Boston immigration judge has decided that applicants for CAT protection could distinguish *In re J-E-* by the time that had elapsed since the BIA decided the case in 2002. Because these horrible prison conditions persisted several years later, the immigration judge reasoned that the Haitian government now has the specific intent to cause severe pain or suffering. *See In re* E-M- (Boston Immigr. Ct. Dec. 11, 2007) (on file with author); *In re* P-C- (Boston Immigr. Ct. Dec. 21, 2006) (on file with author).

[189] *Compare Paul Pierre*, 528 F.3d at 182–83, 189 (stating specific intent means acting with the precise purpose to bring about a desired result; the applicant in this case suffered from a "self-imposed" physical ailment resulting from his failed attempt at suicide after repeatedly stabbing his girlfriend with a meat cleaver), *with Lavira*, 478 F.3d at 170–71 (stating specific intent can be proved through willful blindness; the applicant was a wheelchair-bound, above-the-knee double amputee, and HIV-positive man who was convicted of purchasing one ten-dollar bag of drugs for an undercover agent).

[190] *See Paul Pierre*, 528 F.3d at 191 n.8 ("Nothing herein prevents the government from granting discretionary relief to [Paul] Pierre in the form of deferred action. Though we are bound to the specific intent requirement contained in the CAT, the government is not."). In *Lavira*, the DHS had offered deferred action to the applicant if he agreed to withdraw

action, which is a form of prosecutorial discretion,[191] can be granted only by the DHS, the prosecuting agency.[192] Thus, courts are attempting to pass off their responsibility under the CAT to protect a noncitizen from torture to an agency that may not act sympathetically toward many CAT applicants in exercising its discretion.[193] Unlike

his appeal at the agency level. *Lavira*, 478 F.3d at 163 n.6. Because he refused to do so, the Third Circuit did not view this as a realistic option for that applicant. *See id.*

191 To ameliorate a harsh and unjust outcome, the DHS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. This exercise in administrative discretion, which is not authorized by statute, originally was known as "nonpriority" and is now known as "deferred action." A noncitizen may be granted deferred action at any stage of the removal process. Granting deferred action status means that, for humanitarian reasons, no action will thereafter be taken to proceed against an apparently removable noncitizen. *See* 3 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 72.03(2)(h) (rev. ed. 2008). An Immigration and Naturalization Service memo from 2000 states that the Agency must look at the following factors when considering an application for deferred action or prosecutorial discretion: immigration status, length of residence in the United States, criminal history, humanitarian concerns, immigration history, likelihood of removing the person, likelihood of achieving enforcement goal by other means, eligibility for other relief, effect on future admissibility, current or past cooperation with law enforcement authorities, honorable U.S. military service, community attention, and resources available to the agency. Memorandum from Doris Meissner, INS Comm'r, on Exercising Prosecutorial Discretion to Reg'l Dirs., Dist. Dirs., Chief Patrol Agents, and Reg'l & Dist. Counsel of INS 7–8 (Nov. 17, 2000), *in* 77 INTERPRETER RELEASES 1673, 1679–80 (2000) [hereinafter Meissner Memo].

192 8 U.S.C. § 1252(g) reads:

> Except as provided in this section and notwithstanding any other provision of law . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this [Act].

8 U.S.C. § 1252(g) (2006). In addition, 8 U.S.C. § 1252(a) precludes judicial review of decisions or actions of the Attorney General or the Secretary of Homeland Security; the authority for this preclusion is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security. Courts have generally rejected challenges to arbitrary refusals to grant deferred action. *See, e.g.*, Romeiro de Silva v. Smith, 773 F.2d 1021, 1024–25 (9th Cir. 1985) (finding the court had no jurisdiction to review the refusal to grant deferred action because the informal administrative practice "creates no protectible liberty interest in deferred action, nor does it create a protectible interest in being considered for deferred action status"); Velasco-Gutierrez v. Crossland, 732 F.2d 792, 793–94, 797 (10th Cir. 1984) ("'[D]eferred action' or 'nonpriority' status is essentially an administrative decision by the Service not to deport an otherwise deportable alien," so therefore, a noncitizen's interest in the grant of this relief, in light of the "unfettered discretion[,] . . . [is] too remote and insubstantial to rise to the level of a constitutionally protected liberty interest."); Pasquini v. Morris, 700 F.2d 658, 662 (11th Cir. 1983) (holding that, since deferred action practice does not confer a substantive right, the court has no authority to review the refusal of a request for deferred action consideration in absence of a showing of abuse of discretion).

193 Many applicants for protection under Article 3 have criminal records that bar them from other forms of relief; this criminal history can be weighed against the humanitarian

the DHS, which can weigh an applicant's criminal record against humanitarian factors to determine who merits deferred action, courts deciding applications for deferral of removal under the CAT must consider only the likelihood of torture in the home country.[194]

In addition, deferred action and other types of individualized, discretionary relief have proved to be unworkable in the asylum context. Before the asylum law existed as it does today,[195] people requesting protection from harm would seek parole to enter the United States.[196] These decisions to grant parole occurred through an unstructured, discretionary system with no judicial oversight. This method of asking for protection proved to be unworkable for the DHS and begged for legal uniformity, which prompted Congress to pass the Refugee Act in 1980.[197] Similarly, serious problems arise when courts request that government agencies take over the decision making regarding protection for victims of persecution or torture. In regards to the CAT, such courts are punting the decision to the DHS and effectively converting a mandatory decision into a discretionary one.

factors in their cases when they seek prosecutorial discretion. *See* Meissner Memo, *supra* note 191, at 1679–80; *see also id.* at 1679 ("There is no precise formula for identifying which cases warrant a favorable exercise of discretion.").

194 While a "particularly serious crime" is a bar to asylum, withholding of removal under 8 U.S.C. § 1231(b)(3), and withholding of removal under the CAT, there is no criminal bar to deferral of removal under the CAT. *See supra* note 52. Also, unlike asylum, deferral and withholding of removal under the CAT are not discretionary. 8 U.S.C. § 1158(b) (2006); 8 C.F.R. §§ 208.16(d)(1), 208.17(a) (2009); INS v. Cardoza-Fonseca, 480 U.S. 421, 428 n.5 (1987). Therefore, a court considering an application for deferral of removal under the CAT may not deny the claim based on the applicant's criminal record. 8 C.F.R. § 208.17.

195 Today, asylum laws and regulations are codified at 8 U.S.C. § 1158 and 8 C.F.R. §§ 208.1 to 208.15.

196 *See Cardoza-Fonseca*, 480 U.S. at 427 n.4. There were a few predecessors to the asylum and withholding of removal statutes, but these statutes were either entirely discretionary or allowed protection only to certain persons, i.e., those fleeing a communist-dominated country. *See* ALEINIKOFF ET AL., *supra* note 50, at 847–48.

197 Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 438–39 (1992) (explaining that the Refugee Act was enacted to achieve uniform, fair, and impartial asylum procedures). The 1980 Refugee Act added 8 U.S.C. § 1158 establishing asylum status, which is discretionary. The Act also amended the nonrefoulement section of the Immigration and Nationality Act, then 8 U.S.C. § 1253(h), to make its provisions mandatory. ALEINIKOFF ET AL., *supra* note 50, at 847–49.

V
A BETTER CHOICE: "FORESEEABLE CONSEQUENCES" DEFINITION OF SPECIFIC INTENT

A more generous definition of specific intent would allow adjudicators to focus on the likely harm to the victim; as such, this definition would better effectuate the history and purpose of protection under Article 3 of the CAT. Under this definition, specific intent means "knowing the act would likely result in severe pain or suffering." This meaning finds ample support in criminal law jurisprudence; it has also been proposed by the Office of Legal Counsel (OLC) of the DOJ in its interpretation of the criminal provisions of the CAT.

A. The Purpose and Legislative History of Article 3 Protection

The "hair-splitting"[198] of deciding the meaning of specific intent in CAT protection cases comes down to a life-or-death situation for most applicants. One scholar has commented that proof of intent in the area of criminal law has been modified to protect perceived societal interests.[199] Courts are willing to apply a "result-oriented construction of the statute's mental requirement"[200] in criminal law cases to avoid prosecution for a particularly compelling defendant or ensure prosecution for a particularly detestable defendant.[201] Courts also may be willing to interpret a statute to contain a mens rea of general intent, as opposed to specific intent, to preclude an intoxication defense.[202] The proverbial hair should be split in favor of Article 3 applicants, for whom there is a societal interest[203] in

198 United States v. Bailey, 444 U.S. 394, 407 (1980).

199 Musalo, *supra* note 135, at 1229.

200 Batey, *supra* note 71, at 348.

201 *See id.* at 386.

202 The Connecticut Supreme Court sought to prevent an intoxication defense for rape by holding that it was a general intent crime. *See* State v. Smith, 554 A.2d 713, 716 (Conn. 1989). The court stated: "The difficulty of convicting a thoroughly intoxicated person of rape, if awareness of lack of consent were an element of the crime, would diminish the protection that our statutes presently afford to potential victims from lustful drunkards." *Id.*

203 The CAT proposed to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world." CAT, *supra* note 6, preamble, at 113; *see also* CAT REPORT, *supra* note 14, at 3 (discussing Congress's passage of a joint resolution in 1984 that both reaffirmed the federal government's opposition to torture and its commitment to combat the practice of torture

protection from enduring severe pain or suffering at the hands of a foreign government.[204]

Moreover, the term "specific intent" is so malleable that a more expansive definition can be supported with ample criminal law jurisprudence.[205] Defining specific intent to include both purposeful and knowing acts is not contrary to the legislative will, as Presidents Reagan and Bush and the Senate did not follow the Model Penal Code approach to defining the mens rea of torture in the CAT, which would have given courts more direction.[206] The Senate instead ratified the CAT with an understanding that included a specific intent requirement, despite years of criminal law jurisprudence that showed the varying possible definitions of the term.[207]

The adoption of the specific intent requirement as an understanding, not a reservation, is significant. Reservations alter a country's treaty obligations; whereas understandings contain the Senate's interpretation of certain provisions.[208] As the Third Circuit stated: "This suggests to us that the commonly understood meaning at the time of ratification was that, at least to the United States, the specific intent standard was consistent with a reasonable

and expressed support for the involvement of the government in the formulation of international standards and effective implementing mechanisms against torture).

204 Professor Musalo argued that asylum seekers should also get the benefit of the "perceived societal interest" in protecting them from persecution. *See* Musalo, *supra* note 135, at 1228–39.

205 *See* cases cited *supra* Parts II.A and III.B.

206 At the same time Presidents Reagan and Bush submitted the understandings to the CAT and the Senate adopted such understandings, the Model Penal Code had been enacted to clarify the murky waters of specific and general intent. *See* Méndez, *supra* note 79, at 430 ("A solution to the confusion the common-law terms have created is to adopt the mens rea terms conceived by the American Law Institute."). Moreover, at the time that the Senate adopted the understandings and Congress passed the FARRA, the definition of "specific intent" had been interpreted to include "knowingly" and not just "purposefully." *See, e.g.*, Tison v. Arizona, 481 U.S. 137, 157 (1987); United States v. U.S. Gypsum Co., 438 U.S. 422, 446 (1978); United States v. Silverman, 745 F.2d 1386, 1393 (11th Cir. 1984); United States v. Buffalano, 727 F.2d 50, 54 (2d Cir. 1984); United States v. Neiswender, 590 F.2d 1269, 1273 (4th Cir. 1979).

207 *See* cases cited *supra* Parts II.A and III.B.

208 *See* LIESBETH LIJNZAAD, RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY AND RUIN? 60 (1995) (describing interpretations such as U.S. understandings as a "transition from the text of a treaty to treaty practice"); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 429–30 (2000) (analogizing reservations to "counteroffers" in a bilateral treaty and stating the traditional rule in bilateral treaties that the reserving state generally is not a party to the treaty unless every other party agrees to the reservation).

interpretation of the language in Article 1."[209] The Senate could have determined that the specific intent standard would include more than purposeful conduct,[210] as this definition is consistent with the one used by many criminal courts.[211] It is also consistent with "a reasonable interpretation of the language in Article 1,"[212] as no other country limits the definition of torture to only purposeful conduct.[213]

B. The Justice Department's Definition of Specific Intent

The DOJ also relied on a more expansive definition of specific intent in the context of whether U.S. interrogators should be punished under the CAT for their treatment of detainees.[214] Initially, the OLC had a very narrow reading of the specific intent element of torture,

[209] Auguste v. Ridge, 395 F.3d 123, 143 n.20 (3d Cir. 2005).

[210] It is a well-settled principle that Congress is presumed to be aware of existing case law when it legislates. *See* Keene Corp. v. United States, 508 U.S. 200, 212 (1993) (noting the "presumption that Congress was aware of [prior] judicial interpretations [of a statute] and, in effect, adopted them"); Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991) ("'[W]e do not lightly assume that Congress has intended to depart from established principles'" created through judicial decisions. (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982))); Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

[211] *See* cases cited *supra* note 206.

[212] *Auguste*, 395 F.3d at 143 n.20.

[213] *See* BOULESBAA, *supra* note 33, at 20 (discussing that all countries other than the United States advocated for a definition of "torture" that included acts that are committed with "general intent," which can include grossly negligent acts); BURGERS & DANELIUS, *supra* note 24, at 118 ("According to the definition in article 1, torture must be an *intentional* act. It follows that where pain or suffering is the result of an accident or of mere negligence, the criteria for regarding the act as torture are not fulfilled."); Copelon, *supra* note 136, at 326 ("The intent required under the international torture conventions is simply the general intent to do the act which clearly or foreseeably causes terrible suffering."). In 2002, when the OLC was asked to interpret the criminal provisions of the CAT, the OLC erroneously concluded that all other countries advocated for a specific intent requirement in the definition of torture. *See* Memorandum from Jay S. Bybee, Assistant Att'y Gen., on Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A to Alberto R. Gonzales, Counsel to the President 15 n.7 (Aug. 1, 2002) [hereinafter Bybee Memo], *available at* http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf. *But see* BOULESBAA, *supra* note 33, at 20 ("The U.S. was the only country that was not satisfied with the term 'intentionally.' No other State commented on it; it invited no serious discussion from the Working Group and the U.S.'s proposal was not adopted."). In the same footnote in the Bybee Memo, the OLC stated that even if a narrow reading of the "specific intent" requirement was not consistent with the Article 1 definition of torture, "the [specific intent] understanding represents a modification of the obligation undertaken by the United States." *See* Bybee Memo, *supra*, at 15 n.7. *But see supra* note 208 and accompanying text (describing that reservations, not understandings, alter a country's treaty obligations).

[214] *See* Levin Memo, *supra* note 22.

which was similar to the BIA's definition in *In re J-E-*.[215] In an "infamous" 2002 memo, the OLC gave Central Intelligence Agency (CIA) operatives a definition of torture under 18 U.S.C. § 2340[216] that allowed the agents to use harsh interrogation techniques without subjecting them to prosecution for torture.[217] Regarding torture, this 2002 memo concluded that "even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith."[218]

In its December 30, 2004, memo on U.S. torture policy, which superseded the 2002 memo in its entirety,[219] the Justice Department

[215] *See* Bybee Memo, *supra* note 213, at 3–5. For a discussion of how the Bush administration's narrow definition of "torture" had a collateral effect on CAT applicants, see Renee C. Redman, *Defining "Torture": The Collateral Effect on Immigration Law of the Attorney General's Narrow Interpretation of "Specifically Intended" when Applied to United States Interrogators*, 62 N.Y.U. ANN. SURV. AM. L. 465 (2007).

[216] 18 U.S.C. § 2340A makes it a criminal offense for any person outside of the United States to commit or attempt to commit torture. 18 U.S.C. § 2340(1) defines an act of torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions) upon another person within his custody or physical control."

[217] *See generally* Bybee Memo, *supra* note 213; Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641, 645–46 (2005). In April 2009, President Obama released four additional OLC memos concerning U.S. interrogation techniques in response to a Freedom of Information Act request. Mark Mazzetti & Scott Shane, *Memos Spell Out Brutal C.I.A. Mode of Interrogation*, N.Y. TIMES, Apr. 17, 2009, at A1. One of the memos, also written by Jay Bybee in 2002, applies his narrow definition of torture to authorize specific interrogation tactics that were used against al Qaeda operative Abu Zubaydah. *See generally* Memorandum from Jay S. Bybee, Assistant Att'y Gen., on Interrogation of al Qaeda Operative to John Rizzo, Acting Gen. Counsel, Cent. Intelligence Agency (Aug. 1, 2002), *available at* http://i.cdn.turner.com/cnn/2009/images/05/22/bybee.pdf.

[218] Bybee Memo, *supra* note 213, at 4. Dean Koh criticized the Bybee Memo as "perhaps the most clearly erroneous legal opinion I have ever read." Koh, *supra* note 217, at 647. He cited "five obvious failures" of the Bybee Memo, which are: (1) the opinion fails to mention the legal and historical context in which the memo was written; (2) the opinion defines "torture" so narrowly that the word's meaning is lost and even Saddam Hussein's security forces' techniques would not constitute torture; (3) the opinion misinterprets the power of the President under the Commander-in-Chief power in Article II of the Constitution by suggesting that, through this power, the President can sanction torture and Congress has no power to interfere; (4) the opinion suggests that lower executive officials can escape prosecution for illegal torture by claiming that they were "just following orders"; and (5) the opinion suggests that the CAT allows cruel, inhuman, or degrading treatment as permissible U.S. government interrogation tactics. *Id.* at 647–53.

[219] Dean Koh discussed the repudiation of the 2002 memo:

> After being leaked to the press shortly after the revelation of atrocities at Abu Ghraib, the Bybee Opinion sparked a firestorm of criticism. After months of

redefined the specific intent element of torture, citing Wayne R. LaFave's *Substantive Criminal Law*.[220] The 2004 memo stated that the specific intent element would be met if the defendant performed an act and "consciously desires" that act to inflict severe physical or mental pain or suffering.[221] The memo recognized that a mens rea of knowledge could also suffice to prove specific intent:

> [I]f an individual acted in good faith, and only after reasonable investigation establishing that his conduct would not inflict severe physical or mental pain or suffering, it appears unlikely that he would have the specific intent necessary to violate sections 2340-2340A. Such an individual could be said neither consciously to desire the proscribed result, *see, e.g.*, *Bailey*, 444 U.S. at 405, nor to have 'knowledge or notice' that his act 'would likely have resulted in' the proscribed outcome, *Neiswender*, 590 F.2d at 1273.[222]

If the DOJ is willing to expose U.S. interrogators to easier prosecution for torture by broadly defining specific intent, then it is absurd that those seeking protection under the CAT must use a narrower definition to prove that the acts they fear are "torture."[223] The DOJ found sufficient ambiguity in the legislative history of the CAT to interpret the specific intent requirement according to the common law definition,[224] thus rendering more criminal defendants

> public debate, it was finally rescinded on December 30, 2004, less than a week before its addressee, Alberto Gonzales, appeared before the Senate for his confirmation hearings as Attorney General of the United States.

Id. at 646. "Almost as soon as the Bybee Opinion made it to the front page of [the] *New York Times*, the Administration repudiated it, demonstrating how obviously wrong the opinion was." *Id.* at 655.

220 Levin Memo, *supra* note 22.

221 *Id.* (quoting LAFAVE, *supra* note 13, § 5.2(a), at 341).

222 *Id.* Of the four memos released by President Obama in April 2009, three memos, written in 2005, assured the CIA that its interrogation techniques were still legal, even when multiple methods were combined. Mazzetti & Shane, *supra* note 217, at A1. The 2005 memos did not alter the definition of specific intent cited in the 2004 Levin Memo. *See, e.g.*, Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., on Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques that May Be Used in the Interrogation of a High Value al Qaeda Detainee to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intelligence Agency, 29–30 (May 10, 2005), *available at* http://www.aclu.org/safefree/general/olc_memos.html; Levin Memo, *supra* note 22.

223 *See* Redman, *supra* note 215, at 489–91; *see also* Franck Pierre v. Gonzales, 502 F.3d 109, 120 (2d Cir. 2007) ("It is unseemly for a government to adopt different meanings of the same word in the same treaty; and it is imprudent for a court to fix on a special or unnatural meaning in litigation when the political branches are evidently disposed otherwise.").

224 *See, e.g.*, DRESSLER, *supra* note 73, § 10.04, at 130 ("At common law, a person 'intentionally' causes the social harm of an offense if: (1) it is his desire (i.e., his conscious object) to cause the social harm; or (2) he acts with knowledge that the social harm is

guilty of torture. Assuming such ambiguity exists, the use of a narrower definition of specific intent in civil immigration cases as compared to criminal cases flies in the face of the rule of lenity.[225]

VI
PROPOSED SOLUTIONS AND CONCERNS

One solution I propose is for Attorney General Holder to issue a new precedential decision modifying the BIA's definition of specific intent in *In re J-E-*. An alternative solution is for courts to adopt the "foreseeable consequences" definition of specific intent, notwithstanding *In re J-E-*. Both of these solutions present their own problems, however, which are discussed below.

A. Policy Concerns for the Attorney General to Overrule In re J-E-

As the agency entrusted with the adjudication of CAT protection cases, the DOJ may change its official position on its interpretation of the definition of torture.[226] As discussed in Part V, a "foreseeable consequences" definition in these cases would unify the DOJ's interpretation of the specific intent standard of the CAT in both

virtually certain to occur as a result of his conduct." (footnote omitted)); LAFAVE, *supra* note 13, § 5.2, at 340 ("Intent has traditionally been defined to include knowledge, and thus it is usually said that one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts.").

225 The rule of lenity requires that courts interpret ambiguous statutes in a manner favorable to a criminal defendant. It is a principle of law that only applies to ambiguous statutes because a clear intention from the legislature overrides a court's preference for what types of offenses should be punished under the criminal statute. *See* DRESSLER, *supra* note 73, § 5.04, at 50–51.

226 Indeed, in the waning days of the Bush administration, Attorney General Mukasey issued two precedent decisions that overruled longstanding BIA precedent in immigration law. *See In re* Compean, 24 I. & N. Dec. 710 (Op. Att'y Gen. 2009) (holding that there is no Fifth Amendment right to effective assistance of counsel in immigration proceedings and, thus, no right to file a motion to reopen based on such ineffective assistance); *In re* Silva-Trevino, 24 I. & N. Dec. 687, 699–704 (Op. Att'y Gen. 2008) (holding that the "categorical inquiry," which requires adjudicators to examine only the elements of a crime and the record of conviction to determine whether a noncitizen is removable for a criminal conviction, is not always the proper method for determining whether an offense involves moral turpitude); *see also* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("'An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis,' . . . for example, in response to changed factual circumstances, or a change in administrations . . . ." (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984) (internal citations omitted) (first alteration in original)).

criminal prosecution and protection cases. It would also unite the United States with our world allies[227] because all countries would present a unified definition of "torture."[228] In 2002, when the BIA decided *In re J-E-*, it was the early stages of interpreting the Convention.[229] With the benefit of the 2004 OLC memo[230] and guidance from circuit courts' interpretations of specific intent,[231] Attorney General Holder can take another look at the definition of torture.

However, the BIA's holding in *In re J-E-* implicitly reflects the congressional intent to limit Article 3 protection so that criminals would not be eligible for this relief from removal.[232] The decision also reflects a broader "floodgates" concern, one that had reared its head in asylum cases before CAT protection was available.[233] The applicant's facts in *In re J-E-* present a practical quandary: if Haitian prison conditions "torture" and the evidence clearly demonstrates that criminal deportees are more likely than not to be detained in these

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227 *See* Barack Obama, President of the U.S., Inaugural Address (Jan. 20, 2009), *reprinted in The Address: "All This We Will Do,"* N.Y. TIMES, Jan. 21, 2009, at P2 ("And so, to all other peoples and governments who are watching today, from the grandest capitals to the small village where my father was born, know that America is a friend of each nation, and every man, woman and child who seeks a future of peace and dignity.").

228 *See* BOULESBAA, *supra* note 33, at 20.

229 *In re* J-E-, 23 I. & N. Dec. 291, 309 (B.I.A. 2002) (Schmidt, dissenting).

230 *See supra* Part V.B.

231 *See supra* Part IV.A.

232 FARRA § 2242(c) states:

> To the maximum extent consistent with the obligations of the United States under the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, the regulations . . . shall exclude from the protection of such regulations aliens described in . . . 8 U.S.C. 1231(b)(3)(B) . . . .

FARRA, Pub. L. No. 105-277, tit. XXII, § 2242(c), 112 Stat. 2681, 2681–822; 8 U.S.C. § 1231(b)(3)(B) (2006) (listing conviction of particularly serious crime, persecution of others, commission of serious nonpolitical crime before arrival in the United States, danger to the security of the United States); *see also In re J-E-*, 23 I. & N. Dec. at 311 (Rosenberg, dissenting) ("It is no secret that Congress was not pleased with being obligated to extend protection to persons, including those with criminal convictions, who are barred from eligibility for asylum and withholding of removal.").

233 *See, e.g.*, Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993) ("If persecution were defined that expansively, a significant percentage of the world's population would qualify for asylum in this country—and it seems most unlikely that Congress intended such a result."); *In re* H-, 21 I. & N. Dec. 337, 350 (B.I.A. 1996) (Heilman, dissenting) ("Indeed, if one pursues the majority's logic, all warring sides persecute one another, and this means that all civil wars are nothing more than acts of persecution. The implications of such a sweeping conception of 'persecution' should give us all pause.").

conditions, then would this ruling encourage Haitians to come to the United States, commit crimes, then demand protection?[234] And what about all of the lawful, permanent resident Haitians, now facing removal for an aggravated felony, who Congress deemed unworthy of a second chance?[235] Would Article 3 protection become their back door to staying in the United States?

Despite these floodgate concerns, a broader definition of specific intent will not provide relief to all Haitian criminal deportees. For example, Haitians who do not suffer from a life-threatening illness may not be able to prove that their pain and suffering is severe enough to merit CAT protection.[236] In addition, criminal deportees who can secure timely release from prison in Haiti may not be able to prove that they are more likely than not to endure severe pain or suffering.[237]

B. Chevron *Deference to the BIA's Definition of Specific Intent*

If courts begin to adopt a uniform, broad reading of specific intent in CAT protection cases, they face the doctrine of *Chevron* deference.[238] A general principle of administrative law is that once an agency has interpreted the statute it was entrusted to administer, it is unlikely that a federal court will second-guess the agency's

234 *See* Elien v. Ashcroft, 364 F.3d 392, 396 (1st Cir. 2004) (refusing to recognize "a 'social group' consisting of deported Haitian nationals with criminal records in the United States" out of concern that these Haitians could commit crimes in the United States, "thus immunizing them from deportation").

235 In 1997, Congress eliminated the waiver of deportation that previously was available to long-term permanent U.S. residents who had been convicted of an aggravated felony and replaced the waiver with cancellation of removal; noncitizens who have been convicted of an aggravated felony are barred from cancellation of removal. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, div. C, tit. III, § 304, 110 Stat. 3009–546, 3009–587.

236 In *In re J-E-*, the BIA discussed the meaning of "severe pain or suffering" in the definition of torture and concluded that certain acts of police brutality were not "torture." *In re J-E-*, 23 I. & N. Dec. at 295–98.

237 The most recent U.S. Department of State report on human rights conditions in Haiti states: "Because of lack of available space in prisons and detention centers, the government made efforts to release the deportees quickly." BUREAU OF DEMOCRACY, U.S. DEP'T OF STATE, 2008 HUMAN RIGHTS REPORT: HAITI (2009), *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119163.htm; *see also In re* M-B-A-, 23 I. & N. Dec. 474, 477–80 (B.I.A. 2002) (holding that a Nigerian woman who feared torture in a Nigerian prison as a criminal deportee could not prove that the feared detention was more likely than not to happen to her).

238 *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

interpretation.[239] Under this principle, commonly known as "*Chevron* deference," a reviewing court must determine whether Congress clearly answered the question at issue in the statutory language.[240] If Congress was clear, the reviewing court follows the language of the statute without deference to the agency.[241] If Congress was ambiguous in the statutory language, the court will defer to the agency's interpretation so long as the interpretation is reasonable.[242] Commentators have suggested that if a reviewing court finds the statute to be ambiguous, the court routinely defers to the agency.[243]

In the context of immigration law, *Chevron* deference is particularly rampant. Courts repeatedly quote the Supreme Court's 1999 *INS v. Aguirre-Aguirre* decision[244]: "judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'"[245] The notion that "[i]mmigration has been a part of our foreign relations, and foreign relations has been the reserve of the political branches"[246] explains

239 *Id.* at 844. An agency must promulgate the interpretation in the exercise of its congressional authority in order to merit *Chevron* deference. *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001). Thus, an improper process, such as failing to propose a regulation and provide a notice-and-comment period, may cause a court to refuse deference to the agency's interpretation. *See id.*

240 *Chevron*, 467 U.S. at 842.

241 *Id.* at 842–43.

242 *Id.* at 843–44.

243 *See, e.g.*, Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 977 (1992) ("Under *Chevron*, the court must initially establish whether the issue is suitable for independent judicial resolution; if it is not, the court automatically shifts into a deferential mode. As a result, independent judgment now requires special justification, and deference is the default rule.").

244 INS v. Aguirre-Aguirre, 526 U.S. 415 (1999).

245 *Id.* at 425 (quoting INS v. Abudu, 485 U.S. 94, 110 (1988)); *see also, e.g.*, Villegas v. Mukasey, 523 F.3d 984, 988 (9th Cir. 2008).

246 Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 340 (2002). In *The Chinese Exclusion Case* in 1889, the Supreme Court explained the plenary power doctrine:

> The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.

Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 609 (1889). For a general discussion of the executive branch's plenary power over immigration law, see DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY

the executive branch's "plenary power" over immigration law and the extreme deference given to the agency in immigration cases.[247] In its interpretation of the CAT, an international treaty adopted into U.S. law, courts have given deference to the BIA because it is an executive agency interpreting U.S. treaty obligations.[248]

C. Deference to the BIA's Interpretation of Criminal Law

Chevron deference is only appropriate when courts are considering a statutory scheme that the agency is entrusted to administer.[249] Unlike a reviewing court, the agency has a "full understanding of the force of the statutory policy in the given situation"[250] and "[']a body of experience and informed judgment to which courts and litigants

(2007); T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365 (2002); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989).

247 *See* KANSTROOM, *supra* note 246, at 15–20.

248 Auguste v. Ridge, 395 F.3d 123, 140 (3d Cir. 2005); *see also* Franck Pierre v. Gonzales, 502 F.3d 109, 117 (2d Cir. 2007) (providing citations to supportive cases); *cf.* El Al Isr. Airlines v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); United States v. Stuart, 489 U.S. 353, 369 (1989). Professor Curtis Bradley examined why courts have given *Chevron*-style deference to the executive branch. Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 664 (2000). Professor Bradley explained justifications for this deference, which include the following: (1) unlike domestic law, where power is shared among the three branches of government, the executive branch is the sole player in foreign affairs and thus requires flexibility; (2) decisions in foreign affairs are more political than legal in nature; and (3) the executive branch has much greater expertise and access to information than courts. *Id.* Critiques of such deference include: (1) the distinction between foreign and domestic affairs is not always clear and has eroded in recent years, (2) the executive branch is not the sole player in foreign affairs because the Constitution assigns responsibilities for foreign affairs to all three branches of government, (3) the need for flexibility in foreign affairs is no greater than in complex domestic matters, and (4) it is not clear to what extent judicial enforcement will actually impede the ability of the United States to act effectively in international relations. *Id.*; *see also id.* at 703 (citing Perkins v. Elg, 307 U.S. 325, 335–42, 344–49 (1939)) (comparing treaty resolution to *Chevron* analysis because courts interpreting treaties must determine whether the plain language of the treaty clearly resolves the issue). Some courts have questioned the amount of deference that should be given to the BIA's interpretation of the CAT, which has application outside of the context of immigration. *See Franck Pierre*, 502 F.3d at 113–14; Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies *charged with their negotiation* and enforcement is entitled to great weight." (emphasis added)).

249 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

250 *Id.* (quoting United States v. Shimer, 367 U.S. 374, 382–83 (1961)).

may properly resort for guidance.'"[251] However, courts may interpret terms that, while they appear in an agency's statute, do not require specialized knowledge to interpret. For example, in the 2001 *Francis v. Reno* opinion,[252] the Third Circuit decided that the BIA deserved no deference when interpreting whether a conviction was an "aggravated felony," which was defined as a crime of violence under 18 U.S.C. § 16.[253] Despite the inclusion of 18 U.S.C. § 16 in the Immigration and Nationality Act (INA), which the BIA is entrusted to administer, the Third Circuit decided that a federal court was equally equipped to interpret whether an offense was a crime of violence under this federal criminal statute.[254]

In the immigration law context, several courts have held that the BIA receives *Chevron* deference when it is interpreting the INA, but not when it is interpreting state or federal criminal laws.[255] The BIA routinely interprets criminal statutes because there are myriad grounds for removal that are based upon a criminal conviction.[256] When an immigration adjudicator is presented with a criminal conviction, the categorical approach established by the Supreme Court in *Taylor v. United States*[257] is used to determine whether that conviction renders the noncitizen removable. Under the categorical approach, an adjudicator must examine only the elements of the criminal statute and the minimum conduct necessary for a conviction under the statute. If these match the ground for removal, the inquiry ends there, and the adjudicator does not consider the facts that led to the

[251] United States v. Mead Corp., 533 U.S. 218, 227 (2001) (quoting Bragdon v. Abbott, 524 U.S. 624, 642 (1998)).

[252] Francis v. Reno, 269 F.3d 162 (3d Cir. 2001).

[253] *See* 8 U.S.C. § 1101(a)(43)(F) (2006).

[254] *See Francis*, 269 F.3d at 168; *see also* Dalton v. Ashcroft, 257 F.3d 200, 203–04 (2d Cir. 2001).

[255] Soliman v. Gonzales, 419 F.3d 276, 281 (4th Cir. 2005); Michel v. INS, 206 F.3d 253, 262 (2d Cir. 2000) ("[W]here the BIA is interpreting § 237(a)(2)(A)(ii) of the INA, *Chevron* deference is warranted, but where the BIA is interpreting state or federal criminal laws, we must review its decision *de novo*."); *see also* Hamdan v. INS, 98 F.3d 183, 185 (5th Cir. 1996). *But see* Cabral v. INS, 15 F.3d 193, 197 (1st Cir. 1994).

[256] *See, e.g.*, 8 U.S.C. §§ 1182(a)(2), 1227(a)(2) (2006).

[257] Taylor v. United States, 495 U.S. 575 (1990). The *Taylor* decision addressed whether a state burglary conviction was a predicate burglary offense under 18 U.S.C. § 924(e), which would enhance the defendant's sentence. *Id.* at 602. Recently, Attorney General Mukasey decided that the BIA should abandon the *Taylor* method for determining whether a respondent was convicted of a crime involving moral turpitude. *In re* Silva-Trevino, 24 I. & N. Dec. 687, 699–704 (Op. Att'y Gen. 2008).

conviction.[258] Courts have held that when the BIA is engaged in this sort of examination of the elements of a criminal statute, the agency does not deserve any deference because courts can and often do interpret the elements of a criminal statute.[259]

In the CAT context, the BIA is interpreting specific intent, a criminal law concept, not an immigration law term such as "refugee."[260] Specific intent is not an obscure regulatory concept in which courts have no expertise; as stated by the Third Circuit, "[t]he specific intent standard is a term of art that is well-known in American jurisprudence."[261] For this reason, courts do not necessarily owe deference to the BIA's interpretation of this criminal law term.[262]

CONCLUSION

The United States cares about eliminating torture worldwide and protecting individuals from torture, as demonstrated by its seven years of negotiations of the CAT. The U.S. ratification of the CAT and

[258] Immigration adjudicators may also engage in a "modified categorical approach" if the statute, for example, contains some elements included in the ground of removability and others that are not included. In this instance, the adjudicator is permitted to examine the record of conviction, which includes the charging document, plea, verdict, and sentence. *See* 8 U.S.C. § 1229a(c)(3)(B) (2006); Shepard v. United States, 544 U.S. 13, 20–23 (2005) (holding that police reports are not included in the record of conviction in a sentencing case); *In re* Teixeira, 21 I. & N. Dec. 316, 319 (B.I.A. 1996) (holding that police reports are not included in the record of conviction in an immigration case). The BIA has also advocated for the use of the categorical approach for policy reasons, as this approach prevents adjudicators from using hearing time to "retry" the underlying conviction. *See In re* Pichardo, 21 I. & N. Dec. 330, 335–36 (B.I.A. 1996); *see also* Conteh v. Gonzales, 461 F.3d 45, 56 (1st Cir. 2006) ("[B]ecause the BIA may not adjudicate guilt or mete out criminal punishment, it must base removal orders on convictions, not on conduct alone.").

[259] *See, e.g.*, *Michel*, 206 F.3d at 262.

[260] *Cf.* Negusie v. Holder, 129 S. Ct. 1159, 1164, 1167 (2009) (reasoning that whether a person is a "persecutor of others" under the INA is an ambiguous statutory concept that merits *Chevron* deference and remanding the case to the BIA to interpret the statutory meaning); Chen v. Ashcroft, 381 F.3d 221, 224 (3d Cir. 2004).

[261] Auguste v. Ridge, 395 F.3d 123, 145 (3d Cir. 2005). Despite the large volume of case law defining specific intent in American jurisprudence, the BIA cited not a single criminal law case in the *In re J-E-* opinion and only cited *Black's Law Dictionary* for its "specific intent" definition. *In re* J-E-, 23 I. & N. Dec. 291, 301 (B.I.A. 2002).

[262] One scholar suggests that the U.S. Department of Justice should be given *Chevron* deference in its criminal law interpretations as the Agency that specializes in criminal law. Dan M. Kahan, *Reallocating Interpretive Criminal-Lawmaking Power Within the Executive Branch*, 61 LAW & CONTEMP. PROBS. 47, 54 (1998). This approach, however, has not been adopted by the courts.

implementation of the treaty demonstrates a further commitment to these goals. However, when asked to interpret Article 3 of the CAT, the BIA and several courts have declined to uphold these aspirations by setting an insurmountable barrier to relief from removal under the CAT. This barrier is the narrow specific intent definition that includes only purposeful conduct, which is exacerbated by the requirement that applicants prove a fifty-one percent likelihood of such intent by an applicant's government. As the dissent stated in *In re J-E-*:

> We are in the early stages of the very difficult and thankless task of construing the Convention. Only time will tell whether the majority's narrow reading of the torture definition and its highly technical approach to the standard of proof will be the long-term benchmarks for our country's implementation of this international treaty.[263]

The Obama administration should create a new benchmark for the U.S. implementation of the CAT by reversing the BIA's holding in *In re J-E-* and redefining specific intent in Article 3 cases. This new definition should include acts that are committed knowing that severe pain or suffering is a foreseeable consequence. In the alternative, courts should redefine the term in these cases, notwithstanding the principles of *Chevron* deference. This new definition is consistent with the legislative history and purpose of the CAT because it allows an adjudicator to consider the likely harm to the victim and does not focus only on the intent of the alleged torturer. Moreover, time has told that the BIA's early interpretation of the definition of torture was too narrow, especially given courts' broader reading of the term and the broader definition of specific intent in the DOJ's own 2004 memo interpreting whether U.S. interrogators could face prosecution under the criminal provisions of the CAT. The executive branch and courts should effectuate the goals of Article 3 of the CAT for what it is: a human rights instrument that protects victims, not prosecutes torturers.

263 *In re J-E-*, 23 I. & N. Dec. at 309 (Schmidt, dissenting).