

## TORTUROUS INTENT: *REFOULEMENT* OF HAITIAN NATIONALS AND U.S. OBLIGATIONS UNDER THE CONVENTION AGAINST TORTURE

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### ABSTRACT

This paper argues that the Board of Immigration Appeals (BIA) erred when it strictly limited the scope of Convention Against Torture (CAT) protection for deportees facing inhumane treatment in Haitian jails. The authors examine *In re J-E-*, in which the BIA narrowed the definition of torture under CAT to acts undertaken by governmental officials with the *purpose* of causing the detainee to suffer, thereby excluding governmental acts undertaken simply with the *knowledge* that the detainee would suffer. In *J-E-*, the BIA assumed that Congressional language of “specific intent” compelled a requirement of purpose by the governmental actor. This paper provides a careful analysis of how the term “specific intent” has been used in criminal law and finds that, contrary to the BIA’s analysis, there is significant doctrinal support for interpreting CAT to require only a knowledge *mens rea* on the part of governmental actors. A knowledge requirement is also consistent with the language of CAT, the language of the Senate’s reservations to its signing, and the spirit and purpose of CAT. The authors argue that the BIA’s cursory analysis is not entitled to deference by the Circuit Courts, and they provide recommendations for legislators and practitioners.

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*“More than fifty years ago, Justice Frankfurter wrote that, when it comes to torture, ‘there comes a point where this Court should not be ignorant as judges of what we know as men.’”<sup>1</sup>*

## I. INTRODUCTION

The plight of Haiti’s prisoners represents a humanitarian crisis of striking magnitude. Prison conditions are characterized by “holding cells without food, water, medical or mental health care or due process . . . . [C]ell[s] have no sinks, toilets, beds, [and] are grossly overcrowded and unsanitary.”<sup>2</sup> Physical abuse at the hands of prison guards is pervasive and includes isolated instances of treatment rising to the level of torture, such as electric shock and severe boxing of the ears that can cause eardrum damage.<sup>3</sup> The *Miami Herald* has reported that Haitian inmates complain that guards beat them, and that prisons and jails do not provide enough

1. *Jean-Pierre v. Att’y Gen.*, 500 F.3d 1315, 1316 (11th Cir. 2007).

2. *Illegal and Inhumane Detention of Arriving Criminal Deportees in Haiti*, ALTERNATIVE CHANCE (Oct. 15, 2007), <http://www.alternativechance.org/Overview-of-Alternative-Chance-Chans-Alternativ-Past-and-Future-Activities-for-Criminal-Deportees-in-Haiti-those-Challenging-Criminal-Deportation-to-Haiti-October-15-2007>. Alternative Chance is a Haitian NGO dedicated to prison and criminal justice reform.

3. *Country Rep. on Human Rights Practices in Haiti*, U.S. DEP’T OF STATE BOARD OF DEMOCRACY, HUMAN RIGHTS, & LABOR (2001), <http://www.state.gov/g/drl/rls/hrrpt/2001/wha/8332.htm>.

food to sustain life.<sup>4</sup>

In 1994, the United States passed legislation implementing its obligations<sup>5</sup> as a signatory to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”).<sup>6</sup> CAT defines torture and prohibits the deportation or extradition—the “*refoulement*”—of immigrants who have substantial grounds to believe they will face torture upon returning to their home nations.<sup>7</sup> Immigration advocates have since attempted to claim CAT relief for potential Haitian deportees who face imprisonment upon arrival in Haiti, arguing that Haitian prison conditions are tantamount to torture.<sup>8</sup>

The Board of Immigration Appeals (“BIA”)<sup>9</sup> first addressed a potential Haitian deportee’s claim for CAT relief in its seminal 2002 decision *In re J-E*.<sup>10</sup> In interpreting the U.S. implementing legislation, the BIA determined that the regulatory definition of torture included a mens rea<sup>11</sup> element of *specific intent* to torture.<sup>12</sup> It defined specific intent according to U.S. criminal law as possessing a *purpose* to torture.<sup>13</sup> In holding that Haitian prison conditions did not constitute torture, and thus denying the petitioner CAT relief, the BIA found an absence of specific

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4. Yves Colon, *Haiti’s Prisons: Inside the Gates of Hell*, MIAMI HERALD, Mar. 25, 2001, at 1A.

5. As discussed further below, *infra* note 49, the Convention Against Torture is not a self-executing treaty. Congress passed separate legislation to implement the United States’ signatory obligations. See Foreign Affairs Reform and Restructuring Act, 8 U.S.C.A. § 1231 (1998).

6. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1–33, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

7. CAT art. 3(1); *Pierre v. Att’y Gen.*, 528 F.3d 180, 185 (3d Cir. 2008).

8. *E.g.*, *Auguste v. Ridge*, 395 F.3d 123, 138–39 (3d Cir. 2005).

9. The Board of Immigration Appeals (BIA) is the highest administrative body in the United States for interpreting and applying immigration laws. It has been given nationwide jurisdiction to hear appeals from decisions rendered by Immigration Judges and by District Directors of the Department of Homeland Security (DHS). Decisions of the Board are binding on all DHS officers and Immigration Judges unless modified or overruled by the Attorney General or a Federal court. Most Board decisions are subject to judicial review in the Federal courts. The majority of appeals reaching the Board involve orders of removal and applications for relief from removal. Other cases before the Board include the exclusion of aliens applying for admission to the United States, petitions to classify the status of alien relatives for the issuance of preference immigrant visas, fines imposed upon carriers for the violation of immigration laws, and motions for reopening and reconsideration of decisions previously rendered. *Board of Immigration Appeals*, U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, <http://www.justice.gov/eoir/biainfo.htm> (last visited July 1, 2011).

10. *In re J-E*, 23 I. & N. Dec. 291 (BIA 2002).

11. Mens rea is the criminal state of mind that the prosecution must prove in order to secure a conviction. It is the second of two essential elements at common law, the first being the actus reus of the crime. BLACK’S LAW DICTIONARY 825 (8th ed. 2004).

12. *In re J-E*, 23 I. & N. Dec. at 298.

13. *Id.*

intent to torture.<sup>14</sup> The Circuit Courts of Appeals that have addressed this issue have deferred to the BIA's specific intent analysis.<sup>15</sup>

This paper argues that the BIA's interpretation of specific intent—as requiring purpose—is not compelled by U.S. criminal law or by statutory interpretation. Specific intent is a term used inconsistently throughout the field of criminal law, and as such is amenable to differing interpretations. In fact, there is significant doctrinal support for interpreting CAT to require a *knowledge* mens rea. This paper further argues that the traditional criminal law justifications for requiring purpose, the most culpable form of mens rea,<sup>16</sup> do not apply in the CAT context. To the contrary, there is a strong argument for requiring a knowledge mens rea for crimes traditionally requiring purpose when the crime is particularly serious, the nature of the defendant's knowledge is inherently guilty, and the degree of risk to which the defendant exposes the victim is extreme. Interpreting CAT to require a knowledge mens rea is also consistent with the language of CAT, the language of the Senate's reservations to the signing of CAT, and doctrinal interpretations of specific intent in the criminal law. A knowledge mens rea is also more consistent with the spirit and purpose of CAT: to promote “the inherent dignity of the human person” by aiding the eradication of torture worldwide.<sup>17</sup>

To support these arguments, Section Two explains the plight of Haitian criminal deportees and why their advocates believe imprisonment in Haiti is torture. Section Three describes CAT, the process of its implementation into U.S. law, and judicial interpretations of the regulatory definition of torture. Section Four contends that the BIA erred in defining specific intent as requiring a mens rea of purpose according to U.S. criminal law, and provides an overview of the varied definitions of specific intent both at common law and in the torture context. Section Five argues that there is ample doctrinal support for a mens rea of knowledge for specific intent crimes, and further argues that a knowledge mens rea is consistent with the U.S. legislative and judicial implementation of CAT. Section Six offers recommendations for practitioners and policymakers seeking to reform the current practice through litigation or legislation. Finally, Section Seven argues that a broader definition of specific intent would not lead to a flood of CAT beneficiaries, nor would it implicate security concerns within the U.S.

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14. *Id.* at 301.

15. *E.g.*, *Pierre v. Att’y Gen.*, 528 F.3d 180, 187 (3d Cir. 2008); *Pierre v. Gonzales*, 502 F.3d 109, 113–14, 116 (2d Cir. 2007); *Cadet v. Bulger*, 377 F.3d 1173, 1185–86 (11th Cir. 2004).

16. *See* MODEL PENAL CODE §2.02(10) (Proposed Official Draft 1962) (describing the four criminal mental states in descending order of culpability: purpose, knowledge, recklessness, and negligence).

17. CAT, *supra* note 6 at pmb1.

## II.

## BACKGROUND: HAITI'S PRISONS ARE MARKED BY DEPLORABLE CONDITIONS AND INDEFINITE DETENTION OF CRIMINAL DEPORTEES

Haiti has a weak police force, a barely existent judiciary, and overcrowded prisons that lack even the most basic standards necessary to human dignity.<sup>18</sup> Human rights violations in the prisons have been well documented by international organizations. The U.S. Bureau of Citizenship & Immigration Services reports that “[i]n one month, 11 inmates died in the *Penitencier Nacional*, some from malnutrition and lack of sunlight, the rest from tuberculosis and AIDS.”<sup>19</sup> Further, “[c]onditions in the jails are horrifying. About forty men [live] in a twelve by fifteen foot cement cell. There is no toilet, no sink, no room to lie down. The cells are sometimes pitch black, the air thick with the stench of human sweat and waste.”<sup>20</sup>

United States courts have similarly found that substandard conditions are rampant. The Third Circuit described Haiti's prisons in the following terms:

The prison population is held in cells that are so tiny and overcrowded that prisoners must sleep sitting or standing up, and in which temperatures can reach as high as 105 degrees Fahrenheit during the day. Many of the cells lack basic furniture, such as chairs, mattresses, washbasins or toilets, and are full of vermin, including roaches, rats, mice and lizards. Prisoners are occasionally permitted out of their cells for a duration of about five minutes every two to three days. Because cells lack basic sanitation facilities, prisoners are provided with buckets or plastic bags in which to urinate and defecate; the bags are often not collected for days and spill onto the floor, leaving the floors covered with urine and feces. There are also indications that prison authorities provide little or no food or water, and malnutrition and starvation is a continuous problem. Nor is medical treatment provided to prisoners, who suffer from a host of diseases including tuberculosis, HIV/AIDS, and Beri-Beri, a life-threatening disease caused by malnutrition. At least one source . . . likened the conditions in Haiti's prisons to a “scene

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18. Amy Bracken, *Influx of Deportees Stirs Anger*, BOSTON GLOBE, Mar. 11, 2007, at A6.

19. U.S. BUREAU OF CITIZENSHIP & IMMIGRATION SERV., HAITI: INFORMATION ON CONDITIONS IN HAITIAN PRISONS AND TREATMENT OF CRIMINAL DEPORTEES (2001) [hereinafter 2001 *Bureau of Citizenship Report*].

20. U.S. BUREAU OF CITIZENSHIP & IMMIGRATION SERV., HAITI: INFORMATION ON CONDITIONS IN HAITIAN PRISONS AND TREATMENT OF CRIMINAL DEPORTEES (2002) [hereinafter 2002 *Bureau of Citizenship Report*].

reminiscent of a slave ship.”<sup>21</sup>

The Eleventh Circuit relied on the U.S. State Department’s findings of prisoner abuse:

Police mistreatment of suspects at both the time of arrest and during detention remains pervasive in all parts of the country. Beating with fists, sticks, and belts is by far the most common form of abuse. However, international organizations documented other forms of mistreatment, such as burning with cigarettes, choking, hooding, and kalot marassa (severe boxing of the ears, which can result in eardrum damage). Those who reported such abuse often had visible injuries consistent with the alleged maltreatment. There were also isolated allegations of torture by electric shock. Mistreatment also takes the form of withholding medical treatment from injured jail inmates. Police almost never are prosecuted for the abuse of detainees.<sup>22</sup>

Imprisoned inside the walls of Haiti’s penitentiaries are numerous U.S. deportees. Haiti mandatorily detains all criminal deportees from the United States.<sup>23</sup> Detention may last as little as three months if deportees have family members in Haiti willing and able to advocate on their behalf, frequently through the payment of bribes.<sup>24</sup> Otherwise, deportees are detained for indefinite periods.<sup>25</sup> During a seven-month period monitored by the Office of the United Nations High Commissioner for Refugees (UNCHR), the United States deported 351 Haitian nationals with criminal convictions back to Haiti.<sup>26</sup>

The plight of Haiti’s prisoners has grown even bleaker during the last two years. On January 12, 2010, a devastating earthquake struck Haiti and damaged much of the country’s infrastructure, including its prisons. Eight of Haiti’s seventeen prisons were destroyed or damaged in the quake.<sup>27</sup> Sections of the national penitentiary crumbled, allowing thousands of inmates to flee.<sup>28</sup> Conditions for inmates who remained incarcerated

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21. *Auguste v. Ridge*, 395 F.3d 123, 153 (3d Cir. 2005).

22. *Cadet v. Bulger*, 377 F.3d 1173, 1193–94 (11th Cir. 2007) (citing *Country Rep. on Human Rights Practices in Haiti*, U.S. DEP’T OF STATE BOARD OF DEMOCRACY, HUMAN RIGHTS, & LABOR (2001), <http://www.state.gov/drl/rls/hrrpt/2001/wha/8332.htm>).

23. 2002 *Bureau of Citizenship Report*; *Auguste*, 395 F.3d at 134. The criminal grounds for removal are laid out in 8 U.S.C. §§ 1182(a)(2), 1227(a)(2) and include the following offenses: crimes involving moral turpitude (including certain misdemeanors); controlled substance offenses; firearms offenses; aggravated felonies; prostitution; money laundering; and trafficking.

24. 2001 *Bureau of Citizenship Report*, *supra* note 19.

25. *Id.*

26. *Id.*

27. Michelle Faul, *Haiti quake opens window on dismal prisons*, MSNBC.COM (Mar. 6, 2010), [http://www.msnbc.msn.com/id/35741965/ns/world\\_news-haiti\\_earthquake/](http://www.msnbc.msn.com/id/35741965/ns/world_news-haiti_earthquake/).

28. Neal Katz, *Haiti Earthquake News: Main Prison Destroyed, 4,000 Prisoners*

worsened. Les Cayes prison, in the south of Haiti, where 467 detainees were crammed together in fourteen cells, abolished twice-a-day bathroom privileges and beat unruly prisoners.<sup>29</sup> On January 19, many inmates revolted, leading to a stand-off with police that ended when the police stormed the prison and killed or wounded several dozen inmates.<sup>30</sup>

The Haitian government and aid organizations were able to repair some of the prison facilities, and the national penitentiary in Port-au-Prince housed about 2,000 prisoners in November 2010. However, that month, the cholera outbreak reached the prison population.<sup>31</sup> By November 19, thirty inmates were infected with cholera and thirteen had died.<sup>32</sup>

Before and since the earthquake, many criminal deportees to Haiti have sought deferral of removal under the United States' obligations as a signatory to CAT.

### III.

#### BACKGROUND: THE INTERNATIONAL LAW FRAMEWORK, THE CONVENTION AGAINST TORTURE, AND JUDICIAL INTERPRETATIONS OF CAT

##### *A. The Prohibition of Torture is Considered Jus Cogens under International Law*

The underpinning of the international political system is a group of “peremptory norms” considered essential to peaceful coexistence in the international community. Collectively, these norms are termed *jus cogens*.<sup>33</sup> Scholars have variously referred to *jus cogens* as “‘fundamental,’ ‘inalienable,’ or ‘inherent,’” as well as “essential” and “overriding

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*Escape*, CBSNEWS.COM (Jan. 15, 2010), [http://www.cbsnews.com/8301-504083\\_162-6100169-504083.html](http://www.cbsnews.com/8301-504083_162-6100169-504083.html); Alice Speri, *Minors Languish in Haiti's Overcrowded Jails*, DAILY HAITIAN TIMES (Jun. 13, 2011), [http://www.haitiantimes.com/view/full\\_story/8747974/article-Minors-Languish-in-Haiti-s-Overcrowded-Jails](http://www.haitiantimes.com/view/full_story/8747974/article-Minors-Languish-in-Haiti-s-Overcrowded-Jails).

29. Deborah Sontag and Walt Bogdanich, *Escape Attempt Led to Killings of Unarmed Inmates*, N.Y. TIMES (MAY 22, 2010), [http://www.nytimes.com/2010/05/23/world/americas/23haiti.html?pagewanted=2&\\_r=1&fta=y](http://www.nytimes.com/2010/05/23/world/americas/23haiti.html?pagewanted=2&_r=1&fta=y).

30. *Id.*

31. *Haiti cholera outbreak spreads to Port-au-Prince prison*, BBC NEWS (Nov. 19, 2010), [www.bbc.co.uk/news/world-latin-america-11800143](http://www.bbc.co.uk/news/world-latin-america-11800143).

32. *Id.*

33. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 332 (describing *jus cogens* as referring to a “norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted”); Karen Parker, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 414–15 (1989).

principles.”<sup>34</sup>

The prohibition against torture is widely considered *jus cogens*.<sup>35</sup> All major human rights instruments contain such a prohibition, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Geneva Conventions. Further, torture during wartime is considered a violation of International Humanitarian Law.<sup>36</sup> As the United Nations’ Special Rapporteur on torture stated in his 1986 report, “[t]orture is now absolutely and without any reservation prohibited under international law whether in time of peace or war. In all human rights instruments the prohibition of torture belongs to the group of rights from which no derogation can be made.”<sup>37</sup>

*B. The Drafting and Signing of CAT Reflects a Unified International Commitment to the Eradication of Torture*

The United Nations General Assembly promulgated CAT to reinforce *jus cogens* and existing legal prohibitions via a single, dedicated instrument, and to further define states’ obligations to combat and criminalize torture.<sup>38</sup> The stated purpose of CAT is “to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.”<sup>39</sup> CAT’s precursor, Article 3 of the Universal Declaration of Human Rights, provides that “no state may permit or tolerate torture or other cruel, inhuman, or degrading treatment or punishment.”<sup>40</sup> CAT expands upon this prohibition by offering a specific definition of torture and establishing a regime for international cooperation in the prosecution of torture. Signatories are bound to establish domestic mechanisms to criminalize torture, including legislative and judicial measures, and are obliged to extradite foreign nationals taking refuge within state boundaries who are suspected of torture.<sup>41</sup>

Article 1 of CAT defines torture as:

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34. Parker, *supra* note 33, at 414–15.

35. *See, e.g.*, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 716 (9th Cir. 1992) (“There is no doubt that the prohibition against official torture is a norm of customary international law. . . .”); *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d. Cir. 1980) (concluding, after examining customary international law, that “official torture is now prohibited by the law of nations.”).

36. Parker, *supra* note 33, at 437 & n.165; HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 226 (3d ed. 2007).

37. Parker, *supra* note 33, at 438.

38. *Id.*

39. CAT, *supra* note 6, at pmb1.

40. S. COMM’N ON FOREIGN AFFAIRS, *CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT*, S. REP. NO. 101-30, at 2 (1990).

41. *Id.*

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.<sup>42</sup>

Article 3 prohibits the *refoulement* or extradition of “a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture,” taking 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.”<sup>43</sup>

The United Nations General Assembly adopted CAT by unanimous agreement on December 10, 1984 and entered CAT into force on June 26, 1987.<sup>44</sup> The United States was an active party in negotiations of the language of the treaty and the obligations attendant to CAT, and became a signatory on April 18, 1988.<sup>45</sup> On July 19, 1990, the Senate Foreign Relations Committee voted unanimously to report favorably on CAT with a resolution for ratification.<sup>46</sup> The Committee commented that ratification would “demonstrate clearly and unequivocally U.S. opposition to torture and U.S. determination to take steps to eradicate it.”<sup>47</sup> The Senate voted to ratify CAT on October 27, 1990, and CAT became binding on the U.S. when President Clinton delivered the ratifying documents to the United Nations in 1994.<sup>48</sup>

*C. The United States’ Ratification of CAT Defined the Scope of U.S. Obligations and Narrowed CAT’s Potential Application*

While the U.S. articulated broad support for the purposes of CAT, the Senate ratified the Convention subject to three reservations, eight

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42. CAT, *supra* note 6, at art. 1.

43. *Id.* at art. 3.

44. S. REP. NO. 101-30, at 2.

45. *Id.*

46. *Id.* at 3.

47. *Id.*

48. Henry Mascia, *A Reconsideration of Haitian Claims for Withholding of Removal Under the Convention Against Torture*, 19 PACE INT’L L. REV. 287, 294 (2007).

understandings, and two declarations.<sup>49</sup> Among these was a clarification that the pain and suffering associated with torture must be “severe” to rise above the level of pain and suffering associated with lesser forms of cruel, inhuman, or degrading treatment or punishment.<sup>50</sup> In addition, the Senate Report clarified that CAT’s Article 3 *refoulement* prohibition applies only where it is “more likely than not” that torture will occur.<sup>51</sup>

Finally, and most pertinent to this article, the Senate declared that CAT’s Article 1 definition of torture as treatment that is “intentionally inflicted” would be interpreted as a requirement of “specific intent” to torture.<sup>52</sup> Specific intent was chosen to distinguish torture from lesser acts of cruel and inhuman treatment that, while deplorable, are not so universally and categorically condemned as to warrant the legal consequences attendant to CAT;<sup>53</sup> specifically, the Senate chose specific intent to guard against U.S. interrogators triggering CAT obligations “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 the purposes of th[e] Convention.”<sup>54</sup>

Also among the Senate’s reservations was a declaration that Articles 1 through 16 of CAT would not be self-executing upon ratification.<sup>55</sup> Therefore, implementing legislation was required before a private cause of action could be brought under CAT.<sup>56</sup> On October 21, 1998, President Clinton signed into law the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA),<sup>57</sup> which authorized the implementation of CAT and required that the appropriate authorities promulgate implementing regulations consistent with the Senate’s reservations within 120 days.<sup>58</sup> In accordance with FARRA, the Department of Justice promulgated regulations (“the Regulations”) outlining the procedures deportees must follow to bring a private cause of action to defer their deportation under

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49. S. COMM’N ON FOREIGN AFFAIRS, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. REP. NO. 101-30, at 9 (1990). Because the President can enter into a treaty only with the advice and consent of the Senate, he must give effect to reservations, understandings, and declarations expressed by the Senate on its consent. RESTATEMENT (THIRD) OF FOREIGN REL. L. § 314 cmt. b (1987).

50. S. COMM’N ON FOREIGN AFFAIRS, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. REP. NO. 101-30, at 13 (1990).

51. *Id.* at 16.

52. *Id.* at 13–14.

53. *Id.* at 14.

54. *Id.*

55. *Id.* at 10.

56. *Ogbudimpka v. Ashcroft*, 342 F.3d 207, 218 (3d Cir. 2003).

57. FOREIGN AFFAIRS REFORM AND RESTRUCTURING ACT, 8 U.S.C.A. § 1231 (1998).

58. *Id.*

CAT's Article 3.<sup>59</sup>

The Regulations embody the regulatory definition of torture for the purposes of CAT claims in the United States. If the applicant is able to show that “it is more likely than not” that she will be tortured, the applicant must be granted a deferral of removal.<sup>60</sup> The Regulations define torture according to Article 1 of CAT and incorporate language from the Senate's reservations, stating: “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.”<sup>61</sup> While this language is taken directly from the Senate Report, it carries an important difference in emphasis: the Senate Report clarifies that the phrase “unanticipated or unintended” signifies that acts resulting in “unexpectedly severe physical suffering” are not torture.<sup>62</sup> This suggests that the specific intent requirement could be satisfied where an official anticipates, or is aware that, severe pain and suffering will result from his actions, while the Regulations use this language standing alone to define specific intent.<sup>63</sup>

*D. The Board of Immigration Appeals Has Interpreted Specific Intent to Require a Mens Rea of Purpose*

The Board of Immigration Appeals (BIA) first applied the Regulations to a Haitian criminal deportee in its 2002 decision *J-E*.<sup>64</sup> The petitioner, a native of Haiti convicted of selling cocaine and ordered removed from the United States, argued that he would be subjected to torture upon return to Haiti and was thus entitled to relief under CAT.<sup>65</sup> In support of his claim, he presented evidence in the form of State Department reports and newspaper articles demonstrating that upon *refoulement* he would face prolonged, indefinite detention in overcrowded conditions where prisoners are denied adequate food, water, medical care, sanitation, and freedom of movement. He also presented documentation of prison guard brutality, including burning inmates with cigarettes, and using choking, hooding, *kalot marassa* (severe boxing of the ears), and

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59. 8 C.F.R. §§ 208.16–208.17 (2006).

60. 8 C.F.R. § 208.17.

61. *Id.*

62. S. COMM'N ON FOREIGN AFFAIRS, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. REP. NO. 101-30, at 14 (1990).

63. 8 C.F.R. § 208.18 (a)(5) (stating “[i]n 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”).

64. *In re J-E*, 23 I. & N. Dec. 291 (BIA 2002).

65. *Id.* at 292–93, 299–301.

electric shock.<sup>66</sup>

In interpreting the Regulations, the BIA articulated a justiciable definition of torture and applied that definition to the Haitian prison context. The BIA found the regulatory definition of torture presented a five-prong test, under which the act must be:

- (1) an act causing severe physical or mental pain or suffering;
- (2) intentionally inflicted;
- (3) for a proscribed purpose;
- (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and
- (5) not arising from lawful sanctions.<sup>67</sup>

The BIA determined that the second prong requires specific intent, and that specific intent should be interpreted according to U.S. criminal law.<sup>68</sup> The BIA cited *Black's Law Dictionary*, which defines specific intent as “‘intent to accomplish the precise criminal act that one is later charged with,’” and distinguishes general intent that “‘commonly ‘takes the form of recklessness . . . or negligence.’”<sup>69</sup> The BIA did not cite additional sources, nor did it further examine the relationship between the specific intent standard and the other mens rea classifications in U.S. criminal law, such as knowledge and purpose.

The BIA stated that the third prong, requiring a proscribed purpose, underscores the specific intent requirement by providing evidence of the actor’s motivation.<sup>70</sup> Proscribed purposes include: “punishment for a victim’s or another’s act; intimidating or coercing a victim or another; or any discriminatory purpose.”<sup>71</sup> The BIA further clarified that the fifth prong does not include sanctions that, while lawfully imposed, defeat CAT’s purpose of prohibiting torture.<sup>72</sup>

Applying this definition of the specific intent standard to Haitian prison officials, the BIA concluded that Haitian authorities do not have the requisite intent—purpose—necessary for their actions to constitute torture.<sup>73</sup> The BIA determined that Haitian authorities do not create and maintain substandard prisons in order to inflict pain and suffering on inmates. Although they intentionally detain prisoners knowing that such conditions exist, it is not the Haitian authorities’ express purpose to inflict torture by means of indefinite detention in unquestionably painful and

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66. *Id.* at 293, 301.

67. *Id.* at 297.

68. *Id.* at 300–01.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 299.

73. *Id.* at 301.

injurious conditions.<sup>74</sup> Rather, the BIA made a factual finding that Haiti's prison conditions are a result of poverty, budgetary constraints, and management problems.<sup>75</sup> With respect to prison guard abuses, the BIA concluded the petitioner had documented instances of brutality rising to the level of torture, but failed to demonstrate the practices were pervasive enough to give rise to an inference that he was more likely than not to be subjected to torture.<sup>76</sup>

*E. Circuit Courts Have Deferred to the BIA's Definition of Specific Intent*

The Second, Third, and Eleventh Circuits have decided cases of Haitians seeking deferral of removal under CAT.<sup>77</sup> Each has granted deference to the BIA's interpretation of specific intent and held that Haitian deportees can only obtain relief if they show they are more likely than not to be singled out for purposeful acts of abuse that rise to the level of torture.<sup>78</sup> These courts suggest that such a factual showing could be possible for prisoners with particular conditions or vulnerabilities that make them targets for purposeful acts of torture, but affirmed the BIA's determination that relief is not available to the vast majority of Haitian deportees.<sup>79</sup> However, the three Circuits varied in how they reached their decisions. The Second Circuit has indicated that a less culpable form of mens rea could be consistent with specific intent in the CAT context, while the Third Circuit has found that the BIA's interpretation is the only permissible reading of CAT.<sup>80</sup> The Eleventh Circuit has implicitly left open the possibility of a more expansive definition of specific intent.

In *Pierre v. Gonzales*, the petitioner argued before the Second Circuit that CAT requires only general intent.<sup>81</sup> He argued that the specific intent standard was therefore an impermissible narrowing of CAT obligations and not entitled to deference. The Second Circuit rejected this argument. It characterized specific intent as requiring the actor to intend the precise

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74. *Id.* at 300–01.

75. *Id.*

76. *Id.* at 303.

77. *E.g.*, *Pierre v. Gonzales*, 502 F.3d 109 (2d Cir. 2007); *Pierre v. Att'y Gen.*, 528 F.3d 180 (3d Cir. 2008); *Jean-Pierre v. Att'y Gen.*, 500 F.3d 1315 (11th Cir. 2007).

78. *See Pierre v. Gonzales*, 502 F.3d at 115–16; *Pierre v. Att'y Gen.*, 528 F.3d at 186; *Jean-Pierre*, 500 F.3d at 1320.

79. *Pierre v. Gonzales*, 502 F.3d at 121–22; *Pierre v. Att'y Gen.*, 528 F.3d at 187–88; *Jean-Pierre*, 500 F.3d at 1324–25.

80. *See Pierre v. Gonzales*, 502 F.3d at 118 n.6 (indicating that specific intent could be present where a government actor is aware of a virtual certainty that pain rising to the level of torture will result from her actions).

81. General intent usually takes the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence). BLACK'S LAW DICTIONARY 825–26 (8th ed. 2004) (defining general intent).

criminal consequences of his conduct, not just a general intent to do the act that causes the proscribed consequences.<sup>82</sup> The court held that the Senate used the term “specific intent” to incorporate the criminal law’s specific intent standard, but the court deferred to the BIA’s articulation of that standard without independently examining how criminal law defined specific intent. However, the court indicated that a mens rea of purpose might not be the only permissible reading, stating: “nothing in this opinion prevents . . . the inference . . . that a particular course of action is taken with specific intent to inflict severe pain and suffering if . . . the actor is aware of a virtual certainty that such pain and suffering will result.”<sup>83</sup> This implies that while CAT and its implementing Regulations require specific intent, the standard could be satisfied by a mens rea of knowledge.

The Third Circuit, in contrast, has indicated that requiring a mens rea of purpose is the only permissible interpretation of the Regulations. In *Auguste v. Ridge*, the Third Circuit refused to defer a petitioner’s removal on the grounds that the Haitian authorities lack specific intent to torture.<sup>84</sup> In *Auguste*, the Third Circuit defined specific intent with reference to the United States Supreme Court decision in *Carter v. United States*.<sup>85</sup> In *Carter*, the Court contrasted specific intent, for which the actor “must expressly intend to achieve the forbidden act,” with general intent, which requires the actor to possess “knowledge with respect to the actus reus<sup>86</sup> of the crime.”<sup>87</sup>

Three years later, the Third Circuit affirmed *Auguste* in *Pierre v. Attorney General*, in which the court drew a strict line between actions for which severe pain and suffering is a foreseeable consequence and actions for which severe pain and suffering is the desired result.<sup>88</sup> Again relying on *Carter*, the Third Circuit rejected the argument that knowledge of a substantial certainty that severe pain and suffering will result is sufficient to establish specific intent. Rather, the court stated that “mere knowledge,” as opposed to “deliberate and conscious purpose,” distinguishes general intent from specific intent.<sup>89</sup> In reaching this conclusion, the Third Circuit also relied on *United States v. Bailey*, a Supreme Court decision that found “‘purpose’ corresponds loosely with the common-law concept of specific intent, while ‘knowledge’ corresponds

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82. *Pierre v. Gonzales*, 502 F.3d at 118.

83. *Id.* at 118 n.6.

84. *Auguste v. Ridge*, 395 F.3d 123, 145–47 (3d Cir. 2005).

85. *Carter v. United States*, 530 U.S. 255 (2000).

86. Actus reus is “[t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea* to establish criminal liability . . . .” BLACK’S LAW DICTIONARY 39 (8th ed. 2004).

87. *Auguste*, 395 F.3d at 145 (citing *Carter*, 530 U.S. at 268–69).

88. *Pierre v. Att’y Gen.*, 528 F.3d 180, 189 (3d Cir. 2008).

89. *Id.*

loosely with the concept of general intent.”<sup>90</sup> The Third Circuit also referenced statutes, cases, and Congressional reports implying that a mens rea of purpose is the hallmark of specific intent, and that knowledge is only sufficient to establish general intent.<sup>91</sup>

The Eleventh Circuit has deferred to the BIA’s interpretation of specific intent in the CAT context, but has declined to extend it in factually distinguishable cases. The Eleventh Circuit first reviewed *J-E-* in *Cadet v. Bulger*, where it deferred to the BIA’s determination that Haitian prison authorities do not create and maintain substandard prison conditions with the specific intent to inflict severe pain and suffering on detainees.<sup>92</sup> Like the Second Circuit, the Court did not engage in an independent examination of the meaning of specific intent, deferring instead to the BIA’s legal conclusion.<sup>93</sup> However, unlike the Second and Third Circuits, *Cadet* did not base its holding primarily on the specific intent issue. Rather, the court found that indefinite detention, poor prison conditions, and mistreatment such as beatings together constituted cruel, inhuman, and degrading treatment that did not rise to the level of torture.<sup>94</sup>

The Eleventh Circuit took a more sympathetic tone when it revisited the issue in *Jean-Pierre v. U.S. Attorney General*.<sup>95</sup> The petitioner suffered from AIDS and argued he would not have access to his lifesaving medication in a Haitian prison.<sup>96</sup> The court heard evidence that a lack of medicine would cause delirious and erratic behavior, which would in turn lead him to be singled out for abuse and mistreatment rising to the level of torture, including particularly harsh beatings with metal rods, and confinement in a small crawlspace without food or water for periods of days or months.<sup>97</sup> The court rejected the immigration judge’s and the BIA’s perfunctory recitations of the *J-E-* holding, remanding the case for examination of whether the evidence established that the petitioner’s particular vulnerability would make him more likely than not to be singled out for specific intentional acts of mistreatment rising to the level of

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90. United States v. Bailey, 444 U.S. 394, 405 (1980).

91. *Pierre v. Att’y Gen.*, 528 F.3d 180, 190 (3d Cir. 2008). In reaching this conclusion, the court overruled a previous line of authority focused on the Senate’s intention to exclude from CAT relief cases where “severe pain or suffering . . . is the unintended consequence of an intentional act.” *Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003). Those cases suggested that specific intent could be proved through evidence of willful blindness. *Lavira v. Att’y Gen.*, 478 F.3d 158, 171 (3d Cir. 2007) (noting the court “cannot rule out the generally accepted principle that intent can be proved through evidence of willful blindness”).

92. *Cadet v. Bulger*, 377 F.3d 1173, 1193–94 (11th Cir. 2007).

93. *Id.* at 1194.

94. *Id.*

95. *Jean-Pierre v. Att’y Gen.*, 500 F.3d 1315 (11th Cir. 2007).

96. *Id.* at 1317.

97. *Id.* at 1325–27.

torture at the hands of Haitian prison guards.<sup>98</sup>

As the foregoing reveals, the Circuit Courts of Appeals that have decided cases of Haitians seeking deferral of removal under CAT have granted deference to the BIA's interpretation of specific intent. However, both the Second and Eleventh Circuits' decisions leave open the possibility that individual detainees could be eligible for CAT relief, were they able to make the factual showings those courts have required.

#### IV.

#### CAT JURISPRUDENCE RELIES ON AN IMPROPER CHARACTERIZATION OF SPECIFIC INTENT AS "PURPOSE" IN THE CRIMINAL LAW

The BIA's definition of specific intent is at once reductive and unclear. In *J-E-*, the BIA purports to incorporate the specific intent standard from criminal law, yet it does not engage in a robust examination of the term. The BIA merely cites to *Black's Law Dictionary*, which defines only three broad categories of mens rea: purpose, recklessness, and negligence.<sup>99</sup> *Black's* defines purpose as the "intent to accomplish the precise criminal act that one is later charged with," but offers no delineation between specific and general intent and provides no guidance as to whether a mens rea of knowledge falls within or outside of the specific intent category. A closer examination of criminal jurisprudence reveals that the scope of specific intent is a difficult question to resolve, as the term has been inconsistently applied to both purposeful and knowing criminal acts.

#### *A. Specific Intent is Used Inconsistently in Criminal Law and Does Not Clearly Correspond to a Mens Rea of Purpose*

Contrary to the BIA and Third Circuit characterizations, specific intent does not have a single clear meaning. At common law, specific intent crimes such as burglary, false pretenses, embezzlement, attempt, solicitation, and conspiracy required knowledge or desire that the result would occur.<sup>100</sup> General intent crimes such as manslaughter required intention to do that act and at least recklessness as to the consequences of

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98. *Id.* at 1326–27.

99. *In re J-E-*, 23 I. & N. Dec. 291, 301 (BIA 2002) (quoting BLACK'S LAW DICTIONARY). BLACK'S LAW DICTIONARY defines recklessness as follows: "Conduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk. Recklessness involves a greater degree of fault than negligence but a lesser degree of fault than intentional wrongdoing." BLACK'S LAW DICTIONARY (9th ed. 2009) (defining recklessness). Negligence is defined as "The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregarding of others' rights. The term denotes culpable carelessness." *Id.*

100. BLACK'S LAW DICTIONARY 825–26 (8th ed. 2004) (defining general intent).

that action.<sup>101</sup> However, the distinction has been inconsistently applied by both courts and legislatures. As one treatise explains:

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.<sup>102</sup>

Further compounding this terminological confusion, both criminal law treatises and case law have treated specific intent as requiring that the actor possess intent to do the act, and knowledge or desire as to the consequences.<sup>103</sup> The Supreme Court reiterated this formulation in *Tison v. Arizona*, finding specific intent where the actor had a mental state of purpose with respect to the action and a high degree of knowledge as to the consequences of that action.<sup>104</sup> The Fourth Circuit articulated a more expansive definition in *United States v. Neiswender*, finding specific intent where the actor had purpose with respect to the actus reus of the crime, but knowledge or notice amounting to recklessness with respect to the consequences of his actions.<sup>105</sup> The court found that “the defendant need only have had knowledge or notice that success” of his criminal venture would likely lead to the proscribed consequences.<sup>106</sup> It defined notice as the reasonable foreseeability of the natural and probable consequences of an action.<sup>107</sup>

These precedents attach distinct and conflicting meanings to specific intent, ranging from a mens rea of purpose to a mens rea of recklessness.

*B. Carter and Bailey Are Not Dispositive of a Single, Unambiguous Definition of Specific Intent as Purpose.*

As discussed above, *Black’s Law Dictionary* was the sole authority

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101. *Id.*

102. WAYNE R. LAFAVE & AUSTIN W. SCOTT, HANDBOOK ON CRIMINAL LAW § 28, 201–02 (1972).

103. *See e.g.*, WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW 355 n.79 (2d ed. 2003); *Tison v. Arizona*, 481 U.S. 137, 150 (1987); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 445 (1978).

104. *Tison*, 481 U.S. at 150 (“Traditionally, ‘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.’”)

105. *United States v. Neiswender*, 590 F.2d 1269, 1273 (4th Cir. 1979).

106. *Id.*

107. *Id.*

cited by the BIA to justify its “purpose” requirement for specific intent. When reviewing the BIA’s decision, the Third Circuit—perhaps recognizing that the agency’s analysis was inadequately supported—used a more extensive legal analysis to “flesh[] out” the BIA’s argument that specific intent requires a mens rea of purpose.<sup>108</sup> In *Pierre v. Attorney General* and *Auguste v. Ridge*, the Third Circuit heavily relied on two Supreme Court cases, *United States v. Carter* and *United States v. Bailey*.<sup>109</sup> However, the Third Circuit mischaracterized the holdings in *Carter* and *Bailey*, and a careful examination of these two cases reveals the inconsistency with which the term specific intent has been applied.

In *Carter*, the Supreme Court said general intent requires the defendant to possess “knowledge with respect to the *actus reus* of the crime.”<sup>110</sup> To define specific intent, *Carter* relied on *United States v. Lewis*,<sup>111</sup> which arguably conflates intent with motive. Lewis completed the *actus reus* of bank robbery, but argued he lacked specific intent because he did not intend to deprive the bank of the stolen funds permanently.<sup>112</sup> Rather, Lewis hoped to be caught and returned to prison where he could continue his writing career.<sup>113</sup> Following a lengthy discussion of the evidence tending to show that Lewis did not in fact clearly want to be caught by the police, the Court held that Lewis had specific intent regardless of his intent to only temporarily deprive the bank of its money:

Assuming, however, that Lewis did intend to turn himself in after the robbery, did he still have the intent required by the statute? The second paragraph of [the statute] requires specific intent . . . . We believe that an individual who enters a bank with the intention of taking money by intimidating employees of the bank, is answerable for the consequences of his actions . . . even assuming his motive for committing the act was to be caught and returned to prison. The fact that the bank was to be deprived of the funds only temporarily does not change the result.<sup>114</sup>

Nevertheless, the *Carter* Court characterized *Lewis* as finding that although Lewis “knowingly engaged in the acts of using force and taking money (satisfying ‘general intent’), he did not intend permanently to deprive the bank of its possession of the money (failing to satisfy ‘specific intent’).”<sup>115</sup> To the extent that the *Carter* Court correctly characterizes the

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108. *Pierre v. Att’y Gen.*, 528 F.3d 180, 189–90 (3d Cir. 2008).

109. *Id.*; *Auguste v. Ridge*, 395 F.3d 123, 145–46 (3d Cir. 2005).

110. *Carter v. United States*, 530 U.S. 255, 268 (2000).

111. *United States v. Lewis*, 628 F.2d 1276, 1279 (10th Cir. 1980).

112. *Id.* at 1278.

113. *Id.*

114. *Id.* at 1279.

115. *Carter*, 530 U.S. at 268.

*Lewis* holding, the Court's formulation of specific intent in *Carter* appears closer to a kind of "specific intent plus;" that is, the actor's ultimate motive in achieving the proscribed consequences may be relevant to finding that specific intent was present. The *Carter* opinion itself therefore underscores the varying treatment of specific intent.

In *Bailey*, the Supreme Court surveyed the history and formulations of the mental element of criminal liability in the American tradition.<sup>116</sup> The Court affirmed that specific intent was used at common law in various ways, including to refer to the scienter requirement in general, to connote the intent to commit a crime at a particular time and place, and to differentiate purpose from less culpable forms of mens rea.<sup>117</sup> The Court then recounted how this inconsistent doctrinal treatment led the American Law Institute to abandon the general and specific intent dichotomy in favor of the Model Penal Code's four classifications of mens rea.<sup>118</sup> The Court concluded with a summary of the state of the law: "In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent."<sup>119</sup>

The previous statement can best be understood in context as the Court's attempt to provide a general framework of specific intent rather than an authoritative determination of the unitary meaning of specific intent as purpose. As the concurring judge in the Third Circuit case of *Pierre v. Attorney General* argued: "*Bailey* purported only to summarize the state of the law, not to overrule precedent interpreting the common law term . . . . [T]he term 'loosely' used by the *Bailey* Court indicates that specific intent, in fact, has meanings other than purpose."<sup>120</sup> Indeed, the Third Circuit's own jury instructions in 2006 defined "intentionally" and "with intent" to mean: "[e]ither that (1) it was [defendant's] conscious desire or purpose . . . to cause a certain result, or that (2) [defendant] knew that (he)(she) . . . would be practically certain to cause that result."<sup>121</sup> This indicates that even within the Third Circuit, specific intent can have multiple meanings.

### C. *The Department of Justice Agrees that Specific Intent is Ambiguous*

The Department of Justice has offered the Executive's opinion of the proper meaning of specific intent, particularly with respect to the intent

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116. *United States v. Bailey*, 444 U.S. 394, 403 (1980).

117. *Id.* (citing LaFavre & Scott, *supra* note 102).

118. *Id.* at 403–04.

119. *Id.* at 405.

120. *Pierre v. Att'y Gen.*, 528 F.3d 180, 192–93 (3d Cir. 2008) (Rendell, J., concurring).

121. *Id.* at 192.

required in classifying torture. In 2002, Assistant Attorney General Jay Bybee provided President George W. Bush with a definition of specific intent that proved controversial and is widely believed to have been used to legitimate U.S. practices in detention centers in Iraq and Afghanistan, including at the Abu Ghraib facility.<sup>122</sup> In a memo to the White House Counsel, Bybee stated:

knowledge alone that a particular result is certain to occur does not constitute specific intent . . . [E]ven if a 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.<sup>123</sup>

The DOJ has since renounced this statement and substantially altered its understanding of specific intent. In a 2004 memo, the DOJ withdrew its previous statement that specific intent to torture required the victim's severe pain and suffering to be the perpetrator's "precise objective."<sup>124</sup> Instead, the DOJ stated: "It is well recognized that the term 'specific intent' is ambiguous and that Courts do not use it consistently."<sup>125</sup> The memo contrasts the purpose standard articulated in *Bailey* with the foreseeability standard articulated in *Neiswender*, and in light of the inconsistencies, declines to offer an authoritative definition of specific intent.<sup>126</sup> Instead, it concludes that: "[i]n light of the President's directive that the United States not engage in torture, it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture."<sup>127</sup>

Read together, the weight of authority demonstrates that specific intent does not have a single, authoritative meaning in U.S. criminal law. It does not clearly correspond to either a mens rea of purpose or to a lesser form of culpability. Rather, specific intent is used inconsistently throughout criminal law.

## V.

### A KNOWLEDGE MENS REA IS CONSISTENT WITH CRIMINAL LAW PRINCIPLES, THE PURPOSES OF CAT, THE SENATE RESERVATIONS AND

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122. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002).

123. *Id.* at 4.

124. Memorandum from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel, to James B. Comey, Deputy Att'y Gen., Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A, Op. Off. Legal Counsel (Dec. 30, 2004), available at <http://www.justice.gov/olc/18usc23402340a2.htm>. [hereinafter 2004 DOJ Memo].

125. *Id.*

126. *Id.*

127. *Id.*

## DOJ MEMOS, AND THE NORMATIVE GOAL TO PROHIBIT CONDUCT THAT OTHERWISE CONSTITUTES TORTURE

In light of the ambiguous meanings of specific intent, the term should be read consistently with the objectives and purposes of CAT, together with the intentions of the drafters of the Senate's reservations. A knowledge mens rea serves these purposes. Such a reading also provides doctrinal consistency with criminal law jurisprudence, which requires using the minimal mens rea classification necessary to separate innocent from guilty conduct.

*A. A Mens Rea of Knowledge is Consistent with the Purposes of CAT*

CAT is the result of a concerted international effort, in which the U.S. played a leading role, to promote human dignity through the eradication of torture.<sup>128</sup> The prohibition against torture is *jus cogens*, and thus deserves the utmost respect and adherence.<sup>129</sup> As such, according to the DOJ, "it would not be appropriate to rely on parsing the specific intent element . . . to approve as lawful conduct that might otherwise amount to torture."<sup>130</sup> These considerations counsel against interpreting the specific intent standard to require purpose and favor using a mens rea that is not permissive of the extreme suffering taking place in Haiti. A knowledge mens rea meets these ideals.

*B. A Mens Rea of Knowledge is Consistent with the Senate's Reservations*

The Senate Report's reservations do not indicate an objective to closely circumscribe the range of conduct prohibited under CAT. The Senate Report emphasizes that "unanticipated or unintended" severity of pain and suffering does not rise to the level of torture, so as to ensure that CAT obligations are not triggered "in cases where unexpectedly severe physical suffering is caused."<sup>131</sup> It appears, therefore, that the Senate was concerned with imposing liability for *accidental* or *unknowing* torture. The language of the Report, as such, neither mandates a mens rea of purpose nor forecloses a mens rea of knowledge. Indeed, a knowledge mens rea would preclude liability for negligent acts that cause pain rising to the level of torture, which is consistent with the intent of the Senate reservations.

The Regulations that govern deportees' potential claims for relief

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128. S. COMM'N ON FOREIGN AFFAIRS, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. REP. NO. 101-30, at 2 (1990).

129. Parker, *supra* note 33, at 438.

130. 2004 DOJ Memo, *supra* note 124, at 10.

131. S. REP. NO. 101-30, *supra* note 40, at 14.

define torture according to Article 1 of CAT and incorporate language from the Senate's reservations, stating: "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."<sup>132</sup> Arguably, then, the Regulations take the Senate Report out of context, thereby distorting its meaning.

*C. A Mens Rea of Knowledge is Consistent with the DOJ's  
Interpretive Memos*

The 2004 DOJ memo offers additional evidence of the proper definition of specific intent to torture. The memo treats the regulatory definition of torture in CAT as the operative definition of torture for the U.S. under all circumstances and examines each element of that definition.<sup>133</sup> While it does not explicitly define specific intent, the memo does describe two outer bounds, one a case where specific intent is definitely present and one a case where it is definitely lacking:

It is clear that the specific intent element . . . would be met if a defendant performed an act and "consciously desire[d]" that act to inflict severe physical or mental pain or suffering. Conversely, if 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 . . . specific intent.<sup>134</sup>

In other words, purpose is sufficient but not necessary for a finding of specific intent. Conversely, good faith non-negligent, non-reckless actors do not have specific intent regardless of whether their actions result in severe pain and suffering rising to the level of torture. Both the DOJ memo and the Senate Report thus take pains to ensure that good faith actors are not found to have specific intent to torture. But neither precludes a knowledge mens rea in place of a purpose requirement.

*D. A Mens Rea of Knowledge is Consistent with Criminal Law Mens  
Rea Principles*

While the meaning of the Senate Report and the intent of its drafters should have guided the BIA's interpretation of the Regulations, the BIA relied exclusively on *Black's Law Dictionary* and purportedly defined specific intent according to the criminal law.<sup>135</sup> A thorough examination of mens rea principles in the criminal law, however, reveals that knowledge is

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132. 8 C.F.R. § 208.18(a)(5) (2006).

133. 2004 DOJ Memo, *supra* note 124, at 3–10.

134. *Id.* (citations omitted).

135. *In re J-E-*, 23 I. & N. Dec. 291, 301 (BIA 2002).

the proper interpretation of specific intent in the CAT context.

In criminal law, the mens rea requirement generally separates morally culpable actors from innocent actors who may be liable for negligence but do not merit moral condemnation. The proper mens rea carefully calibrates liability to fault. Accordingly, where some ambiguity is present or when a statute is silent,<sup>136</sup> a court should interpret a statute to require the minimum mens rea necessary to separate innocent from guilty conduct.<sup>137</sup>

1. *The Common Law and Statutory Justifications for Requiring a Purpose Mens Rea are Not Present in the CAT Context*

The Model Penal Code defines four levels of mens rea: negligence, recklessness, knowledge, and purpose. The distinction between negligence and recklessness is critical, because under the Model Penal Code no one can be held criminally liable unless they have a mens rea of at least recklessness.<sup>138</sup> However, in most cases it is not necessary to distinguish between knowledge and purpose because “there is good reason for imposing liability whether the defendant desired or merely knew of a practical certainty of the results.”<sup>139</sup> Yet the distinction between knowledge and purpose becomes crucial when entirely innocent conduct may easily be criminalized unless it is the precise objective of the actor to accomplish the criminal consequences.<sup>140</sup> Two circumstances fit that description and

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136. *See, e.g.,* *Staples v. United States*, 511 U.S. 600, 605 (1994); *Morissette v. United States*, 342 U.S. 246, 262 (1952) (explaining mens rea statutory interpretation principles and indicating that, where a statute proscribing a regulatory crime is silent as to the requisite mental state, courts must infer a Congressional intent to intentionally omit a mens rea requirement, and hold even unwitting criminal actors strictly liable for offenses committed); AMJUR CRIMLAW § 121 (“When a statute defining an offense is silent with respect to mens rea, courts may look to the common-law origins of the crime. When an act is prohibited and made punishable by statute only, the statute is generally to be construed in light of the common law, and the existence of criminal intent is to be regarded as essential, even when in terms it is not required. Thus, where the antecedent common-law crime includes mens rea as an element, the courts will interpret the statute to require a mens rea. However, where a crime does not have a common-law antecedent, the determination of requisite intent is first a question of statutory construction.”)

137. MODEL PENAL CODE, *supra* note 16, at § 2.02(10) (stating that the minimum mens rea necessary to separate innocent from guilty conduct should be applied); *see also* *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) (explaining that there is a “presumption in favor of a scienter requirement” for each element of a statute).

138. MODEL PENAL CODE, *supra* note 16 at § 2.02(c) (stating that one “acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct”). *Black’s Law Dictionary* similarly defines recklessness as “[c]onduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk.” BLACK’S LAW DICTIONARY 1298–99 (8th ed. 2004).

139. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 445 (1978).

140. *See* *United States v. Bailey*, 444 U.S. 394, 404 (calling the distinction between knowledge and purpose the most significant and the most esoteric among the culpable

therefore require a mens rea of purpose under the Model Penal Code:<sup>141</sup> group criminality<sup>142</sup> and inchoate crimes.<sup>143</sup> Neither of these rationales are present in the torture context.

*a. The Rationale for Requiring Purpose in Group Criminality is Not Transferable to the Torture Context*

Group criminality poses unique problems of proof and culpability. A central tenet of criminal law is that one is held responsible for her own actions, not the actions of others. Further, autonomy principles are compromised by the notion that one can cause another to act. Our actions are presumed to be the result of our volition rather than the product of circumstance.<sup>144</sup> Vicarious liability is, as such, anathema to our criminal justice system.<sup>145</sup> As a result, the concept of mens rea becomes particularly crucial in group crimes, since physical cause cannot be relied upon to inform our understanding of the criminal actor's intentions, and when vicarious liability must be avoided.<sup>146</sup>

Accordingly, group crimes of aiding and abetting and conspiracy require a mens rea of purpose to materially further the criminal enterprise of another.<sup>147</sup> This state of mind is most often proved by the defendant's knowledge of the criminal venture coupled with something more than mere indifference as to the venture's success.<sup>148</sup> The aider or conspirator must possess a stake in the venture, or the aider must "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."<sup>149</sup>

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mental states).

141. See generally Herbert Wechsler, William Kenneth Jones & Harold L. Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy (pts. 1 & 2)*, 61 COLUM. L. REV. 571, 957, 975–77 (1961) and cases cited therein.

142. Group criminality is "[a]n agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and (in most states) action or conduct that furthers the agreement; a combination for an unlawful purpose." BLACK'S LAW DICTIONARY 327 (8th ed. 2004).

143. An inchoate offense is "[a] step toward the commission of another crime, the step in itself being serious enough to merit punishment. The three inchoate offenses are attempt, conspiracy, and solicitation." *Id.* at 1111.

144. Sanford H. Kadish, *A Theory of Complicity*, ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H. L. A. HART 288 (Ruth Gavison ed., 1987).

145. Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1155 (1997) ("Free choice is a bedrock assumption of liberal theories of criminal law.").

146. *Id.*

147. See Wechsler, Jones & Korn, *supra* note 141, at 975–77.

148. Nye & Nissen v. United States, 336 U.S. 613, 619 (1949).

149. *Id.* (quoting Judge Learned Hand).

If knowledge were instead sufficient for a finding of liability in group crimes, a range of everyday conduct would be criminalized. The paper merchant who knows, or is willfully blind to the knowledge, that her customer uses the paper she sells to forge checks could face jail time. The teenager who overhears her father explain his conspiracy to launder money could spend years in jail as a coconspirator if she drives her father to the workplace where he commits such acts of fraud. A knowledge mens rea would thus cast a wide net of liability over productive social enterprise and morally innocent, or perhaps at worst morally questionable, behavior. Neither the criminal law nor our moral instincts tolerate such an outcome. To the contrary, imposing an affirmative duty to dissociate from criminal behavior appears overly burdensome. “The assumption . . . is that people are entitled to carry on their lives without deviating every time doing so might . . . hamper the execution of a criminal plan.”<sup>150</sup> In sum, a knowledge mens rea in the context of group crimes would violate autonomy principles and the prohibition against vicarious liability, and would improperly calibrate liability to fault. Purpose is the proper mens rea for group criminality.

This rationale for requiring purpose is not easily transferable to the torture context, however. There is no danger of innocent, everyday commercial conduct being criminalized, as in the case of the prototypical merchant.<sup>151</sup> Deplorable prison conditions cannot be construed as a quotidian enterprise. Nor is there danger that one actor will be held liable for the actions of another, creating vicarious liability and violating autonomy principles. Indeed, the government official creating and maintaining inhumane prison conditions would be held liable directly for the act of creating, maintaining, and placing human beings in captivity subject to such conditions, despite her indifference to the pain and suffering that result.<sup>152</sup> The autonomy rationale is inapposite under these circumstances. This is particularly so because only the intentional creation and maintenance of conditions amounting to torture would satisfy the requisite mens rea—as such, neither the prison guard lawfully performing his duties within such a prison’s walls, nor the taxpayer funding construction of such a prison, nor any other actor innocent of a role in the intentional creation of inhumane conditions would be held liable.

Proponents of a purpose mens rea might argue that a knowledge requirement would impose vicarious liability, though in a limited sense. If a knowledge mens rea made CAT relief available to individuals who would

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150. GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 369–70 (2d ed. 1961).

151. *Id.*

152. CAT creates liability for actions “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.” CAT, *supra* note 6, at art. 1.

otherwise be removed from the United States, the U.S. government would become vicariously liable for the wrongs of foreign governments. Arguably, this form of vicarious liability is considerably less troubling since it is the objective of CAT's Article 3 *refoulement* provision.<sup>153</sup> As a signatory to the Convention, the United States undertook a series of affirmative obligations to further human dignity through the eradication of torture worldwide, among them the obligation not to deport or extradite any person facing a substantial likelihood of torture in their home nation. As an active party to the shaping of CAT, the United States voluntarily contracted to this imposition of liability where all five prongs of CAT's regulatory definition are present. The number of potential deportees eligible for CAT's protections should not change the ex-ante fairness of the obligation the United States undertook. Furthermore, as the prohibition on torture is *jus cogens*, there is never a good reason for allowing it. Accordingly, CAT obligations should not be interpreted to require a higher mens rea for the purpose of limiting the extent of signatories' Article 3 *refoulement* obligations.<sup>154</sup>

*b. The Rationale for Requiring Purpose for Inchoate Crimes is not Transferable to the Torture Context*

Inchoate crimes—or the law of attempt—also have unique problems of proof and culpability. When a crime is committed, the justice system is challenged to determine the mental state with which the actor committed the crime, so it can properly calibrate liability to fault. This same process is not possible when the crime has not happened. It is almost nonsensical to say that one has attempted an act when she has mere knowledge that the crime could result from her actions. For example, it would be absurd to say that a person who picks up a candy bar in a corner market, knowing that she could walk out of the store without paying but fully intending to pay, would be guilty of attempted shoplifting. Of course, if the woman intended to shoplift but only managed to pick up the candy bar before being apprehended, conviction is logical and consistent with the principles of criminal justice. Criminalization of innocent activity is contrary to our conceptions of moral culpability in criminal law and would chill a range of productive behavior.<sup>155</sup> As such, a mens rea of purpose gives substance to the concept of criminal attempt, while a knowledge mens rea would render the concept devoid of meaning.

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153. *Id.*, at art. 3.

154. *Cf.* ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 166–210 (2003) (concluding that America can deter terrorism and still strike an appropriate balance between liberty and security).

155. *Cf.* MODEL PENAL CODE, *supra* note 16, at § 2.02(10) (stating that the minimum mens rea necessary to separate innocent from guilty conduct should be applied).

As with group criminality, the justifications underlying a heightened mens rea requirement for attempt are not applicable to the torture context. Substandard prison conditions are the result of a completed, actualized course of conduct. They present no question of incomplete activity. Accordingly, a mens rea of knowledge would not criminalize morally innocent behavior, nor threaten to chill a range of risky yet productive behavior,<sup>156</sup> as it does in the context of inchoate crimes.

In sum, the criminal law requires a mens rea of purpose only in two areas: group criminality and inchoate crimes. Outside of these realms, criminal law does not draw a distinction between knowledge and purpose to determine the actor's intent. Rather, a person

intends a result of his act (or omission) under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that the result is practically certain to follow from his conduct, whatever his desire may be as to that result . . . In either circumstance, the defendant is consciously behaving in a way that the law prohibits, and such conduct is a fitting object of criminal punishment.<sup>157</sup>

Because knowledge of substantially certain results constitutes intent, knowledge is the minimum mens rea necessary to separate innocent from guilty conduct. Outside the context of group and inchoate crimes, a knowledge mens rea is consistent with the criminal law's careful calibration of liability to fault.

2. *Knowledge is a Sufficient Mens Rea for Crimes Generally Requiring Purpose Where the Crime is Particularly Serious or Where the Defendant Possessed Guilty Knowledge*

Some courts have maintained that a knowledge mens rea is sufficient for group or inchoate crimes when the crime is particularly serious, when the defendant has guilty knowledge, or when the risk of dangerous consequences is particularly high. These approaches offer alternative rationales for imposing a knowledge mens rea in the CAT context.

Judge Richard Posner details the rationale for requiring knowledge, rather than purpose, for particularly serious crimes in *United States v. Fountain*.<sup>158</sup> In that case, Gometz, a prison inmate, aided in the murder of a prison guard by standing near the bars of his cell. Gometz had a knife in his belt, which the principal grabbed and used to stab the guard. Gometz argued that he should not be held liable as an aider and abettor to murder

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156. Indeed, no such risky yet productive behavior is apparent in the torture context.

157. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 445 (1978).

158. *United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985).

because he lacked the mens rea of purpose: he had no stake in the venture and was indifferent to the outcome of the killing.<sup>159</sup>

Posner rejected Gometz's contention. He explained that knowledge of the principal's criminal purpose was sufficient for conviction at common law and that many states continue to follow that rule.<sup>160</sup> Wisconsin jury instructions on aider and abettor liability, for example, state that a "person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, he knowingly either (a) renders aid to the person who commits the crime, or (b) is ready and willing to render aid . . ." <sup>161</sup> Other Circuits have also found that knowledge can sometimes suffice as the mens rea for liability for group crimes.<sup>162</sup>

While the federal criminal aiding and abetting statute at issue in *Fountain* has been interpreted to require purpose, Posner argues that there is a compelling case for following the common law doctrine when a crime is particularly serious.<sup>163</sup> His claim is two-fold: first, that knowledge of a particularly serious crime should be sufficient for liability is a "compelling appeal to common sense," and second, that the deterrence value of a knowledge mens rea justifies widening the net of liability.<sup>164</sup> The first claim requires little elaboration. When the actor gives aid knowing that her aid will lead to murder, to acts of terrorism, or other heinous crimes among those most dangerous to a peaceful society, it appears illogical to absolve the actor of culpability simply because she was indifferent to the success of the venture. Posner argues that imposing an affirmative duty to disclose or thwart such crimes would have minimal social costs and that those costs are justified by the additional benefit to society.<sup>165</sup>

Other cases focus on the guilty nature of the knowledge the aider possesses, rather than on the seriousness of the crime. *Direct Sales Co. v. United States* supports the proposition that, if the aider has guilty knowledge, purpose can be imputed to her knowledgeable acts of aiding and abetting, even where the crime is not among those most abhorrent to

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159. *Id.* at 797–98.

160. *Id.* (citing *Backun v. United States*, 112 F.2d 635, 636–37 (4th Cir. 1940) and *Bacon v. United States*, 127 F.2d 985, 987 (10th Cir. 1942)).

161. *State v. Sharlow*, 110 Wis. 2d 226, 227, 327 N.W.2d 692 (1983).

162. *E.g.*, *United States v. Eberhardt*, 417 F.2d 1009, 1013 (4th Cir. 1969).

163. *United States v. Fountain*, 768 F.2d 790, 798 (7th Cir. 1985).

164. *Id.*

165. To illustrate the point, Posner contrasts the case of a shopkeeper who sells a dress to a prostitute with the case of a shopkeeper who sells a gun to one planning to commit murder: "In the second case, a man buys a gun from a gun dealer saying that he wants it in order to kill his mother-in-law, and he does kill her. The dealer would be guilty of aiding and abetting murder. This liability would help deter—and perhaps not trivially given public regulation of the sale of guns—a most serious crime." *Id.* at 798.

society.<sup>166</sup> The defendant in *Direct Sales* was a company that sold morphine sulfate in large quantities and over a prolonged period to a doctor putting the drug to criminal use. The company offered special discounts and promotions for bulk purchases, but argued that it had no stake in the criminal venture.<sup>167</sup> The Court found that the goods themselves were inherently susceptible to criminal use and that this guilty knowledge gave rise to an inference of intent. The goods' susceptibility to harmful use "is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to show that by the sale he intends to further promote and cooperate in it."<sup>168</sup> The company's knowledge of the guilty or illicit nature of the activity was thus sufficient, without a greater showing of purpose, to find liability.

*People v. Lauria*, one of the cases cited by Posner, combines elements of each of these two formulations.<sup>169</sup> *Lauria* cites a series of cases supporting *Direct Sales* and standing for the proposition that "a supplier who furnishes equipment which he knows will be used to commit serious crime may be deemed from that knowledge alone to have intended to produce the result."<sup>170</sup> Thus the "seller of gasoline who knew the buyer was using his product to make Molotov cocktails for terroristic use" would be liable for aiding and abetting the crime.<sup>171</sup> *Lauria* cautions that this analysis could easily be applied to every crime, creating an intolerably and unreasonably vast net of liability over realms of everyday life and behavior. *Lauria* suggests, therefore, that knowledge be sufficient only for felonies, but not for misdemeanors.<sup>172</sup> This is perhaps an even wider net of liability than that proposed by Posner, who would limit the sufficiency of knowledge in group offenses only to those most serious crimes.

Like Posner, the *Lauria* court justifies this conclusion based on a deterrence rationale. The "distinction between the obligations arising from knowledge of a felony and those arising from knowledge of a misdemeanor continues to reflect basic human feelings about the duties owed by individuals to society."<sup>173</sup> It concluded that "[h]einous crime must be stamped out" and that doing so is "the responsibility of all."<sup>174</sup> In sum, *Lauria* suggests that where the aider possesses guilty knowledge of a felony commission she should be liable, and that this widening of the scope of liability is justified by society's vital interest in deterring felonies.

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166. *Direct Sales Co. v. United States*, 319 U.S. 703, 709–14 (1943).

167. *Id.* at 705–06.

168. *Id.* at 711.

169. *People v. Lauria*, 59 Cal. Repr. 628, 631 (Cal. Ct. App. 1967).

170. *Id.*

171. *Id.*

172. *Id.* at 634–35.

173. *Id.* at 634.

174. *Id.*

Finally, some courts have suggested purpose can be imputed from knowledge when the degree of risk of proscribed consequences flowing from the actor's conduct is intolerably high. This approach focuses not on the nature of the knowledge nor the nature of the crime, but rather on the nature and degree of the risk involved. For example, in *Smallwood v. Maryland*, the government charged a man who knew he was HIV positive with assault with intent to murder in the forcible rape of three women.<sup>175</sup> Citing *Maryland v. Raines*, the Court explained that finding intent to kill, or purposeful killing, is necessarily an inferential endeavor, and that such intent can be inferred from the use of a deadly weapon against a vital part of the body.<sup>176</sup> In *Raines*, the defendant shot a gun at the window of a passing car, knowing that the driver was directly behind the window. That knowledge gave rise to an inference that the defendant intended to kill the victim.<sup>177</sup> In contrast, shooting in the general direction of a passing car would be insufficient to give rise to an inference of intent.<sup>178</sup>

The *Smallwood* court distinguished *Raines* by finding that the degree of risk to which Raines knowingly exposed his victims was substantially and materially smaller. It said that in *Raines*, “the risk of killing the victim is so high that it becomes reasonable to assume that the defendant intended the victim to die.”<sup>179</sup> But in *Smallwood*, “[i]t is less clear that death by AIDS from that single exposure is a sufficiently *probable* result to provide the sole support for an inference that the person causing the exposure intended to kill.”<sup>180</sup> *Smallwood* thus suggests that where an actor knowingly exposes a victim to an extreme degree of risk, the knowledge of that extreme risk supports an inference of purposefulness sufficient for liability.

Taken together and individually, this caselaw supports a knowledge mens rea in the CAT context. Torture is *jus cogens*, leaving no doubt as to the seriousness of the crime. In international law, it is considered to be a crime of the highest order,<sup>181</sup> just as the crime at issue in *Fountain* was extremely serious. The knowledge the Haitian government possesses about the conditions of confinement can best be characterized as guilty knowledge, as in *Direct Sales*. Those conditions are so extreme as to put Haitian authorities responsible for the creation and maintenance of inhumane conditions on notice of the illicit nature of their activity. Finally,

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175. *Smallwood v. State*, 680 A.2d 512, 513 (Md. 1996).

176. *Id.* at 515 (quoting *State v. Earp*, 571 A.2d 1227 (Md. 1990) and *State v. Raines*, 606 A.2d 265 (Md. 1991)).

177. *State v. Raines*, 606 A.2d 265, 270 (Md. 1991).

178. *Id.*

179. *Smallwood*, 680 A.2d at 516.

180. *Id.*

181. *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1016 (9th Cir. 2000) (“The individual’s right to be free from torture is an international standard of the highest order.”)

the risk to which Haitian authorities expose detainees is extreme, as in *Raines*. With little access to food, potable water, or the most basic sanitation, and under the constant threat of prison guard brutality, it is nearly certain that detainees will experience extreme pain and suffering. In fact, the Second Circuit appears to have endorsed this final possibility: “nothing in this opinion prevents the agency from drawing the inference . . . that a particular course is taken with specific intent to inflict severe pain and suffering if it is found on the record evidence that the actor is aware of a virtual certainty that such pain and suffering will result.”<sup>182</sup> In sum, there is ample doctrinal support in criminal law to interpret CAT’s specific intent standard as requiring a mens rea of knowledge.

## VI.

### RECOMMENDATIONS FOR ADVOCATES

While there is doctrinal support for applying a knowledge mens rea to CAT, advocates will have to work to secure this change. It could be accomplished through litigation or by direct advocacy to Congress or the Executive. In fact, a multi-pronged approach that combines litigation and advocacy may be necessary. Courts are reluctant to substitute their own judgment for that of Congress or the Executive when it comes to politically sensitive issues. But if courts are presented with the right arguments, they might be willing to remand Haitian CAT claims to the BIA on the basis that *J-E* should be reconsidered. There is also reason to believe that on a remand the Obama Administration might favor a more expansive interpretation of CAT, particularly in the Haitian context, given that the renewed deportation of criminal deportees to Haitian prisons was fiercely criticized by many advocates and observers.<sup>183</sup>

#### *A. The BIA’s Interpretation is Not Entitled to Deference by the Courts*

A major obstacle to achieving a broader definition of “torture” through the courts is overcoming judicial deference to the BIA. As mentioned above, the Circuits have not analyzed the Regulations *de novo*, but instead have accorded substantial deference to the agency’s interpretation of the Regulations in *J-E*.<sup>184</sup>

This deference is not without basis. The Supreme Court has expressly

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182. *Pierre v. Gonzales*, 502 F.3d 109, 118 n.6 (2d Cir. 2007).

183. *See, e.g.*, Patricia Zapor, ‘Now not the time’ to resume deportations of Haitians, *US agency told*, U.S. CATHOLIC, Feb. 8, 2011, <http://www.uscatholic.org/news/2011/02/now-not-time-resume-deportations-haitians-us-agency-told> (discussing the efforts of religious, civil rights, and human rights organizations to halt post-earthquake deportations to Haiti).

184. *See supra* Section III.E.

held that the BIA should be granted *Chevron* deference “as it gives ambiguous statutory terms ‘concrete meaning through a process of case-by-case adjudication.’”<sup>185</sup> In fact, the agency is especially entitled to deference—beyond that traditionally accorded to executive agencies—as the BIA “exercise[s] especially sensitive political functions that implicate questions of foreign relations.”<sup>186</sup> Judicial deference is appropriate not only where the BIA is interpreting statutory provisions, but also when it interprets regulations enacted to implement the Immigration and Nationality Act (INA).<sup>187</sup>

It is worth noting that the Regulations are technically interpreting a treaty provision, rather than an INA provision. However, courts give similar deference to agency interpretations of treaties.<sup>188</sup> Moreover, Congress expressly directed the Attorney General to promulgate the Regulations, indicating that Congress intended the agency (rather than the courts) to interpret the treaty and related provisions.<sup>189</sup> Because it is not clear which deference framework is appropriate, the Circuit Courts have used different terminology for reaching essentially the same deferential standard of review. The Third Circuit explicitly cited *Chevron* in deferring to *J-E*,<sup>190</sup> while the Second Circuit framed its deference as emanating from various sources, including the traditional deference owed to the BIA in interpreting immigration regulations and the general deference owed to the Executive in interpreting treaties.<sup>191</sup> Whether the *Chevron* terminology is employed or not, a court will defer to an agency’s considered decision in interpreting ambiguous statutory or regulatory language, so long as the interpretation is not manifestly contrary to the text or clearly unreasonable.<sup>192</sup>

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185. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448–49 (1987)).

186. *Id.* (quoting *INS v. Abudu*, 483 U.S. 94, 110 (1988) (noting that judicial deference in the immigration context is particularly important, as the executive is engaging in “especially sensitive political functions implicate questions of foreign relations”)).

187. *See, e.g., Olmsted v. Holder*, 588 F.3d 556, 558 (8th Cir. 2009); *Li Fang Lin v. Mukasey*, 517 F.3d 685, 691–92 (4th Cir. 2008).

188. *See, e.g., Abbott v. Abbott*, 130 S.Ct. 1983, 1993 (2010) (deferring to the Executive Branch’s interpretation of language in the Convention on the Civil Aspects of International Child Abduction); *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.”).

189. When Congress passed Public Law 105-277, it directed the heads of the appropriate agencies to prescribe implementing regulations. Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (1998). This provision was incorporated into the INA as a note to 8 U.S.C. § 1231.

190. *Pierre v. Att’y Gen.*, 528 F.3d 180, 189 (3d Cir. 2008).

191. *Pierre v. Gonzales*, 502 F.3d 109, 113–14, 116–17 (2d Cir. 2007).

192. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (interpreting INA provision under *Chevron* deference); *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168

The strongest argument advocates can make against agency deference is that the BIA failed to use its discretion in interpreting an ambiguous term. In interpreting the Senate Report and the Regulations, the BIA failed to recognize that specific intent could be understood as requiring merely knowledge.<sup>193</sup> Moreover, the BIA did not come to this conclusion through reasoned analysis; the BIA's legal analysis was limited to a single citation to *Black's Law Dictionary*. As a consequence, the BIA did not use its agency expertise to evaluate the policy consequences of a knowledge mens rea requirement, nor did it employ its expertise in immigration law in making sense of an ambiguous term. The agency did not use its discretion at all. Instead, it assumed that it had no discretion to interpret the term specific intent in any way other than requiring a mens rea of purpose.

The Supreme Court recently held that the BIA's failure to recognize ambiguity is grounds for remand. In *Negusie v. Holder*, which was decided after the above-mentioned Circuit decisions reviewing *J-E*, the Supreme Court considered the BIA's interpretation of the "persecutor bar" to a category of immigration relief known as withholding of removal.<sup>194</sup> The BIA was charged with interpreting an INA provision that precluded relief under withholding of removal if the applicant had participated in persecution on a protected ground. When issuing its interpretation, the BIA declined to consider the existence of an exception to this bar for individuals who were coerced into engaging in torture; it assumed that a prior case, *Fedorenko v. United States*, foreclosed the possibility of a duress exception.<sup>195</sup> But *Fedorenko* applied to a distinguishable statute and the Supreme Court held the BIA erred in finding that case dispositive.<sup>196</sup> The Court observed that the BIA's interpretation of the statute as not containing a duress exception was not necessarily unreasonable. However, the BIA's failure to recognize the statute's ambiguity merited a remand:

The Government argues that "if there were any ambiguity in the text, the Board's determination that the bar contains no such exception is reasonable and thus controlling." . . . . Whether such an interpretation would be reasonable, and thus owed *Chevron* deference, is a legitimate question; but it is not now before us. The BIA deemed its interpretation to be mandated by *Fedorenko*, and that error prevented it from a full consideration of the statutory

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(1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448–49 (1987) (interpreting INA provision under *Chevron* deference); *Pierre v. Gonzales*, 502 F.3d at 116 (same) (quoting *Tachiona v. United States*, 396 F.3d 205, 216 (2d Cir. 2004)).

193. *In re J-E*, 23 I. & N. Dec. 291, 300–01 (BIA 2002).

194. *Negusie v. Holder*, 129 S. Ct. 1159 (2009).

195. *Id.* at 1162 (citing *Fedorenko v. United States*, 449 U.S. 490 (1981)).

196. *Id.* at 1163.

question here presented.<sup>197</sup>

In a similar fashion, the BIA in *J-E* erroneously interpreted the Senate's language as mandating a "purpose" requirement. Thus, just as the Court held in *Negusie*, the BIA's decision should be reconsidered.<sup>198</sup>

The presumption of deference is further undercut by the BIA's lack of particular expertise in interpreting criminal terms. A key policy rationale underlying *Chevron* deference is that an agency has particularized expertise in that field and is better equipped than federal courts to make necessary policy decisions.<sup>199</sup> But one commentator has pointed out that the BIA should not be granted *Chevron* deference when interpreting specific intent, as this is a criminal law concept, rather than an immigration law term.<sup>200</sup> Federal courts have declined to follow the BIA's interpretation of certain criminal statutes and criminal law concepts in the past, based on a lack of agency expertise,<sup>201</sup> and departure from the agency's interpretation may be similarly appropriate here.

If a federal court finds that the BIA did in fact exercise its discretion and is thus entitled to *Chevron* deference, its interpretation may still be struck down if a court finds that it is either (1) contrary to the plain meaning of the text, or (2) unreasonable or arbitrary and capricious.<sup>202</sup> As discussed above, the Senate's language is ambiguous as to whether knowledge or purpose should be required—it would be difficult to argue that a knowledge requirement was *mandated* by the plain language. The standard of review when determining whether an interpretation is arbitrary and capricious is highly deferential. However, advocates could argue that the BIA's limited analysis in *J-E* did not meet the minimum standards of reasoned decision-making required for agency decisions to avoid being arbitrary and capricious.<sup>203</sup>

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197. *Id.* at 1166.

198. The Court made clear that a remand was appropriate in such circumstances. *See Negusie*, 129 S. Ct. at 1164 (citing *INS v. Orlando Ventura*, 537 U.S. 12, 16–17) (2002) (“When the BIA has not spoken on ‘a matter that statutes place primarily in agency hands,’ our ordinary rule is to remand to ‘giv[e] the BIA the opportunity to address the matter in the first instance in light of its own experience.’”).

199. *Ventura*, 537 U.S. at 16–17; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN.L.REV. 363, 370 (1986) (“[C]ourts will defer more when the agency has special expertise that it can bring to bear on the legal question.”).

200. Mary Holper, *Specific Intent and the Purposeful Narrowing of Victim Protection Under the Convention Against Torture*, 88 OR. L. REV. 777, 824–26 (2009).

201. *Id.*

202. *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843–44 (1984).

203. *See Motor Vehicles Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (stating that an interpretation may be found to be arbitrary and capricious if it has not been formulated through “reasoned decisionmaking”).

*B. Attorneys and Community Groups Should Engage in  
Administrative and Congressional Advocacy*

Even if a court declines to defer to *J-E*'s interpretation of specific intent, it will likely simply remand the case to the BIA for reconsideration. The federal courts are reluctant to employ their own definitions for terms that agencies have regulatory authority to interpret.<sup>204</sup> A court is thus unlikely to replace the BIA's definition of specific intent under CAT with its own. Accordingly, advocates who want to expand the coverage of CAT should also target the executive and legislative branches.

On January 13, 2010, the day after the Haiti earthquake, DHS Secretary Janet Napolitano announced that the U.S. government would halt deportations of Haitian nationals back to Haiti "for the time being."<sup>205</sup> U.S. Citizenship and Immigration Services (an agency within DHS) designated Haiti as a country experiencing "extraordinary and temporary conditions" that prevented Haitians in the U.S. from returning to their country safely.<sup>206</sup> Accordingly, many Haitians already in the United States became eligible for Temporary Protected Status (TPS), which provided eligible applicants with temporary lawful status and related benefits. However, individuals with criminal records were largely barred from TPS eligibility<sup>207</sup> and those subject to deportation waited in limbo for DHS's next move.

In December 2010, DHS disclosed that it would resume deportations to Haiti, with a focus on Haitians who had criminal convictions and had finished serving their sentences.<sup>208</sup> Presumably, most of these deportees would be automatically detained in Haiti's deteriorating prisons. Deportations began in January 2011. On February 1, the Associated Press reported that Wildrick Guerrir, a Haitian man deported from the United States and detained in one of Haiti's prisons, died after exhibiting cholera-like symptoms.<sup>209</sup> Mr. Guerrir was deported because of a conviction for unlawful possession of a firearm, an offense for which he had served less

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204. See Ventura, 537 U.S. at 16–17.

205. Statement by Matt Chandler, Deputy Press Sec'y, Dept. of Homeland Security (Jan. 13, 2010).

206. Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. 3476, 3477 (Jan. 21, 2010).

207. TPS is unavailable to any individual who has been convicted of any felony; two or more misdemeanors, or a single misdemeanor that constitutes a crime involving moral turpitude or a controlled substance violation. See INA § 244(c)(1)(A)(iii); INA § 244(c)(2)(B)(i); 8 C.F.R. 244.4(a) (2011); 8 C.F.R. 244.2(d) (2011).

208. Kirk Semple, *Haitians in U.S. Brace for Deportations to Resume*, N.Y. TIMES (Dec. 19, 2010), <http://www.nytimes.com/2010/12/20/nyregion/20haitians.html>.

209. Jennifer Kay, *Haitian Deportee Dies After Cholera-Like Symptoms*, MIAMIHERALD.COM (Feb. 1, 2011), <http://www.miamiherald.com/2011/02/01/2044410/haitian-deported-by-us-dies-in.html>.

than two years in U.S. jail.<sup>210</sup>

Even nearly two years after the earthquake, Haiti is struggling to recover.<sup>211</sup> Advocates could hold the Obama Administration to its promise to support the Haitian people in the wake of the earthquake.<sup>212</sup> They could urge the Administration to cease removal of deportees when it is likely a deportee will be automatically detained in a prison where the treatment of prisoners rises to the level of torture. Advocates also could lobby their Senators and the Administration to revisit the Senate's reservations to the signing of CAT and urge them to broaden the scope of the intent requirement. Revised Senate reservations would change the substance of U.S. obligations under CAT and would in turn require the BIA to revisit its previous interpretations of the treaty. A clear statement that specific intent in the torture context is either a mens rea of knowledge or purpose would radically change the legal landscape for Haitian criminal deportees.

Advocates could also urge their congressional representatives to amend or pass legislation allowing the Attorney General to grant relief to potential Haitian criminal deportees on a discretionary basis.<sup>213</sup> Discretion must necessarily work hand-in-hand with a clear commitment by the Obama administration and Attorney General Holder to exercise that discretion to aid potential deportees to Haiti. Such advocacy would require a coordinated effort, aimed at both branches.

## VII.

### ARGUMENTS FOR MAINTAINING A PURPOSE MENS REA ARE ULTIMATELY UNPERSUASIVE

#### *A. A Knowledge Mens Rea Would Not Precipitate a Flood of*

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210. *Id.*

211. U.S. Dep't of State, Haiti Travel Advisory (Aug. 8, 2011), [http://travel.state.gov/travel/cis\\_pa\\_tw/tw/tw\\_5541.html](http://travel.state.gov/travel/cis_pa_tw/tw/tw_5541.html) ("Despite the passage of time, Haiti's infrastructure remains in very poor condition, unable to support normal activity, much less crisis situations.").

212. *See, e.g., Obama Promises 'Unwavering Support' to Haiti After Earthquake*, FOXNEWS.COM (Jan. 13, 2010), <http://www.foxnews.com/politics/2010/01/13/obama-sends-thoughts-prayers-haiti-following-earthquake/>.

213. In 1996, Congress enacted the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). AEDPA and IIRIRA expanded the category of criminal convictions that would render an alien ineligible for relief from deportation. Section 348 of IIRIRA changed the law to prohibit the Attorney General from granting a waiver (discretionary relief from deportation) to aliens who were previously admitted to the United States lawfully, but since have been convicted of an aggravated felony. *Reid v. INS*, 203 F. Supp. 2d 47, 50–51 (D. Mass. 2002). Aggravated felonies include: money laundering, fraud, deceit, or tax evasion in excess of ten thousand dollars; theft, gambling, bribery, counterfeiting, or forgery offenses carrying a prison term greater than one year; perjury or obstruction of justice carrying a prison term greater than one year; and forging or altering a passport. 8 U.S.C.A. § 1101.43 (2009).

*Immigrants Claiming Relief Under CAT*

There is no question that a knowledge mens rea standard would relax CAT requirements and make relief available to more deportees. The government might fear a floodgates problem—that is, the United States could suddenly become a place of refuge for immigrants from poor countries around the world whose governments are unable or unwilling to maintain humane prison conditions.<sup>214</sup> The government might justifiably be concerned with the significance of this burden. This concern is, however, misplaced.

In order to claim deferral of removal under CAT, the applicant must meet the substantial likelihood standard for all elements of CAT's regulatory definition. As detailed above, the substantial likelihood standard has been interpreted to mean "more likely than not."<sup>215</sup> The Haitian context is unique because its prison conditions are coupled with a blanket policy of indefinite detention for all criminal deportees. Haitian criminal deportees are in the unique position of being able to show that they will, more likely than not, be imprisoned in abysmal conditions. Outside this context, the individual applicant must show it is more likely than not that she would be targeted for imprisonment, which presumably will be true at best for a minority of applicants. Only in those presumably rare cases would deferral of removal fall squarely, and rightfully, within the U.S. obligations under the Article 3 *nonrefoulement* provisions.

The regulatory definition of torture under CAT contains as its first element that the applicant must face severe pain and suffering. While the conditions in Haiti's prisons are undoubtedly abysmal, consensus does not necessarily exist that they rise to the level of torture. As the difference between the DOJ's 2002 and 2004 torture memos demonstrates, our nation remains conflicted about the distinction between these two classes of conduct. On one hand, the 2004 memo explicitly endorses a category of severe "physical suffering" that need not involve physical pain, but which must have "some extended duration or persistence as well as intensity" and is not merely "mild or transitory."<sup>216</sup> Haitian prisons would appear to fall squarely within this category. On the other hand, in its 2007 decision in *Cadet v. Bulger*, the Eleventh Circuit concluded that CAT relief was not available to the petitioner precisely because the pain and suffering detainees face in Haitian prisons is insufficiently severe.<sup>217</sup> Neither the Second nor the Third Circuit reached this issue, instead basing their holdings on the issue of specific intent. It is possible, based on this

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214. *Pierre v. Att'y Gen.*, 528 F.3d 180, 195 n.10 (3d Cir. 2008) (acknowledging this concern).

215. *Id.* at 185.

216. 2004 DOJ Memo, *supra* note 124.

217. *Cadet v. Bulger*, 377 F.3d 1173, 1193–94 (11th Cir. 2007).

inconsistent record, that Haitian deportees still face an uphill battle in proving that Haitian prison conditions rise to the level of torture.

Petitioners from countries with less severe conditions would likely be barred from Article 3 withholding of removal. Article 16 of CAT lays out a separate category of cruel, inhuman, and degrading treatment or punishment, which signatories must “undertake to prevent,” but which do not trigger Article 3 *nonrefoulement* obligations. Lesser conditions are likely to fall under Article 16, and relief will be limited to those petitioners who face treatment that is truly extreme. Again, withholding of removal in these presumably rare cases is central to CAT, and is justified.

Finally, to trigger its protections, CAT requires that torture be for a proscribed purpose. Among these are: “punishment for a victim’s or another’s act; intimidating or coercing a victim or another; or any discriminatory purpose.”<sup>218</sup> The Second Circuit stated that “[t]he issue of specific intent is isolated in this case only because imprisonment is by its nature designed to punish, but ordinarily does not trigger severe pain or suffering contemplated by CAT.”<sup>219</sup> In the Second Circuit, it does not appear that the proscribed purpose prong would serve as a barrier to relief for CAT applicants. However, there is no guarantee that other Circuits share this conception. Detention has many purposes other than punishment, such as deterrence and containment. Other Circuits might find these purposes compelling and conclude that the specific intent issue is not in fact isolated. Even with a knowledge *mens rea*, therefore, many applicants might be ineligible for relief.

It is clear that the additional elements of the regulatory definition of CAT serve to narrow significantly the class of applicants eligible for deferral of removal. The United States government therefore need not be concerned that a knowledge *mens rea* would open our borders to a flood of immigrants seeking relief.

*B. A Knowledge Mens Rea Would Not Lead to Release of Dangerous Persons onto Our Streets*

The government, and indeed ordinary citizens and residents, might also worry that a relaxed *mens rea* standard for deferral of removal under CAT would release particularly dangerous immigrants onto our streets, since only criminal deportees are subject to indefinite detention. This concern is not without merit. However, the Article 3 obligations of the United States expressly state that there is no exception to the *refoulement* provision, even for those who committed the most serious and heinous of

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218. *In re J-E-*, 23 I. & N. Dec. 291, 297 (BIA 2002).

219. *Pierre v. Gonzales*, 502 F.3d 109, 119 n.8 (2d Cir. 2007).

crimes.<sup>220</sup> The U.S. was an active participant in negotiating the terms of CAT and knowingly incurred this obligation. Further, our criminal justice system is based on a careful calibration of liability to fault, and many criminal deportees have served their sentences. While some may always be troubled that former criminals are released onto the streets, the solution to this problem would be to ensure that potential criminal deportees complete their full sentences or to invest in alternatives to incarceration such as rehabilitation programs, not a CAT mens rea standard that serves to bar from relief many who will face extremely harsh treatment. Finally, many criminal deportees are not, in fact, the kind of dangerous or seasoned criminals who are liable to raise community alarm: “According to Immigration and Customs Enforcement (ICE) . . . 64.6 percent of immigrants deported for crimes in 2005 had been convicted of non-violent offenses, including non-violent theft offenses such as shoplifting.”<sup>221</sup> Thus, while there is legitimate concern that a knowledge mens rea would grant relief to convicted criminals, on balance this concern is insufficient to justify a purpose mens rea standard for CAT.

In sum, a mens rea of knowledge would further the U.S. and international objective of promoting human dignity through the eradication of torture. The counterarguments, though legitimate, are insufficient to outweigh this laudable ideal.

### VIII.

#### CONCLUSION

There remains no consensus as to the definition of torture. CAT is itself a testament to the difficulty and complexity of precisely describing a narrow, extreme class of pain and suffering. As the Senate Report explains, “the Convention does not attempt to catalog the various acts that constitute torture, nor was it possible to draw a precise line between torture and lesser forms of cruel, inhuman or degrading treatment or punishment.”<sup>222</sup>

Although the line is unclear, the Senate Report correctly states that to carry the moral censure and universal condemnation associated with torture, the acts condemned must be “at the extreme end of cruel, inhuman and degrading treatment or punishment.”<sup>223</sup> While CAT must be

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220. CAT, *supra* note 6, at art. 3.

221. *US: Mandatory Deportation Laws Harm American Families*, HUMAN RIGHTS WATCH (July 2007), <http://www.hrw.org/en/news/2007/07/17/us-mandatory-deportation-laws-harm-american-families>.

222. S. COMM’N ON FOREIGN AFFAIRS, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. REP. NO. 101-30, at 13 (1990).

223. *Id.*

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interpreted in this light, like other human rights instruments, it does not exist in a vacuum. Instead it incorporates background norms that reflect our moral intuitions. Human rights treaties:

[A]re not to be conceived as new pieces of positive international law encroaching into what was previously an unregulated area of freedom. Like all human rights instruments, they have . . . a suprapositive aspect: they were “conceived as reflections of nonlegal principles that have normative force independent of their embodiment in law, or even superior to the positive legal system”.<sup>224</sup>

Thus, it is clear that torture as defined by CAT should be reserved only for extreme treatment, and that moral intuition is a legitimate interpretive tool for determining precisely where to draw the line between torture and lesser forms of cruelty. In a democratic society that prides itself on liberty and human dignity, we should not settle for a definition that draws a line that allows the affront on personhood at work in Haitian prisons. Advocates and practitioners must fight tirelessly, in the courts and in the legislature, to achieve the desperately-needed changes to our laws. In the final analysis, a knowledge mens rea is both jurisprudentially sound and morally consonant with the core values of American, and human, society.

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224. Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1693 (2005).