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## ARTICLES

### UN-TORTURING THE DEFINITION OF TORTURE AND EMPLOYING THE RULE OF IMMIGRATION LENITY

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## INTRODUCTION

It is no small irony that the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT" or "the Convention"),<sup>1</sup> whose primary purpose is to protect potential torture victims from deportation to countries where they are likely to be tortured, defines torture in such a narrow way that victims are unlikely to gain the protection promised.<sup>2</sup>

The expressed goals of the international human rights instrument created under the auspices of CAT,<sup>3</sup> adopted by twenty states in 1984 but not enacted in the United States until 1999,<sup>4</sup> were to criminalize torture and prevent the return of anyone to countries where they were likely to be tortured by those acting officially. The United States, however, had a competing motivation—to prevent its government officials from being prosecuted under CAT. Thus, the United States interpreted the definition of torture differently from the more than 153 other signatories, by adding a requirement that torture be "specifically intended."<sup>5</sup> Moreover, the Board of Immigration Appeals (BIA)<sup>6</sup> and several federal courts have

1. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT].

2. *Id.* at art. 1, para. 1, art. 3, para. 1.

3. *See id.* at art. 1.

4. As the Convention was not self-executing, *see* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. TREATY DOC. NO. 100-20, at 2 (1988) [hereinafter MESSAGE TRANSMITTING CAT], following the Senate's consent, implementing regulations were authorized through the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"). Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (1998) (codified in scattered sections of 22 U.S.C.).

5. *See* 136 CONG. REC. S17486, S17491-92 (daily ed. Oct. 27, 1990) [hereinafter CAT Ratification] (resolution expressing that the Senate's advice and consent that CAT be ratified is subject to the understanding "that, in order to constitute torture, an act must be specifically intended to inflict severe physical [sic] or mental pain or suffering"); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=IV.9&chapter=4&lang=en#top](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV.9&chapter=4&lang=en#top) (last visited Mar. 2, 2014) [hereinafter CAT-UNTC Website].

6. The agency is made up of attorneys appointed by the Attorney General. 8 C.F.R. § 1003.1(a)(1) (2009) [hereinafter BIA]. The purpose of the BIA is to "function as an appellate body charged with the review of . . . administrative adjudications under the Act." *Id.* § 1003.1(d)(1). The members of the board "shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board." *Id.* § 1003.1(d)(2). Generally, appeals from rulings of an

interpreted the specific intent requirement even more narrowly than initially intended.<sup>7</sup>

Currently, a noncitizen in the United States with a criminal conviction who fears being tortured if deported usually has only one option, that of Convention protection, even for a crime that may not seem particularly serious.<sup>8</sup> The rule applies even to long-standing lawful permanent residents ("LPRs"),<sup>9</sup> such as the noncitizen in *Dalegrand v. Attorney General*.<sup>10</sup> Mr. Dalegrand, a native of Haiti, had a psychotic condition that was controlled through medication.<sup>11</sup> His application for CAT relief described his fears that, as a criminal deportee in Haiti, he would be subject to indefinite detention and denied access to his medication.<sup>12</sup> His lawyers argued that without medication he would suffer a mental breakdown, which would offer his jailers justification to beat him with "fists, sticks, and belts,"<sup>13</sup> or even to torture him "by electric shock" and "[burn him] with cigarettes, [choke him], or . . . [box him] in the ears."<sup>14</sup> The BIA found that his fears, while substantiated, did not justify CAT protection.<sup>15</sup> In the BIA's narrow view of torture, Dalegrand could not prove that his likely torturer "specifically intended" to torture him; rather, these conditions of confinement would be considered merely a byproduct of detention in the jails of an impoverished nation.<sup>16</sup>

Immigration Judge in the Executive Office of Immigration Review ("EOIR") are heard by the BIA. *Id.* § 1003.1(b)(1)-(b)(3). Subsequent appeals are heard in the federal courts. *See* The U.S. Dept't of Justice, *Board of Immigration Appeals*, JUSTICE.GOV, (Nov. 2011), <http://www.justice.gov/eoir/biainfo.htm> ("Most BIA decisions are subject to judicial review in the federal courts.")

7. *See, e.g.*, *United States v. Neiswender*, 590 F.2d 1269, 1273 (4th Cir. 1979); *United States v. Twine*, 853 F.2d 676, 679-80 (9th Cir. 1988); *Callahan v. A.E.V., Inc.*, 182 F.2d 237, 261 n.15 (3d Cir. 1999); *United States v. Blair*, 54 F.3d 639, 642-43 (10th Cir. 1995).

8. Asylum is the typical relief requested for those fearing persecution following deportation. Several types of convictions prevent such applications, including those for "aggravated felonies," 8 U.S.C. § 1101(a)(43) (2012), which have burgeoned into a broad category of offenses. *See* 8 U.S.C. § 1158(b)(2) (2012).

9. Legal permanent resident is the status given an immigrant who is "lawfully accorded the privilege of residing permanently in the United States." 8 U.S.C. § 1101(a)(20) (2012).

10. 288 F. App'x 838, 839 (3d Cir. 2008).

11. Brief for International Law & Criminal Law Professors et al. as Amicus Curiae Supporting Petitioner at 5-6, *Dalegrand v. Mukasey*, No. 06-4766 (3d Cir. Nov. 20, 2007) [hereinafter *Dalegrand Brief*].

12. *Id.* at 6 (citing *Francois v. Ashcroft (Francois I)*, 343 F. Supp. 2d 327, 329 (D.N.J. 2004) (citing State Department country reports), *aff'd sub nom.*, *Francois v. Gonzales (Francois II)*, 448 F.3d 645 (3d Cir. 2006)).

13. *Id.*

14. *Id.* at 6 (citing *Auguste v. Ridge*, 395 F.3d 123, 129 (3d Cir. 2005) (citing State Department country reports)).

15. *See Dalegrand*, 288 F. App'x at 839-40.

16. *See id.* at 840-41. The court, in this unpublished opinion, cited *Pierre v.*

Situations such as Dalegrand's suggest not only the need to address the inconsistency in the U.S. courts' interpretation of the Convention,<sup>17</sup> but also to advance alternative legal theories to address these shortcomings. This essay seeks to do both. In the first three sections, I examine the background of the Convention in the context of international human rights instruments (Section I); the context for a critique of the CAT's definition of torture, given the legislative history of the Convention and an existing statute that could aid in correcting the misinterpretation adversely affecting CAT enforcement (Section II); and the adverse international implications of the United States' restrictive meaning of torture (Section III). In a concluding section (IV), I offer possible solutions to the problem, invoking a robust principle of Immigration Lenity to prevent the return of potential torture victims to countries where they are likely to suffer torture.

#### I. HISTORY OF THE CONVENTION AGAINST TORTURE (CAT) AT THE UNITED NATIONS (U.N.) AND IN THE UNITED STATES

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by unanimous agreement of the United Nations General Assembly<sup>18</sup> on December 10, 1984, entered into force on June 16, 1987, signed on April 18, 1988, and sent to the U.S. Senate on May 20, 1988.<sup>19</sup> Much time and, undoubtedly, political wrangling<sup>20</sup> elapsed between 1988, when the

*Attorney General of the United States*, 528 F.3d 180 (3d Cir. 2008), to support its reasoning.

17. Several scholars have noted and discussed the problem. See DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* ch. 7 (database updated May 2013); Alyssa Bell & Julie Dona, *Torturous Intent: Refoulement of Haitian Nationals and U.S. Obligations Under the Convention Against Torture*, 35 N.Y.U. REV. L. & SOC. CHANGE 707 (2011); Mary Holper, *Specific Intent and the Purposeful Narrowing of Victim Protection Under the Convention Against Torture*, 88 OR. L. REV. 777, 782 (2009); Henry Mascia, Comment, *A Reconsideration of Haitian Claims for Withholding of Removal Under the Convention Against Torture*, 19 PACE INT'L L. REV. 287 (2007).

18. Enactment followed five years of active negotiations, but the process of gestation had been long and gradual (ca. 35 years). See J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* 31-33 (1988).

19. *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment: Hearing on S. Treaty Doc. No. 100-20 Before the S. Comm. on Foreign Relations*, 101st Cong. 7, 50 (1990) [hereinafter *CAT Hearing on S. Treaty Doc. No. 100-20*] (statement of Abraham D. Sofaer, legal advisor, Department of State).

20. The delay in bringing the Convention to the Senate for ratification caused Senator Edward Kennedy to urge President Reagan to sign and transmit the Convention to the Senate, so the United States could "demonstrate to the community of nations that we remain staunch defenders of human dignity not only at home, but around the world." 134 CONG. REC. 3720 (1988).

United States signed the document,<sup>21</sup> and 1994, when its ratified version was delivered to the United Nations.<sup>22</sup> As President Reagan declared that CAT was not self-executing, it was not until October 21, 1998, when President Clinton signed the Foreign Affairs Reform and Restructuring Act of 1998<sup>23</sup> authorizing implementation of the Convention and ordering regulations to be promulgated,<sup>24</sup> that the Convention became effective in the United States. By May 2008, 145 countries had signed and/or become parties to it.<sup>25</sup>

CAT was designed to acknowledge the obligation of nations under the United Nations Charter to "promote universal respect for, and observance of, human rights and fundamental freedoms"<sup>26</sup> and to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world"<sup>27</sup> by, among other goals, encouraging states to combat and criminalize torture.<sup>28</sup> Article 1 defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession, . . . when . . . inflicted by or at the instigation of . . . a public official or other person acting in an official capacity."<sup>29</sup> Article 3 prohibits returning people to countries "where there are substantial grounds for believing [they] would be in danger of being subjected to torture,"<sup>30</sup> codifying the principle of non-return, or non-

21. See MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32276, *THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS* 3-4 (2006), available at <https://www.fas.org/sgp/crs/intel/RL32276.pdf>.

22. *Id.* at 3 & n.21; *United States v. Matta-Balesteros*, 71 F.3d 754, 775 (9th Cir. 1995) (citations omitted) (stating that CAT was "operative thirty days after its deposit by the President with the United Nations on October 21, 1994"). By 1987, fifty-nine nations had signed it, and by 1988, twenty-eight of those had ratified it. See BURGERS & DANIELIUS, *supra* note 18, at 107-09.

23. FARRA, *supra* note 4.

24. FARRA ordered that CAT regulations be promulgated within 120 days of its enactment. *Id.* § 2242, 112 Stat. 2681-761, -822, -823 (codified in scattered sections of 22 U.S.C.).

25. *Pierre v. Attorney Gen.*, 528 F.3d 180, 184 (3d Cir. 2008).

26. CAT, *supra* note 1, pmbl.

27. *Id.*

28. See Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 438 (1989); see also Federal Torture Statute, 18 U.S.C. § 2340A (2012) (criminalizing torture occurring outside the United States). This statute defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering." *Id.* § 2340(1).

29. CAT, *supra* note 1, at art. 1, para. 1. The regulation defining torture reflects that language. See 8 C.F.R. § 1208.18(a) (2000).

30. CAT, *supra* note 1, at art. 3, para. 1 (codified in United States law at 28 C.F.R. § 200.1 (2013)). In the United States, a removal order may not be issued "in circumstances that would violate Article 3 of [CAT], subject to any reservations,

refoulement.<sup>31</sup> The Convention created two defenses: withholding of removal and deferral of removal.<sup>32</sup> Because those applying for relief under CAT are often ineligible to apply for asylum, "the prohibition on refoulement in Article 33 [became] the 'cornerstone' of the Convention."<sup>33</sup>

Given that torture committed by official actors was already universally prohibited,<sup>34</sup> one might wonder why the U.S. government saw the need to sign the Convention at all. Following World War II, the United States was a primary force motivating international human rights policy, notwithstanding ongoing contradictions in its implementation of such a policy.<sup>35</sup> Yet, for many years, it was the "only major power . . . that had not adhered to any of the major international human rights conventions," and "opposed many attempts to impose international sanctions against violators of human rights."<sup>36</sup> While ultimately ratifying all but two Protocols to the Geneva Convention,<sup>37</sup> the United States did not initially sign the

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understandings, declarations, and provisos contained" in the Senate ratification resolution, as implemented by FARRA. 28 C.F.R. § 200.1. "Convention-based claims by [noncitizens] subject to removal . . . [are] determined by the Attorney General, in consultation with the Secretary of State." *Id.*; see also H.R. Rep. No. 106-69, at 1 (1999) (statement of Hon. Christopher H. Smith, Chairman, Subcommittee on International Operations of Human Rights). In 1996, the term "deportation" in the Immigration and Nationality Act (INA) was replaced with the term "removal," as the concept is still considered by many to be deportation, I will sometimes use that term in this Article. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (effective Apr. 1, 1997) (IIRAIRA).

31. CAT, *supra* note 1, at art.3, para. 1. "Refoulement" is a French term meaning "return," defined by the United Nations Educational, Scientific and Cultural Organization ("UNESCO") as "the expulsion of persons who have the right to be recognised as refugees," whether to their country of birth or to another country in which they could be subjected to persecution. See *Glossary of Migration Related Terms*, UNESCO.ORG, <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/refoulement/> (last visited Mar. 2, 2014). Substantial grounds are determined by "tak[ing] into account all relevant considerations including . . . the existence . . . of a consistent pattern of gross, flagrant or mass violations of human rights." CAT, *supra* note 1, at art. 3, para. 2.

32. See Procedures for Asylum and Withholding of Removal, 8 C.F.R. §§ 208.16-18 (2013). Deferral of removal, which can be more easily terminated than can withholding if conditions change and it becomes possible to effectuate return, is employed with those who prove likelihood of torture, but are otherwise barred from receiving withholding of removal. See *id.*

33. Andrea Hadaway, *Safe Third Countries in Australian Refugee Law: NAGV v. Minister for Immigration and Multicultural Affairs*, 27 SYDNEY L. REV. 727, 737 (2005) (emphasis omitted) (citations omitted).

34. See *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987); *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 714 (9th Cir. 1992).

35. See LOUIS HENKIN ET AL., HUMAN RIGHTS 1020-26 (Robert C. Clark et al. eds., 2d ed. 2009).

36. *Id.* at 1021.

37. See Convention Relating to the Status of Refugees, opened for signature July

1967 United Nations Protocol Relating to the Status of Refugees.<sup>38</sup> Finally, in 1980, the United States confirmed its adherence to the Protocol by enacting the Refugee Act.<sup>39</sup> The focus on victims of torture arose following resolution of the refugee protection issues.

Even as U.S. government officials echoed global calls to protect human rights and end torture,<sup>40</sup> the United States was accused of not only supporting many countries engaged in indiscriminate killings and torture,<sup>41</sup> but also of itself engaging in torture.<sup>42</sup> Renewed alarms

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28, 1951, 189 U.N.T.S. 150.

38. See Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. The United States has a reputation for not cooperating with the international community on human rights issues. Professor Karen Musalo, for example, concluded her 1994 critique of imposing a proof of intent requirement for asylum applicants this way:

The 1980 Refugee Act was an expression of lofty American ideals to conform with international refugee protections and to extend a genuine welcome to individuals fleeing persecution in their homelands. *Zacarias* and its progeny have transformed the promise of an extended hand to fleeing refugees into a meaningless gesture. The time has come for a reassessment of United States policy and an examination of the extent of national commitment to international norms. An appropriate place to begin would be a reevaluation of the incorporation of an intent requirement . . . to individuals fleeing the infliction of torture and other human rights violations. If the United States aspires to be a leader in the "new world order," then it should lead—and hopefully it will do so in a direction worthy of following.

Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179, 1240 (1994). The same can be said for the United States' implementation of the Convention.

39. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (citing H.R. REP. NO. 96-781, at 19 (1980), reprinted in 1980 U.S.C.C.A.N. 160, 1980 WL 13134); see also Musalo, *supra* note 38, at 1183-84. The United States ratified the Protocol in 1968. See *Cardoza-Fonseca*, 480 U.S. at 432.

40. President Roosevelt "proclaimed human rights to be an aim of the Second World War; Eleanor Roosevelt was a major force in the development of the Universal Declaration of Human Rights." HENKIN ET AL., *supra* note 35, at 1020. The United States was actively involved in the United National Charter and the Nuremberg Charter. *Id.* at 1021. In the 1970s, amateur international human rights activists pushed for and achieved United States leadership in a series of statutes declaring respect for human rights. *Id.* at 1023. Despite resistance from the Reagan Administration, Congress enacted the Anti-Apartheid Act during his presidency. *Id.* at 1024; see also MESSAGE TRANSMITTING CAT, *supra* note 4, at iii ("Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today."); Presidential Statement on United Nations International Day in Support of Victims of Torture, 40 WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS 1167, 1167 (June 26, 2004) ("Freedom from torture is an inalienable human right. . . . America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture . . . in all territory under our jurisdiction . . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.")

41. Robert Parry, *How Reagan Promoted Genocide*, CONSORTIUMNEWS.COM (Feb. 21, 2013), <http://www.consortiumnews.com/2013/02/21/how-reagan-promoted-genocide/>

about its activities followed the September 11, 2001 attacks and the subsequent U.S. effort both to locate those involved in the planning of those attacks and to thwart alleged conspiracies against the United States by groups such as Al-Qaeda.<sup>43</sup> The most notorious alarm involved allegations of both "extraordinary rendition" of terrorist suspects to locations where they would be tortured and so-called water boarding of detainees to extract confessions.<sup>44</sup> President

(in 1980s Guatemala and Nicaragua, also 1970s Chile); *How Clinton Authorized Secret CIA Torture Prisons*, DERKEILER.COM (Dec. 30, 2005) <http://newsgroups.derkeiler.com/Archive/Alt/alt.politics.bush/2005-12/msg03865.html>; *Thinking About Torture*, WASHINGTONPOST.COM, June 19, 2004, available at 2004 WLNR 24460841 (describing support for militaries and torturers in Argentina, Guatemala, and El Salvador since 1960s); LESLEY GILL, *THE SCHOOL OF THE AMERICAS: MILITARY TRAINING AND POLITICAL VIOLENCE IN THE AMERICAS* (2004) (1960s to present). For documentation of President Reagan's involvement in the war against Nicaragua's Sandinista government, see John F. Guilmartin Jr., *Nicaragua is Armed for Trouble*, WALL ST. J., Mar. 11, 1985, at 28, available at [www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB40/00940.pdf](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB40/00940.pdf) (National Security Decision Directive 77, Mar. 13, 1985).

42. Guilmartin Jr., *supra* note 41, at 28.

43. See DEXTER FILKINS, *THE FOREVER WAR* 44-47, 122 (2009).

44. See OPEN SOCIETY FOUNDATIONS, *GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION* (2013), available at <http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf> (detailing, in a 214-page report, a "highly classified program of secret detention and extraordinary rendition of terrorist suspects . . . designed to place detainee interrogations beyond the reach of law. Suspected terrorists were seized and secretly flown across national borders to be interrogated by foreign governments that used torture, or by the CIA itself in clandestine 'black sites' using torture techniques."). The report details actions taken against the 136 identified victims, listing 54 foreign governments that participated. *Id.* at 6; *ACLU v. Dep't of Justice*, 681 F.3d 61, 66-76 (2d Cir. 2012) (detailing plaintiffs' unsuccessful complaints seeking to compel compliance with information request for United States approved enhanced interrogation techniques, including "waterboarding"); see also JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 224, 292 (2008) (discussing the leaking of "torture memos" to newspapers and the public); PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES* 156-57 (2008) (stating that United States officials, in responding to scandal, tried to justify why terrorists needed different rules); *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 234-35, 383 (Karen J. Greenberg & Joshua L. Dratel eds., 2005); Colleen Barry, *Milan Court Convicts 3 Americans in CIA Kidnapping All Tried in Absentia for 2003 Abduction Now Found Guilty*, PITTSBURGH POST-GAZETTE, Feb. 2, 2013, at A4; Peter Foster, *CIA 'Black Jail' Interrogations Ruled as Torture*, DAILY TELEGRAPH, Dec. 14, 2012, available at 2012 WLNR 26739028 (detailing 2004 United States use of "extraordinary rendition" and interrogations in CIA "black" jails condemned as torture by European Court of Human Rights, Strasbourg); Christian Lowe & Chris Borowski, *CIA Secret-Prison Probe Stalls*, CHI. TRIBUNE, Feb. 1, 2013, at 16 (detailing alleged 2006 detention in Poland by CIA); Alfred McCoy, *Outsourcing Torture: President Obama Has Shut Down the CIA's Secret Prisons, but that Hasn't Stopped Rendition Abroad*, SALON.COM (Aug. 14, 2012, 12:49 PM), [http://www.salon.com/2012/08/14/tomgram\\_alfred\\_mccoy\\_perfecting\\_illegality\\_salpart/](http://www.salon.com/2012/08/14/tomgram_alfred_mccoy_perfecting_illegality_salpart/)

George W. Bush's administration was plagued for years by significant controversy surrounding his administration's actions that many considered torturous.<sup>45</sup> Even during the Obama Administration's second term, questions persist regarding the government's commitment to human rights in the face of strains on national security. Charges of U.S.-based torture continue.<sup>46</sup>

; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASHINGTONPOST.COM (Nov. 2, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>.

45. These included lists of approved interrogation methods. See Mike Allen & Susan Schmidt, *Memo on Interrogation Tactics Is Disavowed; Justice Document Had Said Torture May Be Defensible*, WASH. POST, June 23, 2004, at A1 (discussing declassification of an internal Department of Justice ("DOJ") opinion that torturing terrorism suspects might be legally defensible, and exposing a February 7, 2002 memo signed by President Bush indicating his belief in his "authority 'under the Constitution' to deny protections of the Geneva Conventions" to combatants detained during the Afghanistan war); Kathleen Clark & Julie Mertus, *Torturing the Law: The Justice Department's Legal Contortions on Interrogation*, WASH. POST, June 20, 2004, at B3; Anthony Lewis, *Making Torture Legal*, N.Y. REV. BOOKS, July 15, 2004, available at <http://www.nybooks.com/articles/archives/2004/jul/15/making-torture-legal/?pagination=false> (discussing authorization of torture by the president); Dana Priest & Bradley Graham, *Guantanamo List Details Approved Interrogation Methods*, WASH. POST, June 10, 2004, at A13, available at <http://www.washingtonpost.com/wp-dyn/articles/A29742-2004Jun9.html> (discussing lists of various interrogation techniques used on detainees); R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos; Most Scholars Reject Broad View of Executive's Power*, WASH. POST, July 4, 2004, at A12 (describing one critic's view that Bush administration memos condoned torture); see also Bell & Dona, *supra* note 17, at 726-27 (postulating that the 2002 memo "is widely believed to have been used to legitimate United States practices in detention centers in Iraq and Afghanistan, including the Abu Ghraib facility").

A 2004 DOJ Memo rejected "parsing the specific intent element . . . to approve as lawful conduct that [which] might otherwise amount to torture." Memorandum from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel to James B. Comfey, Deputy Att'y Gen., Legal Standards Applicable under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004) [hereinafter Memorandum from Daniel Levin], available at <http://www.justice.gov/olc/18usc23402340a2.htm>; see also Editorial, *Torture Policy*, ASIAN POL. NEWS, June 21, 2004, available at 2004 WLNR 22170051 (publishing editorial excerpts from *The Washington Post*) (referencing Abu Ghraib and Guantanamo prison practices endorsed by Secretary of Defense Rumsfeld); Editorial, *Torture Policy*, WASHINGTONPOST.COM, June 21, 2004, available at 2004 WLNR 24466550 (citing a Pentagon-led task force, which, with the DOJ's support, concluded in March 2003 "that the president was authorized to order torture as part of his war-making powers and that those who followed his orders could be immunized from punishment," the editorial went on to say that "[d]ictators who wish to justify torture, and those who would mistreat Americans, have no need to read our editorials: They can download from the [i]nternet the 50-page legal brief issued by Mr. Rumsfeld's chief counsel."); Robert M. Spiller, Jr., Letter to the Editor, *To Adhere to the Law on Torture*, WASH. POST, June 17, 2004, at 28, available at <http://www.washingtonpost.com/wp-dyn/articles/A48014-2004Jun16.html> ("The outrage of Sept. 11, 2001, does not authorize the outrage of torture.").

46. See, e.g., Rod Nordland & Thom Shanker, *U.S. Military Stops Sending Detainees to Some Afghan Prisons on Rights Fears*, N.Y. TIMES, Jan. 16, 2013, at A6, available at <http://www.nytimes.com/2013/01/17/world/asia/us-military-stops-sending->

### A. Convention Negotiations and the Specific Intent Requirement

The U.S. government played an active role in negotiations to draft the Convention,<sup>47</sup> but was reluctant to agree with other signatories on key issues.<sup>48</sup> While succeeding in its effort to narrow the definition of torture to only "severe pain or suffering," it lost in its effort to limit the definition to acts that were "specifically intended."<sup>49</sup> Ultimately, the Convention prohibited all intentional acts leading to torture.<sup>50</sup> In the United States, following the Senate debate on CAT, the document was forwarded to the President, subject to various reservations, understandings, declarations, and one proviso.<sup>51</sup> While these interpretative guidelines were said to

some-detainees-to-afghan-custody.html?pagewanted=1&r=0 (citing suspending transfer of detainees to some Afghan prisons because of "concern over continuing human rights abuses and torture." The actions "were . . . in anticipation of legal provisions . . . which prohibit Defense and State Department financing to foreign government agencies that practice torture or other human rights abuses."). Others question President Obama's "kill list," through which he has executed many by drone strikes. See Editorial, *The "Kill List" Conundrum*, POST & COURIER, (Feb. 12, 2013, 12:01 AM), <http://www.postandcourier.com/article/20130212/PC1002/130219808/1021/the-x2018-kill-list-x2019-conundrum>; Bill Roggio & Alexander Mayer, *Charts on US Strikes in Pakistan*, LONG WAR J., <http://www.longwarjournal.org/pakistan-strikes.php> (last visited Sept. 30, 2013) (charting United States airstrikes in Pakistan from 2004 through 2013).

47. See CAT Ratification, *supra* note 5, at S17,486 (statement of Sen. Pell); see also ANKER, *supra* note 17, § 7:2 n.1 (citing BURGERS & DANIELIUS, *supra* note 18, at 39-99).

48. "Historically, . . . the United States has been famously averse to international legal constraints and has avoided them by declining to ratify several human rights conventions, adding extensive reservations, understandings, and declarations, interpreting its treaty obligations restrictively, and declining to treat human rights conventions as self-executing." Stephen H. Legomsky, *Rationing Family Values in Europe and America: An Immigration Tug of War Between States and Their Supranational Associations*, 25 GEO. IMMIGR. L.J. 807, 839 (2011) (citing Louis Henkin, Editorial Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 342 (1995)).

49. See Holper, *supra* note 17, at 782. The United States suggested that torture be limited only to acts constituting "severe pain or suffering." *Id.* This limitation was not adopted. See BURGERS & DANIELIUS, *supra* note 18, at 41, 117.

50. Holper, *supra* note 17, at 782; BURGERS & DANIELIUS, *supra* note 18, at 118-19. It is noteworthy that all the signatories to CAT, except the United States, define torture as acts committed with general intent, which may include grossly negligent acts, reckless acts, or even negligence. AHCENE BOULESBAA, *THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT* 20-21 (1999) (citing M.C. Bassiouni, *Commentary on the Draft Convention for the Prevention and Suppression of Torture of the International Association of Penal Law*, 48 REVUE INTERNATIONALE DE DROIT PENAL 282, 282-94 (1978) (Fr.)); see also Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 325 (1994) (noting that proposals to require deliberate, malicious, or systematic infliction of torture were explicitly rejected); BLACK'S LAW DICTIONARY 825-26 (8th ed. 2004) (defining general intent as a form of recklessness or negligence).

51. CAT Ratification, *supra* note 5, at S17,486 (statement of Sen. James Sanford);

merely "clarify the meaning of certain provisions,"<sup>52</sup> not "exclude or modify the legal effect of a treaty,"<sup>53</sup> they effectively did modify the treaty as to the definition of torture. The final version contained an understanding requiring that, to constitute torture, an act must be "specifically intended to inflict severe physical or mental pain or suffering."<sup>54</sup> The 1999 implementing regulations reflect this

see generally U.N., OFFICE OF LEGAL AFFAIRS, TREATY SECTION, TREATY HANDBOOK (rev. ed. 2012) [hereinafter TREATY HANDBOOK], available at <https://treaties.un.org/doc/source/publications/THB/English.pdf> (offering basic information on treaties and outlining procedures for States to become parties to a treaty).

52. TREATY HANDBOOK, *supra* note 51, at 3.

53. *Id.* at 12; see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 314 cmt. d (1987) (providing the following definition of "Understandings": "A treaty that is ratified or acceded to by the United States with a statement of understanding becomes effective in domestic law . . . subject to that understanding. If no such statement is made, indication that the President or the Senate ascribed a particular meaning to the treaty is relevant to the interpretation of the treaty by a United States court in much the same way that the legislative history of a statute is relevant to its interpretation."). Understandings are intended to signal a signatory country's perception of certain language in a treaty without changing its meaning. See Holper, *supra* note 17, at 816 n.208 (citing LIESBETH LIJNZAAD, RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY AND RUIN? 60 (1995)). Understandings contrast with "reservations," which are often considered counteroffers to treaty language. Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 429-30 (2000).

54. S. EXEC. REP. NO. 101-30, at 9 (1990) (text of Resolution of Advice and Consent to Ratification as reported by the Committee on Foreign Relations); see also 8 C.F.R. § 208.18(a)(5) (2002). The context in which this understanding arose is significant: the requirement of "intentional infliction of 'mental' pain and suffering [was] included in the definition of 'torture' to reflect the increasing and deplorable use by States of various psychological forms of torture and ill-treatment, [including] mock executions, sensory deprivations, use of drugs, and confinement to mental hospitals." U.N. Comm. Against Torture, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Addendum*, ¶ 95, U.N. Doc. CAT/C/28/Add.5 (Oct. 15, 1999). Because all legal systems recognize that assessment of mental pain and suffering can be subjective, some in the United States criminal justice community suggested that in this respect the Convention's definition fell short of the United States constitutionally-required definition for a criminal offense. *Id.* To provide clarity, the United States conditioned its ratification upon an understanding that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering, and then specified to what that mental pain or suffering referred ("prolonged mental harm caused by or resulting from . . ."). *Id.* Because this was an understanding, not a reservation, it was not to have altered the Treaty's meaning. Holper, *supra* note 17, at 816. "An 'understanding' . . . is a statement of United States interpretation of a particular provision. 'Understandings' are to be contrasted with 'reservations,' which do modify the terms of a treaty . . . and therefore change the international obligations among these states." See ANKER, *supra* note 17, § 7:2, at 610 n.3. "As such, the 'specifically intended' language in the understanding should not be considered an attempt to modify the intentionality requirement in the Torture Convention. Rather, the language should be interpreted consistent with the Torture Convention. Any interpretation contrary to the Torture Convention's purpose

language:

[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.<sup>55</sup>

Noteworthy is the second sentence, that "unanticipated or unintended severity of pain and suffering is not torture."<sup>56</sup> This statement, following immediately upon the first, which defines torture, demonstrates the drafters' true meaning of "torture"—it does not result from severe pain and suffering if it is unanticipated or unintended.<sup>57</sup>

### B. Effects of the Specific Intent Requirement

Insertion of the "specific intent" requirement caused confusion over precisely what the Senate or President meant by the phrase; did they mean specific intent as understood in domestic<sup>58</sup> criminal law,<sup>59</sup> or something less restrictive? While the legislative history indicates that a more fluid definition was meant than that sometimes used in

would be invalid under international law." *Id.* § 7:26, at 650 (internal citations omitted). Professor Lijnzaad's view is that

reservations and interpretative declarations have little in common. Reservations restrict the legal effect of a treaty for the reserving state, a restriction that comes into force the very moment the reservation is accepted by other States Parties . . . Interpretative declarations thus unilaterally clarify the content of (a particular provision of) a treaty.

LIJNZAAD, *supra* note 53, at 59-60 (citations omitted).

55. 8 C.F.R. § 208.18(a)(5) (2002). The United States was criticized for the specific intent understanding. The Netherlands objected that it considered the understanding to have no impact on the obligations of the United States under the Convention, as it "appears to restrict the scope of the definition of torture under article 1 of the Convention." CAT-UNTC Website, *supra* note 5. Some claim that imposition of the reservations, understandings, and declarations supports the notion that the United States sees itself as entitled to exceptions regarding international agreements, titling this "American Exceptionalism." Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1482-83 (2003). Others claim that the United States has not evidenced a true commitment to human rights. See Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 95 (2007) ("Only through the full adoption of international human rights law can the United States make a genuine commitment to human rights and be held to that commitment.").

56. 8 C.F.R. § 208.18(a)(5).

57. Holper, *supra* note 17, at 789. In describing this obvious and logical meaning, I am reminded of the rule of "Occam's Razor," that the simplest of multiple competing theories is preferable. *Occam's Razor*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/occam's%20razor> (last visited Aug. 27, 2013).

58. For purposes of this article, the term "domestic" means the United States.

59. See Holper, *supra* note 17, at 789-806 (describing the complexity of "intent" in criminal law, and its relationship to immigration law).

criminal law,<sup>60</sup> a contrary answer was provided by the BIA in *In re J-E*,<sup>61</sup> holding that a Haitian applicant for CAT protection was properly denied relief, as he had not proved sufficiently that the torture he feared would "be specifically intended to inflict severe physical or mental pain or suffering."<sup>62</sup> Key to the BIA's decision was its understanding of the regulation's term "specifically intended."<sup>63</sup> While opposed vigorously by several dissenting judges,<sup>64</sup> and since critiqued by scholars and commentators alike,<sup>65</sup> the ruling has been widely—although inconsistently—followed in the federal courts.<sup>66</sup>

60. See *infra* Section II.

61. 23 I. & N. Dec. 291, 300, 303-04 (B.I.A. 2002) (13-7 decision) (ruling that fear of imprisonment in Haiti's inadequate prisons was insufficient to prove the government specifically intended to cause severe pain and suffering and thereby inflict torture even though it intentionally detained criminal deportees knowing that the detention facilities were substandard); see also Bell & Dona, *supra* note 17, at 718-20. *But see* Holper, *supra* note 17, at 795-806 (criticizing the decision in *In re J-E*).

62. See *In re J-E*, 23 I. & N. Dec. at 298-300; see also ANKER, *supra* note 17, at § 7:26, at 651 n.18 (citing cases following *J-E*, including those in the First, Second, Third, Fifth, Ninth, and Eleventh circuits between 2004 and 2011). *But see* Habtemicel v. Ashcroft, 370 F.3d 774, 783 (8th Cir. 2004) (declining to follow the *J-E* standard).

63. *In re J-E*, 23 I. & N. Dec. at 300-01 ("Specific intent" is defined as the "intent to accomplish the precise criminal act that one is later charged with," while "general intent" commonly "takes the form of recklessness . . . or negligence.") (quoting BLACK'S LAW DICTIONARY 813-14 (7th ed. 1999)); 8 C.F.R. § 208.18(a)(5) (2002). In fact, the *In re J-E* majority seems to have forgotten, at least for this case, that immigration remedies have long been considered to be civil, not criminal remedies. See *Bilokumsky v. Tod*, 263 U.S. 149, 154 (1923) ("[T]here is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak."); see also Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (deportation proceedings are civil in nature).

64. Dissenting opinions were filed by Board Member Paul Wickham Schmidt, joined by John W. Guendelsberger, Noel Ann Brennan, Cecelia M. Espenoza, and Juan P. Osuna; a separate dissenting opinion was filed by Board Member Lory Diana Rosenberg, joined by Cecelia M. Espenoza. *In re J-E*, 23 I. & N. Dec. at 304, 310 (Schmidt, Board Member & Rosenberg, Board Member, dissenting).

65. See Bell & Dona, *supra* note 17, at 718-23; Holper, *supra* note 17, at 796-806; Mascia, *supra* note 17, at 289, 310-13.

66. Examples abound. See, e.g., Callahan v. A.E.V., Inc., 182 F.3d 237, 261 n.15 (3d Cir. 1999) ("Although harm to the plaintiffs may have been a probable ultimate consequence of the defendants' actions, we do not think they specifically intended to cause such harm."); *United States v. Blair*, 54 F.3d 639, 642 (10th Cir. 1995) ("In short, a specific intent crime is one in which the defendant acts not only with knowledge of what he is doing, but does so with the objective of completing some unlawful act."); *United States v. Twine*, 853 F.2d 676, 680 (9th Cir. 1988) (holding that to prove specific intent, "the level of culpability must exceed a mere transgression of an objective standard of acceptable behavior (e.g., negligence, recklessness)"); *United States v. Neiswender*, 590 F.2d 1269, 1273 (4th Cir. 1979) ("In our view, [to prove specific intent] the defendant need only have had knowledge or notice that success . . . would have likely resulted in an obstruction of justice. Notice is provided by the reasonable foreseeability of the natural and probable consequences of one's acts."). For discussion of the circuit courts that deferred to *In re J-E*, see Bell & Dona, *supra* note

Strong opposition has also arisen among both concurring and dissenting justices at both the BIA and federal court levels,<sup>67</sup> which have noted that the opinion is "inconsistent with both international and domestic criminal law"<sup>68</sup> and runs afoul of CAT when it places "a greater burden on claimants than is permissible under the Torture Convention."<sup>69</sup>

The Supreme Court has not ruled on the definition of torture under CAT. Given the Court's historic reluctance to speak to matters related to immigration based on its long-held principle that Congress and the Executive Branch have plenary power over immigration,<sup>70</sup> it

17, at 720-23.

The Immigration Law Advisor offered a succinct summary of the jurisprudence on this issue in early 2009, indicating that the prevailing view in "[t]he Second, Third, and Ninth Circuits . . . [is] that specific intent requires that 'the actor intend the actual consequences of his conduct, as distinguished from the act that causes these consequences.'" Sarah Cade, *Recent Developments in the Specific Intent Standard in Convention Against Torture Cases*, IMMIGR. L. ADVISOR, Jan. 2009, at 5 (citation omitted), available at <http://www.justice.gov/eoir/vll/ILA-Newsletter/ILA%202009/vol3no1.pdf>. The cases require "that for an act that causes pain and suffering to be torture, the actor must have consciously desired pain and suffering to result." *Id.* Other circuits, such as the Fifth and Eleventh, "also appear poised to follow this standard." *Id.* One might question the extent to which federal courts should be narrowing the meaning of treaty terms. In this case, it is likely that these decisions are causing precisely the harm the Convention was intended to prevent. Research is needed into the federal courts' involvement in treaties and other international agreements concerning treaties not involving immigration.

67. For a thorough summary of the jurisprudence on this issue since *In re J-E*, see ANKER, *supra* note 17, § 7:26, at 649 nn.2-4.

68. *Id.* § 7:26, at 651.

69. *Id.* § 7:26, at 649.

70. While the plenary power may be falling from the Court's favor, oddly, it was cited by President Bush as he targeted Arab and Muslim noncitizens for special rules during the so-called 'war on terror' following September 11, 2001. See Kevin R. Johnson, *Hurricane Katrina: Lessons About Immigrants in the Administrative State*, 45 HOUS. L. REV. 11, 33-35 (2008). For a detailed summary of the key plenary power cases, see Irene Scharf, *The Exclusionary Rule in Immigration Proceedings: Where it Was, Where it Is, Where it May Be Going*, 12 SAN DIEGO INT'L L.J. 53, 56 n.6 (2010). More recently, several cases, including *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001), *INS v. Chadha*, 462 U.S. 919, 959 (1983), and *Francis v. INS*, 532 F.2d 268, 272 (2d Cir. 1976), have given rise to the notion among scholars that "cracks" have developed in the plenary power doctrine. See discussion in STEVE LEGOMSKY & CHRISTINA RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 181-208 (4th ed. 2005).

The Court continues to demonstrate willingness to scrutinize immigration legislation. In *Judulang v. Holder*, 132 S. Ct. 476, 488-90 (2011), the Court ruled arbitrary and capricious the requirement of finding comparable grounds in the INA sections on removal and inadmissibility in order for a LPR to apply for suspension of deportation under INA § 212(c), which concerns non-LPRs. *Id.* In *Arizona v. United States*, 132 S. Ct. 2492, 2526-29 (2012), the Court struck down much of Arizona's statute relating to noncitizens who are undocumented, declaring the statute unconstitutional as it invaded federal control of immigration.

Critical analyses of the plenary power have been undertaken by immigration

is unlikely to resolve the issue in the near future, elevating the urgency to address the confusion surrounding this key issue of humanitarian concern. As Professor Mary Holper has suggested, it is vitally important to clarify the meaning of torture, as its proper and expeditious resolution could avoid a "life-or-death situation for most applicants."<sup>71</sup> She documents thoroughly the adverse effects of these decisions—the BIA's disregard, even contradiction, of standard domestic criminal law jurisprudence concerning specific intent;<sup>72</sup> and the inadequate protection this affords potential torture victims.<sup>73</sup>

## II. CONTEXT FOR A CRITIQUE OF THE CONVENTION'S DEFINITION OF TORTURE

The legislative history of CAT demonstrates that the intended meaning of torture by U.S. government officials is not as narrow as has been interpreted by either the BIA or by some federal courts. Noteworthy is the failure of a Deputy Assistant State Department official testifying before a House Congressional subcommittee in 1999 concerning U.S. policy towards victims of torture to mention specific intent.<sup>74</sup> When asked what she believed torture to be, the official responded, "we often refer to exactly what it says in the Convention, . . . the term 'torture' means 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . ' [I]t is fairly comprehensive."<sup>75</sup> This is evidence that, as late as 1999, specific intent was not vital to the

scholars, including: Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1991) (noting lack of communication between courts and Congress about immigration law because of plenary power); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION—IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 118-33 (1996) (rejecting the argument of plenary power over immigration); T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 7 (2002) (criticizing the "unfettered authority" this power gives Congress).

71. Holper, *supra* note 17, at 815.

72. *Id.* at 795-96. Professor Holper suggests that, consistent with the legislative history, purpose of CAT, and criminal law jurisprudence, the BIA adopt a revised definition requiring either a standard of "knowing that severe pain or suffering is foreseeable" or "knowledge of foreseeable consequences." *Id.* at 779.

73. *Id.* at 795-96; see also Mascia, *supra* note 17, at 311 ("[U]nnecessarily narrowing the definition of torture, [sic] would abrogate the very purpose of the Senate's ratification, 'to make more effective 'the struggle against torture . . . throughout the world.'" (quoting *Auguste v. Ridge*, 395 F.3d 123, 147 (3d Cir. 2005)).

74. *United States Policy Towards Victims of Torture: Hearing on United States Policy Towards Victims of Torture Before the Subcomm. on Int'l Operations & Human Rights of the H. Comm. on International Relations*, 106th Cong. 3 (1999) (statement of Leslie Gerson, Deputy Assistant Secretary, Bureau of Democracy, Human Rights and Labor, United States Department of State).

75. *Id.* at 18.



executive branch.

Prior to approving the Convention, neither the Senate nor the President indicated precisely what they expected when using the phrase "specific intent." To be sure, neither indicated that they meant it to mean the same thing when applied to both lay applicants and U.S. officials subject to criminal prosecution.<sup>76</sup> In fact, both President Reagan's and the State Department's transmittals to the Senate dispel claims that they intended such a narrow meaning.<sup>77</sup> Secretary of State Shultz's letter explained that "[b]ecause specific intent is required, an act that results in unanticipated and unintended severity of pain and suffering is not torture for purposes of this Convention."<sup>78</sup> The President stated his intentions differently in 1990 when, at hearings before the Senate's Committee on Foreign Relations, through an assistant, the President added that "to constitute torture the action must be done in a deliberate and calculated manner, or, to put it in customary U.S. legal terminology, it must be done with specific intent to inflict such a high level of pain."<sup>79</sup>

This presidential sense is wholly different from and far less restrictive than that later adopted by the BIA in *J-E*,<sup>80</sup> where the Board ruled that applicants needed to prove that authorities "intentionally inflicted" pain and suffering or that the conditions resulting in harm had been deliberately created for "a proscribed or prohibited purpose," such as obtaining confessions or punishing

76. Even scholars of criminal law disagree over the meaning of specific intent. See, e.g., Holper, *supra* note 17, at 779. Not all U.S. criminal prosecutions require specific intent; some require only the general intent to do an act. See, e.g., 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW §§ 107, 111 (Clark Boardman Callaghan ed., 15th ed. 2012). "If . . . the crime charged requires only a so-called 'general intent' (usually connoting general malice or its equivalent), such intent is presumed simply by showing that the defendant engaged in the prohibited conduct . . ." *Id.* § 111 (citing general intent crimes of manslaughter, reckless endangering, and criminal property damage). "[T]he drafters of the CAT did not wish this definition to be 'understood as a definition in the strict sense of penal law. . . . [Article 1] gives a description of torture for the purpose of understanding and implementing the Convention rather than a legal definition for direct application in criminal law and criminal procedure.'" Holper, *supra* note 17, at 802 (citing BURGERS & DANIELIUS, *supra* note 18, at 122) (omission in original).

77. MESSAGE TRANSMITTING CAT, *supra* note 4, at iii-vi (message from state department to President on May 10, 1988 and message from the President of the United States transmitting the CAT on May 20, 1988).

78. *Id.* at 3.

79. CAT Hearing on S. Treaty Doc. No. 100-20, *supra* note 19, at 16-17 (statement of Mark Richard, Assistant Attorney General, Criminal Division, Department of Justice); see also Holper, *supra* note 17, at 788 n.64.

80. See *In re J-E*, 23 I. & N. Dec. 291 (B.I.A. 2002). See the discussion of the case *supra* Section I.B.

detainees.<sup>81</sup>

To be sure, there were concerns that a broad understanding of torture would lead to prosecutions of U.S. government officials. These concerns were raised during the Senate ratification hearings,<sup>82</sup> and apparently plagued the negotiators.<sup>83</sup> Whether or not well-founded, these apprehensions do not justify an interpretation of torture that denies protection to potential torture victims.

The legislative history of the Torture Victim Protection Act ("TVPA")<sup>84</sup> supports the view that Congress's use of the word "torture" is not restricted to the narrow concept understood by U.S. courts vis-a-vis CAT. Enacted during the same time, the purpose of the TVPA was to establish "a Federal right of action against violators of human rights."<sup>85</sup> It defines torture as "any act . . . by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on [an] individual."<sup>86</sup> Notably, a "specific intent" requirement is absent in this definition.<sup>87</sup>

The House of Representatives' discussion leading to the TVPA's enactment supports the conclusion that Congress understood torture to mean the same thing as that meant by all CAT signatory nations other than the United States.<sup>88</sup> The discussion also reveals that the legislators had CAT in mind when considering the TVPA, with Congressman Swindall noting that "[i]n 1984, Congress adopted and the President signed into law a joint resolution condemning acts of torture. Public Law 98-447 [TVPA] reaffirms [the United States'] strong objections of [sic] the use of torture under any circumstances."<sup>89</sup> "The definition of 'torture' contained in the

81. *Id.* at 298; see *supra* Section I.B (discussing and critiquing *In re J-E*).

82. CAT Hearing on S. Treaty Doc. No. 100-20, *supra* note 19, at 16-17 (statement of Mark Richard, Assistant Attorney General, Criminal Division, Department of Justice); see also Holper, *supra* note 17, at 788 n.64.

83. Holper, *supra* note 17, at 788 n.64 (referring to the CAT Hearing, statements of Senators Helms and Pressler).

84. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 (2006)). The Act was passed by the United States House of Representatives on October 5, 1988. H.R. Res. 1417, 134th Cong., 134 CONG. REC. 28614 (1988) (enacted).

85. H.R. Res. 1417, 134 CONG. REC. 28612.

86. 28 U.S.C. § 1350(3)(b) (2006).

87. See *id.*

88. See H.R. Res. 1417, 134 CONG. REC. 28612 (statement of Rep. Swindall).

89. *Id.* (statement of Rep. Swindall). In later years, President George Bush, under pressure following accusations of torture by soldiers in Afghanistan, reaffirmed the government's opposition to torture in saying, "America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture . . . in all territory under our jurisdiction . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere." Presidential Statement in Support of Victims of Torture, *supra* note 40, at 1167-68.

[TVPA],” he explained, “is derived from the widely recognized definition contained in the U.N. Convention against Torture.”<sup>90</sup>

The argument that the TVPA and the CAT are distinct statutes, so each may offer its own definition of torture, cannot stand. While there is scant evidence of the U.S. CAT drafters’ concern for potential torture victims,<sup>91</sup> the intended beneficiaries of the TVPA are clearly in similar situations to CAT applicants—TVPA beneficiaries are torture victims for whom a civil cause of action was created to offer them compensation; CAT beneficiaries are those who reasonably fear they will be tortured if forcibly returned to their home countries.<sup>92</sup> The similarity of focus in the two Acts highlights the need for a shared definition.

The paucity of successful Convention cases attests to the effectiveness of the narrow definition of torture, yet it also attests to the adverse humanitarian effects that have befallen CAT applicants. Only a few successful CAT cases have been identified in which the U.S. government challenged the applicant’s proof of specific intent,<sup>93</sup>

90. H.R. Res. 1417, 134 CONG. REC. 28613 (statement of Rep. Swindall).

91. In fact, other than President Reagan’s limited statements, I have been unable to find additional presidential statements invoking concerns for potential victims. See *supra* note 40 and accompanying text. Discussions in the legislature concerned governmental officers as torture defendants. *CAT Hearing on S. Treaty Doc. No. 100-20*, *supra* note 19, at 16. Some concern was also expressed about the constitutional rights of accused torturers. See *id.*

92. Compare Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 (2006)), with CAT, *supra* note 1.

93. See *Lavira v. Attorney Gen.*, 478 F.3d 158, 170-72 (3d Cir. 2007); *Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003) (stating that “we do not interpret this as a ‘specific intent’ requirement. . . . [W]e conclude that the Convention simply excludes severe pain or suffering that is the unintended consequence of an intentional act.”). The Third Circuit’s take is more nuanced. Shortly after *Lavira*, *Pierre v. Gonzales*, 502 F.3d 109 (2d Cir. 2007), was decided, disagreeing with *Lavira* but very particularly, ultimately allowing the ruling to stand. In note ten of the *Pierre* opinion, the court stated that the remand of the defendant in *Lavira* (native of Haiti, HIV-positive, with criminal convictions) occurred:

because both the IJ and the BIA summarily relied on [*J-E*] and failed to “focus . . . on the specifics . . . .” The *Lavira* panel purported to further hold that *Lavira* had [an] . . . argument that the extremely high likelihood of an HIV-positive petitioner’s death in Haitian prison meant that any Haitian official who detained such a petitioner would exhibit “willful blindness” to the likelihood of death; the panel reasoned that this would adequately show specific intent. . . . [T]his proposition seems to us inconsistent with the Third Circuit’s holding in *Auguste* that “[t]he mere fact that the Haitian authorities have knowledge that severe pain and suffering may result by placing detainees in these conditions does not support a finding that the Haitian authorities intend to inflict severe pain and suffering.” . . . To the extent the two cases are in tension, *Auguste* is the more persuasive precedent, though it is hard to contest *Lavira*’s chief holding: IJs should carefully consider evidence that individual petitioners put forth to distinguish their cases from [*J-E*]. That is what the IJ did here.

while U.S. government officials have avoided prosecution under the Convention.<sup>94</sup>

In the last year for which CAT and asylum figures are extant, fiscal year (“FY”) 2011, of the 27,244 CAT applications filed in immigration courts tracked through the judicial process, only 629 were granted, a meager 2.3 percent grant rate, as compared with a 52 percent grant rate for asylum cases brought in immigration court.<sup>95</sup> Granted, the comparison of asylum and CAT cases is not necessarily one of “apples to apples.” Distinctions between asylum and CAT necessitate that fewer CAT applications will succeed as compared with those asking for asylum.<sup>96</sup> Nor do we know the number of potential CAT applicants who, upon learning of the likelihood that their applications were to be denied, have either failed to apply or have withdrawn their applications.<sup>97</sup> Nonetheless, it is difficult to imagine that there would not have been additional successful CAT claims had torture been defined more appropriately.

### III. ADVERSE INTERNATIONAL IMPLICATIONS

Other nations seem to agree that the definition of torture is being, literally, tortured by the United States.<sup>98</sup> Recently, Canada’s Immigrant and Refugee Board (“IRB”) noted,

*Pierre*, 502 F.3d at 122 n.10 (internal citations omitted).

94. See *Holper*, *supra* note 17, at 806 & n.153.

95. U.S. DEPT OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, OFFICE OF PLANNING, ANALYSIS AND TECH., FY 2011 STATISTICAL YEAR BOOK K1, M1 (2011), available at <http://www.justice.gov/eoir/statspub/fy11syb.pdf>. Because these numbers do not specify why applications were rejected, they alone can help us identify neither the applications rejected because of the specific intent requirement, nor the potential applicants who failed to apply because they learned of the difficulty of proving specific intent. It is fair to conclude that there are probably potential applicants who were returned and subsequently tortured because of this interpretation.

96. Awards of asylum seek to prevent persecution, while awards of CAT protection seek to prevent torture. *FY 2012 A Record Year for Asylum Cases*, TRAC IMMIGRATION (Jan. 15, 2012), <http://trac.syr.edu/immigration/reports/306/>. “The odds of an asylum claim being denied in Immigration Court reached [a] historic low in FY 2012, with only 44.5 percent being rejected. Ten years ago, almost two out of three (62.6%) individuals seeking asylum lost their cases in similar actions.” *Id.*

97. It could be informative to study whether people are less likely to apply for a legal benefit if they expect success to be unlikely.

98. “The U.S. provisions have been criticized for imperfectly implementing the obligations under the Torture Convention.” HENKIN ET AL., *supra* note 35, at 979-80 (citing Concluding Observations of the Human Rights Committee, 87th Sess., July 10-28, 2006, ¶ 16, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006)) (noting with concern the United States’ requirement of a “more likely than not” standard in non-refoulement cases). The Committee Against Torture, to which the United States claims it is not subject, “expressed its concern that the United States had established secret detention facilities on the territory of other states, that it engaged in enforced disappearances, that it engaged in extraordinary renditions, . . . and that its legal practices fostered impunity for acts of torture.” HENKIN ET AL., *supra* note 35, at 1609.

the Torture Convention's definition of torture "does not require malevolent intent." . . . "Severe pain or suffering is considered to be intentionally inflicted if . . . it is a desired consequence . . . or it is known to be a likely consequence. If severe pain or suffering is the result only of an accident or negligence, it is not intentional. However, where the perpetrator commits an act which is objectively harmful, the tribunal may presume that pain or suffering was intended." . . . International war crimes tribunals have interpreted the phrase "intentionally inflicted" in a similar manner, construing it to require an act or omission which is deliberate, not accidental . . . . The lack of a subjective desire to cause severe pain or suffering does not constitute a valid defense. Rather, knowledge that prohibited consequences would result from intentional acts satisfies the intentionality requirement.<sup>99</sup>

These concerns were reflected in a ruling by a Canadian federal court that reviewed its 2004 Safe Third Country Agreement ("STCA") with the United States,<sup>100</sup> causing it to rule against implementation of the STCA.<sup>101</sup> The agreement between the two countries provides that the "country of last presence" is responsible for deciding asylum claims presented at a land border port of entry.<sup>102</sup> The country of last presence is either Canada or the United States when the person applying was physically present there immediately before claiming refugee status at a land border.<sup>103</sup> Article IV of the STCA permits each nation to return to the other nation asylum applicants presenting themselves at a land border.<sup>104</sup> In effect, STCAs "absolve [nations] of substantively determining applications for asylum under the Convention"<sup>105</sup> rather than upholding asylum as the

99. ANKER, *supra* note 17, § 7:26, at 649-50 (citations omitted).

100. Agreement Between the United States and Canada for Cooperation in the Examination of Refugee Status Claims from National of Third Countries, U.S.-Can., Dec. 5, 2002, T.I.A.S. No. 04-1229 (entered into force Dec. 29, 2004) [hereinafter STCA], available at <http://www.state.gov/documents/organization/178473.pdf>. For final rule, see 69 Fed. Reg. 69,480 (Nov. 29, 2004).

101. See discussion *infra* Section III.

102. STCA, *supra* note 100, art. 1.1(a).

103. *Id.* art. 4.

104. *Id.*

105. Hadaway, *supra* note 33, at 727 (emphasis omitted). The author refers to the Convention Relating to the Status of Refugees, inaugurated at Geneva in 1951, as amended by the Protocol Relating to the Status of Refugees, inaugurated at New York in 1967. The United States never signed the 1951 Convention Relating to the Status of Refugees, but did ratify the Protocol in 1968. See *supra* note 37-39 and accompanying text. In 1980, Congress passed the Refugee Act, codifying the provisions of the Protocol. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.). The Refugee Act amended the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537 (2006)). The STCA has been subject to substantial and searing critique. "This report concludes that . . . Canada is systematically closing its borders to asylum seekers, and circumventing its refugee protection obligations under domestic

indispensable tool to accomplish the international protection of refugees. The Canada-United States Agreement has returned "more refugee status applicants to the United States than vice versa[;]" about 15,000 people each year apply for asylum in Canada after passing through the United States, while "only about 200 each year do the reverse."<sup>106</sup> If those refugees, when returned to the United States, face refoulement to countries where they are likely to be tortured, Canada will have effected a "[c]hain refoulement" in violation of principles enunciated by the United Nations High Commissioner for Refugees (UNHCR).<sup>107</sup>

Statistics confirm that STCAs thwart appropriate implementation of the Convention against Torture.<sup>108</sup> A UNHCR Report on the United States-Canada STCA for the period between November 29, 2004 and November 6, 2005 indicated that sixteen cases adjudicated by DHS were found to be subject to the STCA without having the benefit of any exceptions, whereas twenty-three were found subject to it but benefited by certain exceptions.<sup>109</sup> Of the eighteen cases adjudicated by the Executive Office of Immigration Review (EOIR)<sup>110</sup> between June 16 and December 9, 2005, where seventeen applicants were charged with being inadmissible and one of the seventeen had been referred by United States Citizenship and

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and international law." Efrat Arbel and Alletta Brenner, Harvard Immigration and Refugee Law Clinical Program, *Bordering on Failure: The Canada-U.S. Border Policy and the Politics of Refugee Exclusion* (Nov. 2013), 1.

106. STEPHEN H. LEGOMSKY, SECONDARY REFUGEE MOVEMENTS AND THE RETURN OF ASYLUM SEEKERS TO THIRD COUNTRIES: THE MEANING OF EFFECTIVE PROTECTION 13 (2003) (internal citation omitted) (figures from 2001-2002 period).

107. "Article 33 of the Refugee Convention expressly refers to refoulement 'in any manner whatsoever.' Chain *refoulement* by causing a person to return to another place from which refoulement occurs is prohibited. Rejection of asylum seekers at the frontier is also prohibited by this phrase and agreement as to the interpretation of the Convention on this point is reflected in numerous conclusions of the Executive Committee of the UNHCR." Penelope Mathew, *Australian Refugee Protection in the Wake of the Tampa*, 96 AM. J. INT'L L. 661, 666 (2002) (internal citation omitted); see U.N. High Comm'r for Refugees, *Human Rights and Refugee Protection, Self-Study Module 5, Vol. II*, at 60 (Dec. 15, 2006), available at <http://www.unhcr.org/publ/PUBL/45a7ad712.pdf> ("Non-refoulement obligations under human rights law would also entail protection against chain-refoulement, that is, removal to a country from which the individual would, in turn, be transferred or returned to another country where he or she would be subject to a serious human rights violation from which the non-refoulement obligation derives.").

108. U.N. High Comm'r for Refugees, Monitoring Report: Canada - United States "Safe Third Country" Agreement, Dec. 29, 2004-Dec. 28, 2005, 111 (Dec. 14, 2006) [hereinafter UNHCR Monitoring Report], available at <http://www.unhcr.org/455b2cca4.html>.

109. *Id.* at 111-12.

110. The EOIR is the administrative body that decides deportation cases. U.S. DEPT OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, OFFICE OF PLANNING, ANALYSIS AND TECH., *supra* note 95, at B1.

Immigration Services (USCIS),<sup>111</sup> one was terminated, two cases were not reported on, one person moved to change venue, and the rest (besides the USCIS-referred case) were awaiting Master Calendar hearings.<sup>112</sup> While the paucity of data (fifty-seven cases) makes it difficult to make firm inferences, and not all reports followed the cases to finality, the data illustrate that, of the fifty-seven cases documented, sixteen were subject to the STCA and thirteen additional applicants may also have eventually been subject to it, for a potential total subject to the STCA of twenty-nine of fifty-seven cases, nearly fifty-one percent.

The finding of a Canadian court in 2007<sup>113</sup> that the STCA violated Canadian law<sup>114</sup> both placed into doubt the status of the United States vis-a-vis the Convention<sup>115</sup> and surfaced the difficulties the United States could face when interpreting treaties such as CAT

111. *About Us*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/aboutus> (last visited Mar. 9, 2013) ("[USCIS] is the government agency that oversees lawful immigration to the United States.").

112. UNHCR Monitoring Report, *supra* note 108, at 63, 110-11.

113. *Canada Council for Refugees v. R.* (*Canadian Council Trial*), 2007 F.C. 1262, para. 338(b) (Can.), *rev'd R. v. Canadian Council for Refugees* (*Canadian Council Appeal*), 2008 F.C. 229, para. 46 (Can. C.A.). While the Canadian Court of Appeals did later overturn the trial court's ruling, it did so on technical grounds, maintaining the significance of the earlier ruling. *See id.* para. 102-05. In *Canadian Council for Refugees v. Canada* (2009), [2008] S.C.R. 422 (Can.), the suit was dismissed (without reasons) on February 5, 2009.

114. Canada's ratification of CAT did not interpose the specific intent requirement. *See Canadian Council Trial*, 2007 F.C. 1262. This places Canada in a difficult position vis-a-vis the United States when Canada invokes the STCA against an asylum applicant who passed through the United States; when the STCA causes Canada to refuse to entertain an application, returning the applicant to the United States, which will likely refole that person to a country that could commit torture, is not Canada effectively violating its own CAT commitment under Article 33?

115. The Canadian appeals court overturned the decision in 2008, but on technical grounds. *Canadian Council Appeal*, 2008 F.C. 229, para. 105. Reversal justifications included: Charter challenges cannot be mounted on the basis of hypotheticals and the applicant's claim was ultimately reviewed by United States Immigration authorities, *id.* para. 102; and no factual basis upon which to assess the alleged Charter breaches, as they were not advanced by a refugee denied asylum in Canada pursuant to the Regulations and facing a real risk of *refoulement* in being sent back to the United States. *Id.* para. 103. My attempts to locate news and commentary following this case have been unsuccessful, but Professor Karen Musalo found Canadian critique of a United States Supreme Court decision on a related issue. In her analysis of the United States implementation of the Refugee Act, she cited criticism, by the Canadian IRB Chairperson, of the decision in *INS v. Elias-Zacharias*, 502 U.S. 478 (1992), "for its seeming contempt for international precedent and for the decisions of other countries: 'In these days of global interdependence perhaps even the Supreme Court might benefit from looking at how courts and refugee boards in like-minded countries have decided similar cases . . . .' [The Chairperson] noted that the majority . . . failed to 'cite a single international precedent, judicial or academic' in reaching its conclusion." Musalo, *supra* note 38, at 1192 n.56 (citing R.G.L. Fairweather, *Political Persecution*, N.Y. TIMES, Mar. 7, 1992, at A24).

in a significantly narrower manner than do other signatories. The court in *Canadian Council Trial* deemed the ruling in the BIA case of *In re J-E-* to be incorrect, particularly in its conclusions about specific intent, in which it cited Professor David Martin's<sup>116</sup> affirmation that *Zubeda v. Ashcroft* had applied "a less exacting standard" for the intent required in these torture claims.<sup>117</sup> The *Canadian* Court held:

Although the regulations require that severe pain or suffering be "intentionally inflicted," we do not interpret this as a "specific intent" requirement. Rather, . . . the Convention simply excludes severe pain or suffering that is the *unintended consequence of an intentional act* . . . . The intent requirement therefore distinguishes between suffering that is the accidental result of an intended act, and suffering that is purposefully inflicted or the foreseeable consequence of deliberate conduct. However, this is not the same as requiring a specific intent to inflict suffering.<sup>118</sup>

The Court cited *Zubeda v. Ashcroft's* critique of *In re J-E-* in support of its conclusion that "requiring an alien to establish the specific intent of his/her persecutors could impose insurmountable obstacles to affording the very protections the community of nations sought to guarantee under the Convention Against Torture,"<sup>119</sup> as it questioned whether the United States' view of Article 3 of the Convention differed from that of Canada's.<sup>120</sup> According to the court, because requirements of the Canadian Charter of Rights and Freedoms<sup>121</sup> must be satisfied when Canadian officials return refugee claimants to the United States,<sup>122</sup> once it found that "[s]everal aspects of United States law put genuine refugees at risk of refoulement to persecution and/or refoulement to torture,"<sup>123</sup> and thus concluded that the STCA did not satisfy Charter requirements, it struck down the law.

116. *Profile of David A. Martin*, UNIV. OF VA. SCH. OF LAW, <http://www.law.virginia.edu/lawweb/faculty.nsf/fhpbi/1187875> (last visited Aug. 28, 2013).

117. *Canadian Council Trial*, 2007 F.C. 1262, para. 247.

118. *Id.* (quoting *Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003)) (emphasis added) (citations omitted).

119. *Id.* para. 248 (quoting *Zubeda*, 333 F.3d at 474).

120. *Id.* para. 249. "It is in the area of arbitrariness and lack of discretion where the principles of fundamental justice collide with the operation of the STCA." *Id.* para. 290.

121. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.).

122. *Canadian Council Trial*, 2007 F.C. 1262, para. 281.

123. *Id.* para. 283-90 (reasoning that the refugee claimant's life, liberty, or security of the person was at stake under this law).

#### IV. SOLUTIONS TO THE PROBLEM OF THE TORTURED DEFINITION OF TORTURE

So long as these varying and incorrect definitions of torture are going to stand, several options are available from the point of view of immigration advocates. At a minimum, the same incorrect definition should apply to all uses of the term in U.S. law. A unified definition might inspire efforts to clarify and correct this important yet misunderstood concept. As the issue is not likely to be reviewed by the U.S. Supreme Court due to the limiting influence of both the plenary power and *Chevron* principles,<sup>124</sup> a unitary definition will encourage immigrants, attorneys, scholars, and political supporters to lobby for fairness.<sup>125</sup> Alternatively, the definition of torture in the TVPA could be unified with that of the CAT, as discussed in Section II above.

Options already proposed could also be adopted. First is Professor Holper's suggestion that the Attorney General overrule *In re J-E* and interpose her proposed definition of specific intent.<sup>126</sup> In contrast to the varying extant definitions of specific intent, many reflecting criminal law principles,<sup>127</sup> Holper's "more generous definition ... would allow adjudicators to focus on the likely harm to the victim" and would thus "better effectuate the history and purpose of protection under Article 3 of the CAT."<sup>128</sup> This would require knowledge that "the act would likely result in severe pain or suffering."<sup>129</sup> Holper's view is supported by the Department of Justice's Office of Legal Counsel,<sup>130</sup> which has acknowledged that "the term 'specific intent' is ambiguous and that the courts do not use it consistently."<sup>131</sup>

Another solution is found in Henry Mascia's suggestion that a

124. See *infra* Section IV.B.-E. For further discussion, see ANKER, *supra* note 17.

125. See Bell & Dona, *supra* note 17, at 738-43 ("Recommendations for Advocates").

126. Holper, *supra* note 17, at 820-22.

127. *Id.* at 787-826 (describing the criminal law jurisprudence on general and specific intent, the varying understandings as to what constitutes specific intent, and the Model Penal Code's interpretations; studying also the immigration law context, from the BIA case of *In re J-E*, to various federal circuit courts of appeals (including the Third, which decided the issue and then changed its mind), and finally, to the view of the Justice Department).

128. *Id.* at 815.

129. *Id.*

130. *Id.* at 819-20. Holper's article is not focused on lenity; she mentions it only on a single occasion while emphasizing that even the DOJ had found "sufficient ambiguity in the legislative history of the CAT to interpret the specific intent requirement according to the common law definition, thus rendering more criminal defendants guilty of torture." *Id.* This ambiguity, she argued, strengthens the notion that "a narrower definition of specific intent in civil immigration cases as compared to criminal cases flies in the face of the rule of lenity." *Id.* at 820.

131. Memorandum from Daniel Levin, *supra* note 45.

general intent satisfies the intent requirement of the regulations<sup>132</sup> and would "more accurately implement the Senate's purpose for the intent element, excluding unanticipated pain and suffering, because 'causing a prohibited result through accident, mistake, carelessness, or absent-mindedness' does not satisfy the general intent standard."<sup>133</sup> Mascia's critique of the Third Circuit's 2005 ruling in *Auguste v. Ridge* is apt, as he asserts that, even in criminal law jurisprudence, when a consequence is foreseeable, courts presume that the actor intended the result; thus, the natural and probable consequences of voluntary actions resulting in torture should raise a rebuttable presumption that the persecutor intended the result.<sup>134</sup> Realigning the torture definition in these ways would do much to reposition the United States into conformity with its expressed commitment to eliminate torture; the nation's excessively narrow definition of torture employed in CAT has—because so distinct from that adopted by the other CAT signatories—essentially removed the United States from legitimate participation in this international effort.

Finally, to address the difficulties faced by potential torture victims because of this narrow definition, the principle of Immigration Lenity should be employed liberally to promote the humanitarian principles that the United States professes underlie its participation in the Convention. Thus, in cases in which respondents would otherwise be denied Convention relief because of the specific intent requirement, Immigration Lenity can prevent refoulement for potential victims of the worst punishment, torture.<sup>135</sup>

##### A. Origins of Immigration Lenity

The rule of lenity derives from criminal law. It is an "ancient canon of statutory construction which directs that ambiguities in penal statutes be construed in favor of the defendant."<sup>136</sup> In an early Supreme Court case, Chief Justice Marshall remarked that

[t]he rule that penal laws are to be construed strictly, is perhaps

132. Mascia, *supra* note 17, at 289, 310-13; see also Bell & Dona, *supra* note 17, at 707, 726-29 (positing that CAT requires merely "a knowledge mens rea" by the perpetrators).

133. Mascia, *supra* note 17, at 311 (internal footnote omitted).

134. See Mascia, *supra* note 17, at 312-13.

135. The impulse that we impose a broader use of Immigration Lenity resembles Professor Musalo's proposal in her 1994 piece, *Irreconcilable Differences?*, *supra* note 38, at 1235-36, when she suggested that the intent requirement of Zacarias in the refugee context "be eliminated and replaced with a more flexible analysis, consistent with the language and purpose of the Refugee Act and with international practice, as recommended by the UNHCR." *Id.*

136. Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 516 (2003) [hereinafter Slocum, *Lenity and Chevron Deference*] (citing *United States v. Wiltberger*, 18 U.S. 76, 95 (1820)).

not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

... Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest.<sup>137</sup>

As the Court explained at a later date, "[t]his policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."<sup>138</sup> However, lenity is "not invoked by a grammatical possibility"<sup>139</sup> and "applies only if, 'after seizing everything from which aid can be derived,' we can make no more than a guess as to what Congress intended."<sup>140</sup> Lastly, we are cautioned that "[a] statute is not 'ambiguous' for purposes of lenity [merely] because there is 'a division of judicial authority' over its proper construction."<sup>141</sup>

Proper occasions for invoking Immigration Lenity are sometimes unclear.<sup>142</sup> One such occasion is for ambiguous provisions, such as sentencing requirements.<sup>143</sup> For example, a 2001 Ninth Circuit case, *Lara-Ruiz v. INS*,<sup>144</sup> cited an earlier Supreme Court case that discussed criminal lenity, supporting its use as it "directs us to read 'ambiguous' statutory provisions narrowly in favor of the alien in deportation proceedings."<sup>145</sup> In refusing to apply lenity in the case in question though, the court noted that it "applies only when 'a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute.'"<sup>146</sup> Thus, the court found that

137. *Wiltberger*, 18 U.S. at 95-96.

138. *Ladner v. United States*, 358 U.S. 169, 178 (1958).

139. *Caron v. United States*, 524 U.S. 308, 316 (1998).

140. *Reno v. Koray*, 515 U.S. 50, 65 (1995) (citing *Smith v. United States*, 508 U.S. 223, 239 (1993); *Ladner*, 358 U.S. at 178) (involving appeal from prisoner denied credit toward sentence for time spent at community treatment center while on bail).

141. *See Koray*, 515 U.S. at 64-65 (citing *Moskal v. United States*, 498 U.S. 103, 108 (1990)).

142. *See, e.g., United States v. Lazaro-Guadarrama*, 71 F.3d 1419, 1421 (8th Cir. 1995) (describing "the term involving in the sentencing guideline" as being "capable of a broad interpretation").

143. *Id.*

144. 241 F.3d 934, 942 (7th Cir. 2001).

145. *Id.*

146. *Id.* (citing *Moskal*, 498 U.S. at 108).

lenity was not warranted because the statute's intended scope was clear, as the phrase "sexual abuse of a minor" in the deportation statute incorporated the conduct at issue.<sup>147</sup> In another case, involving a criminal conviction for counterfeiting securities in interstate commerce, the Court reiterated, "the 'touchstone' of lenity 'is statutory ambiguity.'"<sup>148</sup>

### B. *Crimmigration: Criminal Law and Immigration Law*

The interrelationship between criminal and immigration law that has evolved since the mid-1990s, when two new immigration-related statutes were enacted that are commonly referred to as IIRAIRA and AEDPA,<sup>149</sup> warrants enhanced use of the principle of lenity in immigration matters. Particularly in CAT cases, Immigration Lenity should be invoked to ameliorate the harsh effects of these statutes, which have muddied the distinction between criminal and immigration law, denying thousands of immigrants numerous legal options formerly available. By expanding the definition of 'aggravated felony,' IIRAIRA made tens of thousands of long-term LPRs vulnerable to deportation for relatively minor acts.<sup>150</sup> AEDPA reduced dramatically the types of cases that could be appealed.<sup>151</sup>

147. *Lara-Ruiz*, 241 F.3d at 942.

148. *Moskal*, 498 U.S. at 107 (quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980)). The court added, it "leaves open the crucial question . . . of how much ambiguousness constitutes . . . ambiguity." *Id.* at 108 (citation and internal quotation marks omitted). Others have said that "the criminal rule of lenity 'survives more as a makeweight for results that seem right on other grounds than as a consistent policy of statutory interpretation.'" David S. Rubenstein, *Putting the Immigration Rule of Lenity in its Proper Place: A Tool of Last Resort After Chevron*, 59 ADMIN. L. REV. 479, 493 n.72 (2007) (quoting John Calvin Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198-99 (1985)).

149. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 to -724 (1996); Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (enacted Apr. 24, 1996). Both statutes are codified as amended in scattered sections of United States Code title 8.

150. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 n.33, 383-84, 401 (2006) (citing Anushka Asthana, *Immigrants Rights Groups Split over Senate Bill*, WASH. POST, July 28, 2006, at A14).

151. NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE § 8:38 (2d ed. 2013). IIRAIRA also repealed discretionary waivers of deportation for those convicted of aggravated felonies, and applied the deportation sections retroactively to those who pleaded guilty before the statute's enactment. *See id.*; Bryan Lonagan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55, 60, 66 (2007); Jacqueline P. Ulin, Note, *A Common Sense Reconstruction of the INA's Crime-Related Removal System: Eliminating the Caveats from the Statue of Liberty's Welcoming Words*, 78 WASH. U. L. Q. 1549, 1565 (2000); Gerald L. Neuman, *Admissions and Denials: A Dialogic Introduction to the Immigration Law Symposium*, 29 CONN. L. REV. 1395, 1407 & n.61 (1997).

It is in the wake of these statutory changes that the term "crimmigration" was coined.<sup>152</sup> First identified in an article in the Washington Post newspaper, the author, Dana Priest, referred to "Crimmigration Camps"—U.S.-controlled prisons located in other countries, cheaper than those in the United States, used "to contain noncitizen detainees and United States citizens convicted of serious crimes."<sup>153</sup> In 2006, Professor Juliet Stumpf attempted to locate the origins of crimmigration, theorizing that it derived from the

notions of membership in U.S. society that emphasize distinctions between insiders and outsiders . . . . Both immigration and criminal law marshal the sovereign power of the state to punish and to express societal condemnation for the individual offender. The use of that powerful tool in this new area of crimmigration law is troubling precisely because of the use of membership theory. Because membership theory is inherently flexible, the viewpoint of the decisionmaker as to whether an individual is part of the community often determines whether constitutional and other rights apply at all.<sup>154</sup>

This trend to treat immigrants like criminals, which contradicts well-settled rulings over decades declaring immigration law to be civil in nature,<sup>155</sup> has a silver lining for the issue at hand: the interrelationship created by these new statutes between immigration law and criminal law warrants enhanced and robust use of the principle of lenity in the immigration context,<sup>156</sup> particularly for CAT applicants, who are the most vulnerable.

Given the drastic nature of deportation, it is natural that the

152. See Stumpf, *supra* note 150, at 374.

153. *Id.* at 373-74 & n.30 (citing Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1).

154. Stumpf, *supra* note 150, at 378-79 (footnotes omitted). About the same time (2006), the derogatory label "criminalien" entered the lexicon of right-wing talk radio. See, e.g., Brent Clanton, *Immigration, Criminals, and Diasporas*, BRENT'S BLOG (May 22, 2006, 7:45 AM), <http://brentclanton.blogspot.com/2006/05/immigration-criminaliens-and-diasporas.html>.

155. *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 154 (1923) ("Deportation proceedings are civil in their nature."); see also *Bridges v. Wixon*, 326 U.S. 135, 154, 175 (1945) (explaining that, though a deportation proceeding involves a serious penalty, it is "not a criminal proceeding"); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1891-92 (2000) (arguing that because deportation is now a nearly certain "consequence of criminal conviction[s]," the criminal justice and immigrant removal systems are essentially one, so "constitutional norms applicable to criminal cases" should be applied to deportation).

156. Immigration lenity in immigration law is a canon of statutory interpretation whereby a judge is required to allow a noncitizen to remain in the United States if otherwise the law would create an absurd or exceedingly harsh result, such as refouling someone who is likely to become a victim of torture. See Rubenstein, *supra* note 148, at 491-92 & nn.67-68.

jurisprudence of criminal lenity would eventually bleed into immigration law. While the classic case of *United States v. Wiltberger* concerned penal statutes,<sup>157</sup> with prison the potential outcome, courts have characterized the harsh effects of deportation as similar to banishment<sup>158</sup> to countries unknown by deportees.<sup>159</sup> This harsh consequence, so akin to imprisonment, has propelled us to attend to "the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislative, not in the judicial department."<sup>160</sup> Such tender treatment is particularly warranted in the cases making news recently—those concerning noncitizen children brought to the United States by their parents when the children were young.<sup>161</sup> The generosity of

157. 18 U.S. 76 (1820).

158. See, e.g., *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("[D]eportation is a drastic measure and at times the equivalent of banishment or exile . . ."); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (stating that "[d]eportation is always a harsh measure"); *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 479 (1963) ("[D]eportation is a drastic sanction, one which can destroy lives and disrupt families . . ."); *Barber v. Gonzales*, 347 U.S. 637, 642 (1954) ("Although not penal in character, deportation statutes as a practical matter may inflict 'the equivalent of banishment or exile' . . ." (quoting *Fong Haw Tan*, 333 U.S. at 10)); *Bridges*, 326 U.S. at 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted."). Although the rule of lenity was intended to apply to statutory provisions that render aliens deportable, see *Fong Haw Tan*, 333 U.S. at 9-10, it has since been applied to a wide variety of immigration provisions, including those that provide discretionary relief from deportation. See, e.g., *Lok v. INS*, 548 F.2d 37, 39 (2d Cir. 1977) (stating that recognition of the immigration rule of lenity was "especially pertinent" in a case involving relief from deportation); Rubenstein, *supra* note 148, at 492 n.67; *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (stating that "[t]o deport one who so claims to be a citizen obviously deprives him of liberty . . . It may result also in loss of both property and life, or of all that makes life worth living." (citation omitted)); Slocum, *Lenity and Chevron Deference*, *supra* note 136, at 526 n.65.

159. I recall a client of the Immigration Law Clinic about a decade ago who, while in his late fifties, had no defense to his deportation to Portugal, a country he had left as a young child, never having returned. Because of his shame over his situation, he told his adult children that he was simply "retiring" there.

160. *Wiltberger*, 18 U.S. at 95; see also Slocum, *Lenity and Chevron Deference*, *supra* note 136, at 526, n.65.

161. For a perspective of the concern over the issue, see Julia Preston, *Obama Expresses Confidence in Early Action on Immigration*, N.Y. TIMES CAUCUS BLOG (Nov. 14, 2012, 5:13 PM), <http://thecaucus.blogs.nytimes.com/2012/11/14/obama-expresses-confidence-in-early-action-on-immigration/>; Jonathan Weisman, *Pressure Grows on Congress for Immigration Overhaul*, N.Y. TIMES CAUCUS BLOG (June 25, 2012, 9:40 AM), <http://thecaucus.blogs.nytimes.com/2012/06/25/pressure-grows-on-congress-for-immigration-overhaul/>; Ariha Setalvad, *Immigration Policy Offers Relief for Students Facing Deportation*, N.Y. TIMES CHOICE BLOG (June 26, 2012, 6:52 PM), <http://thechoice.blogs.nytimes.com/2012/06/26/a-reprieve-for-foreign-students/>.

Contemporary arguments concerning the so-called "Dream Act," which would benefit such young arrivals, come to mind. While this proposal has not been enacted as





determination that deportation hearings are civil and not criminal;<sup>175</sup> they are neither entitled to appointed counsel nor to confront witnesses against them,<sup>176</sup> nor to ex post facto prohibitions.<sup>177</sup>

Ironically, the Convention's paucity of legislative history strengthens the argument in favor of Immigration Lenity, precisely because of the ruling in a 1989 case, *In re Tiwari*.<sup>178</sup> There, the BIA found that "[t]he Service has not pointed to any legislative history or legislative intent to support its position" that the respondent was deportable for his alien smuggling conviction, notwithstanding that the statutory requirement for "gain" was not met.<sup>179</sup> In rejecting the government's argument, the BIA reflected lenity language, adding, "any lingering ambiguities regarding the construction of the Act are to be resolved in the alien's favor."<sup>180</sup>

Principles such as that cited in *Tiwari* should be employed to assist CAT applicants who are otherwise unable to obtain relief because of the narrow definition of torture. Nothing in the legislative history supports the view that the specific intent requirement should be interpreted as narrowly as it has been. As already noted, President Reagan and others, in fact, expressed the opposite.<sup>181</sup> If the harshness of deporting *Tiwari* created the urgency to invoke lenity, so should the harshness of deportation when torture is likely to be visited upon unsuccessful CAT applicants.

175. See Stumpf, *supra* note 150, at 392-93. Noncitizens in deportation hearings enjoy far fewer protections than those available to criminal defendants. *Id.* Despite the long-standing tenet that deportation is civil, commentators are expressing growing concern about the hypocrisy of the recent treatment of noncitizens, essentially as criminals, while denying them the concomitant rights. See *id.* at 376-79. On the intersection of immigration and criminal law, see *id.* at 378 ("Many criminal offenses, including misdemeanors, now result in mandatory deportation. Immigration violations previously handled as civil matters are increasingly addressed as criminal offenses. The procedures for determining whether civil immigration laws are violated have come to resemble the criminal process. . . . [T]he trend toward criminalizing immigration law has set us on a path toward establishing irrevocably intertwined systems: immigration and criminal law as doppelgangers." (citations omitted)).

176. *Id.* at 390-91. The government recently announced a new policy, in anticipation of a district court ruling, that it will provide counsel to immigration detainees with serious mental disorders that may render them mentally incompetent to represent themselves. *EOIR and ICE Adopt New Policies in Anticipation of District Court Ruling*, 90 INTERPRETER RELEASES 990, 990-91 (2013).

177. *Marcello v. Bonds*, 349 U.S. 302, 314 (1955) (holding that *ex post facto* prohibitions do not apply to deportation proceedings); Brian G. Slocum, *Canons, The Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 392 n.165 (2007) [hereinafter Slocum, *Plenary Power Doctrine*].

178. 19 I. & N. Dec. 875, 881 (B.I.A. 1989), *reconsideration denied*, 20 I. & N. Dec. 254 (B.I.A. 1991).

179. *Id.* at 880-81.

180. *Id.* at 881 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948)).

181. See *supra* Section II.

The lenity principle is consonant with the needs of CAT applicants; how it has been invoked in other types of cases can be instructive. For example, in *Jobson v. Ashcroft*, the Second Circuit ruled in a deportation case that, to the extent a relevant statutory section was "ambiguous, the 'narrowest of several possible meanings' of section 16(b) [was] warranted . . ."<sup>182</sup> In the CAT context, the narrowest meaning of the phrase 'specifically intended' used to define torture in the Regulations would differ dramatically from that interpreted by the BIA in *In re J-E-* and by several federal circuit courts.

Given the purposes of CAT, to acknowledge the obligation of nations under the United Nations Charter to "promote universal respect for, and observance of, human rights and fundamental freedoms,"<sup>183</sup> and to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,"<sup>184</sup> CAT applicants "should be given the benefit of the doubt" by federal courts that should make use of a broad understanding of Immigration Lenity.<sup>185</sup>

### C. Effects of Immigration Lenity

With the plenary power principle waning but still alive, the principle of Immigration Lenity is akin to an anti-preemption power, leveling the playing field for immigrants, who remain relatively disadvantaged in the United States.<sup>186</sup> While invoking Immigration Lenity has been infrequently "dispositive on its own," it "often serves as a court's alternative rationale after it has determined the outcome,"<sup>187</sup> or as a factor used to determine whether an agency's

182. 326 F.3d 367, 376 (2d Cir. 2003) (citing *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001)) (deciding whether second-degree manslaughter in New York is a crime of violence and thus an aggravated felony, rendering *Jobson* ineligible for most relief). The section at issue was 18 U.S.C. § 16, which denoted a crime of violence as a felony if it involved "by its nature . . . a substantial risk that physical force" against another will be "used in the course of committing [a crime]." *Id.* at 370. The court decided, though, that "lawful permanent residents who are convicted of crimes determined to be aggravated felonies are categorically ineligible for discretionary relief from deportation, regardless of equitable factors in individual cases." *Id.* at 376 (citing *INS v. St. Cyr*, 533 U.S. 289, 296-97 (2001)).

183. CAT, *supra* note 1, pmb1.

184. *Id.*

185. Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 477 & n.176 (1993) (quoting OFFICE OF THE U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES FOR DETERMINING REFUGEE STATUS, para. 196, U.N. DOC. HCR/IP/4 (1979)).

186. See Rubenstein, *supra* note 148, at 480-81 nn.6-7.

187. *Id.* at 492-93. Prof. Rubenstein also cites to other Supreme Court statements that are similar. See, e.g., *INS v. Errico*, 385 U.S. 214, 225 (1966) (stating that, "even if there were some doubt as to the correct construction of the statute, the doubt should

"interpretation of a statute" was reasonable.<sup>188</sup> Others have characterized it as a "tiebreaker."<sup>189</sup> In any event, the suggestion here is for a more robust use of Immigration Lenity, especially as applied in CAT cases, for applicants struggling with the narrow definition of torture. The reasons supporting a more robust use of Immigration Lenity are numerous: alien immigrants remain relatively disadvantaged in the United States, as they have no vote, and thus no say about the laws to which they are subject;<sup>190</sup> many immigrants are unable, even if legally present in the United States,<sup>191</sup> to either become LPRs or, if already in that status, to naturalize and thus participate fully in the political process through voting;<sup>192</sup> finally, the humanitarian purposes of CAT, to strengthen the existing prohibition of torture and other cruel, abusive, and

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be resolved in favor of the alien"); *Costello v. INS*, 376 U.S. 120, 128 (1964) (stating that even if the statutory interpretation issue before the Court was in doubt, it "would nonetheless be constrained by accepted principles of statutory construction in this area of the law to resolve that doubt in favor of the [alien]"); *Ki Se Lee v. Ashcroft*, 368 F.3d 218, 225 (3d Cir. 2004) ("To the extent that any ambiguity lingers, we note that there is a longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." (internal quotation marks omitted)); *Francis v. Reno*, 269 F.3d 162, 169-71 (3d Cir. 2001) (determining that classification of crimes should be determined by state law with respect to the INA and noting that this approach is "consistent with the rule of lenity"); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) ("We find these ordinary canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.").

188. *Slocum, Lenity and Chevron Deference*, *supra* note 136, at 576 n.374; see also *Rubenstein*, *supra* note 148, at 493, n.72 (citing *INS v. St. Cyr*, 533 U.S. 289, 320 (2001)); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9-10 (1948) (finding a "trace" of congressional purpose "in [the statute's] legislative history" before declaring that it would "resolve the doubt[]" in the noncitizen's favor); *Okeke v. Gonzales*, 407 F.3d 585, 596 (3d Cir. 2005) ("A final reason [the BIA's] interpretation of [the statute] is impermissible is that, because of the serious consequences of deportation, rules of statutory interpretation relating to immigration statutes require that ambiguities be construed in the favor of the alien."); *Padash v. INS*, 358 F.3d 1161, 1172-73 (9th Cir. 2004) (relying on rule of lenity along with several factors, including legislative history and other canons of construction); *Slocum, Lenity and Chevron Deference*, *supra* note 136, at 572 n.358 ("[I]n many of the decisions which cite to the immigration rule of lenity, the canon is not used in a dispositive manner, but, rather, as further and perhaps superfluous justification for rejecting the government's interpretation.").

189. See *Slocum, Lenity and Chevron Deference*, *supra* note 136, at 577-78. Tiebreakers can carry more weight than factors.

190. See *Johnson*, *supra* note 70, at 20 ("Both lawful and undocumented immigrants, barred from having any formal political input—namely, a vote—in the administrative state are deeply affected, and often injured by decisions of the bureaucracy.").

191. Temporary visas are available for, among other reasons, work, tourism, or education. See 8 U.S.C. § 1101(a)(15), 1184 (2012).

192. See *Slocum, Lenity and Chevron Deference*, *supra* note 136, at 522 (acknowledging noncitizens inability to vote indicates importance of rule of lenity).

inhuman treatment,<sup>193</sup> will be furthered with more frequent use of Immigration Lenity. In the short term, while the narrow definition of torture under CAT prevails, Immigration Lenity could offer a stopgap measure to protect potential torture victims.

Enhanced use of Immigration Lenity is particularly warranted in the context of the narrow definition of torture because of the imposition in the 1990s of harsh amendments to the U.S. immigration laws, which removed much discretion from immigration judges', made deportable thousands who were not before, and denied relief to so many others.<sup>194</sup> Moreover, Immigration Lenity requests should gain momentum in light of aspects of the 1996 law, commonly coined "IIRAIRA," which altered the structure of proceedings to evict noncitizens from the United States.<sup>195</sup> The IIRAIRA merged immigration proceedings to evict noncitizens, which had been divided between "deportation" and "exclusion."<sup>196</sup> In the past, those deemed to have entered the United States were subject to deportation hearings, while those considered not to have "entered" were subject to exclusion hearings, with fewer rights attendant thereto.<sup>197</sup> Under this scheme, Immigration Lenity arguments were not made in exclusion hearings, presumably because those considered to have not entered were assumed to be ineligible for leniency. Now, with the merging of deportation and exclusion into unified hearings termed "removal,"<sup>198</sup> the era of a more expansive call for Immigration Lenity has arisen.<sup>199</sup> Convincing arguments can now be made that principles of Immigration Lenity should apply equally to all those in removal

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193. See *HENKIN ET AL.*, *supra* note 35, at 405-12.

194. See CAT, *supra* note 1 (adding a requirement that torture be specifically intended).

195. See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-546 to -724 (1996) (codified as amended in scattered sections of 8 U.S.C.).

196. *Id.*

197. *Slocum, Lenity and Chevron Deference*, *supra* note 136, at 524. Under the former INA, even if physically in the United States, if noncitizens had not been formally inspected and admitted they were considered not to have made an entry. See *Immigration and Nationality Act of 1952*, Pub. L. No. 82-414, 66 Stat. 163 (1952). The 1996 Act eliminated (and deleted!) the concept of "entry" in the INA and replaced it with the concept of "admission." See 110 Stat. at 3009-575 (codified as amended at 8 U.S.C. § 1101(a)(13)(A) (2012)).

198. See 8 U.S.C. § 1229a(a)(1) (2012); *Slocum, Lenity and Chevron Deference*, *supra* note 136, at 524.

199. See *Slocum, Lenity and Chevron Deference*, *supra* note 136, at 578-79. Because noncitizens admitted to the United States are entitled to greater statutory and constitutional protections than are inadmissible ones, "the immigration rule of lenity should be entitled to less, if any, weight when statutory provisions applicable only to inadmissible noncitizens are at issue" as "the consequences of deportation—the Court's justification for lenity—are certainly harsher for those who have been admitted into the country." *Id.* at 524-25, 579.

proceedings.<sup>200</sup>

*D. Effect of Chevron Deference on Immigration Lenity*<sup>201</sup>

Notwithstanding the generous and compassionate notion underlying the principle of Immigration Lenity, the case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, if layered onto concepts of a fervent plenary power,<sup>202</sup> could likely prevent review of agency interpretations and have an adverse effect on CAT applicants requesting Immigration Lenity.<sup>203</sup> This result would undoubtedly be contrary to the longstanding traditions in U.S. immigration law and to the beneficent purposes of the Convention.<sup>204</sup>

200. "Thus, while the application of the immigration rule of lenity to provisions applicable to excludable noncitizens had never been authoritatively settled, the issue is now even more unclear due to the enactment of HIRAIRA." Slocum, *Lenity and Chevron Deference*, *supra* note 136, at 525. (discussing post-HIRAIRA's blurring of the distinction between deportation and exclusion).

201. The implications of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), demand a study of its own. I include the discussion here because *Chevron* is important to consider when discussing Immigration Lenity; however, I do not pretend that space here permits a full discussion.

202. *Id.*; see generally Anna Williams Shavers, *The Invisible Others and Immigrant Rights: A Commentary*, 45 HOUS. L. REV. 99, 146 (2008) (quoting Ekwutozia U. Nwabuzor, Comment, *The City of Colossus: Discipio v. Ashcroft, Nonacquiescence, and Judicial Deference in Immigration Law*, 50 HOW. L.J. 575, 604 (2007)) ("Even before *Chevron*, the plenary power doctrine shielded immigration law from meaningful court review."). The argument has been made, although I am not convinced, that given "the strength of the [P]lenary [P]ower [in immigration], . . . a relaxation of . . . deference to [agency interpretations of statutes] will have little effect." Shavers, *supra*, at 149. Rather, it seems that, given the noted judicial increase in scrutiny of immigration-related legislation in recent years, immigration advocates should be more concerned about expansion of *Chevron* to immigration than about the plenary power, although a strong plenary power coupled with a vigorous interpretation of *Chevron* could combine, as Professor Johnson warns, to erode further the legal rights of immigrants. See Johnson, *supra* note 70, at 43.

203. The recent Supreme Court case, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), should not affect the issues discussed herein, as *Clapper* invoked neither lenity, nor the plenary power, nor *Chevron* when the Court refused to accept a challenge to various antiterrorism measures (including renditions, targeted drone killings, and government secrecy); see also Adam Liptak, *Justices Reject Legal Challenge to Surveillance*, N.Y. TIMES, Feb. 27, 2013, at A1.

204. See *supra* Section I; see also *Costello v. INS*, 376 U.S. 120, 128 (1964) ("[D]eportation is a drastic measure and at times the equivalent of banishment or exile . . . . To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." (internal quotation marks omitted) (internal citations omitted)). The *Costello* Court added:

In this area of the law, involving as it may the equivalent of banishment or exile, we do well to eschew technicalities and fictions and to deal instead with realities. The reality is that the petitioner's convictions occurred when he was a naturalized citizen, as he had been for almost 30 years.

The principle of Immigration Lenity, in which ambiguities in immigration statutes are resolved in favor of the non-citizen, is in direct conflict with the main thrust of *Chevron*, in which ambiguities in statutes are resolved in favor of the agency.<sup>205</sup> "On the one hand, *Chevron* demands that courts defer to reasonable agency interpretations of ambiguous statutes. On the other hand, the rule of lenity requires courts to construe ambiguous immigration statutes favorably for aliens."<sup>206</sup> As the consequences of *Chevron* on immigration jurisprudence have not, to date, been resolved by the Court,<sup>207</sup> Immigration Lenity should prevail when in conflict with

If Congress had wanted the relation-back doctrine of § 340(a) to apply to the deportation provisions of § 241(a)(4), and thus to render nugatory and meaningless for an entire class of aliens the protections of § 241(b)(2), Congress could easily have said so.

*Id.* at 131-32.

Furthermore, in *Fong Haw Tan v. Phelan*, the Court indicated:

We give expression to that view by reading this provision of the statute to authorize deportation only where an alien having committed a crime involving moral turpitude and having been convicted and sentenced, once again commits a crime of that nature and is convicted and sentenced for it.

We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

333 U.S. 6, 9-10 (1948) (internal citation omitted).

205. See Slocum, *Lenity and Chevron Deference*, *supra* note 136, at 518-519. He concludes, "courts should consider lenity . . . when reviewing agency interpretations." *Id.* at 519.

206. Rubenstein, *supra* note 148, at 501; see also Slocum, *Lenity and Chevron Deference*, *supra* note 136, at 559.

207. See Slocum, *Lenity and Chevron Deference*, *supra* note 136, at 552-53. Slocum encapsulates the state of immigration post-*Chevron* succinctly:

In immigration cases since the *Chevron* decision, majority opinions of the Court have twice cited the immigration rule of lenity with approval, but in one case a clear statement rule displaced *Chevron* and in the other the Court resolved the interpretive issue at Step One. In *INS v. Cardoza-Fonseca*, the Court mentioned the immigration rule of lenity for the first time since the *Chevron* decision. . . . [T]he Court stated that it decided the issue at *Chevron* Step One, basing its decision on an "analysis of the plain language of the Act, its symmetry with the United Nations Protocol, and its legislative history." The Court found these "ordinary canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]." Similarly, in *INS v. St. Cyr*, the Court found *Chevron* inapplicable because of the "presumption against retroactive application of ambiguous statutory provisions" . . . that . . . was "buttressed by the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]."

*Chevron*, as it offers noncitizens the benefit of the doubt when statutes are ambiguous, whereas *Chevron*, by favoring the agency, removes that benefit.

### 1. The Basics of *Chevron*<sup>208</sup>

*Chevron*, in its essence, instructs courts how to decide cases when questions arise concerning the meaning of specific statutory sections.<sup>209</sup> A key reason underlying the *Chevron* principle is that deference to decisions of administrative agencies is important, because they have an "understanding of the force of the statutory policy in [a] given situation," and the experience and informed judgment in which to make the best decisions under the circumstances.<sup>210</sup> However, the Court has warned that, "[i]n construing statutes, 'we must . . . start with the assumption that the legislative purpose is expressed by the ordinary meaning of the

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Neither *Cardoza-Fonseca* nor *St. Cyr* should be interpreted as resolving the conflict between the immigration rule of lenity and *Chevron*. In *St. Cyr*, . . . the Court's citation to lenity was . . . outside . . . the *Chevron* context. In *Cardoza-Fonseca*, one could argue that because the Court decided the case at Step One and also cited to the immigration rule of lenity, the opinion should be interpreted as implying that the canon is a traditional tool of statutory construction that should be applied in Step One. This interpretation is problematic, though, because the Court stated that it did not rely on the rule in determining congressional intent; its citation to it was therefore unnecessary. Thus . . . neither case resolved the conflict between the immigration rule of lenity and *Chevron*.

*Id.* (internal citations omitted). Nor did the Court in *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999), expressly refer to lenity, so it also failed to reconcile the issue of reconciliation with *Chevron*. See *id.*; see also Rubenstein, *supra* note 148, at 502.

208. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984). The bounds of what became known as the *Chevron* principle were articulated by the Court as follows:

[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.

*Id.* (internal citations omitted).

209. *Id.* at 844-45.

210. *Id.*

words used."<sup>211</sup>

When claims are made of ambiguity or other vagueness in statutory sections, *Chevron* mandates that two steps be undertaken to determine whether administrative actions should even be subject to judicial inquiry: First, in what has come to be known as "Step One," a court asks whether a statute is "silent or ambiguous with respect to the specific issue' before it; if so, 'the question for the court [was] whether the agency's answer is based on a permissible construction of the statute."<sup>212</sup> Another way of understanding the inquiry here is to ask whether Congress spoke directly to the matter.<sup>213</sup> If so, that would control.<sup>214</sup>

In what is known as "Step Two," a court ascertains whether the agency's interpretation of the statute is unreasonable; if so, the decision is not entitled to deference.<sup>215</sup> The determination of reasonableness, though, is not that simple; for example, *Chevron* "did not provide any guidance regarding the role of canons in determining whether the agency's interpretation is reasonable."<sup>216</sup>

*Chevron* was rooted in the 1944 Supreme Court case *Skidmore v. Swift & Co.*, which held "that an agency's interpretation may merit some deference . . . , given the 'specialized experience and broader investigations and information' available to the agency."<sup>217</sup> The *Skidmore* principle has been said to invite agencies to persuade courts of the wisdom of their decisions/actions, as opposed to the *Chevron* principle of deference,<sup>218</sup> which affords greater power to agency decisions.<sup>219</sup>

If *Chevron* were to apply in the face of a claim for Immigration

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211. *INS v. Elias-Zacarias*, 502 US 478, 482 (1992) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

212. *Aguirre-Aguirre*, 526 U.S. at 424 (quoting *Chevron*, 467 U.S. at 843); see also *Cardoza-Fonseca*, 480 U.S. at 448-49.

213. See *Aguirre-Aguirre*, 526 U.S. at 424.

214. This theory is strangely reminiscent of federal preemption, which requires preemption of state causes of action to the extent that Congress explicitly expressed its intention to preempt them. See, e.g., *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996).

215. *Chevron*, 467 U.S. at 865-66 (explaining that if "the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests . . . [it] is entitled to deference").

216. Slocum, *Lenity and Chevron Deference*, *supra* note 136, at 518. A detailed discussion and critique of *Chevron* is beyond the scope of this Article.

217. *De Leon-Ochoa v. Attorney Gen.*, 622 F.3d 341, 349 (3d. Cir. 2010) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001)) (internal quotation marks omitted).

218. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Mead*, 533 U.S. at 228. *Mead* is said to have "resuscitated" *Skidmore*. *DeLeon-Ochoa*, 622 F.3d at 349.

219. See *DeLeon-Ochoa*, 622 F.3d at 348-49.

Lenity, at which stage of its inquiry would that occur? Commentators disagree. Some, like Professor Brian Slocum, believe that "[a]lthough use in Step One is possible, the better approach is to utilize lenity in Step Two, after a statute is deemed to be ambiguous, as one factor in determining whether the agency's interpretation is reasonable."<sup>220</sup> In Professor Rubenstein's view, Immigration Lenity should only be considered after both steps of *Chevron* are completed and a finding is made of both a lack of Congressional attention to or ambiguity in the matter (Step One) and unreasonable agency action (Step Two).<sup>221</sup> In his opinion, this approach "affords the Attorney General an unencumbered first bite at balancing the competing policies undergirding the immigration law when the statute at issue is ambiguous . . . [and] best comports with the judicial deference that judges traditionally afford to the political branches in immigration matters."<sup>222</sup>

## 2. Putting *Chevron* in Context

Does *Chevron* have "constitutional status,"<sup>223</sup> or is it merely a principle of convenience? The answer is unclear. If, as with Immigration Lenity, *Chevron* is simply a rule of statutory construction and not of the Constitution, it should be given no more weight than is given to Immigration Lenity. Doubtful constitutional support for *Chevron* offers a convincing argument that the deference accorded to *Chevron* has exceeded that which is warranted.<sup>224</sup> For the issue under discussion here, this is particularly true, as it involves key policy and humanitarian concerns having international implications.

According to several recent indicators, *Chevron* has lost much of its allure.<sup>225</sup> First, in the 1987 case *INS v. Cardoza-Fonseca*,<sup>226</sup> while

220. Slocum, *Lenity and Chevron Deference*, *supra* note 136, at 575. Slocum believes, then, regarding Steps One and Two, that "the *Chevron* decision left open the question of how canons fit into the Step Two review." *Id.* at 576.

221. For a summary of the *Chevron* steps, see Rubenstein, *supra* note 148, at 482-83, 504-519.

222. *Id.* at 482.

223. Slocum, *Lenity and Chevron Deference*, *supra* note 136, at 535-39. Some have averred that *Chevron*'s conclusions follow logically from the form of government from which it derives, which involves broad congressional delegation of lawmaking authority to agencies (explicit or implicit), the separation of powers principle, and the political accountability of agencies that puts them in a better position than the judiciary to make policy. Slocum concludes that the rationale is most likely that the doctrine reflects congressional intent, not the Constitution. *Id.* at 537. Unfortunately, a thorough discussion of this question is beyond the scope of this Article.

224. *See id.* at 535-39 (explaining that "[t]he *Chevron* opinion itself did not argue that deference was constitutionally compelled").

225. *See infra* notes 224-232 and accompanying text.

226. 480 U.S. 421 (1987).

the Supreme Court acknowledged that the BIA should be accorded deference, the Court employed an individualized, subtle scrutiny of the BIA's actions, more akin to a case-by-case analysis, in rejecting the BIA's view of the standard necessary to prove persecution in asylum cases.<sup>227</sup> Then, in the 1999 case *INS v. Aguirre-Aguirre*, even when the Court employed the *Chevron* principle to defer to agency action, it essentially reaffirmed *Cardoza-Fonseca*.<sup>228</sup>

In *Aguirre-Aguirre*, the question was whether the respondent, a native and citizen of Guatemala, was entitled to relief even though "he 'committed a serious nonpolitical crime' before his entry into the United States" when he protested governmental policies by burning buses, assaulting passengers, and vandalizing and destroying private property.<sup>229</sup> The BIA denied relief after concluding that the actions constituted serious nonpolitical crimes; ultimately the Court deferred,<sup>230</sup> emphasizing, "judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations'"<sup>231</sup> as "[a] decision by the Attorney General to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may affect our relations with that country or its neighbors."<sup>232</sup> As it invoked *Chevron*, the Court stated that the Ninth Circuit Court of Appeals "should have asked whether 'the statute is silent or ambiguous with respect to the specific issue' before it; if so, 'the question for the court [was] whether the agency's answer is based on a permissible construction of the statute.'"<sup>233</sup> The

227. *See id.* at 448. The federal circuit courts of appeals, as well as scholars, have dealt with this issue. In *Osorio v. INS*, 18 F.3d 1017, 1022 (2d Cir. 1994), for example, overturning the BIA's denial of a Guatemalan union leader's asylum claim, the court held that it need not accept an "unreasonable interpretation of the BIA." The scholarship concerning *Chevron* is voluminous. *See, e.g.*, Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2085 n.69, 2109 (1990) (citing Court rejection of agency interpretations that "will not prevail when they conflict with syntactic norms"); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 476-78 (1989) (disagreeing with notion that courts must defer to an agency's statutory interpretation); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 444-46 (1989) (expressing the need for judicial interpretation of statutory ambiguities).

228. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (stating that "the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication'" (quoting *Cardoza-Fonseca*, 480 U.S. at 448-49)).

229. *Id.* at 418 (quoting 8 U.S.C. § 1253(h)(2)(C)).

230. *Id.* at 418-19.

231. *Id.* at 425 (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

232. *Id.*

233. *Id.* at 418 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)); *see also Cardoza-Fonseca*, 480 U.S. at 448-49.

Court seemed convinced to defer because of the power given the Attorney General to determine statutory entitlement to relief.<sup>234</sup>

The distinctions between the situation in Aguirre-Aguirre and the one in question here are multiple. First, Aguirre-Aguirre involved a criminal deportee, not one affirmatively applying for protection from torture.<sup>235</sup> Second, CAT is an international agreement, to which the United States has been committed since 1994,<sup>236</sup> and is not truly one that concerns immigration, but rather it concerns *not refouling* potential torture victims. While I have been unable to establish why CAT regulations were placed under the purview of the BIA, an inference can be made that, to the drafters, it was the obvious placement for them given that applications for torture protection would likely arise in the context of asylum applications in deportation hearings.<sup>237</sup> However, that determination does not insure that the agency tasked with the delicate administration of CAT regulations appreciates either the humanitarian concerns or larger context of the international drafting negotiations that took place over a number of years.<sup>238</sup>

Next, a view of more recent Supreme Court cases determining the effect of agency interpretation hints that the Court may now be less influenced by *Chevron* than in the past. In 2005, for example, in *Clark v. Martinez*, the Court rejected an agency interpretation of a section of the immigration statute without even mentioning *Chevron*.<sup>239</sup> Another encouraging note from that case is that it was Justice Scalia's majority opinion which concluded that the plain meaning of the indefinite detention statute required identical applications for lawful permanent residents and the undocumented.<sup>240</sup> More importantly, the opinion cited two cases that

234. *Aguirre-Aguirre*, 526 U.S. at 424-25 (citing 8 U.S.C. § 1103(a) (Supp. III 1994); 8 U.S.C. § 1253(b)(1), (2) (Supp. III 1994)).

235. 526 U.S. at 422-23.

236. *Inspection and Expedited Removal of Aliens*, 62 Fed. Reg. 10,312, 10,316 (Mar. 6, 1997) (indicating that the INS has considered applications since Nov. 1994, the effective date of Article 3, thus prior to finalization of regulations).

237. I was able to locate the FARRA section concerning CAT stating: "(b) REGULATIONS.— Not later than 120 days after the date of enactment of this Act, [Oct. 21, 1998], the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under [CAT] . . ." FARRA, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (1998)). I was unable to locate any legislative history or other information concerning discussions as to which executive agency should decide CAT cases.

238. See BURGERS & DANIELIUS, *supra* note 18, ch. 2 (describing the lengthy process, beginning in 1977 and running through 1984, of meetings, negotiations, preparations, drafting, redrafting, and finalizing that culminated in the convention).

239. 543 U.S. 371, 378-79 (2005).

240. *Id.* (deciding that the indefinite detention sub-section must be applied in the same manner for both LPRs and the undocumented).

invoked Immigration Lenity, *Leocal v. Ashcroft* and *United States v. Thompson/Center Arms Co.*<sup>241</sup> Finally, several courts of appeal have recently questioned the application of *Chevron* in the immigration context.<sup>242</sup>

Nor does a recent Supreme Court decision weaken the argument for enhanced use of Immigration Lenity. That case, *Holder v. Martinez Gutierrez*,<sup>243</sup> upheld a BIA ruling on a statutory immigration issue<sup>244</sup> as the Court abrogated the Ninth Circuit cases of *Cuevas-Gaspar v. Gonzales*<sup>245</sup> and *Mercado-Zazueta v. Holder*.<sup>246</sup> There, the Court held that the BIA's refusal to impute a parent's years of continuous presence in the United States to their child in order to establish eligibility for cancellation of removal was based on a "permissible construction of the statute."<sup>247</sup> According to the Court, the BIA "could reasonably conclude that an alien living in this country as a child must meet" the residency requirements for a specific period of time on his/her own.<sup>248</sup> The Board's "position prevails" according to the Court, "if it is a reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best."<sup>249</sup> The Court opined that the BIA's view was "consistent with the statute's text";<sup>250</sup> despite the "statute's objectives of 'providing relief to aliens with strong ties to the United States' and 'promoting family unity,'"<sup>251</sup> the Court did not believe its purposes demanded imputation in this instance.<sup>252</sup> Nor was the Court convinced that the BIA acted improperly in refusing imputation in this case while accepting it in others.<sup>253</sup>

*Martinez Gutierrez* is irrelevant to the suggestion made in this

241. *Id.* at 380-81 (citing *Leocale v. Ashcroft*, 543 U.S. 1, 11-12, n.8 (2004); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18, n.10 (1992)).

242. For example, see *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 967 (9th Cir. 2003), in which the government argued for *Chevron* deference. The court ruled against deference where the question concerned a nationality determination as "issues of law pertaining to nationality are for the court." *Id.*; see also *Hughes v. Ashcroft*, 255 F.3d 752, 757-58 (9th Cir. 2001) (finding that nationality claims are not entitled to deference).

243. 132 S. Ct. 2011 (2012).

244. *Id.* at 2021.

245. 430 F.3d 1013 (9th Cir. 2005).

246. 580 F.3d 1102 (9th Cir. 2009).

247. *Martinez Gutierrez*, 132 S. Ct. at 2014-15 (invoking 8 U.S.C. § 1229b(a) (1996)).

248. *Id.* at 2014.

249. *Id.* at 2017 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 & n.11 (1984)).

250. *Id.* (discussing 8 U.S.C. § 1229b(a) (1996)).

251. *Id.* at 2019. This case does not raise Immigration Lenity issues, as the decision is based on examination of the statutory language itself. *Id.*

252. *Id.* at 2019-21.

253. *Id.*

Article. In *Martinez-Gutierrez*, a specific immigration-related regulation was at stake, not a law with international implications.<sup>254</sup> A child was asking for a benefit to be bestowed that Congress had not granted.<sup>255</sup> Here, noncitizens are seeking application of the universally accepted definition of torture. The fact that Congress placed CAT regulations within the BIA's purview is not an excuse for the federal courts, or even Congress,<sup>256</sup> if it realizes its error, to deny its evident intent where the BIA seems unable, or unwilling, to enforce that intent. Congress apparently erred in creating these regulations, either by placing the power to determine the meaning of torture with the BIA or by not realizing that "what torture meant" would be an issue in the first place. Short of Congress acting, the federal courts should use their oversight powers to correct the BIA's errors.<sup>257</sup>

In addition to the above indicators that *Chevron* may be weakening and must not pose a significant barrier to Immigration Lenity are two recent Supreme Court cases that, while not immigration-related, imply that "cracks" may be emerging in the *Chevron* jurisprudence in the same way they have been identified with regard to the plenary power.<sup>258</sup> The first concerned an importer challenging a tariff classification ruling by the U.S. Customs Service;<sup>259</sup> the Court held that the classification was not entitled to *Chevron* deference, as there was "no indication that Congress intended such a ruling to carry the force of law . . ." <sup>260</sup> The second case found that, where the Clean Air Act authorized the Environmental Protection Agency (EPA) to regulate greenhouse gases yet the EPA refused to rule on whether these gases "cause or contribute to climate change[,] [i]ts action[s] were] . . . 'arbitrary, capricious, . . . or otherwise not in accordance with law.'" <sup>261</sup> The

254. *Id.* at 2014 (discussing 8 U.S.C. § 1229b(a)).

255. *Id.* at 2016.

256. Congress has enacted the so-called Technical Corrections Acts following major immigration legislation in order to correct anomalies in a new statute. See Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (1994).

257. Johnson, *supra* note 70, at 29-32.

258. See LEGOMSKY & RODRIGUEZ, *supra* note 70, at 181-208.

259. *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

260. *Id.* The Court stated that a *Skidmore* claim may be raised "where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions . . . . A classification ruling in this situation may therefore at least seek a respect proportional to its 'power to persuade.'" *Id.* at 235. The Court added that, "under *Skidmore v. Swift & Co.*, . . . the ruling is eligible to claim respect according to its persuasiveness." *Id.* at 221.

261. *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007) (citing 42 U.S.C. § 7607(d)(9)(A) (2000)). The Court cited *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.* immediately following its holding, noting the contrasting view in *Chevron*

EPA's broad discretion in deciding whether to bring enforcement actions<sup>262</sup> mandated, said the Court, that it "must-ground its reasons for action or inaction in the statute."<sup>263</sup>

In a manner akin to that which is developing with the plenary power,<sup>264</sup> this line of cases suggests the Court's willingness to scrutinize claims of agency deference to determine accurately the extent to which it is warranted.<sup>265</sup> These cases should give pause to routine deference to the BIA,<sup>266</sup> as the reasonableness of its rulings have been questioned implicitly by the Supreme Court and explicitly by many well-regarded immigration practitioners and scholars,<sup>267</sup> and as the humanitarian issue at stake is so weighty.

### 3. The Scholarly Critique of *Chevron*

Recently, Professor Kevin Johnson has enhanced our perspective on the inherent contradictions involved in imposing a *Chevron* analysis onto immigration jurisprudence. His concerns, while expressed about immigration law in general, are particularly apt when considering the issue of torture under consideration here. Professor Johnson points out that the Supreme Court's basis for *Chevron* was

warranted because the executive branch, through election of the President, is politically accountable to the voters, and decisions

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with the indication "Cf." *Id.* at 534-35 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

262. *Id.* at 527.

263. *Id.* at 535.

264. See discussion *infra* Section IV.E.

265. Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1, 3 (2006) (supporting the view that the *Chevron* doctrine has been limited).

266. Professor Rubenstein conducted an exhaustive survey of the various federal circuits' treatment of the juxtaposition of lenity and *Chevron*:

Absent definitive guidance from the Supreme Court, the circuit courts' treatment of the issue has, understandably, been quite varied. Indeed, just about every conceivable approach has been employed or suggested by the circuit courts, which can be summarized as follows: (1) applying *Chevron* and ignoring the rule of lenity; (2) applying the rule of lenity and ignoring *Chevron*; (3) recognizing both doctrines and not deferring to the agency's interpretation because the statute was clear on its face; (4) recognizing both doctrines and rejecting the principle of lenity because the statute was clear on its face; (5) applying the rule of lenity where *Chevron* was found not to apply; (6) considering the rule of lenity at *Chevron*'s first step in determining whether Congress's intent was clear; (7) considering the rule of lenity at *Chevron*'s second step in determining whether the agency's interpretation was reasonable; (8) applying *Chevron* deference and finding that the rule of lenity did not apply at step two because the agency's interpretation was otherwise reasonable; and (9) employing the rule of lenity after determining that the agency's construction was unreasonable.

Rubenstein, *supra* note 148, at 502-04 & n.130-39 (internal citations omitted).

267. Johnson, *supra* note 70, at 42.

properly delegated to agencies are necessarily political and should be deferred to by the courts. The administration of the immigration laws thus poses a fundamental problem for the democratic rationale for deference: if we entrust agencies with making and enforcing the laws because of their political accountability, what should we do if a specific agency is only accountable to part of the group of people affected, directly or indirectly, by its decisions?<sup>268</sup>

In illuminating the contradiction that exists where both undocumented and lawful immigrants are barred from formal political input through voting while they are also the ones "deeply affected, and often injured, by decisions of the bureaucracy,"<sup>269</sup> he questions whether the Supreme Court is justified in deferring "to agency decisions based on the political accountability of the President."<sup>270</sup>

Lory Rosenberg, a noted immigration scholar and former member of the Board of Immigration Appeals, contextualized the strength of Immigration Lenity vis-a-vis *Chevron* deference in her concurring opinion in the case of *In re Crammond*, when she noted:

This approach to interpreting deportation statutes [regarding lenity] has not been altered by the Supreme Court's intervening decisions in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, and its progeny. For example, in interpreting the definitional term "refugee," the Supreme Court considered both the statutory language and the relevant legislative history and concluded that "[w]e find these ordinary canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." Thus, in interpreting a definitional section of the statute, the Court found not only that the statutory language and legislative history adequately reflected congressional intent, but acknowledged the narrow construction principle. . . .

We have recognized and applied this rule with approval in over 30 precedent decisions issued since 1949.<sup>271</sup>

Perhaps Professor Holper summarized it best:

*Chevron* deference is only appropriate when courts are considering a statutory scheme that the agency is entrusted to administer. . . . [C]ourts may interpret terms that, while they appear in an agency's statute, do not require specialized knowledge to interpret. . . .

In the immigration law context, several courts have held that the BIA receives *Chevron* deference when it is interpreting the INA, but not when it is interpreting state or federal criminal laws.

268. Johnson, *supra* note 70, at 20.

269. *Id.*

270. *Id.* at 21 (recommending greater judicial review in these circumstances).

271. 23 I. & N. Dec. 9, 30 (B.I.A. 2001) (Rosenberg, concurring) (citations omitted).

The BIA routinely interprets criminal statutes because there are myriad grounds for removal that are based upon a criminal conviction. . . . Courts have held that when the BIA is engaged in this sort of examination of the elements of a criminal statute, the agency does not deserve any deference because courts can and often do interpret the elements of a criminal statute.

In the CAT context, the BIA is interpreting specific intent, a criminal law concept, not an immigration law term such as "refugee." Specific intent is not an obscure regulatory concept in which courts have no expertise; as stated by the Third Circuit, [t]he specific intent standard is a term of art that is well-known in American jurisprudence. For this reason, courts do not necessarily owe deference to the BIA's interpretation of this criminal law term.<sup>272</sup>

#### 4. Reconciling *Chevron* and Immigration Lenity with CAT

Commentators disagree over the effects of *Chevron* on Immigration Lenity, which is generally considered to be based not on constitutional principles, as is its sister principle in criminal law,<sup>273</sup> but rather on principles of fairness<sup>274</sup> and canons of statutory construction.<sup>275</sup> Recent Court pronouncements on related issues imply that, notwithstanding the Court's failure thus far to rule on this issue,<sup>276</sup> it does favor a vibrant application of Immigration Lenity.

Short of a Supreme Court ruling, the approach of the Second Circuit's 1994 decision on Immigration Lenity is instructive. In *Ali v. Reno*,<sup>277</sup> the court acknowledged that courts "accord substantial deference to an agency's construction of regulations promulgated pursuant to a statutory scheme entrusted to the agency's administration."<sup>278</sup> However, it nonetheless employed a broad use of lenity even though it did not mention the term, as it noted that "[l]ingering ambiguities in a statute concerning the forfeiture of residence in this country should be resolved in favor of the alien."<sup>279</sup>

272. Holper, *supra* note 17, at 824-26 (footnotes omitted) (internal quotation marks omitted).

273. Rubenstein, *supra* note 148, at 493-94.

274. See, e.g., Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (citing the drastic consequences of deportation as a reason to support lenity).

275. Slocum, *Plenary Power Doctrine*, *supra* note 177; Greenfield, *supra* note 265, at 38-62 (suggesting how the conflict between *Chevron* and lenity may be resolved); Slocum, *Lenity and Chevron Deference*, *supra* note 136, at 552-53.

276. Indeed, *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012), is not a lenity case.

277. 22 F.3d 442, 455 (2d Cir. 1994) (challenging termination of LPR status within five years after gaining that status).

278. *Id.* at 446 (citing *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

279. *Id.* (citing, among others, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)).



As Ali, a noncitizen losing LPR status because of several offenses against the immigration laws,<sup>280</sup> was given the benefit of the doubt, surely CAT-protected applicants are at least as entitled to the same beneficial treatment. Here, as with Ali, a court should resolve any lingering statutory ambiguities concerning CAT beneficiaries in the applicants' favor.<sup>281</sup>

The impact of *Chevron* on the principle of Immigration Lenity is particularly important in the context of the issue raised in this article—namely, the justness and meaning of the specific intent requirement in the Convention's definition of torture. Because CAT claims are generally raised during removal hearings<sup>282</sup> at the agency level, requests for broad *Chevron* deference are likely to be frequent. Imposition of *Chevron* deference atop the already stringent standards for proving a CAT claim<sup>283</sup> could, literally, be fatal for torture protection applicants.<sup>284</sup>

Professor Slocum opines "that the immigration rule of lenity should be a factor considered by courts in determining whether the Attorney General's interpretation is reasonable,"<sup>285</sup> as "judicial consideration of canons is consistent with democratic theory and the *Chevron* doctrine and . . . canons should be considered by courts when reviewing agency interpretations."<sup>286</sup> While recognizing "[t]he confusion among the circuits"<sup>287</sup> over this issue, beginning with *Cardoza-Fonseca*, in which the Court declared that a "pure question of statutory construction [was] for the courts to decide,"<sup>288</sup> he posits

280. *Id.* at 445. None of the offenses were criminal offenses. *See id.*

281. *See* Rubenstein, *supra* note 148, at n.203-06.

282. Proving a CAT claim is difficult enough without adding a specific intent requirement. Unlike asylum claims, which are routinely filed affirmatively by those not yet in removal proceedings, CAT claims are generally raised as an affirmative defense in removal hearings. *See* U.S. DEPT OF JUSTICE, ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS: RELIEF AND PROTECTIONS BASED ON FEAR OF PERSECUTION OR TORTURE 3-4 (2009), available at <http://www.justice.gov/eoir/press/09/AsylumWithholdingCATProtections.pdf>.

283. For instance, unlike the standard in an asylum application, wherein the applicant need only prove a likelihood of persecution if removed, the CAT standard of proof is much higher, requiring proof "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2). In addition, in contrast to asylum, CAT applicants must prove that the torture will be at the hands of the government. *Id.* § 208.18(a)(1).

284. *See* Slocum, *Lenity and Chevron Deference*, *supra* note 136, at 539. For this reason, some commentators, including Professor Brian Slocum, suggest that Immigration Lenity should be considered a "traditional tool of statutory construction," preventing reviewing courts from deferring to an "agency's interpretation because the issue would be resolved at Step One" of the *Chevron* analysis. *Id.* at 542.

285. *Id.* at 519.

286. *Id.*

287. *Id.* at 533.

288. *Id.* (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)). The Court's

that the Court in *Cardoza-Fonseca* "realigned judicial review with the traditional approach," contemplating independent review by courts of declarations of law and deferential review by agencies of applications of law.<sup>289</sup>

Professor Slocum is correct to the extent he posits that *Chevron* does not warrant more BIA deference than it already enjoys. The courts should decide, particularly in cases as consequential as torture claims,<sup>290</sup> that the definition of torture is a question of law, not simply a "deferential review of law-application." Whereas Slocum notes that several federal courts recognize the continuing relevance of Immigration Lenity while not explicitly accounting for it within the *Chevron* framework,<sup>291</sup> he suggests that the proper distinction is whether "the issue is a pure question of law that does not implicate agency expertise,"<sup>292</sup> in which case, presumably, deference to agency action should yield to Immigration Lenity.<sup>293</sup>

Slocum's suggestion of limited *Chevron* deference to the BIA when pure questions of law arise advances the argument that the BIA should not be empowered to interpret the meaning of torture, for this issue, based in principles of international law and treaty, is both a question of law and beyond the purview and expertise of the BIA.<sup>294</sup>

view in *Cardoza-Fonseca* was as follows:

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, we explained: "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."

*Cardoza-Fonseca*, 480 U.S. at 446-48 (internal citations omitted) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, n.9 (1984)).

289. Slocum, *Lenity and Chevron Deference*, *supra* note 136, at 534 & n.124.

290. Recall the quote from *Cardoza-Fonseca* that "[d]eportation is always a harsh measure;" here, where torture is at stake, that is even more true. 480 U.S. at 449.

291. *See* Slocum, *Lenity and Chevron Deference*, *supra* note 136, at 534, 553.

292. *Id.* at 535 & nn.131-32. Slocum avers "that there is a conflict between the immigration rule of lenity and *Chevron* deference, as well as between *Chevron* and other substantive canons, that the Court has resolved the conflict with respect to some substantive canons by displacing *Chevron* when clear statement rules are applicable." *Id.* at 559-60.

293. *Id.* at nn.131-32.

294. Professor Slocum agrees, emphasizing use of lenity in these cases:

It is unpersuasive . . . to assume that Congress intends to delegate authority to agencies to make legal interpretations that do not hinge on their expertise. In cases involving pure questions of law that do not implicate agency expertise, the argument for *Chevron* deference is weak, thus the immigration rule of lenity should apply with full force. . . . [C]ourts in immigration cases have, consistent with this approach, resisted deferring to agency interpretations when the issue is a purely legal one that does not implicate the agency's expertise. . . . [I]f the statute is ambiguous, the agency's interpretation should be entitled to little . . . weight, while the

The BIA's authority and expertise is in applying immigration laws, not international ones.<sup>295</sup> It has little, if any, expertise in the international legal concepts operating here, and none discerning the proper definition of torture under the Convention. In fact, until *In re J-E-*, the BIA had only ruled on two cases requesting CAT protection: in one, it ruled that it lacked jurisdiction to grant relief;<sup>296</sup> in the second, it ruled that the applicant failed to prove fear of torture by a government official.<sup>297</sup> The decision about what constitutes torture is within the purview of the judiciary and not within an agency with no expertise and little ken for the consequential international implications of its decisions.<sup>298</sup> Rather than imposing *Chevron* deference in these cases to benefit the BIA, federal courts should impose Immigration Lenity in these cases to benefit immigrants.

If, notwithstanding this discussion, federal courts insist on imposing a *Chevron* analysis in these cases, the BIA's decisions still do not warrant deference. The answer to *Chevron's* first question, "is the statute ambiguous?" is clearly yes; if not, the BIA and federal courts would not have produced so many diverging definitions of the meaning of torture. The answer to *Chevron's* second question, "is the agency's interpretation unreasonable?" is again yes. Given all the arguments heretofore discussed, it is clear that the BIA's decision as to the meaning of torture is unreasonable.

#### E. Plenary Power and the Application of Immigration Lenity in Convention Cases

Just as *Chevron* deference should not be interposed in Convention cases to deny protection to deserving applicants, the

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immigration rule of lenity should be used as a strong factor directing the court to construe the statute in favor of the noncitizen.

*Id.* at 578-79 (internal citations omitted).

295. See 8 C.F.R. § 1003.1(d)(1) (2009).

296. *In re H-M-V-*, 22 I. & N. Dec. 256, 258 (B.I.A. 1998) (noting that CAT regulations were not yet in effect).

297. *In re S-V-*, 22 I. & N. Dec. 1306, 1314 (B.I.A. 2000).

298. Slocum, *Lenity and Chevron Deference*, *supra* note 136, at 579-80. This contrasts with other types of cases involving more typical immigration law issues. Slocum advances that:

Congress often leaves statutory gaps with the expectation that the Attorney General will exercise discretion in giving meaning to the undefined term. . . . It is in provisions providing for relief from deportation, however, that the Attorney General has especially broad discretion. Immigration law . . . is uniquely discretionary and grants the Attorney General an enormous amount of latitude, including interpretive discretion to define statutory terms and delegated discretion to decide whether to grant relief if statutory eligibility has been established. In such cases, the concept of the immigration rule of lenity as a nondelegation doctrine is in significant tension with the broad discretion delegated to the Attorney General.

*Id.* (internal citations omitted).

plenary power should not be used to the same end. For numerous reasons, the humanitarian principles of Immigration Lenity should prevail over the plenary power. First, the plenary power has undergone significant dilution in recent years.<sup>299</sup> Second, the humanitarian concerns here are central to the U.S. government's international endeavors. When the need to protect people from torture is weighed against a principle that shows signs of weakening, human rights principles should prevail. Third, as the Convention is an instrument derived from concepts of international law, CAT cases do not raise issues that have traditionally been subject to the plenary power. Plenary power cases have involved the routine immigration issues of deportation and procedural and substantive due process concerns,<sup>300</sup> not torture allegations.

The Supreme Court's decision in *Zadvydas v. Davis* supports the view that the plenary power doctrine should not rescue the narrow interpretation of torture. In *Zadvydas*, Professor Rubenstein explains, "the Court declined to apply the plenary doctrine when construing a non-substantive immigration statute that contained no express time limit for executive detention of certain classes of aliens pending their removal."<sup>301</sup> He reasons that this was because a serious constitutional issue was at stake.<sup>302</sup> Similarly, serious foreign policy and humanitarian issues are at stake with Convention protection; leaving the resolution to agency deferral is a mistake.

Professor Rubenstein, though, characterizes *INS v. Aguirre-Aguirre*<sup>303</sup> as requiring that the plenary power doctrine receive "the maximum degree of deference that *Chevron* affords."<sup>304</sup> His view, that the case stands for the proposition that the BIA, "as the Attorney General's delegate[,] is entitled to *Chevron* deference even where the BIA's interpretation of an ambiguous statute at issue is unfavorable to the alien[.]"<sup>305</sup> is inaccurate, given that the Court did not make the statement cited above. The Court did conclude that the Ninth Circuit was incorrect in failing to defer to the BIA's interpretation of the

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299. See Scharf, *supra* note 70, at 56-57 n.6 (noting that "cracks" have developed in plenary power").

300. See *id.* at 55-62 (describing the historical view of the application of the Fourth Amendment in immigration hearings).

301. Rubenstein, *supra* note 148, at 486 (citing *Zadvydas v. Davis*, 533 U.S. 678, 688-89 (2001)); see also *INS v. Chadha*, 462 U.S. 919, 941-42 (1983) (emphasizing that the plenary power doctrine is "subject to important constitutional limitations").

302. Rubenstein, *supra* note 148, at 487.

303. 526 U.S. 415 (1999).

304. Rubenstein, *supra* note 148, at 516 (noting that the Second and Eighth Circuits agree).

305. *Id.* at 502. The *Aguirre-Aguirre* ruling does not follow the statement concerning "the BIA's interpretation of an ambiguous statute . . . unfavorable to the alien." *Id.*; see generally *Aguirre-Aguirre*, 526 U.S. at 424 (holding that the Ninth Circuit failed to accord the BIA's interpretation the level of deference required under *Chevron*).

"serious nonpolitical crime exception"<sup>306</sup> in the relevant INA section.<sup>307</sup> But, as with other cases touching on this issue, *Aguirre-Aguirre* failed to resolve the relationship between the plenary power and *Chevron*.<sup>308</sup>

The implications of *Aguirre-Aguirre* are more nuanced than have been suggested. First, because it is distinguishable on the key issue addressed in this Article, the definition of torture, *Aguirre-Aguirre* does not control resolution of the issue. The phrase "specific intent," from which the controversy over the meaning of torture derives, is not found in the INA, a statute the BIA interprets daily,<sup>309</sup> but rather in a statute of international significance deriving from a United Nations international human rights instrument.<sup>310</sup> The definition of torture involves interpretation of a phrase in a statute involving multi-lateral cooperation and mutual foreign commitments through the Convention, not a simple construction of an INA phrase. Finally, that the Convention regulations<sup>311</sup> were placed under the same title of the Code of Federal Regulations as INA regulations belies the suggestion that the BIA's opinions are entitled to deference, given that the justification for agency deference cited in *Chevron*—expertise of the agency<sup>312</sup>—is nonexistent here.

Over-reliance on the plenary power in the immigration context has been critiqued artfully by Professor Johnson,<sup>313</sup> who points out that agencies, which are not directly accountable to those primarily affected by their decisions, have limited incentive "to act professionally with the appearance of fairness. In immigration law, the courts defer to the immigration bureaucracy generally without any significant check on the harsh treatment of immigrants. This might help to explain, at least in part, the persistent charges of arbitrary and inept BIA decisionmaking."<sup>314</sup>

306. *Aguirre-Aguirre*, 526 U.S. at 424.

307. Note that the issue did not involve construing the remedy of withholding in CAT; the issue in *Aguirre-Aguirre* comes about in different circumstances. See *id.*

308. Professor Rubenstein acknowledges that the plenary power has narrowed in recent years, with *Zadvydas v. Davis*, 533 U.S. 678 (2001) an example of this trend. Rubenstein, *supra* note 148, at 486.

309. See discussion *supra* Section I.B.

310. See discussion *supra* Section II.

311. 8 C.F.R. § 1208.18 (2012).

312. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

313. Johnson, *supra* note 70, at 42 (citations omitted). Others have critiqued the plenary power as it affects immigrants. See, e.g., Holper, *supra* note 17, at 823.

314. Johnson, *supra* note 70, at 42 (citations omitted). Johnson indicates that "there is precious little evidence that administrative agencies are politically accountable to noncitizens." *Id.* at 39. Professor David Cole adopts a similar position, stating that the fact that aliens cannot vote "makes it that much more essential that the basic rights reflected in the Bill of Rights be extended to aliens in our midst." David Cole, *Enemy*

Professor Johnson suggests that this lack of political accountability makes unsound the notion that there should be "*Chevron*-style deference to administrative agencies in immigration matters . . . . Rather," he suggests, we need "more scrutinizing judicial review of immigration decisions . . . to ensure compliance with the law and the efficient administration of the immigration bureaucracy."<sup>315</sup> He aptly locates the irony extant in immigration deference, pointing out that, "[d]espite the problems in the immigration bureaucracy, deference to immigration decisions of administrative agencies traditionally has been *greater* than that afforded other agencies."<sup>316</sup>

Johnson agrees that piling *Chevron* principles on top of the plenary power has only exacerbated the problems of unfettered immigration agency discretion,<sup>317</sup> which is patent in the deference granted to the BIA in determining the definition of torture in the Convention Against Torture. "*Chevron* deference combines with the plenary power doctrine to create an especially potent form of deference to Congress and the executive branch on immigration matters."<sup>318</sup> He offers a constructive suggestion to this problem: "eliminat[ing] *Chevron*-style deference to the decisions of the immigration bureaucracy. Meaningful judicial review would encourage the immigration agencies to take greater care in immigration matters and to comply with the law."<sup>319</sup>

The commentators agree, then, about the place of Immigration Lenity in a *Chevron* analysis: the rigid and narrow interpretation of "torture" for purposes of CAT must yield to a more liberal interpretation of the concept. Under Rubenstein's theory, a finding under Step One of statutory ambiguity would lead to the Step Two analysis, to decide whether the BIA's interpretation was reasonable.<sup>320</sup> As the legislative history indicates that the BIA's interpretation of the specific intent requirement for torture is unreasonable,<sup>321</sup> the rule of Immigration Lenity would serve to give

*Aliens*, 54 STAN. L. REV. 953, 981 (2002).

315. Johnson, *supra* note 70, at 42. Even in *Chevron* itself are the kernels supporting the argument that it is political accountability which warrants agency deference, as the executives who appoint the agency bureaucrats are *answerable to the people*. *Chevron*, 467 U.S. at 865.

316. Johnson, *supra* note 70, at 43 (citing STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 262-71 (1987)).

317. *Id.* at 39, 42.

318. *Id.* at 43 (citation omitted).

319. *Id.* Here he mentions that both political action and "meaningful judicial review hopefully may bring some improvements in the immigration bureaucracy's adjudication of immigration matters and encourage the exercise of greater care when establishing policy affecting immigrants." *Id.*

320. Rubenstein, *supra* note 148, at 482, 504.

321. See *supra* Section II.

the applicant the benefit of the doubt in proving the likelihood that he or she would be tortured if refouled.

#### CONCLUSION

By invoking the principle of Immigration Lenity in cases in which the BIA continues to misunderstand the meaning of "specific intent," U.S. federal courts can help achieve the humanitarian aims of the Convention Against Torture: eradication of torture and promotion of human rights. Immigration Lenity is particularly warranted here, where it will prevent the return of potential torture victims to countries where they are likely to be tortured. In addition, it will sustain the intended meaning of the phrase "specific intent," that pain and suffering resulting from torture needs to be anticipated or intended, not inadvertent or accidental.<sup>322</sup> Given the stakes in these cases, principles supporting Immigration Lenity should enter prominently in any conflicts with the principles of deference imposed by either *Chevron* or the plenary power.

Only a totally cynical view of the political branches of government could justify signing this treaty while intending that a significant part of it, the non-refoulement principle, would offer virtually no protection to potential torture victims. Not only would this be contrary to the goals of the treaty, but it would also be contrary to the expressed purpose in enacting the Convention Against Torture.

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322. CAT, *supra* note 1, pmbl.