ARTICLE

# WHEN DOES MENTAL HEALTH COERCION CONSTITUTE TORTURE?:

# IMPLICATIONS OF UNPUBLISHED U.S. IMMIGRATION JUDGE DECISIONS DENYING NON-REFOULEMENT PROTECTION

*Matthew S. Smith*[*] *& Michael Ashley Stein*[**]



* Director of Advocacy Initiatives, Harvard Law School Project on Disability (HPOD). The author served as country conditions expert in several of the 49 cases described in Part IV.

** Executive Director, HPOD; Visiting Professor, Harvard Law School; Extraordinary Professor, University of Pretoria Faculty of Law Centre for Human Rights. The authors would like to thank Gerald Neuman, Sabrineh Ardalan, Munmeeth Soni, Alice Barrett, Peter Alfredson, Hannah Comstock, Caitlin Anderson, and Hannah Cartwright for their insightful suggestions and comments on earlier drafts; Bryce Hollander for his research assistance; and all the attorneys and organizations who took time to respond to our requests for the unpublished immigration judge decisions that inform this article. The views contained herein are our own.

## *I. INTRODUCTION*

The absolute prohibition of torture is one of a handful of rarefied, *jus cogens* peremptory norms of international law.[1] Humanity has collectively concluded that acts of torture are so vile and repugnant that they countenance no exceptions. As a matter of law, neither good intentions, resource limitations, exhaustion of viable alternatives, nor prevention of future harm may excuse it. Thus, torture can never be justified.[2] An important corollary of the universal torture prohibition is the bar on removing noncitizens to countries where they may be tortured, commonly called *non-refoulement*.[3] Like the absolute prohibition of torture, the ban on *refoulement* is absolute.[4]

1. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980); *see also Matter of J-E-*, 23 I. & N. Dec. 291, 310 (B.I.A. 2002) (en banc), (Rosenberg, dissenting) (quoting *Filartiga*, 630 F.2d at 890).

2. *See* Nuru v. Gonzales, 404 F.3d 1207, 1222 (9th Cir. 2005) ("Even in war, torture is not authorized."); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, art. 2(2), [hereinafter CAT] ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.").

3. CAT, *supra* note 2, art. 3.

4. *See* Margit Ammer & Andrea Schuechner, *Principle of Non-Refoulement*, *in* THE UNITED NATIONS CONVENTION AGAINST TORTURE AND ITS OPTIONAL PROTOCOL: A COMMENTARY

The Convention Against Torture ("CAT") serves to codify these norms and to create a global framework for implementing them.[5] In 1994, the United States ratified the CAT, subject to certain reservations, understandings, and declarations ("RUDs").[6] In 1998, Congress passed the Foreign Affairs Reform and Restructuring Act (FARRA) to implement its CAT obligations.[7] In 1999, the former Immigration and Naturalization Service promulgated regulations aimed at implementing US CAT obligations in removal proceedings.[8] The emergence of CAT relief for noncitizens challenging their removal gave immigrant advocates hope for an alternative means to avoid severe harm in the context of rising restrictions on other forms of relief from removal.[9]

Notwithstanding the historical, ableist roots of US immigration restrictions,[10] more recently, noncitizens with psychosocial disabilities[11] have gained access to critical forms of

98, 114 (Manfred Nowak et al. eds., 2d ed. 2019). Note, however, that this obligation is distinct from the non-refoulement duty described in the United Nations Convention Relating to the Status of Refugees. *See id.* at art. 33, Jul. 28, 1951, 189 U.N.T.S. 150.

5. CAT, *supra* note 2, art. 3(1) ("No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.").

6. Declarations and Reservations Made upon Ratification, Accession, or Succession, 1830 U.N.T.S. 320 (Oct. 21, 1994).

7. Pub. L. No. 105-277, Div. G, Title XXII, 112 Stat. 2681-2822 (codified as Note to 8 U.S.C. § 1231). FARRA forbids that United States "expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681, 2681-822 (1998) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture.").

8. *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8,478 (Feb. 19, 1999) (codified as 8 C.F.R. §§ 1208.16-1208.18).

9. Jon Bauer, *Obscured by "Willful Blindness": States' Preventive Obligations and the Meaning of Acquiescence Under the Convention Against Torture*, 52 COLUM. HUM. RTS. L. REV. 738, 744 (2021).

10. *See* DOUGLAS C. BAYNTON, DEFECTIVES IN THE LAND: DISABILITY AND IMMIGRATION IN THE AGE OF EUGENICS 13-23 (2016) (documenting the eugenics movement's advocacy to screen immigrants for defects); *see also generally* JAY TIMOTHY DOLMAGE, DISABLED UPON ARRIVAL: EUGENICS, IMMIGRATION, AND THE CONSTRUCTION OF RACE AND DISABILITY 13-23 (2018).

11. Although many immigration adjudicators refer to "mental illness" rather than "psychosocial disability," we use the latter term herein in deference to civil society groups representing users and survivors of psychiatry. *See, e.g.,* World Network of Users and Survivors of Psychiatry, *Implementation Manual for the United Nations Convention on the*

assistance to invoke the regulatory grounds for relief from removal under CAT. Importantly, the Board of Immigration Appeals ("BIA") decision *Matter of M-A-M-* granted persons who are "mentally incompetent" to represent themselves in removal proceedings the rare right to counsel at public expense in removal proceedings.[12] Further, pursuant to the *Franco v. Holder* class action settlement in 2013,[13] the Executive Office for Immigration Review ("EOIR") established the National Qualified Representative Program ("NQRP") to implement the same immigration statutory provision requiring safeguards for incompetent respondents.[14] NQRP currently operates in twenty-four of the thirty-one states with immigration courts,[15] providing "Qualified Representatives" ("QRs") to certain unrepresented and detained respondents who are found by an Immigration Judge ("IJ") or the BIA to be mentally incompetent to represent themselves in immigration proceedings."[16]

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*Rights of Persons with Disabilities* 9 (2008), http://www.un.org/disabilities/documents/COP/WNUSP%20CRPD%20Manual.doc. At the same time, we recognize that many members of this community identify less as "persons with disabilities" than "psychiatric survivors." *See, e.g.,* Judi Chamberlain, *Rehabilitating Ourselves: The Psychiatric Survivor Movement*, 24 INT'L J. MENTAL HEALTH 39 (1995).

12. *Matter of M-A-M-*, 25 I. & N. Dec. 474, 479 (B.I.A. 2011) (interpreting 8 U.S.C. § 1229a(b)(3)).

13. *See* Franco-Gonzales v. Holder, 767 F.Supp.2d 1034 (C.D. Cal. 2010); Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013). In addition, the Central District of California's permanent injunction framed access to a Qualified Representative as a reasonable accommodation owed to noncitizens with disabilities under Section 504 of the Rehabilitation Act. *Id.* at *1.

14. *See* Memorandum from Brian M. O'Leary, Chief Immigration Judge, to All Immigration Judges, on Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions, at 3 (Aug. 1, 2002). The EOIR further ordered US Immigration and Customs Enforcement (ICE) to identify ICE detainees who may be mentally incompetent under *Matter of M-A-M-*. *See* Memorandum from John Morton, ICE Director, to Thomas D. Homan, Peter S. Vincent, & Kevin Landy, on Civil Immigration Detention: Guidance for New Identification and Information-Sharing Procedures Related to Unrepresented Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013).

15. Greg Chen & Jorge Loweree, *Policy Brief: The Biden Administration and Congress Must Guarantee Legal Representation for People Facing Removal*, AILA Doc. No. 21011501 (Jan. 15, 2021). *See also* VENUE, RIGHT TO PRESENT EVIDENCE, AND RIGHT TO COUNSEL, IMMIGR. LAW & CRIMES § 8:23.

16. *National Qualified Representative Program,* DEP'T OF JUST., https://www.justice.gov/eoir/national-qualified-representative-program-nqrp [https://perma.cc/T9TX-HDRN] (last visited Mar. 23, 2022); Michael Corradini, *National*

At the same time, restrictions to other forms of relief to removal have heightened. As one practitioner has recently observed, "For a growing proportion of asylum seekers, CAT relief provides the only path to protection," citing a steep decline in IJs' asylum and withholding grant rates, from 56% in 2014 to 28% in 2020.[17] This holds especially true for noncitizens with psychosocial disabilities, who frequently are barred from non-CAT removal relief due to their prior criminal histories.[18] Thus, noncitizens with psychosocial disabilities' prospects for removal relief increasingly depend on whether they can convince IJs that coercive mental health practices amount to torture ("CAT claims").

These developments coincide with rising concerns over the suffering caused by coercive mental health practices.[19] Globally, the adoption and implementation of the United Nations Convention on the Rights of Persons with Disabilities ("CRPD") has drawn attention to the human rights implications of mental health coercion.[20] Institutional mental health settings, such as state-run psychiatric hospitals, routinely employ coercive forms of "treatment" that are intolerable in other settings. For example,

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*Qualified Representative Program*, VERA INST., https://www.vera.org/projects/national-qualified-representative-program [https://perma.cc/U3CH-4QVM] (last visited Mar. 23, 2022).

17. Bauer, *supra* note 9, at 744-45.

18. A host of criminal offenses, and even charges, may be considered "particularly serious crimes" that render noncitizens ineligible for asylum and withholding of removal. 8 U.S.C. §§ 1158(b)(2)(A)(ii) & 1231(b)(3)(B)(ii). For a classic treatise on the intersection of mental health and the criminal legal system, see generally MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL (2000).

19. *See* United Nations Human Rights Council, Resolution on Mental health and human rights, U.N. Doc. A/HRC/RES/43/13, ¶ 7 (July 1, 2020) (rejecting mental health care regimes reliant on "biomedical interventions, coercion, medicalization and institutionalization"); United Nations Human Rights Council, Resolution on Mental Health and Human Rights, U.N. Doc. A/HRC/36/L.25, ¶ 8 (2017) (urging states to "abandon all practices that fail to respect the rights, will and preferences of all persons, on an equal basis" and to "provide mental health services for persons with mental health conditions or psychosocial disabilities on the same basis as to those without disabilities, including on the basis of free and informed consent"). *See generally* MENTAL HEALTH, LEGAL CAPACITY, AND HUMAN RIGHTS (Michael Ashley Stein et al. eds., 2021); COERCIVE CARE: RIGHTS, LAW AND POLICY (Bernadette Mcsherry & Ian Freckelton eds., 2013); WASHINGTON COLLEGE OF LAW CENTER FOR HUMAN RIGHTS & HUMANITARIAN LAW, TORTURE IN HEALTHCARE SETTINGS: REFLECTIONS ON THE SPECIAL RAPPORTEUR ON TORTURE'S 2013 THEMATIC REPORT (2014).

20. *See* Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Jan. 24, 2007) [hereinafter CRPD]; *see also* Dainius Puras & Piers Gooding, *Mental Health and Human Rights in the 21st Century*, 18 WORLD PSYCH. 42 (2019).

mental health workers have exceeded prescribed regimens by punishing, intimidating, or coercing persons with psychosocial disabilities to the point of severe harm and death.[21] Other routinized forms of coercion are justified as "treatment," even though they are exclusively or disproportionately applied in segregated mental health facilities. These include nonconsensual psychosurgeries, use of electroshock without safeguards,[22] administration of chemical restraints,[23] and prolonged application of mechanical restraints.[24] Since the CRPD's adoption in 2006, United Nations ("UN") treaty bodies and special mandate holders have characterized many of these acts as forms of torture.[25]

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21. *See generally* Phil Fennell, *Article 15: Protection against Torture and Cruel or Inhuman or Degrading Treatment or Punishment*, *in* THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY 426 (Ilias Bantekas, Michael Ashley Stein, & Dimitris Anastasiou eds., 2018); Janet E. Lord, *Shared Understanding or Consensus-Masked Disagreement? The Anti-Torture Framework in the Convention on the Rights of Persons with Disabilities*, 33 LOY. L.A. INT'L & COMP. L. REV. 27 (2010).

22. *See* Manfred Nowak (Special Rapporteur on Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment), Interim Report, U.N. Doc. A/63/175, ¶ 61 (July 28, 2008) [hereinafter SRT Interim Report 2008]; Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), U.N. Doc. A/HRC/22/53, ¶ 63 (Feb. 1, 2013) [hereinafter SRT Report 2013]. *See also* EUR. COMM. FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT ¶ 39 (Mar. 21, 2017), https://rm.coe.int/16807001c3 [https://perma.cc/9R72-GQZM] [hereinafter CPT Standards]; Fennell, *supra* note 21, at 459-60 (discussing cases); Natalie Drew et al., *Human Rights Violations of People with Mental and Psychosocial Disabilities: An Unresolved Global Crisis*, 378 THE LANCET 1164, 1168 (2011).

23. *See* SRT Interim Report 2008, *supra* note 22, ¶ 63; *see also* Fennell *supra* note 21, at 451-52 (discussing cases); Lord, *supra* note 21, at 60 ("The use of medication, particularly psychotropic medications, either on prisoners or persons with disabilities in institutions where overmedication is used as a form of chemical restraint for treatment (or punishment) will also fall afoul of the proscription.").

24. *See* SRT Report 2013*, supra* note 22 at ¶ 63; SRT Interim Report 2008, *supra* note 22, ¶ 55; *see also* Fennell, *supra* note 21, at 459-60 (discussing cases).

25. *See, e.g.*, Catalina Devandas-Aguilar (Special Rapporteur on the Rights of Persons with Disabilities), Report, U.N. Doc. A/73/161, ¶ 14 (July 16, 2018) (criticizing pre-CRPD instruments for having "justified the use of coercion against persons with disabilities in health care, including involuntary treatment and hospitalization, solitary confinement, the use of restraints and forced sterilization on the basis of notions of 'medical necessity' and 'dangerousness'"); UN Human Rights Council, Resolution on Mental health and human rights, U.N. Doc. A/HRC/RES/32/18, p. 2 (July 18, 2016) (recognizing that "unlawful or arbitrary institutionalization, overmedicalization and treatment practices that fail to respect their autonomy, will and preferences" may constitute torture); CRPD Committee, Concluding observations on the initial report of Chile, U.N. Doc. CRPD/C/CHL/CO/1, ¶ 33 (Apr. 13, 2016) (expressing "deep concern that practices such as psychosurgery, electroconvulsive therapy, extended isolation in cells without heating or basic services,

Yet many noncitizens with psychosocial disabilities fail to convince IJs of the same. While the vast majority of CAT claims fail,[26] IJs' denials of CAT claims by noncitizens with psychosocial disabilities dramatically highlight themes central to the global struggle to combat mental health coercion. Specifically, some adjudicators have concluded that the harm that CAT claimants with psychosocial disabilities fear in institutional mental health settings is not sufficiently intentional to trigger the United States' *non-refoulement* duty under US national law. In this view, evidence of environmental factors or mental health workers' non-torturous motivations prevent coercive mental health practices from warranting CAT relief. When so deciding, these IJs ascribe coercive practices to good intentions, resource limitations, lack of viable alternatives, or prevention of future harm. Accordingly, IJs' denials of CAT claims raise important normative and practical questions about how adjudicators apply national legal standards that transpose international obligations to mental health coercion.[27]

Herein, we review a unique sample of 49 unpublished IJ decisions denying noncitizens with psychosocial disabilities' claims for relief under CAT. Part II frames our analysis of IJs' CAT claim denials by describing growing global concerns about coercion in mental health care settings. Part III summarizes relevant US legal standards for CAT claims. Part IV identifies trends in how IJs apply these standards to CAT claims predicated on coercive mental health practices. Part V discusses how these trends are at counter purposes with the worldwide movement

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[and] physical restraints" were used "with the sole purpose of 'disciplining' or 'correcting deviant behavior' in persons with psychosocial disabilities"); Juan E. Méndez, *Introduction*, *in* TORTURE IN HEALTHCARE SETTINGS, *supra* note 19, at xix (urging States to ban mental health coercive measures "including the non-consensual administration of psychosurgery, electroshock and mind-altering drugs for both long- and short-term application").

26. For context, in FY2018, EOIR reported 1,334 grants of CAT relief and 25,964 denials. *See* Table 16. DEP'T OF JUST. CONVENTION AGAINST TORTURE I-862 INITIAL AND SUBSEQUENT CASE COMPLETIONS BY DECISION, EOIR STATISTIC YEARBOOK FY 2018, 30, https://www.justice.gov/eoir/file/1198896/download [https://perma.cc/J9SC-W6KW].

27. For present purposes, we focus on the practical implications of trends in IJs' adjudication of CAT claims by noncitizens with psychosocial disabilities, while recognizing the significant normative ramifications at the intersection of CAT, the CRPD, and mental health coercion. For one such thoughtful exploration, see Michael L. Perlin, *International Human Rights and Institutional Forensic Psychiatry: The Core Issues*, *in* THE USE OF COERCIVE MEASURES IN FORENSIC PSYCHIATRIC CARE (Birgit Völlm & Norbert Nedopil eds., 2016).

away from coercive mental health practices. Part VI offers concrete recommendations for practitioners representing CAT claimants with psychosocial disabilities, for US immigration adjudicators and policy-makers, and for international monitors. We conclude with brief reflections on the implications of CAT claim adjudications for the United States' fulfillment of its international obligations.

## *II. COERCION IN MENTAL HEALTH CARE SETTINGS*

"Prejudicial laws and harmful social conventions regarding people with disabilities have existed since antiquity."[28] Persons with psychosocial disabilities have experienced an especially lurid history of systematic human rights violations involving involuntary institutionalization, experimentation, sterilization, and incapacitation.[29] Historically, such violations have perhaps been nowhere more prevalent than in institutional mental health settings.[30]

28. Michael Ashley Stein et al., *Disability, in* 2 OXFORD INTERNATIONAL Encyclopedia OF LEGAL HISTORY 334 (Stanley N. Katz et al. eds., 2009).

29. *See generally* Matthew S. Smith & Michael Ashley Stein, *Connecting the Right of Collective Legal Capacity by Indigenous Peoples with the Right of Individual Legal Capacity by Persons with Disabilities*, 9 INT'L HUM. RTS. L.R. 147, 158 (2020) (collecting cases from the European Court of Human Rights). Recent scholarship has also exposed the intersectional dimensions of these violations. *See, e.g.,* Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 419 (2018); MAB SEGREST, ADMINISTRATIONS OF LUNACY: RACISM AND THE HAUNTING OF AMERICAN PSYCHIATRY AT THE MILLEDGEVILLE ASYLUM (2020); MARTIN SUMMERS, MADNESS IN THE CITY OF MAGNIFICENT INTENTIONS: A HISTORY OF RACE AND MENTAL ILLNESS IN THE NATION'S CAPITAL (2019); WENDY GONAVER, THE PECULIAR INSTITUTION AND THE MAKING OF MODERN PSYCHIATRY 1840-1880 (2018).

30. Andrés J. Gallegos, *Misperceptions Of People With Disabilities Lead To Low-Quality Care: How Policy Makers Can Counter The Harm And Injustice*, HEALTH AFFAIRS (Apr. 1, 2021), https://www.healthaffairs.org/do/10.1377/forefront.20210325.480382 [https://perma.cc/D4X6-KQYW] ("Explicit and implicit discriminatory bias within the health care professions represent an insidious virus against which people with disabilities have been fighting for decades."); *see also Ending Coercion in Mental Health: The Need for a Human Rights-based Approach, Resolution 2291,* COUNCIL OF EUROPE, ¶ 2 (2019), https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28038&lang=en [https://perma.cc/8NJD-G9HV] [hereinafter Council of Europe] (noting "the use of involuntary measures in mental health settings mainly results from a culture of confinement which focuses and relies on coercion to 'control' and 'treat' patients who are considered potentially 'dangerous' to themselves or others").

Coercion[31] has long been endemic to mental health care systems.[32] Premised on "the traditional psychiatric view that providers should determine the direction of treatment … providers unilaterally decide what is best for people diagnosed with mental health conditions."[33] Not coincidentally, coercive practices are most prevalent "in settings that are isolated from the lives of service users," where providers exert exclusive control and can avoid scrutiny.[34] Troublingly, coercion may be on the rise,[35] despite greater empirical evidence of how coercive methods undermine therapeutic aims.[36]

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31. There has yet to emerge a consensus definition of coercion in mental health contexts. Some have pointed to the Oxford English Dictionary definition, which characterizes coercion as persuasion "by using force or threats." Piers Gooding et al., *Alternatives to Coercion in Mental Health Settings: A Literature Review,* MELBOURNE SOC. EQUITY INST. 9 (2018), https://socialequity.unimelb.edu.au/__data/assets/pdf_file/0012/2898525/Alternatives-to-Coercion-Literature-Review-Melbourne-Social-Equity-Institute.pdf [https://perma.cc/P943-JXKP]. Importantly, coercion is not necessarily coterminous with "involuntary." Indeed, some patients receiving involuntary treatment have reported not feeling coerced, while other patients receiving voluntary treatment have reported coercion. *See* John Monahan et al*., Coercion in the Provision of Mental Health Services: The MacArthur Studies in* RESEARCH IN COMMUNITY AND MENTAL HEALTH, VOL. 10: COERCION IN MENTAL HEALTH SERVICES – INTERNATIONAL PERSPECTIVES 13-30, 27 (Joseph P. Morrissey & John Monahan eds., 1999).

32. *See generally* Rep. of the U.N. High Comm'r for Hum. Rts., Mental Health and Human Rights, U.N. Doc. A/HRC/39/36 (July 24, 2018). *See also* Jiri Raboch et al., *Use of Coercive Measures During Involuntary Hospitalization: Findings From Ten European Countries,* 61 PSYCHIATRIC SERVICES 1012, 1012–17 (2010).

33. *See* Charlene Sunkel et al., *Lived Experience Perspectives from Australia, Canada, Kenya, Cameroon and South Africa – Conceptualising the Realities*, *in* MENTAL HEALTH, LEGAL CAPACITY, AND HUMAN RIGHTS 317 (Michael Ashley Stein et al. eds., 2021).

34. Benjamin A. Barsky et al., *Redefining International Mental Health Care in the Wake of the COVID-19 Pandemic*, *in* MENTAL HEALTH, LEGAL CAPACITY, AND HUMAN RIGHTS 244 (Michael Ashley Stein et al. eds., 2021).

35. Council of Europe, *supra* note 30, ¶ 1 (observing "growing number of persons with mental health conditions or psychosocial disabilities are subject to coercive measures . . . . [e]ven in countries where so-called restrictive laws have been introduced to reduce the recourse to such measures"); *see also* Rep. of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, ¶ 28, U.N. Doc. A/HRC/41/34 (Apr. 12, 2019).

36. *See generally* BRADLEY FOXLEWIN, WHAT IS HAPPENING AT THE SECLUSION REVIEW THAT MAKES A DIFFERENCE? A CONSUMER LED RESEARCH STUDY (ACT Mental Health Consumer Network, 2012); Christina Katsakou et al., *"Psychiatric Patients" Views on Why their Involuntary Hospitalisation was Right or Wrong: A Qualitative Study*, 47 SOC. PSYCH. & PSYCHIATRIC EPIDEMIOLOGY 1169 (2012); Caroline Larue et al., *The Experience of Seclusion and Restraint in Psychiatric Settings: Perspectives of Patients*, 34 ISSUES IN MENTAL HEALTH

Coercion in institutional mental health settings knows many forms, "including different forms of restraint (mechanical, physical or pharmacological), forcible seclusion in confined spaces, treatment by administration of medication without the person's consent and restrictive conditions imposed as part of treatment and supervision in the community."[37] Although the forms of coercion may vary across socio-economically diverse contexts

> there are more commonalities than differences across countries, including misconceptions around mental health, stigma and discrimination, chronic underfunding of mental health services, a lack of available options to respond to what might be perceived as disruptive behavior or emotional crisis and an acceptance of the use of coercion as a legitimate way to respond to people in crisis.[38]

Perversely, "coercive practices like forced medicalization and pharmaceutical interventions often transpire under the guise of evidence-based practice," notwithstanding ample evidence to the contrary.[39] Clinician groups, including the World Psychiatric Association, have questioned the putative benefits of such approaches.[40] In fact, "research has shown that coercive practices can adversely impact quality of life for people with psychosocial disabilities, leaving many traumatized and disempowered."[41] This holds true even for "crisis" or "emergency" mental health care.

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NURSING 317 (2013); Cynthia Robins et al., *Special Section on Seclusion and Restraint: Consumers Perceptions of Negative Experiences and "Sanctuary Harm" in Psychiatric Settings*, 56 PSYCH. SERV. 1134 (2005).

37. S.P. Sashidharan et al., *Reducing Coercion in Mental Healthcare*, 28 EPIDEMIOLOGY & PSYCHIATRIC SCI., 605, 605-06 (2019).

38. Michelle Funk et al., *Strategies to Achieve a Rights-Based Approach through WHO QualityRights*, *in* MENTAL HEALTH, LEGAL CAPACITY, AND HUMAN RIGHTS 245 (Michael Ashley Stein et al. eds., 2021).

39. Barsky et al., *supra* note 34, at 32 (collecting studies); *see also* Council of Europe, *supra* note 30, ¶ 2 (signaling "the lack of empirical evidence regarding . . . the effectiveness of coercive measures in preventing self-harm or harm to others").

40. Faraaz Mahomed et al., *Compulsory Mental Health Interventions and the CRPD: Minding Equality by Anna Nilsson (Review)*, 43 HUM. RTS Q. 616, 616-20 (2021).

41. Barsky et al., *supra* note 34, at 32 (collecting studies). *See also* Rep. of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, ¶ 64, U.N. Doc. A/HRC/35/21 (Mar. 28, 2017) [hereinafter SRPMH Report 2017] ("Justification for using coercion is generally based on 'medical necessity' and 'dangerousness.' These subjective principles are not supported by research and their application is open to broad interpretation, raising questions of arbitrariness.").

Increasingly, there is evidence that non-coercive, community-based crisis services can deliver the desired outcomes in assisting people during crisis situations.[42] Moreover, power asymmetries dissuade "people from seeking further treatment thus increasing the risk of non-adherence and involuntary treatment, particularly those with long-term mental health problems."[43] Thus, the persistence of "paternalistic and coercive practices" is "one of many paradoxes in mental health practice."[44]

For example, the global mental health community has rejected nontherapeutic uses of mind-altering substances.[45] While current international legal standards permit therapeutic psychotropic drugs under certain conditions, their nontherapeutic applications—namely, to punish or coerce persons rather than to treat mental health conditions—have been widely repudiated.[46] Because they lack therapeutic justification, such applications of psychotropic drugs are commonly referred to not as "treatment," but as "chemical restraints."[47] Accordingly, the UN has prohibited mental health workers from using antipsychotic drugs "as a punishment or for the convenience of others."[48] Other

42. Gooding et al., *supra* note 31.

43. Barsky et al., *supra* note 34, at 33 (quoting S.P. Sashidharan et al., *supra* note 37). *See also* SRPMH Report 2017, *supra* note 41, ¶ 65 ("Coercion in psychiatry perpetuates power imbalances in care relationships, causes mistrust, exacerbates stigma and discrimination and has made many turn away, fearful of seeking help within mainstream mental health services.").

44. Barsky et al., *supra* note 34, at 32-33.

45. *See* 8 C.F.R. § 1208.18(a)(4)(ii) (specifically mentioning "mind altering substances" as a cause of severe prolonged harm that may constitute torture).

46. *See, e.g.,* SRT Interim Report 2008, *supra* note 22, ¶ 63 ("Inside institutions, as well as in the context of forced outpatient treatment, psychiatric medication, including neuroleptics and other mind-altering drugs, may be administered to persons with mental disabilities without their free and informed consent or against their will, under coercion, or as a form of punishment. The administration in detention and psychiatric institutions of drugs, including neuroleptics that cause trembling, shivering and contractions and make the subject apathetic and dull his or her intelligence, has been recognized as a form of torture.") (citing Pieter Kooijmans (Special Rapporteur on Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment), U.N. Doc. E/CN.4/1986/15, ¶ 119 (Feb. 19, 1986)).

47. CPT Standards, *supra* note 22, at 2; *see also* Fennell, *supra* note 21, at 444 (discussing how the relevance that absence of therapeutic purpose has for torture analysis).

48. Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, G.A. Res. 46/119, U.N. Doc. A/RES/46/119 (1991); *see also* Fennell, *supra* note 21, at 449 (positing that the principle prohibiting

international bodies have adopted this bright-line rule.[49] Recognizing this broad understanding, the UN Special Rapporteur on Torture has urged states to ban chemical restraints in institutional settings.[50] Critical to the Special Rapporteur's determination was the inherent powerlessness of psychiatric patients in such settings and the impunity with which mental health workers in many countries can administer psychotropic drugs non-therapeutically.[51]

This focus on the torturous nature of chemical restraints coincides with a broader movement away from using coercive measures in mental health settings, regardless of the purported therapeutic aims of mental health workers.[52] More recently, the Special Rapporteur has signaled that coercive practices, including

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nonconsensual intrusive and irreversible treatments may also apply to "psychotropic medication administered without consent . . . electro convulsive therapy (ECT), restraint, physical and chemical, and seclusion or solitary confinement).

49. *See, e.g.,* CPT Standards, *supra* note 22, at 2 ("Means of restraint should never be used as punishment, for the mere convenience of staff, because of staff shortages or to replace proper care or treatment.") (referring collectively to physical, mechanical, and chemical restraints); *Mental Health and Prisons,* WORLD HEALTH ORG. & INT'L COMM. RED CROSS, https://web.archive.org/web/20220306221453/www.who.int/mental_health/policy/mh_in_prison.pdf (last visited Apr. 27, 2022) (describing abusive use of medications as torture). *See also* SRT Interim Report 2008 *supra* note 22, at 47 (citing "lack [of] therapeutic purpose" as indicia of torture); *see also* Statement by Mr. Dainius Pūras, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (July 3, 2020) (noting the "limited effectiveness of psychotropic medications," the scientific literature's role in having "downplayed" their side effects, and that their overuse "risks legitimizing coercive practices"), https://www.ohchr.org/en/statements/2020/10/statement-mr-dainius-puras-special-rapporteur-right-everyone-enjoyment-highest [https://perma.cc/ER7C-XPKZ] (last visited Apr. 28, 2022).

50. SRT Report 2013, *supra* note 22, ¶¶ 63, 89(b). *See also* Rep. of the UN High Comm'r for Human Rights, ¶ 33, U.N. Doc. A/HRC/34/32 (Jan. 31, 2017) (signaling that "the use of restraints, forced medication and overmedication" may constitute torture); U.N. Comm. on the Rights of Persons with Disabilities, General Comment No. 2, ¶ 42, U.N. Doc. CRPD/C/GC/1 (May 19, 2014) (declaring that coercive mental health measures, such as restraints, may constitute torture).

51. SRT Report 2013, *supra* note 22, at ¶¶ 63-64 (describing their use as "systematic").

52. *See* Rep. of the Special Rapporteur on the Right of Everyone to the Enjoyment of Highest Attainable Standard of Physical and Mental Health, ¶ 57, U.N. Doc. A/HRC/44/48 (Apr. 15, 2020) (urging a "radical shift away from coercion" in mental health systems); *see also* SRPMH Report 2017, *supra* note 41, ¶¶ 10, 25, 29, 64 (citing growing body of research questioning the efficacy of coercive measures).

"psychiatric intervention on the grounds of 'medical necessity' or the 'best interests' of the patient . . . may well amount to torture" because they "generally involve highly discriminatory and coercive attempts at controlling or 'correcting' the victim's personality, behaviour or choices and almost always inflict severe pain or suffering."[53] Especially relevant to institutional mental health settings, where coercive practices are known to propagate, is the Special Rapporteur's call to reframe torture inquiries to focus not just on whether "isolated techniques" are severe and intentional enough to constitute torture, but also to consider environmental factors, such as the institutional nature of many mental health settings.[54] Because people "tend to experience . . . torture holistically," the contexts in which specific, harmful acts occur matter for determining CAT violations.[55] This reframing builds on previous efforts to distinguish torture from other forms of cruel, inhuman, or degrading treatment based on the "powerlessness" of the victim, rather than merely the severity of harm caused.[56] In other words, context matters, and the risk of torture increases when members of historically marginalized groups are placed involuntarily into vulnerable situations.[57]

53. Nils Melzer (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), Report of the Special Rapporteur to the Human Rights Council Forty-Third Session, ¶ 37, U.N. Doc. A/HRC/43/49 (Mar. 20, 2020) [hereinafter SRT Report 2020].

54. *Id.* ¶ 70.

55. *Id.*

56. SRT Interim Report 2008, *supra* note 22, ¶¶ 27–76; *see also* Rep. of the Office of the High Comm'r for Hum. Rts., *Expert Seminar on Freedom from Torture and Ill-Treatment and Persons with Disabilities* (Dec. 11, 2007), http://www2.ohchr.org/english/issues/disability/docs/torture/seminartorturereportfinal.doc [https://perma.cc/FA2C-3CT2].

57. *See* Committee Against Torture, *General Comment No. 4* (*2017) on the Implementation of Article 3 of the Convention in the Context of Article 22*, U.N. Doc. CAT/C/GC/4 ¶ 17 (Sep. 4, 2018) [hereinafter CAT Committee] ("The Committee considers that severe pain or suffering cannot always be assessed objectively. It depends on the negative physical and/or mental repercussions that the infliction of violent or abusive acts has on each individual, taking into account all relevant circumstances of each case, including the nature of the treatment, the sex, age and state of health and vulnerability of the victim and any other status or factors.").

## *III. CAT CLAIM ELEMENTS*

IJs act as frontline sentries in discharging the United States' *non-refoulement* duty. As administrative judges within the Department of Justice ("DOJ"), IJs serve as the first-instance triers-of-fact in removal proceedings and issue initial decisions on respondents with psychosocial disabilities' CAT claims. Their decisions are appealable to the BIA,[58] and BIA decisions are appealable to the federal Circuit Court of Appeals in which the IJ resides. Published BIA decisions are binding on all Department of Homeland Security ("DHS") officers and IJs unless the Attorney General[59] or a federal court modifies or overrules them.

Under FARRA, CAT relief is mandatory, unlike asylum, which is discretionary.[60] CAT relief comes in the form of either withholding or deferral. Respondents who commit a "particularly serious crime" are precluded from withholding of removal and are only eligible for deferral,[61] which is more tenuous. Though withholding grants slightly more durable relief from removal, both deferral and withholding orders may be revisited in the future, should conditions in the respondent's country of origin change such that removal without *refoulement* becomes possible.[62] Unlike asylum, neither form of relief affords CAT claimants a pathway to citizenship or legal permanent resident status, nor does either form of relief prevent immigration authorities from removing respondents to third countries where torture is unlikely.[63] The

58. The Board of Immigration Appeals ("BIA") is a federal agency within the Department of Justice's Executive Office for Immigration Review ("EOIR").

59. Occasionally, the Attorney General exercises its discretionary authority pursuant to 8 C.F.R. § 1003.1(h)(1)(i) to refer to itself certain BIA decisions for review.

60. 8 C.F.R. §§ 1208.16(c)(4); *see also* Moncrieffe v. Holder, 569 U.S. 184, 187 n.1 (2013) (noting that the government "has no discretion to deny relief to a noncitizen who establishes his eligibility" for CAT relief).

61. *See* 8 C.F.R. §§ 1208.16(c)-(d) (2021) (withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.); *id.* at § 1208.17(a) (2020) (Deferral of removal under the Convention Against Torture); *see generally* EOIR, *Fact Sheet: Asylum and Withholding of Removal Relief Convention Against Torture Protections* 8 (Jan. 15, 2009), https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf [https://perma.cc/EGW9-ULY5] (last visited Apr. 28, 2022) (describing differences between CAT withholding and deferral).

62. 8 C.F.R. § 1208.24(b) (2021) (Termination of asylum or withholding of removal or deportation); *id.* at § 1208.17(d) (2021) (Termination of deferral of removal).

63. *See* 8 C.F.R. § 1208.16(f) (2021).

primary benefit of CAT relief is avoidance of torture in the respondent's country of origin. Consequently, most respondents also seek other forms of relief, such as asylum[64] or withholding of removal,[65] and IJs generally only adjudicate CAT claims where they have denied or found respondents ineligible for other forms of relief.

Under the FARRA regulations, respondents have the burden of proving that, if removed, they are "more likely than not"[66] to experience severe physical or mental suffering intentionally inflicted by, or with the acquiescence of, a public official for one of several proscribed purposes.[67] These purposes include: obtaining information or a confession, punishment, intimidation or coercion, or for any reason based on discrimination of any kind,[68] presumably including disability-based discrimination. Crucially, in the United States torture is a specific intent crime; therefore, severe pain or suffering must be *specifically* intended by the prospective torturer, as distinct from harms that may be "unanticipated or unintended."[69] To show that the harm they fear qualifies as torture, respondents must satisfy each of these

64. 8 C.F.R. § 1208.13 (2021); *see generally* Janet E. Lord et al., *Advancing Disability Rights-Based Refugee and Asylum Claims*, VA. INT'L L.J., (forthcoming) (discussing asylum claims by noncitizens with disabilities).

65. *See* 8 C.F.R. § 1208.16 (2021).

66. *Id.* at §§ 1208.16(c)(2) & 17(a). This threshold appears to exceed the "substantial grounds" standard set by Article 3 of the CAT. *See* CAT, *supra* note 2, art. 3. Some adjudicators believe that evidence showing that torturous conduct is "routine, widespread, horrific, and officially tolerated" should be sufficient, because "[f]ew, if any, prospective torture victims will be able to provide 'statistical proof' of a '50.001% chance' of torture." *Matter of J-E-*, 23 I. & N. Dec. 291, 308 (B.I.A. 2002) (Schmidt, dissenting); *contra id.* at 303 (appearing to require evidence that torture is "pervasive"). See, e.g., Al-Saher v. INS, 268 F.3d 1143, 1147 (9th Cir. 2001) (remanding in the face of evidence that Iraqi security forces "routinely" tortured detainees). By contrast, the likelihood of persecution, which represents less severe harm than torture, required of asylum-seekers is much lower than fifty percent. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987) (rejecting a "clear probability" of future persecution standard for asylum-seekers and suggesting that a one in ten chance of future persecution may be sufficient) (quoting ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 180 (1966)). As a matter of policy, it is counterintuitive that the threshold for relief from less egregious harms than torture should be lower than for CAT claims.

67. *See* 8 C.F.R. § 1208.18(a)(1) (2021).

68. *See id.* These proscribed purposes are enumerated in the CAT itself. CAT, *supra* note 2, art. 1(1).

69. 8 C.F.R. § 1208.18(a)(5) (2021).

elements of a CAT claim—the harm must be severe, be specifically intended, have direct or indirect government involvement, and be done for a proscribed purpose. We describe each of these in greater detail in the sections below, before turning to how IJs apply these elements to noncitizens with psychosocial disabilities' CAT claims regarding harms in mental health settings in Part IV.

### *A. Severe Pain or Suffering*

Pain or suffering, whether physical or mental, must be severe. For purely mental pain and suffering, the harm must be prolonged and may result from the intentional or threatened infliction of severe physical pain or suffering, or the administration of (or threatened administration of) mind-altering substances or other procedures calculated to profoundly disrupt the senses or the personality.[70] Substandard mental health care alone does not constitute torture.[71] The United States has not adopted more nuanced approaches to defining torture. For example, IJs need not alter their severe harm analysis based on the victim's position of "powerlessness" with respect to the torturer.[72] Similarly, IJs need not expressly look to environmental factors to adduce severe harm.[73] As we discuss in Part IV, IJs are much more likely to interpret environmental factors as disqualifying certain harmful conduct as torture.

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70. *See* 8 C.F.R. § 1208.18(a)(4) (2021). Inhumane conditions and lack of access to appropriate medical care do not, in and of themselves, constitute torture, although the *intentional* denial of medical care does rise to the level of torture under CAT. Cole v. Holder, 659 F.3d 762, 773-74 (9th Cir. 2011) (citing Eneh v. Holder, 601 F.3d 943, 948 (2010)).

71. *See* Raffington v. Cangemi, 399 F.3d 900 (8th Cir. 2005).

72. The UN Special Rapporteur has signaled that rather than severity of harm, "the decisive criteria for distinguishing torture from cruel, inhuman and degrading treatment may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted." Manfred Nowak (Special Rapporteur on Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment), Civil and Political Rights, Including the Questions of Torture and Detention. ¶ 39, UN Doc. E/CN.4/2006/6 (Dec. 23, 2005); *see also* SRT Report 2020, *supra* note 53, at ¶¶ 40, 69 (recognizing disability and disability-related rights restrictions may contribute to powerlessness); SRT Interim Report 2008, *supra* note 22, at ¶ 50.

73. SRT Report 2020, *supra* note 53, at ¶ 86 (exhorting that the "intentionality, purposefulness and severity of the inflicted pain or suffering must always be assessed as a whole and in the light of the circumstances prevailing in the given environment"). Instead, as will be discussed in Part IV, they tend to use environmental factors strictly as exculpatory evidence.

### *B. Specific Intent*

Harm must be intentionally inflicted. The United States' understanding of the CAT's intent requirement[74] requires specific intent to exclude acts resulting in "unanticipated and unintended" suffering.[75] Instead, "for an act to constitute torture, there must be a showing that the actor had the intent to commit the act as well as the intent to achieve the consequences of the act."[76] Although the UN Committee Against Torture ("CAT Committee") has never "considered it necessary to conduct an intent analysis separate from its examination of these facts and circumstances" regarding torturers' motives,[77] the FARRA regulations describe it as a discrete element of CAT claims.[78]

US courts have repeatedly upheld the FARRA regulations' requirement of specific intent,[79] even though some scholars have argued that this sets a higher bar on CAT claimants than the express terms of the CAT itself.[80] Prominently, in *Villegas v.*

74. *See* 136 CONG. REC. S36193 (1990) ("[T]he United States understands that, in order to constitute torture, an act must be *specifically* intended to inflict severe physical or mental pain or suffering.") (emphasis added).

75. CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT, S. REP. NO. 101-30, at 14 (1990); *see also Matter of J-R-G-P-*, 27 I. & N. Dec. 482, 484 (B.I.A. 2018) (citing *Matter of J-E-*, 23 I. & N. Dec. 291, 301 (B.I.A. 2002)) ("'[T]orture' does not cover 'negligent acts' or harm stemming from a lack of resources.").

76. Auguste v. Ridge, 395 F.3d 123, 145-46 (3d Cir. 2005) (affirming *Matter of J-E-*, 23 I. & N. Dec.); *see also* Pierre v. Att'y Gen. of U.S., 528 F.3d 180, 189 (3d Cir. 2008) (en banc) (affirming *Auguste*, 395 F.3d) (citing Pierre v. Gonzales, 502 F.3d 109, 118 (2d Cir. 2007)).

77. Oona A. Hathaway et al., *Tortured Reasoning: The Intent to Torture under International and Domestic Law*, 52 VA. J. INT'L L. 791, 796 (2012).

78. *See* 8 C.F.R. § 1208.18(a)(5) (2021).

79. *See, e.g.,* Villegas v. Mukasey, 523 F.3d 984, 988-89 (9th Cir. 2008) (noting that "[e]very other circuit to consider the question has concluded that 'torture' under the CAT requires specific intent to inflict harm"); *Auguste*, 395 F.3d at 143 (rejecting the petitioner's contention "that the United States' understanding of Article 1 of the Convention as requiring 'specific intent' is inconsistent with the Convention"); *Matter of J-R-G-P-*, 27 I. & N. Dec. at 485 (collecting cases).

80. *See* Mary Holper, *Specific Intent and the Purposeful Narrowing of Victim Protection Under the Convention Against Torture*, 88 ORE. L. REV. 777, 779 (2009) (criticizing the BIA's "misguided approach to CAT protection that creates an insurmountable obstacle to actually obtaining such protection"). *See also* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 7:26 (2021 ed.) (citing KEES WOUTERS, INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULEMENT 443 (2009) ("The term 'intentionally' refers not just to the specific intent, but also to the so-called 'general intent, whereby the torturer knows that a certain conduct will cause severe pain or suffering, even though that is not

*Mukasey*, which involved a noncitizen of Mexican origin diagnosed with "severe bipolar disorder,"[81] the Ninth Circuit Court of Appeals affirmed what the FARRA regulations and the United States' CAT understanding had already made clear: CAT claimants must prove would-be torturers' *specific* intent to inflict severe harm, which requires more than showing severe harm was merely "foreseeable."[82]

How much more is uncertain, though, in part because US courts have not consistently delimited the dividing line between specific and general intent.[83] The "uniquely prospective" nature of specific intent inquiries in removal proceedings compounds this ambiguity.[84] Adjudicators may infer intent from circumstantial evidence.[85] For example, in cases involving Haiti's blanket

necessarily his objective.'"); Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 325 (1994) ("The intent required under the international torture conventions is simply the general intent to do the act which clearly or foreseeably causes terrible suffering."). *But see* Hathaway et al., *supra* note 77, at 795 (concluding that in effect the proscribed purpose element of CAT claims "renders torture a specific intent crime under international law").

81. *Villegas*, 523 F.3d at 985.

82. *Id.* at 988.

83. Memorandum from Daniel Levin, Acting Assistant Att'y Gen., to James B. Comey, Deputy Att'y Gen., on Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A, at 16 (Dec. 30, 2004) [hereinafter Levin Memo] ("It is well recognized that the term 'specific intent' is ambiguous and that the courts do not use it consistently.") (citing 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.2(e), at 355 n.79 (2d ed. 2003)); *see also id.* at 16-17 (noting that some US courts "suggest that only a conscious desire to produce the proscribed result constitutes specific intent; others suggest that even reasonable foreseeability suffices" and concluding he "d[id] not believe it is useful to try to define the precise meaning of 'specific intent'" because "it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture").

84. Hathaway et al., *supra* note 77, at 812 (attributing IJs' "stricter approach to proof of intent to torture" to the speculation inherent to assessing the mental state of future torturers). *See also* Pierre v. Gonzales, 502 F.3d 109, 118 (2d Cir. 2007) (acknowledging "the difficulties that might arise in applying that standard to evidence of country conditions in order to predict the likelihood of future events in individual cases").

85. *Pierre*, 502 F.3d at 118; Guerra v. Barr, 951 F.3d 1128, 1135 (9th Cir. 2020) (approving an IJ's use of "evidence of primitive and abusive practices on mental health patients . . . to support an inference of specific intent to inflict harm"), *amended by* Guerra v. Barr, 974 F.3d 909 (9th Cir. 2020); Ridore v. Holder, 696 F.3d 907, 917 (9th Cir. 2012) ("If it is true that the . . . government has a policy of placing accused human rights violators in charge of prisoners, as the IJ found it does, then there is nothing illogical in inferring the government intends to put those prisoners at risk of cruel, abusive treatment that would

detention policies for criminal deportees, courts have sought evidence of targeting individuals as indicia of specific intent.[86] Even so, some courts uphold grants of CAT relief where IJs find in the first instance that government actors deliberately use detention facilities to harm inmates.[87]

### *C. Government Involvement*

Harm must be inflicted either by a government actor or with the government's acquiescence. Harm by private actors, no matter how severe, does not warrant CAT relief unless the government was, at minimum, willfully ignorant of the private conduct.[88] The conduct of low-level government actors is sufficient to prove acquiescence; it need not occur at the highest levels of government.[89] Proof of government acquiescence should not generally be required where government actors are the putative torturers, although in practice, as we describe in Part IV, this is often not the case even with regard to mental health workers employed in state-run psychiatric facilities. Indeed, immigration adjudicators often appear to conflate the specific intent and government acquiescence elements of CAT claims.

### *D. Proscribed Purpose*

Harm must be inflicted for a proscribed purpose. Such purposes include: to obtain information or a confession; to punish,

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qualify as 'severe suffering' or 'torture'—as the IJ found."); Coronel Resendiz v. Barr, 810 F. App'x 538, 540-41 (9th Cir. 2020).

86. Hathaway et al., *supra* note 77, at 817-19 (discussing cases).

87. *Ridore*, 696 F.3d at 917 (faulting the BIA for having "summarily rejected (or ignored) the [ IJs'] findings"); *see also* Guerra v. Barr, 951 F.3d 1128, 1136-37 (9th Cir. 2020), *amended by* Guerra v. Barr, 974 F.3d 909, 913 (9th Cir. 2020) (citing *Ridore*, 696 F.3d at 918-19).

88. Aguilar-Ramos v. Holder, 594 F.3d 701, 705-06 (9th Cir. 2010) ("Government acquiescence does not require actual knowledge or willful acceptance of torture; awareness and willful blindness will suffice.").

89. *See* Xochihua-Jaimes v. Barr, 962 F.3d 1175, 1185 (9th Cir. 2020) (emphasizing that "high-level government efforts, however important and laudable, do not necessarily reflect low-level government actors on the ground"); Madrigal v. Holder, 716 F.3d 499, 509-10 (9th Cir. 2013) (asserting that "corruption of public officials in Mexico remains a problem, particularly at the state and local levels of government," and that the actions of low-level officials, even when acting in contravention of the country's will, may be sufficient to show government acquiescence for the purposes of CAT relief).

intimidate, or coerce them; or for any reason relating to discrimination.[90] Although proscribed purpose is a distinct element from intent for CAT claims, in practice it "is closely linked to, perhaps even subsumed by, the interpretation of the specific intent requirement."[91] "Evidence showing an illicit purpose may easily overlap with evidence showing a specific intent to inflict severe pain or suffering."[92] Indeed, some have argued that evidence of proscribed purpose effectively satisfies the specific intent requirement under US law.[93] Because of the proximity of the intent and purpose elements, "the purpose requirement has not been significantly elaborated in US case law. Rather, decision-makers typically recite the statutory language without distinct analysis of the purpose requirement."[94] Indeed, as we describe in Part IV, none of the forty-nine IJ decisions we reviewed contained a proscribed purpose analysis as distinct from specific intent.

## *IV. HOW IJS APPLY CAT ELEMENTS*

As previously noted, IJs are the frontline of implementing the United States' *non-refoulement* obligations. To better understand how IJs interpret the FARRA regulations, we reviewed a nonrepresentative sample of forty-nine unpublished IJ decisions between 2016 and 2021 from California (n=35), Colorado (n=4), New York (n=1), Washington (n=2), and Virginia (n=7) that denied

90. 8 C.F.R. § 1208.18(a)(1) (2021).

91. ANKER, *supra* note 80, § 7:27. For example, the *Pierre* Court apparently considered evidence that the harmful consequences of detention for a Haitian with esophageal dysphasia were "unfortunate but unintended" as negating the proscribed purpose element. 528 F.3d at 189 ("We find that this unintended consequence is not the type of proscribed purpose contemplated by the CAT."). *See also id.* at 190 (holding that "petitioner cannot obtain relief under the CAT unless he can show that his prospective torturer will have the goal or purpose of inflicting severe pain or suffering").

92. *Pierre*, 502 F.3d at 119 n.8.

93. Hathaway et al., *supra* note 77, at 820 ("In the immigration jurisprudence, the U.S. courts' interpretation of the intent standard for torture mirrors the approach adopted by U.S. courts in other contexts and by international bodies: The specific intent requirement for torture is met by evidence that pain or suffering will be knowingly inflicted on an individual for a proscribed purpose.").

94. ANKER, *supra* note 80, § 7:27. As an example of the proximity of these two elements, the *Villegas* Court apparently elided the phrases "specific intent" and "proscribed purpose" where it found "nothing indicat[ing] that Mexican officials . . . created these conditions for the specific purpose of inflicting suffering upon the patients." 523 F.3d at 989.

CAT claims by noncitizens with psychosocial disabilities. We obtained these decisions through personal communications with the attorneys and organizations who provided representation in these cases. Below, we outline their broad characteristics, before analyzing in detail trends in how IJs have resolved each of the four main elements of CAT claims.

### *A. Forty-Nine IJ Decisions*

Twenty-four different IJs delivered the forty-nine decisions, although one judge accounted for fifteen of them. Because these are unpublished decisions, we assigned each a unique number.[95] We use these identifiers in place of case names in the sections that follow. Although we intentionally limited our review to CAT relief denials, it bears noting that some respondents with psychosocial disabilities do prevail.[96] We note that some grants of CAT relief appear to misapply the relevant standards in ways similar to those we describe in the forty-nine denials we reviewed;[97] nevertheless, we primarily concerned ourselves with denials because the consequences of erroneous denials are dire, both in terms of the United States' duty to fulfill its international obligations and the human cost of exposing individuals to significant risk of severe harm.

Most cases (n=30) involved respondents of Mexican origin, but they also included persons from El Salvador (n=6), Guatemala (n=6), and Guinea (n=2), with one case apiece involving respondents with origins in Brazil, Egypt, Honduras, Kenya, and Nicaragua. All but one of the respondents were male. Several identified as LGBTQ (n=4). All but one of the respondents was deemed incompetent to represent themselves and therefore appointed a qualified representative pursuant to *Matter of M-A-M-*.[98]

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95. *See infra* Table 1.

96. Indeed, we also obtained a smaller number (n=4) of IJ decisions granting CAT relief in addition to the 49 denials.

97. For example, in the IJ decision that led to *Matter of R-A-F-*, the IJ analyzed whether the Mexican government acquiesced to harms committed mental health workers employed in state-run psychiatric hospitals. 27 I. & N. Dec. 778 (A.G. 2020).

98. 25 I. & N. Dec. 474 (B.I.A. 2011). Because the CAT claim of the respondent in Case No. 31 (I.J. Dec. Jan. 22, 2020) was denied only after the BIA reversed a grant of withholding

The most common diagnosis among respondents was schizophrenia (n=19), followed, respectively, by depressive disorders (n=12), neurocognitive disorders or intellectual disabilities (n=11), post-traumatic stress disorder or unspecified trauma (n=10), bipolar disorders (n=9), anxiety disorders (n=8), and schizoaffective disorder (n=6). Most respondents (n=29) had received more than one formal diagnosis from a psychiatrist, psychologist, or licensed clinical social worker, while several (n=6) based their claims on symptoms, such as hallucinations, that suggested psychosocial disabilities while lacking formal diagnoses.[99]

Most respondents' CAT claims focused primarily on feared harms relating to their psychosocial disabilities, although for some these fears appeared subsidiary to their fear of other kinds of harm. Respondents' fears of psychosocial disability generally centered on inpatient mental health facilities and carceral settings. Respondents with substance abuse disorders (n=9) also feared harm in rehabilitation facilities. Some respondents also feared harm unrelated to their psychosocial disabilities, including harm due to gang violence (n=18) or their LGBTQ identity (n=4), religious beliefs (n=3), or political views (n=2). Most (n=29) respondents engaged experts to provide country conditions evidence through written or live testimony.

Several precedents were repeatedly cited by IJs in support of their denials, namely, *Villegas v. Mukasey, Matter of J-F-F-*, *Matter of J-E-*, and *Matter of J-R-G-P-*.[100] *Villegas* was the most frequently cited and discussed in greatest detail, as measured by the number of citations within each decision. But *Villegas* was only cited by the thirty-seven decisions from IJs under the Ninth Circuit Court of Appeal's jurisdiction; among the twelve decisions from other jurisdictions, *Villegas* was only cited in Case No. 44 (I.J. Dec. Apr. 2021).[101] By contrast, *J-F-F-*, *J-E-*, and *J-R-G-P-* were cited frequently

of removal under section 241(b)(3)(A) of the Immigration and Naturalization Act, *see* 8 CFR § 208.16(b), the IJ's decision does not specify whether his counsel was appointed pursuant to an incompetency determination.

99. *See infra* Table 1 for more detail.

100. *See infra* Table 2.

101. Case No. 44, at 9 (I.J. Dec. Apr., 2021) (collecting Circuit Court specific intent holdings).

across jurisdictions. *J-R-G-P-* was cited in twenty-six of thirty-two cases decided after October 31, 2018.[102] *Matter of R-A-F-* was also cited in seven of eighteen cases decided after February 26, 2020.[103] Recent cases have cited *J-E-* more frequently than older cases, despite *J-E-* being the oldest of these BIA and Attorney General decisions. However, as we describe in greater detail below, many IJs appear to misinterpret these precedents to the detriment of noncitizens with psychosocial disabilities claiming CAT protection.

In 39 cases, IJs found that respondents had failed to satisfy more than one element of their CAT claims. Most frequently, IJs cited insufficient evidence of the specific intent element (n=47). Although likelihood of torture was the second-most common ground for CAT relief denial (n=38), we do not describe this aspect of IJs' decisions given the highly fact-specific nature of these inquiries and IJs' duty to aggregate the likelihood of multiple prospective sources of torture.[104] Only ten IJs dismissed CAT claims based on a failure to show just one element of their claims, eight of which were on specific intent grounds, and two on likelihood grounds. Many IJs also found that respondents failed to show sufficient government involvement (n=30), although these analyses were often not distinct from specific intent analyses, as we describe below. IJs rarely questioned whether the harms feared by CAT claimants failed to satisfy the severity element; indeed, several IJs expressly recognized that the harms they feared likely did satisfy that element.[105] Finally, consistent with immigration

102. *See infra* Table 3.

103. *See infra* Table 3.

104. Thus, CAT claimants need not show that they will more likely than not be tortured in institutional mental health settings; rather, they may show that the probability of mental health-related torture, when combined with the probability of other forms of torture, such as by gang members or law enforcement officers, is greater than fifty percent. *See* Cole v. Holder, 659 F.3d 762, 775 (9th Cir. 2011); *see also* Guerra v. Barr, 951 F.3d 1128 (9th Cir. 2020), *amended by* Guerra v. Barr, 974 F.3d 909, 916 (9th Cir. 2020); Resendiz v. Barr, 810 Fed. Appx. 538, 540 (9th Cir. 2020).

105. *See, e.g.,* Case No. 4, at 20 (I.J. Dec. July 22, 2016) (conceding "there is a risk of treatment that can be considered to11ure if Respondent would be institutionalized in one of these institutions"); Case No. 7, at 5 (I.J. Dec. Apr. 21, 2017) & Case No. 9, at 7 (I.J. Dec. Nov. 27, 2017) (acknowledging that "abusive practices, such as isolation, prolonged physical restraints, lobotomies, and electroconvulsive therapy, to control and constrain their actions…could rise to the level of torture"); Case No. 10, at 22 (I.J. Dec. Mar. 7, 2018) ("recogniz[ing] that some harms faced by patients in public psychiatric institutions may rise to the level of severe pain or suffering"); Case No. 24, at 22 (I.J. Dec. June 17, 2019)

adjudicators' practice noted above,[106] IJs never directly analyzed the proscribed purpose element of CAT claims.

Below, we describe in greater detail our findings regarding IJs' specific intent analyses of CAT claims given the prominent role this element plays in their decisions. We discern several themes. First, there is a lack of uniformity among IJs as to the appropriate unit for their specific intent analyses: some IJs focused on the intent of governmental entities instead of that of the would-be torturers, namely, individual mental health workers. Additionally, among IJs that did address the intent of individual mental health workers, some also performed apparently extraneous government acquiescence analyses, despite seeming to acknowledge that mental health workers are public officials, which largely resemble specific intent analyses of governmental entities. Finally, no IJs appeared to consider evidence describing individual mental health workers' goal of controlling mental health patients as probative of the proscribed purpose "coercion"; instead, they tended either to overlook mental health workers' coercive aims or to consider them as undercutting specific intent.

### *B. Intent of Governmental Entities*

There are two distinct approaches for how IJs approach specific intent analyses. The first, which we discuss in this section, focuses on whether governmental entities writ large specifically intended to cause harm.[107] When IJs focus on the intent of governments writ large, they tended to overlook unique harms that individual workers in institutional mental health settings may cause. Within this approach, we discerned two sub-themes, which we address in turn. First, some IJs appeared to require that CAT claimants show that governmental entities intentionally created

(finding that "the record reflects abusive practices in such facilities that may rise to the level of torture"); Case No. 34, at 11 (I.J. Dec. Aug. 4, 2020) (acknowledging "that torture occurs in mental institutions in Mexico"); Case No. 49, at 9 (I.J. Dec. Nov. 29, 2021) (concluding "that this evidence overwhelmingly illustrates harm rising to the level of torture within Mexican mental health institutions"). *But see* Case No. 1, at 50 (I.J. Dec. Mar. 14, 2016) (finding "no evidence that merely administering high dosages of psychotropic medication would cause severe pain or suffering when properly monitored").

106. *See* discussion *supra* Section III.C.

107. The other approach, which focuses on the mental state of individual mental health workers, is discussed *infra* in Section IV.D.

and maintained deplorable conditions in mental health facilities to harm patients. Second, some IJs perceived record evidence of either scarce resources or negligent operation and oversight of mental health facilities not as circumstantial evidence that may support inferences of specific intent,[108] but rather as affirmative defenses that ended their specific intent analyses. Both of these sub-themes appear to derive from questionable interpretations of relevant legal precedents.

### 1. Intent to Create Deplorable Conditions

When IJs focused on governmental entities' intent, they generally required evidence that governments intentionally maintained deplorable conditions inside inpatient mental health facilities for the purpose of inflicting severe pain or suffering on patients. Many, such as Case No. 40, refer to *Matter of J-E-* for the proposition that the respondent must show that the government "intentionally and deliberately creat[es] and maintain[s]" conditions inside mental health or other facilities.[109] As a result, they focused less on the conduct of individual actors in those facilities and more on the general conditions.[110] Intuitively, systemic issues lend themselves to systemic explanations, as the IJ in Case No. 43 demonstrated: "the substandard conditions in Mexico's mental health and penal facilities are more likely 'the result of neglect, lack of resources, or insufficient training and education,' rather than a specific intent to inflict severe physical or mental pain or suffering."[111]

This may stem in part from respondents' framing of country conditions. For example, per the IJ in Case No. 13, "Respondent has argued that the conditions inside the mental health institutions alone, sponsored by the government of Mexico, are enough to find

108. Guerra v. Barr, 951 F.3d 1128 (9th Cir. 2020), *amended by* Guerra v. Barr, 974 F.3d 909, 913 (9th Cir. 2020).

109. *See, e.g.*, Case No. 40, at 17 (I.J. Dec. Jan. 13, 2021).

110. *See, e.g., id.* at 20 (concluding "the Respondent cannot show the conditions in Federico Mora Hospital constitute torture within the meaning of the CAT and precedential Board cases" while underplaying individual harmful acts "of physical, sexual, and psychological mistreatment and violence" therein).

111. Case No. 43, at 13 (I.J. Dec. Mar. 29, 2021) (quoting *Matter of J-R-G-P-*, 27 I. & N. Dec. 482, 486-87 (B.I.A. 2019) and also citing *Matter of R-A-F-*, 27 I. & N. Dec. 778, 778 (A.G. 2020)).

that the government of Mexico engages in cruel and tortuous behavior towards mentally ill individuals."[112] To the extent the IJ faithfully represented the respondent's claim, the claim is inapposite: as noted above, both the FARRA regulations and numerous BIA and circuit court precedents clearly indicate that CAT claims require proving that prospective torturers specifically intend to inflict severe pain or suffering.[113]

IJs' focus on conditions also appears to be more informed by an interpretation of *Matter of J-E-* that to show specific intent CAT claimants must prove that governmental authorities "intentionally and deliberately create[] and maintain" substandard conditions in institutional settings "in order to inflict torture."[114] There, the respondent had claimed that Haitian authorities had a practice of indefinitely detaining criminal deportees in inhumane conditions. Although the divided BIA panel (13-7) recognized that "Haitian authorities are intentionally detaining criminal deportees *knowing* that the detention facilities are substandard,"[115] it held that the respondent was required to show further that the Haitian authorities did so for a proscribed purpose, which the record evidence did not support.[116] Following the panel's reasoning, a showing that Haitian authorities knowingly detained criminal deportees in substandard facilities for a proscribed purpose may have satisfied the FARRA regulations' specific intent requirement.

The BIA observed that even if the respondent were to have shown specific intent, he would also have had to prove the Haitian authorities had a proscribed purpose, which the record evidence did not support.[117] The BIA did not dispute that "[t]he evidence establishes that isolated acts of torture occur in Haitian detention facilities," including acts such as "burning with cigarettes, choking, hooding, kalot marassa, and electric shocks."[118] However, it ruled

112. Case No. 13, at 21 (I.J. Dec. May 14, 2018). *See also* Case No. 16, at 21 (I.J. Dec. Aug. 10, 2018); Case No. 18, at 23 (I.J. Dec. Oct. 4, 2018); Case No. 19, at 18 (I.J. Dec. Oct. 23, 2018).

113. *See* discussion *supra* at Section III.B.

114. *Matter of J-E-*, 23 I. & N. Dec. 291, 301 (B.I.A. 2002).

115. *Id.* at 301 (emphasis added).

116. *Id.* at 300 (citing Haiti's legitimate security interests).

117. *Id.*

118. *Id.* at 302. "Kalot marassa" refers to "severe boxing of the ears, which can result in eardrum damage." *Id.* at 301.

that the respondent "failed to establish that these severe instances of mistreatment are so pervasive as to establish a probability that a person detained in a Haitian prison will be subject to torture."[119] Thus, even though IJs frequently cite *Matter of J-E-* for the proposition that a specific intent showing requires proving that authorities "are intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture," the case's holding was arguably more limited, and in fact, signaled that specifically intended acts inside detention facilities may constitute torture, even if governmental entities lack torturous intent for detaining people.[120]

This prevailing interpretation of *Matter of J-E-* appears to lead many IJs to limit their specific intent inquiries to whether governmental entities intentionally use deplorable detention facilities to harm patients therein, thereby ignoring whether indisputably intentional, harmful acts inside mental health facilities satisfy the specific intent element for CAT relief.[121] While such a standard may be warranted for records devoid of evidence of specific forms of coercive mental health care, in the cases we reviewed, the IJs appeared to acknowledge these acts but declined to give them much weight based on *Matter of J-E-*.

### 2. Government Negligence or Resource Scarcity

Relatedly, some IJs considered evidence of historical governmental negligence or resource scarcities to obviate specific intent to inflict severe harm. Generally, instead of expressly calling for evidence that governmental entities intentionally use mental health facilities to harm patients, these IJs appear to reason that

119. *Id.* at 304 (contrasting this case with Al-Saher v. INS, 268 F.3d 1143 (9th Cir. 2001), where "the record indicated that the security services routinely tortured detainees and that Iraqi refugees often reported instances of torture") (emphasis original).

120. *Id.* at 301 (B.I.A. 2002).

121. *See, e.g.,* A-E-R-, AXXX XXX 231 (B.I.A Nov. 12, 2021) (unpublished) (concluding that the IJ "appears to have conflated the concept of "deplorable conditions" in mental institutions as a result of neglect, a lack of resources, or insufficient training and education, as discussed in cases such as *Villegas* and *Matter of J-R-G-P-*, with the respondent's claim and evidence, including expert opinions, that Salvadoran personnel intentionally and affirmatively use involuntary electroconvulsive therapy, prolonged physical restraints, and physical and sexual abuse with the specific intent of torturing patients") (internal citations omitted).

evidence of systemic or environmental causes for the prevalence of mental health harms effectively trumps other evidence of individual acts of coercion by mental health workers.

For example, in Case No. 44 the country conditions expert specifically "predicted Respondent would be subjected to mistreatment, abuse, and torture upon his institutionalization."[122] The IJ also noted, "Mexico's mental health facilities include indefinite detention, neglect, electro-convulsive therapy (ECT), over-medication, and, 'in some extreme cases, long-term use of restraints,'" and a 2019 report on four facilities "detailed the use of cages, isolation rooms, prolonged restraints, and rape."[123] Elsewhere, the IJ noted the expert's testimony that she had observed ECT applications "for behavior modification or as punishment for bad or uncooperative behavior, not as treatment."[124] Nevertheless, the IJ reasoned that the expert's testimony and record evidence merely

> reflects widespread deficiencies in healthcare access, resources, training, and education in mental health treatment. Significantly, [the expert] herself testified that the lack of mental health resources in Mexico is due to "social abandonment," which lacks the requisite specific intent.[125]

Citing *Matter of J-R-G-P-* and *Matter of R-A-F-*, the IJ found that record evidence of resource scarcity coupled with societal neglect negated the undisputed expert testimony and recent documentation by firsthand investigators detailing specific harmful acts.[126] But the IJ failed to explain how acts such as over-medication or prolonged application of restraints either were not sufficiently intentional or did not cause severe harm. Instead, the IJ concluded that "the usage of ECT, restraints, over-medication, and other abuses, while abhorrent, is the result of inadequate care, poor training, and limited resources."[127] This conclusion appears

122. Case No. 44, at 11 (I.J. Dec. Apr., 2021).

123. *Id.* (citation omitted).

124. *Id.* at 13.

125. *Id.* at 11-12.

126. *Id.* at 13 (acknowledging "the harm some individuals experience in Mexico's mental health institutions," while concluding "the Record reflects that such harm results from inadequacies in the country's healthcare infrastructure as a whole").

127. *Id.* at 13.

to imply that challenging environmental factors can defeat specific intent findings.

Similarly, the IJ in Case No. 47 failed to explain why environmental factors rendered moot the volitional acts of individual mental health workers. The IJ acknowledged that some "individuals are subjected to isolation, psychosurgeries, and lobotomies."[128] The IJ also noted that "[a]buses of persons with disabilities included the use of physical and chemical restraints; physical and sexual abuse; human trafficking, including forced labor; disappearance; and the illegal adoption of institutionalized children."[129] The IJ further credited testimony from the respondent's country conditions expert, "who has documented abuses in Mexico for years, reiterated that conditions in Mexican mental health institutions are plagued by abuses such as long-term restraints and inadequate care."[130] Yet the IJ concluded "that these abuses stem from neglect, improper training, and a dearth of resources."[131] The judge reasoned that the "lack of community-based services," "lack of medical care and rehabilitation," and absent "habilitation services and behavioral programs," made "long-term use of chemical restraints [in mental health facilities] almost inevitable."[132] Here, the IJ again attributed indisputably harmful acts to systemic, environmental factors without explaining why mental health workers' specific actions were either insufficiently intentional or harmful. As with Case No. 44, this IJ in Case No. 47 expected a CAT claimant to prove not only that mental health workers commit intentional, harmful acts but also that no other environmental factor is a contributing cause[133]—a showing far beyond what the FARRA regulations require.

128. Case No. 47, at 14 (I.J. Dec. Sept. 1, 2021).

129. *Id.* (quoting U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: MEXICO (Mar. 20, 2021) https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/mexico/ [https://perma.cc/9PQ7-7ZAK]).

130. *Id.*

131. *Id.* at 14.

132. *Id.* at 14 (internal citations omitted).

133. *See also* Case No. 24, at 23 (I.J. Dec. June 17, 2019) (reasoning that "[t]he fact that these facilities may be understaffed and under-resourced does not establish a specific intent to torture" despite recognizing respondent's CAT claim was premised on "intentional conduct by individual actors rather than deplorable conditions").

In Case No. 10, the IJ found that conditions in mental health facilities were not "based on anything more than outdated medical practice rooted in 'historical gross negligence and misunderstanding of the nature of psychiatric illness.'"[134] The IJ did not square this finding with findings regarding specific acts of mistreatment by mental health workers in the immediately following paragraph, where she described treatment at Guatemala's lone public psychiatric hospital:

> One patient at the hospital described the hospital's treatment of patients as being motivated out of a desire to punish, rather than to treat: "Those who refuse their medication are beaten and put in the 'little room,' a barren isolation cell . . . [ d]esperate women sell their bodies for as little as [five] quetzales, or less than a dollar, to afford basic necessities."[135]

Presumably, outdated medical practices do not entirely account for routine beatings and isolation to coerce patients, to say nothing of the reported rampant sexual assault—all of which describe conduct decidedly devoid of therapeutic aims. Yet, this IJ, as others,[136] appeared to consider evidence of governmental entities' negligence as foreclosing the possibility of finding that individual mental health workers might specifically intend to cause severe harm.

These IJs' reasoning appears to be related at least in part to a belief that binding precedent forecloses specific intent findings where mental health workers operate in environments shaped by historical governmental negligence or resource scarcity.[137] The IJ

134. Case No. 10, at 20 (I.J. Dec. Mar. 7, 2018).

135. *Id.* at 21.

136. For example, in Case No. 12 (I.J. Dec. May 7, 2018), the respondent's country conditions expert testified that "the care institutionalized individuals received is meant to punish, beating out of them their improper behavior." *Id.* at 6. Nevertheless, the IJ concluded that "Guatemalan officials have the specific intent to harm the patients in these institutions." *Id.* at 16.

137. *See also* Case No. 31, at 12-13 (I.J. Dec. Jan. 22, 2020) (quoting *Matter of J-R-G-P-*, 27 I. & N. Dec. at 484 to support his conclusion that "use of prolonged physical and chemical restraints, the administration of psychotropic medications, and the application of electroconvulsive therapy, all without documented clinical necessity, in Mexican psychiatric facilities," even though "utilized as a means to control and discipline patients," was "not indicative of a specific intent on the part of Mexican authorities," given "lack of proper funding and a deficiency of properly trained personnel") (internal citations omitted).

in Case No. 3 apparently considered himself bound by precedent to find that the Mexican government writ large does not specifically intend to torture mental health patients:

> [I]n *Villegas*, the Ninth Circuit held that the Mexican government lacked specific intent with regards to its treatment of mental patients. While it is true that government-funded hospitals and psychiatrists may be considered part of the Mexican government, the government lacks the specific intent to harm mental patients as required to constitute torture under the CAT. Therefore, the deplorable conditions at a psychiatric hospital that may be experienced by Respondent do not rise to the level of torture[.][138]

In contrast with other sections of the same IJ's CAT claim analysis pertaining to other prongs, here, the IJ referenced no factual evidence from the record in support of his conclusory statement that the government lacked the specific intent to harm mental patients. Indeed, this passage suggests that the IJ considered *Villegas* to foreclose a finding of specific intent, regardless of the evidence that the record may have contained regarding specific acts by mental health workers that cause severe pain or suffering.

In fact, *Villegas* Court did not so hold. Rather, *Villegas* held what the plain language of 8 C.F.R. §§ 1208.18(a)(1) & (5), read together, expressly state: "that to establish a likelihood of torture for purposes of the CAT, a petitioner must show that severe pain or suffering was specifically intended—that is, that the actor intend the actual consequences of his conduct, as distinguished from the act that causes these consequences."[139] Hence, *Villegas* affirmed and applied the first half of the *Matter of J-E-* standard, namely, in absence of record evidence that individuals would specifically intend to inflict harm on patients, CAT claimants must show that public officials "created the[] conditions [in mental health facilities] for the specific purpose of inflicting suffering upon the patients."[140] Indeed, to avoid a misreading of *Matter of J-E-*, *Villegas* signaled that IJs should focus on individuals' intent, rather than the intent of the government writ large, when it indicated that the specific intent and government acquiescence analyses are

138. Case No. 3, at 18 (I.J. Dec. July 18, 2016) (citations omitted).
139. Villegas v. Mukasey, 523 F.3d 984, 989 (9th Cir. 2008).
140. *Id.*

separate: "*Zheng* specifically addressed official acquiescence in torture by private parties, intent of *someone*—either the government official or the private party to whom the official acquiesces—to inflict severe harm."[141] Despite this clear language, many IJs erroneously interpret *Matter of J-E-* or *Villegas* to mean that evidence of government negligence or resource scarcity defeats specific intent.

The BIA's *Matter of J-R-G-P-* decision appears to have compounded this error.[142] In Case No. 29, for example, the IJ reduced evidence of the "abuse and mistreatment that occurs in state-run mental health institutions in Mexico"[143] to mere "conditions" attributable to scarce resources, without inquiring into whether the acts "abuse and mistreatment" perpetrated by mental health workers themselves were specifically intended or whether they are so common as to make it likely that the respondent would experience them. To wit:

> In Matter of J-R-G-P-, the Board took issue with the argument that "abusive or squalid conditions in pretrial detention facilities, prisons, or mental health institutions," in Mexico was sufficient evidence to establish that the government intended to create these conditions and cause the facilities' residents severe pain or suffering. Where harmful conditions in facilities, such as insufficient resources and training or neglect on behalf of persons running the facilities, were beyond the government's control, the Board does not attribute them to the action or inaction of the Mexican government.[144]

However, this IJ's characterization of intentional, harmful conduct by mental health workers as "conditions" misdirected her inquiry. Citing *Matter of J-R-G-P-* appears to legitimize this misdirection, but the BIA in *Matter of J-R-G-P-* was likely "battling a strawman."[145] In *J-R-G-P-*, the BIA found, "The evidence of record

141. *Id. See also* R-A-F-, AXXX XXX 809 (B.I.A. Aug. 3, 2020) (unpublished) ("It is important to emphasize that the "specific intent" element of the definition of ''torture" is separate and distinct from the requirement that torture be committed with the consent or acquiescence of an official or an individual acting in an official capacity. 8 C.F.R. § 1208.18(a) (outlining the elements of the definition of torture).").

142. *See generally Matter of J-R-G-P-*, 27 I. & N. Dec. 482 (B.I.A. 2018).

143. *Id.*

144. Case No. 29, at 8 (I.J. Dec. 2019) (internal citations omitted).

145. Roye v. Att'y Gen. of U.S., 693 F.3d 333, 342 (3d Cir. 2012).

indicates that the substandard conditions in mental health facilities, pretrial detention, and prisons in Mexico are the result of neglect, lack of resources, or insufficient training and education."[146] But the respondent in *Matter of J-R-G-P-*, in contrast with *Villegas*, had not based his CAT claim solely on the conditions inside mental health facilities. Instead, the respondent's theory for CAT relief turned on specific mental health workers "practices, such as prolonged physical restraints, lobotomies, or electroconvulsive therapy."[147] Conceivably, the IJ in Case No. 29 might reasonably have cited *Matter of J-R-G-P-* in support of a conclusion that "although the record establishes that some individuals committed to mental health facilities have experienced abuse, the respondent has not shown that such abuse is so common that it is more likely than not that he will personally experience it."[148] But the IJ did not directly analyze the likelihood of the respondent's feared harms due to her application of *Matter of J-R-G-P-* for the proposition that evidence of specific acts of "abuse and mistreatment" by mental health workers was part and parcel of the generalized conditions in mental health facilities caused by scarce resources.[149]

### *C. Acquiescence as Intent*

For CAT claims, the analysis of whether harms are intentionally inflicted is distinct from who inflicts them. Moreover, mental health workers who are government employees working in state-operated inpatient mental health facilities should presumably qualify as "public officials" for the purposes of the FARRA regulations. Indeed, some, though not all,[150] IJs have so

146. 27 I. & N. Dec. at 487.

147. Case No. 9, at 8 (I.J. Dec. Nov. 27, 2017).

148. *Matter of J-R-G-P-*, 27 I. & N. Dec. at 486.

149. *See, e.g.,* Case No. 46, at 4-5 (I.J. Dec. Aug. 24, 2021) ("In short, where a record plausibly establishes that abusive or squalid conditions in pretrial detention facilities, prisons, or mental health institutions . . . are the result of neglect, a lack of resources, or insufficient training and education, rather than a specific intent to cause severe pain and suffering, it is not error to find a respondent has not met his burden." (quotations omitted)).

150. *See, e.g.,* Case No. 29, at 8 (I.J. Dec. 2019) (concluding "Respondent failed to demonstrate that any harm he may experience in Mexico would occur with the acquiescence of a public official or one acting in an official capacity" while solely focusing

found.[151] Among the decisions we reviewed, more often than not IJs performed government acquiescence analyses without specifically finding that mental health workers in state-operated facilities were not government actors for the purposes of CAT claims. Some IJs did so even after finding mental health workers were government actors. For example, in Case No. 9, the IJ conceded that "Mexican health workers act in an official capacity for the purposes of determining eligibility for deferral of removal under the CAT" but nevertheless performed a government acquiescence analysis anyway.[152]

Some IJs appear to believe that CAT claimants must show government acquiescence regardless of whether they allege torture at the hands of government actors. Thus, in addition to showing individual mental health workers' specific intent to inflict severe harm, these IJs obligate claimants to show that the Mexican government writ large condones their conduct. For example, in Case No. 29 the IJ found:

> The Record does not demonstrate that the Mexican government is willfully blind to the torture Respondent fears in Mexico. . . . The Court notes that there certainly may be abuse and mistreatment that occurs in state-run mental health institutions in Mexico, however, the Record does not support that the Mexican government is aware of this issue and chooses to ignore it.[153]

Following this logic, some IJs consider public commitments by governmental entities to improving conditions in facilities sufficient to thwart CAT claims.[154] Thus, CAT claimants effectively

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on whether the Mexican government writ large is "willfully blind to the torture" even though the respondent feared harm by mental health workers employed in state-run facilities).

151. For example, in Case No. 7, at 4 (I.J. Dec. Apr. 21, 2017) the IJ found that "health workers at Mexican government operated and funded psychiatric facilities are public officials or persons acting in an official capacity for the purpose of determining eligibility for deferral of removal under the CAT." Similarly, the IJ in Case No. 3, at 18 (I.J. Dec. July 18, 2016) recognized that "it is true that government-funded hospitals and psychiatrists may be considered part of the Mexican government."

152. Case No. 9, at 7 n.5 (I.J. Dec. Nov. 27, 2017).

153. Case No. 29, at 8 (I.J. Dec. 2019) (internal citations omitted).

154. Case No. 40, at 21 (I.J. Dec. Jan. 13, 2021) ("The government's stated commitment to improving conditions weighs against a finding of specific intent.").

must overcome governments' professed good intentions.[155] In Case No. 27, the IJ reached the same conclusion despite expressly recognizing "that even a single public official can torture or acquiesce in torture."[156] The judge concluded that a beneficent desire by the Mexican government prevented the court from finding that the abuses acknowledged within mental health facilities constituted torture. Although governmental policies may have some bearing on the intentions of public officials, they would seem to be a poor proxy for what happens in practice, as governments rarely formalize or advertise their intentions to harm certain populations.[157]

Further, many IJs appear inclined to consider evidence of government "good works" as foreclosing a specific intent finding. In Case No. 8, the IJ concluded the respondent failed to prove "that any long-term physical restraint, lobotomy, or other degrading treatment that she may experience while institutionalized would be performed by or at the acquiescence of the Mexican government," because

> in the past fifteen years, the government of Mexico has begun recognizing the rights of individuals with mental health issues, protecting those rights, and instituting widespread mental health reform . . . . While the mental healthcare system is by no means perfect and appears to require further budgeting and efforts, Mexico has taken steps in an attempt to assist those with mental health conditions. As such, any mistreatment in a psychiatric hospital would not rise to the level of torture and would not be performed by or at the acquiescence of the Mexican government.[158]

Thus, evidence that the Mexican government had taken steps to close abusive institutions led this IJ to conclude that "any

155. More drastically, some IJs appear to expect of express pro-torture policies. *See, e.g.*, Case No. 3, at 19 (I.J. Dec. July 18, 2016) & Case No. 8, at 16 (I.J. Dec. Sept. 15, 2017) (faulting respondents for failing to point to "laws directed at legalizing institutionalized torture").

156. Case No. 27, at 17 (I.J. Dec. Oct. 23, 2019) ("'an applicant for CAT relief need not show that the entire foreign government would consent to or acquiesce in his torture. He need show only that "a public official" would so acquiesce.") (internal citations omitted).

157. *See Matter of J-E-*, 23 I. & N. Dec. at 308 (Schmidt, dissenting) (observing that governments are incentivized to conceal evidence of torture).

158. Case No. 8, at 16 (I.J. Dec. Sept. 15, 2017) (internal citations omitted).

mistreatment in a psychiatric hospital" would not qualify as torture.

Though some IJs concede that the actual "progress" made by governments is inadequate, they nonetheless find lack of acquiescence. In Case No. 27 the IJ was "deeply concerned with the conditions in Mexican psychiatric facilities" and found "that problems undoubtedly remain in Mexico's mental health system, the record also demonstrates that the government has taken steps to address and improve conditions for individuals with mental illness." The same IJ credited the Mexican government's "pledge[] to make progress and protect the rights of persons with mental illness." Despite its "little advancement in improving its mental health system and poor conditions continue to exist within Mexican psychiatric facilities, . . . the Court finds that the Mexican government has taken steps to address many of those issues, and they are advancements nonetheless."[159]

Similarly, the IJ in Case No. 23 found:

> extensive evidence in the record describing efforts by the Mexican government to improve the mental health care system and provide outpatient and community based mental health services to individuals with mental illness. Although these efforts have not yet been fully unimplemented or entirely effective, they nevertheless demonstrate that the Mexican government does not consent or acquiesce to torture within psychiatric hospitals.[160]

The IJ then proceeded to cite *Chavarin v. Sessions* for the proposition that "evidence indicating that some progress has been made 'defeats the notion that the Mexican government intends to cause severe pain and suffering.'"[161] Thus, "some progress" by governments was held by some IJs as a bar to finding that the government writ large specifically intends to inflict harm in mental health facilities.

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159. Case No. 27, at 16 (I.J. Dec. Oct. 23, 2019).

160. Case No. 23, at 27 (I.J. Dec. Mar. 22, 2019).

161. *Id.* Elsewhere, the Ninth Circuit has chastised DHS for relying on *Chavarin* in part because it is "a non-precedential memorandum." Guerra v. Barr, 951 F.3d 1128, 1135, n.5 (9th Cir. 2020), *amended by* Guerra v. Barr, 974 F.3d 909 (9th Cir. 2020) (citing Chavarin v. Sessions, 690 F. App'x 924, 926 (9th Cir. 2017)). Note also that the BIA relied in part on *Chavarin* in *Matter of J-R-G-P-*, 27 I. & N. Dec. at 485 (internal citations omitted).

Indeed, these IJs may conflate the distinct specific intent and government acquiescence elements of a CAT claim, as shown by *Roye v. Attorney General of U.S.* There, the IJ had found that "the widespread physical and sexual abuse of mentally ill inmates in Jamaican prisons" by guards and other inmates "was specifically intended to cause severe pain and suffering."[162] Although the BIA did not dispute this finding, it reversed, stating that the respondent had failed to show he would "be imprisoned by Jamaican authorities for the specific purpose of torturing him."[163] The Third Circuit Court of Appeals rejected this interpretation of the FARRA regulations and characterized the BIA's approach as "battling a strawman."[164] It held that the BIA "confused two distinct elements of a claim for relief under the CAT—*i.e.*, torture versus consent to or acquiescence in torture—and further confused the mental states associated with each."[165] The Court explained that Roye's CAT claim was based not on "whether the act of detaining mentally ill deportees is an act of torture" but on "whether the physical and sexual abuse of mentally ill prisoners that occurs in Jamaican prisons rises to the level of torture."[166] Thus, the BIA applied the specific intent standard "to the wrong question, ignoring the IJ's finding on specific intent and bypassing consideration of whether the physical and sexual assaults that Roye is likely to experience during a term of incarceration in a Jamaican prison rise to the level of torture under the CAT."[167] The BIA "failed to attend to Roye's actual argument regarding the intent of those who will likely assault him."[168] Instead of examining separately the specific intent and government acquiescence elements of a CAT claim, "the BIA mixed them together, saying that evidence that the Jamaican government is willfully blind to the mistreatment of mentally ill prisoners could not prove specific intent to cause pain and suffering."[169]

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162. Roye v. Att'y Gen. of U.S., 693 F.3d 333, 341-42 (3d Cir. 2012). *See also* ANKER, *supra* note 80, § 7:26.

163. *Roye,* 693 F.3d at 341-42.

164. *Id.* at 342.

165. *Id.* at 344.

166. *Id.* at 342.

167. *Id.* (internal citations omitted).

168. *Id.*

169. *Id.* at 344.

Consequently, IJs that require evidence of government acquiescence in addition to the specific intent of mental health workers likely commit the same error that the *Roye* Court sought to correct.[170] Unlike the intent of governmental entities approach described above, which may distract IJs from evidence of intentional, harmful acts by workers in mental health facilities, some IJs' extraneous government acquiescence inquiries appear to negate evidence of individual mental health workers' intent altogether.

### *D. Individuals' Intent*

By contrast with some IJs' tendency to focus on the intentions of governmental entities, either in specific intent or extraneous government acquiescence analyses, others directly address the intent of individual workers in mental health facilities. Here, too, IJs' application of precedent suggests troubling trends. First, some IJs find that mental health workers' lack of training, education, or professionalization prevents them from forming the requisite level of intent to inflict harm. But it is counterfactual to expect only those with special expertise to know that prolonged mechanical or chemical restraints cause severe pain or suffering. Second, some IJs intone that mental health workers intend "to treat, not torture" persons with psychosocial disabilities, even when the workers apply electroconvulsive therapies without safeguards, use prolonged mechanical restraints, or administer psychotropic medications without therapeutic justification. Although IJs appear inclined to count workers' beneficent intentions against CAT claimants, they generally do not consider evidence of more coercive aims, namely, to control or to discipline patients, to constitute proscribed purposes that might satisfy the specific intent element of their CAT claims.

170. Moreover, as a practical matter, few governments have official policies of torture against certain groups, and even fewer noncitizens with psychosocial disabilities have the wherewithal to unearth them. As some immigration adjudicators themselves recognize, the international condemnation of torture likely incentivizes governments "to conceal or minimize the evidence of torture[.]" *Matter of J-E-*, 23 I. & N. Dec. at 308 (Schmidt, dissenting).

### 1. Ignorance

Some IJs consider lack of training or education among mental health workers to negate their specific intent to inflict harm. For example, the IJ in Case No. 42 attributed mental health workers' mistreatment of patients to a "deficiency of properly trained personnel."[171] The IJ observed, "[t]hough Mexican mental health professionals overmedicated patients and used physical restraints, at best only 5-11% of them have received more than two days worthy [*sic*] of training in mental health."[172] Likewise, the IJ in Case No. 24 concluded that mental health workers reported beliefs' that "the use of restraints or overmedication to be 'the only thing to do' when patients become self-injurious or aggressive," foreclosed a specific intent finding.[173] Despite acknowledging evidence of "abusive practices in such facilities that may rise to the level of torture,"[174] and notwithstanding expert testimony that mental health workers apply prolonged restraints for "sheer convenience," not out of ignorance, and the IJ attributed these beliefs to "a lack of education," noting that "scarce economic resources prohibit the development of education and training."[175]

IJs have overwhelmingly cited *Matter of J-R-G-P-* for the proposition that "abusive or squalid conditions in pretrial facilities, prisons, or mental health institutions in the country of removal are the result of neglect, a lack of resources, or insufficient training and education, rather than a specific intent to cause severe pain and suffering."[176] In the underlying IJ decision, the IJ conceded that the

171. Case No. 42, at 24 (I.J. Dec. Mar. 11, 2021).

172. *Id.* at 24-25.

173. Case No. 24, at 23 (I.J. Dec. June 17, 2019). Case No. 21 (I.J. Dec. Nov. 20, 2018) uses identical language at 26.

174. Case No. 24, at 22 (I.J. Dec. June 17, 2019).

175. Case No. 24, at 23 (I.J. Dec. June 17, 2019). Case No. 21 (I.J. Dec. Nov. 20, 2018) uses identical language at 26, although the expert's testimony varied.

176. *See* Case No. 41, at 14-15 (I.J. Dec. Jan. 26, 2021); Case No. 28, at 26 (I.J. Dec. Dec. 26, 2019); Case No. 22, at 21 (I.J. Dec. Jan. 31, 2019); Case No. 48, at 11 (I.J. Dec. Oct. 4, 2021); Case No. 30, at 18 (I.J. Dec. Jan. 22, 2020); Case No. 36, at 22 (I.J. Dec. Aug. 27, 2020); Case No. 24, at 23 (I.J. Dec. June 17, 2019); Case No. 25, at 18 (I.J. Dec. June 27, 2019); Case No. 38, at 17 (I.J. Dec. Oct. 22, 2020); Case No. 21, at 26 (I.J. Dec. Nov. 20, 2018); Case No. 44, at 9 (I.J. Dec. Apr. 2021); Case No. 29, at 8 (I.J. Dec. 2019); Case No. 39, at 15 (I.J. Dec. Nov. 25, 2020); Case No. 40, at 21-22, (I.J. Dec. Jan. 13, 2021); Case No. 46, at 4 (I.J. Dec. Aug. 24, 2021); Case No. 43, at 13 (I.J. Dec. Mar. 29, 2021); Case No. 31, at 13 (I.J. Dec. Jan. 22, 2020); Case No. 23, at 27 (I.J. Dec. Mar. 22, 2019); *see also* Case No. 42, at 24 (I.J. Dec.

respondent would likely be "involuntarily hospitalized in a psychiatric institution if removed to Mexico" based on the respondent's history of at least four past involuntary hospitalizations, lack of insight into his mental health condition, and consistent refusal to take medications.[177] The IJ recognized the country conditions expert's testimony that "patients—particularly patients who display 'erratic' behavior as part of their conditions—are often subjected to a range of abusive practices, such as isolation, prolonged physical restraints, lobotomies, and electroconvulsive therapy, to control and constrain their actions" and "that several of these treatments could rise to the level of torture."[178]

Nevertheless, the IJ concluded that the "rampant human rights abuses committed by workers in mental health institutions and care facilities across Mexico" were not specifically intended; rather, they merely resulted from "historical gross negligence and misunderstanding of the nature of psychiatric illness."[179] Instead of "specific intent to torture patients under their care," mental health workers intend "to control violent behavior" and "lack [] more humane options."[180] The IJ continued:

> Further, the workers stated they lacked the resources for alternative forms of treatment and so, relied on more primitive methods for administrative convenience. . . . The workers considered physical restraints to be the "only option" out of a misguided sense that the restraints were medically necessary for the patients' wellbeing."[181]

For the IJ, the facts "closely mirror[ed] those in *Villegas*," even though the record in *Villegas* does not appear to include testimony by an expert who had witnessed firsthand the application of prolonged physical restraints in Mexican mental health facilities.[182] Thus, the IJ concluded that mental health workers' "intent to control" patients using "primitive methods" for

Mar. 11, 2021) (remaining "unconvinced that, more likely than not, the mistreatment would be motivated by a specific desire to cause severe pain and suffering as opposed to a lack of mental health resources").

177. Case No. 9, at 5 (I.J. Dec. Nov. 27, 2017).

178. *Id.* at 7.

179. *Id*. at 8 (quoting *Villegas*, 523 F.3d at 989).

180. *Id.*

181. Case No. 9, at 8 (I.J. Dec. Nov. 27, 2017) (internal citations omitted).

182. *Id.* at 9.

"administrative convenience" due to "misguided belief[s]" prevented a specific intent finding.

This much is clear: with *Matter of J-R-G-P-*, the BIA amplified *Villegas*, along with many IJs' tendency to overextend its core holding that merely affirmed the specific intent requirement for CAT claims, to removal proceedings involving noncitizens with psychosocial disabilities far beyond purview of the Ninth Circuit Court of Appeals. As Table 4 shows, it has been referenced in all but six of the thirty-two IJ decisions that have followed *J-R-G-P-*. As measured by number of citations, it appears to have had the greatest influence among IJs denying CAT claims, even though the Ninth Circuit recently remanded it to the BIA for further review of the respondent's fear of experiencing sexual abuse in mental health facilities.[183]

The BIA correctly stated the *Villegas* Court's conclusion that "subjecting patients to the poor conditions in Mexico's mental health facilities" did not satisfy the elements of a CAT claim.[184] But like many IJs, the BIA overlooked that in contrast with *Villegas*, the case before it contained record evidence both in reports of investigations and in expert testimony that mental health workers intentionally caused institutionalized patients harm. The BIA instead observed that "the record reflects that the conditions in that country's mental institutions are the result of limited options for controlling patients' violent behavior and a lack of resources and training—not a specific intent to inflict pain or suffering on patients."[185] In doing so, the BIA made no mention of the facts regarding use of prolonged physical restraints that the IJ found insufficient to show specific intent. Instead, it only engaged the expert's testimony on the issue of acquiescence, which as we explain in greater detail in Section IV.C, should not have been in dispute where the mental health workers in question were public employees and therefore government agents.[186] The BIA's decision is devoid of discussion of the IJ's dispositive analysis of mental

183. Penaloza v. Garland, No. 18-72993, 2022 WL 522418, at *2 (9th Cir. 2022) (concluding the "BIA erred in failing to address Gutierrez's arguments that he would more likely than not be subject to sexual abuse in a Mexican mental health facility").

184. *Matter of J-R-G-P-*, 27 I. & N. Dec. at 485.

185. *Id.* at 486-87.

186. *Id.* at 487.

health workers' intent. We are unaware of other intentional, severely harmful acts that are simply excusable by lack of training.

### 2. Purpose

When assessing the intent of individual mental health workers, some IJs consider evidence of workers' good intentions to defeat a specific intent finding. For example, the IJ in Case No. 17 noted that "well-meaning staff" reported keeping "patients in cages for safety reasons" and benignly medicating patients "to keep them calm."[187] Although the IJ conceded that these methods reflected "antiquated notions about mental health treatment," their good intentions nevertheless foreclosed a specific intent finding.[188] This line of reasoning is hardly unique.[189] Indeed, some IJs' reasoning appears to be formulaic and only loosely tied to the records before them, as very similar language appears in cases involving markedly different country contexts. The below excerpt is reproduced nearly verbatim in different cases involving Brazil, El Salvador, Guatemala, and Mexico:

> There is no evidence the staff of these institutions intend to torture patients rather than treat their illnesses. The record does not reflect that health workers acting in an official capacity or serving as government employees would have specifically intended to severely harm patients, even if it was the foreseeable consequence.[190]

187. *Id.*

188. Case No. 17, at 6 (I.J. Dec. Aug. 28, 2018) (citations omitted).

189. *See* Case No. 3, at 18 (I.J. Dec. July 18, 2016) (giving weight to "the reason proffered by the hospitals for restraining patients is safety").

190. *See* Case No. 11, at 35 (I.J. Dec. Apr. 25, 2018); Case No. 13, at 21 (I.J. Dec. May 14, 2018); Case No. 16, at 22 (I.J. Dec. Aug. 10, 2018); Case No. 18, at 24 (I.J. Dec. Oct. 4, 2018); Case No. 19, at 19 (I.J. Dec. Oct. 23, 2018); *see also* Case No. 30, at 18 (I.J. Dec. Jan. 22, 2020) (finding "insufficient evidence to conclude that these workers intend to torture patients, rather than to treat their illnesses, maintain order within psychiatric facilities, and prevent aggressive and potentially dangerous behavior"); Case No. 23, at 27 (I.J. Dec. Mar. 22, 2019) (finding "insufficient evidence to conclude that these workers intend to torture patients, even if that is the result, rather than to treat their illnesses"); Case No. 9, at 10 (I.J. Dec. Nov. 27, 2017) & Case No. 6, at 6 (Apr. 21, 2017) ("[W]ithout evidence clearly establishing that public officials at these facilities deliberately implemented procedures designed to punish rather than to treat, the Court is unable to conclude they specifically intended to torture their patients.").

However, the simplistic syllogism that "intent to treat" forecloses a specific intent finding fails for several reasons. Such a construction of the FARRA regulations is tantamount to requiring CAT claimants to show that mental health workers *exclusively* intend to cause severe harm, an interpretation that was advanced in the notorious "torture memos" of the second Bush Administration and later repudiated.[191] Neither the FARRA regulations nor the CAT require that torturers have an exclusive intent to cause severe harm, in contrast with other statutes that have been interpreted to have more exacting intent requirements. In fact, the CAT Committee has observed that evidence of proscribed purpose can support a finding of intentionality,[192] in stark contrast with the IJs who use mental health workers' motives to undermine evidence of intent.[193] While not all mental health workers may primarily intend to cause severe harm through their use of coercive mental health methods, courts have not construed "specifically" to mean "exclusively" for CAT claims.

Moreover, even at criminal law intent is distinct from motive.[194] In other words, *why* mental health workers might cause severe harm is distinct from *whether* they will do so with the

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191. *Compare* Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President, on Standards of Conduct for Interrogation under 18 U.S.C. S 2340-2340A, at 3-4 (Aug. 1, 2002) (arguing that 18 U.S.C. § 2340, which tracks the FARRA regulations torture definition, "requires that a defendant act with the specific intent to inflict severe pain, the infliction of such pain must be the defendant's precise objective") [hereinafter Bybee Memo] *with* Levin Memo, *supra* note 83, at 16 n.27 (rejecting the "precise objective" interpretation). *See also* Hathaway et al., *supra* note 77, at 793 (noting that under the Bybee Memo's standard, "if the accused knowingly causes pain or suffering but had some other objective for which pain and suffering was merely incidental, such as extracting information, he lacks the requisite 'specific intent'").

192. *See* discussion *supra* Section III.C.

193. *See* discussion *supra* Section III.C.

194. *See* Cheek v. United States, 498 U.S. 192, 200-01 (1991). *Accord* Levin Memo, *supra* note 83, at 17 (maintaining that "specific intent must be distinguished from motive. There is no exception under the statute permitting torture to be used for a 'good reason.' Thus, a defendant's motive (to protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute."). *See also Prosecutor v. Kunarac, Kovak, & Yukovic*, ICTY Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 155 (June 12, 2002) (rejecting appellant's argument that his aim of sexual gratification in raping Muslim women defeating a finding that he acted for a proscribed purpose and holding that so long as "one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose (even one of a sexual nature) is immaterial").

requisite intent—purposely, knowingly, or otherwise.[195] Indeed, the CAT and FARRA regulations both establish intent and purpose as discrete elements. In fact, although evidence of proscribed purpose may support an inference of specific intent,[196] it is unclear whether the converse holds true. Should evidence mental health workers' motives be permitted to negate their mental state, then two distinct elements of a CAT claim would be diametrically opposed—a construction of the FARRA regulations yielding absurd results.

Last, such a construction ignores the harms known to stem from mental health coercion. The scientific literature on the efficacy of coercive mental health treatment undermines mental health workers' claims that their intent is not to harm.[197] In contrast to Haiti's blanket policy of detaining all criminal deportees, most countries do not have a blanket policy of institutionalizing all persons with psychosocial disabilities.[198] Far from an "unintended consequence," the effects of prolonged mechanical or chemical restraints or electroconvulsive therapies without safeguards are both intuitive and well-known among the global mental health community.[199] It seems perverse to expect that would-be torturers first be sufficiently trained on mental health care standards before they form the requisite intent in applying coercing methods.

Indeed, other than to undercut evidence of mental health workers' mental state, IJs give little attention to evidence

195. *See* Model Penal Code § 2.02(2).

196. *See* discussion *supra* Section III.D.

197. *See* discussion *supra* Part II.

198. *See generally Matter of J-E-,* 23 I. & N. Dec. 291 (B.I.A. 2002).

199. *See, e.g.,* Pierre v. Gonzales 502 F.3d 109 (2d Cir. 2007); *see also* discussion *supra* Section II.B; SRT Report 2020, *supra* note 53, at ¶ 37 (stressing that "purportedly benevolent purposes cannot, per se, vindicate coercive or discriminatory measures"); SRT Interim Report 2008 *supra* note 22, at 49 (noting "serious violations and discrimination against persons with disabilities may be masked as 'good intentions' on the part of health professionals"). Indeed, the IJ decision granting CAT relief that led to *Matter of R-A-F-* has seen through the claims by mental health workers on which other IJs have relied that

> [i]n many cases, the type of "treatment" provided to patients is carried out under the claim that it is intended to benefit the patient. However, medical treatments of an intrusive and irreversible nature, when lacking a therapeutic purpose, may constitute torture or ill-treatment when enforced or administered without the free and informed consent of the person concerned.

suggesting that mental health workers' coercive aims may in fact constitute proscribed purposes. Particularly, no IJs directly addressed whether mental health workers' aim to "control" patients constitute the proscribed purpose of "coercion." Further, instead of expressly determining whether controlling patients' behavior qualifies as a proscribed purpose, some IJs find mental health workers' reasons for using coercive methods on persons with psychosocial disabilities to be legitimate. Thus, paradoxically, evidence of proscribed purposes for inflicting severe harm in effect undercuts evidence of specific intent.

For example, in Case No. 7 respondent's expert presented uncontroverted testimony that "health workers deliberately employed these practices because they sought to punish and discipline patients."[200] Yet, apparently ignoring this specific and uncontroverted evidence, the IJ concluded: "Without evidence clearly establishing that workers at these facilities deliberately implemented procedures designed to punish rather than to treat, the court is unable to conclude that they specifically intended to torture patients."[201]

Indeed, some IJs demonstrated beliefs that harmful coercive practices are part and parcel of standard mental health care. For example, the IJ in Case No. 48 found:

> the record shows staff members use physical restraints when they are deemed "necessary" to *control* the behavioral symptoms of institutionalized patients, needed to control "aggressive" or "difficult" patients, required to prevent "disruptive behavior," or implemented for staff "convenience" or in lieu of "alternative care." Similarly, staff members rationalize that overmedication and sedation is necessary to *control* "unruly" or "difficult" patient behavior, or to keep patients "calm."[202]

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200. Case No. 7, at 5 (I.J. Dec. Apr. 21, 2017).

201. *Id.* at 6. *See also* Case No. 20, at 15 (I.J. Dec. Nov. 19, 2018) ("Rather, the evidence suggests the goal of health care workers in Mexican psychiatric hospitals is to maintain order and *control* within the facilities, not to torture or harm the patients.") (emphasis added).

202. Case No. 48, at 9 (I.J. Dec. Oct. 4, 2021) (emphasis added). *See also* Case No. 24, at 22 (I.J. Dec. June 17, 2019) (observing that mental health workers use "prolonged physical restraints and overmedication . . . as a means to *control* patients' self-abusive or aggressive behavior") (emphasis added).

Similarly, in Case No. 23 (I.J. Dec. Mar. 22, 2019) the IJ regarded mental health workers' desire to "maintain order" when applying mind-altering substances in psychiatric facilities to foreclose a finding of harmful intent.[203] The IJ, moreover, characterized evidence of unchecked use of chemical and physical restraints in Mexican psychiatric facilities as insufficient "to demonstrate that mental health workers intend to torture patients with schizophrenia" and merely indicative "that these forms of treatment are used to prevent aggressive and potentially dangerous behavior."[204] Instead, mental health workers' controlling purpose indicated a lack of specific intent to inflict harm. Thus, the IJ appeared to use evidence satisfying one prong of the respondent's CAT claim to negate evidence of another prong.

Strikingly, some IJs all but expressly name an enumerated proscribed purpose in the course of finding that mental health workers lack specific intent. For example, the IJ in Case No. 31 concluded that mental health workers lack specific intent to inflict severe harm despite expert testimony that "prolonged physical and chemical restraints, the administration of psychotropic medications, and the application of electroconvulsive therapy, all without documented clinical necessity . . . are utilized as a means to control and discipline patients."[205] Nevertheless, these IJs ultimately found that workers' aim of controlling or punishing patients—rather than satisfying the proscribed purpose element of the respondents' CAT claims[206]—instead disqualified this conduct as torture.

## *V. DISCUSSION*

The decisions we reviewed demonstrate concerning trends in how IJs apply the FARRA regulations to CAT claims by noncitizens

203. Case No. 23, at 27 (I.J. Dec. Mar. 22, 2019). *See also* Case No. 20, at 15 (I.J. Dec. Nov. 19, 2018) (reasoning that "the goal of health care workers in Mexican psychiatric hospitals is to maintain order and control within the facilities, not to torture or harm the patients").

204. Case No. 23, at 27 (I.J. Dec. Mar. 22, 2019).

205. Case No. 31, at 12 (I.J. Dec. Jan. 22, 2020). "Punishment" is also a proscribed purpose. 8 C.F.R. § 1208.18(a)(1). *See also* CAT, *supra* note 2, art. 1(1).

206. *See* SRT Interim Report 2008, *supra* note 22, ¶ 63, (characterizing mental health workers' use of "psychiatric medication, including neuroleptics and other mind-altering drugs [on] persons with mental disabilities . . . under coercion, or as a form of punishment . . . as a form of torture").

with psychosocial disabilities fearing harm by mental health workers. Some IJs' focus on discerning the intentions of governments writ large leads them to overlook whether individual mental health workers' intent satisfies that element of a CAT claim. This approach to intent appears heavily influenced by earlier cases, especially *Matter of J-E-* and *Villegas*, that were based on fact patterns that lacked clear evidence of individual actors' mental state, and therefore are less instructive for fact patterns that include evidence of harm by individual actors, not entities. In *Matter of J-E-*, the operative act underlying the respondent's CAT claim was Haitian authorities' detention of criminal deportees in substandard conditions;[207] analogously, in *Villegas*, the operative act was the Mexican government's warehousing of mental health patients in "terrible squalor."[208] In *Matter of J-E-*, the BIA appeared to recognize that certain acts perpetrated by prison guards might have been shown to constitute torture, had these acts been "pervasive and widespread" rather than "isolated."[209] Relatedly, not only did the *Villegas* Court not address whether specific coercive mental health practices constitute torture, the court appears to have indicated that IJs should focus on individuals' intent, rather than the intent of the government writ large.[210]

Other IJs adopting this intent of governmental entities approach appear to suggest that legal precedents prevent them from finding that mental health workers specifically intend to inflict severe harm where challenging environmental factors, such as historical negligence by government entities or resource scarcity, also appear to contribute to the prevalence of coercive mental health practices. In addition to *Matter of J-E-* and *Villegas*, these IJs tend to rely on overly broad applications of *Matter of J-R-*

207. *Matter of J-E-*, 23 I. & N. Dec. 291, 301 (B.I.A. 2002).

208. Villegas v. Mukasey, 523 F.3d 984, 989 (9th Cir. 2008).

209. *Matter of J-E-*, 23 I. & N. Dec. at 303. *See also id.* at 302 ("Instances of police brutality do not necessarily rise to the level of torture, whereas deliberate vicious acts such as burning with cigarettes, choking, hooding, kalot marassa, and electric shock may constitute acts of torture.").

210. *Villegas,* 523 F.3d at 989. *See also* J-G-C-R-, AXXX XXX 347, at 3 (B.I.A. No. 30, 2016) (unpublished) (remanding an IJ's denial of relief because "[i]mplicit in the Immigration Judge's decision is the view that the relevant government actor is the government writ large, or higher level decision-makers, and not the health care workers" with instructions to examine individual workers' mental state).

*G-P-* and *Matter of R-A-F-*.[211] They use these precedents to characterize coercive mental health practices as "conditions" endemic to institutional mental health settings rather than willful, individual acts by workers in those settings. Indeed, some IJs appear to engage in a form of external displacement,[212] whereby environmental factors overshadow individual mental health workers' role in carrying out coercive acts. Even if systemic issues such as historical neglect or scarce resources may in fact contribute to lack of accountability for harmful mental health coercion, it is unclear why such conditions should in effect immunize individual actors from scrutiny for their conduct in the context of IJs' specific intent analyses.

Moreover, some IJs' approach to the government involvement element of CAT claims appears to raise the bar for claimants fearing harm at the hands of mental health workers employed by those very governments in their state-operated facilities. Some IJs appear to require CAT claimants to show government acquiescence without specifying why these workers are not government actors for the purpose of CAT claims.[213] Other IJs appear to confuse the distinct specific intent and government involvement elements of CAT claims, cataloging governmental good works in the mental health arena as evidence undercutting mental health workers' specific intent.[214] Equally troublingly, some IJs appear to consider that either professions of good intentions or well-intentioned but ineffective efforts by governments to improve mental health systems are sufficient to defeat CAT claims.[215] These tendencies in effect demand showings by CAT claimants in excess of the FARRA regulations' requirements.

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211. *See* discussion *supra* Section IV.B.2; *see also infra* Table 3.

212. *See generally* Nils Melzer (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), Interim Report, U.N. Doc. A/75/179 (July 20, 2020) (describing various psychological defense mechanisms triggered by evidence of torturous conduct).

213. *See* discussion *supra* Section IV.C.

214. *See id. See also* R-A-F-, AXXX XXX 809, 3 (B.I.A. Aug. 3, 2020) (unpublished) (emphasizing "that the 'specific intent' element of the definition of 'torture' is separate and distinct from the requirement that torture be committed with the consent or acquiescence of an official or an individual acting in an official capacity").

215. *See* discussion *supra* Section IV.C.

Finally, some IJs adopting an individual intent approach conclude that mental health workers lack specific intent due to either ignorance or good intentions.[216] Citing *Matter of J-R-G-P-*, some IJs find that "insufficient training or education" for mental health workers prevents them from forming a torturous mental state.[217] These IJs appear to assume that mental health workers require a certain degree of training to understand that mental health coercion causes severe harm. Notably, it is unclear that there is an analogous "sufficient training" requirement in non-mental health contexts to show specific intent. Other IJs cite workers' intent "to treat, not torture" as preventing a specific intent finding.[218] These IJs' reasoning implies that respondents are required to show that prospective torturers *exclusively* intend to cause them severe harm. This interpretation of the FARRA regulations featured prominently in the repudiated "torture memos."[219] Moreover, it ignores the practice of US courts as well as international adjudicators to consider evidence of proscribed purpose sufficient to satisfy the United States' specific intent requirement.[220] Instead, some IJs improperly use evidence that mental health workers seek to coerce patients to foreclose specific intent findings.

At the same time, as previously noted, most IJs appear to concede that harms caused by psychosurgeries, use of electroshock without safeguards, administration of chemical restraints, prolonged application of mechanical restraints, and other coercive mental health practices may constitute torture.[221] Many also find "troubling and unfortunate" circumstances of

216. *See* discussion *supra* Section IV.D.

217. *See* discussion *supra* Section IV.D.1.

218. *See* discussion *supra* Section IV.D.2.

219. *See* Bybee Memo, *supra* note 191; *see also generally Dep't of Justice, Office of Professional Responsibility, Report: Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists* (July 29, 2009), https://irp.fas.org/agency/doj/opr-final.pdf [https://perma.cc/9BXB-NVN7] (describing the Bybee Memo's genesis and related opinions).

220. *See* Hathaway et al., *supra* note 77, at 820.

221. *See* discussion *supra* at n.105.

mental health service users face in their countries of origin,[222] and are "deeply" or "extremely concerned" by evidence of mistreatment by mental health workers.[223] Nevertheless, they reason that governments' ineffective efforts, minimal progress, and stated commitments to improve mental health systems defeat specific intent.[224] Fundamentally, whether IJs ascribe the prevalence of coercive mental health care to resource limitations or professionals' outmoded beliefs or ignorance, IJs appear disinclined to conclude that coercive mental health care practices constitute torture where they believe that the circumstances in respondents' countries of origin in effect render coercion inevitable in providing care to persons with psychosocial disabilities.[225]

In essence, many IJs appear resistant to conclude that mental health workers ever specifically intend to cause severe harm on persons with psychosocial disabilities in institutional settings. IJs

222. *See, e.g.*, Case No. 15, at 10 (I.J. Dec. July 18, 2018); Case No. 27, at 12-13 & 15-16 (I.J. Dec. Oct. 23, 2019); Case No. 30, at 17 (I.J. Dec. Jan. 22, 2020); Case No. 42, at 25 (I.J. Dec. Mar. 11, 2021); Case No. 46, at 6 (I.J. Dec. Aug. 24, 2021).

223. *See, e.g.,* Case No. 5, at 11 (Mar. 24, 2017); Case No. 7, at 6 (I.J. Dec. Apr. 21, 2017); Case No. 9, at 6 (I.J. Dec. Nov. 27, 2017); Case No. 10, at 24 (I.J. Dec. Mar. 7, 2018); Case No. 27, at 16 (I.J. Dec. Oct. 23, 2019).

224. *See, e.g.,* Case No. 20, at 15 (I.J. Dec. Nov. 19, 2018) ("Additionally, although progress has been slight, the Mexican government has made some steps towards improving conditions for individuals with mental illness and patients in psychiatric hospitals. This suggests conditions in the Mexican mental health system are not necessarily the result of a specific intent to harm individuals with mental illness.") (citing *Villegas*); Case No. 23, at 27 (I.J. Dec. Mar. 22, 2019) ("Second, there is extensive evidence in the record describing efforts by the Mexican government to improve the mental health care system and provide outpatient and community-based mental health services to individuals with mental illnesses. Although these efforts have not yet been fully implemented or entirely effective, they nevertheless demonstrate that the Mexican government does not consent or acquiesce to torture within psychiatric hospitals.") (internal citations omitted); Case No. 39, at 15 (I.J. Dec. Nov. 25, 2020) ("[W]hile progress to improve the mental health care system in El Salvador has been slow, evidence of record indicates that organizations like MSF, who work together with the Salvadoran government's Ministry of Health, have made some strides to improve mental health care access in the country."); Case No. 40, at 21 (I.J. Dec. Jan. 13, 2021) ("Just as in *J-R-G-P-*, the government has shown a desire to improve conditions and move to a better model of care; granted, the process appears to be moving slowly. The government's stated commitment to improving conditions weighs against a finding of specific intent.") (internal citations omitted).

225. *See, e.g.,* Case No. 7, at 5 (I.J. Dec. Apr. 21, 2017); Case No. 9, at 8 (I.J. Dec. Nov. 27, 2017); Case No. 21, at 26 (Nov. 20, 2018); Case No. 44, at 13 (Apr. 2021); Case No. 45, at 8 (I.J. Dec. June 2021); Case No. 47, at 14 (Sept. 1, 2021).

frequently found that evidence of workers' specific intent is negated by their good intentions or those professed by the government writ large.[226] None of the IJs appears to have considered that evidence of mental health workers' aims to control patients may constitute "coercion," one of the enumerated proscribed purposes in both the FARRA regulations and the CAT.[227] Instead, many IJs buttressed their reasoning with questionable interpretations of *Villegas*, *Matter of J-E-*, and more recently *Matter of J-R-G-P-* and *Matter of R-A-F-*.[228]

In this respect, noncitizens with psychosocial disabilities advancing CAT claims predicated on harms in institutional mental health settings appear to be confronting attitudes similar to those that the global psychiatric survivor movement has long struggled against.[229] The CRPD has helped to elevate the voices of psychiatric survivors and mental health users, and its reframing of coercive mental health practices as implicating core human rights protections against torture has garnered allies among the professional mental health community. And even though the United States has not ratified the CRPD, these developments may over time play a greater role in IJs' deliberations. Indeed, our organization, the Harvard Law School Project on Disability (HPOD), together with other disability rights actors, has endeavored to bring these considerations to bear through several recent *amicus curiae* briefs in several appeals originating from CAT claims.[230]

Framing harmful mental health practices as forms of "coercion" may help IJs to connect the dots between the fears of noncitizens with psychosocial disabilities and conduct prohibited by CAT. US courts generally do not separately analyze proscribed purpose as a distinct element of CAT claims; where discussed, this element is often "subsumed" in specific intent analyses.[231] This

226. *See* discussion *supra* Sections IV.B.2 & IV.D.1.

227. 8 C.F.R. § 1208.18a(1); CAT, *supra* note 2, art. 2(1).

228. *See* discussion *supra*, at Section IV.B. *See also infra* Table 3.

229. *See generally* LINDA J. MORRISON, TALKING BACK TO PSYCHIATRY: THE PSYCHIATRIC CONSUMER/SURVIVOR/EX-PATIENT MOVEMENT (2013).

230. For example, HPOD intervened as *amicus* in Penaloza v. Garland, 2022 WL 522418 (9th Cir. Feb. 22, 2022); Villegas-Gomez v. Garland, 2022 WL 71823 (9th Cir. Jan. 7, 2022); Coronel Resendiz v. Barr, 810 Fed.Appx. 538 (9th Cir. 2020); and Clemente-Pacheco v. Sessions, 732 Fed.Appx. 537 (9th Cir. 2018).

231. *See* discussion *supra* Section III.D.

pattern holds true among the IJ decisions we reviewed. Moreover, US courts' tendency to consider proscribed purpose as part of their specific intent analyses suggests to us that at least some adjudicators may be open to considering evidence of one or more enumerated proscribed purposes as satisfying the specific intent element of CAT claims.

To us, this suggests a possible opening for CAT claimants fearing mental health harms to satisfy the specific intent element. Although a consensus definition of "coercion" in mental health contexts has yet to emerge, there is limited precedent delimiting the parameters of "coercion" as defined by CAT, FARRA, and its regulations.[232] As evident from several IJs' decisions we reviewed, unsuccessful CAT claimants have nevertheless succeeded in persuading IJs that mental health workers aim to control or to punish patients in institutional settings.[233] It is unclear from the decisions themselves whether CAT claimants have expressly argued that these aims amount to coercion. But the growing scientific literature on mental health coercion seems to present a potent resource for CAT claimants seeking to connect those dots.

## *VI. RECOMMENDATIONS*

Bridging the gap between mental health coercion and conduct triggering CAT *non-refoulement* protection will not happen overnight. Incremental, resource-intensive case-by-case efforts will require thoughtful coordination to have noticeable effects, though singular cases can have outsized impacts. We offer the following recommendations for representatives of CAT claimants, US immigration policymakers, and international monitors to help ensure that the United States fulfills its *non-refoulement* obligations as they apply to noncitizens with psychosocial disabilities.

232. We note simply that BLACK'S LAW DICTIONARY (11th ed. 2019) defines "coercion" as "[c]ompulsion of a free agent by physical, moral, or economic force or threat of physical force," which on its face appears to align with the common usage referenced in Gooding et al., *supra* note 31, at 9.

233. *See* discussion *supra* Section IV.D.2.

### *A. Strategies for Practitioners*

Practitioners should direct IJs' attention to the intent of individual mental health workers.[234] Where IJs focus on the intent of governments writ large, practitioners should directly challenge such reasoning as premised on mistaken interpretations of *Matter of J-E-* and *Matter of J-R-P-G-*, for example, by analogizing their specific intent errors with the government acquiescence error detected in *Roye*. Moreover, practitioners should be attentive to the multiple kinds of interpretative errors we describe in Part IV, with an eye to arguing on appeal that these are errors of law and therefore warrant *de novo* review.[235]

IJs likely have limited awareness of the growing mental health coercion literature. To a certain extent, their decisions are confined by the evidence presented to them. Here, representatives of noncitizens with psychosocial disabilities have an important role to play in educating IJs on contemporary views on coercive mental health practices. Presenting additional information from the scientific literature about the harm and intentionality inherent to use of electroshock without safeguards, administration of chemical restraints, and prolonged application of mechanical restraints may help to supplant paternalistic notions about appropriate standards of care for persons with psychosocial disabilities that IJs may harbor. In addition, practitioners should consider marshaling arguments that such forms of coercion constitute evidence of proscribed purpose that might also satisfy specific intent.

Further, practitioners should impress upon IJs that unlike prisons, there is no overriding imperative to involuntarily detain persons with psychosocial disabilities in institutional mental health settings. Even if in certain contexts mental health workers truly have no alternative, non-coercive forms of treatment, they also have the option of refraining from harmful methods and

234. Arguments that "the conditions inside the public mental health institutions alone" appear destined to fail. *See, e.g.,* Case No. 13, at 21 (I.J. Dec. May 14, 2018); Case No. 16, at 21 (I.J. Dec. Aug. 10, 2018); Case No. 18, at 23 (I.J. Dec. Oct. 4, 2018); Case No. 19, at 18 (I.J. Dec. Oct. 23, 2018).

235. *Matter of R-A-F-*, 27 I. & N. Dec. 778, 779–80 (A.G. 2020) (directing the BIA to review *de novo* IJs' application of legal standards to elements of CAT claims). *But see* Guerra v. Barr, 951 F.3d 1128, 1134 (9th Cir. 2020), *amended by* Guerra v. Barr, 974 F.3d 909, 913 (9th Cir. 2020) (describing the specific intent determination as question of fact subject to clear error review) (citing *Ridore*, 696 F.3d at 916-17).

working to release patients. While it may be true that some persons with psychosocial disabilities could ultimately benefit from some involuntary treatments, the peremptory *jus cogens* nature of the universal prohibition on torture should override mental health service providers' beneficence.

Finally, practitioners should also specifically invite experts to characterize findings presented in other country conditions exhibits, so that they can provide expert opinions as to the motives of mental health workers, while avoiding unnecessary discussion of governmental policies or other environmental factors, which appear to distract some IJs from workers' mental state. Practitioners might also consider carefully how to frame documentary evidence that IJs have already frequently used to justify CAT denials. While some courts may be willing to affirm grants of CAT relief based on IJs' findings that mental health and other facilities are used to inflict severe harm,[236] reports that describe at length the conditions inside mental health facilities may ultimately distract IJs from the few specific acts that might more readily qualify as torture. While there is ample evidence of poor conditions in institutional mental health settings, from the decisions we reviewed, it seems that not all IJs are willing to interpret relevant legal precedents to allow them to make inferences about mental health workers' specific intent based on those conditions.

### *B. Guidance for IJs*

One possible solution may be for the EOIR to issue guidance for IJs on adjudicating CAT claims by noncitizens with psychosocial disabilities, such as by updating its benchbook for IJs.[237] Alternatively, the Attorney General may certify certain cases from the BIA to set forth this guidance. In addition, the EOIR may endeavor to publish precedential decisions that accord with these

236. *See, e.g., Ridore,* 696 F. 3d at 917; Guerra v. Barr, 951 F.3d 1128 (9th Cir. 2020), *amended by* Guerra v. Barr, 974 F.3d 909, 913 (9th Cir. 2020).

237. The EOIR's *Immigration Judges Benchbook* is a compilation of information aimed at assisting IJs to adjudicate their cases, such as guidance on how to conduct a competency hearing pursuant to *Matter of M-A-M-*. *Immigration Judge Benchbook*, DEP'T OF JUST.: EOIR (2020), https://fileshare.eoir.justice.gov/benchbook-archived.zip.

principles in its online resources disseminating BIA and Attorney General precedents.[238]

Immigration adjudicators have at times exasperated Circuit Court of Appeals judges sitting in review,[239] prompting them to call for immigration officials to adopt common-sense policies that would expedite both courts' and immigration adjudicators' resolution of factually similar removal cases. For example, Judge Easterbrook has invoked Social Security Administration policies for social welfare benefits adjudications as worthy examples for immigration authorities to follow.[240] In the absence of precise guidance as to what kinds of coercive mental health methods may satisfy the elements of a CAT claim based on the growing scientific literature, IJs may interpolate their own biases about appropriate treatment for persons with psychosocial disabilities.

Indeed, beyond the Social Security Administration's disability-related benefits adjudications, the disability rights experience demonstrates the utility of more specific regulations.[241] For example, until the 2008 Americans with Disabilities Amendment Act (ADAAA),[242] most Americans with Disabilities Act (ADA) litigation centered on whether plaintiffs had a disability as

238. BIA Precedent Chart, DEP'T OF JUST. https://www.justice.gov/eoir/bia-precedent-chart [https://perma.cc/D5ZM-TBK3] (last updated Dec. 27, 2021).

239. *See, e.g.,* Nina Bernstein, *U.S. Relieves Judge of Duties in Courtroom,* N.Y. TIMES (Mar. 13, 2007), https://www.nytimes.com/2007/03/13/nyregion/13judge.html [https://perma.cc/VGG7-CZEL].

240. Banks v. Gonzales, 453 F.3d 449, 454-55 (7th Cir. 2006) ("The immigration bureaucracy has much to learn from the experience of other federal agencies that handle large numbers of comparable claims with individual variations."). For additional information on the Social Security Administration's ("SSA") administrative law judges, see U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-14, RESULTS-ORIENTED CULTURES: OFFICE OF PERSONNEL MANAGEMENT SHOULD REVIEW ADMINISTRATIVE LAW JUDGE PROGRAM TO IMPROVE HIRING AND PERFORMANCE MANAGEMENT (2010). The GAO's 2017 report also points to the SSA hearings. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-37, SOCIAL SECURITY DISABILITY: ADDITIONAL MEASURES AND EVALUATION NEEDED TO ENHANCE ACCURACY AND CONSISTENCY OF HEARINGS DECISIONS (2017).

241. Note, however, that the purposes of disability benefits programs and nondiscrimination statutes differ greatly. *See* Michael Ashley Stein et al., *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 691-92 (2014) (tracing the Social Security Disability Insurance program's roots to the Elizabeth Poor Laws).

242. ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553 (2008) (expressly rejecting the US Supreme Court's construction of the ADA disability definition).

defined by the statute.[243] These highly fact-specific and subjective determinations were susceptible to influence by largely non-disabled judges' preconceived notions about persons with disabilities that constricted Congress' intended scope of statutory protection.[244] As a result, persons with certain kinds of disabilities could bring suit in one jurisdiction, but not others. The judiciary's attention to *who* had a qualifying disability distracted it from determining *what* accommodations they were owed.[245] The ADAAA streamlined ADA cases, diverting scarce judicial resources to substantive questions.[246]

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243. *See* Michael Waterstone et al., *Disability Cause Lawyering*, 53 WILLIAM & MARY L. REV. 1287, 1348-49 (2012) (summarizing and concurring with scholarly criticisms of the Supreme Court's disability definition-centric jurisprudence for contributing to low success rates by ADA claimants); *see also* Michael Ashley Stein et al., *supra* note 241 at 691 (noting that prior to 2010 over 97 of pre-ADAAA employment disability-based discrimination claimants in federal courts lost).

244. See Matthew Diller, Judicial Backlash, the ADA, and the Civil Rights Model of Disability, 21 BERKELEY J. EMP. & LAB. L. 19 (2000) *reprinted in* BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 62 (Linda Hamilton Krieger ed., 2003) (arguing that "[j]udges view the ADA a form of public benefit program for people with disabilities, rather than a mandate for equality"). See also Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL'Y 383 (2019) (arguing some post-ADAAA decisions remain tinged by judicial biases). *See generally* Anita Silvers et al., *Disability and Employment Discrimination at the Rehnquist Court*, 75 MISS. L. J. 945 (2006) (arguing that the Supreme Court under Chief Justice Rehnquist failed to reject paternalistic notions of "protecting" people with disabilities in ways inconsistent with its race and sex antidiscrimination jurisprudence).

245. *Compare* Stein et al., *supra* note 242, at 694 (arguing to "shift[] the locus of accommodation disputes from the contentious identity-based contours of the 'disabled' plaintiff to the underlying issue of alleged discrimination" in order to "remed[y] problems arising from excluding 'unworthy' individuals from employment opportunity—people whose functional modes do not comply with prevailing workforce design and organizational presumptions and who therefore require accommodation") *with* City of Cleburne, TX v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985) (justifying its decision not to hold that persons with intellectual disabilities are a quasi-suspect classification because they are not "all cut from the same pattern . . . they range from those whose disability is not immediately evident to those who must be constantly cared for"). *But see id.* at 468 (Marshall, J. concurring) (criticizing the majority for requiring groups to be cut from a "cookie mold" to constitute a quasi-suspect class).

246. *See generally* Stephen F. Befort, *An Empirical Analysis of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027 (2013) (observing general judicial fidelity to Congressional intent in post-ADAAA decisions, while noting "a continuing judicial unease with disability discrimination claims generally and with reasonable accommodation requests more specifically").

Such guidance should at minimum instruct IJs as to the following. First, it should be undisputed that certain kinds of conduct that occurs in mental health facilities cause severe pain or suffering for the purposes of CAT claims. The denials of CAT claims we reviewed seem to concede as much. Second, specific intent inquiries should focus on individual mental health workers' mental state, not the more abstract intentions of governmental entities. Third, evidence of widespread abuses, deplorable conditions, negligence, ignorance, and resource scarcity should support circumstantial inferences of specific intent by mental health workers, not cut against it.[247] Fourth, evidence of mental health workers' goals of punishing, coercing, or discriminating against persons with psychosocial disabilities should not be considered to undercut evidence of specific intent, but instead as evidence of proscribed purpose that reinforces specific intent evidence. Finally, it should be undisputed that mental health workers in state-run facilities are public officials for the purposes of CAT claims, while ineffectual policies and laws should not negate acquiescence findings.

Such guidance would serve several purposes. First and foremost, it would contribute to ensuring that the United States upholds its obligations under the CAT and customary international law. Second, it would help to combat the disability bias inured in highly subjective, fact-specific, and individualized adjudications.[248] Third, it would both promote judicial economy and focus strapped administrative agency resources.[249] Fourth, it would ward against

247. As one BIA panel recently stated, "[i]nvoluntarily subjecting a mental health patient to electroconvulsive therapy, restraining the patient indefinitely, or physically or sexually abusing him or her, are not 'conditions' that result from neglect, a lack of resources, or insufficient training or education." *Matter of A-E-R-*, AXXX XXX 231, 3-4 (B.I.A. Nov. 12, 2021) (unpublished).

248. Faraaz Mahomed et al., *Compulsory Mental Health Interventions and the CRPD: Minding Equality by Anna Nilsson (Review)*, 43 HUM. RTS. Q. 616, 618 (2021) (criticizing the European Court of Human Rights' proportionality analysis as "easily manipulatable as well as open-ended" with uneven results in disability rights cases).

249. There is a long-standing backlog in immigration adjudications. *See generally*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES (2017).

shifting political winds.[250] To the extent that IJs are sensitive to changing immigration policies across administrations, narrowing the field of inquiry for CAT claims would ensure that domestic political priorities do not trump international obligations.

### *C. CAT Committee Engagement*

Finally, immigration and disability rights advocates should engage the CAT Committee in order to shine a light on trends in immigration adjudicators' resolution on of CAT claims by noncitizens with psychosocial disabilities that may undermine international obligations. The intersection of *non-refoulement* protections and disability rights appears to be underexplored by the CAT Committee, and the emergence of the CRPD may encourage the Committee to engage this issue.[251] For example, in General Comment No. 4, for example, the CAT Committee does not mention mental health-related harms as circumstances that duty-bearers should consider when implementing their *non-refoulement* duty.[252]

This holds true specifically with regard to the Committee's monitoring of the US' CAT implementation. In its 2013 concluding obligations on the United States, the CAT Committee did not address its fulfillment of its CAT article 3 *non-refoulement* duty in removal proceedings involving noncitizens with psychosocial disabilities. Although its most recent list of issues requests specific information about "the number asylum seekers whose applications were accepted because they had been tortured or might be tortured if returned to their country of origin,"[253] the Committee did not inquire specifically about noncitizens with

250. *See* Jeffrey S. Chase, *The Real Message of Matter of R-A-F-*, JEFFREY S. CHASE–OPINIONS/ANALYSIS ON IMMIGRATION LAW (Mar. 1, 2020), https://www.jeffreyschase.com/blog/2020/3/1/the-real-message-of-matter-of-r-a-f- [https://perma.cc/VQJ6-US5Q] (arguing that the Attorney General aimed "not to give guidance, but to serve warning" on individual BIA appellate judges).

251. *See also generally* Lord et al., discussion *supra* 64 (recommending ways that UN entities might promote a more CRPD-consistent international refugee and asylum law framework).

252. CAT Committee, *supra* note 57, ¶ 29.

253. Committee Against Torture, List of Issues Prior to Submission of the Sixth Periodic Report of the United States of America, U.N. Doc. CAT/C/USA/QPR/6, ¶ 10 (Jan. 26, 2017).

psychosocial disabilities in removal proceedings.[254] In reply, the United States' most recent periodic report to the CAT Committee only mentions its NQRP program briefly, and provides general quantitative information about grant and denial rates of CAT claims.[255] The Committee can and should address how systematic errors by IJs in adjudicating CAT claims and how US precedents and legal standards may be impermissibly narrowing the scope of CAT *non-refoulement* protections for noncitizens with psychosocial disabilities.

In particular, advocates might urge the Committee to interrogate how the United States' interpretation of CAT requiring intent to be "specific" may in effect be too narrow, especially in the context of removal proceedings, where IJs' inquiries are inherently speculative and where they lack opportunities to directly examine the intentions of putative torturers.[256] Additionally, they may encourage the CAT Committee to press the United States on what measures it has taken to ensure that immigration adjudicators do not conflate discrete elements of CAT claims, especially as applied to mental health coercion.

## *VII. CONCLUSION*

International law's prohibition of torture is absolute and encompasses an affirmative duty to prevent *refoulement*. Justified critiques of American exceptionalism aside, the CAT is one of the few international human rights treaties that the United States has ratified, making its implementation all the more crucial. And despite not yet ratifying the CRPD, the United States is frequently heralded as a disability rights pioneer.[257] Strengthening its

254. The Committee only inquired specifically about persons with psychosocial disabilities in US penitentiary or psychiatric facilities. *See id.*

255. Committee Against Torture, Sixth Periodic Report Submitted by the United States of America Under Article 19 of the Convention Pursuant to the Simplified Reporting Procedure, Due in 2018, U.N. Doc. CAT/C/USA/6/7602E, ¶ 56 (Sept. 24, 2021).

256. Relatedly, the CAT Committee has criticized the United States' "restrictive interpretation" of mental torture requiring "prolonged mental harm" for impermissibly contravening the object and purpose of the treaty. Committee Against Torture, Consideration of Reports Submitted by State Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture, United States of America, U.N. Doc. CAT/C/USA/CO/2, ¶ 13 (July 25, 2006).

257. *See* Michael Ashley Stein & Janet E. Lord, *Ratify the UN Disability Treaty,* FOREIGN POL'Y IN FOCUS (July 9, 2009), http://fpif.org/ratify_the_un_disability_treaty [https://perma.cc/KKL7-RZNJ].

implementation of its *non-refoulement* duty with respect to noncitizens with psychosocial disabilities is an area yearning for attention. While it may be that today, due to *Matter of M-A-M-*, *Franco v. Holder*, and the gradual expansion of the NQRP, noncitizens with psychosocial disabilities in removal proceedings are likely accessing counsel more frequently than ever, the legal straits they must navigate to obtain CAT relief remain narrow. As the IJ decisions we reviewed illustrate, adjudicators may be overlooking evidence of individual mental health workers' coercive methods, as well as the extent to which mental health coercion constitutes conduct proscribed by CAT, to the peril of individual respondents and the United States' international commitments alike. If nothing else, our study underscores the importance of intersectional approaches to challenges faced by persons with disabilities in the immigration legal system.[258]

258. In addition to Franco-Gonzales v. Holder, 767 F.Supp.2d 1034 (C.D. Cal. 2010), see *Fraihat v. U.S. Immigration and Customs Enforcement* for a promising application of disability rights legal standards to persons with disabilities in immigration detention during the COVID-19 pandemic. 445 F.Supp.3d 709 (C.D. Cal. Apr. 20, 2020), *rev'd and remanded by* 16 F.4th 613 (9th Cir. 2021).

## TABLES

### A. Table 1. Background of CAT Claimants

| ***Case*** | ***Country of Origin*** | ***Mental Health Diagnoses*** |
|---|---|---|
| *Case No. 1 (I.J. Dec. Mar. 14, 2016)* | Mexico | Adjustment Disorder with mixed Anxiety and Depressed Mood, Major Depressive Disorder, Learning Disabilities |
| *Case No. 2 (I.J. Dec. July 18, 2016)* | Mexico | Paranoid Schizophrenia |
| *Case No. 3 (I.J. Dec. July 18, 2016)* | Mexico | Memory Loss, Anxiety, Depression, unspecified Learning Disability |
| *Case No. 4 (I.J. Dec. July 22, 2016)* | Mexico | Depression |
| *Case No. 5 (I.J. Dec. Mar. 24, 2017)* | Mexico | Schizophrenia, Mild Neurocognitive Disorder with Behavioral Disturbance, Persistent Depressive Disorder with Anxious Distress, Severe Alcohol Use Disorder |
| *Case No. 6 (I.J. Dec. Apr. 20, 2017)* | Mexico | Deaf Mute, Pedophilia |
| *Case No. 7 (I.J. Dec. Apr. 21, 2017)* | Mexico | Schizophrenia |
| *Case No. 8 (I.J. Dec. Sept. 15, 2017)* | Mexico | Bipolar Disorder, Substance Use Disorder, Alcohol Use Disorder |
| *Case No. 9 (I.J. Dec. Nov. 27, 2017)* | Mexico | Schizoaffective Disorder Bipolar Type, Anti-Social Personality Disorder |
| *Case No. 10 (I.J. Dec. Mar. 7, 2018)* | Guatemala | Schizoaffective Disorder, Bipolar Type, and Mild Neurocognitive Disorder or Borderline Intellectual Functioning |
| *Case No. 11 (I.J. Dec. Apr. 25, 2018)* | El Salvador | Schizophrenia and Bipolar Disorder |
| *Case No. 12 (I.J. Dec. May 7, 2018)* | Guatemala | Undiagnosed, hears voices |

| ***Case*** | ***Country of Origin*** | ***Mental Health Diagnoses*** |
|---|---|---|
| *Case No. 13 (I.J. Dec. May 14, 2018)* | Mexico | Bipolar Disorder, Schizophrenia |
| *Case No. 14 (I.J. Dec. June 22, 2018)* | Egypt | Bipolar Disorder |
| *Case No. 15 (I.J. Dec. July 18, 2018)* | Mexico | Undiagnosed, neurological speech impairment, auditory hallucinations, mood fluctuations |
| *Case No. 16 (I.J. Dec. Aug. 10, 2018)* | Brazil | Schizophrenia, Bipolar Disorder, Loss of Consciousness |
| *Case No. 17 (I.J. Dec. Aug. 28, 2018)* | Mexico | Psychotic Disorder, Personality Disorder, Schizophrenia, Paranoia, Delusional Disorder |
| *Case No. 18 (I.J. Dec. Oct. 4, 2018)* | Guatemala | Schizophrenia |
| *Case No. 19 (I.J. Dec. Oct. 23, 2018)* | El Salvador | Undiagnosed, intellectual impairment and possible psychotic disorder |
| *Case No. 20 (I.J. Dec. Nov. 19, 2018)* | Mexico | Bipolar Schizoaffective Disorder |
| *Case No. 21 (I.J. Dec. Nov. 20, 2018)* | Mexico | Schizophrenia |
| *Case No. 22 (I.J. Dec. Jan. 31, 2019)* | Guatemala | Undiagnosed, auditory and visual hallucinations |
| *Case No. 23 (I.J. Dec. Mar. 22, 2019)* | Mexico | Schizophrenia, Unspecified Intellectual Disability, Alcohol Use Disorder, Cannabis Use Disorder, Unspecified Trauma-and-Stressor-Related Disorder |
| *Case No. 24 (I.J. Dec. June 17, 2019)* | Mexico | Schizophrenia |
| *Case No. 25 (I.J. Dec. June 27, 2019)* | Kenya | Schizophrenia, Bipolar Disorder |
| *Case No. 26 (I.J. Dec. Aug. 26, 2019)* | El Salvador | Major Depressive Disorder with Psychotic Features, Stimulant Use Disorder |

| ***Case*** | ***Country of Origin*** | ***Mental Health Diagnoses*** |
|---|---|---|
| *Case No. 27 (I.J. Dec. Oct. 23, 2019)* | Mexico | Schizophrenia, Chronic Complex Trauma Disorder, Cognitive Impairment |
| *Case No. 28 (I.J. Dec. Dec. 26, 2019)* | Mexico | Undiagnosed, auditory and visual hallucinations |
| *Case No. 29 (I.J. Dec. 2019)* | Mexico | Unspecified Neurocognitive Disorder Bordering on Dementia, Generalized Anxiety Disorder Bordering on Dementia, Mild Neurocognitive Disorder |
| *Case No. 30 (I.J. Dec. Jan. 22, 2020)* | Mexico | Schizophrenia |
| *Case No. 31 (I.J. Dec. Jan. 22, 2020)* | Mexico | Bipolar Disorder, Schizoaffective Disorder, Attention Deficit Disorder, Substance Use Disorder |
| *Case No. 32 (I.J. Dec. Apr. 24, 2020)* | Nicaragua | PTSD, Schizophrenia |
| *Case No. 33 (I.J. Dec. June 30, 2020)* | Guinea | Depression, Anxiety, Emotional Distress with Suicidal Ideation and Dissociative Episodes |
| *Case No. 34 (I.J. Dec. Aug. 4, 2020)* | Mexico | Major Depressive Disorder, PTSD, Neurocognitive Disorder, Type-2 Diabetes, Epilepsy, Hypertension |
| *Case No. 35 (I.J. Dec. Aug. 14, 2020)* | Guinea | Schizophrenia, Psychosis, Anxiety Disorder |
| *Case No. 36 (I.J. Dec. Aug. 27, 2020)* | El Salvador | Schizoaffective Disorder |
| *Case No. 37 (I.J. Dec. Sept. 16, 2020)* | Mexico | Undiagnosed, symptoms of depression and anxiety |
| *Case No. 38 (I.J. Dec. Oct. 22, 2020)* | Guatemala | Depression, Schizophrenia |
| *Case No. 39 (I.J. Dec. Nov. 25, 2020)* | El Salvador | Schizophrenia |
| *Case No. 40 (I.J. Dec. Jan. 13, 2021)* | Guatemala | PTSD, Anxiety Disorder, Depressive Disorders, possibly Schizophrenia |

| ***Case*** | ***Country of Origin*** | ***Mental Health Diagnoses*** |
|---|---|---|
| *Case No. 41 (I.J. Dec. Jan. 26, 2021)* | El Salvador | Bipolar Disorder |
| *Case No. 42 (I.J. Dec. Mar. 11, 2021)* | Mexico | PTSD, Major Neurocognitive Disorder due to Traumatic Brain Injury, with Behavioral Disturbance |
| *Case No. 43 (I.J. Dec. Mar. 29, 2021)* | Mexico | Attention Deficit Hyperactivity Disorder, Generalized Anxiety Disorder, Major Depressive Disorder, PTSD, Unspecified Neurocognitive Disorder |
| *Case No. 44 (I.J. Dec. Apr. 2021)* | Mexico | PTSD, Complex Trauma, Schizoaffective Disorder, Amphetamine Use Disorder |
| *Case No. 45 (I.J. Dec. June 2021)* | Mexico | Major Depressive Disorder, Anxiety Disorder with Anxious Distress, Other Psychotic Disorder: Persistent Auditory Hallucinations, Mild Alcohol Use Disorder, PTSD |
| *Case No. 46 (I.J. Dec. Aug. 24, 2021)* | Honduras | Depressed Mood, Suicidal Ideations, Visual Hallucinations |
| *Case No. 47 (I.J. Dec. Sept. 1, 2021)* | Mexico | Unspecified Depressive Disorder with Psychotic Features |
| *Case No. 48 (I.J. Dec. Oct. 4, 2021)* | Mexico | Major Depressive Disorder, Anxiety Disorder, Alcohol Use Disorder, Unspecified Delirium, Delusional Disorder |
| *Case No. 49 (I.J. Dec. Nov. 29, 2021)* | Mexico | Adjustment Disorder with mixed Anxiety and Depressed Mood, Major Depressive Disorder, Learning Disabilities |

*B. Table 2. Frequently Cited Long-Standing Precedents*

| ***Case*** | ***Country*** | ***Circuit*** | ***J-E-*** | ***J-F-F-*** | ***Villegas*** |
|---|---|---|---|---|---|
| *Case No. 1 (I.J. Dec. Mar. 14, 2016)* | Mexico | 9th | 2 | 1 | 11 |
| *Case No. 2 (I.J. Dec. July 18, 2016)* | Mexico | 9th | | 3 | |
| *Case No. 3 (I.J. Dec. July 18, 2016)* | Mexico | 9th | | 3 | 5 |
| *Case No. 4 (I.J. Dec. July 22, 2016)* | Mexico | 9th | | | 3 |
| *Case No. 5 (I.J. Dec. Mar. 24, 2017)* | Mexico | 9th | 1 | 1 | 10 |
| *Case No. 6 (I.J. Dec. Apr. 20, 2017)* | Mexico | 9th | 1 | | 4 |
| *Case No. 7 (I.J. Dec. Apr. 21, 2017)* | Mexico | 9th | | 1 | 13 |
| *Case No. 8 (I.J. Dec. Sept. 15, 2017)* | Mexico | 9th | | 4 | 2 |
| *Case No. 9 (I.J. Dec. Nov. 27, 2017)* | Mexico | 9th | | 3 | 12 |
| *Case No. 10 (I.J. Dec. Mar. 7, 2018)* | Guatemala | 9th | | 5 | 5 |
| *Case No. 11 (I.J. Dec. Apr. 25, 2018)* | El Salvador | 9th | | | 1 |
| *Case No. 12 (I.J. Dec. May 7, 2018)* | Guatemala | 9th | | 1 | 1 |
| *Case No. 13 (I.J. Dec. May 14, 2018)* | Mexico | 9th | | | 2 |
| *Case No. 14 (I.J. Dec. June 22, 2018)* | Egypt | 9th | | | |
| *Case No. 15 (I.J. Dec. July 18, 2018)* | Mexico | 9th | | | 1 |
| *Case No. 16 (I.J. Dec. Aug. 10, 2018)* | Brazil | 9th | | | 2 |
| *Case No. 17 (I.J. Dec. Aug. 28, 2018)* | Mexico | 9th | 1 | 3 | 10 |
| *Case No. 18 (I.J. Dec. Oct. 4, 2018)* | Guatemala | 9th | | | 1 |
| *Case No. 19 (I.J. Dec. Oct. 23, 2018)* | El Salvador | 9th | | | 1 |
| *Case No. 20 (I.J. Dec. Nov. 19, 2018)* | Mexico | 9th | | 2 | 1 |
| *Case No. 21 (I.J. Dec. Nov. 20, 2018)* | Mexico | 9th | | 1 | 1 |
| *Case No. 22 (I.J. Dec. Jan. 31, 2019)* | Guatemala | 9th | | 1 | 1 |

| ***Case*** | ***Country*** | ***Circuit*** | ***J-E-*** | ***J-F-F-*** | ***Villegas*** |
|---|---|---|---|---|---|
| *Case No. 23 (I.J. Dec. Mar. 22, 2019)* | Mexico | 9th | 1 | 3 | 3 |
| *Case No. 24 (I.J. Dec. June 17, 2019)* | Mexico | 9th | | 1 | 2 |
| *Case No. 25 (I.J. Dec. June 27, 2019)* | Kenya | 9th | | 1 | 1 |
| *Case No. 26 (I.J. Dec. Aug. 26, 2019)* | El Salvador | 9th | | 1 | |
| *Case No. 27 (I.J. Dec. Oct. 23, 2019)* | Mexico | 9th | | | 4 |
| *Case No. 28 (I.J. Dec. Dec. 26, 2019)* | Mexico | 9th | | 2 | 2 |
| *Case No. 29 (I.J. Dec. 2019)* | Mexico | 10th | 1 | 3 | |
| *Case No. 30 (I.J. Dec. Jan. 22, 2020)* | Mexico | 9th | 1 | | 1 |
| *Case No. 31 (I.J. Dec. Jan. 22, 2020)* | Mexico | 2nd | 2 | 3 | |
| *Case No. 32 (I.J. Dec. Apr. 24, 2020)* | Nicaragua | 9th | 1 | 1 | 3 |
| *Case No. 33 (I.J. Dec. June 30, 2020)* | Guinea | 4th | | | |
| *Case No. 34 (I.J. Dec. Aug. 4, 2020)* | Mexico | 9th | | 2 | 3 |
| *Case No. 35 (I.J. Dec. Aug. 14, 2020)* | Guinea | 4th | | 1 | |
| *Case No. 36 (I.J. Dec. Aug. 27, 2020)* | El Salvador | 9th | | 1 | 2 |
| *Case No. 37 (I.J. Dec. Sept. 16, 2020)* | Mexico | 9th | | 2 | 2 |
| *Case No. 38 (I.J. Dec. Oct. 22, 2020)* | Guatemala | 9th | | 1 | 4 |
| *Case No. 39 (I.J. Dec. Nov. 25, 2020)* | El Salvador | 4th | 5 | 5 | |
| *Case No. 40 (I.J. Dec. Jan. 13, 2021)* | Guatemala | 4th | 4 | | |
| *Case No. 41 (I.J. Dec. Jan. 26, 2021)* | El Salvador | 9th | 1 | 2 | 2 |
| | | | | | |

| ***Case*** | ***Country*** | ***Circuit*** | ***J-E-*** | ***J-F-F-*** | ***Villegas*** |
|---|---|---|---|---|---|
| *Case No. 42 (I.J. Dec. Mar. 11, 2021)* | Mexico | 4th | | 1 | |
| *Case No. 43 (I.J. Dec. Mar. 29, 2021)* | Mexico | 4th | 1 | | |
| *Case No. 44 (I.J. Dec. Apr. 2021)* | Mexico | 10th | 2 | 1 | 2 |
| *Case No. 45 (I.J. Dec. June 2021)* | Mexico | 10th | 1 | 1 | |
| *Case No. 46 (I.J. Dec. Aug. 24, 2021)* | Honduras | 4th | 4 | | |
| *Case No. 47 (I.J. Dec. Sept. 1, 2021)* | Mexico | 10th | 2 | | |
| *Case No. 48 (I.J. Dec. Oct. 4, 2021)* | Mexico | 9th | 1 | 2 | 1 |
| *Case No. 49 (I.J. Dec. Nov. 29, 2021)* | Mexico | 9th | 2 | 2 | 3 |

*C. Table 3. Frequently Cited Recent Precedents*

| ***Case*** | ***Circuit*** | ***J-R-G-P-*** | ***R-A-F-*** | ***Guerra*** |
|---|---|---|---|---|
| | | *Decided 10/31/18* | | |
| *Case No. 20 (I.J. Dec. Nov. 19, 2018)* | 9th | | | |
| *Case No. 21 (I.J. Dec. Nov. 20, 2018)* | 9th | 2 | | |
| *Case No. 22 (I.J. Dec. Jan. 31, 2019)* | 9th | | | |
| *Case No. 23 (I.J. Dec. Mar. 22, 2019)* | 9th | 2 | | |
| *Case No. 24 (I.J. Dec. June 17, 2019)* | 9th | 1 | | |
| *Case No. 25 (I.J. Dec. June 27, 2019)* | 9th | 1 | | |
| *Case No. 26 (I.J. Dec. Aug. 26, 2019)* | 9th | | | |
| *Case No. 27 (I.J. Dec. Oct. 23, 2019)* | 9th | 2 | | |
| *Case No. 28 (I.J. Dec. Dec. 26, 2019)* | 9th | 1 | | |
| *Case No. 29 (I.J. Dec. 2019)* | 10th | 2 | | |
| *Case No. 30 (I.J. Dec. Jan. 22, 2020)* | 9th | 2 | | |
| *Case No. 31 (I.J. Dec. Jan. 22, 2020)* | 2nd | 3 | | |
| | | | *Decided 2/26/20* | *Decided 3/23/20* |
| *Case No. 32 (I.J. Dec. Apr. 24, 2020)* | 9th | | | |
| | | | | |
| *Case No. 33 (I.J. Dec. June 30, 2020)* | 4th | 1 | 1 | |
| *Case No. 34 (I.J. Dec. Aug. 4, 2020)* | 9th | | | 2 |
| *Case No. 35 (I.J. Dec. Aug. 14, 2020)* | 4th | 1 | | |
| *Case No. 36 (I.J. Dec. Aug. 27, 2020)* | 9th | 2 | | |
| *Case No. 37 (I.J. Dec. Sept. 16, 2020)* | 9th | 1 | | |
| *Case No. 38 (I.J. Dec. Oct. 22, 2020)* | 9th | 3 | | 1 |
| *Case No. 39 (I.J. Dec. Nov. 25, 2020)* | 4th | 3 | | |
| *Case No. 40 (I.J. Dec. Jan. 13, 2021)* | 4th | 6 | 1 | |
| *Case No. 41 (I.J. Dec. Jan. 26, 2021)* | 9th | 2 | | |
| *Case No. 42 (I.J. Dec. Mar. 11, 2021)* | 4th | 1 | | |
| *Case No. 43 (I.J. Dec. Mar. 29, 2021)* | 4th | 2 | 1 | |
| *Case No. 44 (I.J. Dec. Apr. 2021)* | 10th | 2 | 4 | |
| *Case No. 45 (I.J. Dec. June 2021)* | 10th | 3 | 3 | |
| *Case No. 46 (I.J. Dec. Aug. 24, 2021)* | 4th | 4 | 2 | |
| *Case No. 47 (I.J. Dec. Sept. 1, 2021)* | 10th | 3 | 2 | |
| *Case No. 48 (I.J. Dec. Oct. 4, 2021)* | 9th | 1 | | 3 |
| *Case No. 49 (I.J. Dec. Nov. 29, 2021)* | 9th | | | 3 |

*D. Table 4. Grounds for Denying CAT Relief*

| ***Case*** | ***Severe Harm*** | ***Specific Intent*** | ***Government Role*** | ***Likelihood*** |
|---|---|---|---|---|
| *Case No. 1 (I.J. Dec. Mar. 14, 2016)* | No | Yes | No | Yes |
| *Case No. 2 (I.J. Dec. July 18, 2016)* | No | No | No | Yes |
| *Case No. 3 (I.J. Dec. July 18, 2016)* | No | Yes | Yes | Yes |
| *Case No. 4 (I.J. Dec. July 22, 2016)* | No | Yes | No | Yes |
| *Case No. 5 (I.J. Dec. Mar. 24, 2017)* | No | Yes | No | Yes |
| *Case No. 6 (I.J. Dec. Apr. 20, 2017)* | No | Yes | No | Yes |
| *Case No. 7 (I.J. Dec. Apr. 21, 2017)* | No | Yes | No | Yes |
| *Case No. 8 (I.J. Dec. Sept. 15, 2017)* | No | Yes | Yes | Yes |
| *Case No. 9 (I.J. Dec. Nov. 27, 2017)* | Yes | Yes | Yes | Yes |
| *Case No. 10 (I.J. Dec. Mar. 7, 2018)* | No | Yes | Yes | Yes |
| *Case No. 11 (I.J. Dec. Apr. 25, 2018)* | No | Yes | Yes | Yes |
| *Case No. 12 (I.J. Dec. May 7, 2018)* | Yes | Yes | Yes | Yes |
| *Case No. 13 (I.J. Dec. May 14, 2018)* | Yes | Yes | Yes | Yes |
| *Case No. 14 (I.J. Dec. June 22, 2018)* | Yes | Yes | Yes | Yes |
| *Case No. 15 (I.J. Dec. July 18, 2018)* | Yes | Yes | Yes | Yes |
| *Case No. 16 (I.J. Dec. Aug. 10, 2018)* | Yes | Yes | Yes | Yes |
| *Case No. 17 (I.J. Dec. Aug. 28, 2018)* | Yes | Yes | Yes | Yes |

| ***Case*** | ***Severe Harm*** | ***Specific Intent*** | ***Government Role*** | ***Likelihood*** |
|---|---|---|---|---|
| *Case No. 18 (I.J. Dec. Oct. 4, 2018)* | No | Yes | Yes | Yes |
| *Case No. 19 (I.J. Dec. Oct. 23, 2018)* | No | Yes | Yes | Yes |
| *Case No. 20 (I.J. Dec. Nov. 19, 2018)* | No | Yes | No | Yes |
| *Case No. 21 (I.J. Dec. Nov. 20, 2018)* | No | Yes | Yes | Yes |
| *Case No. 22 (I.J. Dec. Jan. 31, 2019)* | No | Yes | Yes | Yes |
| *Case No. 23 (I.J. Dec. Mar. 22, 2019)* | No | Yes | Yes | Yes |
| *Case No. 24 (I.J. Dec. June 17, 2019)* | No | Yes | Yes | Yes |
| *Case No. 25 (I.J. Dec. June 27, 2019)* | No | Yes | Yes | Yes |
| *Case No. 26 (I.J. Dec. Aug. 26, 2019)* | No | Yes | No | Yes |
| *Case No. 27 (I.J. Dec. Oct. 23, 2019)* | No | Yes | Yes | Yes |
| *Case No. 28 (I.J. Dec. Dec. 26, 2019)* | No | Yes | Yes | Yes |
| *Case No. 29 (I.J. Dec. 2019)* | No | Yes | Yes | Yes |
| *Case No. 30 (I.J. Dec. Jan. 22, 2020)* | No | Yes | Yes | Yes |
| *Case No. 31 (I.J. Dec. Jan. 22, 2020)* | No | Yes | Yes | Yes |
| *Case No. 32 (I.J. Dec. Apr. 24, 2020)* | No | Yes | No | No |
| *Case No. 33 (I.J. Dec. June 30, 2020)* | Yes | Yes | Yes | Yes |
| *Case No. 34 (I.J. Dec. Aug. 4, 2020)* | No | Yes | Yes | Yes |
| *Case No. 35 (I.J. Dec. Aug. 14, 2020)* | No | Yes | No | No |

| ***Case*** | ***Severe Harm*** | ***Specific Intent*** | ***Government Role*** | ***Likelihood*** |
|---|---|---|---|---|
| *Case No. 36 (I.J. Dec. Aug. 27, 2020)* | No | Yes | No | No |
| *Case No. 37 (I.J. Dec. Sept. 16, 2020)* | No | Yes | Yes | Yes |
| *Case No. 38 (I.J. Dec. Oct. 22, 2020)* | No | Yes | No | No |
| *Case No. 39 (I.J. Dec. Nov. 25, 2020)* | No | Yes | No | No |
| *Case No. 40 (I.J. Dec. Jan. 13, 2021)* | No | Yes | No | No |
| *Case No. 41 (I.J. Dec. Jan. 26, 2021)* | No | Yes | No | No |
| *Case No. 42 (I.J. Dec. Mar. 11, 2021)* | No | Yes | Yes | Yes |
| *Case No. 43 (I.J. Dec. Mar. 29, 2021)* | No | Yes | No | Yes |
| *Case No. 44 (I.J. Dec. Apr. 2021)* | No | Yes | No | No |
| *Case No. 45 (I.J. Dec. June 2021)* | No | Yes | Yes | No |
| *Case No. 46 (I.J. Dec. Aug. 24, 2021)* | No | Yes | Yes | No |
| *Case No. 47 (I.J. Dec. Sept. 1, 2021)* | No | Yes | Yes | No |
| *Case No. 48 (I.J. Dec. Oct. 4, 2021)* | No | Yes | No | Yes |
| *Case No. 49 (I.J. Dec. Nov. 29, 2021)* | No | No | No | Yes |
| TOTALS | 8 | 47 | 30 | 38 |