

REDEFINING “PARTICULARLY SERIOUS CRIMES” IN REFUGEE LAW

*Mary Holper**

Abstract

Refugees are not protected from deportation if they have been convicted of a “particularly serious crime” (PSC) which renders them a danger to the community. This raises questions about the meaning of “particularly serious” and “danger to the community.” The Board of Immigration Appeals, Attorney General, and Congress have interpreted PSC quite broadly, leaving many refugees vulnerable to deportation without any consideration of the risk of persecution in their cases. This trend is disturbing as a matter of refugee law, but it is even more disturbing because it demonstrates how certain criminal law trends have played out in immigration law. This Article offers an explanation for the PSC expansion, the “mistrusting criminal judges effect.” Attorney General Ashcroft and the Board of Immigration Appeals (Board) eliminated the criminal sentence as a relevant factor from the test set forth in the 1982 seminal case on PSC, *Matter of Frenescu*, which is part of an increasing mistrust of criminal court judges in immigration law. This PSC trend mirrors a trend occurring within the criminal justice system; namely, the “severity revolution” of the 1980’s and 90’s, where attention shifted away from rehabilitating the individual offender and toward minimizing the risks presented by certain classes of offenders. The severity revolution, which was reflected in immigration law during the 1990’s and 2000’s, allowed “tough on crime” mentality to outweigh the humanitarian aspects of the 1980 Refugee Act, where the term PSC first was introduced into U.S. immigration law. This Article seeks to expose this troubling trend in PSC law and proposes that the term include only violent crimes against persons where the offender has served a significant sentence.

* Associate Clinical Professor, Boston College Law School. I would like to thank Dan Kanstroom, Hiroshi Motomura, Juliet Stumpf, Bijal Shah, Sarah Sherman-Stokes, Katie Young, Kari Hong, Katie Tinto, Rachel Rosenbloom, Renee Jones, Judy McMorrow, Jim Repetti, Mary Bilder, Rachel Settlege, Sabi Ardalan, Jean Han, and Kate Aschenbrenner for their helpful comments on drafts of this Article. This Article also greatly benefitted from input during a presentation for the Hastings College of Law Faculty and at the 2015 Emerging Immigration Scholars’ Workshop. I also would like to thank Casey Riley and Karen Breda for their excellent research assistance, and Kate Scanlan and Xing-Yin Ni for their incredible work litigating issues contained in this Article. Finally, I would like to thank Dean Vince Rougeau for his generous research support.

INTRODUCTION	1094
I. THE PSC BAR IN CONTEXT.....	1098
A. <i>Asylum and Withholding of Removal</i>	1099
B. <i>PSC as a Bar to Nonrefoulement</i>	1101
C. <i>U.S. Statutory Implementation of the PSC Bar</i>	1102
D. <i>Foundational Board Cases Interpreting PSC</i>	1104
II. FROM VIOLENT TO NONVIOLENT CRIMES.....	1107
A. <i>“Violent Crime” Defined</i>	1107
B. <i>Violent Offenses as PSCs: The Early Days</i>	1109
C. <i>Drug Trafficking as a PSC</i>	1110
D. <i>Possession of Child Pornography as a PSC</i>	1113
E. <i>Financial Crimes as PSCs</i>	1115
III. EXPLAINING HOW NONVIOLENT CRIMES BECAME PSCS.....	1117
A. <i>The Mistrusting Criminal Judges Effect</i>	1117
B. <i>Mistrusting Criminal Judges in Other Areas of Immigration Law</i>	1120
C. <i>Mirroring the Severity Revolution in Criminal Law</i>	1125
D. <i>The Bail Reform Act of 1984: A Case Study in Dangerousness</i>	1129
IV. PROPOSAL: VIOLENT CRIMES WITH SIGNIFICANT PRISON TIME AS PARTICULARLY SERIOUS CRIMES.....	1134
CONCLUSION.....	1146

INTRODUCTION

The issue of which refugees present a danger to the U.S. community has been at the forefront of the news. Sympathy for the plight of Syrian refugees in the summer and fall of 2015 was quickly drowned out by a call for strict controls on refugees following the Paris terrorist attacks and San Bernardino shootings of late 2015, which culminated in President Trump issuing a series of Executive Orders in 2017 that banned all Syrian nationals from entering the U.S. and temporarily suspended refugee admissions.¹ The conversation has focused almost exclusively on who

1. See, e.g., Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017); Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Deborah Amos, *For Refugees and Advocates, an Anxious Wait for Clarity on Trump’s Policy*, NPR (Nov. 15, 2016, 4:43 AM),

should be blocked from entering the United States. This Article explores a question that nobody has asked: for noncitizens who already are in the United States and seek protection under the 1951 Refugee Convention, what types of behaviors render them a danger to the community? Specifically, if a noncitizen has been convicted of a crime in the United States, what types of crimes should bar someone from refugee protection?

In seeking to answer this question, this Article explores the term PSC, which is a bar to refugee protection under both U.S. and international law. This Article examines the evolution of the PSC bar to refugee protection in U.S. law, which, since its introduction in 1980, has broadened to sweep in numerous crimes, leaving many noncitizens vulnerable to deportation without any consideration of their claims to refugee protection. This Article proposes a PSC definition that includes only violent crimes, i.e., those involving actual or threatened physical injury to a person, where the noncitizen served a significant sentence, for example, five years. The PSC bar exists to protect the public from dangerous individuals; because this is a central goal of criminal law, criminal law's focus on the inviolability of the body should inform PSC determinations.² Also, deporting the violent offender actually protects the U.S. community from a dangerous individual, since that person will physically be unable to commit a violent crime against a person from abroad. Limiting PSCs to those who served significant sentences provides appropriate deference to the criminal sentencing judge, who already has examined the facts and circumstances of the crime at issue and decided whether this person is a danger to the community. This proposal also presents a commonsense solution that is faithful to the plain meaning of the statute, since the word "crime" has two modifiers, "particularly" and "serious."

<http://www.npr.org/sections/parallels/2016/11/15/502010346/for-refugees-and-advocates-anxious-wait-for-clarity-on-trumps-policy> ("During the campaign, Trump said he planned to suspend the Syrian refugee program, and threatened to deport those already here."); Eleanor Goldberg, *After Syrian Boy Drowns, Donations Pour in to Help Refugees and Migrants*, HUFFINGTON POST (Sept. 3, 2015, 5:30 PM), http://www.huffingtonpost.com/entry/syrian-boy-drowns-donations_us_55e8a0b0e4b0b7a9633c5915; David M. Herszenhorn & Michael D. Shear, *Republicans Call for Halt to Syrian Refugee Program*, N.Y. TIMES (Nov. 17, 2015), <https://www.nytimes.com/2015/11/18/us/politics/paul-ryan-calls-for-halt-to-syrian-refugee-program.html>. There have been several rounds of litigation concerning President Trump's three executive orders. See Maryellen Fullerton, *Trump, Turmoil, and Terrorism: The U.S. Immigration and Refugee Ban*, 29 INT'L J. REFUGEE L. 327, 327–38 (2017); Adam Liptak, *Supreme Court Allows Trump Travel Ban to Take Effect*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/politics/trump-travel-ban-supreme-court.html>.

2. See Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 611 (2011) (citing THOMAS HOBBS, *LEVIATHAN* 138 (George Routledge & Sons, 2d ed. 1886) (1651)).

To explain why PSC has broadened beyond recognition, thus necessitating this proposal, this Article suggests a theory for why nonviolent crimes have become PSCs, which I name the “mistrusting criminal judges effect.” Attorney General John Ashcroft and the Board of Immigration Appeals (Board) eliminated the criminal sentence as a relevant factor from the test set forth in the 1982 seminal case on PSC, *Frentescu*³; this is part of an increasing mistrust of criminal court judges in immigration law. This trend is disturbing as a matter of refugee law, but it is even more disturbing because it demonstrates how certain criminal law trends have played out in immigration law. More specifically, the PSC evolution mirrors the “severity revolution” of the 1980s and ’90s, where attention shifted away from rehabilitating the individual offender and toward minimizing the risks presented by certain classes of offenders.⁴

This Article builds on scholarship concerning the convergence of criminal and immigration law (dubbed “cimmigration”).⁵ While many have written on various topics within the field of cimmigration,⁶ and

3. 18 I. & N. Dec. 244, 247 (B.I.A. 1982) (requiring the judge to consider “[1] the nature of the conviction, [2] the circumstances and underlying facts of the conviction, [3] the type of sentence imposed, and, most importantly, [4] whether the type and circumstances of the crime indicate that the alien will be a danger to the community” when determining whether a crime is a PSC), *superseded in part by statute*, Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, *as recognized in* C-, 20 I. & N. Dec. 529 (B.I.A. 1992).

4. See Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 832–33 (2000); Jonathan Simon, *Sanctioning Government: Explaining America’s Severity Revolution*, 56 U. MIAMI L. REV. 217, 219 (2001).

5. See Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 377 (2006).

6. See, e.g., CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* (2015); SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR (Maria João Guia et al. eds., 2013); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1890 (2007); Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the “War” on Terrorism?*, 51 EMORY L.J. 1059, 1060 (2002); Ingrid Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1284 (2010); César Cuauhtémoc García Hernández, *Creating Cimmigration*, 2013 BYU L. REV. 1457, 1458; Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law,”* 29 N.C. J. INT’L L. & COM. REG. 639, 640 (2004); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1891 (2000); Stephen H. Legomsky, *A New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471 (2007); María Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 671 (1997); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 82 (2005) [hereinafter Miller, *Blurring the Boundaries*]; Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 613 (2003) [hereinafter Miller, *Citizenship & Severity*]; Stumpf, *supra* note 5, at 377.

others have focused primarily on refugee protection,⁷ there has been surprisingly little written about the PSC bar to refugee protection,⁸ where crimmigration law meets refugee law. PSC law is also an increasingly important topic as we see more claims for refugee protection marked dead on arrival—denied based on a PSC conviction before the noncitizen can even present the facts of his or her persecution to an immigration judge. This Article seeks to fill that gap in the literature.

Part I of this Article describes the history of the PSC bar, which is taken from the 1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention)⁹ and the 1967 Protocol Relating to the Status of Refugees (Refugee Protocol),¹⁰ to which the United States acceded in 1968.¹¹ Part I also discusses the various U.S. statutes implementing this bar to protection under refugee law and foundational Board cases interpreting the PSC bar. Part II describes key cases

7. See, e.g., Deborah Anker et al., *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees Under United States Asylum Law*, 11 GEO. IMMIGR. L.J. 709, 741–43 (1997); Anjum Gupta, *The New Nexus*, 85 U. COLO. L. REV. 377, 380 (2014); Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179, 1195 (1994).

8. See Fatma Marouf, *A Particularly Serious Exception to the Categorical Approach*, 97 B.U. L. REV. 1427, 1469–84 (2017) (arguing that particularly serious crime findings should be determined by using the categorical approach that governs crime-based deportability); David Delgado, *Running Afoul of the Non-Refoulement Principle: The [Mis]Interpretation and [Mis]Application of the Particularly Serious Crime Exception*, 86 S. CAL. L. REV. POSTSCRIPT 1, 17–18 (2013) (criticizing the Board's holdings that non-aggravated felonies can be considered PSCs on a case-by-case basis and that there should be no separate determination of dangerousness as part of the PSC determination); William M. Hains, *Chevron's Ambiguity Hurdle: Delgado v. Holder and the Proper Interpretation of the Particularly Serious Crime Exception to Deportation Relief*, 2010 BYU L. REV. 81, 99 (arguing that the Ninth Circuit's opinion in *Delgado v. Holder* "perpetuates a misinterpretation of the INA [Immigration and Nationality Act] by declaring that the Attorney General is free to designate by adjudication non-aggravated felonies as particularly serious, despite the statute's plain language granting authority only to make such designations by regulation in this matter"); Gwendolyn M. Holinka, Q-T-M-T: *The Denial of Humanitarian Relief for Aggravated Felons*, 13 EMORY INT'L L. REV. 405, 408 (1999) (arguing for alternative interpretations of withholding that law would honor both international obligations and domestic U.S. interests); Michael McGarry, Note, *A Statute in Particularly Serious Need of Reinterpretation: The Particularly Serious Crime Exception to Withholding of Removal*, 51 B.C. L. REV. 209, 230–40 (2010) (arguing for separate determination of dangerousness in PSC analysis).

9. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

10. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

11. Deborah E. Anker, *Gruetter v. Bollinger: Justice Ruth Bader Ginsburg's Legitimization of the Role of Comparative and International Law in U.S. Jurisprudence*, 127 HARV. L. REV. 425, 426 n.11 (2013).

interpreting the PSC bar through the lens of violence, beginning with a proposed definition of “violent crime” that includes actual or threatened physical injury to a person. Part II describes how in the early days of interpreting the PSC bar, primarily violent offenses were found to be PSCs. Part II then discusses the case of drug trafficking, which laid the foundation for nonviolent crimes as PSCs, and discusses today’s landscape, where possession of child pornography and financial crimes also are PSCs.

Part III suggests a theory for why nonviolent crimes have become PSCs, which I call the “mistrusting criminal judges effect,” and describes how the Board and Attorney General eliminated the criminal sentence as a relevant factor from its original PSC test. This Part also discusses other areas of immigration law in which little to no deference is given to a criminal judge’s decision. Finally, Part III links the PSC evolution to the severity revolution of criminal law and examines the Bail Reform Act of 1984,¹² which was born out of the severity revolution, as a case study in dangerousness from which to draw lessons in the PSC context. In Part IV, this Article proposes that the Board or Attorney General, for cases falling within their discretion, redefine PSC to include only violent offenses against persons where the noncitizen served a significant sentence.

I. THE PSC BAR IN CONTEXT

This Part describes the history of the PSC bar, including its international law origins. This Part begins with an overview of asylum and withholding of removal, the types of relief available to a refugee in U.S. law that are barred due to a PSC conviction.¹³

12. Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 3141–50 (2012)).

13. Even if barred from protection under the Refugee Convention due to a crime, a noncitizen who fears torture may seek relief under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, art. 3, 1465 U.N.T.S. 85 [hereinafter *Torture Convention*], which the United States ratified in 1994 and adopted into U.S. law through the Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-761, 2681-822 to -823 (1998). Article 3 protects a noncitizen from removal to a country “where there are substantial grounds for believing that he would be in danger of being subjected to torture,” regardless of the crimes that subjected her to removal. *Torture Convention*, *supra*, art. 3; *see* 8 C.F.R. § 208.17 (2017). In U.S. law, this relief remains quite limited, as the Board has chosen to narrowly interpret the meaning of “torture” under the Convention. *See* *Torture Convention*, *supra*, 1465 U.N.T.S. at 113–14 (“[T]orture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or

A. Asylum and Withholding of Removal

A noncitizen who fears persecution in her home country may obtain protection under U.S. immigration laws by requesting asylum or withholding of removal. These means of requesting protection from the U.S. government stem from international protective principles for refugees that emerged between the two World Wars and took hold following World War II.¹⁴ Refugee protections were codified in the 1951 Refugee Convention¹⁵ and 1967 Refugee Protocol,¹⁶ to which the United States acceded in 1968. By signing the Protocol, the United States became bound by Articles 2 through 34 of the Refugee Convention.¹⁷ The concept of *nonrefoulement*, or nonreturn, appears in Article 33.1 of the Convention, which states that “[no] Contracting State shall expel or return . . . a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.”¹⁸

Nonrefoulement first was implemented in U.S. law in 1950, and in 1952 came to be called withholding of deportation.¹⁹ In 1996, when “removal” replaced “deportation” as the official term describing the

with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”); see also Mary Holper, *Specific Intent and the Purposeful Narrowing of Victim Protection Under the Convention Against Torture*, 88 OR. L. REV. 777, 779 (2009) (arguing that the Board’s narrow interpretation of “specific intent” impermissibly shifts the focus off protecting the victim and onto the alleged torturer’s acts); Lori A. Nessel, “*Willful Blindness*” to Gender-Based Violence Abroad: United States’ Implementation of Article Three of the United Nations Convention Against Torture, 89 MINN. L. REV. 71, 80 (2004) (arguing that to provide meaningful protection from gender-based torture, the term “acquiescence” must be interpreted to include a state’s failure to prosecute or to protect against torture by nonstate actors). While a full discussion of the Torture Convention is outside the scope of this Article, it is important to note that it exists as one additional protective mechanism beyond asylum and withholding and is available to those who are barred from such relief because of a PSC.

14. See GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 119 (2d ed. 1996).

15. Convention Relating to the Status of Refugees, *supra* note 9.

16. Protocol Relating to the Status of Refugees, *supra* note 10.

17. *Id.* art. I.

18. Convention Relating to the Status of Refugees, *supra* note 9, art. 33.1.

19. See THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 793 (8th ed. 2016) (discussing Internal Security Act of 1950, Pub. L. No. 81-831, § 23, 64 Stat. 987, 1010, which exempted noncitizens from deportation “to any country in which the Attorney General shall find that such alien would be subjected to physical persecution”); see also Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 243, 66 Stat. 163, 212–14 (enacting 8 U.S.C. § 1253(h) (1952)) (first naming “withholding of deportation,” which authorized the Attorney General “to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason”).

expulsion of a noncitizen from the United States,²⁰ withholding of deportation became withholding of removal.²¹ Withholding is a mandatory form of relief from removal.²² If the noncitizen can prove that what she fears amounts to persecution,²³ that it is more likely than not to happen,²⁴ and that it will occur on account of one of the five protected grounds, she should be granted withholding, regardless of her desirability as a member of the U.S. community. Importantly, though, withholding is “country-specific,” which means that an applicant could be deported to a third country where she will not face persecution.²⁵ Also, someone who has been granted withholding is not given full membership rights in the United States, as she may not apply for permanent residency, petition for family to join her in the United States, or travel outside the United States. In effect, she lives under an order of removal, but with permission to stay because nonrefoulement prevents her deportation to the country of persecution (assuming no other country will accept her).²⁶

Asylum did not exist in U.S. law until 1980, when Congress passed the Refugee Act of 1980,²⁷ which amended the Immigration and Nationality Act (INA) of 1965.²⁸ Congress maintained withholding of deportation, yet introduced asylum, which in some respects is very similar to withholding. In order to be granted asylum, an applicant must prove fear or persecution on account of one of the five protected

20. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304, 110 Stat. 3009-546, 3009-587 to -597 (enacting 8 U.S.C. § 1229a(a)(1), (3) and (e)(2) (2000)).

21. Congress also moved the nonrefoulement provision to 8 U.S.C. § 1231(b)(3) (2000), where it had formerly been in 8 U.S.C. § 1253(h)(2)(B) (1994). IIRIRA §§ 305, 308.

22. See 8 U.S.C. § 1231(b)(3) (2012). In the early days, the nonrefoulement provision was discretionary. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987); ALEINIKOFF ET AL., *supra* note 19, at 813. The United States acceded to the substantive portions of the Refugee Convention, in particular Article 33, in 1967, so thereafter nonrefoulement was not discretionary. See *Cardoza-Fonseca*, 480 U.S. at 423–24. To bring the United States in line with its treaty obligations, the United States made withholding mandatory by statute with the Refugee Act in 1980. See *id.*; Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107 (codified at 8 U.S.C. § 1253(h)(2)(B) (1982)).

23. See *Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (defining persecution as a “threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive”), *overruled in part by Cardoza-Fonseca*, 480 U.S. 421.

24. See *INS v. Stevic*, 467 U.S. 407, 429–30 (1984).

25. See *Cardoza-Fonseca*, 480 U.S. at 428 n.6 (quoting *Salim*, 18 I. & N. Dec. 311, 315 (B.I.A. 1982)).

26. See *I-S- & C-S-*, 24 I. & N. Dec. 432, 434 (B.I.A. 2008).

27. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

28. Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.); see also *Refugee Act of 1980*, NAT’L ARCHIVES FOUND., <https://www.archivesfoundation.org/documents/refugee-act-1980/> (last visited Feb. 3, 2017).

grounds.²⁹ The likelihood of persecution need not be as high—the Supreme Court has said an asylum applicant must only show a “well-founded” fear, which translates to a 10% likelihood that persecution will occur, whereas a withholding applicant must show a 51% likelihood that persecution will occur.³⁰ Should a noncitizen prevail in a request for asylum, unlike withholding, she may apply to become a permanent resident of the United States and later a U.S. citizen.³¹ Asylum, however, is discretionary; a judge can refuse asylum, even though an applicant has met all of the requirements, if the judge believes she is undesirable as a member of the U.S. community.³² In such a circumstance, a judge would then consider the same applicant’s circumstances for a grant of withholding. In contrast to withholding, which implements Article 33.1 of the Refugee Convention, the Supreme Court has described asylum as the U.S. implementation of Article 34 of the Convention,³³ which states that contracting states “shall as far as possible facilitate the assimilation and naturalization of refugees.”³⁴

B. PSC as a Bar to Nonrefoulement

The drafters of the Refugee Convention at first considered the principle of nonrefoulement to be so fundamental that there should be no exception.³⁵ Including any exception was quite controversial, as it meant a signatory country would be allowed to send someone back to the arms of her persecutors.³⁶ In fact, the Refugee Convention’s U.S. delegate suggested “it would be highly undesirable to suggest in the text of that article that there might be cases, even highly exceptional cases, where a man might be sent to death or persecution.”³⁷ However, the drafters ultimately recognized that national security could trump the nonrefoulement principle, and that some countries may not ratify the Refugee Convention if there was no exception for dangerous individuals.³⁸ The drafters thus opted to include certain bars to protection in the form of nonrefoulement: serious nonpolitical crime, war crimes and crimes against humanity, acts contrary to the purposes and principles of

29. See 8 U.S.C. §§ 1101(a)(42)(A), 1158(b) (2012).

30. See *Cardoza-Fonseca*, 480 U.S. at 431, 440, 449.

31. See 8 U.S.C. § 1159.

32. See *Cardoza-Fonseca*, 480 U.S. at 424.

33. See *id.* at 441.

34. Convention Relating to the Status of Refugees, *supra* note 9, art. 34.

35. GOODWIN-GILL, *supra* note 14, at 119–20.

36. See PAUL WEIS, THE REFUGEE CONVENTION, 1951 326–36 (1995).

37. Rep. of the Ad Hoc Comm. on Refugees & Stateless Persons, Second Session, ¶ 30, U.N. Doc. E/1850; E/AC.32/8 (Aug. 25, 1950).

38. WEIS, *supra* note 36, at 326–36.

the United Nations,³⁹ and PSC.⁴⁰ Although they sound similar, the serious nonpolitical crime bars an applicant who has committed some offense outside of the country where she is seeking refuge; the PSC bar pertains to offenses committed for which there has been a conviction in the country of refuge.⁴¹

After describing who qualifies for nonrefoulement in Article 33.1 of the Refugee Convention, Article 33.2 immediately qualifies that benefit, stating:

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.⁴²

The Convention does not define PSC. Leading international refugee law experts have commented that it is only justified in the most exceptional of circumstances and should include crimes such as murder, rape, armed robbery, and arson.⁴³ The United Nations High Commissioner for Refugees (UNHCR), in its Handbook on Procedures and Criteria for Determining Refugee Status,⁴⁴ states that the exception is reserved for “extreme cases.”⁴⁵ The UNHCR Handbook goes into more detail about how to define a “serious nonpolitical crime”;⁴⁶ it defines such a crime as a “capital crime or a very grave punishable act.”⁴⁷

C. U.S. Statutory Implementation of the PSC Bar

The 1980 Refugee Act and each subsequent amendment to the withholding statutes contained the PSC bar; it was not until 1996 that

39. Convention Relating to the Status of Refugees, *supra* note 9, art. 1(F).

40. *Id.* art. 33(2).

41. UNITED NATIONS HIGH COMM’R FOR REFUGEES, HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, paras. 153–54 (2011), <http://www.unhcr.org/3d58e13b4.html> [hereinafter UNHCR HANDBOOK].

42. Convention Relating to the Status of Refugees, *supra* note 9, art. 33(2).

43. WEIS, *supra* note 36, at 342; ATLE GRAHL-MADSEN, DIV. OF INT’L PROT. OF THE UNITED NATIONS HIGH COMM’R FOR REFUGEES, COMMENTARY ON THE REFUGEE CONVENTION 1951 art. 33 cmt. 9 (1997), <http://www.unhcr.org/publ/PUBL/3d4ab5fb9.pdf>; Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW 87, 139 (Erika Feller et al. eds., 2003).

44. UNHCR HANDBOOK, *supra* note 41, para. 155.

45. *Id.* para. 154.

46. *See id.* paras. 155–61.

47. *Id.* para. 155 (“Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1 F (b) even if technically referred to as ‘crimes’ in the penal law of the country concerned.”).

PSC became a bar to asylum.⁴⁸ When originally enacted, the PSC bar applied to an individual who “having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.”⁴⁹ This language replicated the PSC bar in the Refugee Convention, since “Congress’ primary purposes was to bring U.S. refugee law into conformance with [the Protocol].”⁵⁰

In subsequent changes made to the withholding of removal statute, Congress began to give some meaning to PSC by reference to another term of art in immigration law, “aggravated felony.” In 1990, Congress amended the statute to make aggravated felonies categorically PSCs.⁵¹ However, in 1990, there were only a small number of crimes that were considered aggravated felonies.⁵² Over the course of several pieces of legislation in the 1990s, Congress expanded the definition of what was considered an aggravated felony.⁵³ To ensure compliance with the Protocol, with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),⁵⁴ Congress amended the PSC exception to allow the Attorney General to override the categorical determination that all aggravated felonies were PSCs when “necessary to ensure compliance with the 1967 [Refugee Protocol].”⁵⁵

The AEDPA version of the statute was only on the books for a few short months before the current version of the withholding statute was passed in 1996 with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).⁵⁶ The statute reads: “Subparagraph

48. Lauterpacht & Bethlehem, *supra* note 43, at 107. Although PSC was not a bar to asylum until 1996, the Immigration Act of 1990 provided that a noncitizen who has been convicted of an aggravated felony “may not apply for or be granted asylum.” Immigration Act of 1990, § 515(a)(1), Pub. L. No. 101-649, Stat. 4978, 5053.

49. 8 U.S.C. § 1253(h)(2)(B) (1982).

50. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1986).

51. Immigration Act of 1990 § 515(a)(2).

52. *See infra* note 214.

53. *See infra* note 216.

54. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

55. AEDPA § 413(f). The Board, in *Q-T-M-T-*, established a test to implement AEDPA § 415(f)’s mandate to conduct a discretionary analysis to ensure compliance with the Refugee Protocol. 21 I. & N. Dec. 639, 653 (B.I.A. 1996). Aggravated felonies with sentences of at least five years would be PSCs, with no further inquiry into the facts and circumstances of the case. *See id.* Aggravated felonies with sentences of fewer than five years, however, would presumptively be PSCs, but that presumption could be overcome if “there is any unusual aspect of the alien’s particular aggravated felony that convincingly evidences that his or her crime cannot rationally be deemed ‘particularly serious’ in light of our treaty obligations under the Protocol.” *Id.* at 654.

56. Pub. L. No. 104-208, § 305(a), 110 Stat. 3009-546, 3009-597 to -598 (codified as amended in scattered sections of the U.S. Code). IIRIRA was passed on Sept. 30, 1996, and became effective on Apr. 1, 1997.

(A) [providing for withholding of removal] does not apply . . . if the Attorney general decides that the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States.”⁵⁷ This version of the statute eliminated the categorical bar for aggravated felonies.⁵⁸ In IIRIRA, Congress again expanded the definition of aggravated felony, “primarily by reducing, from five years to one, the minimum penalty necessary for several offenses to qualify as aggravated felonies.”⁵⁹ Congress then changed the categorical PSC exception to only include aggravated felony convictions with at least five-year sentences.⁶⁰ In another provision, Congress clarified that such sentence did not refer to time served, but included any amount of the sentence that was suspended.⁶¹ For asylum, Congress deemed all aggravated felonies to be PSCs.⁶²

D. Foundational Board Cases Interpreting PSC

Following the passage of the 1980 Refugee Act, the meaning of PSC was an important unresolved question for the Board to decide. In 1982, the Board decided *Frentescu*, which became the seminal case on the meaning of PSC.⁶³ In *Frentescu*, the Board recognized that it was charting new territory. The Refugee Act, Protocol, and UNHCR Handbook all had little to say about the meaning of the term.⁶⁴ From the statutory language, the Board determined that a “‘particularly serious crime’ is more serious than a ‘serious nonpolitical crime,’ although many crimes may be classified [as both].”⁶⁵ The UNHCR Handbook also instructed that the PSC bar was for “extreme cases.”⁶⁶ The Board also rejected arguments that PSC is synonymous with “crime involving moral turpitude,” another term of art in immigration law with a long history of Board case law interpreting its meaning.⁶⁷

57. 8 U.S.C. § 1231(b)(3)(B)(ii) (2012).

58. *Id.*

59. *Alphonsus v. Holder*, 705 F.3d 1031, 1040 (9th Cir. 2013).

60. 8 U.S.C. § 1231(b)(3); IIRIRA § 305(a).

61. 8 U.S.C. § 1101(a)(48)(B); IIRIRA § 322.

62. 8 U.S.C. § 1158(b)(2)(B)(i); IIRIRA § 604.

63. *See Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982), *superseded in part by statute*, Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, *as recognized in C-*, 20 I. & N. Dec. 529 (B.I.A. 1992).

64. *See Frentescu*, 18 I. & N. Dec. at 246.

65. *Id.* at 245, 247.

66. *Id.* at 246.

67. *Id.* at 246 n.7. *See generally* Mary Holper, *Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness*, 90 NEB. L. REV. 647, 649 (2012) (discussing the history of crimes involving moral turpitude).

In order to guide immigration judges in their PSC determinations, the Board set forth a test. There are two parts to the *Frentescu* test: first, the judge must determine whether the crime “on [its] face” is a PSC.⁶⁸ If the crime is not inherently particularly serious, the record should be assessed on a case-by-case basis.⁶⁹ For the case-by-case determinations, the Board articulated four factors that are relevant to the determination of whether a crime is a PSC: “[1] the nature of the conviction, [2] the circumstances and underlying facts of the conviction, [3] the type of sentence imposed, and, most importantly, [4] whether the type and circumstances of the crime indicate that the alien will be a danger to the community.”⁷⁰ The Board continuously revived the *Frentescu* test with each statutory change to the PSC bar.⁷¹ The test became imbedded in PSC law to such an extent that some federal courts of appeals, when reviewing PSC determinations, determined that the Board abused its discretion by *not* applying one of the *Frentescu* factors.⁷²

68. *Frentescu*, 18 I. & N. Dec. at 247. The Board later decided that first degree burglary—which involves burglary of a residence and aggravating circumstances such as being armed with a deadly weapon, displaying a weapon, threatening with a weapon, or causing injury—was a *per se* PSC. See Garcia-Garrocho, 19 I. & N. Dec. 423, 425–26 (B.I.A. 1986), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 305(a), 110 Stat. 3009-546, *as recognized in* Blandino-Medina v. Holder, 712 F.3d 1338 (9th Cir. 2013); *see also* Ahmetovic v. INS, 62 F.3d 48, 52 (2d Cir. 1995) (holding that first degree manslaughter was inherently particularly serious); Gjonaj v. INS, 47 F.3d 824, 826 (6th Cir. 1995) (holding that assault with a firearm with intent to murder is so serious that no factual inquiry into individual circumstances is necessary); Carballe, 19 I. & N. Dec. 357, 360 (B.I.A. 1986) (holding that armed robbery involving the use of a firearm on its face is a PSC), *modified*, Gonzalez, 19 I. & N. Dec. 682 (B.I.A. 1988).

69. *Frentescu*, 18 I. & N. Dec. at 247.

70. *Id.* The Ninth Circuit has described the *Frentescu* decision as “neither adopt[ing] a precise definition of what constitutes a particularly serious crime nor set[ting] forth any comprehensive list of crimes falling within the definition.” *Alphonsus v. Holder*, 705 F.3d 1031, 1039 (9th Cir. 2013).

71. See L-S-, 22 I. & N. Dec. 645, 649 (B.I.A. 1999) (en banc); S-S-, 22 I. & N. Dec. 458, 463–65 (B.I.A. 1999) (en banc), *overruled by* Y-L-, 23 I. & N. Dec. 270 (B.I.A. 2002); C-, 20 I. & N. Dec. 529, 534, 534 n.3 (B.I.A. 1992). The Board never determined whether the *Frentescu* framework applies to applications decided under AEDPA because the only precedential decision, *Q-T-M-T-*, only addressed the standard for those convicted of aggravated felonies. See *Q-T-M-T-*, 21 I. & N. Dec. 639, 654 (B.I.A. 1996).

72. See *Afridi v. Gonzales*, 442 F.3d 1212, 1221 (9th Cir. 2006) (“We conclude that the BIA acted arbitrarily and capriciously in failing in its duty to consider the facts and circumstances of Mr. Afridi’s conviction.”), *overruled on other grounds by* Estrada-Espinoza v. Mukasey, 546 F.3d 11471 (9th Cir. 2008); *Yousefi v. INS*, 260 F.3d 318, 330 (4th Cir. 2001) (“Because the Board failed to consider the two most important *Frentescu* factors and relied on improper considerations, we conclude that the Board’s decision was arbitrary and capricious.”); *cf.* *Nethagani v. Mukasey*, 532 F.3d 150, 155 (2d Cir. 2008) (affirming the decision of the agency because the Board “properly applied its own precedent” by “address[ing] each *Frentescu* factor”).

In 1985, the Board decided another important issue—whether the judge should weigh the likelihood of persecution against the seriousness of the offense when deciding whether an offense is a PSC. In *Rodriguez-Coto*,⁷³ the Board answered this question for both PSCs and serious nonpolitical crimes, deciding that the crime determination is a threshold issue.⁷⁴ The Board reasoned: “We cannot find that the language and framework of [the withholding provision] supports such an approach, which would in effect transform a statutory exclusionary clause into a discretionary consideration.”⁷⁵ Thus a finding that a crime was a PSC prevented any further inquiry into the merits of a withholding claim.⁷⁶ The Supreme Court later upheld this decision with respect to serious nonpolitical crimes.⁷⁷

In the 1986 case *Carballe*,⁷⁸ the Board decided whether there should be a separate determination of dangerousness once a noncitizen was found to have been convicted of a PSC under the *Frentescu* test.⁷⁹ The “separate determination of dangerousness” at issue in *Carballe* would be akin to a bond hearing, assessing the applicant’s current dangerousness and considering evidence such as remorse and rehabilitation.⁸⁰ The finding of dangerousness imbedded within the *Frentescu* test, on the other hand, requires looking at the nature and circumstances of the crime—essentially freezing the inquiry at the time of conviction—to determine whether that crime and those facts indicate that someone will be a danger to the community.⁸¹ The Board in *Carballe* found that the statute did not require two separate and distinct factual findings of dangerousness.⁸² The Board stated that “those aliens who have been finally convicted of particularly serious crimes are presumptively dangers

73. 19 I. & N. Dec. 208 (B.I.A. 1985), *modified*, *Gonzalez*, 19 I. & N. Dec. 682.

74. *See id.* at 209.

75. *Id.*

76. *See id.*

77. *See* *INS v. Aguirre-Aguirre*, 526 U.S. 415, 426 (1999) (“As a matter of plain language, it is not obvious that an already-completed crime is somehow rendered less serious by considering the further circumstance that the alien may be subject to persecution if returned to his home country.”).

78. 19 I. & N. Dec. 357, 360 (B.I.A. 1986), *modified*, *Gonzalez*, 19 I. & N. Dec. 682.

79. *See id.* at 359–60.

80. *Id.*; *cf.* *Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006) (listing factors an immigration judge must consider when determining bond, with one factor being the recency of his criminal activity).

81. *See* *Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982) (listing as one of the four factors “whether the type and circumstances of the crime indicate that the alien will be a danger to the community”), *superseded in part by statute*, Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, *as recognized in* *C-*, 20 I. & N. Dec. 529 (B.I.A. 1992).

82. *Carballe*, 19 I. & N. Dec. at 360.

to this country's community."⁸³ The Board found, however, that the two clauses were "inextricably related."⁸⁴ The Board reasoned that the separate dangerousness assessment was not necessary because the *Frentescu* test already incorporated such a finding, since the fourth and "most important[]" factor⁸⁵—danger to the community—is the "essential key" to determining whether a conviction is particularly serious.⁸⁶ Every federal court of appeals to consider *Carballe* has deferred to the decision, with several courts opining that Congress intended no separate determination of dangerousness once a crime was a PSC.⁸⁷

II. FROM VIOLENT TO NONVIOLENT CRIMES

There is growing trend in PSC case law where nonviolent offenses are PSCs. In the early days, primarily violent offenses were PSCs with one exception: drug trafficking. Categorizing drug trafficking as a PSC opened the door to recent cases, where more nonviolent offenses such as financial crimes and possession of child pornography bar protection. This Part will explore this evolution in the PSC case law. To contextualize the discussion, this Part begins with a proposed definition of "violent crime."

A. "Violent Crime" Defined

The law has no settled meaning of "violent crime."⁸⁸ Criminal law scholar Alice Ristroph has examined a variety of definitions of violent crime in common law and federal sentencing laws to demonstrate that violence is a dual concept that describes both a seemingly undeniable fact of pain and injury to the body and moral judgments.⁸⁹ The term "violence," she argues, "becomes an abstraction, and eventually that abstraction may become a repository for all we find repulsive, transgressive, or simply sufficiently annoying."⁹⁰ She argues that the lack

83. *Id.*

84. *Id.*

85. *Frentescu*, 18 I. & N. Dec. at 247.

86. *Carballe*, 19 I. & N. Dec. at 360.

87. *See, e.g.*, *Ahmetovic v. INS*, 62 F.3d 48, 52–53 (2d Cir. 1995); *Al-Salehi v. INS*, 47 F.3d 390, 393 (10th Cir. 1995); *Garcia v. INS*, 7 F.3d 1320, 1322 (7th Cir. 1993); *Mosquera-Perez v. INS*, 3 F.3d 553, 557 (1st Cir. 1993); *Martins v. INS*, 972 F.2d 657, 661 (5th Cir. 1992); *Arauz v. Rivkind*, 845 F.2d 271, 275 (11th Cir. 1988), *superseded by regulation*, 8 C.F.R. 208 (1988); *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397 (9th Cir. 1987). Following IIRIRA, a regulation was also enacted to codify the *Carballe* decision. *See* 8 C.F.R. § 1208.16(d)(2) (2017) ("For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community.").

88. *See* Ristroph, *supra* note 2, at 575.

89. *Id.* at 574–75.

90. *Id.* at 575.

of a critical analysis of violence is one of the failures of criminal law, which finds legitimation by addressing the problem of violent crime.⁹¹ She writes, “If the criminal law does best when violence—the old-fashioned, physically harmful kind—is involved, then perhaps the law needs a renewed focus on ‘true’ violence.”⁹²

It is this “true” violent crime—that which involves actual or threatened physical injury—that this Article proposes as a definition of “violent crime” for the purposes of assessing whether an offense is a PSC.⁹³ Although federal sentencing law has definitions such as “crime of violence”⁹⁴ and “violent felony,”⁹⁵ these definitions suffer from the broadening of the concept of “violence” that Ristroph describes by expanding the term to include crimes involving the risk of injury.⁹⁶ What is more, the Supreme Court recently held that one prong of the “violent felony” definition—a crime that “otherwise involves conduct that presents a serious potential risk of physical injury to another”—is void for vagueness.⁹⁷ Thus, rather than rely on these Congressional definitions of violent crime, this Article defines the term by reference to actual or threatened physical injury to a person. In this way, this Article uses a violent crime definition that more closely tracks the common law “crimes against persons” categories, which reflected societal concerns with physical injuries to the human body.⁹⁸

91. *Id.* at 611–13.

92. *Id.* at 618.

93. *See id.* at 573, 618.

94. 18 U.S.C. § 16 (2012) (defining a “crime of violence” as “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense”).

95. *Id.* § 924(e)(2)(B) (defining “violent felony” as “any crime punishable by imprisonment for a term exceeding one year . . . that has as an element the use, attempted use, or threatened use of physical force against the person of another; or is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another”).

96. *See Ristroph, supra* note 2, at 574.

97. *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). The Ninth Circuit, following *Johnson*, decided that the “crime of violence” definition under 18 U.S.C. § 16(b), which forms the basis of an “aggravated felony” ground of deportation, was void for vagueness. *Dimaya v. Lynch*, 803 F.3d 1110, 1120 (9th Cir. 2015). *But see United States v. Taylor*, 814 F.3d 340 (2016) (upholding against a vagueness challenge a definitional provision located at 18 U.S.C. § 924(c)(3)(B)). The Supreme Court accepted certiorari on the *Dimaya* case. *See Lynch v. Dimaya*, 137 S. Ct. 31 (2016). The case was argued in January 2017 and reargued in October 2017. SCOTUSblog, *Sessions v. Dimaya*, <http://www.scotusblog.com/case-files/cases/lynch-v-dimaya/> (last visited Jan. 24, 2017).

98. *See Ristroph, supra* note 2, at 579–80.

B. *Violent Offenses as PSCs: The Early Days*

The Board has never set forth a test whereby only violent crimes could be PSCs; however, in its early case law interpreting PSC, primarily violent offenses were found to be PSCs. In *Frentescu*, the Board stated, “Crimes against persons are more likely to be categorized as ‘particularly serious crimes.’ Nevertheless, we recognize that there may be instances where crimes (or a crime) against property will be considered as such crimes.”⁹⁹ Despite leaving the door open to property crimes as PSCs, in Mr. *Frentescu*’s case the Board held that burglary of a dwelling with intent to commit theft was not a PSC because “there is no indication that the dwelling was occupied or that the applicant was armed; nor is there any indication of an aggravating circumstance.”¹⁰⁰ In *Carballe*, the Board held that two felony convictions for robbery with a firearm were inherently PSCs because they “involved the use of a firearm [and] . . . were felonies, as well as offenses against individuals”; thus, “On their face, they were dangerous”; the Board went further to describe robbery as a “grave, serious, aggravated, infamous, and heinous crime.”¹⁰¹

In most subsequent cases, the Board found that violent crimes were PSCs.¹⁰² For example, robbery by force, violence, or assault was found to be a PSC,¹⁰³ as was robbery of an occupied home while armed with a handgun,¹⁰⁴ robbery with deadly weapon,¹⁰⁵ armed robbery,¹⁰⁶ aggravated battery involving a firearm,¹⁰⁷ and burglary involving a deadly weapon.¹⁰⁸ In contrast, the Board held that a conviction for alien smuggling (for commercial gain) was not a PSC even though “the act of smuggling can put aliens in significant danger, and . . . it can also

99. *Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982), *superseded in part by statute*, Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, *as recognized in* C-, 20 I. & N. Dec. 529 (B.I.A. 1992).

100. *Id.*

101. *Carballe*, 19 I. & N. Dec. 357, 360 (B.I.A. 1986).

102. *See* *Denis v. Att’y Gen.*, 633 F.3d 201, 216 (3d Cir. 2011) (“The BIA has consistently stated that crimes entailing or threatening to use physical force or violence against another person ‘are more likely to be categorized as particularly serious.’” (quoting N-A-M-, 24 I. & N. Dec. 336, 342 (B.I.A. 2007); L-S-, 22 I. & N. Dec. 645, 649 (B.I.A. 1999); L-S-J-, 21 I. & N. Dec. 973, 974–75 (B.I.A. 1997))).

103. S-V-, 22 I. & N. Dec. 1306, 1309 (B.I.A. 2000).

104. S-S-, 22 I. & N. Dec. 458, 466–67 (B.I.A. 1999), *overruled by* Y-L-, 23 I. & N. Dec. 270, 270 (B.I.A. 2002).

105. L-S-J-, 21 I. & N. Dec. at 974–75.

106. *Rodriguez-Coto*, 19 I. & N. Dec. 208, 208 (B.I.A. 1985).

107. B-, 20 I. & N. Dec. 427, 428–29 (B.I.A. 1991).

108. *Garcia-Garrocho*, 19 I. & N. Dec. 423, 425–26 (B.I.A. 1986), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 305(a), 110 Stat. 3009-546, *as recognized in* *Blandino-Medina v. Holder*, 712 F.3d 1338 (9th Cir. 2013).

endanger the lives of United States residents.”¹⁰⁹ In that case, the Board stressed that despite the potential for significant bodily harm—the respondent hid a woman in a compartment built underneath the floor of a van—the “respondent did not, in fact, cause [the alien] harm.”¹¹⁰ Although it is possible that the case of alien smuggling seemed more closely related to immigration law, and thus fundamentally different than conventional criminal law violations it had considered in other PSC cases, the Board’s language certainly suggests that the actual causation of bodily harm was necessary for an offense to be a PSC in the early days.

C. *Drug Trafficking as a PSC*

Drug trafficking is a nonviolent crime that, in being classified as a PSC, became the bridge to other nonviolent crimes becoming PSCs. In 1988, the Board held that drug trafficking was a PSC, stating, “The harmful effect to society from drug offenses has consistently been recognized by Congress in the clear distinctions and disparate statutory treatment it has drawn between drug offenses and other crimes.”¹¹¹ In 1991, the Board found drug trafficking to be a *per se* PSC, citing to both the disparate Congressional treatment of the offense and societal harms of drug trafficking.¹¹²

109. L-S-, 22 I. & N. Dec. 645, 655 (B.I.A. 1999).

110. *Id.* at 654–56.

111. Gonzalez, 19 I. & N. Dec. 682, 683–84 (B.I.A. 1988). To support this proposition, the Board cited immigration statutes that rendered deportable someone who had a conviction relating to a controlled substance. *See id.* at 684 (citing 8 U.S.C. §§ 1251(a)(1), (4) (1982)). The Board also discussed the refugee waiver, which asylees and refugees can use to waive grounds of inadmissibility for humanitarian reasons; Congress prevented noncitizens who were inadmissible for drug trafficking from applying for such waiver. *See id.* (citing 8 U.S.C. § 1182(a)(23) (current version at 8 U.S.C. §§ 1157(c)(3), 1159(c) (2012))).

112. U-M-, 20 I. & N. Dec. 327, 330–32 (B.I.A. 1991). The Board stated:

Illicit narcotic drugs sold in the United States ruin or destroy the lives of many American citizens each year. Apart from the considerable number of people in this country who die of overdoses of narcotics or who become the victims of homicides related to the unlawful traffic of drugs, many others become disabled by addiction to heroin, cocaine, and other drugs. There are also many in this country who suffer crimes against their persons and property at the hands of drug addicts and criminals who use the proceeds of their crimes to support their drug needs. Additionally, a considerable amount of money is drained from the economy of the United States annually because of unlawful trafficking in drugs. This unfortunate situation has reached epidemic proportions and it tears the very fabric of American society.

Id. at 330.

In 2002, Attorney General Ashcroft in *Y-L-* created a presumption that drug trafficking aggravated felony convictions are PSCs.¹¹³ The three noncitizens whose cases were considered had been convicted of drug trafficking, which met the definition of aggravated felony,¹¹⁴ yet each was sentenced to less than five years and thus did not have a statutory PSC for the purposes of withholding.¹¹⁵ The Board had held that they were not barred from withholding, yet the Attorney General vacated those decisions, certifying the case to himself.¹¹⁶ Attorney General Ashcroft stated: “[T]he BIA has seen fit to employ a case-by-case approach, applying an individualized, and often haphazard, assessment as to the ‘seriousness’ of an alien defendant’s crime. Not surprisingly, this methodology has led to results that are both inconsistent and, as plainly evident here, illogical.”¹¹⁷

To support this presumption, he quoted heavily from the 1991 Board case about the societal harms of drug trafficking.¹¹⁸ The Attorney General further cited to the “long-standing *congressional* recognition that drug trafficking felonies justify the harshest of legal consequences.”¹¹⁹ For this assertion, he cited to the controlled substances ground of deportability,¹²⁰ various harsh penalties for aggravated felons in the INA (of which drug trafficking is a subset),¹²¹ and other federal statutes outside of immigration law.¹²²

113. See *Y-L-*, 23 I. & N. Dec. 270, 274 (B.I.A. 2002).

114. See *id.* at 271; see also 8 U.S.C. § 1101(a)(43)(B) (defining “aggravated felony” to include drug trafficking).

115. See *Y-L-*, 23 I. & N. Dec. at 271, 273.

116. See *id.* at 272, 277. 8 C.F.R. § 3.1(h)(1)(i) permits the Attorney General to certify a question to him or herself; this practice has been criticized. See Laura S. Trice, Note, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1767–68 (2010).

117. *Y-L-*, 23 I. & N. Dec. at 273 (citation omitted).

118. *Id.* at 275.

119. See *id.*

120. See *id.* (citing 8 U.S.C. § 1227(a)(2)(B) (2012)).

121. See *id.* (citing 8 U.S.C. § 1252(a)(2)(C) (no judicial review for aggravated felons); 8 U.S.C. § 1228 (expedited removal for aggravated felons)). The Attorney General further stated,

The fact that Congress, as part of the IIRIRA legislation of 1996, chose to jettison a prior INA ruling treating *all* aggravated felonies—of which drug trafficking felonies are a subset—as *per se* ‘particularly serious crimes,’ should not be confused with an indication that Congress no longer considered *drug trafficking crimes in particular*, to be as serious and pernicious as it had previously viewed them.

Id. at 275–76.

122. See *id.* at 275 (citing 18 U.S.C. § 3592(c)(12) (providing that a serious federal drug offense conviction is an aggravating factor for purposes of imposing the federal death penalty));

What is notable about the Attorney General's decision is how he justified the presumption that drug trafficking is a PSC by reference to not only the societal harms caused by drug trafficking, but also the violent nature of the offense. He stated:

The devastating effects of drug trafficking offenses on the health and general welfare, not to mention national security, of this country are well documented. Because the illegal drug market in the United States is one of the most profitable in the world, it attracts the most ruthless, sophisticated, and aggressive traffickers. Substantial violence is present at all levels of the distribution chain. Indeed, international terrorists increasingly employ drug trafficking as one of their primary sources of funding.¹²³

By citing to the violent nature of drug trafficking, he brought this holding in line with the many Board cases that had found violent offenses to be PSCs.¹²⁴ He also listed six criteria that a respondent must show to overcome the presumption;¹²⁵ one of these criteria was “the absence of any violence or threat of violence, implicit or otherwise, associated with the offense.”¹²⁶ In making the exceptions to his new rule very limited—only those who could demonstrate all of the criteria he mentioned (not just the absence of violence) could escape the PSC presumption—the

see also id. (citing 21 U.S.C. § 862 (subjecting convicted drug traffickers to order of ineligibility for federal benefits)).

123. *Id.* at 276 (footnote omitted); *see also* Demleitner, *supra* note 6, at 1064–65 (“In 2002, the federal government began a powerful publicity campaign connecting the ‘war on drugs’ with the ‘war on terrorism.’”).

124. *See supra* Section II.B.

125. *Y-L-*, 23 I. & N. Dec. at 276–77 (reasoning that there may be the “very rare case where an alien may be able to demonstrate extraordinary and compelling circumstances that justify treating a particular drug trafficking crime as falling short of [the PSC] standard”).

126. *Id.* at 276. The six criteria the Attorney General listed to overcome the PSC presumption for a drug trafficking crime are “at a *minimum*.”

(1) a very small quantity of controlled substance; (2) a very modest amount of money paid for the drugs in the offending transaction; (3) merely peripheral involvement by the alien in the criminal activity, transaction, or conspiracy; (4) the absence of any violence or threat of violence, implicit or otherwise, associated with the offense; (5) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; and (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles.

Id. at 276–77.

Attorney General likely was marking a new era of nonviolent crimes as PSCs.¹²⁷

D. *Possession of Child Pornography as a PSC*

The Board's 2012 decision in *R-A-M*¹²⁸ is a good example of how nonviolent crimes have become PSCs in recent years. Mr. R-A-M feared persecution in Honduras because of his sexual orientation and sought asylum and withholding of removal.¹²⁹ While he was in removal proceedings, he was convicted of possession of child pornography under a California statute that punished knowingly possessing or controlling any image or film that depicts a person under the age of eighteen engaging in or simulating sexual conduct.¹³⁰ His sentence was 280 days of imprisonment and three years' probation.¹³¹ The immigration judge found that his offense was an aggravated felony and therefore he had a statutory PSC for asylum purposes.¹³² However, as his sentence was less than five years, he was eligible for withholding, so the immigration judge was permitted to look at the nature and circumstances of his crime.¹³³

The immigration judge had determined that the crime, although serious, was not particularly serious because he had a light sentence; he was convicted of possession instead of production, marketing, or distribution of child pornography; and the children already had been victimized before he downloaded the pornographic materials.¹³⁴ What is most critical is the final portion of the immigration judge's decision. The judge considered that the respondent was receiving treatment for his drug and alcohol problem and was scheduled for treatment at an inpatient facility upon his release from DHS detention.¹³⁵ For this reason, the judge

127. The Ninth Circuit deferred to *Y-L-*, upholding the Attorney General's authority under the statute to create strong presumptions for PSC determinations. *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 948–49 (9th Cir. 2007). The court held, however, that because he pled guilty to drug trafficking prior to the *Y-L-* decision, it could not be applied to his case retroactively. *Id.* at 950–53. In unpublished cases, several other courts accepted *Y-L-* as a proper exercise of the Attorney General's discretion. *See, e.g.,* *Infante v. Att'y Gen.*, 574 F. App'x 142, 145–47 (3d Cir. 2014); *Diaz v. Holder*, 501 F. App'x 734, 738 (10th Cir. 2012); *Galeneh v. Ashcroft*, 153 F. App'x 881, 886 (3d Cir. 2005).

128. 25 I. & N. Dec. 657 (B.I.A. 2012).

129. *Id.*

130. *Id.* at 658.

131. *Id.*

132. *See id.* at 658–59 (reasoning that his offense was an aggravated felony pursuant to 8 U.S.C. § 1101(a)(43)(I) because it is “described in” 18 U.S.C. § 2252, which punishes the knowing possession of child pornography).

133. *See id.* at 659–60.

134. *Id.* at 660.

135. *Id.*

found, “there was no indication that the respondent had been violent in the past or would be violent in the future.”¹³⁶

The Board reversed, reviewing the judge’s decision *de novo*¹³⁷ and finding that the conviction was for a particularly serious crime.¹³⁸ The Board first cited to the societal harms of child pornography.¹³⁹ The Board conceded that possession was not as serious as production or distribution and thus found that it could look beyond the elements of his offense to the facts and circumstances of his crime.¹⁴⁰ The only egregious fact the Board could point to was that “he [had] repeatedly downloaded numerous images and videos of child pornography for his [own] personal use,”¹⁴¹ and thus the Board cycled back to repeating the harmful effects of child pornography on society.¹⁴² The Board also found unimportant the relatively light sentence he received because “the severity of the crime is not always reflected in the length of the sentence.”¹⁴³

In *R-A-M-*, the Board noted the shift from its past decisions that violent crimes against persons tended to be PSCs.¹⁴⁴ The Board stated: “[W]hile an offense is more likely to be considered particularly serious if it is against a person, it does not have to be violent to be a particularly serious crime.”¹⁴⁵ To support this proposition, the Board cited *Y-L-*, the 2002 Attorney General decision that drug trafficking convictions presumptively constitute particularly serious crimes,¹⁴⁶ and, inexplicably, a 2000 Board case holding that a “robbery conviction, which involves a violent crime against a person, is a particularly serious crime.”¹⁴⁷ The Board also cited *N-A-M-*, a 2007 Board case that appears to have gutted the *Frentescu* test in order to sweep more offenses into the PSC category.¹⁴⁸

136. *Id.*

137. *Id.* at 658.

138. *Id.* at 660.

139. *Id.* (“Child pornography is an intrinsically serious offense that is directly related to the sexual abuse of children.”).

140. *Id.* at 661.

141. *Id.*

142. *Id.*

143. *Id.* at 662 (quoting *N-A-M-*, 24 I. & N. Dec. 336, 344 n.8 (B.I.A. 2007)).

144. *See supra* Section II.B.

145. *R-A-M-*, 25 I. & N. Dec. at 662 (quoting *N-A-M-*, 24 I. & N. Dec. at 343).

146. *Y-L-*, 23 I. & N. Dec. 270, 274 (A.G. 2002), *overruled in part by* *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004).

147. *S-V-*, 22 I. & N. Dec. 1306, 1309 (2000).

148. *N-A-M-*, 24 I. & N. Dec. at 342. For those crimes escaping the statutory categorization as a PSC, the Board in *N-A-M-* set forth a test that eliminated the fourth and “most important” *Frentescu* factor, “whether the type and circumstances of the crime indicate that the alien will be a danger to the community.” *Id.*; *Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982). To explain such a change, the Board articulated that their approach to determining whether a crime is

E. *Financial Crimes as PSCs*

There has been a series of unpublished cases by the Board finding that nonviolent financial crimes were PSCs; federal circuit courts of appeals have upheld decisions that mail fraud,¹⁴⁹ tax fraud and money laundering,¹⁵⁰ securities fraud,¹⁵¹ and unauthorized access to a computer¹⁵² were PSCs. In these cases, federal courts either determined they had no jurisdiction to review PSC, a discretionary decision,¹⁵³ or reviewed the decisions under the highly deferential abuse of discretion standard of review.¹⁵⁴

particularly serious had evolved since *Frentescu*. “For example,” the Board wrote, “once an alien is found to have committed a particularly serious crime, we no longer engage in a separate determination to address whether the alien is a danger to the community.” *N-A-M-*, 24 I. & N. Dec. at 342 (citing *Carballe*, 19 I. & N. Dec. 357 (B.I.A. 1986)). The Board purported to rely on *Carballe* for this omission, but completely misapplied *Carballe*’s holding regarding dangerousness. In *Carballe*, the Board held that, once a judge applied the four *Frentescu* factors (of which dangerousness was an essential key), there was no need to engage in a separate determination of dangerousness, based on future dangerousness. See *Carballe*, 19 I. & N. Dec. at 360; see also *Alphonsus v. Holder*, 705 F.3d 1031, 1039 (9th Cir. 2013) (“*Carballe* accepted and reiterated *Frentescu*’s reliance on dangerousness as the sine qua non of a particularly serious crime . . .”). What the Board did in *N-A-M-* was authorize judges to not engage in any determination of dangerousness. The impact of this missing fourth factor became clear in decisions such as *R-A-M-*, where the Board managed to skirt any reference to dangerousness when it decided possession of child pornography was a PSC, and one of the Board cases deciding that a financial crime was a PSC. See *R-A-M-*, 25 I. & N. Dec. at 662 (“[T]he Immigration Judge’s belief that the respondent would not be violent in the future is not dispositive of whether his conviction is for a particularly serious crime. As we explained in *Matter of N-A-M-*, it is not necessary to make a separate determination whether the alien is a danger to the community. The focus ‘is on the nature of the crime and not the likelihood of future serious misconduct.’” (citation omitted) (quoting *N-A-M-*, 24 I. & N. Dec. at 342)); see also *Tian v. Holder*, 576 F.3d 890, 897 (8th Cir. 2009) (upholding Board’s decision that unauthorized access to a computer is a PSC because, due to *N-A-M-*, “a separate determination of danger to the community [is not] necessary”).

149. *Arbid v. Holder*, 700 F.3d 379, 381 (9th Cir. 2012).

150. *Hakim v. Holder*, 628 F.3d 151, 157 (5th Cir. 2010).

151. *Kaplun v. Att’y Gen.*, 602 F.3d 260, 273 (3d Cir. 2010).

152. *Tian*, 576 F.3d at 892, 897.

153. See 8 U.S.C. § 1252(a)(2)(B)(ii) (2012) (no judicial review of discretionary decisions). *But cf. Arbid*, 700 F.3d at 383–84 (reasoning, post-*Kucana*, that PSC determinations can be reviewed notwithstanding 8 U.S.C. § 1252(a)(2)(B)(ii) because the statute does not explicitly vest discretion in the Attorney General); *Kucana v. Holder*, 558 U.S. 233, 247 (2010) (holding that 8 U.S.C. § 1252(a)(2)(B)(ii) only bars judicial review for decisions that are made discretionary by Congress).

154. See, e.g., *Arbid*, 700 F.3d at 385 (“On abuse-of-discretion review, we may disturb the BIA’s ruling if the BIA acted ‘arbitrarily, irrationally, or contrary to law.’” (quoting *Singh v. INS*, 213 F.3d 1050, 1052 (9th Cir. 2000))).

In a 2009 case, the Eighth Circuit reviewed a Board decision that unauthorized access to a computer was a PSC.¹⁵⁵ The Board had dismissed an argument that people who commit economic crimes do not constitute a danger to the community by describing this claim as “speculative” and “unpersuasive.”¹⁵⁶ The Eighth Circuit ruled that it had no jurisdiction to determine a discretionary decision regarding the proper weighing of the *Frentescu* factors.¹⁵⁷ Similarly, in a 2010 Third Circuit decision upholding a Board decision that securities fraud was a PSC, the court first decided that it did not have jurisdiction over discretionary decisions such as PSCs.¹⁵⁸ In dicta, however, the court responded to the petitioner’s argument that “the BIA ‘has never held that . . . a nonviolent white collar criminal offense could constitute a particularly serious crime.’”¹⁵⁹ The court reasoned that the inclusion of aggravated felonies in the PSC bar meant that Congress intended some nonviolent crimes to be PSCs (as the aggravated felony definition contains nonviolent offenses such as fraud)¹⁶⁰ and that “nothing in our precedent suggests that a financial crime cannot, as a matter of law, be a particularly serious crime.”¹⁶¹ In 2012, the Ninth Circuit upheld a Board decision that mail fraud was a PSC.¹⁶² The Board in this case upheld an immigration judge’s decision that, based on the “good likelihood” that the fraud could happen again, the petitioner “certainly would be a danger to the community.”¹⁶³ There, the Ninth Circuit specifically stated that the petitioner had not raised a legal challenge to the Board’s interpretation of the withholding

155. *Tian*, 576 F.3d at 896–97.

156. *Id.* at 897. The Board also held that it did not consider a “separate determination to address whether the alien is a danger to the community.” N-A-M-, 24 I. & N. Dec. 336, 342 (B.I.A. 2007). *But cf. supra* note 148 (discussing how the *N-A-M-* test is flawed).

157. *Tian*, 576 F.3d at 897.

158. *Kaplun v. Att’y Gen.*, 602 F.3d 260, 262, 267, 273 (3d Cir. 2010). The Ninth Circuit disagreed with this portion of the ruling in *Arbid*. *See Arbid*, 700 F.3d at 384 (relying on the Supreme Court’s decision in *Kucana v. Holder*, 558 U.S. 233 (2010) that the judicial review bar of discretionary decisions contained in 8 U.S.C. § 1252(a)(2)(B)(ii) only applied to those discretionary decisions that the statute makes discretionary).

159. *Kaplun*, 602 F.3d at 267.

160. 8 U.S.C. § 1101(a)(43)(M)(i) (2012) (“The term ‘aggravated felony’ means an offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000 . . .”).

161. *Kaplun*, 602 F.3d at 268. In a 2010 Fifth Circuit case upholding a Board decision that tax fraud and money laundering were PSCs, the court held that the Board need not individually consider each *Frentescu* factor before reaching its decision; it was enough that the Board engaged in some case-specific analysis. *Hakim v. Holder*, 628 F.3d 151, 152, 154–55 (5th Cir. 2010). The petitioner did not raise whether the Board had properly weighed the *Frentescu* factors and therefore the court did not need to decide whether it had jurisdiction to review such a discretionary decision. *Id.* at 155 n.1.

162. *Arbid*, 700 F.3d at 385.

163. *Id.*

statute, but only challenged the weighing of the *Frentescu* factors.¹⁶⁴ The court, reviewing the Board's decision on abuse of discretion review, did not disturb the Board's ruling.¹⁶⁵

III. EXPLAINING HOW NONVIOLENT CRIMES BECAME PSCS

How did we get to a place where the PSC bar, which was once reserved for "extreme" cases¹⁶⁶ and typically included only violent offenses, has come to include nonviolent offenses like drug trafficking, possession of child pornography, and financial crimes? This Part explores a theory for why nonviolent crimes are PSCs, the mistrusting criminal judges effect, and then seeks to connect this trend to larger trends in both immigration law and criminal law.

A. *The Mistrusting Criminal Judges Effect*

The Board's increasing lack of faith in criminal judges, which this Article terms the "mistrusting criminal judges effect," provides an explanation for why many nonviolent offenses are PSCs. When the Board decided *Frentescu* in 1982, one of the four factors a judge was directed to consider was the type of sentence imposed.¹⁶⁷ The Board, finding that Mr. *Frentescu* had not been convicted of a PSC, stated that his suspended sentence with three months to serve "as viewed by the state . . . court judge, reflect[ed] upon the seriousness of the applicant's danger to the community."¹⁶⁸ This statement indicated the Board's faith in the criminal judge's ability to identify dangerous criminals by imposing on them the longest sentences.¹⁶⁹

The Attorney General's 2002 *Y-L-* decision, where Attorney General Ashcroft found that drug trafficking convictions were presumptively PSCs,¹⁷⁰ marked the beginning of the mistrusting criminal judges effect in PSC determinations. Attorney General Ashcroft reversed three Board decisions finding that drug trafficking convictions with less than a five-year sentence were not PSCs.¹⁷¹ The Board had based its decision partially on the respondents' cooperation with federal authorities in

164. *Id.* at 385 n.4.

165. *Id.* at 385.

166. *See* *Frentescu*, 18 I. & N. Dec. 244, 246 (B.I.A. 1982).

167. *See id.* at 247.

168. *Id.*

169. *See id.*; *see also* *L-S-*, 22 I. & N. Dec. 645, 655 (B.I.A. 1999) (holding that alien smuggling for commercial gain was not a PSC, partially influenced by the sentence imposed, three and a half months of time served).

170. *See* *Y-L-*, 23 I. & N. Dec. 270, 274 (A.G. 2002), *overruled in part* by *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004).

171. *See id.* at 285.

collateral investigations, their limited criminal history records, and the fact that they were sentenced at the low end of the applicable sentencing guideline ranges.¹⁷² The Board also had read the IIRIRA amendments to the PSC bar, which classified only aggravated felonies with five-year sentences as per se PSCs, as reflecting a Congressional desire to replace classifications based on category or type of crime with classifications based on length of sentence imposed.¹⁷³ The Attorney General disagreed, stating that “the discretionary authority reserved to the Attorney General with respect to offenses from which less severe sentences flow is clearly intended to enable him to emphasize factors *other than* length of sentence.”¹⁷⁴ He set forth a presumption that drug trafficking convictions were per se PSCs, and only in extraordinary and compelling circumstances could a noncitizen overcome the presumption.¹⁷⁵ Notably absent from this list of criteria that might overcome the PSC presumption were several criteria that, for a criminal judge, would justify a lower sentence. He wrote: “I emphasize here that such commonplace circumstances as cooperation with law enforcement authorities, limited criminal histories, downward departures at sentencing, and post-arrest (let alone post-conviction) claims of contrition or innocence do not justify such a deviation.”¹⁷⁶

In 2007, the Board in *N-A-M-* solidified the mistrusting criminal judges effect in the PSC analysis.¹⁷⁷ There, the respondent had been sentenced to no term of imprisonment for his menacing conviction, yet the Board found this fact unimportant.¹⁷⁸ The Board wrote:

Factors that are subsequent and unrelated to the commission of the offense, such as cooperation with law enforcement authorities, bear only on sentencing. Similarly, offender characteristics may operate to reduce a sentence but do not diminish the gravity of a crime. Therefore, the sentence imposed is not the most accurate or salient factor to consider in determining the seriousness of an offense.¹⁷⁹

The Board’s rationale begs a question about its faith in the criminal judge. Would a criminal judge fail to sentence someone who was a danger to the community to prison time, even if there were compelling personal circumstances?

172. *See id.* at 272.

173. *Id.* at 273.

174. *Id.* at 274.

175. *Id.* at 276.

176. *Id.* at 277.

177. *See N-A-M-*, 24 I. & N. Dec. 336, 343 (B.I.A. 2007).

178. *Id.*

179. *Id.*

In 2012, the Board again stated its lack of faith in the criminal judge when it decided that possession of child pornography was a PSC in *R-A-M*.¹⁸⁰ Notwithstanding the respondent's sentence of 280 days in prison and three years of probation, the Board stated "the nature of the respondent's crime is so condemnable that the length of the sentence is less significant to the analysis."¹⁸¹ This quote highlights the Board's substitution of its own judgment for that of the criminal judge: if the crime was so condemnable, wouldn't the criminal judge have given a more severe sentence?

The mistrusting criminal judges effect can also be seen in the financial crimes cases. Although federal courts upheld unpublished Board cases without giving significant discussion of the Board's underlying rationale, we do see that none of the financial crimes upheld as PSCs had sentences exceeding the five years this Article proposes as a "significant" sentence.¹⁸² In one case, the U.S. Court of Appeals for the Fourth Circuit upheld a Board decision that discounted a "relatively light" sentence in the PSC analysis since her sentence was based on cooperation with law enforcement, rather than the nature of her offense.¹⁸³

Of course, naming the mistrusting judges effect as a cause of the problematic PSC expansion suggests that immigration adjudicators *should* follow criminal judges' decisions. One can argue that criminal judges and immigration judges do not share common motives because they are actors in different systems with different objectives. The criminal law, many say, should focus on rehabilitating the offender so he can be released into society.¹⁸⁴ In contrast, immigration law should focus on whether a particular person should be included in U.S. society in the first

180. 25 I. & N. Dec. 657, 662 (B.I.A. 2012) (holding that the respondent's crime, "possession of child pornography[,] constitutes a particularly serious crime").

181. *Id.* at 662.

182. *See, e.g.,* *Arbid v. Holder*, 700 F.3d 379, 382 (9th Cir. 2012) (finding that mail fraud with a sixteen-month sentence and \$650,000 in restitution was a PSC); *Hakim v. Holder*, 628 F.3d 151, 152 (5th Cir. 2010) (holding that tax fraud and money laundering with a thirty-seven-month sentence was a PSC); *Kaplun v. Att'y Gen.*, 602 F.3d 260, 262–63 (3d Cir. 2010) (finding that securities fraud with a fifty-six-month sentence was a PSC); *Gao v. Holder*, 595 F.3d 549, 552 (4th Cir. 2010) (holding that tax fraud and unlawful export with a seven-month sentence, eight months of community confinement, forfeiture of \$505,521, a \$2,500 fine, and penalties of \$88,885 was a PSC); *Tian v. Holder*, 576 F.3d 890, 892–93 (8th Cir. 2009) (finding that unauthorized access to a computer with eleven months in prison and a total of \$143,000 in restitution was a PSC).

183. *Gao*, 595 F.3d at 557.

184. SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES* 116 (9th ed. 2012) ("By the early twentieth century, rehabilitation had taken a firm hold in the ideology (if not in the practices) of American punishment."); *see also* *Williams v. New York*, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.").

place.¹⁸⁵ However, there is significant debate about the purpose of criminal punishment;¹⁸⁶ in addition to rehabilitation, criminal law focuses on incapacitation for the sake of protecting society.¹⁸⁷ The criminal judge's assessment of the nature and circumstances of a person's crime leads the judge to decide how long to incapacitate that offender, thus concluding how dangerous of a person he is based on the commission of that crime (as well as other factors, such as how likely it is that the offender will rehabilitate).¹⁸⁸ Because the immigration judge is asked to make that same determination when deciding whether the offense is a PSC, the sentence given by the criminal judge is particularly relevant.

B. *Mistrusting Criminal Judges in Other Areas of Immigration Law*

The mistrusting criminal judges effect is not limited to the Board's PSC law, but is apparent in immigration law as a whole. One example is the Board's refusal to recognize vacatur of guilty pleas by criminal courts if those vacatur are for immigration reasons only.¹⁸⁹ Following

185. See García Hernández, *supra* note 6, at 1466 (discussing historical distinctions between criminal law, which “maintained a focus on the traditional conduct associated with criminality,” and immigration law, which “remained firmly encamped within civil law, sorting through the administrative matter of who was authorized to be in the country”).

186. For a discussion on the different justifications for punishment in criminal law, see generally KADISH ET AL., *supra* note 184, at 89–111 (discussing various theories of punishment, including utilitarianism, retribution, rehabilitation, incapacitation, and mixed theories).

187. See *Williams*, 337 U.S. at 248 n.13 (discussing The Trial Judge's Dilemma, which requires a judge, when sentencing an offender, to consider several factors, the first of which is “[t]he protection of society against wrong-doers” and the third of which is “[t]he reformation and rehabilitation of the [offender]” (citing SHELDON GLUECK, PROBATION AND CRIMINAL JUSTICE 113 (1933))); MODEL PENAL CODE § 7.01(1) (AM. LAW INST. 2015) (recommending that a court should not sentence a convicted defendant to imprisonment unless “there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime”; “the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution”; or “a lesser sentence will depreciate the seriousness of the defendant's crime”); Sheldon Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 457 (1928) (“Society's legal institutions are concerned with the utilitarian possibilities of a punishment régime, possibilities which are founded upon the social purpose of the machinery of justice, namely, the maintenance of the general security with as little interference with the individual's rights as a human being and citizen as is necessary for the achievement of that social purpose.”); see also KADISH ET AL., *supra* note 184, at 117 (discussing how in the late 1970s, rehabilitation as a justification for punishment met with much resistance, but that it has since resurged as a central goal of punishment).

188. See García Hernández, *supra* note 6, at 1497 (“Such ‘indeterminate sentencing’ regimes placed enormous responsibility on judges that suggested a deep commitment to the notion that judges, as formally neutral actors in the criminal justice system, were well-positioned to assess the severity of a convicted individual's conduct and devise a fitting sanction.”).

189. Pickering, 23 I. & N. Dec. 621, 624 (B.I.A. 2003) (“Thus, if a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a ‘conviction’ within the meaning of section 101(a)(48)(A). If, however, a court vacates

the harsh effects of the 1996 laws, many noncitizens returned to state court, seeking to vacate their criminal convictions.¹⁹⁰ Since a criminal conviction formed the basis of deportation, this would alleviate the immigration impact, thus preventing an otherwise legal immigrant from being deported.¹⁹¹ At a minimum, the vacatur of the conviction might cause the noncitizen to be eligible for relief, thus allowing an immigration judge to exercise her discretion in evaluating the equities in a noncitizen's case.¹⁹² State court judges often were sympathetic, vacating a criminal conviction so that the noncitizen could avoid deportation or be eligible for relief.¹⁹³ In 2003, the Board saw what was happening—that sympathetic criminal court judges were vacating convictions—and decided to blunt the impact of the practice. The Board decided in *Pickering*¹⁹⁴ that if a conviction was vacated for immigration purposes only, that vacatur would not count for immigration purposes.¹⁹⁵ Although the Board later retreated from this position, it provides an example of the Board's mistrust of state criminal judges.¹⁹⁶

Another example of the mistrusting criminal judges effect is the Board's refusal to grant bond to an individual, even though a criminal

a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains 'convicted' for immigration purposes."), *rev'd*, *Pickering v. Gonzalez*, 465 F.3d 263 (6th Cir. 2006).

190. See Miller, *Blurring the Boundaries*, *supra* note 6, at 83 ("In the years between 1996 and 2001, the immigration system bought into the 'severity revolution' occurring within the criminal justice system.")

191. See 8 U.S.C. § 1227(a)(2) (2012) (basing most grounds of crime-related deportability on "conviction of a crime").

192. See *id.* § 1229b(a). For example, the INA provides for cancellation of removal for lawful permanent residents who have not been convicted of an aggravated felony and who have been in the United States continuously for seven years after admission in any status, five of which was after being admitted as a permanent resident. See C-V-T-, 22 I. & N. Dec. 7, 10–11 (B.I.A. 1998) (describing the equitable factors the judge should consider when considering an application for cancellation of removal).

193. See Amany Ragab Hacking, *Plea at Your Peril: When Is a Vacated Plea Still a Plea for Immigration Purposes?*, 29 ST. LOUIS U. PUB. L. REV. 459, 459 (2010) ("[A]n Arkansas state court vacated the defendant's conviction solely to avoid immigration consequence . . .").

194. 23 I. & N. Dec. 621 (B.I.A. 2003), *rev'd*, *Pickering v. Gonzalez*, 465 F.3d 263 (6th Cir. 2006).

195. *Id.* at 624. The Sixth Circuit, reviewing the Board's decision in *Pickering*, agreed with the Board's ruling as a matter of law, yet decided that in Mr. Pickering's case, the government did not show that the criminal court vacated his conviction solely for immigration purposes. *Pickering*, 465 F.3d at 266–67, 269.

196. The Board later decided that a sentence vacated for immigration reasons only would still be valid. Cota-Vargas, 23 I. & N. Dec. 849, 852 (B.I.A. 2005) ("While the language and purpose of section 101(a)(48)(A) of the Act provided support for the interpretive approach we adopted in *Pickering* as it related to the existence of a 'conviction,' the Immigration Judge's application of the *Pickering* rationale to sentence modifications has no discernible basis in the language of the Act.")

court has released that same person on bail or parole.¹⁹⁷ The Immigration Judge Benchbook, which is written and updated by the Executive Office of Immigration Review (the agency that houses the Board and immigration judges), provides guidance on immigration substance and procedure for judges.¹⁹⁸ First introduced in 2007, it is intended to be a guide for judges and not a substitute for judges checking the law in their circuit courts.¹⁹⁹ Nonetheless, it is a significant indicator of how the agency perceives the importance of various factors. The Benchbook, under the heading “Introductory Guides: Bond,” lists all of the significant factors that judges should consider when determining whether to release a noncitizen on bond.²⁰⁰ Listed as a “less significant factor” in a bond determination is early release from prison, parole, or low bond in related criminal proceedings.²⁰¹

On a legislative level, perhaps the best example of mistrusting criminal judges is the elimination of the Judicial Recommendation Against Deportation (JRAD) in 1990. When Congress first made noncitizens deportable for criminal conduct in 1917, it allowed state court sentencing judges to recommend “that such alien shall not be deported.”²⁰² Thus, sentencing judges could eliminate the harsh effects of the deportation laws by considering, on a case-by-case basis, who was

197. See *Andrade*, 19 I. & N. Dec. 488, 490 (B.I.A. 1987) (“Indeed, we find that the immigration judge placed undue reliance on the respondent’s parole in reaching her decision. Incarcerated individuals may be released from prison early on parole for reasons other than rehabilitation. We do not believe this factor in and of itself carries significant weight in determining whether an alien is a good bail risk for immigration purposes.”); cf. *Shaw*, 17 I. & N. Dec. 177, 179 (B.I.A. 1979) (“[W]e find that the immigration judge placed an undue reliance on the pending criminal charges and the lack of a large criminal bond in setting the significant bond ordered in this case. We find it inappropriate to speculate as to the possible rationale for the one dollar bond set in the criminal proceeding, and we do not agree that the fact that a low criminal bond was set somehow weighs in favor of a larger immigration bond.”).

198. The Executive Office for Immigration Review’s Immigration Judge Benchbook, which was removed from the agency’s website in mid-2017, is available through the website of an immigration law firm that obtained it through a Freedom of Information Act request. Matthew Hoppocak, *Here is the Current Immigration Judge Bench Book (Sort Of)*, HOPPOCK LAW FIRM (July 3, 2017), <https://www.hoppocklawfirm.com/immigration-judge-bench-book/>.

199. *Id.*

200. *Id.* The Benchbook lists as significant factors: fixed address in the United States, length of residence, family ties in the United States (particularly those that can confer benefits on the noncitizen), employment history in the United States, immigration record, attempts to escape from authorities, prior failures to appear for scheduled court proceedings, criminal record (including extensiveness and recency), and ineligibility for relief from removal. *Id.*

201. *Id.* (citing *Andrade*, 19 I. & N. Dec. 488; *Shaw*, 17 I. & N. Dec. 177).

202. *Padilla v. Kentucky*, 559 U.S. 356, 361–64 (2010) (quoting Immigration and Nationality Act of 1917, 39 Stat. 890) (describing history of JRAD, judicial recommendation against deportation, which is no longer in existence).

deserving of a recommendation against deportation.²⁰³ “However, . . . Congress first circumscribed the JRAD provision” for drug crimes in 1952, and then in 1990 completely eliminated the JRAD.²⁰⁴

In another example of Congress mistrusting criminal judges, Congress amended the definition of “conviction” in 1996 with IIRIRA. The new definition encompasses state court rehabilitative statutes such as deferred adjudications that previously would not have led to deportation because the criminal judge did not intend them to be convictions.²⁰⁵ Congress thus explicitly overruled a 1988 Board decision that allowed adjudications that were “deferred” for state purposes to not count as “convictions” in immigration law.²⁰⁶ Finally, also in 1996, Congress defined a “sentence” or “term of imprisonment” (which carries significant consequences because many convictions are aggravated felonies by virtue of a term of

203. *Id.* at 361–62.

204. *Id.* at 363 & n.5. Professors Margaret Taylor and Ronald F. Wright have given a full discussion of the history of JRADs, including the successor and “flip side” to JRADs, the power given to sentencing judges to enter orders of a removal, a process that never truly got “off the ground.” See Margaret H. Taylor and Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1143–57 (2002); see also Legomsky, *supra* note 6, at 499 (“Federal sentencing judges have been given ample power to order removal but, with the abolition of JRADs, now have almost no power to prevent it.”).

205. 8 U.S.C. § 1101(a)(48)(A) (2012) defines “conviction” for immigration purposes as:

a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

206. H.R. REP. NO. 104-828, at 224 (1996) (Conf. Rep.) (“This new provision . . . clarifies Congressional intent that even in cases where adjudication is ‘deferred,’ the original finding or confession of guilt is sufficient to establish a ‘conviction’ for purposes of the immigration laws.”); see also Ozkok, 19 I. & N. Dec. 546, 551–52 (B.I.A. 1988) (interpreting “convicted of” in the INA as encompassing the first two prongs of the new definition at 8 U.S.C. § 1101(a)(48)(A) but adding a third: “[A] judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court’s order, without availability of further proceedings regarding the person’s guilt or innocence of the original charge”).

imprisonment of at least one year)²⁰⁷ to mean a suspended sentence.²⁰⁸ Thus, regardless of whether a criminal judge intended to signal that a defendant was not dangerous or his crime was not serious and therefore he deserved no prison time, that suspended sentence would be seen as no different than a sentence where the offender spent the entire time in prison as a consequence of his conduct.

There remain areas of immigration law in which Congress has maintained some deference to state criminal judges. For example, a “crime involving moral turpitude” (CIMT) is a ground of inadmissibility,²⁰⁹ yet has a “petty offense exception” if the criminal court imposed a sentence of six months or less and the state legislature set the maximum possible punishment at one year.²¹⁰ Many “aggravated felony” categories are not triggered unless the criminal court imposes a one-year sentence.²¹¹ Similarly, the statutory PSC bar for withholding is only triggered if the court imposes a five-year sentence for an aggravated felony.²¹² The respect given to criminal judges in these provisions was blunted, however, by the “term of imprisonment” and “sentence” definitions Congress set forth with IIRIRA.²¹³ Also, what little deference still remains to the criminal court judge is muted by the many offenses

207. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(F) (stating that the crime of violence is aggravated felony if term of imprisonment of at least one year is imposed); *id.* § 1101(a)(43)(G) (stating that a theft offense is aggravated felony if term of imprisonment of at least one year is imposed).

208. *Id.* § 1101(a)(48)(B) (“Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”); H.R. REP. NO. 104-828, at 224 (“[T]his new definition [of term of imprisonment] clarifies that in cases where immigration consequences attach depending upon the length of a term of sentence, any court-ordered sentence is considered to be ‘actually imposed,’ including where the court has suspended the imposition of the sentence.”).

209. 8 U.S.C. § 1182(a)(2)(A)(i)(I).

210. *Id.* § 1182(a)(2)(A)(ii)(II); *see also* Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1731 (2011) (citing to petty offense exception to CIMT inadmissibility as a place where “federal immigration law . . . relies on state criminal justice actors . . . to exempt certain crimes from the harshness of removal”).

211. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(F) (including the crime of violence with a one-year sentence); *id.* § 1101(a)(43)(G) (including theft or burglary offense with one-year sentence); 1101(a)(43)(R) (including commercial bribery, counterfeiting, forgery, or trafficking in vehicles with altered identification numbers with a one-year sentence); *id.* § 1101(a)(43)(S) (including obstruction of justice, perjury, or bribery of a witness with a one-year sentence).

212. *See id.* § 1231(b)(3).

213. *See supra* notes 207–08 and accompanying text.

that have been swept into the meaning of terms such as “aggravated felony”²¹⁴ and “crime involving moral turpitude.”²¹⁵

C. *Mirroring the Severity Revolution in Criminal Law*

The PSC evolution described in Part II reflects not only an immigration law trend of mistrusting criminal judges, but also demonstrates how certain criminal law trends have manifested themselves in immigration law. The severity revolution, so dubbed by criminal scholar Joseph Kennedy, was a trend that occurred during the 1980s and '90s, where there was a dramatic break in the field of criminal punishment.²¹⁶ In contrast to the prior goals of minimizing pain and cruelty in the penal process, the severity revolution espoused severity of

214. Initially introduced in the 1988 Anti-Drug Abuse Act, the aggravated felony definition included murder, drug trafficking, and firearms trafficking (or attempts or conspiracies to commit those crimes). See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70. Amendments since 1988 have added crimes of violence, theft, receipt of stolen property, fraud, forgery, and obstruction of justice, to name a few of a now twenty-one-part definition. See Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(b)(5), 117 Stat. 2875, 2879 (codified as amended at 8 U.S.C. § 1101(a)(43)(K)(iii) (2012)) (adding peonage, slavery, involuntary servitude, and trafficking in persons); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 321(a)(1), 110 Stat. 3009-546, 3009-627 (codified as amended at 8 U.S.C. § 1101(a)(43)(A)) (adding sexual abuse of a minor and rape); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e)(8), 110 Stat. 1214, 1278 (adding bribery, forgery, counterfeiting, certain gambling offenses, vehicle trafficking, obstruction of justice, perjury, and bribery of a witness); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(a), 108 Stat. 4305, 4321–22 (adding theft, receipt of stolen property, burglary, trafficking in fraudulent documents, RICO, certain prostitution offenses, fraud or deceit, tax evasion, and human smuggling); Immigration Act of 1990, Pub. L. No. 101-649 § 501(a)(3), 104 Stat. 4978, 5048 (adding “crime[s] of violence”). With IIRIRA in 1996, Congress also reduced the length of sentence necessary to trigger the aggravated felony definition from five years to one year, while at the same time defining a sentence to include any suspended sentence. IIRIRA §§ 321(a), 322(a) (amending aggravated felony and “term of imprisonment” definition).

215. In a prior article, I described how “[t]he term CIMT allows immigration judges to make judgments about the ‘moral standards prevailing at the time,’ thus placing them in the role of God, passing judgment on the morals of the noncitizens whose cases lie in their hands.” Holper, *supra* note 67, at 678–79 (footnote omitted). I describe several circumstances where the Board has swept more crimes into the CIMT category. See *id.* at 682–83. For example, failure to register as a sex offender, aggravated DUI, and domestic violence are each crimes that, once brought to the attention of the Board, fit within the broad CIMT category. See, e.g., Tobar-Lobo, 24 I. & N. Dec. 143, 144–46 (B.I.A. 2007); Lopez-Meza, 22 I. & N. Dec. 1188, 1196 (B.I.A. 1999); Tran, 21 I. & N. Dec. 291, 293–94 (B.I.A. 1996). In these examples, the Board looked to contemporary “moral standards” to define what type of crime involves moral turpitude. See, e.g., Tran, 21 I. & N. Dec. at 294. More recently, the Board has swept additional offenses into the crime involving moral turpitude category, finding that more theft offenses involved moral turpitude. See, e.g., Obeya, 26 I. & N. Dec. 856, 861 (B.I.A. 2016); Diaz-Lizarraga, 26 I. & N. Dec. 847, 854–55 (B.I.A. 2016).

216. Kennedy, *supra* note 4, at 831–32.

punishment as an overarching good.²¹⁷ The severity revolution was both expressive (communicating the message about the seriousness of certain types of offenses) and instrumental (focusing on public protection and risk management).²¹⁸ As part of the severity revolution, legislatures responded to courts' willingness to "let off" too many offenders by enacting harsh mandatory minimum sentences,²¹⁹ thus decreasing courts' discretion to consider the whole person and his circumstances. Discretion was shifted into the hands of prosecutors, who could choose among criminal charges and have significant negotiating power due to the harsh mandatory minimum sentences, and police, who could choose which people to arrest in the first place.²²⁰

217. Bernard E. Harcourt, *The Shaping of Chance: Actuarial Models and Criminal Profiling at the Turn of the Twenty-First Century*, 70 U. CHI. L. REV. 105, 105 (2003) ("At the close of the century, the contrast could hardly have been greater. The rehabilitative project had been largely displaced by a model of criminal law enforcement that emphasized mandatory sentences, fixed guidelines, and sentencing enhancements for designated classes of crimes. The focus of criminal sentencing had become the category of crime, rather than the individual characteristics and history of the convicted person, with one major exception for prior criminal conduct."); see Kennedy, *supra* note 4, at 831; Simon, *supra* note 4, at 219.

218. See Kennedy, *supra* note 4, at 856; cf. Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449–50, 452 (1992) (discussing what the authors term the "new penology," which focuses on risk-based assessments and managing dangerous populations without regard to individual circumstances of each offender).

219. See García Hernández, *supra* note 6, at 1498–99 ("Rather than continue to confide in the neutral role that judges are supposed to occupy, over the next two decades [after the 1970s] policymakers began to portray judges as 'betrayers of the common good.'" (quoting JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 113 (2007))); see also WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 227–28 (2011) (describing the Warren court's errors, including "siphoning the time of attorneys and judges away from the question of the defendant's guilt or innocence and toward the process by which the defendant was arrested, tried, and convicted," which produced a political and legal backlash); García Hernández, *supra* note 6, at 1499 (discussing the Sentencing Reform Act of 1984, which established the Sentencing Commission, which in turn issued sentencing guidelines to bind federal judges, and the financial incentives Congress provided to states to enact "'truth in sentencing' laws that required convicted individuals to serve at least eighty-five percent of their sentence[s]"); Kennedy, *supra* note 4, at 850–52 (discussing the turn toward more determinate sentencing processes, which was supported by liberals, who were concerned about invidious discrimination in the criminal justice system, and conservatives, who supported strict accountability in punishment); Simon, *supra* note 4, at 236 (discussing "3-Strikes" laws that swept through the country in the mid-1990s, which "simultaneously expressed mistrust of judges and contempt for the intellectual capacities of repeat offenders").

220. See García Hernández, *supra* note 6, at 1497, 1499–1500.

Immigration law scholar Theresa Miller has noted the appearance of these criminal law trends in immigration law, commenting, “In the years between 1996 and 2001, the immigration system bought into the ‘severity revolution’ occurring within the criminal justice system.”²²¹ In her first article on this topic,²²² she describes harsh features of the immigration system, such as the curtailment of procedural and substantive rights, increased immigration enforcement instead of a preference for assimilation, expanded criminal grounds of deportation while curtailing relief and expanded criminal grounds of detention (all of which rely on group-based as opposed to individual assessments of dangerousness), increased cooperation between local law enforcement and immigration authorities, and the conversion of immigration from a civil rights issue to a national security issue.²²³ These features, she argues, have transformed the immigration system in a similar way that the criminal justice system was transformed starting in the 1980s, with a shift in focus from rehabilitating the individual offender to managing dangerous populations through blanket policies (thus presuming their inability to rehabilitate).²²⁴ In Miller’s second article on this topic,²²⁵ she builds on her earlier work by discussing how the war on terror following the attacks of 9/11 capitalized on immigration law’s utility for “crime control and social control to confront the ‘hypercrime’ of terrorism.”²²⁶ She cites to post-9/11 policies, including the surveillance, classification, and containment of supposedly high-risk populations, namely Muslim or Middle Eastern men, instead of focusing on individual dangerousness.²²⁷

Miller did not address the severity revolution’s reflection in PSC law, which at the time she wrote may have seemed like a narrow corner of refugee law. However, as outlined in Part II, the PSC category is growing, and, like other crimmigration terms of art, sweeping in many offenses.²²⁸ In PSC cases, one can see the impact of the severity revolution, with the Board and Attorney General deciding that criminal judges’ decisions about who merited punishment and incarceration were not the best indicators of who actually was a danger to the community.²²⁹

221. Miller, *Blurring the Boundaries*, *supra* note 6, at 83.

222. See generally Miller, *Citizenship & Severity*, *supra* note 6 (discussing the downside of moving towards a “severity revolution” in the context of immigration law).

223. See *id.* at 615.

224. See *id.* at 611, 653–54.

225. See generally Miller, *Blurring the Boundaries*, *supra* note 6 (discussing the social control dimensions as they related to the escalating criminalization of immigration law).

226. *Id.* at 85.

227. *Id.* at 102–04.

228. See *supra* Part II; see also notes 214–15 (describing expansion of “aggravated felony” and “crime involving moral turpitude”).

229. See *supra* Section III.A.

The severity revolution's targeting of certain types of offenders is also mirrored in the published PSC cases. As Joseph Kennedy wrote, drug dealers, child molesters, and violent criminals became scapegoats for a society that lacked a common religion in the 1980s and '90s.²³⁰ He wrote, "[h]orrible crimes provide moments of communion for a secular society that no longer comes together within the walls of any one church or around any one text."²³¹ A diverse secular society could rely on punishment of these "monstrous offenders" to express a shared sense of the sacred, whereas more homogeneous societies could rely on uniform religious beliefs.²³² The published PSC cases reflect this same scapegoating of such "monstrous offenders": drug trafficking, violent offenses, and possession of child pornography all are PSCs, thus reflecting the perceived danger that these types of offenders present to U.S. society.²³³

The determinate sentencing schemes of the severity revolution also reflect a "harm-based system of penology,"²³⁴ which "leave[s] less room for an individualized assessment of an offender's circumstances."²³⁵ Similarly, the PSC analysis, like the severity revolution, focuses not on the individual offender but on the risks presented by certain classes of offenders and the harms those crimes cause.²³⁶ Rather than focus on the dangerousness or individual characteristics of one offender, drug trafficking became a per se PSC based on the generalized harm it caused to society.²³⁷ Instead of focusing on any particular harms caused by one person who possessed child pornography, the Board instead focused on the societal harms that such possession causes.²³⁸ Board decisions finding financial crimes to be PSCs also have made generalizations about the societal harms of such crimes.²³⁹

230. Kennedy, *supra* note 4, at 833.

231. *Id.* at 847.

232. *Id.* at 848, 858.

233. *See supra* Part II.

234. Kennedy, *supra* note 4, at 856 (quoting Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 908–09 (1991)); accord Feeley & Simon, *supra* note 218, at 461.

235. Kennedy, *supra* note 4, at 856.

236. *See* Miller, *Citizenship & Severity*, *supra* note 6, at 646. Theresa Miller noted such categorization and risk management in immigration law by a movement away from individualized determinations and toward group-based assessments of dangerousness. *Id.* at 651. She cites examples such as mandatory detention and the broadening of the meaning of "aggravated felons," which authorizes both mandatory detention and deportation. *Id.*

237. *See* Y-L-, 23 I. & N. Dec. 270, 274–75 (A.G. 2002), *overruled in part* by *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004).

238. *See* R-A-M-, 25 I. & N. Dec. 657, 660–61 (B.I.A. 2012).

239. In one of the author's cases, a client with an identity theft conviction was found to have been convicted of a PSC; the Board supported its holding by stating, "Identity theft is a serious

Unfortunately, because the Refugee Act was passed in 1980, at the dawn of the severity revolution, its humanitarian aspects could not override the “tough on crime” mentality of the severity revolution.²⁴⁰ In fact, as criminal law scholar Jonathan Simon has observed, the new refugees of the 1980s, who were neither politically nor ethnically similar to the majority of Americans, were viewed not sympathetically but as a threat to national security.²⁴¹ Thus we see, in the interpretation of the Refugee Act through the PSC bar, the severity revolution playing out in individual decisions about which people are eligible for withholding. As part of this trend, we see the Board and Attorney General losing all faith in criminal judges to help determine, for purposes of PSC determinations, who is a danger to the community. We also see the Board and Attorney General making broad generalizations about classes of offenders as a way to minimize the risk presented by certain societal scapegoats.

D. *The Bail Reform Act of 1984: A Case Study in Dangerousness*

If the PSC evolution has in fact mirrored the severity revolution, it is helpful to compare PSC law to a severity revolution-era law with a similar purpose. The Bail Reform Act (BRA) of 1984, part of the Comprehensive Crime Control Act of 1984,²⁴² provides a useful case study in a law that

problem in our society.” L-V-R- (Nov. 17, 2014). This case was remanded to the Board to determine how a 1996 statutory provision would apply to her PSC analysis. *See* Velerio-Ramirez v. Lynch, 808 F.3d 111, 118 (1st Cir. 2015). The Board subsequently upheld its prior decision, focusing on the societal ills of identity theft. L-V-R- (Sep. 23, 2016).

240. *See* Kennedy, *supra* note 4, at 855.

241. *See* Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 582–84 (1998). Simon discusses how the Cold War pattern of refugees fleeing to the United States from Communist countries ended in the 1980s, as more Central Americans and Haitians sought protection. *Id.* at 582. He also describes how the Mariel Boatlift, which caused thousands of Cuban refugees to descend upon Miami at one time in 1980, changed the public’s perception of a refugee, as they were both darker-skinned than prior Cuban immigrants and erroneously deemed to be predominantly criminals and mentally ill. *See id.* at 590. Likewise, Haitian refugees were “overwhelmingly black and most were poor,” and “an early association of Haiti as having a high incidence of AIDS cases further stigmatized the entire population.” *Id.* at 591; *cf.* García Hernández, *supra* note 6, at 1461 (“By the mid-1980s, immigration reentered the political arena where prominent policymakers associates the new round of arriving noncitizens, racialized as not white, with lawbreaking that endangered the nation’s security.”). Others have suggested that the arrival of large numbers of asylum-seekers causes countries to curtail the right to refuge out of concern for controlling borders. *See, e.g.*, David A. Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, in REFUGEE POLICY: CANADA AND THE UNITED STATES 30 (H. Adelman ed., 1991) (“When the number of asylum-seekers increases sharply, the ability to control appears increasingly threatened, at least in the absence of a convincing demonstration that the increase came from a real outbreak of implacable persecution—that is, evidence that most of the new arrivals are ‘true refugees.’”).

242. Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of 18, 21, 28, 29, 31, and 42 U.S.C.).

was passed at the height of the severity revolution and discusses the meaning of danger to the community. The 1984 BRA was enacted to respond to society's growing concern for the possibility of crimes being committed by defendants awaiting trial for both capital and noncapital offenses.²⁴³ Maintaining a presumption for pretrial release, the 1984 BRA mandated that the government prove by clear and convincing evidence that no-release conditions will reasonably ensure the safety of the community.²⁴⁴ Congress included the consideration of dangerousness, however, as a strict exception to the presumption of pretrial release.²⁴⁵

The 1984 BRA created a procedure whereby prosecutors can ask for detention hearings when the case involved certain crimes, such as drug trafficking and crimes of violence, that indicated a defendant's dangerousness.²⁴⁶ The 1984 BRA also created rebuttable presumptions of dangerousness when defendants are charged with certain enumerated crimes,²⁴⁷ effectively shifting the burden of production from the government to the defendant.²⁴⁸ The judicial officer presumes, in these cases, that no condition or combination of conditions will reasonably assure the appearance of the defendant at trial or the safety of the community if there is probable cause to believe that the defendant committed certain enumerated offenses.²⁴⁹ The rebuttable presumptions have been amended over the years to include several offenses; today, offenses involving drug trafficking, terrorism, carrying a firearm in the commission of a crime of violence, and offenses involving minor victims

243. See 18 U.S.C. §§ 3141–50; S. REP. NO. 225, at 5 (1983) (“[The 1966 Bail Reform Act] has come under criticism as too liberally allowing release and as providing too little flexibility to judges in making appropriate release decisions regarding defendants who pose serious risks of flight or danger to the community. . . . In the Committee’s view, it is intolerable that the law denies judges the tools to make honest and appropriate decisions regarding the release of such [dangerous] defendants.”).

244. See 18 U.S.C. §§ 3142. To determine whether or not a particular defendant is dangerous to the community, a judicial officer shall consider: (1) the circumstances of the charged offense; (2) the amount of evidence against the defendant; (3) the history and character of the defendant; and (4) the nature and seriousness of the danger to another person or the community. *Id.* § 3142(g).

245. The Supreme Court upheld the constitutionality of the BRA of 1984 in 1987. *United States v. Salerno*, 481 U.S. 739, 747–49, 751 (1987).

246. 18 U.S.C. § 3142(f); S. REP. NO. 225, at 17–22.

247. 18 U.S.C. § 3142(e)(3).

248. See, e.g., *United States v. Carbone*, 793 F.2d 559, 560 (3d Cir. 1986) (“In effect, these sections create a rebuttable presumption against [the defendant’s] release and imposed the burden of producing countervailing evidence upon him.”); *United States v. Jessup*, 757 F.2d 378, 380–81 (1st Cir. 1985) (in construing Bail Reform Act of 1984, determining that “Congress did not intend to shift the burden of persuasion to the defendant but intended to impose only a burden of production”); *United States v. Diaz*, 777 F.2d 1236, 1237–38 (7th Cir. 1985); *United States v. Fortna*, 769 F.2d 243, 251 (5th Cir. 1985).

249. 18 U.S.C. § 3142(e)(3).

(from sexual abuse to offenses involving child pornography) all create the rebuttable presumption of dangerousness.²⁵⁰

What lessons can one draw from the 1984 BRA to import into PSC law? First, the evolution of which categories of crimes evince “dangerousness” in the BRA parallels this evolution in PSC determinations. The BRA’s signature component, the authorization of pretrial detention due to dangerousness,²⁵¹ was modeled after the District of Columbia Court Reform and Criminal Procedures Act of 1970.²⁵² In the D.C. statute, Congress only permitted pretrial detention if the prosecutor proves by a substantial probability that the defendant committed a crime of violence²⁵³ or a “dangerous crime.”²⁵⁴ “Dangerous crime” was defined by reference to violent crimes: theft by force, burglary of a dwelling, arson, rape, or assault with intent to commit

250. *See id.* The statute creates a presumption of dangerousness if there is probable cause to believe that the defendant committed: (1) an offense for which the maximum term of imprisonment of ten years or more is mandated by the Controlled Substances Act, the Controlled Substances Import and Export Act; (2) an offense under 18 U.S.C. § 924(c) (person who during and in relation to any crime of violence or drug trafficking crime uses or carries a firearm), § 956(a) (person who conspires to murder, kidnap, or maim), or § 2332b (person who commits acts of terrorism transcending national boundaries) of this title; (3) an offense listed in 18 U.S.C. § 2332b(g)(5)(B) (person who commits federal crime of terrorism) for which a maximum term of ten years is prescribed; (4) an offense under chapter 77 for which a maximum term of imprisonment of twenty years or more is prescribed (peonage, slavery, and human trafficking); or (5) an offense involving a minor victim (like kidnapping, sex trafficking, sexual abuse, offenses resulting in death, sexual exploitation, selling or buying of children, child pornography, or transportation of minors). *Id.*

251. *See* S. REP. NO. 225, at 18 (discussing how 18 U.S.C. §§ 3142(e) and (f) “create[] new authority to deny release to those defendants who are likely to engage in conduct endangering the safety of the community even if released pending trial only under the most stringent of the conditions listed in section 3142(c)”).

252. *See id.* at 22. Scholars disputed how closely the BRA tracked the DC statute because the BRA had fewer procedural protections. Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 347 (1990).

253. Section 1331(4) defined “crime of violence” as:

murder, forcible rape, carnal knowledge of a female under the age of sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years, mayhem, kidnaping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses as defined by any Act of Congress or any State law, if the offense is punishable by imprisonment for more than one year.

D.C. Code § 23-1331(4) (1970).

254. *Id.* § 23-1322(a)(1).

rape.²⁵⁵ “Dangerous crime,” however, also included drug trafficking.²⁵⁶ Similarly, in the 1984 BRA, Congress deemed drug traffickers a danger to the community by describing dangerousness by the term “safety of any other person or the community.”²⁵⁷ The Senate Report stated,

The committee intends that the concern about safety be given a broader construction than merely danger of harm involving physical violence. . . . The committee also emphasizes that the risk that a defendant will continue to engage in drug trafficking constitutes a danger to the “safety of any other person or the community.”²⁵⁸

The DC model tracks the early days in which crimes were labeled PSCs; in those days, only violent crimes and drug trafficking convictions were PSCs. The 1984 BRA kept drug trafficking as a proxy for dangerousness; the drafters intended to track the DC statute’s dangerousness definitions.²⁵⁹ In 2003, however, Congress expanded the presumption of dangerousness in federal bail determinations to include other nonviolent offenses such as possession of child pornography.²⁶⁰ Similarly, the Attorney General in 2002 decided that drug trafficking was presumptively a PSC, building on earlier Board decisions,²⁶¹ and the

255. A “dangerous crime” included:

(A) taking or attempting to take property from another by force or threat of force, (B) unlawfully entering or attempting to enter any premises adapted for overnight accommodation of persons or for carrying on business with the intent to commit an offense therein, (C) arson or attempted arson of any premises adaptable for overnight accommodation of persons or for carrying on business, (D) forcible rape, or assault with intent to commit forcible rape, or (E) unlawful sale or distribution of a narcotic or depressant or stimulant drug (as defined by any Act of Congress) if the offense is punishable by imprisonment for more than one year.

Id. § 23-1331(3).

256. *Id.* § 23-1331(3)(E).

257. S. REP. NO. 225, at 12–13.

258. *Id.*; see also Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, 36 FORDHAM URB. L.J. 121, 143 (2009) (“[T]he BRA does not define danger; the legislative history does suggest, however, that Congress considers drug trafficking dangerous to communities.”).

259. See S. REP. NO. 225, at 20–21.

260. See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 203, 117 Stat. 650, 660 (amending 18 U.S.C. § 3142(e) to include several offenses involving minor victims, including kidnapping, production or possession of child pornography, and transporting children for the purposes of child prostitution).

261. See *supra* Section II.C.

Board in 2012 decided that possession of child pornography was a PSC.²⁶²

Second, that financial crimes and most other nonviolent offenses do not create a presumption of dangerousness under the BRA or authorize pretrial detention based on dangerousness should be significantly instructive in the PSC context.²⁶³ As noted, the Board and Attorney General may be subtly tracking the BRA's dangerousness presumptions in its published decisions. The only nonviolent offenses found to be PSCs in published decisions concerned drug trafficking and possession of child pornography, offenses which would create a presumption of dangerousness under the BRA (although neither the Board nor Attorney General referenced the BRA in those decisions).²⁶⁴ However, financial crimes create no presumption of dangerousness under the BRA.²⁶⁵

262. See *R-A-M-*, 25 I. & N. Dec. 657, 660 (B.I.A. 2012).

263. See 18 U.S.C. § 3142(e)–(f). Several circuit courts have held that pretrial detention for dangerousness is only authorized when the case involves one of the enumerated crimes set forth in 18 U.S.C. § 3142(e) or (f) or if, pursuant to 18 U.S.C. § 3142(f)(2)(B), there is a serious risk that the defendant will obstruct justice or threaten, injure, or intimidate a prospective witness or juror. See, e.g., *United States v. Bryd*, 969 F.2d 106, 109–10 (5th Cir. 1992) (“Detention can be ordered, therefore, only ‘in a case that involves’ one of the six circumstances listed in (f), and in which the judicial officer finds, after a hearing, that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.”); *United States v. Ploof*, 851 F.2d 7, 11–12 (1st Cir. 1988) (holding that pretrial detention solely on the ground of dangerousness to another person or to the community is not authorized); *United States v. Himler*, 797 F.2d 156, 157–58 (3d Cir. 1986) (“The district court ordered that the defendant be detained prior to trial because of the danger of the defendant’s recidivism in crimes involving the use of fraudulent identification. We hold that this is not the type of danger to the community which will support an order of detention under the Bail Reform Act of 1984.”).

264. Compare 18 U.S.C. § 3142(e)(3)(E) (presumption of dangerousness in pretrial detention hearing if there is probable cause to believe the defendant committed one of a number of offenses against minor victims, one of which is 18 U.S.C. § 2252, which punishes, in part, receipt of child pornography in interstate commerce), and *id.* § 3142(e)(3)(A) (presumption of dangerousness in pretrial detention hearing if there is probable cause to believe the defendant committed a drug trafficking offenses), with *R-A-M-*, 25 I. & N. at 660 (holding that possession of child pornography is a PSC), and *Y-L-*, 23 I. & N. Dec. 270, 274 (A.G. 2002) (holding that drug trafficking convictions are presumptively PSCs).

265. See 18 U.S.C. § 3142(e). For the purposes of a bail hearing pending sentencing pursuant to 18 U.S.C. § 3143, which does not limit the categories of crimes that create a presumption of dangerousness, courts have found that the likelihood to commit financial crimes can demonstrate danger to the community. See, e.g., *United States v. Reynolds*, 956 F.2d 192, 192–93 (9th Cir. 1992) (“We further hold that danger may, at least in some cases, encompass pecuniary or economic harm.”); see also *United States v. Madoff*, 316 F. App’x 58, 59–60 (2d Cir. 2009) (reasoning, in dicta, that defendant convicted of nonviolent offenses can still be a danger to the community for purposes of bail determination on appeal). In *United States v. Provenzano*, the Third Circuit interpreted a prior version of BRA, which authorized detention based on dangerousness when considering bail for a defendant on appeal but, unlike the 1984 BRA, set

Therefore, if the Board or Attorney General were to use the BRA's dangerousness presumptions as an analogy for which classes of offenders are a danger to the community, financial crimes do not fit.

IV. PROPOSAL: VIOLENT CRIMES WITH SIGNIFICANT PRISON TIME AS PARTICULARLY SERIOUS CRIMES

This Article proposes that the Board or Attorney General, for discretionary PSCs, redefine PSC to include only violent offenses against persons where the noncitizen served a significant sentence. Although the PSC statutory definition certainly could benefit from an overhaul, since in its current form all aggravated felonies (a category that includes numerous nonviolent offenses) with five-year sentences (which do not require time to be served) are automatically PSCs for the purposes of withholding of removal,²⁶⁶ a Congressional amendment to the PSC definition is outside of the scope of this Article.

This proposal allows PSC law to benefit from the lessons learned from the severity revolution. There has been significant scholarly critique of the draconian crime-prevention measures passed during the 1980s and '90s²⁶⁷ and the BRA in particular.²⁶⁸ The references to drug trafficking as

forth no statutory presumptions of dangerousness. 605 F.2d 85, 95 (3d Cir. 1979). Although the defendants had been convicted of federal racketeering, which involved no physical harm to any person, the court held that "a defendant's propensity to commit crime generally, even if the resulting harm would be not solely physical, may constitute a sufficient risk of danger to come within the contemplation of the Act." *Id.* The drafters of the 1984 BRA cited to *Provenzano* to justify the idea that "danger to the community" can be extended to nonphysical harms. S. REP. NO. 225, at 12 (1983).

266. See *supra* notes 51–62 and accompanying text; *supra* note 214.

267. See, e.g., DAVID GARLAND, *THE CULTURE OF CONTROL* 3, 8–20 (2001) (describing twelve indices of change in the U.S. and British criminal justice systems from 1970 to 2000 and stating, "The last three decades have seen an accelerating movement away from the assumptions that shaped crime control and criminal justice for most of the twentieth century"); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 3–4 (2007) ("Americans have built a new civil and political order structured around the problem of violent crime. . . . [M]any Americans have come to tolerate [organized barbarism] as a necessary response to unacceptable risks of violence in everyday life."); STUNTZ, *supra* note 219, at 5 ("The criminal justice system has run off the rails. . . . [N]o stable regulating mechanism governs the frequency or harshness of criminal punishment, which has swung wildly from excessive lenity to even more excessive severity."); Kennedy, *supra* note 4, at 833 ("We have developed a draconian system of punishment for dealing with the monsters that we have imagined being everywhere, a system that swallows up hordes of lesser offenders."); Simon, *supra* note 4, at 221 (considering different theories behind the "severity revolution").

268. See, e.g., Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 749–51 (2011) (arguing that the BRA violates the due process concept of the presumption of innocence); Wiseman, *supra* note 258, at 155–56 (arguing that the BRA's allowance for judges to consider "'character, physical and mental condition, family ties, employment, financial

a proxy for dangerousness, thus meriting long prison sentences, is part of the severity revolution, the context in which the “war on drugs” took place.²⁶⁹ Political leaders sought to link drug crimes to violence in order to win support for the war on drugs.²⁷⁰ The severity revolution, however, has failed.²⁷¹ Many believe that we lost the war on drugs.²⁷² Thus it is untenable to cling to such proxies for dangerousness, especially when refugee protection is at issue. For this reason, this Article does not argue that PSC decisions should perfectly track the BRA dangerousness presumption categories. Rather, the meaning of “dangerousness” in PSC determinations should be interpreted more narrowly than the those in federal bail law, since a person’s life is at stake, and a PSC finding means that a noncitizen may not even present the facts of persecution to an immigration judge.²⁷³ When interpreting the Refugee Convention, the trend should be heading in the *opposite* direction from the criminal justice

resources, length of residence in the community, community ties, past conduct, [and] history relating to drug or alcohol abuse,” along with their “history and characteristics” when deciding whether to grant a bail violates the anti-discrimination principles of the Eighth Amendment (quoting 18 U.S.C. § 3142(g)); see also Laurence H. Tribe, *An Ounce of Detention: Preventative Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 376–78 (1970) (critiquing preventative detention and the precursor to the BRA of 1984, the District of Columbia Court Reform and Criminal Procedures Act of 1970, as the first time a bail judge could consider dangerousness because historically, bail law had only allowed judges to consider flight risk). *But see* Albert Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 548–50 (1986) (disputing the historical record that pretrial detention was only based on flight risk and never on dangerousness).

269. See Simon, *supra* note 4, at 227.

270. See Ristroph, *supra* note 2, at 614–15.

271. See, e.g., Kennedy, *supra* note 4, at 907 (“We are imprisoning legions of people who do not deserve or need to be imprisoned and keeping others incarcerated for far longer than we should.”); see also STUNTZ, *supra* note 219, at 294–97 (discussing changes that must be made in the law and practice of criminal sentencing, starting with its severity, because “America’s inmate population is infamously massive”).

272. See, e.g., Nekima Levy-Pounds, *Going up in Smoke: The Impacts of the Drug War on Young Black Men*, 6 ALB. GOV’T L. REV. 563, 564 (2013) (describing the “devastating impacts” and “unintended consequences” that have resulted from the war on drugs); Edward McGlynn Gaffney, Jr., *On Ending the War on Drugs*, 31 VAL. U. L. REV. xi, xvii (1997); David Schultz, *Rethinking Drug Criminalization Policies*, 25 TEX. TECH. L. REV. 151, 156–57 (1993) (“[T]here is no solid evidence that drug interdiction and enforcement strategies decreased production of drugs or decreased either the supply or demand for drugs in the United States.”); see also Kenworthy Bilz & John M. Darley, *What’s Wrong with Harmless Theories of Punishment*, 79 CHI.-KENT L. REV. 1215, 1244–45 (2004) (discussing harms to black communities stemming from the longer sentences for crack cocaine than for powder cocaine); Ristroph, *supra* note 2, at 615 (discussing how the U.S. Sentencing Commission’s “Drugs Violence Task Force,” created in the 1990s, demonstrated weak empirical support of a link between drugs and violence and that “some evidence suggested that these policies [of long prison sentences for drug offenders] may increase violence”).

273. See Rodríguez-Coto, 19 I. & N. Dec. 208, 209 (B.I.A. 1985).

system's severity revolution. Withholding claims should be focused on the individualized person and the risk she presents to the U.S. community instead of group-based assessments of dangerousness. The "tough on crime" mentality of the severity revolution²⁷⁴ should not stand in the way of U.S. treaty obligations to protect refugees.

One can argue that the lessons learned from the war on drugs do not apply in the PSC context. The war on drugs failed, many say, because it caused more harm than it prevented—namely, the harm to black communities because of the long sentences doled out primarily to young black men for drug-related offenses.²⁷⁵ Long sentences are not at issue in the PSC context. However, the harms are similar. Here, the communities from which immigrants are deported suffer in the loss of sister, daughter, or mother; in fact, the community suffers even more because deportation is *permanent*.²⁷⁶ Also, communities suffer doubly from the deportation of a refugee because they potentially lose the person forever if she is killed upon deportation, as she fears. At a minimum, communities here suffer because they live with the anxiety that their sister, daughter, or mother is going to be persecuted in the country of deportation. Moreover, the goal of the PSC bar—protecting the U.S. community²⁷⁷—arguably is not served by deporting a drug trafficker. Unlike the noncitizen who may commit future violent crimes, someone who is likely to commit drug trafficking in the future still could engage in such activity from abroad, thus equally harming the U.S. community. As Attorney General Ashcroft noted, "international terrorists increasingly employ drug trafficking as one of their primary sources of funding."²⁷⁸ Of course the low-level offenders (those who sell small amounts of drugs to finance their own habits) may be less inclined to engage in international drug trafficking, but some have questioned whether these offenders even should be included when we discuss the dangers presented by drug traffickers.²⁷⁹

274. See Kennedy, *supra* note 4, at 855.

275. See Bilz & Darley, *supra* note 272, at 1244–45; Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 173–76 (1999) (discussing the competing harm arguments that proponents and opponents of the war on drugs have used); Levy-Pounds, *supra* note 272, at 564–65.

276. See 8 U.S.C. § 1182(a)(9)(A)(i) (2012) (barring from admission any noncitizen who has previously been removed if convicted of an aggravated felony); *id.* § 1101(a)(43)(B) (categorizing drug trafficking as an aggravated felony); see also *id.* § 1182(a)(2)(A)(i)(II) (barring from admission any person convicted of a controlled substance offense); *id.* § 1182(a)(2)(C) (barring from admission any person who the consular officer knows or has "reason to believe" is a drug trafficker); *id.* § 1182(h) (permitting a waiver of inadmissibility only for simple possession of thirty grams or less of marijuana for one's own use).

277. See N-A-M-, 24 I. & N. Dec. 336, 339–41 (B.I.A. 2007).

278. Y-L-, 23 I. & N. Dec. 270, 276 (B.I.A. 2002).

279. See Thomas E. Scott, *Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis*, 27 AM. CRIM. L. REV. 1, 32 (1989) (questioning harsh punishment for

This proposal also presents a commonsense solution that is faithful to the plain meaning of the statute; thus it would likely pass any reasonableness inquiry by a reviewing court.²⁸⁰ The plain meaning of “particularly serious” reveals the narrowness of this limited category of crimes. Congress chose to include not one but two modifiers of “crime” in the withholding statute. “Particularly” means “in a special or unusual degree, to an extent greater than in other cases.”²⁸¹ “Serious” means “excessive or impressive in quality, quantity, extent, or degree.”²⁸² Also, “a ‘particularly serious crime’ must be more serious than a serious non-political crime, itself already a limited category.”²⁸³ That an offense is serious enough to be punishable in the criminal code does not mean it is serious enough to be labeled a PSC. Rather, the adjective and adverb should mean something.

Instead of giving common sense meaning to the modifiers of “crime,” the Board and Attorney General have decided crimes are PSCs because there is harm to a victim.²⁸⁴ Yet, in theory, for every crime, there is harm to a victim; otherwise it would not be punishable as a crime.²⁸⁵ For today’s PSC analysis, it does not matter that the harm is attenuated for the crime to trigger a PSC finding. Take, for example, drug trafficking.²⁸⁶ According to Attorney General Ashcroft, society is harmed because illegal drugs are sold, which causes people to die of overdoses or become

peripheral actors in the drug trade like drug mules and street salesmen, which the author, a U.S. district court judge, describes as “lower echelon offenders”).

280. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (holding that if Congress is ambiguous in a statutory term, the court will defer to the agency’s interpretation so long as it is reasonable); see also *Ahmetovic v. INS*, 62 F.3d 48, 53 (2d Cir. 1995) (finding that PSC is an ambiguous term for the purposes of the *Chevron* analysis).

281. *Leon v. Kirkland*, 403 F. App’x 268, 270 (9th Cir. 2010).

282. *Serious*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/serious> (last visited Apr. 3, 2017).

283. *Alphonsus v. Holder*, 705 F.3d 1031, 1049 (9th Cir. 2013).

284. See *G-G-S-*, 26 I. & N. Dec. 339, 343 (B.I.A. 2014) (“The presence or absence of harm to the victim is also a pertinent factor in evaluating whether a crime was particularly serious.”).

285. See, e.g., *Bilz & Darley*, *supra* note 272, at 1229 (“Crime inflicts harms on victims. Punishments are designed to ‘answer’ crimes by inflicting counter-harms on the offender. . . . Officially declaring a behavior a ‘crime’ amounts to recognition that the behavior causes harm.”); *Harcourt*, *supra* note 275, at 110, 192–93 (arguing that the harm principle, which justifies punishment only because there is a resulting harm, has proliferated to justify punishing so many activities—“activities that have traditionally been associated with moral offense”—that the original harm principle itself, which “was never equipped to determine the relative importance of harms,” is no longer useful); *id.* at 120–21 (introducing the harm principle by stating “[t]hat the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others” (quoting JOHN STUART MILL, *ON LIBERTY* 9 (Elizabeth Rapaport ed., 1978) (1859))).

286. See *Y-L-*, 23 I. & N. Dec. 270, 275 (A.G. 2002).

disabled by drug addiction.²⁸⁷ Those who are disabled by drug addiction harm society further by robbing people or property to feed their addiction.²⁸⁸ Society is further harmed because “a considerable amount of money is drained from the economy of the United States annually because of the unlawful trafficking in drugs.”²⁸⁹ Also, “[s]ubstantial violence is present at all levels of the distribution chain.”²⁹⁰ It is confounding that a crime with such an inchoate, indirect set of harms could be a PSC. If, for example, a noncitizen convicted of drug trafficking also robbed someone at gunpoint to support a drug habit, wouldn’t this lead to a separate conviction for armed robbery, which the Board has held was a PSC?²⁹¹ Compare this inchoate set of harms to the Board’s decision in 1999 that alien smuggling was not a PSC.²⁹² Although there was significant potential for bodily harm—the respondent hid a woman in a compartment built underneath the floor of a van—the “respondent did not, in fact, cause [the alien] harm.”²⁹³ The evolution of how the Board has defined a PSC, with respect to any harm that may have been caused (or could be caused), demonstrates how much the definition of PSC has been stretched.

Proposing a commonsense solution—one that focuses on violent conduct and a substantial amount of time spent in prison as a result—finds backing in Supreme Court cases interpreting another crimmigration term of art, “aggravated felony.” Here, we see the Court appealing to notions of common sense in determining what fits in the aggravated felony category. For example, the Board held in 1999 that DUI offenses were crimes of violence, which would be an aggravated felony if the sentence imposed was at least one year.²⁹⁴ The Supreme Court, in a unanimous decision in 2004, decided, evoking common sense, that a DUI statute punishing negligence causing serious bodily injury was not a

287. *Id.*

288. *Id.*

289. *Id.* (quoting U-M-, 20 I. & N. Dec. 327, 330 (B.I.A. 1991)).

290. *Id.* at 276.

291. *See, e.g.*, L-S-J-, 21 I. & N. Dec. 973, 974–75 (B.I.A. 1997).

292. *See* L-S-, 22 I. & N. Dec. 645, 655 (B.I.A. 1999).

293. *Id.* at 654–56.

294. *See* Puente, 22 I. & N. Dec. 1006, 1006 (B.I.A. 1999); Magallanes, 22 I. & N. Dec. 1, 3 (B.I.A. 1998). Several circuit courts disagreed with the Board. *See, e.g.*, *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1145 (9th Cir. 2001) (holding that a DUI is not a crime of violence and thus is not an aggravated felony); *Dalton v. Ashcroft*, 257 F.3d 200, 207–08 (2d Cir. 2001); *Bazan-Reyes v. INS*, 256 F.3d 600, 611 (7th Cir. 2001); *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir. 2001). This prompted the Board to clarify that it only would find DUI offenses to be crimes of violence in the circuits that had not decided the issue. *See* Ramos, 23 I. & N. Dec. 336, 339 (B.I.A. 2002).

crime of violence aggravated felony.²⁹⁵ Similarly in 2002, the Board held that felony possession of a controlled substance was a “drug trafficking” aggravated felony.²⁹⁶ When the issue reached the Supreme Court, the Court reversed the Board, finding that the Board had failed to use common sense when interpreting what was a drug trafficking aggravated felony.²⁹⁷ The Court had a subsequent opportunity to opine on the interaction between drug laws and deportability²⁹⁸ and again found that the Board’s position lacked common sense.²⁹⁹ If “aggravated felony” can be defined by reference to common sense, why not do the same with “particularly serious crime?”

Why draw the line at violent offenses? Is this proposal just another example of labeling the violent offender, who is disproportionately a person of color,³⁰⁰ a danger whereas the white fraudster is not?³⁰¹ There are good reasons to draw the line at violent offenses in the PSC analysis.

295. See *Leocal v. Ashcroft*, 543 U.S. 1, 11–12 (2004); see also *id.* at 11 (“[W]e cannot forget that we ultimately are determining the meaning of the term ‘crime of violence.’ The ordinary meaning of this term, combined with § 16’s emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses.”).

296. *Yanez-Garcia*, 23 I. & N. Dec. 390, 397 (B.I.A. 2002). The Board reversed its prior decisions holding that, for uniformity purposes, offenses would only be aggravated felonies if the federal Controlled Substances Act punished them as felonies; simple possession of most offenses would not be punished as a felony in the federal system. See *K-V-D-*, 22 I. & N. Dec. 1163, 1178 (B.I.A. 1999); *Davis*, 20 I. & N. Dec. 536, 539 (B.I.A. 1992); *Barrett*, 20 I. & N. Dec. 171, 173 (B.I.A. 1990).

297. See *Lopez v. Gonzales*, 549 U.S. 47, 54 (2006) (“Reading [the statute] the Government’s way, then, would often turn simple possession into trafficking, just what the English language tells us not to expect, and that result makes us very wary of the Government’s position.”).

298. See *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 582 (2010) (holding that a second simple possession offense was not an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(B) because it was not punished as a recidivist offense in the state).

299. See *id.* at 575 (citing *Lopez*, 549 U.S. at 54) (“Because the English language tells us that most aggravated felonies are punishable by sentences far longer than 10 days, and that mere possession of one tablet of Xanax does not constitute ‘trafficking,’ *Lopez* instructs us to be doubly wary of the Government’s position in this case.”).

300. See THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 5 (2008) (discussing Federal Bureau of Investigation’s Unified Crime Report, which reflects that 39% of violent crime arrests are of African Americans).

301. It is questionable that only white people commit fraud and financial crimes. See, e.g., *Singh v. Att’y Gen.*, 677 F.3d 503, 506 (3d Cir. 2012) (demonstrating an example of a Jamaican national deportable for fraud offense); *Pierre v. Holder*, 588 F.3d 767, 770 (2d Cir. 2009) (providing an example of a Haitian national deportable for fraud offense); *Conteh v. Gonzales*, 461 F.3d 45, 50 (1st Cir. 2006) (providing an example of a Sierra Leonean national deportable for fraud offense). Of course, this assumes that nationals of Jamaica, Haiti, and Sierra Leone are not white.

First, the inviolability of the body is a central concept of criminal law.³⁰² As Alice Ristroph has written, “[t]he possibility of violent crime is a central source of legitimation for the criminal justice system. We humans are physically vulnerable creatures, and we expect law to provide a measure of protection.”³⁰³ To support her argument, Ristroph cites legal philosopher HLA Hart, who characterized efforts to protect vulnerable human bodies from physical injury as the “minimum content” of a legal system,³⁰⁴ and political philosopher Thomas Hobbes, who identified fear of violent death as so central to human psychology that it is the driving force behind the creation of political societies.³⁰⁵ Professor Henry Shue also has argued that the right to physical security of the person is a “basic right,” which prioritizes it above all other rights.³⁰⁶ Because the PSC bar stems from a desire to protect the public from dangerous individuals, which is a central goal of criminal law, the inviolability of the body at the heart of criminal law should be the same in PSC law.³⁰⁷ Second, although neuroscience suggests that people such as fraud victims who suffer emotional injuries can feel what is tantamount to physical pain,³⁰⁸ violent attacks on the human body causes both physical *and* emotional pain, because a person whose physical body is violated then feels great emotional pain that comes from a lack of security in one’s surroundings.³⁰⁹ Third, deporting the violent offender actually protects

302. See Ristroph, *supra* note 2, at 612 (“The primary reason to have criminal laws, police forces, and prisons is to address the problem of violent crime. The system’s central purpose, in the public understanding, is not to enforce morality or even to deter purely self-regarding harmful behavior such as drug use. The system exists to protect public safety.”).

303. *Id.* at 611.

304. *Id.* (citing H.L.A. HART, *THE CONCEPT OF LAW* 189 (1961)).

305. *Id.* (citing HOBBS, *supra* note 2, at 138).

306. See HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCES, AND U.S. FOREIGN POLICY* 18–20 (2d ed. 1996).

307. See *id.*; *supra* Section I.B.

308. See Betsy J. Grey, *The Future of Emotional Harm*, 83 *FORDHAM L. REV.* 2605, 2623–24 (2015) (“Both scientists and scholars have moved away from explanations that treat ‘mental’ and ‘physical’ as separate categories. Neuroscientists have begun to develop new models of looking at the interaction between mind and body.”); Francis X. Shen, *Sentencing Enhancement and the Crime Victim’s Brain*, 46 *LOY. U. CHI. L.J.* 405, 405 (2014) (“There is no successful justification for treating mental injuries as categorically distinct from other physical injuries. There is, however, good reason for law to treat mental injuries as a unique type of physical injury.”); Shaun Cassin, Comment, *Eggshell Minds and Invisible Injuries: Can Neuroscience Challenge Longstanding Treatment of Tort Injuries?*, 50 *HOUS. L. REV.* 929, 954 (2013) (“Neuroscience is making it harder to support a legal distinction between physical and emotional injuries.”).

309. See, e.g., Shen, *supra* note 308, at 432 (describing psychological injury to a rape victim, who, “for over two years after the crimes occurred . . . has needed continuous psychological counseling and anti-depressant medication to help her overcome her constant fear of being

the U.S. community from a dangerous individual, since that person will physically be unable to commit a violent crime against a person from abroad. That offender can, however, continue to commit drug trafficking, financial crimes, or possession of child pornography from afar, so the U.S. community is not as protected when we deport this type of offender.³¹⁰

Why implement a significant sentence requirement? This is one way of reversing the trend of mistrusting criminal judges that is seen in both PSC determinations and immigration law in general. That a criminal court judge actually required the convicted person to spend some time in prison is highly instructive of the person's dangerousness. If a criminal judge decided this person should go free, the immigration system should trust that judge, if for no other reason that it is inefficient for the immigration judge to repeat a finding made by a criminal court judge.³¹¹ Of course, in many cases, criminal judges' hands are tied by mandatory minimum sentences. However, the Supreme Court and Congress have chipped away at certain aspects of the severity revolution's harsh sentencing policies.³¹² As the critics of mandatory minimums gain more traction,³¹³ PSC determinations will feel the impact. It is also true that the sentence an offender served is often less of a product of the criminal judge, and more of a product of plea negotiations with the prosecutor.³¹⁴ In the plea bargain cases, this Article's proposal then asks the Board (who serves under the Attorney General) or Attorney General to trust a fellow

attacked and to help her function on a daily basis” (quoting *State v. Arnett*, 49 S.W.3d 250, 261 (Tenn. 2001))).

310. See *supra* notes 277–79 and accompanying text.

311. Cf. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1690 (2013) (defending the categorical approach, the elements-based mechanism for deciding whether a criminal conviction renders a noncitizen deportable, by listing its practical purposes, one of which is that “[i]t promotes judicial and administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact”).

312. See, e.g., Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 and 28 U.S.C.) (eliminating sentencing disparity between crack and powder cocaine); *United States v. Booker*, 543 U.S. 220, 233–37 (2005) (holding that that the Federal Sentencing Guidelines, when instructing judges to make factual findings to calculate increases in applicable sentencing ranges, violates the Sixth Amendment right to trial by jury).

313. See, e.g., STUNTZ, *supra* note 219, at 295–96 (describing the effect of *Booker* as making the sentencing guidelines “ceilings rather than rules,” which restored discretion to federal sentencing, and arguing that this “state of affairs offers a useful model for a kind of sentencing law that might push prison populations down rather than up”); David Yellen, *What Juvenile Court Abolitionists Can Learn from the Failures of Sentencing Reforms*, 1996 WIS. L. REV. 577, 583–84 (“[T]here is near unanimity among commentators, judges, and even the United States Sentencing Commission that mandatory minimums are failures, imposing unduly harsh sentences in many cases and inviting evasion and manipulation.”).

314. See *García Hernández*, *supra* note 6, at 1497, 1499–1500.

prosecutor to not offer such a lenient sentence to someone who is a danger to the community.

Another critique of relying on criminal court judges' sentences is that criminal court judges suffer from implicit bias, judging young black males to be more dangerous and requiring long prison sentences to protect society.³¹⁵ A proposal that uses these criminal court sentences as a basis for deciding who merits refugee protection allows what many deem a racist system of criminal justice to inject racism into refugee determinations.³¹⁶ However, criminal justice actors are far ahead of their immigration colleagues in the training they receive on implicit bias.³¹⁷ Since criminal judges have received more training than immigration

315. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009) (reporting results of a study of trial judges, which demonstrated that judges hold implicit racial biases, these biases can influence their judgment, but that judges can, in some instances, compensate for their implicit biases); *id.* at 1202 (“Each of these judgments [concerning bail, pretrial motions, evidentiary issues, witness credibility, and so forth] could be influenced by implicit biases, so the cumulative effect on bottom-line statistics like incarceration rates and sentence length is much larger than one might imagine.”); see also Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1314 (2002) (discussing the stereotypical association between African Americans and violence).

316. Professor César Cuauhtémoc García Hernández discusses how, in the post-Civil Rights Act era, deeply ingrained racial biases that dominated U.S. history were repackaged in the supposedly race-neutral criminal justice system. García Hernández, *supra* note 6, at 1493–97. He argues that the immigration system followed this pattern; instead of keeping out entire racial groups as had happened in earlier years, decisions about who to admit or deport turned on “facially neutral” criminal histories. *Id.* at 1503, 1509; see also Rebecca Sharpless, *Clear and Simple Deportation Rules for Crimes: Why We Need Them and Why It’s Hard to Get Them*, 92 DENV. U. L. REV. 933, 935–36 n.8 (2015) (citing articles that discuss racial and other discrimination in sentencing).

317. “The National Campaign to Ensure the Racial and Ethnic Fairness of America’s State Courts was launched in 2006 to mobilize the significant expertise, experience, and commitment of state court judges and court officers to ensure both the perception and reality of racial and ethnic fairness in the nation’s state courts.” PAMELA M. CASEY ET AL., NAT’L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS i (2012), http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx. As part of this campaign, state court judges were specifically trained about implicit bias in decision-making. See *id.* In contrast, The Ethics and Professionalism Guide for Immigration Judges states that judges should not manifest bias in a proceeding. See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, ETHICS AND PROFESSIONALISM GUIDE FOR IMMIGRATION JUDGES IX 3 (2011), <http://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf>. However, there does not appear to be any training for immigration judges to recognize and avoid implicit bias in their decision-making even though, as both Immigration Judge Dana Leigh Marks and immigration scholar Fatma Marouf have noted, the conditions are ripe for implicit bias in their decisions. See Dana Leigh Marks, *Who, Me? Am I Guilty of Implicit Bias?*, 54 A.B.A. JUDGES’ J. 20, 21 (2015); Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 440 (2011).

judges, they are better able to recognize their biases and correct for them in discretionary decisions such as sentencing.³¹⁸

What is a “significant” sentence? A bright-line rule that this Article proposes is that the noncitizen actually have served five years in prison.³¹⁹ This five-year cutoff is contained in the current PSC statutory language, as Congress intended for aggravated felonies with five-year sentences to be *per se* PSCs.³²⁰ Additionally, this cutoff has precedent in immigration law, as it tracks the old law of the 212(c) waiver.³²¹ The 212(c) waiver, which no longer exists in immigration law, was previously available to long-term permanent residents who could show that their equities outweighed the negative factors in their life such as a criminal record.³²² It was only available, however, to those who had served less than five years for an aggravated felony conviction.³²³ This provides an example of deferring to criminal sentencing judges that hardly exists in immigration law; it would be a good idea to bring back this piece of 212(c) law into PSC determinations.

What, then, of others’ proposals to correct the PSC test? Others have argued for a balancing test; this Article will not recreate that debate.³²⁴

318. See Rachlinski et al., *supra* note 315, at 1197.

319. Professor Rebecca Sharpless has proposed a similar five-year sentence cutoff in her article arguing that deportation proceedings should not be initiated for any noncitizen convicted of a crime unless that person has received a five-year sentence. Sharpless, *supra* note 316, at 956. She argues that such a bright-line cutoff injects transparency and notice into the deportation system, which allows more public confidence in the system. *Id.* at 952–53. Additionally, such rules offer cost savings to the overburdened immigration court system, since the decisions will be easier to administer. *Id.* at 953.

320. See *Blandino-Medina v. Holder*, 712 F.3d 1338, 1344, 1345 (9th Cir. 2013) (interpreting INA to establish only one category of *per se* particularly serious crimes, aggravated felonies with five-year sentences, and the agency must conduct a case-by-case analysis for all other crimes).

321. See 8 U.S.C. § 1182(c) (1976). While the 212(c) waiver originally was available to any long-term lawful permanent resident who had an aggravated felony conviction, the Immigration Act of 1990 barred 212(c) relief from residents who served more than five years for an aggravated felony. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

322. See *INS v. St. Cyr*, 533 U.S. 289, 295–97 (2001); *Marin*, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978).

323. See 8 U.S.C. § 1182(c) (1976).

324. See generally Delgado, *supra* note 8, at 18; cf. GOODWIN-GILL, *supra* note 14, at 106 (“In practice, the claim to be a refugee can rarely be ignored, for a balance must also be struck between the nature of the offence presumed to have been committed and the degree of persecution feared.”); 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 297–98 (1996); WEIS, *supra* note 36, at 342 (“The principle of proportionality has to be observed, that is, in the words of the UK representative at the Conference, whether the danger entailed to the refugee by expulsion or return outweighs the menace to public security that would arise if he were permitted to stay.”); Nadia Yakoob, *Political Offender or Serious Criminal? Challenging the Interpretation of ‘Serious, Nonpolitical Crimes’ in INS v. Aguirre-Aguirre*, 14 GEO. IMMIGR. L.J. 545, 564–65 (2000).

The Supreme Court, however, has disagreed with this approach, as has the Board.³²⁵ In *INS v. Aguirre-Aguirre*,³²⁶ the Court held that when interpreting the serious nonpolitical crime bar to withholding, there should be no balancing of the risk of persecution against the seriousness of the harm.³²⁷ Although that was not a PSC case, the Court upheld the Board's decision in *Rodriguez-Coto*³²⁸ that in deciding whether an offense is either a serious nonpolitical crime or a PSC, there should be no balancing of the risk of persecution against the seriousness of the crime.³²⁹ Proponents of the balancing test present strong moral arguments, although "even its strongest proponents do not claim that the balancing test is a mandatory requirement of law"; rather, the balancing test is less controversial if seen as a "humanitarian cross-check."³³⁰ In fact, there may be some unofficial humanitarian cross-checking going on behind the scenes of an immigration judge's decision when deciding PSC.³³¹

Some also have argued for a separate determination of dangerousness,³³² calling on the Board to overrule its decision in

325. See *Rodriguez-Coto*, 19 I. & N. Dec. 208, 209 (B.I.A. 1985); cf. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 426 (1999) (upholding the Board's decision in *Rodriguez-Coto* that for a serious nonpolitical crime determination it is not necessary to weigh the risk of persecution).

326. 526 U.S. 415 (1999).

327. *Id.* at 426.

328. 19 I. & N. Dec. 208 (B.I.A. 1985).

329. See *id.* at 209.

330. Michael Kingsley Nyinah, *Exclusion Under Article 1F: Some Reflections on Context, Principles and Practice*, 12 INT'L J. REFUGEE L. 295, 307 (2000); see also *id.* (raising questions as to whether there can truly be "degrees of persecution" and why two refugees who committed the same offense can be treated differently, for the purposes of the serious nonpolitical crime exception, if one suffered more persecution than the other).

331. In an example from the author's practice, one client presented significant evidence of the likelihood of his persecution, yet had several assault with a dangerous weapon offenses, which under the Board's earliest case law would likely be a PSC. See, e.g., B-, 20 I. & N. Dec. 427, 430-31 (B.I.A. 1991) (holding that aggravated battery involving a firearm was a PSC). However, neither the Department of Homeland Security trial attorney nor the immigration judge raised the issue, even though the PSC issue was argued and briefed for the case. The client was granted withholding of removal. See L-S-, 22 I. & N. Dec. 645, 653-54 (B.I.A. 1999) ("A determination that a crime is 'particularly serious' cannot . . . be made in a vacuum. It must take into account that an alien convicted of such a crime, and therefore excluded from applying for relief under section 241(b)(3), could be an alien who would otherwise meet the burden of proof for this relief and thus would be subject to persecution when removed from the United States.").

332. The separate determination of dangerousness finds support from international refugee law experts and other countries' interpretations of the Refugee Convention. See, e.g., JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 344 (2005) ("Beyond [a PSC determination], there must also be a determination that the offender 'constitutes a danger to the community.'"); Lauterpacht & Bethlehem, *supra* note 43, at 140 ("An additional assessment is called for which will hinge on an appreciation of issues of fact such as the nature and circumstances of the particularly serious crime for which the individual was convicted, when the

Carballe.³³³ An early critic of this separate determination of dangerousness, Judge Robert Vance of the Eleventh Circuit, discussed the administrative difficulties of such a separate determination of dangerousness, stating that it “would require a prediction as to the alien’s potential for recidivism and would lead to extensive, drawn-out hearings complete with psychological evaluations and expert testimony.”³³⁴ In other areas of law where predictions of dangerousness must be made,³³⁵ psychiatrists and other mental health professionals have argued how unpredictable these are, making the point that “the prediction of dangerous behavior is an ‘empirical quicksand’ and that psychology and psychiatry should get clear of it as expeditiously as possible.”³³⁶ The Supreme Court, however, has held that such psychological predictions about dangerousness can be made in death penalty cases (although U.S. Supreme Court Justice Harry Blackmun strongly disagreed).³³⁷ The

crime in question was committed, evidence of recidivism or likely recidivism, etc.”); *see also* EN (Serbia) v. Secretary of the Home Department (2010) QB 633 (UK) (ruling by the United Kingdom Queen’s Bench stating that “Article 33(2) of the Refugee Convention imposed on a state wishing [to expel a refugee] both the requirement that the person had been convicted by final judgment of a [PSC] and the requirement that he constitute a danger to the community”); *Pushpanathan v. Minister of Citizenship and Immigration*, [1988] 1 S.C.R. 982, ¶ 12 (Can.) (Canadian Supreme Court ruling that, when interpreting the Refugee Convention’s PSC determination, the government must “make the added determination that the person poses a danger to the safety of the public or to the security of the country . . . to justify *refoulement*.”); *In re Tamayo & Department of Immigration* (1994) 37 ALD 786, ¶ 20 (Austl.) (ruling by the Australian Administrative Appeals Tribunal stating that the reference in Article 33(2) of the convention to “a refugee who ‘constitutes a danger to the community of that (refuge) country’ is similarly concerned with the risk of recidivism,” so a refugee’s personal circumstances must be considered insofar as they affect the possibility of recidivism and the danger to the community).

333. *See, e.g.*, Delgado, *supra* note 8, at 12–14; McGarry, *supra* note 8.

334. *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1222–23 (11th Cir. 1985) (Vance, J., concurring).

335. *See* Elyce Zenoff, *Controlling the Dangers of Dangerousness: The ABA Standards and Beyond*, 53 GEO. WASH. L. REV. 562, 562–63 n.2 (1985) (citing S.A. Shah, *Dangerousness: Conceptual Prediction and Public Policy Issues*, in *VIOLENCE AND THE VIOLENT INDIVIDUAL* 151, 153–54 (J. Hays, T. Roberts & K. Solway eds., 1981)) (listing examples of dangerous determinations in the law).

336. DANGEROUSNESS: PROBABILITY AND PREDICTION, PSYCHIATRY AND PUBLIC POLICY 2 (Christopher D. Webster et al. eds., 1985); *see also* Jack Williams, *Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention*, 79 MINN. L. REV. 325, 334 (1994) (“The consensus among experts is that clinical predictions of dangerousness, like court decisions, are inferior to statistical predictions.”).

337. *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983) (“The suggestion that no psychiatrist’s testimony may be presented with respect to a defendant’s future dangerousness is somewhat like asking us to disinvent the wheel.”). *But see id.* at 928 (Blackmun, J., dissenting) (“Psychiatric predictions of future dangerousness are not accurate; wrong two times out of three, their probative value, and therefore any possible contribution they might make to the ascertainment of truth, is virtually nonexistent.”).

separate determination of dangerousness can be made in immigration law—in fact it is made on a daily basis in bond hearings, as the judge must consider first and foremost whether the noncitizen is a danger to people or property.³³⁸

Given the steep uphill battle of overruling the Supreme Court, Board, and every circuit court, this Article posits that we do not need to go so far. Even without a balancing test or separate determination of dangerousness, the problems highlighted in this Article can be corrected if PSC is narrowly limited to violent offenses where the offender served significant prison time. The solution proposed in this Article would allow the immigration judge to focus exclusively on dangerousness, as opposed to requiring a balancing test. The solution also would allow the immigration judge to focus on the nature and circumstances of the crime in question as opposed to trying to predict future dangerousness. However, the solution would largely place the decision of who is dangerous with two important players: the criminal judge and criminal law. The proposal relies on criminal judges, by trusting them to sort out the dangerous criminals for the most prison time, and criminal law, by using violence—“the old-fashioned, physically harmful kind”—as a proxy for dangerousness.³³⁹

CONCLUSION

“[T]he line must be drawn so that ‘particularly serious crimes’ are not a major proportion of crimes generally.”³⁴⁰ The Ninth Circuit’s words of wisdom provide a refreshing change from the PSC law trends of the past decade and a half, which have led many refugees to be deported without any consideration of their fear of persecution. This Article has sought to explain why PSC has broadened beyond recognition by using the term’s expansion as an example of the mistrust of criminal judges in immigration law, a trend that mirrors aspects of criminal law’s severity revolution. It is time for the Board or Attorney General to reverse the trends in PSC law that have allowed nonviolent crimes to be PSCs. This will allow immigration judges to see refugees for what they are: individuals in need of protection, not dangerous criminals in need of deportation.

338. See *Urena*, 25 I. & N. Dec. 140, 141 (B.I.A. 2009) (citing 8 C.F.R. 1236.1(c)(8) (2009), which governs determinations of bond made by ICE, for the suggestion that “danger to the community” means danger to property or persons); *Adeniji*, 22 I. & N. Dec. 1102, 1113 (B.I.A. 1999).

339. Ristroph, *supra* note 2, at 618 (“If the criminal law does best when violence—the old-fashioned, physically harmful kind—is involved, then perhaps the law needs a renewed focus on ‘true’ violence.”).

340. *Alphonsus v. Holder*, 705 F.3d 1031, 1048 (9th Cir. 2013).