

## PRAGMATICS AND PROBLEMS

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Born of an international commitment to avoid sending migrants to countries where they face persecution on a small set of protected bases,<sup>1</sup> asylum law is one aspect of U.S. immigration law that purports to serve humanitarian purposes.<sup>2</sup> Its humanitarianism is thwarted, however, when migrants who otherwise qualify for asylum or withholding of removal<sup>3</sup> are deported because they have been convicted of a “particularly serious crime” (PSC), a sweeping term of art which bars an asylum claim.<sup>4</sup> For some migrants, deportation results in death.<sup>5</sup> As such, to serve asylum’s humanitarian aims, the PSC bar should be reserved for “extreme cases.”<sup>6</sup> However, as Professor Mary Holper describes in her recent article, *Redefining “Particularly Serious Crimes” in Refugee Law*, as part of a ruthless trend in U.S. criminal justice and immigration policy some call “the severity revolution,”<sup>7</sup> the PSC bar has become overly expansive,<sup>8</sup> encompassing nonviolent offenses even where no incarceration results.<sup>8</sup>

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1. See Mary Holper, *Redefining “Particularly Serious Crimes” in Refugee Law*, 69 FLA. L. REV. 1093, 1099–1100 (2017).

2. Although generally humanitarian purposes animate asylum law, the narrow relief it provides is woefully inadequate to accommodate those migrating to avoid harm. See generally Laura Westra, Satvinder Juss & Tullio Scovazzi, *Introduction to the Question of Asylum Seekers: ‘Se Non Ora, Quando?’*, in TOWARDS A REFUGEE ORIENTED RIGHT OF ASYLUM 1, 3–7 (Laura Westra, Satvinder Juss & Tullio Scovazzi eds., 2015).

3. Asylum is a discretionary immigration benefit for migrants who can show a well-founded fear of persecution in their countries of origin on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b) (2012). If a migrant shows that her life or freedom “would be threatened” (a higher burden of proof) based on one of those five protected grounds, she must not be removed, unless a bar to withholding of removal applies. See § 1231(b)(3).

4. See § 1158(b)(2)(A)(ii), (B) (asylum PSC bar); § 1231(b)(3)(B)(ii) (withholding PSC bar).

5. See, e.g., Sarah Stillman, *When Deportation Is a Death Sentence*, NEW YORKER (Jan. 15, 2018), <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence> (telling the stories of several migrants who explained that they would be killed if deported, were deported, and were killed).

6. Holper, *supra* note 1, at 1102 (quoting UNITED NATIONS HIGH COMM’R FOR REFUGEES, HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, ¶ 154 (2011), <http://www.unhcr.org/3d58e13b4.html>).

7. See Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 83 (2005); Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 831–32 (2000).

8. See N-A-M-, 24 I. & N. Dec. 336, 343 (B.I.A. 2007) (“[W]e find no merit to the respondent’s argument that the offense is not a particularly serious crime because a sentence to a

Further, the approach immigration judges (IJs) use to determine whether an offense is a PSC produces inconsistent, unpredictable results,<sup>9</sup> raising serious concerns for migrant criminal defendants deciding whether to accept a plea deal. To correct the severity revolution's distorting effect on the PSC bar, Professor Holper proposes that the Board of Immigration Appeals (Board) or Attorney General (AG) adopt an approach whereby the PSC bar would only apply if a migrant was convicted of a violent offense against persons and incarcerated for five years.<sup>10</sup> Although unlikely to be adopted by the current AG, the proposal is a simple, commonsense tapering to the problem of an increasingly expanding PSC bar. The proposed reform does not, however, address some of the more pressing concerns involving the PSC bar, including those related to the rehabilitation of criminal offenders and the difficulties inherent in assessing dangerousness. Nor does it challenge the premise that U.S. citizens are more deserving than other human beings. Despite those shortcomings, Professor Holper offers a pragmatic reform that would begin to correct the severity revolution's distorting effects on the PSC bar and render the PSC analysis more predictable.

Professor Holper convincingly contextualizes the expansion of the PSC bar within the severity revolution. Just after the civil rights movement made explicit racism socially unacceptable, the severity revolution emerged: politicians used the "war on crime" and "war on drugs" to stoke fears of criminality; legislators created lengthy mandatory prison sentences; police enforced laws with a heavy hand, directing enforcement efforts at communities of color; and mass incarceration was born.<sup>11</sup> Congress also increased the number of criminal offenses that could result in deportation, criminalized conduct related to migration, and began creating what scholars today call "crimmigration."<sup>12</sup> As Professor

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term of imprisonment was not imposed."); Holper, *supra* note 1, at 1113–15.

9. Fatma Marouf, *A Particularly Serious Exception to the Categorical Approach*, 97 B.U. L. REV. 1427, 1453 (2017) (explaining that the current PSC analysis "leads to arbitrary, inconsistent, and unpredictable outcomes"); Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1181 (2016) ("The BIA and federal courts have failed to achieve uniformity or consistency in the methodology or meaning of the particularly serious crime bar.").

10. Holper, *supra* note 1, at 1093, 1143.

11. See MICHELE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 7–8 (2012); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457, 1494–97 (2013); Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703, 707–10, 729–30 (2010).

12. García Hernández, *supra* note 11, at 1468–69; Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137–38 (2009); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 629 (2003) ("With a changed perspective on immigration that unsympathetically viewed illegal aliens as lawbreakers, Congress marshaled in its 'war' on illegal immigration many of the

Holper explains, the Board and AG also expanded the PSC bar during this time. Doubling criminal judges, the Board de-emphasized the importance of a criminal sentence in evaluating a crime's seriousness and brought nonviolent offenses into the PSC fold.<sup>13</sup> In addition to the "mistrusting criminal judges effect" that Professor Holper identifies as contributing to the PSC bar's expansion,<sup>14</sup> Congress also augmented the bar by mistrusting IJs, creating an extensive list of aggravated felonies,<sup>15</sup> which automatically trigger the PSC bar,<sup>16</sup> and eliminating an IJ's discretion to limit the impact of an aggravated felony conviction.<sup>17</sup> In a political climate that deemed almost all crimes "serious," the number of crimes considered "particularly serious" became sufficiently large that today that phrase has become unmoored from its ordinary meaning.

To correct the severity revolution's distorting effect on the PSC bar, Professor Holper asks the Board or AG to define PSC to include only violent crimes against persons resulting in five years' incarceration. Her proposal has much to offer. First, it would better honor the humanitarian aims of asylum law by protecting more migrants who, under the current approach, face removal to a country where they will be persecuted. For these individuals, Professor Holper's recommendation offers the promise of life rather than death. Second, as Professor Holper explains, her proposal better reflects the plain language meaning of PSC than does the current approach.<sup>18</sup> With a focus on the "harm" associated with a crime, the PSC definition currently encompasses far more offenses than a plain reading might suggest are "serious" and "particularly" so,<sup>19</sup> bringing within its orbit such surprising offenses as resisting arrest<sup>20</sup> and tampering with evidence.<sup>21</sup> The Eleventh Circuit has criticized the harm approach

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same resources it was already deploying in its war on drugs.").

13. Holper, *supra* note 1, at 1117.

14. *Id.*

15. Since creating the aggravated felony ground of deportability in 1988, Congress has several times expanded the meaning of that term. *See* Holper, *supra* note 1, at 1125 n.7.

16. *See* 8 U.S.C. § 1158(b)(2)(B)(i) (for purposes of asylum, a migrant convicted of an aggravated felony, defined at 8 U.S.C. § 1101(a)(43), has been convicted of a particularly serious crime); § 1231(b)(3)(B) (for purposes of withholding of removal, a migrant convicted of an aggravated felony or felonies who was sentenced to an aggregate term of imprisonment of at least five years has been convicted of a particularly serious crime).

17. Before 1996, pursuant to former section 212(c) of the Immigration and Nationality Act, IJs could exercise discretion to cancel removal based on an aggravated felony conviction if a migrant's equities outweighed negative factors. *See* *INS v. St. Cyr*, 533 U.S. 289, 295–96 (2001). The Antiterrorism and Effective Death Penalty Act of 1996 eliminated that relief for migrants thereafter convicted of an aggravated felony. *Id.* at 297 n.7.

18. *See* Holper, *supra* note 1, at 1137–38.

19. *Id.* at 1137.

20. *See* *Alphonsus v. Holder*, 705 F.3d 1031, 1050 (9th Cir. 2013) (remanding for better explanation as to why the Board deemed resisting arrest a PSC).

21. *Denis v. U.S. Att'y Gen.*, 633 F.3d 201, 216 (3d Cir. 2011).

as overly inclusive.<sup>22</sup> After the Board found that prostitution was a PSC because of its general impact on the community, the Eleventh Circuit vacated the finding (without deciding whether prostitution can be a PSC), writing as follows:

To some extent, every petty crime, such as speeding, jaywalking, and loitering, has an impact on the community. As a result, the BIA's reasoning reflects no analytical framework by which it can rationally distinguish crimes that are "particularly serious" from those that are not.<sup>23</sup>

When the Board suggests that an offense such as prostitution or resisting arrest is "particularly serious," it loses credibility given the commonsense meaning of those words—it might even offend some victims and their loved ones who have experienced a particularly serious crime, like murder or rape. By offering a two-part definition requiring a five-year prison term and physical harm to a person, Professor Holper provides an analytical framework that gives meaning to the words "particularly" and "serious."

Third, the proposed rule would simplify the PSC analysis. The current approach to determining whether an offense is a PSC can involve a fact-intensive, case-by-case inquiry in which an IJ examines "all reliable information."<sup>24</sup> Unsurprisingly, this approach can be time-consuming and unpredictable.<sup>25</sup> Even former Attorney General John Ashcroft criticized

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22. Yuan v. U.S. Att'y Gen., 487 Fed. Appx. 511, 514 (11th Cir. 2012) (unpublished).

23. *Id.*

24. N-A-M-, 24 I. & N. Dec. 336, 338 (B.I.A. 2007). To determine whether a conviction constitutes a PSC, IJs first ask whether the offense is an aggravated felony (for asylum) or an aggravated felony where the migrant was sentenced to an aggregate term of imprisonment of at least five years (for withholding of removal). If so, the migrant has been convicted of a PSC. See *supra* note 16. If the offense does not fall within these Congressionally-determined PSC categories, the IJ will ask whether the offense is particularly serious based on "the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction." N-A-M-, 24 I. & N. Dec. at 342. She might focus solely on the nature of the conviction, finding the offense particularly serious "on [its] face." Matter of Frentescu, 18 I. & N. Dec. 244, 247 (B.I.A. 1982); see, e.g., N-A-M-, 24 I. & N. Dec. at 343 (finding that felony menacing was a PSC based solely on its elements); Garcia-Garrocho, 19 I. & N. Dec. 423, 426 (B.I.A. 1986) (finding that first degree burglary was a PSC on its face); see also Lapaix v. U.S. Att'y Gen., 605 F.3d 1138, 1143 (11th Cir.2010) (noting that an IJ may deem an offense particularly serious based on the elements of the offense alone); Hamama v. INS, 78 F.3d 233, 240 (6th Cir. 1996) (same); but see Blandino-Medina v. Holder, 712 F.3d 1338, 1346–47 (9th Cir. 2013) (explaining that Congress has created the only category of offenses that are particularly serious *per se* and the Board may not "create additional categories of facially particularly serious crimes"). Generally, however, the IJ will ask whether the elements of the offense "potentially bring the offense within the ambit of a particularly serious crime." N-A-M-, 24 I. & N. Dec. at 342. If so, she can examine all relevant facts, including those outside the record of conviction, to determine whether the offense was "particularly serious." *Id.*

25. See Marouf, *supra* note 9, at 1453; Koh, *supra* note 9, at 1181.

the Board's case-by-case approach as "haphazard" and one that produces "inconsistent" and "illogical" results.<sup>26</sup> Although this approach has survived void for vagueness challenges,<sup>27</sup> its unpredictability is especially concerning for migrant criminal defendants trying to determine whether to accept a plea deal: their Sixth Amendment right to counsel guarantees them advice on the immigration consequences of a potential conviction,<sup>28</sup> but the inconsistency involved in the current PSC analysis makes it difficult for counsel to provide this advice. Professor Holper's proposal would reduce some of the guesswork involved in the PSC analysis by immediately eliminating offenses where the migrant spent fewer than five years incarcerated. Although the proposed five-year incarceration rule is in some tension with Congress' determination that all aggravated felonies accompanied by a five-year term of imprisonment, *whether or not suspended*, are PSCs for withholding purposes,<sup>29</sup> that tension is not dispositive. Indeed, beyond statutorily-prescribed categories of PSCs, Congress also entrusted the AG to decide which offenses might be PSCs "notwithstanding the length of sentence imposed."<sup>30</sup> Congress did not require that the AG exercise her discretion only to add offenses with shorter sentences to the list of PSCs but merely explained that the sentence requirements it set for *per se* PSCs need not limit the AG's discretion. Presumably, then, the AG could decide only to include offenses with longer sentences in its administratively-determined categories of PSCs. Doing so would better honor the notion that such offenses be not only serious but "particularly serious."

Admittedly, determining whether an offense constitutes a violent crime against a person entails some complexity. As Professor Holper acknowledges, "violence" is a rather broad concept, and where it appears elsewhere in federal law, it has become overly expansive, sometimes including the mere risk of injury.<sup>31</sup> She proposes to solve this problem by limiting the violent crime portion of her PSC definition to those crimes involving "actual or threatened physical injury."<sup>32</sup> If the Board took up Professor Holper's proposal, it would need to resolve some questions to further narrow this definition. For instance, Professor Holper's notion of violence excludes emotional impact. She focuses on crime "which

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26. See *Y-L-*, 23 I. & N. Dec. 270, 273 (Att'y Gen. 2002).

27. See *Alphonsus v. Holder*, 705 F.3d 1031, 1043 (9th Cir. 2013); see also Koh, *supra* note 9, at 1181–83 (explaining why that decision should be revisited).

28. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

29. See 8 U.S.C. §§ 1101(a)(48)(B) (defining "term of imprisonment"); 1231(b)(3)(B).

30. § 1231(b)(3)(B)(iv).

31. Holper, *supra* note 1, at 1108. Note that the Supreme Court has pushed back against statutes incorporating a risk of injury into their approaches to violence, holding portions of the definitions of both "crime of violence" and "violent felony" void for vagueness. See *Sessions v. Dimaya*, 138 S. Ct. 1204, 1215 (2018); *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015).

32. Holper, *supra* note 1, at 1108.

involves actual or threatened physical injury” as if harm to people can be neatly divided into harms to the body and harms to the mind.<sup>33</sup> Modern science, some of which she points to, suggests the impossibility of disentangling emotional and physical injuries.<sup>34</sup> Moreover, Professor Holper does not address *de minimis* injury or specify whether her approach has a *mens rea* requirement. Is offensive touching sufficiently violent for a PSC finding under the proposed reform? Can a strict liability crime resulting in physical injury fairly be deemed “particularly serious?” Is negligence a sufficient *mens rea*? Questions such as these, however, are no more complex than the current PSC analysis. By narrowing the number of offenses that could be PSCs, Professor Holper’s proposal would simplify the current broad, fact-intensive approach and thus produce more consistent, predictable results.<sup>35</sup> In an overburdened immigration court system<sup>36</sup> in which most migrants represent themselves,<sup>37</sup> the value of creating a simpler rule should not be underestimated.

Despite offering an administrable rule that honors the plain meaning of the PSC phrase, the proposal does not address some of the more difficult problems related to the PSC bar. As Professor Holper explains, the expansion of the PSC definition “mirror[ed] 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.”<sup>38</sup> Professor Holper’s proposal would correct *some* of the severity revolution’s impact on the PSC bar by reducing the number of potential PSCs, but it would not correct the general approach to criminality that the severity revolution took: namely, the proposal does not account for the possibility of rehabilitation, nor does it shift the focus away from classes of offenders toward an individualized analysis. Rather, the proposal accepts that an entire class of people—migrants convicted

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33. *Id.*

34. *Id.* at 1140 n.308.

35. An approach that would produce even more consistent results and further simplify the analysis would implement Professor Holper’s approach by rulemaking and require IJs to use the categorical approach. Although the categorical approach has its own limitations, it is simpler and more efficient than fact-based inquiries such as that the PSC analysis currently requires. See Marouf, *supra* note 9, at 1481–82; Jennifer Lee Koh, *The Whole Better Than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 295 (2012).

36. The backlog of cases in immigration courts is now approaching 700,000. *Immigration Court Backlog Tool*, TRAC IMMIGRATION, [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/) (last updated Mar. 2018).

37. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7 (2015) (reporting that from 2007 to 2012 only 37% of migrants in removal proceedings had counsel).

38. Holper, *supra* note 1, at 1096.

of a violent offense who spent five years incarcerated—constitutes a danger to society. Like the current approach, which, Professor Holper explains, “freeze[s] the inquiry [into an individual’s dangerousness] at the time of conviction,”<sup>39</sup> the proposed rule freezes the inquiry at the time of sentencing. Professor Holper assumes that a violent offense accompanied by five years’ incarceration marks an individual as dangerous for the rest of her life. Psychologists, of course, have shown that people can and do change.<sup>40</sup> For a variety of reasons—from age to family ties—past criminality does not necessarily portend future dangerousness.<sup>41</sup> Others have argued persuasively for honoring rehabilitation in the immigration context,<sup>42</sup> and the United Nations High Commissioner for Refugees favors such an approach to the PSC bar.<sup>43</sup> Recognizing that people can change is especially important in removal proceedings, given that removal has no statute of limitations<sup>44</sup> and yet the

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39. *Id.* at 1106. *See also* R-A-M-, 25 I. & N. Dec. 657, 662 (B.I.A. 2012) (“[T]he respondent’s potential rehabilitation is not significant to the analysis.”); G-G-S-, 26 I. & N. Dec. 339, 345 (B.I.A. 2014) ([C]onsideration of an alien’s mental health as a factor in the criminal act . . . is not a factor to be considered in a particularly serious crime analysis); *but see* Gomez-Sanchez v. Sessions, 887 F.3d 893, 900 (9th Cir. 2018) (Board’s determination that migrant’s mental health at time of offense was not relevant to PSC analysis was not entitled to *Chevron* deference).

40. *See, e.g.*, James Gilligan, *Punishment Fails. Rehabilitation Works*, N.Y. TIMES (Dec. 19, 2012), <https://www.nytimes.com/roomfordebate/2012/12/18/prison-could-be-productive/punishment-fails-rehabilitation-works> (summarizing research showing that violent offenders who participated in a rehabilitation program reduced their likelihood of committing another violent offense by 83 percent and that obtaining a college degree has been shown to be 100 percent effective for reducing recidivism for decades).

41. *See* U.S. SENTENCING COMM’N, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS 11 (2017) (noting that recidivism rates fall substantially with age); NATIONAL RES. COUNCIL, PAROLE, DESISTANCE FROM CRIME, AND COMMUNITY INTEGRATION 44–45 (2008) (collecting research studies indicating that family ties support post-release socialization for imprisoned offenders).

42. *See generally* Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1888 (2007) (“A focus on rehabilitation seems more likely to produce social benefits than does removal.”); Bill Ong Hing, *Providing A Second Chance*, 39 CONN. L. REV. 1893, 1897–1910 (2007) (“Given the special challenges faced by . . . immigrants, a system that adopts a rehabilitative approach to justice might be most appropriate.”).

43. According to the United Nations High Commissioner for Refugees, the Refugee Convention’s PSC bar only applies if (1) a migrant is convicted of a particularly serious crime and (2) a separate assessment shows she is a “present or future danger.” U.N. High Comm’r for Refugees, Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading, ¶ 11 (July 2007), <http://www.unhcr.org/en-us/576d237f7.pdf>. The bar should not apply “where the refugee has responded to rehabilitative measures, or where there are indications that the refugee can be reformed.” U.N. High Comm’r for Refugees, The Nationality, Immigration and Asylum Act 2002: UNHCR Comments on the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 (Nov. 2004).

44. *See* Restrepo v. U.S. Att’y Gen., 617 F.3d 787, 801 (3d Cir. 2010).

effect of displacement is permanent. Thus, a migrant convicted of an offense at age eighteen might find herself in removal proceedings at age sixty-eight. Under the proposed reform, if that conviction was for a violent offense and involved five years' incarceration, that individual would not be eligible for asylum regardless of what had happened in her life during the fifty years since her offense. The proposed rule thus accepts that some people will be forever marked as dangerous and therefore disposable enough to be sent to a place where they face persecution. Professor Holper's proposal would shrink the number of people who find themselves in this predicament, but it does nothing to challenge the defensibility of bright-line categorization as a dangerous undesirable that leads to removal into a potentially life-threatening situation.

Like the Board's current approach, the proposal also sidesteps the difficult question of assessing future dangerousness, if such an assessment is possible.<sup>45</sup> In discarding others' proposals to improve the PSC analysis by allowing for a separate dangerousness determination, Professor Holper notes that the Board has already rejected this approach<sup>46</sup> and mentions the difficulties inherent in predicting dangerousness.<sup>47</sup> She explains that mental health professionals have previously argued against the feasibility of guessing whether someone poses a future threat.<sup>48</sup> Yet, the proposed reform also asks that we ignore these warnings and assume that the fact "that a criminal court judge actually required [a] convicted person to spend some time in prison is highly instructive of the person's dangerousness."<sup>49</sup> Although appealing in its simplicity, this assertion overlooks the research showing just how unreliable predictions of dangerousness are, even when made by mental health experts,<sup>50</sup> and asks for uncritical faith in judges' ability to predict dangerousness and manifest that prediction in a sentence of incarceration. On the other hand, requiring an IJ to make this same determination is equally problematic. Given the difficulties inherent in predicting dangerousness, the more fundamental question we should be asking is whether clumsily labeling an individual as dangerous can ever justify her deportation—a form of banishment "among the severest of punishments."<sup>51</sup>

Similarly, the proposed solution favors pragmatic reform over struggling with difficult foundational questions. Like other schemes to

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45. For a discussion of the difficulties inherent in a dangerousness determination, see Marouf, *supra* note 9, at 1477–79.

46. See Carballe, 19 I. & N. Dec. 357, 360 (B.I.A. 1986).

47. Holper, *supra* note 1, at 1145.

48. *Id.*

49. *Id.* at 1141.

50. See Marouf, *supra* note 9, at 1477–78.

51. *Fong Yue Ting v. United States*, 149 U.S. 698, 749 (1893) (Field, J., dissenting).



reform the PSC bar, Professor Holper's proposal does not interrogate the deeply troubling premise that U.S. citizens are more deserving of protection than other human beings. Instead, the proposal accepts that a person deemed dangerous should not be allowed to live among U.S. residents, whom she might endanger, even though that same person could just as easily endanger those living in the country to which she is deported (if indeed, she is "dangerous"). The proposal thus ignores the consequences of U.S. deportation practices on the rest of the world even while the federal government expands the nation's border policing well beyond its territorial boundaries.<sup>52</sup>

Furthermore, in granting the privilege of safety to U.S. residents but not others, Professor Holper's proposal conflicts with one of her analytical foundations: that criminal law rightly protects the "inviolability of the body."<sup>53</sup> Embracing Alice Ristroph's claim that "[t]he possibility of violent crime is a central source of legitimation for the criminal justice system," Professor Holper proposes that the PSC definition encompass crimes posing physical harm to persons.<sup>54</sup> In recommending that dangerous individuals be removed from the U.S. so that they cannot harm the U.S. public while saying nothing of the risk to residents of the country in which dangerous deportees arrive, Professor Holper reveals the boundary of the "public" whose bodies deserve the privilege of inviolability: people residing within the U.S. and nowhere else. This is the sharp edge of pragmatism.

Ultimately, Professor Holper offers a practical, moderate reform that would remedy some of the unpredictability that currently plagues the PSC analysis, further the important but limited humanitarian purposes of asylum law, and honor the plain meaning of the "particularly serious crime" statutory text. Her solution would curb the severity revolution's distorting effects on the PSC bar but does not acknowledge the possibility of rehabilitation or interrogate the feasibility of assessing future dangerousness. Nonetheless, among proposals to improve the PSC bar, this one is clear, sensible, and actionable.

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52. See Ashish Kumar Sen, *To Secure the United States' Southern Border, Look to Central America*, ATLANTIC COUNCIL (May 4, 2017), <http://www.atlanticcouncil.org/blogs/new-atlanticist/to-secure-the-united-states-southern-border-look-to-central-america> (quoting John Kelly, at the time Secretary of Homeland Security, as advising President Trump that the U.S. border "begins 1,500 miles south" of the nation's territorial boundary).

53. Holper, *supra* note 1, at 1140.

54. *Id.* (quoting Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 611 (2011)).