BALANCING FUTURE HARMS: THE "PARTICULARLY SERIOUS CRIME" BAR TO REFUGEE PROTECTION

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The particularly serious crime (PSC) analysis in U.S. immigration law stands as a gatekeeper to protection from persecution abroad.[1] Asylum applicants who meet the definition of a refugee are statutorily disqualified from protection and deported if they have been convicted of a crime considered "particularly serious."[2] Because the phrase is nowhere defined in the Immigration and Nationality Act, the Board of Immigration Appeals and federal appellate courts have interpreted it through case law.

Despite the immense importance of the topic, the concept of a PSC is rarely examined in the immigration scholarly world, perhaps reflecting the prevalent view that refugee protection and crime-based deportation are sharply distinct areas of inquiry.[3] But as Professor Mary Holper points out in *Redefining "Particularly Serious Crimes" in Refugee Law*, the PSC inquiry is a critical "corner of" immigration law that implicates both refugee and "crimmigration" law.[4] Her article deserves attention from experts in both areas. She deepens our theoretical knowledge of a critical area of immigration law and points to a concrete path for reform, rendering her piece appealing to theorists and practicing lawyers alike.

The question Professor Holper poses is when, if ever, we should send a person back to a country where it is likely that she will be harmed or killed, solely because she has been convicted of a crime in the United States. In other words, when does the moral, legal, and international law prohibition against deporting someone to persecution or death give way to a concern about the safety of our own community?

Professor Holper's answer is that we should only breach the fundamental principle of nonrefoulement, or nonreturn, when a person seeking protection has committed a truly violent offense against another person and has been incarcerated for five years for the crime.[5] Current U.S. law misses this mark by a longshot. To help us understand why, Professor Holper traces the evolution of the PSC analysis, from its international law beginnings to its wild expansion by Board of

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1. *See* Mary Holper, *Redefining "Particularly Serious Crimes" in Refugee Law*, 69 FLA. L. REV. 1093, 1095 (2017).

2. *See* 8 U.S.C. § 1158(b)(2)(B)(i) (2012) (particularly serious crime bar to asylum); 8 U.S.C. § 1231(b)(3)(B) (2012) (particularly serious crime bar to withholding of removal).

3. *See* Holper, *supra* 1, at 1097 n.8, for notable exceptions.

4. *Id*. at 1127.

5. Professor Holper's proposal to tie the PSC determination to a five-year sentence endorses my proposal that only an actually served sentence of five years should trigger proceedings to remove a noncitizen from the United States. *Id*. at 1143 (citing Rebecca Sharpless, *Clear and Simple Deportation Rules*, DENV. L. REV. 933, 934 (2015)).

Immigration Appeals jurisprudence.[6] Professor Holper explains how the initial narrow definition of a particularly serious crime has swelled over time such that today it encompasses a wide array of property, fraud, and drug crimes.[7]

The reasons Professor Holper suggests are twofold. The "severity revolution" that took hold in the 1980s as part of the war on drugs also drove the draconian expansion of the types of crimes that trigger deportation, including the PSC definition.[8] But a parallel phenomenon, what Professor Holper coins as the "mistrusting criminal judges effect," has also played a role.[9] In the past, criminal sentencing judges had considerable control over whether noncitizen defendants who appeared before them would be deported. Judges could issue judicial recommendations against deportation (JRADs).[10] Consistent with the approach of deferring to criminal judges, the Board of Immigration Appeals (BIA), in its 1982 decision *Matter of Frentescu*, held that the question of whether a crime is "particularly serious" depends in significant part on the length of the criminal sentence imposed.[11]

In 1990, however, Congress cut back considerably on the influence of sentencing judges by eliminating JRADs.[12] The BIA, in the 2007 case *In re N-A-M-*, walked back its reliance on the sentence as a proxy for whether a crime is particularly serious.[13] Today, even an offense with a relatively short sentence, or no sentence, can qualify as particularly serious.[14] By situating the PSC doctrinal expansion within the larger phenomena of mass incarceration and distrust of judicial discretion, Professor Holper lends depth to our understanding of how it came to be that we send people back to likely persecution and possible death because of nonviolent offenses, even if the sentence for the crime was short or nonexistent.

Her solution—that we reverse course and only send refugees back for serious and truly violent offenses against people with five year sentences—stems from her insight that only harms against people should figure into the PSC analysis. The idea is that the PSC analysis must only weigh likes against likes. The harm of future persecution of the refugee should only be balanced against its equivalent, namely direct harms perpetuated by the refugee on another person. Crimes against property, the state, or society in general should have no bearing on asylum and

6. *See* Holper, *supra* note 1, at 1098.
7. Holper, *supra* note 1, at 1124–25.
8. *Id*. at 1125–29.
9. *Id*. at 1117.
10. *Id*. at 1122.
11. 18 I. & N. Dec. 244, 244 (B.I.A. 1982).
12. Holper, *supra* note 1, at 1122.
13. 24 I. & N. Dec. 336, 343 (B.I.A. 2007).
14. Holper, *supra* note 1, at 1118.

refugee determinations.

Professor Holper's suggestion takes as a premise that a past, violent offense is an indication of future dangerousness. Because the PSC analysis is concerned with avoiding future harm, not punishing for prior bad acts, a past offense is only relevant to the extent it holds predictive power. If someone committed a violent offense in the past but meets the refugee definition and has no propensity for future bad acts, the balance of harms should tip in her favor. Retribution—or the withholding of protection as a way of righting the moral wrong of having inflicted harm against another—should have no place in the PSC calculus.

Predicting future dangerousness, however, is tricky business. Past criminal history may be a poor indicator of future dangerousness.[15] Further complicating the analysis is the reality that many people convicted of violent crime take pleas to avoid the threat of a long sentence. By their nature, pleas are not a solid basis for assessing future behavior.

Defining what counts as a "violent" offense against a person for Professor Holper's test presents challenges as well. For example, states run the gamut on what qualifies as robbery. Robbery can include snatching someone's glasses, bumping into someone, or taking money or a cellphone out of a person's hand.[16]

There may be further reasons to be skeptical of using violent crime as a basis for denying protection from persecution. Cognizant that at least some gains have been made against mass incarceration in the area of victimless drug offenses, progressive scholars, activists, and advocates have raised the need to focus on harsh penal responses to violent crime. As Christopher Seeds and others have argued, an end to mass incarceration requires sentence reduction for both nonviolent and violent offenses.[17] Contrasting nonviolent and violent offenses may further

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15. *See* Fatma Marouf, *A Particularly Serious Exception to the Categorical Approach*, 97 B.U. L. REV. 1427, 1476 (2017) (citing sources). For discussion of why future dangerousness is over-predicted, see John Monahan & Lesley Cummings, *Prediction of Dangerousness as a Function of its Perceived Consequences*, 2 J. CRIM. JUST. 239, 240 (1974).

16. *See, e.g.*, U.S. v. Yates, 866 F.3d 723, 729–31 (6th Cir. 2017) (Ohio robbery statute encompasses acts involving minimal force such bumping into someone or snatching a purse); People v. Harverson (2010) 804 N.W.2d 757, 762 (Mich. App. 2010) (snatching of victim's glasses was sufficient factual predicate for robbery); Brief for Petitioner, Stokeling v. U.S., 684 Fed. Appx. 870 (11th Cir. 2017) (No. 17-5554), 2018 WL 2960923, at *34 (certiorari granted) (discussing case law showing the minimal force needed to violate the Florida robbery statute, including taking money from a person's hands).

17. Christopher Seeds, *Bifurcation nation: American penal policy in late mass incarceration*, 19(5) PUNISHMENT & SOC'Y 590, 591 (2017). *See also* Katherine Beckett et al., *The End of an Era? Understanding the Contradictions of Criminal Justice Reform*, ANN. REV. OF CRIMINOLOGY 238, 240 (2016) (discussing the fate of mass incarceration and the efforts relating to comprehensive sentencing reform); Marie Gottschalk, CAUGHT: THE PRISON STATE AND THE

entrench the ideology of harsh punishment rather than unravel it. This commentary complicates the ease with which Professor Holper can rely on "violent crime against people" as an appropriate classification.

The assumption that a past violent crime can be a solid predictor of future dangerousness also raises a moral dilemma. Unlike in the civil commitment context, where dangerous people are confined (and purportedly healed), deportation involves sending people marked as dangerous to be at liberty in other countries. Neither the BIA's PSC test nor Professor Holper's proposed calculus take into account the reality of sending people to countries where, if they avoid persecution and death, they might engage in further criminal activity. These deportations are most morally suspect when the people being deported have developed their criminal behavior while growing up in the United States. Although no consensus exists regarding the causes of crime, theorists broadly agree that societal and economic factors play a significant role. The view of criminality as largely a function of structural forces, as opposed to moral failings of individuals, calls into question the practice of deporting people with criminal histories who have lived in the United States for more than a short period time.

Given the difficulties of predicting future dangerousness and defining violence, as well as questionable morality of deporting people with U.S. criminal records to other countries, Professor Holper's narrow interpretation of the PSG bar holds appeal. Her proposal to define PSCs as violent crimes against a person with a five-year sentence actually served represents a sensible and workable solution—one that reigns in the clear excesses of our current doctrine.

An alternate approach is one taken by a number of European countries, including Sweden, Norway, and Belgium. These countries prioritize their commitment to nonrefoulement over the PSC bar by having adjudicators first assess whether people meet the refugee definition. The PSC assessment, and other bars to asylum, come second, only after the refugee determination. People who meet the refugee definition, but who have a PSC, cannot obtain permanent status but instead receive a type of renewable, civil probation. Protected from deportation, they are able to work and, in some countries, have access to free health care.

This categorical respect for the principle of nonrefoulement may be out of reach for the United States, given the politics of the day. But the European approach reminds us of just how out of step we are with much of the world. Professor Holper's proposal—limiting PSCs to violent crimes against people where at least a five-year sentence was served—

LOCKDOWN OF AMERICAN POLITICS 8 (2015) (discussing major penal reforms intended to reduce the incarceration rate, including sentence reduction for certain offenses).

may seem far-fetched given the current state of our law. But it is a comparison of our PSC doctrine with that of our European peers that truly puts us to shame.