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# The Expansion of “Particularly Serious Crimes” in Refugee Law: Mirroring the Severity Revolution

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# The Expansion of “Particularly Serious Crimes” in Refugee Law: Mirroring the Severity Revolution

Mary Holper\*

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 and proposes a 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. While there has been much scholarship on the convergence of criminal and immigration law<sup>1</sup> (dubbed “crimmigration”)<sup>2</sup> and on refugee protection,<sup>3</sup> there has been surprisingly little written about the PSC bar to refugee protection,<sup>4</sup> where crimmigration law meets refugee law. This article seeks to fill that gap in the literature.

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<sup>1</sup> See, e.g., Social Control and Justice: Crimmigration in the Age of Fear (Maria João Guia et al, eds. 2013); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457 (2013); Ingrid Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010); Stephen Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH & LEE L. REV. 469 (2007); Jennifer Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control, and National Security*, 39 CONN. L. REV. 1827 (2007); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); Theresa Miller, *Blurring the Boundaries Between Immigration and Crime Control*, 25 B.C. THIRD WORLD L. J. 81 (2005); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11<sup>th</sup> “Pale of Law,”* 29 N. C. J. INT’L L. & COM. REG. 639 (2004); Theresa Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L. J. 661 (2003); Nora Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the “War” on Terrorism?* 51 EMORY L. J. 1059 (2002); Daniel Kanstroom: *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Cases Make Bad Laws*, 113 HARV. L. REV. 1889 (2000); Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669 (1997).

<sup>2</sup> See Stumpf, *supra* note 1, at 369.

<sup>3</sup> See, e.g., Anjum Gupta, *The New Nexus*, 85 U. COLO. L. REV. 377 (2014); Deborah Anker, Lauren Gilbert & Nancy Kelly, *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); Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT’L L. 1179, 1195 (1994); David A Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, Refugee Policy: Canada and the United States 30-51 (H. Adelman ed. 1991).

<sup>4</sup> See 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 (2013) (criticizing as contrary to Congressional intent and other countries’ interpretations of the Refugee Convention the Board’s

This article proposes two theories for the ever-broadening PSC definition. First is what this article terms 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*,<sup>5</sup> this is part of an increasing mistrust of criminal court judges in immigration law. Second is what this article terms “the sweeping effect:” the expansive reading of the PSC bar is part of a larger trend by the Board and Congress to sweep many offenses into a “cimmigration” term of art<sup>6</sup> in order to render more noncitizens deportable and fewer eligible for relief from removal. These PSC trends mirror 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.<sup>7</sup> The severity revolution, which was reflected in immigration law during the 1990’s and 2000’s,<sup>8</sup> 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 these troubling trends in PSC law and proposes that the term include only violent crimes against persons where the offender has served a significant sentence.

Part I of the 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”) and the 1967 Protocol Relating to the Status of Refugees (“Refugee Protocol”), to which the U.S. acceded in 1968. 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 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 PSC, primarily violent offenses were found to be PSCs. Part II then discusses the case of drug trafficking, which laid the foundation for non-violent crimes as PSCs, and discusses today’s landscape, where possession of child pornography and financial crimes also are PSCs. In Part III, the article lays out two theories for why non-violent crimes have become PSCs. First is the mistrusting sentencing

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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 once a judge has concluded that the noncitizen has been convicted of a PSC); Michael McGarry, *A Statute in Serious Need of Reinterpretation: The Particularly Serious Crime Exception to Removal*, 51 B.C.L. REV. 209, 230-40 (2010) (arguing that courts must honor the intent of the Protocol and Congress by applying a more restrictive understanding of the particularly serious crimes exception and find that an individual poses a continuing danger to the community before they may deny him protection under withholding of removal provisions).

<sup>5</sup> 18 I. & N. Dec. 244, 247 (BIA 1982) (when determining whether a crime is a PSC, 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.”).

<sup>6</sup> Juliet Stumpf, who coined the term “cimmigration,” defines this phenomenon as the criminalization of immigration law through dramatic increases in criminal consequences of immigration law violations and deportations of many for crimes. See Stumpf, *supra* note 1, at 369. This article uses the term to describe crime-related immigration terms of art that carry significant immigration consequences; examples are “aggravated felony,” “crime involving moral turpitude,” and “particularly serious crime.”

<sup>7</sup> See Jonathan Simon, *Sanctioning Government: Explaining America’s Severity Revolution*, 56 U. MIAMI L. REV. 217, 219 (2001); Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L. J. 829, 832 (2000).

<sup>8</sup> Miller, *Blurring Boundaries*, *supra* note 1, at 83; Miller, *Citizenship & Severity*, *supra* note 1, at 618-20.

judges effect; the Attorney General's 2002 decision in *Matter of Y-L*<sup>9</sup> introduced this trend into PSC law and the Board's 2007 *Matter of N-A-M*<sup>10</sup> decision cemented it. This part also discusses other areas of immigration law in which little to no deference is given to a criminal judge's decision: for example, many state court vacatur of guilty pleas are not recognized for immigration purposes, immigration judges are instructed to give little weight to a criminal judge's bail decision when deciding an immigration bond, Congress eliminated the Judicial Recommendation Against Deportation, and Congress changed the immigration definitions of "conviction," "sentence," and "term of imprisonment" to give less weight to criminal judges' decisions. The other theory described is the sweeping effect, the tendency of the Board, Attorney General, and Congress to sweep as many crimes as possible into "crimmigration" terms of art like "particularly serious crime," "aggravated felony," and "crime involving moral turpitude," stretching these vague terms beyond recognition. Part IV links the PSC evolution to the severity revolution of criminal law and examines the Bail Reform Act of 1984, which was born out of the severity revolution, as a case study in dangerousness to draw lessons in the PSC context. Finally, this part examines the lessons learned from this era of harsh criminal law and argues that refugee law should not repeat such trends. In Part V, the article proposes that Congress redefine PSC to include only violent offenses against persons where the noncitizen served a significant sentence; alternatively, the Board or Attorney General could adopt such a test for cases falling within their discretion.

## I. The PSC Bar in Context

This section describes the history of the PSC bar, including its international law origins. The section 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.<sup>11</sup>

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<sup>9</sup> *Matter of Y-L*, A-G-, & R-S-R-, 23 I. & N. Dec. 270 (A.G. 2002).

<sup>10</sup> 24 I. & N. Dec. 336 (BIA 2007).

<sup>11</sup> 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 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the United States ratified in 1994 and adopted into U.S. law through the Foreign Affairs Reform and Restructuring Act, Div. G, Tit. XXII, Pub. L. No. 105-277, § 2242, 112 Stat. 2681 (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, art. 3, para. 1, 1465 U.N.T.S. at 114; 8 C.F.R. § 208.17. 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, art. 1, ¶1, 1465 U.N.T.S. at 113-14 (defining torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining 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 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 Article Three of 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 in order 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

### 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.<sup>12</sup> Refugee protections were codified in the 1951 Refugee Convention and 1967 Refugee Protocol, to which the U.S. acceded in 1968. By signing the Protocol, the United States became bound by articles 2 through 34 of the Refugee Convention.<sup>13</sup> 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 in a particular social group or political opinion.”<sup>14</sup>

Nonrefoulement first was implemented in U.S. law in 1950, and in 1952 came to be called withholding of deportation.<sup>15</sup> In 1996, when “removal” replaced “deportation” as the official term describing the expulsion of a noncitizen from the U.S.,<sup>16</sup> withholding of deportation became withholding of removal.<sup>17</sup> Withholding is a mandatory form of relief from removal.<sup>18</sup> If the noncitizen can prove that what she fears amounts to persecution,<sup>19</sup> that it is more likely than not to happen,<sup>20</sup> 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

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actors). While a full discussion of the Torture Convention is outside of 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.

<sup>12</sup> See Guy S. Goodwin-Gill, *The Refugee in International Law* 119 (2d ed. 1996).

<sup>13</sup> 189 U.N.T.S. 150, 176 (1954), 19 U.S.T. 6259, 6278, T.I.A.S. No. 6577 (1968).

<sup>14</sup> Refugee Convention Article 33.1.

<sup>15</sup> See Thomas Alexander Aleinikoff et al., *Immigration and Citizenship: Process and Policy* 812-13 (7th ed. 2012) (discussing Internal Security Act of 1950, Ch. 1024 § 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. 212 (enacting former 8 U.S.C. § 1253(h)) (first naming “withholding of deportation,” which authorized the Attorney General “to withhold deportation 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.”).

<sup>16</sup> Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) § 304, Pub. L. 104-208, 110 Stat. 3009 (enacting 8 U.S.C. § 1229a(a)(1), (3) and (e)(2)).

<sup>17</sup> Congress also moved the nonrefoulement provision to 8 U.S.C. § 1231(b)(3), where it had formerly been in 8 U.S.C. § 1253(h)(2)(B). IIRIRA §§ 305, 308.

<sup>18</sup> See former 8 U.S.C. § 1253(h)(2)(B); 8 U.S.C. § 1231(b)(3)). In the early days, the nonrefoulement provision was discretionary. See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); Aleinikoff et al., *supra* note 15, at 813. The U.S. 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 U.S. in line with its treaty obligations, the U.S. made withholding mandatory by statute with the Refugee Act in 1980. See *id.*; see also Refugee Act of 1980, Pub. L. No. 96-212 §203(e), 94 Stat. 102, 107 (1980).

<sup>19</sup> See *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985) (defining persecution as a “threat to life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive”).

<sup>20</sup> See *INS v. Stevic*, 467 U.S. 407, 429-30 (1984).



deported to a third country where she will not face persecution.<sup>21</sup> 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 U.S., or travel outside the U.S. In effect, she lives under an order of removal, but with permission to stay because the removal may not be effectuated to the country of persecution (assuming no other country will accept her).<sup>22</sup>

Asylum did not exist in U.S. law until 1980, when Congress passed the Refugee Act, which amended the Immigration and Nationality Act (“INA”).<sup>23</sup> 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 grounds.<sup>24</sup> 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.<sup>25</sup> Should a noncitizen prevail in a request for asylum, unlike withholding, she may apply to become a permanent resident of the U.S. and later a U.S. citizen.<sup>26</sup> 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.<sup>27</sup> 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,<sup>28</sup> which states that contracting states “shall as far as possible facilitate the assimilation and naturalization of refugees.”<sup>29</sup>

#### 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.<sup>30</sup> 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.<sup>31</sup> 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.”<sup>32</sup> However, the drafters ultimately recognized that national security could trump the nonrefoulement principle, and that some countries may not ratify the Refugee Convention if

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<sup>21</sup> See *Cardoza-Fonseca*, 480 U.S. at 428 n.6 (quoting *Matter of Salim*, 18 I. & N. Dec. 311, 315 (1982)).

<sup>22</sup> See *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 433 (BIA 2008).

<sup>23</sup> Pub. L. No. 96-212, Title II, 94 Stat 102 (1980).

<sup>24</sup> See 8 U.S.C. §§ 1158(b), 1101(a)(42)(A).

<sup>25</sup> See *Cardoza-Fonseca*, 480 U.S. at 431, 440, 449.

<sup>26</sup> See 8 U.S.C. § 1159.

<sup>27</sup> See *Cardoza-Fonseca*, 480 U.S. at 424.

<sup>28</sup> See *id.* at 441.

<sup>29</sup> Refugee Convention Article 34.

<sup>30</sup> Goodwin-Gill, *supra* note 12, at 119-20.

<sup>31</sup> See Paul Weis: *The Refugee Convention, 1951: The Travaux Préparatoires Analysed With a Commentary* by Dr. Paul Weis 326-36 (Paul Weis ed., 1995).

<sup>32</sup> Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session, UN Doc. E/1850; E/AC.32/8 ¶ 30 (Aug. 25, 1950).

there was no exception for dangerous individuals.<sup>33</sup> 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 the United Nations,<sup>34</sup> and PSC.<sup>35</sup> 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.<sup>36</sup>

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.<sup>37</sup>

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.<sup>38</sup> The United Nations High Commissioner for Refugees (“UNHCR”), in its Handbook on Procedures and Criteria for Determining Refugee Status,<sup>39</sup> states that the exception is reserved for “extreme cases.”<sup>40</sup> The UNHCR Handbook goes into more detail about how to define a “serious nonpolitical crime;”<sup>41</sup> it defines such a crime as a “capital crime or a very grave punishable act.”<sup>42</sup>

### 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 PSC became a bar to asylum.<sup>43</sup> When originally enacted, the PSC bar applied to an individual who “having been convicted by a final

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<sup>33</sup> Weis, *supra* note 31, at 326-36.

<sup>34</sup> Refugee Convention Art. 1(F).

<sup>35</sup> Refugee Convention Art. 33(2).

<sup>36</sup> UNHCR Handbook, ¶¶153-154.

<sup>37</sup> Refugee Convention Art. 33(2).

<sup>38</sup> Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* 139, ¶ 186 (Erika Feller, Volker Turk & Frances Nicholson, eds., 2003); Weis, *supra* note 31, at 342; Atle Grahl-Madsen, *Commentary on the Refugee Convention, Division of International Protection of the United Nations High Commissioner for Refugees* (1963) ¶ 9.

<sup>39</sup> U.N. High Comm'r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, ¶ 155, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992) (“UNHCR Handbook”), available at <http://www.unhcr.org/3d58e13b4.html>.

<sup>40</sup> *Id.* at ¶154.

<sup>41</sup> See *id.* at ¶¶155-161.

<sup>42</sup> Handbook ¶155; see also *id.* (“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.”).

<sup>43</sup> Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 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(b)(1), 104 Stat. at 5053, as corrected by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232 105 Stat. 1733, 1752 (enacted Dec. 12, 1991).

judgment of a particularly serious crime, constitutes a danger to the community of the United States.”<sup>44</sup> This language replicated the PSC bar in the Refugee Convention, since “Congress’ primary purposes was to bring United States refugee law into conformance with [the Protocol.]”<sup>45</sup>

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.<sup>46</sup> However, in 1990, there were only a small number of crimes that were considered aggravated felonies.<sup>47</sup> Over the course of several pieces of legislation in the 1990’s, Congress expanded the definition of what was considered an aggravated felony.<sup>48</sup> To ensure compliance with the Protocol, with the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”),<sup>49</sup> 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].”<sup>50</sup>

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 (“IIRIRA”).<sup>51</sup> The statute reads: “Subparagraph (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.”<sup>52</sup> This version of the statute eliminated the categorical bar for aggravated felonies.<sup>53</sup> 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.”<sup>54</sup> Congress then changed the categorical PSC exception to only include aggravated felony convictions with at least five-year sentences.<sup>55</sup> In another provision, Congress clarified that such sentence did not refer to time served, but

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<sup>44</sup> 8 U.S.C. § 1253(h)(2)(B) (1981).

<sup>45</sup> *Cardoza-Fonseca*, 480 U.S. at 436–37.

<sup>46</sup> See Immigration Act of 1990, Pub. L. 101–649, § 515(a)(2), 104 Stat. 4978, 5053.

<sup>47</sup> At the time, murder, drug trafficking, firearms trafficking, and attempts or conspiracies to commit those crimes were the only offenses worthy of the “aggravated felony” classification. See *Anti-Drug Abuse Act of 1988*, Pub. L. No. 100–690, 102 Stat. 4181 (1988).

<sup>48</sup> See *infra* notes 243–47 and accompanying text.

<sup>49</sup> Pub. L. No. 104–132, 110 Stat. 1214 (Apr. 24, 1996).

<sup>50</sup> AEDPA § 415(f), Pub. L. No. 104–132, 110 Stat. 1214. The Board, in *Matter of Q-T-M-T*, 21 I. & N. Dec. 639 (BIA 1996), established a test to implement AEDPA § 415(f)’s mandate to conduct a discretionary analysis to ensure compliance with the Refugee Protocol. 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.* at 653. 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.

<sup>51</sup> Pub. L. 104–208, § 305(a), 110 Stat. 3009–546. IIRIRA was passed on September 30, 1996, and became effective on April 1, 1997.

<sup>52</sup> 8 U.S.C. § 1231(b)(3)(B).

<sup>53</sup> *Id.*

<sup>54</sup> See *Alphonsus v. Holder*, 705 F.3d 1031, 1040 (9th Cir. 2013).

<sup>55</sup> 8 U.S.C. § 1231(b)(3); IIRIRA § 305(a).



included any amount of the sentence that was suspended.<sup>56</sup> For asylum, Congress deemed all aggravated felonies to be PSCs.<sup>57</sup>

#### 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 *Matter of Frentescu*, which became the seminal case on the meaning of PSC.<sup>58</sup> In *Frentescu*, the Board recognized that it was operating on a clean slate. The Refugee Act, Protocol, and UNHCR Handbook all had little to say about the meaning of the term.<sup>59</sup> 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].”<sup>60</sup> The UNHCR Handbook also instructed that the PSC bar was for “extreme cases.”<sup>61</sup> 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.<sup>62</sup>

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.<sup>63</sup> If the crime is not inherently particularly serious, the record should be assessed on a case-by-case basis.<sup>64</sup> 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.”<sup>65</sup> The Board continuously revived the *Frentescu* test with each statutory change to the PSC bar.<sup>66</sup> The test became imbedded in PSC

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<sup>56</sup> See 8 U.S.C. § 1101(a)(48)(B); IIRIRA § 322.

<sup>57</sup> IIRIRA § 604.

<sup>58</sup> See 18 I. & N. Dec. 247; *Alphonsus*, 705 F.3d at 1038.

<sup>59</sup> See *Frentescu*, 18 I. & N. Dec. at 246.

<sup>60</sup> *Id.* at 245, 247.

<sup>61</sup> *Id.* at 246 (quoting UNHCR Handbook ¶154).

<sup>62</sup> *Frentescu*, 18 I. & N. Dec. at 246 n. 7; see generally Mary Holper, *Deportation for A Sin: Why Moral Turpitude Is Void for Vagueness*, 90 NEB. L. REV. 647 (2012) (discussing history of CIMT).

<sup>63</sup> *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 *Matter of Garcia-Garrocho*, 19 I. & N. Dec. 423, 425-26 (BIA 1986); see also *Matter of Carballe*, 19 I. & N. Dec. 357, 360 (BIA 1986) (holding that armed robbery involving the use of a firearm on its face is a PSC); *Gjonaj v. INS*, 47 F.3d 824, 826 (6<sup>th</sup> Cir. 1995) (holding that assault with a firearm with intent to murder is so serious that no factual inquiry into individual circumstances is necessary); *Ahmetovic*, 62 F.3d 48, 52 (2d Cir. 1995) (holding that first degree manslaughter was inherently particularly serious).

<sup>64</sup> *Frentescu*, 18 I. & N. Dec. at 247.

<sup>65</sup> *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.” See *Alphonsus*, 705 F.3d at 1039.

<sup>66</sup> See *Matter of C-*, 20 I. & N. Dec. 529, 534 n.3 (BIA 1992); *Matter of L-S-*, 22 I. & N. Dec. 645, 649 (BIA 1999) (en banc); *Matter of S-S-*, 22 I. & N. Dec. 458, 463–65 (BIA 1999) (en banc). The Board never determine 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. at 654

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.<sup>67</sup>

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 *Matter of Rodriguez-Coto*,<sup>68</sup> the Board answered this question for both PSCs and serious nonpolitical crimes, deciding that the crime determination is a threshold issue. The Board reasoned: “[w]e 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.”<sup>69</sup> Thus a finding that a crime was a PSC prevented any further inquiry into the merits of a withholding claim.<sup>70</sup> The Supreme Court later upheld this decision with respect to serious nonpolitical crimes.<sup>71</sup>

In the 1986 case *Matter of Carballe*,<sup>72</sup> 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. 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.<sup>73</sup> 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.<sup>74</sup> The Board in *Carballe* found that the statute did not require two separate and distinct factual findings of dangerousness.<sup>75</sup> The Board stated “those aliens who have been convicted of particularly serious crimes are presumptively dangers to the country’s community.”<sup>76</sup> The Board found, however, that the two clauses were “inextricably related.”<sup>77</sup> 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 factor”<sup>78</sup>—danger to the community—is the “essential key” to determining whether a conviction

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<sup>67</sup> See *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.”); *Afridi v. Gonzales*, 442 F.3d 1212, 1221 (9th Cir. 2006), abrogated by *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (“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.”); 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”).

<sup>68</sup> 19 I. & N. Dec. 208 (BIA 1985).

<sup>69</sup> *Id.* at 209.

<sup>70</sup> See *id.*

<sup>71</sup> 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.”).

<sup>72</sup> 19 I. & N. Dec. 357 (BIA 1986).

<sup>73</sup> See *id.* at 359-60; cf. *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006) (listing factors an immigration judge must consider when determining bond, with one factor being the recency of his criminal activity).

<sup>74</sup> See *Frentescu*, 18 I. & N. Dec. at 247 (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”).

<sup>75</sup> *Carballe*, 19 I. & N. Dec. at 360.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See *Frentescu*, 18 I. & N. Dec. at 247.

is particularly serious.<sup>79</sup> Every federal court of appeals to have considered *Carballe* has deferred to the decision, with several courts opining that Congress intended no separate determination of dangerousness once a crime was a PSC.<sup>80</sup>

## II. From Violent to Non-Violent 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 non-violent offenses such as financial crimes and possession of child pornography bar protection. This section will explore this evolution in the PSC case law. To contextualize the discussion, this section begins with a proposed definition of “violent crime.”

### a. “Violent Crime” Defined

The law has no settled meaning of “violent crime.”<sup>81</sup> 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 judgements.<sup>82</sup> 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.”<sup>83</sup> She argues that the lack of a critical analysis of violence is one of the failures of criminal law, which finds legitimation by addressing the problem of violent crime.<sup>84</sup> She writes, “[i]f 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.”<sup>85</sup>

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.<sup>86</sup> Although federal sentencing law has definitions such as “crime of violence”<sup>87</sup> and “violent felony,”<sup>88</sup> these definitions suffer from the broadening of the concept of

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<sup>79</sup> *Carballe*, 19 I. & N. Dec. at 360.

<sup>80</sup> See, e.g., *Ahmetovic v. INS*, 62 F.3d 48 (2d Cir. 1995); *Al-Salehi v. INS*, 47 F.3d 390, 393 (10th Cir. 1995); *Garcia v. INS*, 7 F.3d 1320 (7th Cir. 1993); *Mosquera-Perez v. INS*, 3 F.3d 553 (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); *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397 (9th Cir. 1987); see also *Carballe*, 19 I. & N. Dec. at 360 (citing H.R. Rep. No. 608, 96<sup>th</sup> Cong., 1<sup>st</sup> Sess. 17 (1979)) (discussing House Judiciary Committee Report, which noted that the PSC exception included “aliens...who have been convicted of particularly serious crimes *which* make them a danger to the community of the United States.” *Id.* (emphasis in original). Following IIRIRA, a regulation was also enacted to codify the *Carballe* decision. See 8 C.F.R. § 1208.16(d)(2) (“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.”).

<sup>81</sup> Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571 (2011).

<sup>82</sup> *Id.* at 574-75.

<sup>83</sup> *Id.* at 575.

<sup>84</sup> *Id.* at 611-13.

<sup>85</sup> *Id.* at 618.

<sup>86</sup> See *id.* at 573, 618.

<sup>87</sup> 18 U.S.C. § 16 (defining as 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

“violence” that Ristroph describes by expanding the term to include crimes involving the risk of injury.<sup>89</sup> 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 risk of physical injury to another” – is void for vagueness.<sup>90</sup> 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, the 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.<sup>91</sup>

#### 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, “[c]rimes 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.”<sup>92</sup> 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.”<sup>93</sup> 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;”<sup>94</sup> thus, “[o]n their face, they were dangerous;”<sup>95</sup> the Board went further to describe robbery as a “grave, serious, aggravated, infamous, and heinous crime.”<sup>96</sup>

In most cases subsequent cases, the Board found that violent crimes were PSCs.<sup>97</sup> For example, robbery by force, violence, or assault was found to be a PSC,<sup>98</sup> as was robbery of an occupied home while armed with a handgun,<sup>99</sup> robbery with deadly weapon,<sup>100</sup> armed

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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”).

<sup>88</sup> 18 U.S.C. § 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.”)

<sup>89</sup> See Ristroph, *supra* note 81, at 574.

<sup>90</sup> *Johnson v. U.S.*, 135 S. Ct. 2551, 2557 (2015).

<sup>91</sup> See Ristroph, *supra* note 81, at 579-80.

<sup>92</sup> See *Frentescu*, 18 I. & N. Dec. at 247.

<sup>93</sup> *Id.*

<sup>94</sup> *Carballe*, 19 I. & N. Dec. at 360.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See *Denis v. Att’y Gen. of U.S.*, 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.’”) (citing *N-A-M-*, 24 I. & N. Dec. at 342); *L-S-*, 22 I. & N. Dec. at 649; *Matter of L-S-J-*, 21 I. & N. Dec. 973, 974-75 (BIA 1997)).

<sup>98</sup> *S-V-*, 22 I. & N. Dec. 1306, 1309 (BIA 2000).

<sup>99</sup> *S-S-*, 22 I. & N. Dec. at 466-67.

<sup>100</sup> *L-S-J-*, 21 I. & N. Dec. at 974-75

robbery,<sup>101</sup> aggravated battery involving a firearm,<sup>102</sup> and burglary involving a deadly weapon.<sup>103</sup> 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 endanger the lives of United States residents.”<sup>104</sup> 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.”<sup>105</sup>

### c. Drug Trafficking as a PSC

Drug trafficking is a non-violent crime that, in being classified as a PSC, became the bridge to other non-violent 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 treatment it has drawn between drug offenses and other crimes.”<sup>106</sup> 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.<sup>107</sup>

In 2002, Attorney General Ashcroft in *Matter of Y-L-* created a presumption that drug trafficking aggravated felony convictions are PSCs.<sup>108</sup> The three noncitizens whose cases were considered had been convicted of drug trafficking, which met the definition of aggravated felony,<sup>109</sup> yet each was sentenced to less than five years and thus did not have a statutory PSC for the purposes of withholding.<sup>110</sup> The Board had held that they were not barred from withholding, yet the Attorney General vacated those decisions, certifying the case to himself.<sup>111</sup>

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<sup>101</sup> Rodriguez-Coto, 19 I. & N. Dec. at 208.

<sup>102</sup> B-, 20 I. & N. Dec. 427, 429 (BIA 1991).

<sup>103</sup> Garcia-Garrocho, 19 I. & N. Dec. at 425.

<sup>104</sup> See L-S-, 22 I. & N. Dec. at 655.

<sup>105</sup> Id. at 654-56.

<sup>106</sup> *Matter of Gonzalez*, 19 I. & N. Dec. 682, 683-84 (BIA 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 former 8 U.S.C. § 1231(a)(1) and (4)). 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. §§ 1157(c)(3) and 1159(c), former 8 U.S.C. § 1182(a)(23)).

<sup>107</sup> *Matter of U-M-*, 20 I. & N. Dec. 327, 330-32 (BIA 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.

<sup>108</sup> See *Y-L-*, 23 I. & N. Dec. at 274.

<sup>109</sup> See id. at 271; see also 8 U.S.C. § 1101(a)(43)(B) (drug trafficking as an aggravated felony).

<sup>110</sup> See *Y-L-*, 23 I. & N. Dec. at 271.

<sup>111</sup> 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 that has been criticized. See Laura S. Trice, *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 (2010).



AG Ashcroft stated: “the 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.”<sup>112</sup>

To support this presumption, he quoted heavily from the 1991 Board case about the societal harms of drug trafficking.<sup>113</sup> The Attorney General further cited to the “long-standing congressional recognition that drug trafficking felonies justify the harshest of legal consequences.”<sup>114</sup> For this assertion, he cited to the controlled substances ground of deportability,<sup>115</sup> various harsh penalties for aggravated felons in the INA (of which drug trafficking is a subset),<sup>116</sup> and other federal statutes outside of immigration law.<sup>117</sup>

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 the 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.<sup>118</sup>

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.<sup>119</sup> He also listed six criteria that a

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<sup>112</sup> Y-L-, 23 I. & N. Dec. at 273.

<sup>113</sup> See *supra* note 107.

<sup>114</sup> See Y-L-, 23 I. & N. Dec. at 275 (emphasis in original).

<sup>115</sup> See *id.* (citing 8 U.S.C. § 1227(a)(2)(B)).

<sup>116</sup> See *id.* (citing 8 U.S.C. § 1252(a)(2)(C) (no judicial review for aggravated felons); see also *id.* (citing 8 U.S.C. 1228 (expedited removal for aggravated felons)). The AG further stated, “[t]he 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 crime,’ 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.

<sup>117</sup> See *id.* (citing 18 U.S.C. § 3592(c)(12)) (conviction for serious federal drug offense constitutes aggravated factor for purposes of weighing imposition of federal death penalty); see also *id.* (citing 21 § U.S.C. 862) (convicted drug traffickers subject to order of ineligibility for federal benefits).

<sup>118</sup> Y-L-, 23 I. & N. Dec. at 276 (citing Drug Enforcement Administration, U.S. Dep’t of Justice, Target America: Traffickers, Terrorists & Your Kids - A National Symposium on Narco-Terrorism (Dec. 4, 2001), available at <http://www.usdoj.gov:80/dea/deamuseum/transcript.doc>; Drug Trade and the Terror Network: Hearing Before the Subcommittee on Criminal Justice, Drug Policy, and Human Resources of the House Committee on Government Reform, 107th Cong. (Oct. 3, 2001) (statement of Asa Hutchinson, Administrator of Drug Enforcement Administration), available at <http://www.usdoj.gov:80/dea/pubs/cngrtest/ct100301.html>; Office of National Drug Control Policy, Executive Office of the President, Drug-Related Crime (Fact Sheets, March 2000); Bureau of Justice Statistics, U.S. Dep’t of Justice, A National Report: Drugs, Crime, and the Justice System (Dec. 1992)); see also Demleitner, *supra* note 1, at 1064-65 (“In 2002, the federal government began a powerful publicity campaign connecting the ‘war on drugs’ with the ‘war on terrorism.’”).

<sup>119</sup> See *supra* Part IIb.

respondent must show to overcome the presumption,<sup>120</sup> one of these criteria was “the absence of any violence or threat of violence, implicit or otherwise, associated with the offense.”<sup>121</sup> 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 Attorney General likely was marking a new era of non-violent crimes as PSCs.<sup>122</sup>

#### d. Possession of Child Pornography as a PSC

The Board’s 2012 decision in *Matter of R-A-M*<sup>123</sup> is a good example of how non-violent 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.<sup>124</sup> 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.<sup>125</sup> His sentence was 280 days of imprisonment and 3 years’ probation.<sup>126</sup> The Board upheld the judge’s decision that his offense was an aggravated felony and therefore he had a statutory PSC for asylum purposes.<sup>127</sup> 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.<sup>128</sup>

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.<sup>129</sup> 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

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<sup>120</sup> Y-L-, 23 I. & N. Dec. at 276-77 (reasoning that there may be the “very rare case where an alien would be able to demonstrate extraordinary and compelling circumstances that justify treating a particular drug trafficking crime as falling short of [the PSC] standard”).

<sup>121</sup> See *id.* at 276-77. The six criteria the AG 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.*

<sup>122</sup> 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. AG*, 574 Fed. Appx. 142, 145-47 (3d Cir. 2014); *Diaz v. Holder*, 501 Fed. Appx. 734, 738 (10th Cir. 2012); *Galeneh v. Ashcroft*, 153 Fed. Appx. 881, 886 (3d Cir. 2005).

<sup>123</sup> 25 I. & N. Dec. 657 (BIA 2012).

<sup>124</sup> *Id.* at 657.

<sup>125</sup> *Id.* at 658 (citing California Penal Code Secs. 311.11(a), 311.4(d)(1)).

<sup>126</sup> *R-A-M-*, 25 I. & N. Dec. at 658.

<sup>127</sup> 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).

<sup>128</sup> See *id.* at 659.

<sup>129</sup> *Id.* at 660.

inpatient facility upon his release from DHS detention.<sup>130</sup> For this reason, the judge found, “there was no indication that the respondent had been violent in the past or would be violent in the future.”<sup>131</sup>

The Board reversed, reviewing the judge’s decision *de novo*,<sup>132</sup> and finding that the conviction was for a particularly serious crime. The Board first cited to the societal harms of child pornography.<sup>133</sup> 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.<sup>134</sup> 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,”<sup>135</sup> and thus the Board cycled back to repeating the harmful effects of child pornography on society.<sup>136</sup> 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.”<sup>137</sup>

In *R-A-M-*, the Board noted the shift from its past decisions that violent crimes against persons tended to be PSCs.<sup>138</sup> The Board stated: “while 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.”<sup>139</sup> To support this proposition, the Board cited *Y-L-*, the 2002 Attorney General decision that drug trafficking convictions presumptively constitute particularly serious crimes,<sup>140</sup> and, inexplicably, a 2000 BIA case holding that a “robbery conviction, which involves a violent crime against a person, is a particularly serious crime.”<sup>141</sup> The Board also cited *N-A-M-*, a 2007 Board case that this article argues gutted the *Frentescu* test in order to sweep more offenses into the PSC category.<sup>142</sup>

#### e. Financial Crimes as PSCs

There has been a series of unpublished cases by the Board finding that non-violent financial crimes were PSCs; federal circuit courts of appeals have upheld decisions that mail fraud,<sup>143</sup> tax fraud and money laundering,<sup>144</sup> securities fraud,<sup>145</sup> and unauthorized access to a

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 658 (citing 8 C.F.R. § 1003.1(d)(3)(ii)).

<sup>133</sup> *R-A-M-*, 25 I. & N. Dec. at 660 (“Child pornography is an intrinsically serious offense that is directly related to the sexual abuse of children.”).

<sup>134</sup> See *id.* at 661.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 662 (quoting *N-A-M-*, 24 I. & N. Dec. at 344 n.8).

<sup>138</sup> See *supra* Part IIb.

<sup>139</sup> *R-A-M-*, 25 I. & N. Dec. at 662 (quoting *N-A-M-*, 24 I. & N. Dec. at 342).

<sup>140</sup> *Id.* at 662 (citing *Y-L-*, 23 I. & N. Dec. at 274).

<sup>141</sup> See *id.* at 662; *S-V-*, 22 I. & N. Dec. at 1308.

<sup>142</sup> See *infra* notes 219-28 and accompanying text. Federal courts of appeals, in unpublished decisions, have cited to *R-A-M-* approvingly. See, e.g., *Torres v. Lynch*, 2015 WL 3895005, \*1 (9th Cir. June 24, 2015) (upholding Board’s decision that child pornography conviction was a PSC); *Pervez v. Holder*, 546 Fed. Appx. 157, 159 (4th Cir. 2013) (citing *R-A-M-*, 25 I. & N. Dec. at 662) (upholding Board’s decision that indecent liberties with a child was a PSC and stating “[w]hile no child was actually harmed or even involved as a potential victim, a particularly serious crime does not have to be violent or potentially violent”).

<sup>143</sup> *Arbid v. Holder*, 700 F.3d 379 (9th Cir. 2012).

<sup>144</sup> *Hakim v. Holder*, 628 F.3d 151 (5th Cir. 2010).

<sup>145</sup> *Kaplun v. AG of U.S.*, 602 F.3d 260 (8th Cir. 2010).

computer<sup>146</sup> were PSCs. In these cases, federal courts either determined they had no jurisdiction to review PSC, a discretionary decision,<sup>147</sup> or reviewed the decisions under the highly deferential abuse of discretion standard of review.<sup>148</sup>

In a 2009 case, the Eighth Circuit reviewed a Board decision that unauthorized access to a computer was a PSC.<sup>149</sup> The Board had dismissed an argument that persons who commit economic crimes do not constitute a danger to the community by describing this claim as “speculative” and “unpersuasive.”<sup>150</sup> The Eighth Circuit ruled that it had no jurisdiction to determine a discretionary decision regarding the proper weighing of the *Frentescu* factors.<sup>151</sup> Similarly, in a 2010 Eighth 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.<sup>152</sup> In dicta, however, the court responded to the petitioner’s argument that “the BIA ‘has never held that...a non-violent white collar criminal offense could constitute a particularly serious crime.’”<sup>153</sup> 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 non-violent offenses such as fraud)<sup>154</sup> and that “nothing in our precedent suggests that a financial crime cannot, as a matter of law, be a particularly serious crime.”<sup>155</sup> In a case where a federal court reviewed the Board’s decision, in 2012, the Ninth Circuit upheld a Board decision that mail fraud was a PSC.<sup>156</sup> 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.”<sup>157</sup> There the Ninth Circuit specifically stated that the petitioner had not raised a legal challenge to the Board’s interpretation of the withholding statute, but only challenged the weighing of the *Frentescu* factors.<sup>158</sup> The

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<sup>146</sup> *Tian v. Holder*, 576 F.3d 890 (8th Cir. 2009).

<sup>147</sup> See 8 U.S.C. § 1252(a)(2)(B)(ii) (no judicial review of discretionary decisions); but cf. *Kucana v. Holder*, 558 U.S. 233 (2010) (holding that 8 U.S.C. § 1252(a)(2)(B)(ii) only bars judicial review for decisions that are made discretionary by Congress); *Arbid*, 700 F.3d at 383-34 (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).

<sup>148</sup> See, e.g., *Arbid*, 700 F.3d at 385 (quoting *Singh v. INS*, 213 F.3d 1050, 1052 (9th Cir. 2000) (“On abuse-of-discretion review, we may disturb the BIA’s ruling if the BIA acted ‘arbitrarily, irrationally, or contrary to law.’”).

<sup>149</sup> *Tian*, 576 F.3d at 896-98.

<sup>150</sup> *Id.* at 897. The Board also held that it did not consider a “separate determination of danger to the community to be necessary,” citing *N-A-M-*. *Id.*; cf. *infra* notes 218-27 and accompanying text (discussing how the *N-A-M-* test is flawed).

<sup>151</sup> *Id.* at 895, 897.

<sup>152</sup> *Kaplun*, 602 F.3d at 267-68. This portion of the ruling was disagreed with by the Ninth Circuit in *Arbid*. See *Arbid*, 700 F.3d at 384-85 (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 USC 1252(a)(2)(B)(ii) only applied to those discretionary decisions made discretionary by statute).

<sup>153</sup> *Kaplun*, 602 F.3d at 267.

<sup>154</sup> See 8 U.S.C. § 1101(a)(43)(M)(i).

<sup>155</sup> *Id.* 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*, 628 F.3d at 152, 154-55. 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.

<sup>156</sup> See *Arbid*, 700 F.3d at 385-86.

<sup>157</sup> *Id.* at 385.

<sup>158</sup> *Id.* at 385 n. 4.

court, reviewing the Board’s decision on abuse-of-discretion review, did not disturb the Board’s ruling.<sup>159</sup>

### III. Explaining How Non-Violent Crimes Became PSCs

How did we get to a place where the PSC bar, which was once reserved for “extreme” cases<sup>160</sup> and typically included only violent offenses, has come to include nonviolent offenses like drug trafficking, possession of child pornography, and financial crimes? This section explores two theories for why non-violent crimes are PSCs: the mistrusting criminal judges effect and sweeping effect.

#### 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,” is one explanation for why many nonviolent offenses are PSCs. When the Board decided *Frentescu*, one of the four factors a judge was directed to consider was the type of sentence imposed.<sup>161</sup> 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.”<sup>162</sup> This statement indicated the Board’s faith in the criminal judge’s ability to identify dangerous criminals by imposing on them the longest sentences.<sup>163</sup>

The Attorney General’s 2002 *Y-L-* decision, where AG Ashcroft found that drug trafficking convictions were presumptively PSCs, marked the beginning of the mistrusting criminal judges effect in PSC determinations.<sup>164</sup> AG Ashcroft reversed three Board decisions finding that drug trafficking convictions with less than a five-year sentence were not PSCs.<sup>165</sup> The Board had based its decision partially on the respondents’ cooperation with federal authorities in collateral investigations, their limited criminal history records, and the fact that they were sentenced at the low end of the applicable sentencing guideline ranges.<sup>166</sup> 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.<sup>167</sup> The Attorney General disagreed, stating: “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.”<sup>168</sup> He set forth a presumption that drug trafficking convictions were per se PSCs, and only in extraordinary

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<sup>159</sup> Id. at 385-86.

<sup>160</sup> See *Frentescu*, 18 I. & N. Dec. at 246.

<sup>161</sup> See id. at 247.

<sup>162</sup> Id.

<sup>163</sup> See id.; see also *L-S-*, 22 I. & N. Dec. at 655-56 (deciding that alien smuggling for commercial gain was not a PSC is partially influenced by the sentence imposed, 3 and a half months of time served).

<sup>164</sup> See *Y-L-*, 23 I. & N. Dec. at 273-74.

<sup>165</sup> See id. at 273.

<sup>166</sup> See id. at 272.

<sup>167</sup> Id. at 273.

<sup>168</sup> Id. at 274.



and compelling circumstances could a noncitizen overcome the presumption.<sup>169</sup> Notably absent from his list of criteria that might overcome the PSC presumption were several criteria that, for a criminal judge, would justify a lower sentence.<sup>170</sup> 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.”<sup>171</sup>

In 2007, the Board in *N-A-M-* solidified the mistrusting criminal judges effect in the PSC analysis.<sup>172</sup> There the respondent had been sentenced to no term of imprisonment for his menacing conviction, yet the Board found this fact unimportant.<sup>173</sup> 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 the offense.<sup>174</sup>

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?

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-*. 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 sentence is less significant to the analysis.”<sup>175</sup> 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?

This mistrusting criminal judges effect is apparent outside of the Board’s PSC case law. One example is the Board’s refusal to recognize vacatur of guilty pleas by criminal courts if those vacatur are for immigration reasons only.<sup>176</sup> Following the harsh effects of the 1996 laws, many noncitizens returned to state court, seeking to vacate their criminal convictions. Since a criminal conviction formed the basis of deportation, this would alleviate the immigration impact, thus preventing an otherwise legal immigrant from being deported.<sup>177</sup> 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.<sup>178</sup>

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<sup>169</sup> See *supra* note 121 for a listing of those 6 criteria.

<sup>170</sup> See *id.*

<sup>171</sup> *Y-L-*, 23 I. & N. Dec. at 277.

<sup>172</sup> See *N-A-M-*, 24 I. & N. Dec. at 343.

<sup>173</sup> See *id.*

<sup>174</sup> *Id.*

<sup>175</sup> *R-A-M-*, 25 I. & N. Dec. at 662.

<sup>176</sup> *Matter of Pickering*, 23 I. & N. Dec. 621, 624 (BIA 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 a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains ‘convicted’ for immigration purposes.”)

<sup>177</sup> See generally 8 U.S.C. § 1227(a)(2) (basing most grounds of crime-related deportability on “conviction”).

<sup>178</sup> 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 U.S. continuously for seven years after admission in

State court judges often were sympathetic, vacating a criminal conviction so that the noncitizen could avoid deportation or be eligible for relief. 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 *Matter of Pickering* that if a conviction was vacated for immigration purposes only, that vacatur would not count for immigration purposes.<sup>179</sup>

Another example of the mistrusting criminal judges effect is the Board’s refusal to grant bond to an individual, even though a criminal court has released that same person on bail or parole.<sup>180</sup> 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.<sup>181</sup> 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.<sup>182</sup> 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.<sup>183</sup> Listed as a “less significant factor” in a bond determination is early release from prison, parole, or low bond in related criminal proceedings.<sup>184</sup>

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

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any status, five of which was after being admitted as a permanent resident. See 8 U.S.C. § 1229(a); see also *Matter of C-V-T-*, 22 I. & N. Dec. 7, 11-12 (BIA 1998) (describing the equitable factors the judge should consider when considering an application for cancellation of removal).

<sup>179</sup> See *Pickering*, 23 I. & N. Dec. 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. See *Pickering v. Gonzales*, 465 F.3d 263, 266 (6th Cir. 2006). The Board later decided that a sentence vacated for immigration reasons only would still be valid. See *Matter of Cota-Vargas*, 23 I. & N. Dec. 849, 852 (BIA 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.”).

<sup>180</sup> See, e.g., *Matter of Andrade*, 19 I. & N. Dec. 488, 490 (BIA 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. *Matter of Shaw*, 17 I. & N. Dec. 177, 179 (BIA 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.”).

<sup>181</sup> See Executive Office of Immigration Review, *Immigration Judge Benchbook* (last updated Apr. 15, 2015), available at <http://www.justice.gov/eoir/immigration-judge-benchbook>.

<sup>182</sup> *Id.* at “Introduction.”

<sup>183</sup> The Benchbook lists as significant factors fixed address in the U.S., length of residence, family ties in the U.S. (particularly those that can confer benefits on the noncitizen), employment history in the U.S., 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. See *id.* at “Bond/Custody,” 6-7.

<sup>184</sup> *Id.* at 7 (citing *Andrade*, 19 I. & N. Dec. 488; *Shaw*, 17 I. & N. Dec. 177).

sentencing judges to recommend “that such alien shall not be deported.”<sup>185</sup> Thus, sentencing judges could eliminate the harsh effects of the deportation laws by considering, on a case-by-case basis, who was deserving of a recommendation against deportation.<sup>186</sup> However, Congress first circumscribed JRADs for drug crimes in 1952, and then in 1990 completely eliminated the JRAD.<sup>187</sup>

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.<sup>188</sup> 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.<sup>189</sup> Finally, Congress also in 1996 defined a “sentence” or “term of imprisonment” (which carries significant consequences because many convictions are aggravated felonies by virtue of a term of imprisonment of at least one year)<sup>190</sup> to mean a suspended sentence.<sup>191</sup> 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.

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<sup>185</sup> See *Padilla v. Kentucky*, 559 U.S. 356, 361-64 (2010) (citing Immigration and Nationality Act of 1917, 29 Stat. 889-890) (describing history of JRAD).

<sup>186</sup> See *id.*

<sup>187</sup> See *id.* 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 Taylor and Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L. J. 1131, 1143-57 (2002); see also Legomsky, *supra* note 1, at 498-500 (“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.”).

<sup>188</sup> 8 U.S.C. § 1101(a)(48)(A) 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.

<sup>189</sup> See H.R.Rep. No. 104-828 (1996), 1996 WL 563320, at \*224 (“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 *Matter of Ozkok*, 19 I. & N. Dec. 546, 551-52 (BIA 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”).

<sup>190</sup> See, e.g., 8 U.S.C. §§ 1101(a)(43)(F) (crime of violence is aggravated felony if term of imprisonment of at least one year is imposed); 1101(a)(43)(G) (theft offense is aggravated felony if term of imprisonment of at least one year is imposed).

<sup>191</sup> See 8 U.S.C. § 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 (1996), 1996 WL 563320, at \*224 (“[This 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.”).

There remain areas of immigration law in which Congress has maintained some deference to state criminal judges. For example, a “crime involving moral turpitude” is a ground of inadmissibility,<sup>192</sup> 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.<sup>193</sup> Many “aggravated felony” categories are not triggered unless the criminal court imposes a one-year sentence.<sup>194</sup> Similarly, the statutory PSC bar for withholding is only triggered if the court imposes a five-year sentence for an aggravated felony.<sup>195</sup> 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.<sup>196</sup> Also, what little deference still remains to the criminal court judge is muted by the many offenses that have been swept into the meaning of terms such as “aggravated felony” and “crime involving moral turpitude.” This issue is taken up in the next section.

#### b. The Sweeping Effect

The expansive reading of “particularly serious crime” is part of what this article terms “the sweeping effect:” the trend of sweeping many offenses into crimmigration terms of art. While other scholars have noted the increasing merger between criminal and immigration law,<sup>197</sup> which has led to an expanded list of crimes that may result in removal,<sup>198</sup> none has specifically named this phenomenon. The sweeping effect is best illustrated by the saying “if all you have is a hammer, everything looks like a nail.” Except that the Board (and Congress) have had a toolbox full of hammers: namely, terms of art that are vague and able to easily be manipulated, such as “crime involving moral turpitude,” “aggravated felony,” and “particularly serious crime.”<sup>199</sup> Because these terms have such harsh immigration consequences – leading to inadmissibility, deportation, mandatory detention, and ineligibility for relief from removal – the Board and Congress have made significant efforts to harness the ambiguity of these terms by sweeping many crimes into each bucket. This section will explore what this article terms the “sweeping effect” in various areas of Board case law, including the PSC analysis.

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<sup>192</sup> 8 U.S.C. § 1182(a)(2)(A)(i)(I).

<sup>193</sup> 8 U.S.C. § 1182(a)(2)(A)(ii)(II); see also Juliet Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1730-31 (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).

<sup>194</sup> 8 U.S.C. §§1101(a)(43)(F) (crime of violence with one-year sentence); 1101(a)(43)(G) (theft or burglary offense with one-year sentence); 1101(a)(43)(R) (bribery, counterfeiting, forgery, or trafficking in vehicles with altered identification numbers with a one-year sentence); 1101(a)(43)(S) (obstruction of justice, perjury, or bribery of a witness with a one-year sentence).

<sup>195</sup> See 8 U.S.C. § 1231(b)(3).

<sup>196</sup> See *supra* notes 188-91 and accompanying text.

<sup>197</sup> See, e.g., Stumpf, *Crimmigration*, *supra* note 1; Legomsky, *supra* note 1; Garcia Hernández, *supra* note 1.

<sup>198</sup> See, e.g., Garcia Hernández, *supra* note 1, at 1484; Jennifer Chacón, *Whose Community Shield? Examining the Removal of the “Criminal Street Gang Member,”* 2007 U. CHI. LEGAL F. 317, 323-24 (2007); Miller, *Citizenship and Severity*, *supra* note 1, at 614-615.

<sup>199</sup> See, e.g., Holper, *Deportation for A Sin*, *supra* note 62 (arguing that the term “crime involving moral turpitude” is void for vagueness); see also Alphonsus, 705 F.3d at 1041-43 (considering and rejecting argument that the term “particularly serious crime” is void for vagueness); cf. Johnson, 135 S. Ct. at 2257 (holding that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), which contains a “violent felony” definition that is very similar to one prong of the crime of violence aggravated felony definition, 18 U.S.C. § 16(b), is void for vagueness).

### i. Particularly Serious Crimes

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. The dictionary defines “particularly” to mean “in a special or unusual degree,” or “to an extent greater than in other cases.”<sup>200</sup> “Serious” means “excessive or impressive in quality, quantity, extent, or degree.”<sup>201</sup> Also, “a ‘particularly serious crime’ must be more serious than a serious non-political crime, itself already a limited category.”<sup>202</sup> 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 verb and adverb should mean something.

However, what the Board has done in recent years is find that crimes are PSCs because there is harm to a victim.<sup>203</sup> Yet for every crime, there is harm to a victim; otherwise it would not be punishable as a crime.<sup>204</sup> 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.<sup>205</sup> According to Attorney General Ashcroft, society is harmed because illegal drugs are sold, which causes people to die of overdoses or become disabled by drug addiction.<sup>206</sup> Those who are disabled by drug addiction harm society further by robbing persons or property to feed their addiction.<sup>207</sup> 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.”<sup>208</sup> Also, substantial violence is present at all levels of the distribution chain.<sup>209</sup>

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?<sup>210</sup> Compare these inchoate set of harms to the Board’s decision in 1999 that alien smuggling was not a PSC.<sup>211</sup> Although there was significant potential for bodily harm – the respondent hid a woman in a compartment built underneath the floor of a

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<sup>200</sup> Merriam-Webster Dictionary, *available at*: <http://www.merriam-webster.com/dictionary>.

<sup>201</sup> *Id.*

<sup>202</sup> *Alphonsus*, 705 F.3d at 1049; *Frentescu*, 18 I. & N. Dec. at 247.

<sup>203</sup> See *Matter of G-G-S-*, 26 I. & N. Dec. 339, 343 (BIA 2014) (“The presence or absence of harm to the victim is also a pertinent factor in evaluating whether a crime was particularly serious.”).

<sup>204</sup> See, e.g., Kenworthy Bilz & John M. Darley, *What's Wrong with Harmless Theories of Punishment*, 79 CHI.-KENT L. REV. 1215, 1229 (2004) (“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.”); Bernard Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 192-93 (1999) (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 (quoting John Stuart Mill, *On Liberty* 9 (Elizabeth Rapaport ed., 1978) (1859)) (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”).

<sup>205</sup> See *Y-L-*, 23 I. & N. Dec. 275.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 276.

<sup>210</sup> See, e.g., *L-S-J-*, 21 I. & N. Dec. at 974-75.

<sup>211</sup> See *L-S-*, 22 I. & N. Dec. at 655.



van – the “respondent did not, in fact, cause [the alien] harm.”<sup>212</sup> 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 many crimes can be swept into the PSC bucket.

Congress also did its part to expand which crimes would statutorily be PSCs. As explained in Part I, in 1990, Congress rendered all aggravated felonies PSCs for withholding purposes. The ever-increasing sweep of the “aggravated felony” definition,<sup>213</sup> however, caused Congress with AEDPA in 1996 to inject some consideration of international treaty obligations when considering whether an aggravated felony was a PSC.<sup>214</sup> That same year, Congress decided that only aggravated felonies with five year sentences were automatically PSCs, which would comply with U.S. treaty obligations.<sup>215</sup> For asylum, however, Congress deemed aggravated felonies to be automatically PSCs.<sup>216</sup> The Board, in response to Congress’ broadening PSC definition, did not stop there; it decided in its 2007 *N-A-M-* decision that other offenses could still be considered on a case-by-case basis to be a PSC.<sup>217</sup> Circuit courts generally deferred to the Board’s decision on this issue.<sup>218</sup>

What is worse, 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.”<sup>219</sup> To explain such a change, the Board articulated that their approach to determining whether a crime is 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.”<sup>220</sup> The Board purported to rely on *Carballe* for this omission, but completely misapplied *Carballe*’s holding regarding dangerousness.<sup>221</sup> 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.<sup>222</sup> What the Board did in *N-A-M-* was authorize judges to not engage in *any*

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<sup>212</sup> See *id.* at 654-56.

<sup>213</sup> See *infra* Part IIIbiii.

<sup>214</sup> See AEDPA § 413(f); *Alphonsus*, 705 F.3d at 1040 (quoting *Frentescu*, 18 I. & N. Dec. at 246) (discussing that the AEDPA amendment to PSC was needed because “[t]he definition of ‘aggravated felony’ under the INA did not...remain focused on ‘very’ grave crimes, let alone ‘extreme cases.’”).

<sup>215</sup> See IIRIRA § 305.

<sup>216</sup> See IIRIRA § 604.

<sup>217</sup> See *N-A-M-*, 24 I. & N. Dec. at 341.

<sup>218</sup> See, e.g., *Delgado v. Holder*, 648 F.3d 1095, 1102 (9th Cir. 2011); *Nethagani v. Mukasey*, 532 F.3d 150, 156 (2d Cir. 2008); but see *Alaka v. Atty. Gen’l of the U.S.*, 456 F.3d 88, 104 (3d Cir. 2006) (“The plain language and structure (i.e., context) of the statute indicate that an offense must be an aggravated felony to be sufficiently ‘serious.’”). Following the Board’s decision in *N-A-M-*, where the Board rejected the Third Circuit’s rationale in *Alaka*, the Board held that it would follow its decision in *N-A-M-* in the Third Circuit. See *Matter of M-H-*, 26 I. & N. Dec. 46 (BIA 2012) (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982-85 (2005) for the holding that courts must defer to an agency’s interpretation of a statute, regardless of the circuit court’s contrary precedent, unless the prior court decision holds that the construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion).

<sup>219</sup> *N-A-M-*, 24 I. & N. Dec. at 342; *Frentescu*, 18 I. & N. Dec. at 247.

<sup>220</sup> *N-A-M-*, 24 I. & N. Dec. at 342 (citing *Carballe*, 19 I. & N. Dec. 357).

<sup>221</sup> See *id.*

<sup>222</sup> See *Carballe*, 19 I. & N. Dec. at 360; see also *Alphonsus*, 705 F.3d at 1039 (“*Carballe* accepted and reiterated *Frentescu*’s reliance on dangerousness as the sine qua non of a particularly serious crime.”).

determination of dangerousness.<sup>223</sup> 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.<sup>224</sup> By conflating the two dangerousness assessments, the Board in *N-A-M-* created a confusing and internally inconsistent new precedent<sup>225</sup> that is unmoored from the statutory text and its Protocol origins, which require there to be danger to the community.<sup>226</sup> Yet, because the Board purported to be applying old case law, it did not set forth a long explanation, as an agency normally would when it changes course.<sup>227</sup> For this reason, circuit courts reviewing the decision felt constrained by its prior rulings upholding *Carballe* that there was no need for a *separate* determination of dangerousness.<sup>228</sup>

Thus, what we see in recent years is the Board's sweeping effect in action, putting almost any offense into the PSC category, without regard to the fact that this is a term of art, reserved

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<sup>223</sup> Ms. *N-A-M-* argued that the circumstances of the crime indicate that she was acting in self-defense, so circumstances do not indicate a danger to the community. *N-A-M-*, 24 I. & N. Dec. 343 n.7. In response, the Board said "we are not persuaded that she does not pose any future danger to the community." *Id.* at 342-43. By injecting the word "future" into Ms. *NAM*'s argument, the Board was able to give the appearance of following *Carballe*'s holding that there need be no separate determination of dangerousness. See *id.*

<sup>224</sup> See *R-A-M-*, 25 I. & N. Dec. at 662 (quoting *N-A-M-*, 24 I. & N. Dec. at 342)) ([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.');" see also *Tian*, 576 F.3d at 897 (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").

<sup>225</sup> In July 2014, the Board suddenly brought back the fourth *Frentescu* factor, identifying dangerousness as "the pivotal standard by which particularly serious crimes are judged," without acknowledging that it had ever departed from *Frentescu* test. See *Matter of G-G-S-*, 26 I. & N. Dec. 339, 343 (BIA 2014) (citing *Alphonsus*, 705 F.3d at 1041). This created a problem of internally inconsistent precedent for judges to apply. The decision is too new to know how often the Board will cite to it instead of *N-A-M-*, although it appears that the Board now cites to *G-G-S-* as the "current law with respect to a [PSC] determination." In *Re: Omar Koran Smith*, 2015 WL 4761254, at \*1 (BIA July 22, 2015).

<sup>226</sup> See generally Part I.

<sup>227</sup> See *See Brand X*, 545 U.S. at 981 ("Unexplained inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.").

<sup>228</sup> See, e.g., *N-A-M- v. Holder*, 587 F.3d 1052, 1057 (10th Cir. 2009) (citing *Al-Salehi v. INS*, 47 F.3d 390, 393 (10th Cir. 1995)); but see *id.* at 1059-60 (Henry, J., concurring) ("Despite the clear presence of the phrase in the statute and the logical pronouncement in *Frentescu* that the phrase is the most important factor, the 'danger to the community' prong is now absent from the BIA's reiteration of the relevant factors in this case. . . . the BIA's continually competing and definitionally inconsistent constructions of § 1231 frustrate our function as a reviewing court and threaten the reasonableness of its interpretations."); see also *Alphonsus*, 705 F.3d at 1041 ("As demonstrated by the BIA's continued reliance on *Carballe*, *N-A-M-* did not countenance any change in the Board's longstanding focus on dangerousness as the 'essential key' to determining whether an alien's conviction constitutes a conviction for a particularly serious crime."); *Anaya-Ortiz v. Holder*, 594 F.3d 673, 679 (9th Cir. 2010) (quoting *N-A-M-*, 24 I. & N. Dec. at 342) (rejecting argument that the BIA made a legal error in not applying all four *Frentescu* factors by reasoning that the Board's test has evolved, and the PSC test no longer requires the BIA to engage in a "separate determination to address whether the alien is a danger to the community"). Arguing before the Ninth Circuit Court of Appeals, the government suggested that, due to *N-A-M-*, dangerousness was no longer the essential touchstone for particularly serious crime determinations. The court rejected this argument, stating "[t]his assertion contradicts the statutory text, which allows the Attorney General to deny withholding of removal 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.'" *Alphonsus*, 705 F.3d at 1046-47.

for the “extreme” cases.<sup>229</sup> This trend is similar to what the Board has done with other crimmigration terms of art.

## ii. Crimes Involving Moral Turpitude

Crimes involving moral turpitude (“CIMT”), which is one of the oldest criminal grounds of inadmissibility,<sup>230</sup> was incorporated into the criminal grounds of deportability in 1917.<sup>231</sup> Successive legislation saw no efforts to define the term,<sup>232</sup> perhaps because in 1951 the Supreme Court held that it was not void for vagueness.<sup>233</sup> In 1996, Congress expanded who could be deported for a single CIMT: under the prior construction, a sentence of one year had to be imposed by the state court; the new law allowed for deportation if a one-year sentence *may* be imposed.<sup>234</sup> Congress left the meaning of the term CIMT to the Board. The Board then took every opportunity to sweep more crimes into the CIMT bucket.

In a prior article, I described how the 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.<sup>235</sup> I describe several circumstances where the Board has swept more crimes into the CIMT category. For example, failure to register as a sex offender,<sup>236</sup> aggravated DUI,<sup>237</sup> and domestic violence<sup>238</sup> are each crimes that, once brought to the attention of the Board, fit within the broad CIMT category. In these examples, the Board looked to “contemporary moral standards” to define what type of crime involves moral turpitude.<sup>239</sup> Similarly, in the PSC context, we see the Board

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<sup>229</sup> See *Frentescu*, 18 I. & N. Dec. at 246.

<sup>230</sup> An 1891 Act introduced the term CIMT into federal immigration law, excluding from the United States “persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.” Act of March 3, 1891, ch. 551, 26 Stat. 1084.

<sup>231</sup> Act of Feb. 5, 1917, ch. 29, §§ 3, 19, Stat. 874, 875, 889-90 (repealed 1952).

<sup>232</sup> See, e.g., Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163, 182, 204 (1952) (rendering a noncitizen inadmissible for a CIMT and deportable for two CIMTs, or a single CIMT committed within five years of admission if a sentence of one year or longer was imposed).

<sup>233</sup> See *Jordan v. DeGeorge*, 341 U.S. 223 (1951).

<sup>234</sup> AEDPA § 435, 110 Stat. at 1274.

<sup>235</sup> See *Holper, Deportation for A Sin*, *supra* note 62.

<sup>236</sup> See *Matter of Tobar-Lobo*, 24 I. & N. Dec. 143, 145-46 (BIA 2007).

<sup>237</sup> *Matter of Lopez-Meza*, 22 I. & N. Dec. 1188, 1196 (BIA 1999).

<sup>238</sup> *Matter of Phong Nguyen Tran*, 21 I. & N. Dec. 291, 293-94 (BIA 1996).

<sup>239</sup> See *Tobar-Lobo*, 24 I. & N. Dec. at 146 (“[C]ontemporary moral standards play a significant role in determining, at a given time, what crimes involve moral turpitude... Given the serious risk involved in a violation of the duty owed by this class of offenders to society, we find that the crime is inherently base or vile and therefore meets the criteria for a crime involving moral turpitude.”); *Lopez-Meza*, 22 I. & N. Dec. at 1196 (“We find that a person who drives while under the influence, knowing that he or she is absolutely prohibited from driving, commits a crime so base and so contrary to the currently accepted duties that persons owe to one another and to society in general that it involves moral turpitude.”); *Tran*, 21 I. & N. Dec. at 294 (“In our opinion, infliction of bodily harm upon a person with whom one has such a familial relationship is an act of depravity which is contrary to accepted moral standards.”).

referencing general societal harms from crimes such as drug trafficking or possession of child pornography.<sup>240</sup> In both circumstances, we see the Board ignoring the modifiers of “crime” that might limit which offenses fall into that category; the terms instead become catchall categories.<sup>241</sup> Thus CIMT provides another good example of an expansive crimmigration term of art that has felt the sweeping effect.

### iii. Aggravated Felonies

In no other category of immigration crimes is the sweeping effect more obvious than the aggravated felony definition.<sup>242</sup> 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).<sup>243</sup> Yet, in the words of Stephen Legomsky, “it is now a colossus.”<sup>244</sup> 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.<sup>245</sup> 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.<sup>246</sup> As both scholars and practitioners frequently comment, “an ‘aggravated felony’ need no longer be either aggravated or a felony.”<sup>247</sup>

The Board also has contributed to the sweeping effect in the aggravated felony category. For example, as part of “Operation Last Call” in 1998,<sup>248</sup> the former INS began charging DUIs as aggravated felonies. The Board took the bait, holding that DUI offenses were crimes of

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<sup>240</sup> See R-A-M-, 25 I. & N. Dec. at 660; Y-L-, 23 I. & N. Dec. 275-76.

<sup>241</sup> Federal courts of appeals generally have given deference to the Board’s decisions about which crimes are CIMTs. See, e.g., *Marmolejo-Campos v. Holder*, 558 F.3d 903, 911 (9th Cir. 2009) ([W]e conclude that, once the elements of the petitioner’s offense are established, our review of the BIA’s determination that such offense constitutes a ‘crime of moral turpitude’ is governed by the same traditional principles of administrative deference we apply to the Board’s interpretation of other ambiguous terms in the INA.”); see also *id.* (collecting cases where courts have given deference to Board’s CIMT decisions).

<sup>242</sup> See Legomsky, *supra* note 1, at 483-86 (describing how the aggravated felony concept “has accounted for the steadiest and most expansive growth in the range of crimes that give rise to removal”).

<sup>243</sup> See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

<sup>244</sup> Stephen Legomsky, *supra* note 1, at 484.

<sup>245</sup> See Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193 § 4(b)(5), 117 Stat. 2875, 2879 (adding peonage, slavery, involuntary servitude, and trafficking in persons); IIRIRA of 1996, Pub. L. No. 104-208, Div. C. § 321, 110 Stat. 3636-37 (adding sexual abuse of a minor and rape); AEDPA of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (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, 108 Stat. 4305 (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 “crimes of violence”).

<sup>246</sup> IIRIRA, Pub. L. No. 104-208, Div. C. § 321, 110 Stat. 3636-37 (amending aggravated felony definition); see also *id.* at § 322 (amending “term of imprisonment” definition).

<sup>247</sup> See Legomsky, *supra* note 1, at 485; Demleitner, *supra* note 1, at 1065 (“Despite the term ‘aggravated felonies,’ not all of the offenses falling under this heading are felonies, nor would most people consider some of them aggravated.”); American Immigration Council, *Aggravated Felonies: An Overview* (March 2012), available at: <http://www.immigrationpolicy.org/just-facts/aggravated-felonies-overview> (“[D]espite what the ominous-sounding name may suggest, an ‘aggravated felony’ need not be ‘aggravated’ or a ‘felony’ to qualify as such a crime.”).

<sup>248</sup> See Chacón, *Whose Community Shield*, *supra* note 198, at 345 n.143 (citing William Branigin, *INS Reviews DWI Deportation Orders*, WASH POST A21 (Dec. 22, 1998)) (“Over five hundred individuals were detained by the INS in the course of this ‘operation.’”).

violence, which would be an aggravated felony if the sentence imposed was at least one year.<sup>249</sup> Several circuit courts disagreed with the Board,<sup>250</sup> which 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.<sup>251</sup> Finally, the Supreme Court, in a unanimous decision in 2004, decided that a DUI statute punishing negligently causing serious bodily injury was not a crime of violence aggravated felony.<sup>252</sup> Evoking common sense, the Court stated,

[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.<sup>253</sup>

Another example of the Board’s sweeping effect is drug trafficking aggravated felony category. In 2002, the Board held that felony possession of a controlled substance was a “drug trafficking” aggravated felony.<sup>254</sup> 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.<sup>255</sup> The Court had a subsequent opportunity to opine on the interaction between drug laws and deportability,<sup>256</sup> and again found that the Board’s position lacked common sense.<sup>257</sup> Thus with the aggravated felony definition, we see another example of the Board (and Congress) attempting to sweep all offenses into a crimmigration term of art.

The sweeping effect can explain why Congress has made more noncitizens deportable at the same time it has limited relief.<sup>258</sup> There are numerous examples of such effect,<sup>259</sup> while this

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<sup>249</sup> See *Matter of Puente*, 22 I. & N. Dec. 1006 (BIA 1999); *Matter of Magallanes-Garcia*, 22 I. & N. Dec. 1 (BIA 1998).

<sup>250</sup> See, e.g., *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001) (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) (same); *Bazan-Reyes v. INS*, 256 F.3d 600, 611 (7th Cir. 2001) (same); *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir. 2001) (same).

<sup>251</sup> See *Matter of Ramos*, 23 I&N Dec. 336, 339 (BIA 2002).

<sup>252</sup> See *Leocal v. Ashcroft*, 543 U.S. 1, 11-12 (2004).

<sup>253</sup> *Id.* at 10.

<sup>254</sup> *Matter of Yanez-Garcia*, 23 I. & N. Dec. 390, 397 (BIA 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 *Matter of K-V-D-*, 22 I. & N. Dec. 1163 (BIA 1999); *Matter of Davis*, 20 I. & N. Dec. 536 (BIA 1992); *Matter of Barrett*, 20 I. & N. Dec. 171 (BIA 1990).

<sup>255</sup> 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.”).

<sup>256</sup> See *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 581-82 (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).

<sup>257</sup> See *Carachuri*, 560 U.S. 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.”).

<sup>258</sup> For example, with IIRIRA, Congress eliminated the 212(c) waiver for long-term permanent residents, which used to be available to LPRs with aggravated felony convictions; with the same legislation, Congress created cancellation



article does not seek to categorize all of them, it demonstrates that this effect exists and has acted to limit refugee protection by expanding which crimes count as PSCs. What is more, in the future the sweeping effect may expand further, as new crimmigration terms of art are created.<sup>260</sup>

#### IV. Mirroring the Severity Revolution in Criminal Law

While the previous section sought to explain the PSC evolution by connecting it to larger trends in immigration law, this section explores how the PSC transformation mirrors the severity revolution, a trend from the criminal justice system, and draws lessons from such comparison for the PSC context.

##### a. Severity Revolution

A trend that occurred during the 1980's and 90's is what criminal scholar Joseph Kennedy has termed “the severity revolution,” where there was a dramatic break in the field of criminal punishment.<sup>261</sup> In contrast to the prior goals of minimizing pain and cruelty in the penal process, the “severity revolution” espoused severity of punishment as an overarching good.<sup>262</sup> 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).<sup>263</sup> As part of the severity revolution, legislatures responded to courts’ willingness to “let off” too many offenders by enacting harsh mandatory minimum sentences,<sup>264</sup> thus

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of removal for long-term LPRs but made that relief unavailable to LPRs with aggravated felony convictions and rendered a noncitizen ineligible if he had certain offenses within the first seven years after admission. See *INS v. St. Cyr*, 533 U.S. 289, 295-97 (2001); IIRIRA § 304(b).

<sup>259</sup> Another example is the expansive definition of “good moral character,” which is a requirement for naturalization and several forms of relief such as cancellation of removal and voluntary departure. See, e.g., §§ 1229b(b); 1229c(b); 1427; see also Kevin Lapp, *Reforming the Good Moral Character Requirement for Citizenship*, 87 *IND. L. J.* 1571 (2012).

<sup>260</sup> See, e.g., Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012) (barring deferred action for childhood arrivals (DACA) to those convicted, among other offenses, of a “significant misdemeanor”); 8 C.F.R. § 212.7(d) (to secure a waiver for a “violent or dangerous crime,” applicant for admission must show extraordinary circumstances, such as those involving national security or foreign policy considerations, or in cases in which the alien demonstrates exceptional and extremely unusual hardship).

<sup>261</sup> See Kennedy, *supra* note 7, at 831-32.

<sup>262</sup> See *id.* at 831; Simon, *supra* note 7, at 219.

<sup>263</sup> See Kennedy, *supra* note 7, at 856.

<sup>264</sup> See Garcia Hernández, *supra* note 1, at 1498 (quoting Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* 113 (2007) (“Rather than continue to confide in the neutral role that judges are supposed to occupy, over the next two decades [after the 1970’s] policymakers began to portray judges as ‘betrayers of the common good.’”); see also *id.* at 1499 (discussing 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 85% of their sentences); William Stuntz, *The Collapse of American Criminal Justice* 227-28 (Harvard Univ. Press 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); Simon, *supra* note 7, 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

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 persons to arrest in the first place.<sup>265</sup> Theresa Miller noted the trend in immigration law, commenting: "[i]n the years between 1996 and 2001, the immigration system bought into the 'severity revolution' occurring within the criminal justice system."<sup>266</sup>

In PSC cases, one can see the impact of the severity revolution, with the Board and AG 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.<sup>267</sup> The types of offenders targeted by the severity revolution also is 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 1980's and 90s.<sup>268</sup> He wrote, "[h]orrible crimes provide communion for a secular society that no longer comes together within the walls of any one church or around any one text."<sup>269</sup> 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.<sup>270</sup> 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.<sup>271</sup>

The determinate sentencing schemes of the severity revolution also reflect a "harm-based system of penology,"<sup>272</sup> which "leaves less room for an individualized assessment of an offender's circumstances."<sup>273</sup> 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.<sup>274</sup> 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.<sup>275</sup> 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

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offenders"); Kennedy, *supra* note 7, at 850-53 (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); Marc Miller and Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 347, 343-44 (1990) (discussing how after the Warren court, many perceived that those who were "actually guilty" were freed because of heightened procedural protections, thus creating "a system in which final disposition of criminal cases depends more on the conduct of the police than on the conduct of the accused.").

<sup>265</sup> See Garcia Hernández, *supra* note 1, at 1497, 1499-1500.

<sup>266</sup> Miller, *Blurring Boundaries*, *supra* note 1, at 83.

<sup>267</sup> See *supra* notes 165-75.

<sup>268</sup> See Kennedy, *supra* note 7, at 833.

<sup>269</sup> *Id.* at 847.

<sup>270</sup> *Id.* at 848.

<sup>271</sup> See Part II.

<sup>272</sup> Kennedy, *supra* note 7, 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)).

<sup>273</sup> Kennedy, *supra* note 7, at 856.

<sup>274</sup> 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. She cites examples such as mandatory detention and the broadening of the meaning of "aggravated felony," which authorizes both mandatory detention and deportation. Miller, *New Penology*, *supra* note 1, at 651.

<sup>275</sup> See Y-L-, 23 I. & N. Dec. at 271.

possession causes.<sup>276</sup> Board decisions interpreting financial crimes as PSCs also have made generalizations about the societal harms of such crimes.<sup>277</sup>

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.<sup>278</sup> Thus we see, in the interpretation of this act, the severity revolution playing out in individual decisions about which persons 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.

#### b. The Bail Reform Act of 1984 as a Case Study

The Bail Reform Act (“BRA”) of 1984,<sup>279</sup> part of the part of the Comprehensive Crime Control Act of 1984,<sup>280</sup> provides a useful case study in a law that was passed at the height of the severity revolution and discusses the meaning of danger to the community.<sup>281</sup> 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.<sup>282</sup> Maintaining

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<sup>276</sup> See R-A-M-, 25 I. & N. Dec. at 660.

<sup>277</sup> 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, “[i]dentity theft is a serious problem in our society.” In re L-V-R- (Nov. 17, 2014).

<sup>278</sup> For a discussion of the “compassion fatigue” that saw the transformation from a generous policy toward refugees to a growing sense that the U.S. could not control its borders, see Miller, *Citizenship & Severity*, *supra* note 1, at 624-29.

<sup>279</sup> Bail Reform Act of 1984, 18 USCA §§ 3141-50 (1984).

<sup>280</sup> Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 1, 3141-3151).

<sup>281</sup> Although there are other examples where dangerousness is assessed by judges, this article uses federal bail law as the most instructive example of dangerousness determinations for the PSC context because of its central legislative goal of protecting the public, which closely tracks the goals of the PSC bar. For example, civil commitment statutes and sexually violent predator statutes have the partial goal of treating the offender and protecting the offender himself. See, e.g., *Addington*, 441 U.S. 418, 425-26 (1979) (reasoning that the state has a legitimate interest under its *parens patriae* authority to treat the mentally ill and under its police power to protect the community “from the dangerous tendencies of some who are mentally ill”). Statutes governing juvenile detention have been justified as a shift in custody from the child’s parent to the state. See, e.g., *Schall*, 467 U.S. 253, 265 (1984) (“[J]uveniles, unlike adults, are always in some form of custody”). Statutes governing sentencing in general have goals of providing correctional treatment to the defendant and signaling to the public the seriousness of a defendant’s crime in addition to protecting the public from future crime. See, e.g., Model Penal Code § 7.01(1) (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). Statutes governing the death sentence, because they are sentencing statutes, have a combined goal of signaling to the public of the seriousness of the crime. See *id.*; see also *Barefoot v. Estelle*, 463 U.S. 880, 883 n.1 (1983) (quoting TEXAS CODE CRIM. PROC. ANN. 37.071) (death penalty permitted if there is a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society). Statutes governing parole have a combined legislative purpose of preventing dangerous persons from being free in society and allowing those who are not dangerous a period of successful integration into society through a period of controlled release. See Note, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.U. L. REV. 702, 702 (1963).

<sup>282</sup> See 18 U.S.C. §§ 3141-50; S. Rep. No. 225, 98th Cong., 2d Sess. 22, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3188 (“BRA Senate Report”) (stating that the 1966 Bail Reform Act “has come under

a presumption for pretrial release, the 1984 BRA mandates that the Government prove by clear and convincing evidence that no release conditions will reasonably ensure the safety of the community.<sup>283</sup> Congress included the consideration of dangerousness, however, as a strict exception to the presumption of pretrial release.<sup>284</sup>

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.<sup>285</sup> The 1984 BRA also created rebuttable presumptions of dangerousness when defendants are charged with certain enumerated crimes,<sup>286</sup> effectively shifting the burden of persuasion from the government to the defendant.<sup>287</sup> 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 safety of the community if there is probable cause to believe that the defendant committed certain enumerated offenses.<sup>288</sup> 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 (from sexual abuse to offenses involving child pornography) all create the rebuttable presumption of dangerousness.<sup>289</sup>

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

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criticism as too liberally allowing release and as providing too little flexibility to judges in making appropriate release decisions regarding defendants who pose a 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 [dangerous] defendants").

<sup>283</sup> See 18 U.S.C. §§ 3141-42. 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. 18 U.S.C. § 3142(g).

<sup>284</sup> The constitutionality of the BRA of 1984 was upheld by the Supreme Court in the 1987 case *U.S. v. Salerno*, 481 U.S. 739 (1987). The Court held that the government's regulatory interests, preventing crime by the arrestee, was both a legitimate and compelling governmental interest, and that the statute only permitted detention in carefully limited circumstances involving the most serious of crimes. See *id.* at 747-49. Also, the Court was satisfied that there were sufficient procedural protections in place during such a detention hearing and that the duration of confinement was limited by the "stringent time limitations of the Speedy Trial Act." *Id.* at 747, 751.

<sup>285</sup> 18 U.S.C. § 3142(f); BRA Senate Report, *supra* note 282, at 3200-05.

<sup>286</sup> 18 U.S.C. § 3142(e)(3).

<sup>287</sup> See *United States v. Perez-Franco*, 839 F.2d 867, 870 (1st Cir. 1988).

<sup>288</sup> 18 U.S.C. § 3142(e)(3).

<sup>289</sup> 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). See *id.*

detention due to dangerousness,<sup>290</sup> was modeled after the District of Columbia Court Reform and Criminal Procedures Act of 1970.<sup>291</sup> In the DC statute, Congress only permitted pretrial detention if the prosecutor proves by a substantial probability that the defendant committed a crime of violence<sup>292</sup> or a “dangerous crime.”<sup>293</sup> “Dangerous crime” was defined by reference to violent crimes: theft by force, burglary of a dwelling, arson, rape or assault with intent to commit rape.<sup>294</sup> “Dangerous crime,” however, also included drug trafficking.<sup>295</sup> Similarly, in the 1984 BRA, Congress deemed drug traffickers a danger to the community by describing dangerousness by the term “safety to any other person or the community;”<sup>296</sup> the Senate Report stated, “[t]he committee intends that the concern about safety be given a broader construction than merely danger of harm involving physical violence. . . . [t]he 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.’”<sup>297</sup> The DC model tracks the early days of 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.<sup>298</sup> In 2003, however, Congress expanded the presumption of dangerousness in federal bail determinations to include other non-violent offenses such as possession of child pornography.<sup>299</sup> Similarly, the Attorney General in 2002

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<sup>290</sup> See BRA Senate Report, *supra* note 282, at 3201 (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)”).

<sup>291</sup> See *id.* at 3205. Scholars disputed how closely the BRA tracked the DC statute because the BRA had fewer procedural protections. Miller and Guggenheim, *supra* note 264, at 347.

<sup>292</sup> 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 ANN. § 23-1331(4) (1989).

<sup>293</sup> See *id.* § 23-1322(a)(2).

<sup>294</sup> 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. See *id.* § 23-1331(3).

<sup>295</sup> See *id.*

<sup>296</sup> BRA Senate Report, *supra* note 282, at 3195.

<sup>297</sup> *Id.*; see also Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of 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.”).

<sup>298</sup> See BRA Senate Report, *supra* note 280, at 3203-04.

<sup>299</sup> See Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act) § 203, Pub. L. 108–21, 117 Stat 650 (2003) (amending 18 U.S.C. § 3142(e)(3) to include several offenses involving minor offenses, including kidnapping, production or possession of child pornography, and transporting children for the purposes of child prostitution).



decided that drug trafficking was presumptively a PSC, building on earlier Board decisions,<sup>300</sup> and the Board in 2012 decided that possession of child pornography was a PSC.<sup>301</sup>

Second, that financial crimes and most other non-violent 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.<sup>302</sup> As noted, the Board and AG may be subtly tracking the BRA's dangerousness presumptions in its published decisions. The only non-violent 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 AG referenced the BRA in those decisions).<sup>303</sup> However, financial crimes create no presumption of dangerousness under the BRA.<sup>304</sup> 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.

### c. Lessons Learned from the Severity Revolution

There has been significant scholarly critique of the draconian crime prevention measures passed during the 1980's and 90's<sup>305</sup> and the BRA in particular.<sup>306</sup> The references to drug

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<sup>300</sup> See Part IIc.

<sup>301</sup> See R-A-M-, 25 I. & N. Dec. at 660.

<sup>302</sup> 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, injury, or intimidate a prospective witness or juror. See, e.g., U.S. v. Bryd, 969 F.2d 106, 109-110 (5th Cir. 1992); U.S. v. Ploof, 851 F.2d 7, 11-12 (1st Cir. 1988) (holding that pretrial detention hearing for dangerousness is only authorized); U.S. 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.”).

<sup>303</sup> Compare 18 U.S.C. § 3142(e) (3)(E) (presumption of dangerousness in pre-trial 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) with R-A-M-, 25 I. & N. Dec. at 660 (holding that possession of child pornography is a PSC); also compare 18 U.S.C. § 3142(e)(3)(A) (presumption of dangerousness in pre-trial detention hearing if there is probable cause to believe the defendant committed a drug trafficking offenses) with Y-L-, 23 I. & N. Dec. at 274 (holding that drug trafficking convictions are presumptively PSCs).

<sup>304</sup> See 18 U.S.C. § 3142(e). For the purposes of a bail hearing pending sentencing pursuant to 8 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., U.S. v. Reynolds, 956 F.2d 192, 192-93 (9th Cir. 1992); see also U.S. v. Madoff, 316 Fed. Appx. 58, 59-60 (2d Cir. 2009) (unpublished) (reasoning, in dicta, that defendant convicted of non-violent offenses can still be a danger to the community for purposes of bail determination on appeal). In U.S. v. Provenzano, 605 F.2d 85, 95 (3d Cir. 1979), 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 forth no statutory presumptions of dangerousness. *Id.* at 90. 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.* at 95. The drafters of the 1984 BRA cited to *Provenzano* to justify the idea that “danger to the community” can be extended to nonphysical harms. See BRA Senate Report, *supra* note 282, at 3195.

<sup>305</sup> See, e.g., Stuntz, *supra* note 264, at (“The criminal justice system has run off the rails...no stable regulating mechanism governs the frequency or harshness of criminal punishment, which has swung wildly from excessive

trafficking as 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.<sup>307</sup> The severity revolution, however, has failed.<sup>308</sup> Many believe that we lost the war on drugs.<sup>309</sup> 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.<sup>310</sup> When interpreting the Refugee Convention, the trend should be heading in the *opposite* direction than the criminal justice system’s severity revolution. Withholding claims should be focused on the individualized person and the risk she presents to the U.S. community. The “tough on crime” mentality of the severity revolution<sup>311</sup> 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 – namely, the harm to black communities because of the long sentences doled out primarily to young black men for

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lenity to excessive severity.”); Jonathan Simon, *Governing Through Crime* 3-4 (Oxford Univ. Press 2007) (citing Doris Lessing, *The Four-Gated City* (1969)) (“Americans have built a new civil and political order structured around the problem of violent crime... Though Lessing condemned this new order as an ‘organized barbarism,’ many Americans have come to tolerate it as a necessary response to unacceptable risks of violence in everyday life.”); David Garland, *The Culture of Control* 3, 8-20 (Univ. Chicago Press 2001) (describing twelve indices of change in the U.S. and British criminal justice systems from 1970-2000 and stating, “[t]he 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”); Simon, *supra* note 7, at 221 (considering different theories behind the “severity revolution”); Kennedy, *supra* note 7, at 833 (“We have developed a draconian system of punishment for dealing with monsters that we have imagined being everywhere, a system that swallows up hordes of lesser offenders.”).

<sup>306</sup> See, e.g., Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L. J. 723 (2011) (arguing that the BRA violates the due process concept of the presumption of innocence); Wiseman, *supra* note 297, at 155-56 (quoting 18 U.S.C. § 3142(g)) (arguing that the BRA’s allowance for judges to consider “character, physical and mental condition, family ties, employment, financial 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); see also Laurence H. Tribe, *An Ounce of Detention: Preventative Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 376-77 (1970) (critiquing preventive 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 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).

<sup>307</sup> See Simon, *supra* note 7, at 227.

<sup>308</sup> See, e.g., Kennedy, *supra* note 7, 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 264, 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”).

<sup>309</sup> 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); Edward McGlynn Gaffney, Jr., *On Ending the War on Drugs*, 31 VAL. U. L. REV. xvii (1997); David Schultz, *Rethinking Drug Criminalization Policies*, 25 TEX. TECH. L. REV. 151 (1993); see also Bilz and Darley, *supra* note 204, at 1244-45 (discussing harms to black communities stemming from the longer sentences for crack cocaine than for powder cocaine).

<sup>310</sup> See Rodriguez-Coto, 19 I. & N. Dec. at 209.

<sup>311</sup> See Kennedy, *supra* note 7, at 855.

drug-related offenses.<sup>312</sup> 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*.<sup>313</sup> 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/ mother is going to be in harm's way in the country of deportation. Moreover, the goal of the PSC bar – protecting the U.S. community<sup>314</sup> – 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.”<sup>315</sup> 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 people even should be included when we discuss the dangers presented by drug traffickers.<sup>316</sup>

#### V. Proposal: Violent Crimes With Significant Prison Time as Particularly Serious Crimes

This article proposes that Congress redefine PSC to include only violent offenses against persons where the noncitizen served a significant sentence; alternatively, the Board or Attorney General could adopt such a test for cases falling within their discretion.

Why draw the line at violent offenses? First, the inviolability of the body is a central concept of criminal law.<sup>317</sup> 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.”<sup>318</sup> To support her argument, Ristroph cites HLA Hart, who characterized efforts to protect vulnerable human bodies from physical injury as the “minimum content” of a legal system,<sup>319</sup> and 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.<sup>320</sup> Because the PSC bar stems from a desire to protect the public from dangerous individuals, which is the central goal of criminal law, the

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<sup>312</sup> See Levy-Pounds, *supra* note 307, at 564; Bilz and Darley, *supra* note 204, at 1244-45; Harcourt, *supra* note 204, at 173-76 (discussing the competing harm arguments that proponents and opponents of the war on drugs have used).

<sup>313</sup> See 8 U.S.C. § 1182(a)(9)(A)(i) (barring from admission any noncitizen who has previously been removed if convicted of an aggravated felony); 8 U.S.C. § 1101(a)(43)(B) (categorizing drug trafficking as an aggravated felony).

<sup>314</sup> See N-A-M-, 24 I. & N. Dec. at 341.

<sup>315</sup> Y-L-, 23 I. & N. Dec. at 276.

<sup>316</sup> See Thomas E. Scott, *Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis*, 27 AM. CRIM. L. REV. 1, 32 (1990) (questioning harsh punishment for 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”).

<sup>317</sup> See Ristroph, *supra* note 81, 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.”).

<sup>318</sup> *Id.* at 611.

<sup>319</sup> *Id.* at 612 (citing H.L.A. Hart, *The Concept of Law* 189 (1961)).

<sup>320</sup> *Id.* at 611 (citing Thomas Hobbes, *Leviathan*, George Routledge and Sons, ed ed. 1886).

inviolability of the body at the heart of criminal law should be the same in PSC law.<sup>321</sup> Second, 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. 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.<sup>322</sup>

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. 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.<sup>323</sup> As the critics of mandatory minimums gain more traction,<sup>324</sup> PSC determinations will feel the impact.

What is a "significant" sentence? One possible bright-line rule is that the noncitizen actually have served five years in prison. This five-year cutoff is contained in the current PSC statutory language, as Congress intended for aggravated felonies with five-year sentences to be PSCs. Additionally, this cutoff has precedent in immigration law, as it tracks the old law of the 212(c) waiver.<sup>325</sup> 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.<sup>326</sup> It was only available, however, to those who had served less than five years for an aggravated felony conviction.<sup>327</sup> 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.<sup>328</sup> The Supreme Court, however, has

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<sup>321</sup> See *id.*; see also Part Ib.

<sup>322</sup> See *supra* notes 314-15 and accompanying text.

<sup>323</sup> See, e.g., Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat 2372 (2010) (eliminating sentencing disparity between crack and powder cocaine); *U.S. 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).

<sup>324</sup> See, e.g., Stuntz, *supra* note 264, 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 (1996) ("[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.").

<sup>325</sup> See former 8 U.S.C. § 1182(c). 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 (Nov. 29, 1990).

<sup>326</sup> See *St. Cyr*, 533 U.S. at 295-97; *Matter of Marin*, 16 I. & N. Dec. 581, 584-85 (BIA 1978).

<sup>327</sup> See former 8 U.S.C. § 1182(c) (1990).

<sup>328</sup> See Delgado, *supra* note 4, at 18; cf. 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); Goodwin-Gill, *supra* note 12, at 106 ("In practice, the claim to be a refugee can rarely be ignored, for a



disagreed, as has the Board.<sup>329</sup> In *Aguirre-Aguirre*, 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. Although that was not a PSC case, the Court upheld the Board's decision in *Rodriguez-Coto* 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.<sup>330</sup> 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."<sup>331</sup> In fact, there may be some unofficial humanitarian cross-checking going on behind the scenes of an immigration judge's decision when deciding PSC.<sup>332</sup>

Some also have argued for a separate determination of dangerousness,<sup>333</sup> calling on the Board to overrule its decision in *Carballe*.<sup>334</sup> An early critic of this separate determination of

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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 31, 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.").

<sup>329</sup> See *Rodriguez-Coto*, 19 I. & N. Dec. at 209; cf. *Aguirre-Aguirre*, 526 U.S. at 426 (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).

<sup>330</sup> See *Rodriguez-Coto*, 19 I. & N. Dec. at 209.

<sup>331</sup> Michael Kingsley Nyinah, *Exclusion under Article 1F: Some Reflections on Context, Principles and Practice*, 12 INT'L J. REFUGEE L. 307 (2000, special supplementary issue); 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).

<sup>332</sup> 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. at 429 (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 also *Matter of L-S-*, 22 I. & N. Dec. at 653 ("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.").

<sup>333</sup> 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 (Cambridge Univ. Press 2005) ("Beyond [a PSC determination], there must also be a determination that the offender constitutes a danger to the community."); Lauterpacht & Bethlehem, *supra* note 38, at 140 ¶191 ("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 crime in question was committed, evidence of recidivism or likely recidivism, etc."); see also *EN (Serbia) v. Secretary of the Home Department* (2010) Q.B. 633 (U.K.) (United Kingdom Queen's Bench ruling that "Article 33(2) of the Refugee Convention imposes on a state wishing [to expel a refugee] both the requirement that the person have 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 (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 security of the country...to justify refoulement."); *In re Tamayo & Dep't of Immigration* (1994), 37 A.L.D. 786, ¶20 (Australian Administrative Appeals Tribunal ruling that "the reference in Article 33(2) of the convention to a refugee who 'constitutes a danger to the community' is...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").

<sup>334</sup> See, e.g., Delgado, *supra* note 4; McGarry, *supra* note 4.



dangerousness, Judge 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.”<sup>335</sup> In other areas of law where predictions of dangerousness must be made,<sup>336</sup> 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.”<sup>337</sup> The Supreme Court, however, has held that such psychological predictions about dangerousness can be made in death penalty cases (although Justice Blackmun strongly disagreed).<sup>338</sup> The 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 persons or property.<sup>339</sup>

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.<sup>340</sup>

## VI. Conclusion

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<sup>335</sup> *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1222-23 (Vance, J., concurring).

<sup>336</sup> See Elyce Zenoff, *Controlling the Dangers of Dangerousness: The ABA Standards and Beyond*, 53 GEO. WASH. L. REV. 562, 562 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).

<sup>337</sup> *Intro*, *Dangerousness: Probability and Prediction*, *Psychiatry and Public Policy* 2 (Christopher D. Webster et al. eds., 1985) (referencing Alan Stone, *The New Legal Standard of Dangerousness: Fair in Theory, Unfair in Practice*, in *Dangerousness*, *supra* note 337, at 23); 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.”).

<sup>338</sup> *Barefoot*, 463 U.S. at 896 (“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.”).

<sup>339</sup> See *Matter Urena*, 25 I. & N. Dec. 140, 141 (BIA 2009) (citing to 8 C.F.R. 1236.1(c)(8), which governs determinations of bond made by ICE, for the suggestion that “danger to the community” means danger to property or persons); *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1113 (BIA 1999).

<sup>340</sup> See Ristroph, *supra* note 81, at 618 (“If the criminal law does best when violence – the old-fashioned, physically harmful kind – is involved, then perhaps the law needs a new focus on ‘true’ violence.”).

“[T]he line must be drawn so that ‘particularly serious crimes’ are not a major proportion of crimes generally.”<sup>341</sup> The Ninth Circuit’s relatively recent 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 both the mistrust of criminal judges and sweeping effect in immigration law, two trends that mirror aspects of criminal law’s severity revolution. It is time for Congress, the Board, or Attorney General to reverse the trends in PSC law that have allowed non-violent 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.

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<sup>341</sup> *Alphonsus*, 705 F.3d at 1048.