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Response to Professor Holper's Article, "Redefining 'Particularly Serious Crimes' in Refugee Law"

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RESPONSE TO PROFESSOR HOLPER'S ARTICLE, *REDEFINING "PARTICULARLY SERIOUS CRIMES" IN REFUGEE LAW*

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An individual who faces a significant risk of persecution in her home country is barred from asylum in the United States if she is convicted of a "particularly serious crime" ("PSC"). Despite the grave consequences of such a conviction, there is relatively little scholarship exploring how a PSC should be defined. The term, which comes from the UN Refugee Convention, was incorporated into the Immigration and Nationality Act in 1980.[1]

Professor Holper's article, *Redefining "Particularly Serious Crimes" in Refugee Law*, makes an important contribution to the literature by showing how the historical trajectory of the PSC definition mirrors the "severity revolution" of the 1980s and 1990s in the criminal justice system.[2] She also explains that the federal Bail Reform Act (BRA) creates rebuttable presumptions of dangerousness for certain types of offenses—not just crimes of violence, but also drug trafficking and offenses involving minor victims, including possession of child pornography—that are now treated as PSCs in immigration cases.[3]

Professor Holper persuasively argues that immigration law has gone astray by following in the footsteps of the severity revolution, which many agree has failed. Because an individual's life is at stake in cases involving refugee protection, Professor Holper contends that PSC determinations should be narrower than classifications of dangerousness under federal bail law. She proposes dropping offenses like drug trafficking and child pornography from the PSC definition and limiting this categorization to violent crimes against persons with a significant sentence of at least five years.

This response seeks to develop the discussion in two ways. First, it addresses Professor Holper's argument that the Board of Immigration Appeals (BIA) has expressed "mistrust" of criminal law judges by minimizing the importance of the length of a sentence in the PSC determination. I argue that the relationship between the immigration and criminal systems is complicated and cannot easily be categorized as one of trust or mistrust. I then address Professor Holper's proposal and compare it to a proposal that I made recently in an article arguing that the PSC analysis should follow the categorical approach to analyzing

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1. Mary Holper, *Redefining "Particularly Serious Crimes" in Refugee Law*, 69 FLA. L. REV. 1093, 1100 (2017).

2. *Id.* at 1125–26.

3. *Id.* at 1130–31.

convictions.[4]

"IT'S COMPLICATED": TRUST ISSUES IN THE RELATIONSHIP BETWEEN THE IMMIGRATION AND CRIMINAL JUSTICE SYSTEMS

Professor Holper points out several ways that the immigration system "mistrusts" the criminal justice system, including the BIA's directive that little weight should be given to the length of a sentence for purposes of a PSC determination. Other examples noted by Professor Holper are the INA's definition of a "conviction," which ignores whether a sentence was suspended and whether a conviction was expunged or vacated for immigration purposes; the factors considered for release on bond, which minimize an immigrant's early release from prison or low bond in related criminal proceedings; and Congress's elimination of the Judicial Recommendation Against Deportation (JRAD) in 1990, which allowed a sentencing judge in the criminal case to recommend against deportation.

At the same time, however, the immigration system gives substantial deference to the criminal justice system. For example, by focusing on the elements of the statute of conviction as the initial step in the PSC analysis, the BIA allows the criminal process to determine whether an offense comes "within the ambit" of a PSC.[5] Only after this initial determination is made are immigration judges supposed to look at other reliable information in deciding whether a conviction is a PSC.[6] As Professor Holper recognizes, the BIA's shift towards focusing on categories of crimes rather than an individualized analysis reflects the severity revolution.[7]

Some of the BIA's decisions addressing the PSC analysis even give excessive deference to the criminal process. In *Matter of G-G-S-*, for instance, the BIA prohibited immigration judges from considering an individual's mental health at the time of an offense for purposes of the PSC determination, reasoning that the criminal judge had already taken the mental health into account as part of the conviction and sentencing.[8] But that reasoning is flawed.[9] There are many reasons why a defendant's mental health may never be taken into consideration in the criminal proceedings: the offense may be a strict liability crime; the defendant may be reluctant to raise an insanity defense for fear of getting a longer sentence if the defense is unsuccessful; and a sentencing judge may decide not to consider mental health in sentencing as a matter of

4. Fatma Marouf, *A Particularly Serious Exception to the Categorical Approach*, 97 B.U. L. REV. 1427, 1429 (2017).

5. Matter of N-A-M-, 24 I. & N. Dec. 336, 342 (BIA 2007).

6. *Id.*

7. Holper, *supra* note 1, at 1128.

8. Matter of G-G-S-, 26 I. & N. Dec. 339, 345 (BIA 2014).

9. Fatma E. Marouf, *Assume Sane*, 101 CORNELL L. REV. ONLINE 25, 25 (2015)

discretion.[10] By assuming that the criminal court's decision fully accounted for any mental health conditions, the BIA relies too heavily on the criminal process.

These examples suggest that the relationship between the immigration system and the criminal justice system may be more complicated than "mistrustful," reflecting great deference towards criminal law judges in some areas and deviation in others. Indeed, the immigration system has adopted some of the more severe aspects of the criminal justice system, such as the focus on categories of offenses rather than individualized facts, while rejecting mitigating factors that the criminal justice system takes into account, such as evidence of remorse and rehabilitation, as well as any lenience in sentencing.

Professor Holper's concerns about the BIA's refusal to take sentence length into consideration are valid; but we should also be cautious about what it means to "trust" the criminal justice system. The primary concern involves failure to consider a short sentence a sign that a conviction is not that serious. But the opposite and potentially problematic flipside is assuming that long sentences connote dangerousness.

In FY 2016, the average sentence length for offenders who received *relief* from mandatory minimum sentences in the federal system was 67 months, over five years.[11] For those subjected to mandatory minimums, the average sentence was 138 months, over 10 years.[12] Looking specifically at noncitizens, the figures are similar, with average sentences of 66 months for those relieved of mandatory minimums and 124 months for those subjected to mandatory minimum.[13] In 2017, 30% of federal defendants received a sentence of over five years.[14] These statistics suggest that even limiting PSCs to offenses with a sentence of at least five years will have severe consequences for many noncitizens.

Under the Trump Administration, sentences will likely become even longer, since Attorney General Sessions is reversing important policies adopted by the Justice Department under the Obama Administration to reduce sentences, especially for lower level drug-related crimes.[15] In May 2017, Attorney General Sessions issued a memorandum instructing prosecutors to "charge and pursue the most serious, readily provable

10. The Ninth Circuit acknowledged these factors in a recent decision that rejected *Matter of G-G-S-*. *See* Gomez-Sanchez v. Sessions, 892 F.3d 985, 993–94 (9th Cir. 2018).

11. Vera Institute of Justice, *An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System (Sections 4 and 5)*, 30 FED. SENT'G. REP. 34, 47 (2017).

12. *Id.* at 47.

13. *Id.* at 49.

14. U.S. Sentencing Comm'n, *Overview of Federal Criminal Cases Fiscal Year 2017* (June 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/FY17_Overview_Federal_Criminal_Cases.pdf.

15. *Id.* at 8.

offense."[16] Now, if prosecutors want to pursue lesser charges for crimes that carry mandatory minimum sentences, they will need a supervisor's approval to make an exception. To the extent these changes primarily affect drug-related offenses, they would not impact Professor Holper's proposal, which excludes those offenses altogether. But the second largest category of crimes that involve mandatory minimum are firearms offenses, which would likely be considered "violent crimes."[17]

Because the BIA is part of the Department of Justice, headed by the Attorney General and subject to political influence, it is quite possible that future cases addressing PSCs will reflect new law enforcement priorities.[18] The Attorney General can also directly intervene in immigration matters by certifying cases pending before the BIA to himself and singlehandedly make major changes in legal doctrine.[19] Just as AG Sessions recently overruled the only BIA precedent granting asylum based on domestic violence in *Matter of A-B-*, he may well decide to define new types of crimes as presumptively PSCs.[20] This is precisely how drug trafficking offenses became presumptively PSCs under Attorney General Ashcroft during the Bush Administration.

HOW SHOULD A PSC BE DEFINED?

Professor Holper proposes that discretionary determinations about whether an offense is a PSC should be limited to violent crimes (i.e. crimes involving actual or threatened physical injury to another person) with a significant sentence, which she defines as at least five years. This proposal has several strengths. It provides a bright line rule for determining whether a conviction is a PSC. The proposal also avoids subjective interpretations by judges, makes it easier for defendants to predict whether an offense will be considered a PSC before taking a guilty plea, and increases the efficiency of immigration courts by making the PSC analysis simpler.

However, the proposal appears to include only a subset of crimes that already comes within the statutory definition of a PSC. The INA defines a PSC to include all aggravated felonies (as defined by the INA) for purposes of asylum,[21] and an aggravated felony or aggravated felonies with an aggregate sentence of at least five years for purposes of

16. Memorandum from Attorney General Jeff Sessions to all federal prosecutors, "Department Charging and Sentencing Policy" (May 10, 2017), https://www.justice.gov/opa/press-release/file/965896/download.

17. U.S. Sentencing Comm'n, *supra* note 14, at 34–35.

18. The Attorney General is authorized to determine the BIA's jurisdiction, as well as to appoint and remove members of the BIA. 8 C.F.R. 1003.1(a)(1)–(2), (d).

19. 8 C.F.R. 1003.1(h).

20. Matter of A-B-, 27 I. & N. Dec. 316, 520 (AG 2018).

21. 8 U.S.C. § 1158(b)(2)(B)(i).

withholding of removal.[22] Any "crime of violence" with a sentence of at least one year is an aggravated felony under the INA.[23] The definition of a "crime of violence" in the INA encompasses "violent crimes" as defined by the proposal.[24] A violent crime with a sentence of five years would therefore automatically qualify as a PSC under the statute for purposes of both asylum and withholding of removal. Consequently, adopting the proposal would eliminate any truly discretionary aspect of the PSC determination.

The Attorney General (or BIA) could decide to limit PSCs to offenses defined by statute, but any narrower definition would require Congress to revise the statute. Since Professor Holper does not suggest amending the statute, leaving a truly discretionary category in place would require slightly modifying her proposal. This could be done by dropping the requirement of a "significant sentence," or simply by not defining a "significant sentence" as at least five years.

The proposal I make in my article titled *A Particularly Serious Exception to the Categorical Approach* shares some aspects of Professor Holper's proposal but argues that the word "convicted" in the statutory phrase "convicted of a particularly serious crime" requires application of the categorical approach under recent Supreme Court precedents.[25] The categorical approach involves looking to the elements of the statute of conviction and comparing them to the relevant INA provision.[26] If the statute of conviction is broader than the INA provision, then the conviction may not "count" under the INA. When a statute is divisible, the record of conviction may also be considered, which is limited to the charging document, any jury instructions, the plea agreement or judgment of conviction, and the sentence.[27] The categorical approach prevents immigration judges from getting into the facts underlying a conviction.

In order for courts to apply the categorical approach to the PSC analysis, the elements of a PSC must be clearly defined. The first element that I proposed is that the offense must be a violent crime, defined in much the same way as Professor Holper proposes (I described it as the first part of the "crime of violence" definition but limited to crimes against persons).[28] The second element that I proposed was the use of a

22. 8 U.S.C. § 1231(b)(3)(B)(ii).

23. 8 U.S.C. § 1101(a)(43)(F) (referencing 18 U.S.C. § 16).

24. *Id.*; *see also* 18 U.S.C. § 16(a).

25. Marouf, *supra* note 4, at 1432–47. *See also* Descamps v. United States, 133 S. Ct. 2276, 2279 (2013); Moncrieffe v. Holder, 569 U.S. 184, 200 (2013) ("[T]he relevant INA provisions ask what the noncitizen was 'convicted of,' not what he did, and the inquiry in immigration proceedings is limited accordingly."); Carachuri-Rosendo v. Holder, 560 U.S. 563, 579–80 (2010) (focusing on the importance of the conviction as "the relevant statutory hook").

26. *Moncrieffe*, 569 U.S. at 190.

27. *Descamps*, 133 S. Ct. at 2281, 2285.

28. Marouf, *supra* note 4, at 1471.

dangerous weapon likely to produce serious bodily harm or death, which further narrows the types of crimes to the gravest and most dangerous offenses.[29] The third element I proposed is intent, which would eliminate crimes requiring only negligence or recklessness.[30] I argued that this element helps satisfy the principle of proportionality, so that a person is not intentionally exposed to a risk of persecution based on a reckless or negligent injury to someone else. Finally, I argued that PSCs should be limited to felonies, since it would be illogical for a misdemeanor to be deemed "particularly serious" given the existence of the more serious category of felonies. Limiting PSCs to felonies also helps eliminate crimes with shorter sentences without specifying the sentence.

If Professor Holper's requirement of a "violent crime" is based solely on the elements of the statute of conviction, rather than the underlying facts, then both her proposal and my own avoid any individualized assessment of the facts. Although in some cases excluding the facts may hurt the immigrant, it often helps level the playing field in a system where approximately 40% of immigrants are unrepresented and unable to introduce factual evidence in support of their cases. In addition, relying only on the statutory elements and record of conviction promotes uniformity by avoiding highly subjective decisions by immigration judges about which offense are particularly serious and increases the efficiency of the entire determination process.

One of the most important benefits of focusing on the elements and the record of conviction is that it allows immigrants and their criminal defense attorneys to predict the consequences of a conviction when they take a guilty plea, which is how over 90% of criminal charges are resolved.[31] Given that the Supreme Court has held it may be ineffective of counsel for a criminal defense attorney not to advise a defendant about the immigration consequences of a conviction, predictability is critical not only for the immigrant, but also for counsel.[32] It should be noted, however, that incorporating the sentence into the definition of a PSC undercuts predictability. Even if the prosecutor and defendant stipulate to a sentence in a plea agreement, the agreement is not binding on the judge, who may impose a longer sentence after receiving the guilty plea.

Of course, not making an individualized, fact-based assessment of whether an offense is a PSC also has drawbacks. Offender characteristics,

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29. *Id.* at 1472.

30. *Id.*

31. Brian A. Reaves, Bureau of Justice Statistics, U.S. DEP'T OF JUST., NCJ 243777, *State Court Processing Statistics, 2006: Felony Defendants in Large Urban Counties*, 2009, at 22, 24 tbl.21 (2013), http://bjs.gov/content/pub/pdf/fdluc09.pdf. In the federal courts, 97 percent of felony convictions follow guilty pleas. *See* Mark Motivans, Bureau of Justice Statistics, U.S. DEP'T OF JUST., NCJ 234184, *Federal Justice Statistics*, 2009, at 12 tbl.9 (2011), https://www.bjs.gov/content/pub/pdf/fjs09.pdf.

32. Padilla v. Kentucky, 555 U.S. 356, 374 (2009).

including mental illness, evidence of rehabilitation, and any other mitigating factors would not be considered. But, as noted above, they are not considered now, either. Not making individualized determinations is also at odds with the approach embraced by the UN High Commissioner for Refugees, the international authority in charge of interpreting the Refugee Convention. Ignoring the facts would further conflict with the case law of some courts, such as the Ninth Circuit, which handles over half of all the immigration appeals in the country and has interpreted the INA to mean that the agency *must* make individualized PSC determinations for any offenses that fall outside the category established by Congress for purposes of withholding of removal.

Still, given the mess that the BIA has made of the PSC case law, resulting in arbitrary and unpredictable decisions about whether or not a conviction will lead to someone being deported to her death, sticking with the elements of an offense and the record of conviction is a reasonable approach. In this respect, Professor Holper's proposal and mine are more alike than they may initially seem. They both promote consistency and predictability by making violent crimes the heart of the PSC analysis and avoiding fact-based determinations.