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Invoking Federal Common Law Defenses in Immigration Cases

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ABSTRACT

This Article supports taking a deeper look at federal common law defenses' applicability in immigration cases. On the rare occasions when noncitizens attempt to raise common law defenses, immigration judges tend to dismiss such defenses offhand simply because removal proceedings are technically civil, not criminal. Yet many common law defenses may be raised in civil cases. Additionally, immigration proceedings have become increasingly intertwined with the criminal system. After examining how judges already rely on federal common law to fill in gaps in the Immigration and Nationality Act (INA), this Article proposes three categories of removal cases that are particularly well-suited for raising federal common law defenses. The first category involves INA provisions that require conduct to be unlawful without requiring a conviction; the second category involves INA provisions barring asylum, which are closely connected to criminal culpability principles; and the third category involves certain removal grounds with no explicit mens rea requirement. Finally, the Article examines some of the legal and practical challenges to prevailing with these defenses in the removal context, drawing on criminal cases in which such defenses have been raised to immigration-related charges. The Article concludes that a more principled approach to the use of federal common law defenses in removal proceedings is necessary in order to promote consistent and fair adjudication.

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INTRODUCTION

Neither courts nor scholars have adequately explored the relationship between federal common law and the Immigration and Nationality Act (INA).[1] This Article supports taking a deeper look at federal common law defenses' applicability in immigration cases. On the rare occasions when noncitizens attempt to raise common law defenses, immigration judges tend to dismiss them offhand simply because immigration proceedings are technically civil in nature. Yet many common law defenses originated in the civil context and continue to be applied in civil matters.[2]

At the same time, immigration proceedings have become increasingly intertwined with the criminal system.[3] This has occurred through the initiation of removal proceedings based on criminal arrests and deportation of noncitizens with criminal convictions,[4] federal criminal prosecutions for immigration violations,[5] and state and local police officers' involvement in all aspects of

1. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).
2. *See infra* Part II (discussing origins and requirements for common law defenses); *see also* Christopher N. Lasch, *A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis*, 127 YALE L.J. FORUM 410 (2017) (explaining that the common law doctrine of privilege from arrest was applied primarily in civil cases and provides a way to challenge U.S. Immigration and Customs Enforcement's (ICE's) recent practice of arresting immigrants in state and local courthouses).
3. *See, e.g.*, Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 257–58 (2011) (discussing how states prosecute aliens for violating federal immigration law); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1350 (2010) (discussing how "criminal law can function as immigration law"); Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Crimmigration's Past Can Tell Us About Its Present and Its Future*, 104 CALIF. L. REV. 149, 153 (2016) (discussing how overpolicing of communities of color is being used to implement a mass deportation system); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 377 (2006) (discussing "the confluence of criminal and immigration law").
4. U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2016 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT (2017), https://www.ice.gov/sites/default/files/documents/Report/2016/removal-stats-2016.pdf [https://perma.cc/52AL-PV4B] (stating that 58 percent of all ICE removals and 92 percent of ICE removal from the country's interior were convicted criminals); *see also* U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL REPORT 4 (2018), https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf [https://perma.cc/BH4G-76FJ] (stating that 73.7 percent of ICE's administrative arrests involved convicted criminals).
5. AM. IMMIGR. COUNCIL, PROSECUTING MIGRANTS FOR COMING TO THE UNITED STATES (2018), https://www.americanimmigrationcouncil.org/research/immigration-prosecutions [https://perma.cc/RKS5-BUT9]; John Gramlich & Kristen Bailik, *Immigration Offenses Make Up a Growing Share of Federal Arrests*, PEW RES. CTR.: FACT TANK (Apr. 10, 2017),

immigration enforcement.[6] Under the Trump administration, state and local law enforcement officers are playing an ever-greater role in immigration enforcement through the reinstatement of the Secure Communities program, which requires participating jails to submit fingerprints to immigration databases, reinvigoration of 287(g) cooperation agreements, which deputize police to participate in immigration enforcement, and laws such as SB 4 in Texas that threaten officers with fines and jail time for failing to cooperate with U.S. Immigration and Customs Enforcement (ICE).[7]

Not only are the immigration and criminal systems interconnected, but removal proceedings also share many of criminal proceedings' trappings without offering similar protections, such as access to court-appointed counsel.[8] Noncitizens are charged under the INA, must plead to these charges, may be detained during the proceedings, and face the severe penalty of deportation if found removable. While immigration judges are well versed in various

http://www.pewresearch.org/fact-tank/2017/04/10/immigration-offenses-make-up-a-growing-share-of-federal-arrests [https://perma.cc/N5p9-E86X] (stating that half of all federal prosecutions are for immigration violations).

6. *National Map of 287(g) Agreements*, IMMIGRANT LEGAL RESOURCE CTR. (May 2, 2018), https://www.ilrc.org/national-map-287g-agreements [https://perma.cc/9QZM-Q42A] (showing a map of seventy-six jurisdictions with 287(g) cooperation agreements between local law enforcement agencies and ICE, forty-eight of which were entered into under the Trump administration). Section 287(g) of the INA allows the Department of Homeland Security (DHS) to deputize state and local law enforcement officers to enforce immigration laws within their jurisdiction. 8 U.S.C. 1357(g). ICE enters into a Memorandum of Understanding often called a "287(g) agreement" with the law enforcement agency and provides officers a four-week training course. *See Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENF'T (last updated Aug. 10, 2018), https://www.ice.gov/287g [https://perma.cc/XF3G-Q9JA].

7. Maggie Astor, *Texas' Ban on 'Sanctuary Cities' Can Begin, Appeals Court Rules*, N.Y. TIMES (Mar. 13, 2018), https://www.nytimes.com/2018/03/13/us/texas-immigration-law-sb4.html; Inés Valdez, Mat Coleman & Amna Akbar, *Donald Trump Says He's Just Enforcing Immigration Law. But It's Not That Simple*, WASH. POST: MONKEY CAGE (Nov. 7, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/06/donald-trump-says-hes-just-enforcing-immigration-law-but-its-not-that-simple [https://perma.cc/J6NX-SRUR]; Miriam Valverde, *Trump Says Secure Communities, 287(g) Immigration Programs Worked*, POLITIFACT (Sep. 6, 2016, 5:17 PM), https://www.politifact.com/truth-o-meter/statements/2016/sep/06/donald-trump/trump-says-secure-communities-287g-immigration-pro [https://perma.cc/TG8G-MDY6].

8. *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE. L. REV. 469 (2007) (explaining that "immigration law has been absorbing the theories, methods, perceptions, and priorities associated with criminal enforcement while explicitly rejecting the procedural ingredients of criminal adjudication"); Fatma E. Marouf, *Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 HASTINGS L.J. 929, 957–959 (2014) (explaining that "[a]lmost every aspect of removal proceedings more closely resembles a criminal proceeding than a civil one").

applications for relief from removal set forth in the INA, such as asylum, cancellation of removal, and voluntary departure, affirmative defenses are generally unfamiliar territory.[9] Noncitizens usually concede removability, even if represented by counsel. At that point, if they are lucky enough to be eligible for some form of relief from removal, they can submit an application. But the number of disqualifying factors, high legal standards, and discretionary nature of many applications make it extremely difficult for noncitizens to win relief.

Recognizing common law defenses to removal would help shift the asymmetric relationship between the proceedings' quasicriminal nature and the limited remedies available.[10] This shift is needed more than ever in the current political climate, as ICE has largely ceased exercising prosecutorial discretion and is aggressively pursuing removal regardless of a noncitizen's age, health condition, or other sympathetic circumstances.[11] While common law defenses may not be applicable to all inadmissibility and deportability grounds, they can potentially affect the outcome in a subset of cases.[12] More guidance is needed, however, from the Board of Immigration Appeals (BIA) and federal courts regarding the defenses' elements in the removal context, as well as whether they constitute complete defenses or mitigating factors. Adopting a principled approach to the use of common law defenses is essential to ensure more consistent and predictable decisions.

Part I of this Article examines federal common law's role in interpreting federal statutes, arguing that even a complex and detailed statute like the INA has holes in its legislative tapestry that should be filled by common law doctrines. As courts have recognized, the U.S. Congress "legislates against the backdrop of the

9. *See* 8 U.S.C. §§ 1158, 1229(b), 1229(c) (2018) (concerning asylum, various forms of cancellation of removal, and departure).

10. *See* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010) (discussing the absence of an adequate remedy for Fourth and Fifth Amendment violations in removal proceedings); Legomsky, *supra* note 8 (explaining that "immigration law has been absorbing the theories, methods, perceptions, and priorities associated with criminal enforcement while explicitly rejecting the procedural ingredients of criminal adjudication").

11. *See* Julie Rheinstrom, *Current Developments: One Hundred Days of President Trump's Executive Orders*, 31 GEO. IMMIGR. L.J. 433, 434–39 (2017) (calling the breadth of Trump's immigration enforcement priorities "staggering"); Caitlin Dickerson, *Immigration Arrests Rise Sharply as a Trump Mandate Is Carried Out*, N.Y. TIMES (May 17, 2017), https://www.nytimes.com/2017/05/17/us/immigration-enforcement-ice-arrests.html.

12. While deportability refers to removing someone from the United States after he or she has been admitted, inadmissibility generally refers to precluding someone from entering the United States, obtaining a visa, or adjusting status to become a legal permanent resident. *See* 8 U.S.C. §§ 1182, 1227 (2018).

common law";[13] it does not write "on a blank slate,"[14] which means that Congress anticipates that common law will be used to flesh out the legislation it enacts. Part I also points out how courts already rely on various common law doctrines in interpreting the INA.

Part II discusses several specific types of common law defenses, including justification defenses (necessity and self-defense), excuse defenses (duress, infancy, and insanity), and equitable defenses (entrapment by estoppel, equitable estoppel, and laches). This Part demonstrates that courts have recognized all of these defenses in civil cases, and some have been utilized in claims arising under the INA.

Part III argues that these common law defenses are also relevant to removal proceedings. This Part discusses three categories of cases in which common law defenses are particularly viable, in part because of a small body of existing cases recognizing their role. The first category involves INA provisions that require conduct to be "unlawful" or to "violate" a criminal statute without requiring a conviction. This is the most clear-cut category, since adjudicators should consider common law defenses to alleged offenses in order to determine whether the conduct at issue is actually unlawful. The second category involves INA provisions containing certain bars to asylum and a related form of relief called withholding of removal, which are derived from the United Nations (UN) Convention Relating to the Status of Refugees and are closely connected to criminal culpability principles. The third category involves certain inadmissibility and deportability grounds under the INA with no explicit mens rea requirement and, therefore, no backdoor to introducing factors such as age, insanity, or duress. In this category of cases, a common law defense may be the only way to avoid removal.

Finally, Part IV examines some of the legal and practical challenges involved in raising common law defenses in removal proceedings, drawing on criminal cases in which such defenses have been raised to immigration-related charges.

13. Voisine v. United States, 136 S. Ct. 2272, 2286 (2016) (citing Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991)).
14. Meyers v. Oneida Tribe, 836 F.3d 818, 824 (7th Cir. 2016) (holding that Indian tribes possess common law immunity because the U.S. Congress did not write "on a blank slate").

I. FEDERAL COMMON LAW'S ROLE IN INTERPRETING THE IMMIGRATION AND NATIONALITY ACT (INA)

Long ago, the U.S. Supreme Court made clear that there is a "federal common law" that fashions substantive rules not expressly authorized by statute or the Constitution.[15] Commentators have explained that "[t]he difference between the judicial creation of federal common law and the application of federal statutes to specific cases, especially when it involves the construction and enforcement of broadly worded provisions, is one of degree."[16] The Supreme Court has identified two categories of cases in which courts are competent to create federal common law: "those in which a federal rule of decision is necessary to protect 'uniquely federal interests,' . . . and those in which Congress has given the courts the power to develop substantive law."[17] If an area of law is governed by a "pervasively federal framework," as is immigration, it is appropriate for federal courts to "pronounce [federal] common law that will fill the interstices" in the statute.[18] Filling such gaps in the statute may include "construing vague statutory terms, supplying omitted procedural rules, or determining claims and

15. *See, e.g.*, Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (explaining that "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law'").

16. 19 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice & Procedure § 4514 (2d ed. 1996 & Supp. 2015) ; *see also* Richard H. Fallon, Jr. et al., Hart and Wechsler's the Federal Courts and the Federal System 635 (7th ed. 2015) ("Common lawmaking often cannot be sharply distinguished from statutory or constitutional interpretation. As specific evidence of legislative purpose with respect to the issue at hand attenuates, much interpretation shades into judicial lawmaking.").

17. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981).

18. City of Milwaukee v. Illinois, 451 U.S. 304, 336 (1981) ("If the federal interest is sufficiently strong, federal common law may be drawn upon in settling disputes even though the statute or Constitution alone provides no precise answer to the question posed."); *see also* United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973) ("[T]he inevitable incompleteness presented by all legislation means that interstitial federal law-making is a basic responsibility of the federal courts."); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957) ("It is not uncommon for federal courts to fashion federal law where federal rights are concerned."); *see also* Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 426 (1997) (explaining that because immigration law has traditionally been understood to be governed solely by federal law, "the courts had little difficulty developing a body of federal law governing immigration, in the absence of congressional authorization, despite the rhetoric of no federal common law"); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 59 (1995) (arguing that federal common law of foreign relations should be limited to three circumstances, one of which is "immigration matters").

defenses that may be asserted when the elements of a statutory cause of action have been set out in general terms."[19]

A. Relevant Canons of Statutory Interpretation

In examining the role that federal common law plays in interpreting the INA, two statutory construction canons are particularly relevant. First, statutes in derogation of the common law should be strictly construed.[20] As the Supreme Court explained, "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."[21] In order to rebut the presumption, a statute "must 'speak directly' to the question addressed by the common law."[22]

William Eskridge has argued that "[a]n updated version of the old meta-rule is that the common law can be used to fill in statutory gaps, unless it is inconsistent with the overall statutory policy."[23] Eskridge has proposed three reasons why the Supreme Court invokes common law rules to fill in statutory gaps: First, "the common law offers a readily accessible body of rules"; second, "private parties already are generally familiar with such rules and are accustomed to following them"; and third, "common law rules represent public values," that is, "they have been the object of judicial trial-and-error and critical commentary and are, as a result, thought to represent good policy."[24] These reasons help show why it makes sense to recognize common law defenses in interpreting the INA when the statute is silent on their applicability.

19. 19 WRIGHT, MILLER & COOPER, *supra* note 16, at § 4515.
20. *See, e.g.*, Shaw v. R.R. Co., 101 U.S. (11 Otto) 557, 565 (1879) (explaining that no statute should be construed as altering common law further than its words import); Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 692 (1834) ("[I]f a thing is at common law, a statute cannot restrain it, unless it be in negative words."); *see generally* 3 NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 61.1 (7th ed. 2007) (discussing canon on derogation of common law).
21. Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952).
22. United States v. Texas, 507 U.S. 529, 534 (1993) (holding that the "Debt Collection Act left in place the federal common law governing the obligation of the States to pay prejudgment interest on debts owed to the Federal Government"); *see also* Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993) ("Certain [common law] immunities were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them." (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967))).
23. William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1051 (1989).
24. *Id.*

Another highly relevant statutory construction canon provides that common law's repeal by implication is disfavored.[25] Based on this principle, the Supreme Court over a century ago advised:

> [A] statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, renders its provisions nugatory.[26]

More recent cases confirm this principle's continued relevance.[27]

At the same time, however, the Court has cautioned that "[f]ederal courts . . . are not general common law courts"[28] and "the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt."[29] In interpreting the Death on the High Seas Act, for example, the Court stated that although the statute "does not address every issue of wrongful-death law, . . . when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless."[30] Thus, "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted."[31]

The case that may pose the strongest challenge to utilizing common law defenses in immigration cases is *City of Milwaukee v. Illinois and Michigan*.[32] There, the Court held that a comprehensive statutory program, the Federal Water Pollution Act Amendments of 1972, displaced federal common law claims brought by Illinois and Michigan.[33] The Court stressed that "when the

25. *See generally* 2B NORMAN J. SINGER & J.D SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 50:1 (7th ed. 2007).
26. Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907); *see also* Shaw v. R.R. Co., 101 U.S. (11 Otto) 557, 565 (1879) (explaining that "[n]o statute is to be construed as altering the common law, farther than its words import").
27. *See, e.g.*, United States v. Texas, 507 U.S. 529, 534 (1993) (explaining that to abrogate the common law, a statute must "'speak directly' to the question addressed by the common law" (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978))); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991); St. Regis Paper Co., v. United States, 368 U.S. 208, 218 (1961); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952).
28. City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981).
29. Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 97 (1981).
30. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978).
31. *Id.*
32. 451 U.S. 304 (1981).
33. *Id.*

question is whether federal statutory or federal common law governs . . . we start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal common law."[34]

The Court has upheld federal common law rights, however, under other federal statutes. For example, in *United States v. Texas*,[35] the Court held that the federal Debt Collection Act of 1982[36] did not abrogate the U.S. government's federal common law right to collect prejudgment interest on debts the states owed it.[37] While the Court agreed with Texas that "Congress need not affirmatively proscribe the common-law doctrine at issue," it stressed that "courts may take it as a given that Congress has legislated with an expectation that the common law principle will apply except when a statutory purpose to the contrary is evident."[38]

The Tenth Circuit, which was the only appellate court that reached the same conclusion as the Supreme Court on the federal common law issues, interpreted *City of Milwaukee* to apply to situations in which there is a "comprehensive statutory program."[39] The court explained that the question resolved in *City of Milwaukee* was "whether the comprehensive nature of the [Federal Water Pollution Control Act Amendments (FWPCA) of 1972[40]] has supplanted federal common law in that area," noting that "[t]he [Supreme] Court stated that federal common law applies '[u]ntil the field has been made the subject of comprehensive legislation or authorized administrative standards.'"[41] In other words, "Congress had not left the formulation of appropriate federal water pollution standards to the courts through application of nuisance concepts, but had occupied the field through the establishment of a *comprehensive* regulatory program under the Amendments."[42] The Tenth Circuit distinguished the Debt Collection Act of 1982 from the FWPCA, explaining that the Debt Collection Act of 1982 "cannot be seen as the total

34. *Id.* at 316–17 (internal quotation marks omitted).
35. 507 U.S. 529 (1993).
36. Pub. L. 97-365, 96 Stat. 1749 (1982) (codified as amended 18 U.S.C. § 1114 and scattered sections of 5 U.S.C., 26 U.S.C., 28 U.S.C. and 31 U.S.C.).
37. Texas, 507 U.S. at 533–35.
38. *Id.* (internal quotation marks and brackets omitted).
39. Gallegos v. Lyng, 891 F.2d 788, 798 (10th Cir. 1989) (finding that allowing interest to be collected from states with overdue debts to the federal government is an example of "filling a gap left by Congress' silence" in the Debt Collection Act of 1982).
40. Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387 (2018)).
41. *Id.* (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 314 (1981)).
42. *Id.* (summarizing City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981)).

restructuring and complete rewriting of existing debt collection law as were the FWPCA with respect to water pollution law."[43]

B. Using Common Law to Interpret the INA

The INA, like the FWPCA, is a very detailed and comprehensive statute.[44] One might argue, therefore, based on *City of Milwaukee*, that reference to federal common law is not permitted, much less required, in interpreting the INA. But, courts have continued to refer to federal common law in interpreting some other complex and comprehensive statutes, such as the Labor Management Relations Act (LMRA) of 1947[45] and the Employee Retirement Income Security Act (ERISA) of 1974.[46] In fact, the Supreme Court has found that both the LMRA and ERISA authorize federal courts to develop uniform federal common law, although it has found that other statutes do not grant judicial authority to create federal common law.[47] Additionally, appellate courts have held that the "creation of a central regulatory authority" does not mean "abolition of common law rights, unless their retention would render the regulatory scheme ineffective."[48]

The INA neither expressly overrides nor explicitly preserves federal common law. Despite its complexity, there are still many gaps that common law may fill without rendering the legislative scheme ineffective. In *City of*

43. *Id.* (internal quotation marks omitted).
44. *See* Arizona v. United States, 567 U.S. 387, 395 (2012) ("Federal governance of immigration and alien status is extensive and complex."); Chamber of Commerce v. Whiting, 563 U.S. 582, 587 (2011) (stating that the INA "established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" (quoting De Canas v. Bica, 424 U.S. 351, 353, 359 (1976))).
45. Pub.L. 80-101, 61 Stat 136 (codified as amended at 29 USC §§ 141–187 (2018)).
46. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).
47. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54–56 (1987) (holding that courts have power to develop federal common law under Employment Retirement Security Act (ERISA)); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957) (holding that section 301 of the Labor Management Relations Act authorizes federal courts to develop uniform common law). *But see, e.g.*, Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 69 (1966) (holding that no provision of the Mineral Leasing Act of 1920 allowed the Court to develop federal common law to decide disputes among private parties dealing in the leases); Wheedlin v. Wheeler, 373 U.S. 647, 651–52 (1963) (holding that a statute governing congressional-subpoena issuance, and violation of that statute, did not result in private action "arising" under 28 U.S.C. § 1331, and distinguishing *Lincoln Mills*).
48. Kotz v. Bache Halsey Stuart, Inc., 685 F.2d 1204, 1207 (9th Cir. 1982) (holding that retention of common law fraud actions is not inconsistent with the scheme for regulation in the Commodities Exchange Act).

Milwaukee, the Court reasoned that when Congress addresses a question that was previously governed by federal common law, there is no longer a need to rely on federal common law.[49] This suggests that when Congress has not addressed a question previously governed by federal common law, such as whether a particular defense is available, then common law may help fill the interstices in the statute. As the Fourth Circuit has noted, although "a federal court is not entitled *to rewrite* a statute written by Congress to recognize a common law defense, it still can conclude that Congress impliedly recognized the defense when enacting the statute."[50]

The BIA, which is the administrative appellate body that reviews the decisions of immigration judges, as well as the federal circuit courts that review the BIA's decisions, have long applied federal common law to fill in various gaps in the INA's framework. Examples of common law doctrines that the BIA and federal courts routinely apply to immigration cases include res judicata, collateral estoppel, waiver, equitable tolling, and the fugitive disentitlement doctrine. The BIA and federal courts also use common law to interpret inadmissibility and deportability grounds, as well as terms of art in the INA. These adjudicative bodies have even created their own common law doctrines specific to the INA, such as the consular nonreviewability doctrine.

The Supreme Court has instructed that the common law doctrines of res judicata and collateral estopped are to be applied "to those determinations of administrative bodies that have attained finality."[51] In applying these common law doctrines to immigration cases, the BIA and courts have reasoned that they "do[] not contravene the language of the INA or congressional intent" and are "well-established," allowing courts to "imply that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident."[52]

49. City of Milwaukee v. Illinois, 451 U.S. 304, 314 (1981).
50. United States v. Gore, 592 F.3d 489, 492 (4th Cir. 2010) (emphasis added).
51. Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 107 (1991); *see also* Bravo-Pedroza v. Gonzales, 475 F.3d 1358, 1359–60 (9th Cir. 2007) (applying res judicata against the government where the government failed to challenge a prior decision); Fedorenko, 19 I. & N. Dec. 57, 61 (B.I.A. 1984); Barragan-Garibay, 15 I. & N. Dec. 77, 78–79 (B.I.A. 1974) ("We have applied the doctrine of collateral estoppel to prevent the relitigation of issues that have been determined in previous court litigation between the Government and the alien."); Grandi, 13 I. & N. Dec. 798 (B.I.A. 1971) (holding that the applicant was collaterally estopped from arguing that he was brought to the United States against his will after, in criminal proceedings, a court had considered the same contention and found that the applicant came to the United States voluntarily).
52. Duvall v. Attorney Gen., 436 F.3d 382, 387 (3d Cir. 2006); Duhaney v. Attorney Gen., 621 F.3d 340, 347 (3d Cir. 2010) (internal quotation marks omitted). For instance, courts have held that the government's failure to prove alienage collaterally estops the government from

Courts also regularly apply the waiver doctrine in immigration cases, such that arguments not raised before the BIA are deemed waived and cannot be made to the reviewing court.[53] By contrast, courts are divided regarding whether the common law doctrines of estoppel and waiver apply to other complex statutes, such as ERISA.[54] In addition, courts frequently apply the common law doctrine of equitable tolling, which allows litigants to bring claims even after a statute of limitations expires, in addressing the timeliness of motions to reopen that are filed after the deadline provided in the INA.[55] In immigration cases, just

relitigating the issue in subsequent proceedings. *See, e.g.*, Ramon-Sepulveda v. INS, 824 F.2d 749, 750–51 (9th Cir. 1987) (per curiam) (holding that a failure of proof on the alienage issue collaterally estops the INS from relitigating the issue in subsequent proceedings). Similarly, once the government concedes citizenship, it is collaterally estopped from relitigating that issue. Medina v. INS, 993 F.2d 499, 502–04, n.15 (5th Cir. 1993) (finding that collateral estoppel is consistent with the INA and precludes relitigating an individual's citizenship if the issue was conceded by the INS during a prior proceeding); *see also* Hamdan v. Gonzales, 425 F.3d 1051, 1059 (7th Cir. 2005) ("*Res judicata* (as well as the related principle of collateral estoppel) applies to administrative proceedings such as the adjudication of petitions for relief in immigration courts."); Santana-Albarran v. Ashcroft, 393 F.3d 699, 704 (6th Cir. 2005) (applying a five-part test for collateral estoppel to determine if the doctrine is applicable to resolving the issue of when the petitioner entered the United States). However, the res judicata doctrine does not bar the government from lodging new removability charges. *Duhaney*, 621 F.3d at 347 (holding that the res judicata doctrine did not bar the government from lodging additional removability charges following vacatur of the alien's controlled substance conviction and that the government was not precluded from lodging new removal charges based on convictions disclosed in an alien's application for a discretionary waiver of removability).

53. *See, e.g.*, Singh v. Ashcroft, 361 F.3d 1152, 1157 n.3 (9th Cir. 2004) ("Issues not raised in an appellant's opening brief are typically deemed waived." (citation omitted)); Strantzalis v. INS, 465 F.2d 1016, 1018 n.3 (3d Cir. 1972) ("When an alien is informed of his right to retain private counsel [under 8 U.S.C. § 1362] and the alien decides to proceed on his own, he has waived any right provided by this section."); *see also* Thomason v. Aetna Life Ins. Co., 9 F.3d 645, 648 (7th Cir. 1993) (noting that federal common law waiver principles are not as well-established as estoppel principles).

54. *See* White v. Provident Life & Accident Ins. Co., 114 F.3d 26, 29 (4th Cir. 1997) (holding that the federal common law doctrines of waiver and estoppel do not apply to ERISA contracts). *But see* Pitts v. Am. Sec. Life Ins. Co., 931 F.2d 351, 357–58 (5th Cir. 1991) (recognizing waiver as a viable claim under ERISA); *Thomason*, 9 F.3d at 647–49 (leaving open the question of whether the waiver doctrine applies in the ERISA context, but rejecting the waiver argument made by the plaintiff in this case); Glass v. United of Omaha Life Ins. Co., 33 F.3d 1341, 1347–48 (11th Cir. 1994) (same).

55. *See* Lozano v. Montoya Alvarez, 572 U.S. 1, 10–11 (2014) (describing equitable tolling as "a long-established feature of American jurisprudence derived from 'the old chancery rule'" (quoting Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946))). Under the INA and its regulations, a respondent may file only one motion to reopen and must do so within ninety days of the BIA's decision. INA § 240(c)(7)(C)(A), (C); 8 C.F.R. §§ 1003.2(c)(2), 1003.23(b)(1) (2018). However, the BIA and circuit courts have held that these requirements are not jurisdictional and are subject to equitable tolling. *See* Holland v. Florida, 560 U.S. 631, 649 (2010) (recognizing the longstanding equitable tolling principle); Compean, 25 I. & N. Dec. 1 (B.I.A. 2009) (accepting the equitable tolling doctrine, so long

like in other types of cases, litigants must show exceptional circumstances and due diligence for courts to apply the equitable tolling doctrine.[56]

Courts have further drawn on federal common law in immigration cases when interpreting particular deportability and inadmissibility grounds. In determining whether a given conviction triggers a deportability or inadmissibility ground under the INA, courts apply a method of analysis called the categorical approach, which involves comparing the elements of the state statute under which an individual has been convicted to the federal generic crime's elements.[57] If the state statute's elements are broader than the federal generic offense, a conviction under that statute does not count as a conviction for immigration purposes. Performing this analysis requires first defining the federal generic crime's elements. In defining federal generic crimes, courts have drawn on federal common law, along with other federal law sources.[58]

as certain criteria are met). In 2015, the U.S. Supreme Court recognized that nearly all appellate courts had held that the BIA "may sometimes equitably toll the time limit for an alien's motion to reopen." Mata v. Lynch, 135 S. Ct. 2150, 2156 (2015). In determining whether a motion to reopen a deadline should be equitably tolled, courts generally require showing that: (1) the delay was due to an extraordinary circumstance; and (2) reopening was pursued with due diligence. Lawrence v. Florida, 549 U.S. 327, 336 (2007) (holding that an extraordinary circumstance is necessary to warrant equitable tolling); Iturribarria v. INS, 321 F.3d 889, 897 (9th Cir. 2003) (recognizing equitable tolling in situations where the petitioner is prevented from filing due to "deception, fraud, or error, as long as the petitioner acts with due diligence").

56. *Mata*, 135 S. Ct. at 2156.

57. The Supreme Court has clarified the proper application of the categorical and modified categorical approaches in a string of recent cases, including *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Mellouli v. Lynch*, 135 S. Ct. 1980 (2014); *Descamps v. Holder*, 570 U.S. 254 (2013); and *Moncrieffe v. Holder*, 569 U.S. 184 (2013).

58. *See* Gonzales v. Duenas-Alvarez, 549 U.S. 183, 189–90 (2007) (adopting a federal generic "theft" definition in determining whether "aiding and interpreting" a theft is a "theft offense" under the INA); Etienne v. Lynch, 813 F.3d 135, 143 (4th Cir. 2015) ("To determine the meaning of the term 'conspiracy' in the INA, our analysis begins with the 'settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms'"(quoting United States v. Shabani, 513 U.S. 10, 13 (1994))); Jennifer Lee Koh, *The Whole Better Than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 280 (2012). *But see* Taylor v. U.S., 495 U.S. 575, 594 (1990) (declining to "construe[] 'burglary' to mean common-law burglary," because that "would come close to nullifying that term's effect in the statute," since "few of the crimes now generally recognized as burglaries would fall within the common-law definition"); De Lima v. Sessions, 867 F.3d 260, 266 (1st Cir. 2017) (deciding not to limit a "theft offense" to the common law definition in holding that theft of services constitutes a "theft offense" under the INA).

Similarly, courts have developed federal common law in order to interpret terms in the INA such as "good moral character."[59] Someone who lacks good moral character can be denied citizenship and other immigration benefits.[60] Sodomy and adultery used to be bars to good moral character.[61] In construing those terms, courts refused to rely on varying state definitions and instead developed federal common law to define them,[62] which promoted uniformity in adjudicating naturalization applications.[63]

Courts have also held that the common law fugitive disentitlement doctrine applies to immigration cases. This doctrine, which the Supreme Court first applied in the late nineteenth century, provides courts with discretion to dismiss the appeal of an individual who is a fugitive from justice during the appeal's pendency.[64] Courts have reasoned that this doctrine applies not only to convicted criminals who flee while an appeal is pending, but also to a noncitizen who "fails to comply with a notice to surrender for deportation."[65]

59. Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 535 (2001). Another example of a term in the INA whose meaning was developed at common law is entry. Tellez v. Lynch, 839 F.3d 1175, 1178 (9th Cir. 2016) (recognizing that the definition of entry was developed at common law and explaining that the court's interpretation of reentry under the INA reinstatement provision "does not disturb this longstanding common-law definition").

60. *See* 8 U.S.C. § 1427(a) (2018) (requiring five years of "good moral character" preceding the naturalization application); 8 U.S.C. § 1101(f) (defining the statutory bars to "good moral character").

61. In 1981, Congress eliminated the INA provision that prohibited adulterers from establishing good moral character. Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 2(c)(1), 95 Stat. 1611, 1611 (repealing 8 U.S.C. § 1101(f)(2) (1976)).

62. Wishnie, *supra* note 59, at 535. *See also* Nemetz v. INS, 647 F.2d 432, 435 (4th Cir. 1981) (rejecting reliance on Virginia antisodomy statute to interpret "good moral character" requirement for naturalization purposes); Moon Ho Kim v. INS, 514 F.2d 179, 181 (D.C. Cir. 1975) (rejecting reliance on varying state law definitions of "adultery" in interpreting "good moral character" under the INA, as this would "destroy any meaningful uniformity as to the definition of 'adultery' as used in the Congressional enactment"); Wadman v. INS, 329 F.2d 812, 816–17 (9th Cir. 1964) (refusing to rely on a strict construction of California's definition of "adultery" in interpreting this term for purposes of the INA's "good moral character" requirement).

63. *See, e.g.*, *In re* Schroers, 336 F. Supp. 1348, 1349 (S.D.N.Y. 1971) ("Uniformity . . . cannot be attained if resort is had to the laws of the 50 states to determine whether a particular applicant for citizenship has committed adultery."). *But see* Brea-Garcia v. INS, 531 F.2d 693, 696–98 (3d Cir. 1976) (disagreeing with other decisions regarding the need for a uniform federal "adultery" definition in disregard of state law).

64. *See, e.g.*, Smith v. United States, 94 U.S. (4 Otto) 97, 97–98 (1876) (holding that a court may dismiss a convicted fugitive's criminal appeal); Kiran H. Griffith, Comment, *Fugitives in Immigration: A Call for Legislative Guidelines on Disentitlement*, 36 SEATTLE U. L. REV. 209, 213–18 (2012) (discussing the origin and rationale behind the fugitive disentitlement doctrine).

65. Gao v. Gonzales, 481 F.3d 173, 176 (2d Cir. 2007); *see e.g.*, Giri v. Keisler, 507 F.3d 833, 835 (5th Cir. 2007) (dismissing a noncitizen's appeal under the fugitive disentitlement doctrine);

The consular nonreviewability doctrine provides one last example of how courts have applied federal common law to immigration cases. This doctrine precludes judicial review of consular decisions made by U.S. State Department officials at American consulates abroad. The INA expressly limits judicial review of various types of immigration matters, but it does not so limit consular decisions.[66] Rather, federal courts have developed this doctrine solely through cases dating back to the 1920s.[67] While immigration scholars such as Stephen Legomsky have pointed out that arguments for the consular nonreviewability doctrine "were weak at the time they were advanced, and are superseded by the APA," the doctrine remains alive and active today.[68]

These examples of common law doctrines that are routinely raised in immigration cases show how courts have already recognized that the backdrop of common law shines through gaps in the INA. Yet the BIA and federal courts have not yet adequately answered the question of whether federal common law defenses exist in removal proceedings. Part II discusses several of these defenses, along with their applicability to both criminal and civil cases, including, in some

Antonio-Martinez v. INS, 317 F.3d 1089, 1092–93 (9th Cir. 2003) (exercising discretion not to dismiss an appeal under the fugitive disentitlement doctrine). There is a circuit split regarding whether the fugitive disentitlement doctrine applies if a noncitizen fails to report to the U.S. Department of Homeland Security (DHS) but his whereabouts are known to the court, counsel, and federal authorities. *See* Griffith, *supra* note 64, at 211–12, 227–33.

66. *See, e.g.*, 8 U.S.C. § 1252(a)(2)(B)(ii) (2018) (limiting review of discretionary decisions). Consular decisions are not totally discretionary. Consular officers must have "reason to believe" that the visa beneficiary falls within one of the inadmissibility categories defined by statute in order to deny a visa. 8 U.S.C. § 1201(g) (2018). However, consular officers can make discretionary decisions about applications for inadmissibility waivers. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972) (holding that courts will not look behind the Executive's "facially legitimate and bona fide" exercise of discretion to exclude a noncitizen from the United States).

67. *See, e.g.*, Li Hing of H.K., Inc. v. Levin, 800 F.2d 970 (9th Cir. 1986) (showing the development of the consular nonreviewability doctrine through case law); Loza-Bedoya v. INS, 410 F.2d 343 (9th Cir. 1969); United States *ex rel.* Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir. 1929); United States *ex rel.*London v. Phelps, 22 F.2d 288 (2d Cir. 1927); Licea-Gomez v. Pilliod, 193 F. Supp. 577 (N.D. Ill. 1960).

68. STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 150 (1987). Appellate courts have recognized exceptions to the consular nonreviewability doctrine if the plaintiffs allege violations of their own constitutional rights along with their statutory claims, and if the plaintiffs challenge the government's authority to take or not take an action, as opposed to a discretionary decision. Trump v. Hawaii, 138 S. Ct. 2392, 2407 (2018) (noting that the Government relied on the consular nonreviewability doctrine in arguing that the Court could not review President Trump's travel ban, but assuming, without deciding, that the Court could review the plaintiffs' statutory claims); Abourezk v. Reagan, 785 F.2d 1043, 1052 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987) (reasoning that the court had "an independent obligation to consider questions of statutory construction . . . in order to avoid a constitutional confrontation . . . .").

instances, immigration cases. Part III then argues that these defenses should apply in removal proceedings in at least a subset of cases.

II. FEDERAL COMMON LAW DEFENSES

For hundreds of years, courts have recognized common law defenses to crimes.[69] Although all federal crimes are statutory, common law defenses have been "routinely allowed against federal criminal prosecutions without explicit statutory basis."[70] Construing federal statutory crimes to include a mens rea requirement provides one example of this trend. As Stephen Smith has explained, "the purpose and effect of reading *mens rea* requirements into criminal statutes is to create, on judicial initiative alone, a defense for persons lacking the state of mind deemed essential by the courts but not specifically required by Congress as a prerequisite for punishment."[71] In 1952, the Supreme Court construed the federal statutory crime of conversion to include an implicit mens rea requirement based on the common law tradition.[72] The Court found "no grounds for inferring any affirmative action from Congress to eliminate intent" from the offense.[73] In 1978, the Court again relied on common law principles in holding that the defendant's state of mind is an element of a criminal antitrust offense under the Sherman Act of 1890.[74]

More directly on point, in 1980, the Court decided *United States v. Bailey*,[75] which recognized an implicit common law necessity or duress defense for defendants charged with violating a federal statute that criminalized escaping from federal custody.[76] The defendants in that case argued that their escape was

69. *See* Benjamin Reeve, Note, *Necessity: The Right to Present a Recognized Defense*, 21 NEW ENG. L. REV. 779, 781–84 (1985); *see also* Michelle R. Conde, Comment, *Necessity Defined: A New Role in the Criminal Defense System*, 29 UCLA L. REV. 409 (1981) (discussing the development of the necessity defense and arguing that it should have its own category as a hybrid justification/excuse defense); Glanville Williams, *The Defence of Necessity*, 6 CURRENT LEGAL PROBS. 216, 224 (1953) (chronicling the historical evolution of the necessity doctrine in English law).

70. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 287 n.33 (1982); *see also* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (explaining that there are no federal common law crimes).

71. Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 587 (2013).

72. Morissette v. United States, 342 U.S. 246, 272–73 (1952).

73. *Id.* at 273.

74. Sherman Act of 1890, 15 U.S.C. § 1 (2018); United States v. U.S. Gypsum Co., 438 U.S. 422, 435–46 (1978).

75. 444 U.S. 394 (1980).

76. *Id.* at 416 n.11 (recognizing that "a defense of duress or coercion may well have been contemplated by Congress when it enacted [18 U.S.C.] § 751(a)").

necessary because of the prison conditions and death threats by guards.[77] Although the Court rejected the defense under the case's facts, it recognized an implicit common law necessity or duress defense, stating that "Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law."[78] Subsequent decisions by federal appellate courts reinforced *Bailey*'s reasoning that common law defenses exist to statutory federal crimes.[79]

In *United States v. Oakland Cannabis Buyers' Cooperative* (*Oakland Cannabis*),[80] which rejected a medical necessity exception for manufacturing and distributing marijuana, Justice Thomas's majority opinion questioned whether federal courts have the authority to recognize common law defenses not provided by statute, calling this "an open question."[81] But that language was dicta, and three concurring justices challenged it, based on *Bailey*'s recognition of common law defenses to federal statutory crimes.[82] Commentators also immediately criticized the majority opinion in *Oakland Cannabis* as "entirely unconvincing" insofar as it suggested that federal courts lack power to recognize a necessity defense.[83] More recent articles demonstrate that federal courts routinely apply common law defenses in interpreting federal statutes.[84] Numerous cases decided after *Oakland*

77. *Id.* at 398–99.
78. *Id.* at 415 n.11.
79. For example, in 1984, the Ninth Circuit recognized necessity and duress defenses in a case involving a defendant who agreed to smuggle 129 balloons of cocaine from Colombia to the United States after a drug smuggler threatened to kill his wife and child if he did not cooperate. United States v. Contento-Pachon, 723 F.2d 691, 693–95 (9th Cir. 1984). In 1988, the Supreme Court recognized a common law *in pari delicto* defense for actions under the Securities and Exchange Act of 1933. Pinter v. Dahl, 486 U.S. 622 (1988). In 2000, the Third Circuit recognized a necessity defense in a case involving prosecution for being a felon in possession of a firearm, noting that courts have "engrafted" this "judge-made defense" onto the statute. United States v. Dodd, 225 F.3d 340, 345 (3d Cir. 2000) (explaining that "[w]here courts have engrafted a traditional common-law defense onto a statute that itself is silent as to the applicability of traditional defenses, it is within the province of the courts to determine where the burden of proof on that defense is most appropriately placed").
80. 532 U.S. 483 (2001).
81. *Id.* at 490.
82. *Id.* at 499–503 (Stevens, J., concurring) (quoting United States v. Bailey, 444 U.S. 394 (1980)).
83. Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 354.
84. *See, e.g.*, William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1105 (2017) (stating that "[T]raditional defenses such as duress, necessity, or self-defense are routinely applied by federal courts, even though they're uncodified in the federal system"); Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 752 (2013) ("[T]he typical federal statute that defines a crime does not explicitly address these generic [common law] defenses. Nonetheless the Supreme Court has imported these defenses into federal criminal law entirely under the rubric of individual statutes."). *But see* Amy Coney Barrett, *Substantive Canons and Faithful*

Cannabis further confirm that courts recognize federal common law defenses to statutory crimes.[85]

While common law defenses are generally thought of as criminal defenses, courts also apply them in civil cases. For example, courts have recognized common law qualified immunity defenses in civil cases arising from a variety of federal statutes, including the Fair Housing Act,[86] the Federal Wiretap Act,[87] and section 1983 of the Civil Rights Act.[88]

This Part discusses several common law defenses that may be relevant to removal proceedings, explaining how they are invoked in civil as well as criminal contexts. These defenses are divided into three categories: justification defenses, which include necessity and self-defense; excuse defenses, which include duress, infancy, and insanity; and equitable defenses, which include entrapment by estoppel, equitable estoppel, and laches.

Agency, 90 B.U. L. REV. 109, 165 (2010) (doubting the validity of common law defenses to criminal statutes).

85. *See, e.g.*, Dixon v. United States, 548 U.S. 1, 13–14 (2006) (finding an implied duress defense under the Safe Streets Act); United States v. Gore, 592 F.3d 489, 492–93 (4th Cir. 2010) (holding that self-defense is available in limited circumstances to inmates charged under 18 U.S.C. § 111 for assaulting or resisting a correctional officer); United States v. Desinor, 525 F.3d 193, 199 (2d Cir. 2008) (describing "the law pertaining to self-defense" as "a matter of federal common law").

86. Fair Housing Act, 42 U.S.C. §§ 3601–3619, 3631 (2018); *see, e.g.*, Gonzalez v. Lee Cty. Hous. Auth., 161 F.3d 1290 (11th Cir. 1998) (holding that a qualified immunity defense exists for public officials under the Fair Housing Act).

87. Electronic Communications Privacy Act of 1986, Pub. L. 99-508, 100 Stat. 1848 (codified as amended at 18 U.S.C. §§ 2510–2522 (2018)). *See* Tapley v. Collins, 211 F.3d 1210, 1216 (11th Cir. 2000) (holding that a qualified immunity defense remains under the Federal Wiretap Act because the statute lacks an explicit expression of intent to preclude it); Blake v. Wright, 179 F.3d 1003, 1012–13 (6th Cir. 1999) (same). *But see* Berry v. Funk, 146 F.3d 1003, 1013 (D.C. Cir. 1998) (holding that there is no qualified immunity defense under the Federal Wiretap Act because courts may not "graft common law defenses on top of those Congress creates").

88. Pierson v. Ray, 386 U.S. 547 (1967) (holding that a judicial immunity defense remains under § 1983 of the Civil Rights Act, 42 U.S.C. § 1983); *see also* Eskridge, *supra* note 23, at 1053–54 (discussing the public value behind the judicial immunity defense and its development in subsequent cases involving § 1983); David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 500–01 (1992) (identifying five different approaches to interpreting the relevance of common law immunities in § 1983 cases). In *Filarksy v. Delia*, the Supreme Court used a two-step approach for identifying the defenses under § 1983, which "begins with the common law as it existed when Congress passed § 1983 in 1871" and then asks whether anything specific to § 1983 "counsels against carrying forward the common law rule." 132 S. Ct. 1657, 1662–66 (2012).

A. Justification Defenses

Justification defenses exculpate a person whose conduct would otherwise be criminal when special circumstances exist that render the conduct socially and morally acceptable.[89] The principle of proportionality, which has deep roots in Anglo-American law, plays a key role in justification defenses.[90] In this context, proportionality involves "balanc[ing] social benefits and harms" and considering "whether the actor's response is commensurate with the circumstances which provoked it."[91] Necessity and self-defense are two justification defenses.

1. Necessity

The necessity defense initially appeared in civil admiralty cases from the early 1800s involving ships forced to port in places without following proper procedures because of inclement weather, leaks, or other problems.[92] The Supreme Court did not apply the necessity defense to a criminal case until half a century later.[93]

To satisfy the threshold requirements for a necessity defense, litigants must show that "(1) they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their conduct and the harm

89. *See* John L. Diamond, *An Ideological Approach to Excuse in Criminal Law*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 3 (1999) (explaining that a justification defense means "[t]he actor has behaved properly, potentially for the public good, and there is no reason to criminalize his behavior"); Paul H. Robinson & John M. Darley, *Testing Competing Theories of Justification*, 76 N.C. L. REV. 1095, 1097 (1998) (describing two theories that support the justification defense: that the person acts to "avoid greater harm" and that the person "acts for the right reason").

90. *See* Solem v. Helm, 463 U.S. 277, 284–86 (1983) (explaining that the Magna Carta expressed the principle of proportionality, and English courts applied it for centuries); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 221 (3d ed., LexisNexis 2001) (stating that justification defenses require proportionality).

91. J. David Jacobs, Privileges for the Use of Deadly Force Against a Residence-Intruder: A Comparison of the Jewish Law and the United States Common Law, 63 TEMP. L. REV. 31, 33 & n.15. (1990).

92. *See, e.g.*, Brig Struggle v. United States, 13 U.S. (9 Cranch) 71, 76 (1815) (finding insufficient evidence for the necessity defense where a ship violated certain commercial laws by making port in the West Indies without paying bond to the United States); Brig James Wells v. United States, 11 U.S. (7 Cranch) 22, 25–26 (1812) (addressing the necessity defense in a case where a vessel made port in the West Indies, violating the Embargo Act of 1808, due to bad weather and a leaking vessel).

93. *See* United States v. Kirby, 74 U.S. (7 Wall.) 482, 486–87 (1868) (finding that it would be "absurd" to apply a law that prohibited "dr[awing] blood in the streets" to a surgeon who had "opened the vein of a person that fell down in the street in a fit").

to be averted; and (4) they had no legal alternatives to violating the law."[94] These elements are evaluated objectively from the perspective of a reasonable person.[95]

A contemporary example of the necessity doctrine in civil cases is medical necessity. In *Raich v. Gonzales*, seriously ill plaintiffs sought a declaration from the Ninth Circuit stating that medical necessity precludes enforcement of the Controlled Substances Act against them. The court noted that Raich's case "appears to satisfy the threshold requirements for asserting a necessity defense under our case law."[96] Ultimately, however, the court did not resolve this issue, because it concluded that Raich's necessity claim would be "best resolved within the context of a specific prosecution under the Controlled Substances Act."[97]

Another modern form of the necessity defense is the business necessity defense in civil employment discrimination cases arising under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the

94. United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1991).

95. *Id.* at 197–98.

96. Raich v. Gonzales, 500 F.3d 850, 859–60 (9th Cir. 2007), *rev'g sub nom.* Raich v. Ashcroft, 248 F. Supp. 2d 918 (N.D. Cal. 2003), *rev'd,* 545 U.S. 1 (2005). Relying on medical evidence that Raich would suffer debilitating pains, deteriorate quickly, and possibly die without using medical marijuana, the court found that she chose the lesser evil by violating the Controlled Substances Act. *Id.* at 859–60. Next, the court found that she was acting to stop imminent harm because her acute chronic pain and wasting disorders would immediately resume if she stopped using marijuana. *Id.* at 860. Third, the court found a causal connection between her physical condition and her need to use marijuana based on her physician's testimony. *Id.* Finally, the court found no legal alternatives to violating the law because Raich's physician testified that all other alternative medications had been ineffective or resulted in intolerable side effects. *Id.*

97. *Id.* at 860.

Americans with Disabilities Act.[98] Litigants have also invoked the necessity defense in civil cases brought under the Federal Torts Claims Act.[99]

2. Self-Defense

Self-defense is a justification defense that has been firmly ingrained in U.S. law since the nineteenth century.[100] Citing Blackstone and nineteenth century

98. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659–60 (1989) (explaining that, in Title VII employment discrimination cases based on disparate impact, the employer carries the burden of producing business-necessity evidence, but the burden of persuasion remains with the plaintiff); Dothard v. Rawlinson, 433 U.S. 321, 331 n.14 (1977) (holding that physical requirements for prison guards with a disparate impact on women "must be shown to be necessary to safe and efficient job performance"); Griggs v. Duke Power Co., 401 U.S. 424, 427, 432 (1971) (explaining that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation," and stating that the defendant must show that an employment requirement "[has] a manifest relationship to the employment in question" to establish the business necessity defense); EEOC v. UPS, 306 F.3d 794, 804 (9th Cir. 2002) (discussing the business necessity defense in the context of the Americans with Disabilities Act), *amended by* 311 F.3d 1132 (9th Cir. 2002) (denying rehearing en banc); Smith v. City of Des Moines, 99 F.3d 1466 (8th Cir. 1996) (discussing the business necessity defense in the context of the Age Discrimination in Employment Act of 1967); Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.); Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–634); Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 1044 Stat. 327 (1990) (codified as amended in scattered sections of 42 U.S.C.).

99. Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 812 (1946) (codified as amended at 28 U.S.C. § 1346(b), §§ 2671–2680 (2018)); *see, e.g.*, Russ v. United States, 62 F.3d 201, 202–04 (7th Cir. 1995) (affirming the trial court's decision rejecting a Federal Tort Claims Act claim brought by a patient at a Veterans Administration hospital, because the use of force to restrain the patient was justified by necessity); Hinojosa v. City of Terrell, 834 F.2d 1223, 1231 (5th Cir. 1988) ("Although limited to 'necessary' situations, a police officer is also privileged even to *use* actual force against a person in the performance of his duties as an officer."); *see also* Susan B. Apel, *Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt*, 38 AM. U. L. REV. 491, 522–24 (1989).

100. *See* Scribner v. Beach, 4 Denio 448, 450 (N.Y. Sup. Ct. 1847) (describing self-defense as a "primary law of nature"). Some scholars have characterized self-defense as an innate or natural right. *See, e.g.*, Shlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 VA. L. REV. 999, 1027 (2005) ("Starting from the premise of an absolute unqualified right not to be killed, it follows that self-defense, as a derivative right, must be an absolute natural right as well."). Others argue that it is a constitutional right. For arguments that the self-defense doctrine derives from the Second Amendment, see, for example, Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings*, 60 HASTINGS L.J. 1205, 1231 (2009); Glenn Harlan Reynolds, *Second Amendment Penumbras: Some Preliminary Observations*, 85 S. CAL. L. REV. 247, 257 (2012). For arguments that there is a constitutional right to self-defense independent of the Second Amendment, see, for example, Jason T. Anderson, Note, *Second Amendment Standard of Review: What the Supreme Court Left Unanswered in* District of Columbia v. Heller, 81 S. CAL. L. REV. 547, 585

cases, one federal court explained that "the modern rule of self-defense, as it presently applies to criminal and civil cases, is not of constitutional origin, but rather comes to us through our inheritance of English common law."[101] Under the Model Penal Code, the elements required to establish self-defense in a criminal case are (1) a reasonable belief of imminent danger of physical harm; (2) the use of force must be necessary to prevent the harm; and (3) no more force than necessary was used to defend against the harm.[102]

However, some courts apply a different test, reasoning that federal common law requires a party claiming self-defense to show (1) that he was under an unlawful, imminent, and impending threat of death or serious bodily injury; (2) that he had not recklessly or negligently placed himself in such a situation; (3) that he had no reasonable, legal alternative to violating the law; and (4) that a direct causal relationship would have been reasonably anticipated between the criminal action taken and the avoidance of the threatened harm.[103] This test was applied by the Tenth and Second Circuits in the criminal context and then adopted by Bankruptcy Courts in the civil context.[104] Additionally, civil common law tort actions such as negligence and battery may involve self-defense claims.[105] In her article on the self-defense and mistake defenses in

(2009); Anders Kaye, Comment, *Dangerous Places: The Right to Self-Defense in Prison and Prison Conditions Jurisprudence*, 63 U. CHI. L. REV. 693, 709–10 (1996) (arguing that prisoners have a constitutional right to self-defense).

101. Fresno Rifle and Pistol Club, Inc. v. Van de Kamp, 746 F. Supp. 1415, 1421 (E.D. Cal. 1990).

102. Model Penal Code § 3.04 (AM. LAW INST., Proposed Official Draft 1962); BLACK'S LAW DICTIONARY 1390 (8th ed. 2004); WAYNE R. LAFAVE, CRIMINAL LAW 491 (3d ed. 2000); *see also* Martin E. Veinsreideris, *The Prospective Effects of Modifying Existing Law to Accommodate Preemptive Self-Defense by Battered Women*, 149 U. PA. L. REV. 613, 615 (2000) (surveying self-defense statutes from multiple jurisdictions and concluding that the basic self-defense principles are the same, albeit with "seemingly infinite linguistic variations").

103. *See* United States v. Desinor, 525 F.3d 193, 198–200 (2d Cir. 2008); United States v. Butler, 485 F.3d 569, 572 (10th Cir. 2007).

104. *See In re* Greene, 397 B.R. 688, 695 (Bankr. S.D.N.Y. 2008) (citing United States v. Desinor, 525 F.3d 193, 199 (2d Cir. 2008), and United States v. Butler, 495 F.3d 569, 572 (10th Cir. 2007)); *see also In re* Soliman, 539 B.R. 692, 701 (Bankr. S.D.N.Y. 2015) (quoting *In re Greene*, 397 B.R. 688). Self-defense comes up in bankruptcy cases involving a claim that a debt is nondischargeable because of willful and malicious injury. For example, in a case in which a debtor stabbed a creditor, the creditor claimed that the debt was nondischargeable owing to a willful and malicious injury, and the debtor argued self-defense. *In re* Greene, 397 B.R. 688.

105. *See, e.g.*, Williams v. Papi, 30 F. Supp. 3d 306, 316 n.2 (M.D. Pa. 2014) ("Th[is] citation [is to a] criminal case[ ], but the law governing the right of self-defense in civil cases is much the same." (quoting Kitay v. Halpern, 105 Pa. Super. 167, 158 A. 309, 310 (1932)); Murphy v. Bitsoih, 320 F. Supp. 2d 1174, 1203 (2004) (stating that "the Court will evaluate Defendants' conduct under the general civil law of self-defense and defense of others"; noting that "[i]n a civil case, the New Mexico Supreme Court explained, '[T]o justify . . . battery . . . on the

criminal and tort law, Caroline Forell notes that "[t]here are few, if any, substantive distinctions between civil and criminal law with regard to the prerequisites to justification of a claim of self-defense."[106] Self-defense is also relevant to civil rights cases based on statutory and constitutional claims.[107]

B. Excuse Defenses

Unlike justification defenses, excuse defenses do not involve a claim that the individual acted appropriately under the circumstances.[108] Rather, an individual who raises an excuse defense admits doing the wrong thing but contends that some aspect of her condition makes her not culpable.[109] In other words, the person is not to blame because of her individual level of self-control

ground of self-defense, the person assaulted must have done some overt act or made a hostile demonstration of a character to give the assailant reasonable ground to suppose himself in imminent danger'"; and clarifying that "There is the further limitation that only such force may be used as a reasonably prudent [person] under the circumstances would believe necessary to repel the assault."(citing Faubion v. Tucker, 58 N.M. 303, 306 (1954))); Thompson v. Petit, 691 N.E.2d 860, 864 (Ill. App. Ct. 1998) (stating that "Illinois recognizes the doctrine of self-defense as a defense both in criminal and civil cases" in a negligence action brought by a plaintiff to recover damages from a defendant who shot him during a traffic altercation).

106. *See, e.g.*, Caroline Forell, Symposium, *What's Reasonable?: Self-Defense and Mistake in Criminal and Tort Law*, 14 LEWIS & CLARK L. REV. 1401, 1403 (2010); *see also* 33 AM. JUR. 2D *Proof of Facts* § 1 (2018).

107. *See, e.g.*, Smith v. Hill, 741 F. Supp. 647 (E.D. Mich. 1990) (holding that a federal drug agent acted reasonably under the circumstances when he shot a drug dealer to death in self-defense and thus was not liable for violations of the dealer's civil rights); Fernandez v. Leonard, 784 F.2d 1209, 1213–14 (1st Cir. 1986) (holding that defendant FBI officer was not entitled to absolute immunity and denying his motion for summary judgment on constitutional claims where "it could be found that defendant did not act in self-defense, mistakenly or otherwise" in shooting an unarmed kidnap victim); Grisom v. Logan, 334 F. Supp. 273, 279 (C.D. Cal. 1971) (applying the same self-defense standard in civil rights claims as in tort). When a plaintiff brings a lawsuit under § 1983, claiming excessive force by an officer in the course of an arrest, however, some courts have held that the burden of self-defense should not be placed on the defendant but on the plaintiff as part of establishing excessive force. *See* Wing v. Britton, 748 F.2d 494, 497 (8th Cir. 1984).

108. *See* Diamond, *supra* note 89, at 3.

109. Robinson & Darley, *supra* note 89, at 1097. While this is the simplest explanation of the difference, scholars have long debated the distinctions between justification and excuse. *See* Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and* Rethinking, 32 UCLA L. REV. 61 (1984); George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985); Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 L. CONTEMP. PROBS. 89, 89 (1986); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984); Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266 (1975).

or inability to make a meaningful choice.[110] Duress and lack of capacity, which includes infancy (also called immaturity) and insanity, are two excuse defenses discussed here.[111]

1. Duress

The duress defense, like the necessity defense, has deep roots in the common law.[112] The First, Seventh, Ninth, and D.C. Circuits have adopted a three-part test for duress that requires showing "(1) imminent threat of death or grave bodily harm; (2) well-grounded fear that the threat will be carried out; and (3) no reasonable opportunity to escape."[113] The Third Circuit has added a fourth element to this test, at least in the criminal context, requiring the defendant to show that he had not "recklessly placed himself in a situation where he would be forced to engage in criminal conduct."[114] Similarly, the Eleventh

110. *See, e.g.*, D. Michael Bitz & Jean Seipp Bitz, *Incompetence in the Brain Injured Individual*, 12 ST. THOMAS L. REV. 205, 274 (1999) ("Historical perspectives show that civilized societies have almost universally attempted to determine the true culpability of an individual's action prior to assessing the appropriate degree of responsibility.").

111. Whether duress should be classified as an excuse defense or justification defense is subject to debate, but I group it as an excuse defense because that has traditionally been its classification under U.S. law. Some commentators have argued that duress should be classified as a justification defense when it permits acting to protect another person's, not just the defendant's own, life. *See* Noam Wiener, *Excuses, Justifications, and Duress at the International Criminal Tribunals*, 26 PACE INT'L L. REV. 88, 130 (2014). Weiner states: "By removing the requirement that the person acting under duress is himself threatened, the central element that creates the lack of free will is removed from the definition of the defense." *Id.* He further writes: "Because the central element of the defense is no longer the inability of the defendant to freely exercise his free will due to grave personal risk, the defense is no longer an excuse, but rather a justification. . . . [O]nce duress is treated as a justification, inserting a proportionality requirement is necessary." *Id.* Monu Bedi, *Excusing Behavior: Reclassifying the Federal Common Law Defenses of Duress and Necessity Relying on the Victim's Role*, 101 J. CRIM. L. & CRIMINOLOGY 575 (2011) (arguing that both duress and necessity should be classified as excuses based on the victim's role). *See also* Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—and Why It Matters*, 6 BUFF. CRIM. L. REV. 833, 945–46 (2003).

112. Dixon v. United States, 548 U.S. 1 (2006) (discussing the duress defense's origins).

113. United States v. Charmley, 764 F.2d 675, 676 (9th Cir. 1985) (noting that "[a] fourth element ordinarily relevant only in prison escape cases, *viz.*, prompt surrender to authorities upon reaching a place of safety . . . is a factor the court may nevertheless consider in assessing the escapability prong of the duress test"); *see also* United States v. Nwoye, 824 F.3d 1129, 1135, 1137 (D.C. Cir. 2016) (describing the test as two parts but explaining that under the first prong, the defendant must have acted under the influence of a reasonable fear of imminent death or serious bodily injury); United States v. Jocic, 207 F.3d 889, 892 (7th Cir. 2000); United States v. Arthurs, 73 F.3d 444, 448 (1st Cir. 1996).

114. United States v. Paolello, 951 F.2d 537, 541 (3d Cir. 1991); *see also* United States v. Miller, 59 F.3d 417, 422 (3d Cir. 1995).

Circuit requires the defendant to show that he had not "recklessly *or negligently* placed himself in a situation in which it was probable that he would be subject to duress."[115]

The Second, Fourth, Fifth, and Eighth Circuits have also adopted a four-part test with the same basic elements for duress, although they are phrased slightly differently, requiring (1) an imminent threat of death or serious bodily injury; (2) that the defendant did not recklessly or negligently place himself in a situation in which it was probable that he would be forced to choose the criminal conduct; (3) no reasonable, legal alternative to violating the law; and (4) that a direct causal relationship may be reasonably anticipated between the action taken and the avoidance of the harm.[116] Here, the last element requiring a direct causal relationship replaces the well-grounded fear element. The Sixth Circuit appears to be the only circuit that has added a fifth element to the test for duress, requiring the defendant to also show that he "did not maintain the illegal conduct any longer than absolutely necessary."[117]

The circuit split on the correct legal test for duress has not been resolved by the Supreme Court. In *Dixon v. United States*,[118] the Supreme Court acknowledged that it had "not specified the elements of the [duress] defense," but declined to do so in that case.[119] Instead, the court "presumed the accuracy" of the district court's description of the duress elements, which was the four-part test adopted by the Second, Fourth, Fifth, and Eighth Circuits.[120]

Although the duress defense is often associated with criminal cases, it originally appeared in civil cases. In a contract case from 1868 involving a dispute over land, the Supreme Court defined duress as "that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness."[121] Litigants also invoke the common law duress defense in a variety of other types of civil cases, such as civil tax fraud, civil contempt, and carrier fines.[122] In addition, courts have accepted the duress

115. United States v. Blanco, 754 F.2d 940, 943 (11th Cir. 1985) (emphasis added).
116. United States v. Lomax, 87 F.3d 959, 961 (8th Cir. 1996); United States v. Crittendon, 883 F.2d 326, 330 (4th Cir. 1989); United States v. Harper, 802 F.2d 115, 117 (5th Cir. 1986); United States v. Agard, 605 F.2d 665, 667 (2d Cir. 1979).
117. United States v. Johnson, 416 F.3d 464, 468 (6th Cir. 2005).
118. 548 U.S. 1 (2006).
119. United States v. Dixon, 548 U.S. 1, 4 n.2 (2006).
120. *Id.*
121. Brown v. Pierce, 74 U.S. (7 Wall.) 205, 214 (1868).
122. Theodore Roethke, American Law and the Problem of Coerced Provision of Support to a Terrorist Organization as Grounds for Removal, 17 TEMP. POL. & C.R. L. REV. 173, 187–91 (2007).

defense in civil RICO[123] cases and civil enforcement actions brought by the Securities and Exchange Commission for violations of the Investment Advisers Act's[124] antifraud provisions.[125] In federal breach of contract cases, the Federal Circuit has applied a three-part test to determine whether a contract is unenforceable because of duress. The test requires showing "(1) that [a party] involuntarily accepted the other party's terms; (2) that circumstances permitted no other alternative, and (3) that such circumstances were the result of the other party's coercive acts."[126]

Federal courts have also addressed whether the duress defense applies to 8 U.S.C. § 1323, an INA provision that imposes civil penalties on fishing vessels for illegally bringing noncitizens into the United States. In several cases involving fishing vessels that illegally transported Cubans to the United States during the Cuban boatlift of 1980, the Eleventh Circuit determined that duress or coercion could be raised as a defense to the imposition of fines under the INA.[127] Although the BIA had refused to recognize duress as a defense, stating that the relevant statutory provision is a strict liability statute and that fines are imposed without regard to the vessel owners' intentions, the Eleventh Circuit rejected that interpretation.[128] The court allowed the duress defense, requiring the same elements as in criminal cases.[129]

Most recently, the BIA recognized a duress defense to the INA's statutory bar against asylum and withholding of removal for individuals who have persecuted others. In *Matter of Negusie*, a case that had been remanded by the Supreme Court in 2009 but was not decided by the BIA until 2018, the BIA applied a five-part test for duress.[130] In addition to adopting the four elements of

123. Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. No. 91-452, 84 Stat. 941 (codified as amended 18 U.S.C. §§ 1961–1968 (2018)).
124. Investment Advisers Act of 1940, Pub. L. No. 115-141, 54 Stat. 847 (codified as amended 15 U.S.C. § 80b-1 et seq. (2018)).
125. *See, e.g.*, MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc., 62 F.3d 967, 980 (7th Cir. 1995) (recognizing the duress defense in a civil RICO case); SEC v. Illarramendi, 260 F. Supp. 3d 166 (D. Conn. 2017) (recognizing the duress defense in a case brought under the Investment Advisers Act's antifraud provisions).
126. N. Star Steel Co. v. United States, 477 F.3d 1324, 1334 (Fed. Cir. 2007).
127. *See* Pollgreen v. Morris, 770 F.2d 1536, 1544 (11th Cir. 1985); United States v. Blanco, 754 F.2d 940, 942–43 (11th Cir. 1985); United States v. Sanchez, 520 F. Supp. 1038, 1040 (S.D. Fla. 1981), *aff'd* 703 F.2d 580 (11th Cir. 1983), *and reh'g denied*, 709 F.2d 1353 (11th Cir. 1983) (all holding that duress or coercion may be raised as a defense to the imposition of fines under the INA for bringing undocumented Cubans to Florida during the "Freedom Flotilla" or "Mariel boatlift").
128. *Pollgreen*, 770 F.2d at 1543–44.
129. *Id.* at 1544–45.
130. Negusie, 27 I. & N. Dec. 347 (B.I.A. 2018); *see also* Negusie v. Holder, 555 U.S. 511 (2009).

the test that the Supreme Court had "presumed" to be accurate in *United States v. Dixon*, the BIA added a proportionality element, requiring the noncitizen to show that he "knew or reasonably should have known that the harm he inflicted was not greater than the threatened harm to himself or others."[131] In a footnote, the BIA acknowledged that the concept of proportionality is historically associated with the necessity defense in the United States, rather than the duress defense.[132] Soon after the BIA issued its decision, however, Attorney General Sessions certified the case to himself, suggesting that he may overrule the BIA and find no duress defense to the persecutor bar.[133]

2. Lack of Capacity: Infancy and Insanity

The infancy defense and the insanity defense have to do with capacity, which refers to the ability to appreciate an act's wrongfulness.[134] The infancy defense existed at common law as early as Edward III's reign and was accepted as part of U.S. common law in the nineteenth century.[135] Some scholars have viewed the infancy defense "as an aspect of *mens rea* in its general sense," an inability to appreciate "one's moral blameworthiness."[136] In other words, a child may be too immature to form the requisite intent. Others, however, have stressed that despite the overlap between these concepts, there are crucial differences between an infancy defense and a mens rea requirement. While the inquiry into mens rea "assume[s] the capacity to be culpable," the infancy defense is "a critique of the possibility of intentional behavior."[137]

Courts have applied the common law infancy defense not only to criminal cases, but also to civil cases as far back as the 1800s. For example, contracts entered

131. *Negusie*, 27 I. & N. Dec. at 363–64.
132. *Id.* at 364 n.20.
133. Negusie, 27 I. & N. Dec. 481 (B.I.A. 2018) (inviting the parties and amici to submit briefing on "[w]hether coercion and duress are relevant to the application of the Immigration and Nationality Act's persecutor bar").
134. *See* Francis Barry McCarthy, The Role of the Concept of Responsibility in Juvenile Delinquency Proceedings, 10 U. MICH. J.L. REFORM 181, 183–85 (1977).
135. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 22–24 (8th ed 1778); *see also* Andrew M. Carter, *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 U. KAN. L. REV. 687, 708–14 (2006) (discussing the infancy defense's history under English and early American common law).
136. Irene Merker Rosenberg, Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists, 1993 WIS. L. REV. 163, 176 (1993).
137. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 551 (1984).

into by children were treated as void *ab initio*.[138] Some courts have also applied the infancy defense to juvenile adjudications, which are technically civil proceedings. While many courts have relied on the "rehabilitative ideal" of juvenile adjudications in denying use of the infancy defense, courts with a "more realistic vision" of juvenile adjudications' quasicriminal nature have allowed the infancy defense in certain cases.[139] The Federal Juvenile Delinquency Act (FJDA), which provides a civil procedure for the treatment of juveniles who committed an act that violated federal law, does not explicitly preclude or allow an infancy defense.[140]

The insanity defense in criminal cases dates back to medieval times.[141] Courts and commentators in the eighteenth century compared insanity to infancy. In a famous jury instruction from 1724, Justice Tracy asked the jury to determine whether the defendant was "totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast."[142]

In 1843, the House of Lords crafted the M'Naghten test as the means of determining whether a criminal defendant should be excused from his crime because of insanity. For a person to have availed himself of this defense, he needed to prove that, at the time he committed the act, he "was laboring under such a defect of reason, from disease of the mind, as not to know the nature and equality of the act he was doing; or, if he did know it, that he did not know he was

138. *See, e.g.*, Pritchard v. Norton, 106 U.S. 124, 132 (1882) ("[I]nfancy, if a valid defense by the *lex loci contractus* [the law of the place where the contract is made or is to be performed], will be a valid defense everywhere."); Vent v. Osgood, 36 Mass. 572, 575 (19 Pick.) (1837); Richard A. Epstein, Symposium, *Living Dangerously: A Defense of* Mortal Peril, 1998 U. ILL. L. REV. 909, 910 (noting "the common-law defenses of duress, fraud, infancy, and incompetence" to contracts); *cf.* A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630, 636 n.5 (4th Cir. 2009) (noting, in a case brought by four high students against a company that owned and operated a technology system used by schools to detect plagiarism, that the district court refused to void the contract based on the infancy doctrine, reasoning that the plaintiffs could not use this doctrine as a "'sword' to void a contract while retaining the contract's benefits—high school credit and standing to bring this action" (quoting 5 RICHARD A. LORD, WILLISTON ON CONTRACTS § 9.14 (4th ed. 1990))).

139. Walkover, *supra* note 137, at 549–54 (citing *In re* Andrew M., 398 N.Y.S.2d 824 (Fam. Ct. 1977); *In re* Gladys R., 464 P.2d 127 (Cal. 1970) (en banc); and Commonwealth v. Durham, 389 A.2d 108 (Pa. Super. Ct. 1978)).

140. Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031–5042 (2012).

141. *See* Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1208 (2000).

142. Rex v. Arnold (1724) 16 How. St. Tr. 695, 764–65; *see also* MATTHEW HALE, 1 HISTORIA PLACITORUM CORONÆ: THE HISTORY OF THE PLEAS OF THE CROWN 30 (1736) (explaining that the insanity defense required the absence of "understanding and will" akin to a child's mental state); 4 BLACKSTONE, *supra* note 135, at 24–25 (requiring "total idiocy, or absolute insanity" to establish an insanity defense).

doing what was wrong."[143] Although the M'Naghten test has evolved over time, federal courts and most states use different versions of that rule today.[144] Only four states have legislatively abolished the insanity defense and replaced it with a mens rea approach.[145]

While insanity has only rarely been recognized as a defense in civil cases, it is not without precedent. For example, some courts have recognized insanity as a defense to civil damages in assault cases;[146] as a defense to torts in special circumstances, such as when institutionalized individuals with mental disabilities who are unable to control or appreciate the consequences of their conduct injure caretakers who are employed for financial compensation;[147] as a defense to civil tax fraud;[148] and in cases involving life insurance policies that exclude coverage for losses caused by intentional acts such as suicide.[149]

C. Equitable Defenses

Equitable defenses are affirmative defenses based on the inequitable or unfair conduct of the party bringing the lawsuit. Historically, the English Chancellor "entertained defenses to equitable relief that common-law judges would not accept as defenses to claims for money damages in the courts of law."[150] In modern times, law and equity have merged, with the same judges

143. M'Naghten's Case, 8 Eng. Rep. 718, 722 (H.L. 1843).
144. *See* Slobogin, *supra* note 141, at 1209–14.
145. *Id.* at 1200 n.2, 1214. The states that have abolished the insanity defense are Idaho, Kansas, Utah, and Montana. *See* IDAHO CODE § 18-207 (1997); KAN. STAT. ANN. § 22-3220 (1995); UTAH CODE ANN. § 76-2-305 (1999); MONT. CODE. ANN. § 46-14-214 (1999). Nevada's legislature abolished the insanity defense in 1995, but the Nevada Supreme Court held that it was constitutionally required in 2001. *See* NEV. REV. STAT. § 174.035 (1997); Finger v. State, 27 P.3d 66, 86 (Nev. 2001) (holding that the abolition of the insanity defense violated due process), *cert denied*, 534 U.S. 1127 (2002).
146. *See* Fitzgerald v. Lawhorn, 294 A.2d 338, 339 (Conn. Ct. Com. Pl. 1972).
147. *See* Gould v. Am. Family Mut. Ins. Co., 543 N.W.2d 282 (Wis. 1996).
148. *See* Hollman v. Comm'r, 38 T.C. 251 (1962); *see also* Kenneth G. Anderson, *Insanity as a Defense to the Civil Fraud Penalty*, 1963 DUKE L.J. 428 (1963).
149. *See* Stanley R. Kern, *"Insanity" in Civil Law*, 31 J. FORENSIC SCI. 1159 (1986); *see also* Mutual Life Ins. Co. v. Terry, 82 U.S. 580, 591 (1872). Kern writes:

> If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable.

Id.; *see also* Ruvolo v. Am. Cas. Co., 189 A.2d 204, 208 (N.J. 1963) (explaining that "if the actor does not have the mental capacity to do the act intentionally, the [insurance] policy coverage remains operative").
150. Edward Yorio, *A Defense of Equitable Defenses*, 51 OHIO ST. L.J. 1201, 1205–06 (1990).

deciding both types of claims.[151] Equitable defenses can be based on improper conduct by one party, delay in bringing an action, mistake, and other factors. An important characteristic of equitable defenses is that they give judges the flexibility "to shape the remedy to fit the facts of the particular case."[152] The equitable defenses discussed here include entrapment by estoppel and its civil counterpart, equitable estoppel, as well as laches.

1. Entrapment by Estoppel and Equitable Estoppel

Entrapment by estoppel has a misleading name because it has nothing to do with entrapment. It applies when a government official erroneously assures a defendant that certain conduct is legal, and the defendant reasonably relies on that advice in committing an unlawful act.[153] Since the defense is concerned with reliance on wrong information about the law, it is related to due process concerns about fair notice.[154] Although entrapment by estoppel is generally raised as a defense in criminal proceedings, the Seventh Circuit has reasoned that "it does not follow that the defense is irrelevant in civil proceedings."[155] The Sixth Circuit has also recognized this defense's applicability to both criminal and civil proceedings, noting that the burden for establishing the defense is a preponderance of the evidence.[156]

Some courts have found that entrapment by estoppel is equitable estoppel's civil law counterpart. Equitable estoppel may be a defense if the defendant justifiably relies on misrepresentations by the plaintiff and is harmed by that reliance. In civil actions arising under federal law, courts have explained that the federal common law of equitable estoppel applies rather than state law.[157]

151. *Id.* at 1206.
152. *Id.* at 1229.
153. United States v. Achter, 52 F.3d 753, 755 (8th Cir. 1995). The Eleventh Circuit also notes:

> Entrapment-by-estoppel is an affirmative defense that provides a narrow exception to the general rule that ignorance of the law is no defense. To assert this defense successfully, a defendant must actually rely on a point of law misrepresented by an official of the state; and such reliance must be objectively reasonable—given the identity of the official, the point of law represented, and the substance of the misrepresentation.

United States v. Funches, 135 F.3d 1405, 1407 (11th Cir. 1998); *see also* Mary D. Fan, *Legalization Conflicts and Reliance Defenses*, 92 WASH. U. L. REV. 907, 944–45 (2015) (discussing the "entrapment by estoppel" defense and distinguishing it from an entrapment defense).
154. *See* Fan, *supra* note 153, at 943.
155. Keathley v. Holder, 696 F.3d 644, 646 (7th Cir. 2012).
156. *See* United States v. Beaty, 245 F.3d 617, 624 (6th Cir. 2001) (citing United States v. Stewart, 185 F.3d 112, 124 (3d Cir. 1999), *cert. denied*, 528 U.S. 1063 (1999)).
157. Audit Servs., Inc. v. Rolfson, 641 F.2d 757, 762 (9th Cir. 1981).

The Supreme Court has never applied equitable estoppel against the government, which creates a challenge to invoking equitable estoppel as a defense in immigration cases.[158] Yet the Court has not ruled out that possibility either.[159] In *Heckler v. Community Health Services of Crawford County, Inc.*,[160] the Court left open the question of whether estoppel may lie against the government, but clarified that a litigant would need to demonstrate "the traditional elements of estoppel," as well as affirmative misconduct.[161]

The Supreme Court has similarly declined to resolve the question of whether estoppel may lie against the government immigration cases. In *INS v. Hibi*,[162] a Filipino immigrant who had served in the U.S. Army during World War II argued that the government was estopped from claiming he was too late to file for naturalization under the Nationality Act of 1940.[163] That Act allowed noncitizens who had served in the Armed Forces to naturalize without meeting certain literacy and residency requirements if they filed their applications by December 31, 1946.[164] His estoppel claim was based on the government's failure to advise him of his rights. The Supreme Court rejected this estoppel argument, finding that Hibi failed to show "affirmative misconduct," but left open the possibility of an estoppel claim against the government.[165] Subsequently, in *INS v. Miranda*, the Court again declined to reach the question of "whether affirmative misconduct in a particular case would estop the Government from enforcing the immigration laws."[166] The Court simply concluded that an

158. *See, e.g.*, Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917) ("[I]t is enough to say that the United States is neither bound nor estopped by the acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.").

159. *See* Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 422 (1990) ("Courts of Appeals have taken our statements as an invitation to search for an appropriate case in which to apply estoppel against the Government, yet we have reversed every finding of estoppel that we have reviewed."); Montana v. Kennedy, 366 U.S. 308, 315 (1961) ("[W]e need not stop to inquire whether, as some lower courts have held, there may be circumstances in which the United States is estopped to deny citizenship because of the conduct of its officials.").

160. 467 U.S. 51 (1984).

161. *Id.* at 60–61.

162. 414 U.S. 6 (1973)

163. *Id.*; Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137 (repealed 1952).

164. Nationality Act of 1940 § 702.

165. *Hibi*, 414 U.S. at 8–9; *see also* Tom F. Veldman, *Estopping the Government in Immigration Cases: The Immigration Estoppel Light Remains Cautionary Yellow*, 56 NOTRE DAME L. REV. 731, 732–39 (1981) (arguing that "courts of appeals have inconsistently defined and applied" the affirmative misconduct standard in *Hibi*).

166. INS v. Miranda, 459 U.S. 14, 19 (1982).

eighteen-month delay in considering a spousal visa application "falls far short of establishing such conduct."[167]

Although the Supreme Court has not clearly stated that estoppel may lie against the government, federal appellate courts have recognized it as a defense in immigration cases.[168] While courts have defined equitable estoppel's elements in this context slightly differently, they all require affirmative misconduct and reasonable reliance to the noncitizen's detriment.[169] In a decision from the 1970s, the Second Circuit found that the government was equitably estopped from deporting a noncitizen based on the State Department's failure to warn her of certain visa requirements, finding this failure to be "fully as misleading" and "at least as severe as an act of affirmative misconduct."[170] But the court advised that its decision was "limited to the extraordinary circumstances before [it]."[171] In more recent cases, the Second Circuit has explained that "[t]he doctrine of equitable estoppel against the government has narrowed substantially,"[172] and that it is available only "in the most serious of circumstances" and must be "applied with the utmost caution and restraint."[173]

167. *Id.*; *see also Heckler* , 467 U.S. at 51.

168. *See* Gutierrez v. Lynch, 830 F.3d 179, 181–82 (5th Cir. 2016); Ahmed v. Holder, 624 F.3d 150, 155 (2d Cir. 2010); Mejia-Perez v. Gonzales, 490 F.3d 1011, 1012 (8th Cir. 2007); Mudric v. Attorney Gen. of United States., 469 F.3d 94, 99 (3d Cir. 2006); Gutierrez v. Gonzales, 458 F.3d 688, 691–94 (7th Cir. 2006); Salgado-Diaz v. Ashcroft, 395 F.3d 1158, 1166 (9th Cir. 2005); Adefemi v. Ashcroft, 386 F.3d 1022, 1025 n.7 (11th Cir. 2004); Kowalczyk v. INS, 245 F.3d 1143, 1150 (10th Cir. 2001); Westover v. Reno, 202 F.3d 475, 481 (1st Cir. 2000) (considering and rejecting an equitable estoppel claim); Stone v. INS, 13 F.3d 934, 939 (6th Cir. 1994).

169. *See, e.g.*, *Mudric*, 469 F.3d at 99 (explaining that to prevail on an equitable estoppel claim, the noncitizen must establish a misrepresentation on which he reasonably relied to his detriment, as well as affirmative misconduct); *Salgado-Diaz*, 395 F.3d at 1166 (stating that equitable estoppel's traditional elements require showing that "(1) the party to be estopped knows the facts; (2) the party intends that his or her conduct will be acted on; (3) the claimant must be ignorant of the true facts; (4) and the claimant must detrimentally rely on the other party's conduct"); Costa v. INS, 233 F.3d 31, 38 (1st Cir. 2000) ("A private party who presses for an estoppel against the government must establish (1) the occurrence of affirmative government misconduct (2) engendering a reasonable (though erroneous) belief that a certain state of affairs exists (3) upon which the private party relies to his detriment."); *Mejia-Perez*, 490 F.3d at 1012 ("In order to establish a claim of equitable estoppel against the government, Mejia-Perez must prove: (1) a false representation by the government; (2) the government's intent to induce Mejia-Perez to act on the misrepresentation; (3) Mejia-Perez's lack of knowledge or inability to obtain the true facts; (4) Mejia-Perez's detrimental reliance; and (5) affirmative misconduct by the government.").

170. Corniel-Rodriguez v. INS, 532 F.2d 301, 306–07 (2d Cir. 1976).

171. *Id.* at 307 n.18.

172. Ahmed v. Holder, 624 F.3d 150, 155 (2d Cir. 2010).

173. Rojas-Ryes v. INS, 235 F.3d 115, 126 (2d Cir. 2000) (internal citations and quotation marks omitted).

The Ninth Circuit has also found equitable estoppel against the government in the immigration context. A case from 1976 involved a long, unexplained delay in processing a labor certification, which the court called "affirmative inaction."[174] More recently, the Ninth Circuit held that the government should be equitably estopped from relying on a noncitizen's illegal reentry to deport him when the deportation preceding the reentry was wrongful.[175]

Yet, despite these appellate court decisions dating back to the 1970s that recognize estoppel claims against the government in immigration cases, the BIA has expressed uncertainty about whether equitable estoppel may be raised as a defense in the deportation context.[176] In some situations, the BIA has assumed *arguendo* that a noncitizen can make an equitable estoppel defense against the government, but in those cases it always concluded that the individual did not establish estoppel's elements, which it defined as affirmative misconduct, reasonable reliance, and prejudice.[177]

2. Laches

Laches is an equitable defense developed at common law that provides a mechanism for a court to dismiss a case if there is unreasonable, prejudicial delay in commencing a suit.[178] It normally applies when Congress has not provided any statute of limitations.[179] As the Seventh Circuit explained, "When Congress fails to enact a statute of limitations, a [federal] court that borrows a state statute of limitations but permits it to be abridged by the doctrine of laches is not invading congressional prerogatives. It is merely filling a legislative hole."[180]

174. Yoo v. INS, 534 F.2d 1325, 1329 (9th Cir. 1976).
175. Salgado-Diaz v. Ashcroft, 395 F.3d 1158, 1166 (9th Cir. 2005).
176. Tuakoi, 19 I. & N. Dec. 341, 348 (B.I.A. 1985) ("It has not been determined that estoppel will lie against the Government in immigration cases."); Hosseinian, 19 I. & N. Dec. 453, 456 (B.I.A. 1987) ("[I]t is not clear that estoppel will lie against the Government in immigration cases.").
177. *Tuakoi*, 19 I. & N. Dec. at 348; *Hosseinian*, 19 I. & N. Dec. at 456–57.
178. *See* 1 DAN B. DOBBS, LAW OF REMEDIES § 2.4(4), at 103 (2d ed., West Pub Co. 1993) ("Laches . . . may have originated in equity because no statute of limitations applied, . . . suggest[ing] that laches should be limited to cases in which no statute of limitations applies.").
179. *See, e.g.*, Holmberg v. Armbrecht, 327 U.S. 392, 394–95 (1946) ("If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter."); United States v. Mack, 295 U.S. 480, 489 (1935) ("Laches within the term of the statute of limitations is no defense [to an action] at law.").
180. Teamsters & Emp'rs Welfare Tr. v. Gorman Bros. Ready Mix, 283 F.3d 877, 881 (7th Cir. 2002) (internal citation omitted).

Laches has been raised as a defense in many types of civil cases, including copyright suits,[181] patent infringement actions,[182] and disputes over land.[183] Establishing the laches defense generally requires showing "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense."[184]

When the United States brings an action, however, laches is only available as a defense in very limited circumstances. Such circumstances could involve a particularly egregious delay or the United States's pursuit of a private interest rather than a public right or interest.[185] In *Costello v. United States*, the Supreme Court noted that it has consistently adhered to "the principle that laches is not a defense against the sovereign," but the Court went on to comment that it had not "considered the question of the application of laches in a denaturalization proceeding."[186] Instead of deciding whether laches applied in the denaturalization context, the Court simply concluded that "even if we assume the applicability of laches . . . the petitioner failed to prove both of the elements which are necessary to the recognition of the defense."[187]

Several lower courts have similarly found it more expedient to dispose of a laches claim on its merits than to decide its applicability to denaturalization proceedings.[188] The BIA also followed this approach in a case involving a delay

181. Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962 (2014).
182. SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954 (2017).
183. Cayuga Indian Nation v. Pataki, 413 F.3d 266 (2d Cir. 2005) (involving a 200-year delay).
184. Costello v. United States, 365 U.S. 265, 282 (1961).
185. *See* United States v. Admin. Enters., Inc., 46 F.3d 670, 673 (7th Cir. 1995).
186. *Costello*, 365 U.S. at 281–82 (discussing denaturalization under the INA, which at that time was codified at 8 U.S.C. § 340(a) (1952), as well as its statutory predecessor, 8 U.S.C. § 738 (1948)).
187. *Id.* at 282.
188. *See* United States v. Dang, 488 F.3d 1135, 1143–44 (9th Cir. 2007) ("It remains an open question in this circuit as to whether laches is a permissible defense to a denaturalization proceeding . . . . As in *Costello*, we hold that even assuming that laches is a permissible defense, Dang did not make out the required elements of the defense."); Thom v. Ashcroft, 369 F.3d 158, 165 (2d Cir. 2004) ("Rather than deciding the question, we, like the Supreme Court in *Costello*, find it more expedient to dispose of Petitioner's claim on its specific merits."); United States v. Koreh, 59 F.3d 431, 445 (3d Cir. 1995) ("Under the facts of this case, we need not resolve the question of the availability of a laches defense to a denaturalization action. We agree with the district court that even if such a defense were available, Koreh has failed to establish the elements required to maintain the defense."); United States v. Kairys, 782 F.2d 1374, 1384 (7th Cir. 1986). *But see* Savoury v. Attorney Gen., 449 F.3d 1307, 1320 (11th Cir. 2006) ("[A]fter years of failing to do so, the INS finally enforced the immigration laws against Savoury. Laches cannot be asserted to prevent it from doing so."); United States v. Mandycz, 447 F.3d 951, 964–65 (6th Cir. 2006) (rejecting the argument that laches can be raised as a defense in a denaturalization proceeding and also finding that, even if it were to consider the defense, it would not aid Mandycz).

in holding a hearing to rescind a noncitizen's lawful permanent resident status.[189] In at least one case, however, the Third Circuit considered a laches defense brought by a company in an immigration case involving temporary work visas without questioning whether the defense could be made against the sovereign.[190] There, the court affirmed summary judgment against the company on the laches issue because it had failed to demonstrate prejudice.[191]

The relevance of a laches defense to denaturalization and removal proceedings is becoming an increasingly important issue given recent government efforts to review old cases for fraud and misrepresentation.[192] In 2009, under President Obama, the Department of Homeland Security (DHS) launched an initiative called "Operation Janus" to investigate cases of individuals who became U.S. citizens without disclosing old identities and deportation orders.[193] That initiative identified 858 individuals whose paper fingerprint records had not yet been digitized when their citizenship applications were adjudicated, which means that it would have been easier for the government to miss fraud or misrepresentation in naturalization applications.[194] In 2016, the DHS Office of the Inspector General (OIG) reported that ICE had identified 315,000 old fingerprint records for immigrants with final deportation orders or criminal records that were missing from the electronic database but still had not uploaded 148,000 of them.[195] Since that OIG report's publication, the government has dedicated more resources to uploading old fingerprint records dating back to the early 1990s.[196]

Although the Supreme Court ruled in 2017 that citizenship could not be revoked based on falsehoods that did not influence the decision to grant

189. Onal, 18 I. & N. Dec. 147, 149–50 (B.I.A. 1981).
190. Cyberworld Enter. Techs., Inc. v. Napolitano, 602 F.3d 189, 200 (3d Cir. 2010) (involving a nineteen-month delay by the Secretary of Labor in making a determination as to whether a temporary staffing company that placed H-1B employees with secondary employers had violated the INA by failing to inquire whether placements would displace U.S. workers).
191. *Id.*
192. Under the INA, a federal court may revoke citizenship through a civil or criminal proceeding if it was obtained through fraud or misrepresentation. 8 U.S.C. § 1451(a), (e) (2018); *id.* § 1425.
193. U.S. Dep't Homeland Sec., Office of the Inspector Gen., Potentially Ineligible Individuals Have Been Granted U.S. Citizenship Because of Incomplete Fingerprint Records 1 (2016), https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-130-Sep16.pdf [https://perma.cc/7QFU-EY4A].
194. *Id.*
195. *Id.* at 2–3, 7.
196. Amy Taxin, *US Launched Bid to Find Citizenship Cheaters*, ASSOCIATED PRESS (Jun. 12, 2018), https://apnews.com/1da389a535684a5f9d0da74081c242f3 [https://perma.cc/ 8ZEZ-7JUW].

citizenship,[197] that has not deterred the Trump administration from aggressively pursuing denaturalization. In 2018, President Trump created a denaturalization task force and launched "Operation Second Look," which plans to review an estimated 700,000 immigration files.[198] ICE requested $207.6 million in its fiscal year 2019 budget to hire 300 special agents and 212 support personnel to investigate more cases that potentially involve fraud or misrepresentation.[199] In addition, U.S. Citizenship and Immigration Services (USCIS) is opening a new office just to investigate potential denaturalization cases and plans to refer more cases for possible deportation.[200] The new focus on reviewing immigration files dating back thirty years in order to revoke legal status suggests that a laches defense based on undue delay may become increasingly common in both denaturalization and removal proceedings.

Not only naturalized citizens, but certain refugee populations are at risk. For example, USCIS has launched an investigation into potential identity fraud among Burmese refugees who were in Malaysia before being resettled in the United States, causing panic in that community.[201] In February 2018, USCIS summoned over one thousand Burmese refugees for official interviews.[202] While some of these refugees may have purchased other refugees' identities or used fake names, others may simply have spelling errors or discrepancies in their identification documents due to "the scramble to register refugees who were fleeing persecution in Myanmar, then arrest in Malaysia," where they were vulnerable to detention.[203] Since most of these refugees were processed in 2009–2010, their cases will likely be over a decade old by the time any actions are

197. Maslenjak v. United States, 137 S. Ct. 1918, 1923 (holding that denaturalization under 18 U.S.C. § 1425(a) based on a false statement to a government official requires the government to show that falsehood actually influenced the decision to grant citizenship).

198. Dep't of Homeland Sec., Immigration and Customs Enforcement, Budget Overview, Fiscal Year 2019 Congressional Justification 21, https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf [https://perma.cc/R5DY-EB2Y] [hereinafter ICE FY2019 Budget]; Masha Gessen, *In America, Naturalized Citizens No Longer Have an Assumption of Permanence*, New Yorker (June 18, 2018), https://www.newyorker.com/news/our-columnists/in-america-naturalized-citizens-no-longer-have-an-assumption-of-permanence [https://perma.cc/76W7-WSHE].

199. ICE FY2019 BUDGET, *supra* note 198, at 20–21.

200. *See* Patricia Mazzei, *Congratulations, You Are Now a U.S. Citizen. Unless Someone Decides Later You're Not*, N.Y. TIMES, (July 23, 2018), https://www.nytimes.com/2018/07/23/us/denaturalize-citizen-immigration.html.

201. Victoria Macchi, *US Investigation Rattles Resettled Burmese Refugees*, VOICE AM. (Mar. 28, 2018), https://www.voanews.com/a/us-investigation-resettled-burmese-refugees/4319494.html [https://perma.cc/KZ2Q-9S8D].

202. *Id.*

203. *Id.*

brought to revoke their status, suggesting that laches may be a relevant defense.[204]

This Part has shown that courts recognize common law defenses in civil cases, and that they have even recognized common law defenses in some immigration cases arising under the INA. The following Part explores the potential for common law defenses to play a much greater role in removal proceedings.

III. INVOKING FEDERAL COMMON LAW DEFENSES TO REMOVAL

A noncitizen placed in removal proceedings is normally charged with one or more inadmissibility or deportability grounds under the INA. These are civil, administrative charges that could lead to removal from the United States. The Supreme Court has long recognized that deportation is a "penalty" of the most severe magnitude,[205] and that it is "close to punishment for crime."[206] As Justice Field eloquently stated in 1893, "[I]f a banishment of this sort be not a punishment, and among the severest of punishments, it would be difficult to imagine a doom to which the name can be applied."[207] In 2010, the Supreme Court reaffirmed in *Padilla v. Kentucky* that "deportation is a particularly severe 'penalty'" and stressed that removal proceedings are "intimately related to the criminal process."[208]

Scholars have examined removal proceedings' quasicriminal nature and analyzed how the criminal and immigration systems are closely intertwined.[209] Yet neither scholars nor the judiciary have addressed the role of traditional

204. *See USCIS Conducting Re-Interviews of Certain Refugees*, CATH. LEGAL IMMIGR. NETWORK, INC. (Mar. 13, 2018), https://cliniclegal.org/news/uscis-conducting-re-interviews-of-certain-refugees [https://perma.cc/JC4X-MLS4] ("In 2014, USCIS learned that from 2009–2010 there could be 1,700 Burmese refugees who either falsified personal information or whose personal information was used by someone else during refugee processing.").

205. *See, e.g.*, Galvan v. Press, 347 U.S. 522, 531 (1954); Fong How Tan v. Phelan, 333 U.S. 6, 10 (1948) ; *see also* Lennon v. INS, 527 F.2d 187, 193 (2d Cir. 1975) (describing deportation as a penalty that "in [its] severity . . . surpasses all but the most Draconian criminal penalties").

206. Galvan v. Press, 347 U.S. 522, 531 (1954).

207. Fong Yue Ting v. United States, 149 U.S. 698, 749 (1893) (Field, J., dissenting); *see also id.* at 740 (Brewer, J., dissenting) ("Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.").

208. Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (holding that it was ineffective assistance of counsel for a criminal defense attorney to fail to advise a client that a plea made him subject to deportation).

209. *See supra* note 3; Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1919–20 (2000); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299 (2011).

common law defenses in removal proceedings in a coherent or comprehensive manner. Given the limited types of applications that can be filed in removal proceeding, the constraints on immigration judges' authority to grant discretionary relief in individual cases, the gravity of what is at stake, and the lack of proportionality between the immigrant's transgression in many cases and the consequence of deportation, all possible defenses must be explored. While recognizing common law defenses in removal proceedings will not solve the inequities in the system or the well-documented problem of disproportionality,[210] these defenses can be a valuable tool to stop deportations in certain cases. Indeed, developing the law often involves taking unpopular legal theories and making them more popular.

The idea that federal common law defenses exist in removal proceedings despite the complex legislative scheme crafted by Congress in the INA may seem improbable at first glance. But Part I has shown that courts routinely apply many common law doctrines in interpreting the INA, and Part II has shown that courts not only recognize common law defenses in civil cases, but that they have already considered these defenses in some civil cases arising under the INA.

Recognizing a role for common law defenses in removal proceedings does not mean that immigration judges would be required to readjudicate

210. *See, e.g.*, Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1671–79 (2009) (arguing that certain deportation categories are punitive and subject to proportionality review under the Due Process Clause and proposing a rights-based form of statutory relief that would allow immigration judges to ensure proportionality); Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243 (2013) (making normative and historical arguments for noncitizens' right to remain and arguing that deportation should only occur when it is a proportionate response to criminal activity); Jason Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. DAVIS L. REV. 1029, 1041 (2017) (arguing that "concerns about disproportionate results have already motivated the Supreme court to make equity-driven adjustments to the removal system over the past fifteen years, in a break from long-standing policy of extreme deference to the political branches"); Daniel Kanstroom, *Smart(er) Enforcement: Rethinking Removal, Structuring Proportionality, and Imagining Graduated Sanctions*, 30 J.L. & POL. 465 (2015) (proposing a model for taking proportionality and affiliation rights seriously in a structural way) ; Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1738–40 (2009) (arguing that the concept of proportionality should be introduced into immigration law and that deportation's costs would outweigh the benefits in situations involving "minor" violations, such as violating entry conditions); Maureen Sweeney & Hillary Scholten, *Penalty and Proportionality in Deportation for Crimes*, 31 ST. LOUIS U. PUB. L. REV. 11 (2011) (proposing a framework for understanding how Eighth Amendment jurisprudence can support proportionality review in deportation cases); Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415 (2012) (arguing that removal orders should be subject to constitutional proportionality review under the Fifth Amendment Due Process Clause and Eighth Amendment and that, in certain cases, courts should find that deportation is so disproportionate to the gravity of the offense as to be unconstitutional).

convictions for crimes.[211] That clearly is not their role.[212] However, many INA provisions do not require a criminal conviction to render someone removable from the United States, and it is those provisions that lend themselves most readily to common law defenses. This Part shows that there is a small body of case law suggesting the viability of common law defenses in removal proceedings in at least some circumstances. The discussion here focuses on three broad categories of cases under the INA in which the use of federal common law defenses seems particularly promising. These categories are not mutually exclusive, nor are they an exhaustive list. They simply provide a useful way to start thinking about the role that federal common law defenses can play in removal proceedings.

The first category involves INA provisions that require an adjudicator to determine whether a noncitizen has violated a federal criminal law without requiring a conviction. The second category involves INA provisions that bar asylum and a related form of relief called withholding of removal that are derived from international treaties and criminal culpability principles. The third category involves INA provisions that have no explicit mens rea requirement and therefore no backdoor to introducing factors such as age, duress, or insanity, which can be captured with common law capacity defenses.

A. INA Provisions Requiring a Determination of Whether Conduct Is Unlawful

The most clear-cut situation in which common law defenses should be considered in removal proceedings involves INA provisions that require the immigration judge to determine whether an alien has engaged in unlawful conduct. In *Keathley v. Holder*,[213] the Seventh Circuit considered whether an entrapment by estoppel defense was applicable to a noncitizen who had been ordered removed for voting in a federal election.[214] Keathley, a citizen of the Philippines, entered the United States with a fiancé visa and then married a U.S.

211. For a discussion of how state courts have become "venues where the determinative decision for immigration purposes (the conviction) is negotiated even while the formal responsibility for implementing the consequences of those decisions (deportation) remains in removal proceedings," see Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 556 (2013).

212. *See, e.g.*, Mendez-Moralez, 21 I. & N. Dec. 296, 304 (B.I.A. 1996) ("[I]n ascertaining the effect of a criminal conviction, neither the Board nor the Immigration Judge may go beyond the judicial record to determine the guilt or innocence of an alien . . . . He must be considered guilty of the crime." (citations omitted)).

213. 696 F.3d 644 (7th Cir. 2012).

214. *Id.*

citizen. An Illinois government official who knew that Keathley was not a citizen asked her if she would like to vote, and Keathley answered "yes." The state of Illinois subsequently sent her a voter registration card, further leading her to believe that voting would be lawful, and she voted in the November 2006 election. During her interview to adjust her status to legal permanent residence, immigration officials discovered that she had voted and denied her application.

The federal government then placed Keathley in removal proceedings, and she made an entrapment by estoppel defense. The immigration judge and BIA rejected the defense, finding that it was a criminal law doctrine with no relevance to immigration proceedings.[215] The Seventh Circuit, however, reversed, holding that just because entrapment by estoppel is a defense in criminal proceedings, "it does not follow that the defense is irrelevant in civil proceedings."[216] The court explained that the INA provision under which Keathley was charged, 8 U.S.C. § 1182(a)(10)(D)(i), declares that an alien who voted in violation of federal or state law is inadmissible, and the criminal law that makes it unlawful for an alien to vote is 18 U.S.C. § 611.[217] Because "the only way to determine whether a person has violated a criminal statute is to examine both the elements of that law and all defenses properly raised," the court reasoned that "[i]f Keathley has a good defense, she has not violated § 611 and remains eligible for adjustment of status," the process of becoming a permanent resident.[218] The court remanded the case for factual findings relevant to the entrapment by estoppel defense.

Numerous other INA provisions likewise require courts to determine whether a criminal law has been violated, without requiring a conviction. For example, Section 212(a)(3)(A)(i) renders as inadmissible any noncitizen who has "*violat[ed] any law* of the United States relating to espionage or sabotage or . . . any law prohibiting the export from the United States of goods, technology, or sensitive information."[219] Section 212(a)(3)(G) provides that "[a]ny alien who has engaged in the recruitment or use of child soldiers *in violation of section 2442 of title 18*, is inadmissible."[220] Section 212(a)(6)(E)(i) states that "[a]ny alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United

215. *Id.* at 646.
216. *Id.*
217. There is an analogous deportability ground at 8 U.S.C. § 1227(a)(6)(A) (2018).
218. *Keathley*, 696 F.3d at 646; *cf.* Kimani v. Holder, 695 F.3d 666, 671–72 (7th Cir. 2012) (holding that entrapment by estoppel was not available to the petitioner as a defense where he falsely represented himself to be a citizen on the form and presented no evidence that a government official told him to vote or assured him that voting was lawful).
219. 8 U.S.C. § 1182(a)(3)(A)(i) (2018).
220. INA § 212(a)(3)(G), *id.* § 1182(a)(3)(G) (emphasis added).

States *in violation of law* is inadmissible."[221] Analogous deportability grounds similarly depend on violations of law, but do not require a conviction.[222] In applying these provisions, an adjudicator must determine whether a noncitizen has violated a U.S. law, which, in turn, requires considering any common law defenses.

This reasoning also applies to INA provisions that pertain to "unlawful" conduct such as "terrorist activity." The INA defines "terrorist activity" to include "any activity which is *unlawful* . . . which involves . . . [using an] explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property."[223] In *McAllister v. Attorney General*, the Third Circuit implied that common law defenses can be used to challenge a terrorist-activity allegation. In this case, a noncitizen raised three examples that he argued would constitute terrorist activity under this sweeping definition: "an 8-year-old child who brings a baseball bat to school to protect himself from bullies; an individual institutionalized for a mental health disorder who attacks a doctor; [and] a woman who protects herself, in the course of a domestic violence attack, which standard kitchen cooking utensils."[224] The Third Circuit rejected all of these examples, explaining that none would constitute terrorist activity, because "both the little boy and the battered wife have acted in self-defense, which negates the 'unlawful' element."[225] The court further noted that "t[h]e institutionalized individual *in all likelihood* does not have the capacity to satisfy the intent requirement under the common law."[226] Thus, federal common law defenses are relevant to challenge the applicability of INA provisions that require a determination of whether conduct is "unlawful." Yet it is all too common for immigration judges who are not used to considering common law defenses to skip this critical step.

Some might argue that immigration judges are ill-equipped to consider common law defenses to determine whether a criminal law has been violated.

221. INA § 212(a)(6)(E)(i), *id.* § 1182(a)(6)(E)(i) (emphasis added).
222. *See* INA § 237(a)(4)(F), *id.* § 1227(a)(4)(F) ("[a]ny alien who has engaged in the recruitment or use of child soldiers *in violation of section 2442 of title 18*, is deportable" (emphasis added)); INA § 237(a)(1)(E), *id.* § 1227(a)(1)(E) ("[a]ny alien who . . . knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States *in violation of law* is deportable" (emphasis added)).
223. INA § 212(a)(3)(B)(iii)(V)(b); 8 U.S.C. § 1182(a)(3)(B)(iii) (2018) (emphasis added).
224. McAllister v. Attorney Gen., 444 F.3d 178, 186 (3d Cir. 2006).
225. *Id.* at 186–87.
226. *Id.* at 187.

But immigration judges and the BIA routinely scrutinize criminal statutes and apply criminal law principles. For example, in applying the categorical approach,[227] immigration judges must determine whether a given criminal offense falls within the complicated "aggravated felony" or "crime involving moral turpitude" definition.[228] As part of that analysis, immigration judges must also determine whether state criminal statutes are divisible into discrete offenses.[229] In one case, for example, the BIA had to examine Puerto Rico's aggravated-battery crime for the breadth of conduct that would support a criminal conviction in that jurisdiction.[230] Given that immigration judges and the BIA are well-versed in making complex determinations that involve examining criminal statutes and the cases interpreting those statutes, they can also capably consider common law defenses to crimes.

B. INA Provisions Barring Asylum and Withholding of Removal

In 1980, Congress amended the INA to conform domestic laws to international standards in the 1951 UN Convention Relating to the Status of Refugees (Refugee Convention) and the 1967 Protocol relating to the Status of Refugees.[231] Those amendments introduced the statutory provisions governing asylum, as well as a related form of relief called withholding of removal that codifies the international nonrefoulement obligation, the prohibition against returning an individual to a country in which there is a threat to her life or freedom.[232] The INA includes several bars to both asylum and withholding of removal that are derived from the Refugee Convention.[233] If these bars apply, noncitizens can be deported despite a serious risk of future persecution in their

227. For a description of the categorical approach, see *supra* notes 57–58 and accompanying text.
228. *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1673 (2011).
229. *See* Chairez-Castrejon, 27 I. & N. Dec. 21, 23–24 (B.I.A. 2017).
230. Guzman-Polanco, 26 I. & N. Dec. 713 (B.I.A. 2016).
231. INS v. Cardoza-Fonseca, 480 U.S. 421, 436–37 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968.").
232. 8 U.S.C. § 1101(a)(42) (2018) (defining a refugee); *id.* § 1158 (asylum); *id.* § 1231(b)(3)(A) (withholding of removal); *see also* 8 C.F.R. 1208.16 (2018) (withholding of removal).
233. *Compare* 8 U.S.C. § 1158(b)(2) (bars to asylum); *id.* § 1231(b)(3)(B) (bars to withholding of removal), *with* Convention Relating to the Status of Refugees art. 1F, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]. *See also* Protocol Relating to the Status of Refugees, January 31, 1967, 606 U.N.T.S. 267 [hereinafter Protocol] (amending the Refugee Convention to include persons becoming refugees after January 1, 1951 and incorporating, inter alia, the Convention's refugee definition and bars to refugee status).

countries of origin. Whether a bar to persecution applies can therefore have life or death consequences.

This Subpart addresses two of the bars to asylum and withholding of removal: the serious nonpolitical crime bar and the persecution of others bar.[234] This Subpart does not discuss the bar to asylum and withholding of removal based on providing "material support" to a terrorist organization,[235] because the BIA has already held that there is no duress defense to that bar, which makes it a less compelling candidate for common law defenses.[236]

There are several reasons why federal common law defenses are particularly relevant to interpreting the nonpolitical crime and persecutor bars. To begin with, these bars derive from principles of culpability under international criminal law, which incorporate common law defenses. In addition, the United Nations High Commissioner for Refugees (UNHCR), the UN agency responsible for interpreting the Refugee Convention, has construed these bars in ways that incorporate several federal common law defenses discussed in Part II above. Lastly, these bars bear on the nonrefoulement principle, which has become part of customary international law (CIL).[237] As Louis Henkin has explained, since CIL derives from international-community practice, not U.S. policy codified in federal statutes, "when courts determine international law, they do not act as surrogates for the national legislature."[238] For this reason, CIL is not an area in which federal common law should reflexively "bow to [federal] legislation."[239]

234. 8 U.S.C. § 1158(b)(2)(A)(i) (2018) (persecutor bar to asylum); *id.* § 1158(b)(2)(A)(iii) (serious nonpolitical crime bar to asylum); *id.* § 1231(b)(3)(B)(i) (persecutor bar to withholding of removal); *id.* § 1231(b)(3)(B)(iii) (serious nonpolitical crime bar to withholding of removal).

235. 8 U.S.C. § 1182(a)(3)(B)(iv)(IV) (2018).

236. M-H-Z-, 26 I. & N. Dec. 757 (B.I.A. 2016).

237. U.N. High Comm'r for Refugees, Executive Comm. Conclusion No. 25 (XXXIII), ¶ (b) (Dec. 2009); *see also* Cartagena Declaration on Refugees, Colloquium on the Int'l Prot.of Refugees in Central Am., Mex. & Pan, *Annual Report of the Inter-American Commission on Human Rights*, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, Section III(5) (Nov. 22, 1984), https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf; *see generally* Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection*, 23 GEO. IMMIGR. L.J. 1 (2008).

238. Henkin, *infra* note 239, at 876.

239. Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 876 (1987) (arguing that customary international law (CIL) is not inferior to federal statutes because "the reasons that common law bows to [federal] legislation are inapplicable to international law"). Other scholars have been much more skeptical about how "federal courts can apply a newly-developed norm of CIL as a matter of federal common law to invalidate a prior inconsistent federal statute." Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 843 (1997).

1. The Serious Nonpolitical Crime Bar

A person is barred from asylum and withholding of removal if they have committed a "serious nonpolitical crime."[240] The fact that the word crime is used in this bar itself indicates that common law defenses should be considered based on the reasoning discussed in Subpart III.A: Just like inadmissibility and deportability grounds that require conduct to be "unlawful" or "in violation of law," this bar requires a crime, and whether a crime has actually been committed requires considering relevant defenses. Since the serious nonpolitical crime bar does not require a conviction, the determination of whether a crime has been committed does not involve reassessing culpability that a criminal court has already determined.[241]

This approach is consistent with UNHCR's interpretation of the exclusion clauses in Article 1F of the Refugee Convention, which uses language that is nearly identical to the serious nonpolitical crime bar in the INA.[242] With respect to all exclusion clauses, UNHCR has emphasized individual responsibility, noting that "[i]n some cases, an individual may not have the mental capacity to be held responsible for a crime, for example, because of insanity, mental handicap, involuntary intoxication, or, in the case of children, immaturity."[243] UNHCR has further stated that "[f]actors generally considered to constitute defences to criminal responsibility should be considered."[244] The duress defense, for example, "applies where the act in question results from the person concerned necessarily and reasonably avoiding a threat of imminent death, or of continuing or imminent serious bodily harm to him– or herself or another person, and the person does not intend to cause greater harm than the one sought to be avoided."[245] Similarly, "[a]ction in self-defence or in defence of others or of property must be reasonable and proportionate in relation to the

240. 8 U.S.C. §§ 1158(b)(2)(A)(iii) (2018).
241. By contrast, the particularly serious crime bar to asylum and withholding of removal specifically requires a conviction. *Id.* §§ 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii).
242. *Compare Id.* § 1158(b)(2)(A)(iii) (serious nonpolitical crime bar to asylum) *and id.* § 1231(b)(3)(B)(iii) (serious nonpolitical crime bar to withholding of removal), *with* Refugee Convention, *supra* note 233, art. 1F(b).
243. U.N. Refugee Agency, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1(F) of the 1951 Convention relating to the Status of Refugees ¶ 21, HCR/GIP/03/05 (Sept. 4, 2003), https://www.unhcr.org/en-us/3f7d48514.pdf#zoom=95 [https://perma.cc/ZR4R-AHB7].
244. *Id.* ¶ 22.
245. *Id.*

threat."[246] These interpretations by UNHCR mirror the requirements of the common law defenses for duress and self-defense.

With respect to the "serious nonpolitical crime" bar specifically, UNHCR has indicated that adjudicators should consider mitigating circumstances, such as "provocation and self-defense," as well "minority of the offender."[247] UNHCR has further explained that in determining whether a crime is political, as opposed to nonpolitical, "[t]he political element of the offence should [] outweigh its common-law character," which also suggests a role for common law defenses, because the term "common-law character" indicates a need to analyze whether the act would qualify as a crime under common law.[248] The test the BIA adopted for determining whether an act constitutes a serious nonpolitical crime reflects important aspects of UNHCR's definition. The BIA's test requires immigration judges to assess whether "the criminal nature" of the conduct "outweigh[s] its political nature."[249] As discussed in Subpart III. A above, assessing the "criminal nature" of an act requires considering common law defenses. Furthermore, there are a handful of cases in which immigration judges, the BIA, and circuit courts have considered self-defense and duress in assessing an act's "criminal nature" as part of this balancing test. But adjudicators are not doing this routinely, explicitly, or in a manner that necessarily tracks the common law defenses' elements.

One of the few cases in which circuit courts have at least implicitly recognized the role of common law defenses to the serious nonpolitical crime bar is *Efe v. Holder*.[250] There, the Fifth Circuit considered and rejected a petitioner's argument that he did not commit a serious nonpolitical crime because his actions involved self-defense. Significantly, the court did not refuse to consider self-defense in its analysis; it simply concluded that the petitioner had

246. *Id.*

247. GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 179 (2007) (describing a 1980 proposal by UNHCR to the U.S. authorities suggesting that these mitigating circumstances tend to rebut the presumption of a serious crime).

248. United Nations High Comm'r for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status 152 (2d ed. 1992, reissued 2011), http://www.unhcr.org/en-us/3d58e13b4.pdf [https://perma.cc/WL66-FNGQ] [hereinafter UNHCR Handbook]. UNHCR has drawn heavily on the jurisprudence of common law countries in interpreting the Refugee Convention.

249. INA v. Aguirre-Aguirre, 526 U.S. 415, 429–31 (1990) (finding the BIA's interpretation that the criminal nature of the offense must outweigh its political character permissible and holding that "[t]he criminal element of an offense may outweigh its political aspect even if none of the acts are deemed atrocious"); *see also* McMullen, 19 I. & N. Dec. 90, 97–98 (B.I.A. 1984) ("In evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character.").

250. 293 F.3d 899, 906 (5th Cir. 2002).

not actually acted in self-defense. The court found that the "more likely account of how the stabbing took place has [the petitioner] escaping the beating, entering a house, finding a knife, running back out into the demonstration, and killing the police officer."[251] Since the petitioner "was no longer under immediate threat of physical harm once he escaped into the house," the court "rule[d] out his self-defense claim."[252]

In at least two cases, the Sixth Circuit has also indicated a willingness to consider common law defenses in interpreting the serious nonpolitical crime bar. *Berhane v. Holder*[253] involved an Ethiopian asylum seeker who had thrown rocks at the police during antigovernment demonstrations in Ethiopia.[254] While the court's decision focused primarily on whether the noncitizen's actions were political and whether they were serious, the court noted that "[n]either the Board nor the Immigration Judge . . . addressed one of Berhane's principal arguments: that his rock throwing was an act of self defense [sic] and was never directed at civilians."[255] The court went on to explain that a self-defense theory "might diminish the criminal nature of the actions, which weighs in the balance."[256] While this language recognizes self-defense as relevant to evaluating criminal culpability, it is still tentative, using the word "might." Furthermore, at no point does the Sixth Circuit refer to self-defense as an affirmative common law defense or mention its elements.

In *Urbina-Mejia v. Holder*,[257] decided that same year, the Sixth Circuit considered an argument resembling a common law duress defense. The case involved a teenager from Honduras who had joined the 18th Street gang at age fourteen after "members of the gang informed him that he was to join their gang . . . and told him to go to the football field where they 'persuaded' him to join by continuously beating him for eighteen seconds."[258] The immigration judge and BIA determined that he committed a serious nonpolitical crime based on "his actions while a member of the gang, including hitting a man in the back with a baseball bat and extorting people for money on the street."[259] Although Urbina-Mejia argued that he had been coerced to commit these acts as a juvenile member of the gang, the immigration judge rejected that argument, reasoning

251. *Id.*
252. *Id.*
253. 606 F.3d 819 (6th Cir. 2010).
254. *Id.* at 823.
255. *Id.* at 825.
256. *Id.*
257. 597 F.3d 360 (6th Cir. 2010).
258. *Id.* at 362.
259. *Id.* at 369.

that Urbina-Mejia "possessed a 'fair amount of autonomy' in that he shared the proceeds of his crimes and carried a firearm."[260] The BIA and Sixth Circuit affirmed this finding without much analysis. While *Urbina-Mejia* shows that the BIA and Sixth Circuit were willing to consider an argument resembling a common law duress defense, the decision makes no reference to the elements for establishing duress and never mentions the common law.

Matter of E-A-,[261] a subsequent BIA decision addressing the serious nonpolitical crime bar, discussed duress and self-defense. The case involved an asylum seeker who had been employed as a driver for the Democratic Party of Cote d'Ivoire's youth group from 1994 to 1999.[262] On "five or six occasions in 1994, the applicant participated as a member of this group while it burned passenger buses and cars, threw stones, pushed baskets of food off the heads of merchants as they walked on the streets, and threw merchandise off of merchants' tables in the market."[263] No one was hurt during these incidents.[264] The applicant testified that he was coerced into committing these acts because party leaders were watching him, and he feared losing his job or being thrown into prison if he refused to participate.[265]

In analyzing this case, the BIA rejected the coercion argument, reasoning that the applicant's fear "was speculative and not based on any specific, credible threat or any evidence that such actions had been carried out on others similarly situated to him."[266] The BIA further found that "[t]he applicant's generalized fear is not sufficient to show that he would have suffered any dire consequences, such as serious physical harm or economic persecution, if he had refused to participate in the group."[267] In a footnote, the BIA mentioned that its analysis of the criminal nature of the applicant's conduct could be different if the facts indicated self-defense, but there was no such evidence here.[268] Ultimately, the BIA concluded that the acts cumulatively triggered the serious nonpolitical crime bar.[269]

While the BIA's decision is promising insofar as it acknowledges that duress and self-defense are relevant to the serious nonpolitical crime analysis, it

260. *Id.* at 363.
261. 26 I. & N. Dec. 1, 2 (B.I.A. 2012)
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.* at 7.
266. *Id.* at 7–8.
267. *Id.* at 8.
268. *Id.* at 7 n.6.
269. *Id.* at 8–9.

also raises significant concerns. To begin with, just like the Fifth and Sixth Circuit cases discussed above, the BIA's decision does not explicitly describe duress or self-defense as affirmative common law defenses or explain their elements. This makes it difficult for asylum applicants and attorneys to know what they need to prove to establish self-defense or duress in order to overcome the serious nonpolitical crime bar. The BIA's analysis suggests that the applicant failed to establish an impending threat of death or serious bodily injury and a well-grounded fear that those threats would be carried out, two of the elements that courts generally require for a duress defense. The reference to economic persecution, however, breaks away from the traditional elements of the criminal duress defense and suggests a slightly different test. As the Supreme Court has noted, there is no federal statute defining the duress defense's elements, and the Court itself has repeatedly declined to define the elements.[270] While the BIA recently defined the elements of duress for purposes of the persecutor bar, discussed further below,[271] it may not necessarily define duress the same way with respect to the serious nonpolitical crime bar.

Furthermore, the language the BIA uses suggests that it is not treating duress and self-defense as complete defenses, but as mitigating factors, which differs from the traditional understanding of an affirmative defense. Under the BIA's analysis, facts showing coercion and self-defense go to the weight given to criminal culpability in the balancing test for determining whether an act constitutes a serious nonpolitical crime, rather than to the conclusion that the act was not a crime at all. Finally, the BIA's finding that numerous acts, which occurred over several years, cumulatively rose to the level of a serious nonpolitical crime complicates any attempt to apply common law defenses in this context. Would self-defense and duress need to be established for each act or for only some of the acts? By assessing a series of acts in their totality, the BIA again departs from the traditional approach to criminal culpability, making it even more difficult to determine how to establish a defense.

2. The Persecutor of Others Bar

The persecutor bar to asylum and withholding of removal applies if an individual has persecuted other people on account of their race, religion, nationality, political opinion, or membership in a particular social group.[272] This

270. Dixon v. United States, 548 U.S. 1, 4 n.2 (2006).
271. *See* Negusie, 27 I. & N. Dec. 347, 363 (B.I.A. 2018).
272. 8 U.S.C. § 1158(b)(2)(A)(i) (2018) (persecutor bar to asylum); *id.* § 1231(b)(3)(B)(i) (persecutor bar to withholding of removal).

bar is based on Article 1F(a) of the Refugee Convention, which applies to an individual who "has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes."[273] Although the persecutor bar's language is different than that of Article 1F(a), the BIA has recognized that the persecutor bar should be construed consistently with Article 1F(a).[274] In addition, UNHCR has interpreted "a crime against humanity" under Article 1F(a) to include "persecution, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[275]

The repeated use of the word "crime" in Article 1F(a) clearly roots the persecutor bar in criminal-culpability principles.[276] Article 1F(a) also specifies that the crime should be interpreted as "defined in the international instruments."[277] The term "international instruments" refers to several documents that existed when the Refugee Convention was drafted, including the 1945 Charter of the International Military Tribunal (also known as the Nuremberg Charter or London Charter), the 1948 Genocide Convention, the 1949 Geneva Conventions for the Protection of Victims of War, and the 1950 reports of the International Law Commission (ILC).[278] Additionally, however, UNHCR has explained that Article 1F(a) allows for "a dynamic interpretation of the relevant crimes so as to take into account developments in international law,"

273. Refugee Convention, *supra* note 233, art. 1F(a); *see also* JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 524 (2d ed. 2014) (explaining that Article 1F excludes those who are undeserving of protection because they are "seeking to evade legitimate prosecution or punishment for serious domestic crimes, . . . have committed serious international crimes, . . . [or are] guilty of actions contrary to the principles and purposes of the UN"); James C. Hathaway, *The Michigan Guidelines on the Exclusion of International Criminals*, 35 MICH. J. INT'L L. 3, 7 (2013) ("The fundamental object and purpose of Article 1(f)(a) is to exclude persons whose international criminal conduct means that their admission as a refugee threatens the integrity of the international refugee regime.").

274. *See* Alvarado, 27 I.& N. 27, 30 n.3 (B.I.A. 2017).

275. U.N. Refugee Agency Standing Comm., *Note on the Exclusion Clauses*, (May 30 1997), http://www.unhcr.org/en-us/excom/standcom/3ae68cf68/note-exclusion-clauses.html [https://perma.cc/AP5F-DB78]; *see also* U.N. Refugee Agency, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* ¶ 34 (Sept. 4 2003), http://www.refworld.org/docid/3f5857d24.html [https://perma.cc/A7J2-GCE5] [hereinafter UNHCR Background Note] (including "persecution" among crimes against humanity); UNHCR Handbook, *supra* note 248, ¶ 149 (explaining that Article 1F must be interpreted restrictively considering exclusion's serious consequences).

276. Refugee Convention, *supra* note 233, art. 1F(a).

277. *Id.*

278. UNHCR Background Note, *supra* note 275, ¶¶ 23–24.

thereby incorporating more recent instruments, such as the Rome Statute of the International Criminal Court.[279]

These instruments, and the war crimes prosecutions that followed World War II, recognize common law defenses.[280] As Anthony D'Amato explained, "defenses available under the general principles of criminal law are of course available in war-crimes prosecutions, such as self-defense, being under 18 years old at the time of the commission of the crime, lacking criminal intent, or acting in self-defense."[281]

The commentaries to the Draft Code of Offences Against the Peace and Security of Mankind, which the ILC completed in 1951 at the UN General Assembly's request, stresses the notion of "individual responsibility" and imposes two criteria in determining the defenses' admissibility.[282] First, defenses should be limited to those "that are well-established and widely recognized as admissible with respect to similarly serious crimes under national or international law."[283] Second, the court should consider the defense's applicability in light of the character of the crime in a particular case.[284]

The ILC's commentaries recognize self-defense and duress as well-established defenses, distinguishing duress from a defense of following superior orders.[285] This is consistent with the conclusion reached by the UN War Crimes Commission's Law Reports on Trials of War Criminals, published in 1949 based on a review of nearly 2000 decisions by military tribunals, as well as the various countries' laws.[286] The UN War Crimes Commission found that duress is a defense if the following three elements are satisfied: "(a) the act charged was done

279. *Id.* ¶¶ 23–25. The UNHCR also mentioned the statutes of the international criminal tribunals for the prosecution of serious violations of international humanitarian law committed in the former Yugoslavia and Rwanda. *Id.*

280. *See* Christopher L. Blakesley, *Obstacles to the Creation of a Permanent War Crimes Tribunal*, 18 FLETCHER F. WORLD AFF. 77, 93–94 (1994) (explaining that "[d]uress is traditionally a separate defense from superior orders"); Valerie Epps, *The Soldier's Obligation to Die When Ordered to Shoot Civilians or Face Death Himself*, 37 NEW ENG. L. REV. 987, 990–91 (2003) (distinguishing duress from illegal superior orders).

281. Anthony D'Amato, *National Prosecution for International Crimes*, *in* 3 INTERNATIONAL CRIMINAL LAW 169, 295 (M. Cherif Bassiouni ed., 1987).

282. *Draft Code of Crimes Against the Peace and Security of Mankind With Commentaries*, 1996 Y.B. Int'l Law Comm'n 17, U.N. Doc. A/CN.4/L.527, http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf [https://perma.cc/M6SF-E9S3] [hereinafter Report of the ILC]; *see also* J. Spiropoulos (Special Rapporteur), *Draft Code of Offences Against the Peace and Security of Mankind*, [1950]1 Y.B. Int'l Law Comm'n 725 U.N. Doc. A/CN.4/25.

283. Report of the ILC, *supra* note 282, at 39.

284. *Id.*

285. *Id.* at 40.

286. 15 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 174 (1949).

to avoid an immediate danger both serious and irreparable; (b) there was no adequate means of escape; (c) the remedy was not disproportionate to the evil."[287]

The ILC's commentaries acknowledge that there is no minimum age for criminal responsibility under international law but advise that a competent court "may have to decide whether the youth of the accused at the time the alleged crime occurred should be considered to constitute a defence or extenuating circumstance in a particular case."[288] The commentaries also state that the UN War Crimes Commission "did not conduct an exhaustive analysis of the ages of the persons convicted . . . but noted that persons as young as fifteen years were of age were convicted and punished in some of these [war] trials."[289] This implicitly suggests that it would be appropriate for a court to find that persons under age fifteen are not culpable, which is consistent with subsequent war-crime prosecution decisions. For example, the prosecutor for the Special Court of Sierra Leone decided not to prosecute children under age fifteen.[290]

The Rome Statute of the International Criminal Court, adopted in 1998 and entered into force in 2002, provides more recent guidance on defenses in this context.[291] The defenses the Rome Statute recognized include a "mental disease or defect" that destroys the person's capacity to appreciate the conduct's unlawfulness or nature or the person's ability to conform to the law's requirements; involuntary intoxication; self-defense "in a manner proportionate to the degree of danger to the person or the other person or property protected"; and duress "resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person," as long as "the person acts necessarily and responsibly to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided."[292] Although the Rome Statute does not mention age

287. *Id.* at 174.
288. Report of the ILC, *supra* note 282, at 41–42.
289. *Id.* at 42.
290. The founding prosecutor for the Special Court of Sierra Leone, David M. Crane, has argued that the Geneva Conventions' special protections for children under fifteen during times of armed conflict, combined with the prohibition in the Convention on the Rights of the Child against the use of children in armed conflict, implies that "a child soldier recruited under duress cannot commit a war crime." David M. Crane, *Prosecuting Children in Times of Conflict: The West African Experience*, 15 HUM. RTS. BRIEF 11, 14 n.31 (2008) (explaining the decision not to prosecute children under fifteen as part of the war crimes trials in Sierra Leone).
291. Rome Statute of the International Criminal Court, art. 31, U.N. Doc. 32/A/CONF.183/9, *reprinted in* 37 I.L.M. 999 (1998).
292. *Id.*

as a defense, it requires the crime's material elements to be committed with "intent and knowledge" in order for an individual to be held responsible.[293]

International law scholars have paid the most attention to the duress defense to the persecutor bar. After carefully analyzing the origins of the exclusion clauses of the Refugee Convention, including the international instruments and military tribunal decisions discussed above, decisions by other state parties to the Refugee Convention, and the U.S. legislative history behind the persecutor bar, Kate Evans concluded that duress should be recognized as a defense to the persecutor bar.[294] Other international law scholars have also supported this position in amici briefs.[295]

In *Hernandez v. Reno*, the Eighth Circuit considered a case involving a Guatemalan man whom guerrillas had forcibly recruited and ordered to shoot at peasants.[296] The court deemed it necessary to "engage in a particularized evaluation in order to determine whether an individual's behavior was culpable to such a degree that he could be fairly deemed to have assisted or participated in persecution."[297] Although the word duress was not explicitly mentioned in the case, the court's culpability analysis clearly contemplates this defense. In vacating the BIA's decision for not considering all of the relevant evidence, the court stressed that the BIA should have taken into account the petitioner's "uncontroverted testimony that his involvement . . . was at all times involuntary and compelled by threats of death," that he participated "in fear for his life," and that "the commander stood behind him during the shooting and checked the magazine of his rifle afterwards."[298]

293. *Id.* art. 30.1. The Rome Statute defines "intent" to mean that: "(a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events." *Id.* art. 30.2. "Knowledge" means "awareness that a circumstance exists or a consequence will occur in the ordinary course of events." *Id.* art. 30.3.

294. Kate Evans, *Drawing Lines Among the Persecuted*, 101 MINN. L. REV. 453, 538 (2016).

295. *See* Brief for Scholars of International Refugee Law as Amici Curiae in Support of Petitioner at 28–31, Negusie v. Holder, 555 U.S. 511 (2009) (No. 07-499) (describing the connection between the international military tribunals and exclusions contained in the Refugee Convention and Protocol); Proposed Brief of Scholars of International Refugee Law as Amici Curia at 4–6, Amicus Invitation, No. 16-08-08 (B.I.A. 2016), https://www.uidaho.edu/~/media/UIdaho-Responsive/Files/law/academics/practical-skills/clinics/BIA-Law-Scholars-Amicus-Brief-Persecutor-Bar.ashx [https://perma.cc/H9YK-QVZE] (arguing that Article 1F(a) of the Refugee Convention "expressly incorporate[d] international criminal law principles of culpability including commonly applicable defenses to liability" and is "ultimately concerned with those culpable individuals who bear responsibility for persecuting others").

296. Hernandez v. Reno, 258 F.3d 806, 808–09 (8th Cir. 2001).

297. *Id.* at 813.

298. *Id.* at 814.

In 2018, the BIA finally recognized a narrow duress exception to the persecutor bar in *Negusie*, a case that the Supreme Court had remanded nine years earlier so that the BIA could address the issue in the first instance.[299] The BIA adopted a five-part test for duress, stating:

> While we need not define the precise boundaries of a duress standard in the context of this case, at a minimum, the applicant must establish by a preponderance of the evidence that he (1) acted under an imminent threat of death or serious bodily injury to himself or others; (2) reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting; (3) had no reasonable opportunity to escape or otherwise frustrate the threat; (4) did not place himself in a situation in which he knew or reasonably should have known that he would likely be forced to act or refrain from acting; and (5) knew or reasonably should have known that the harm he inflicted was not greater than the threatened harm to himself or others.[300]

The BIA explained that last element of proportionality "derives from international law" and "narrows the scope of the duress defense," requiring the harm threatened against the applicant to rise to the level of persecution.[301] However, the only legal authorities that the BIA cited for incorporating the proportionality element were Canadian cases.[302] The BIA found that Negusie, who had been forcibly conscripted into the Eritrean army, failed to satisfy the elements of duress, reasoning that "the threats of death he received, should he disobey orders . . . did not constitute the imminent threat of death or serious bodily injury required to meet the standard of duress."[303] The BIA further found that he had a reasonable opportunity to escape, because "he eventually escaped through a 'weak spot' and walked through the jungle to his friend's home."[304] Although the BIA's decision in Negusie set a high bar for a duress defense, now-former Attorney General Sessions issued an automatic stay of the decision and certified it to himself for reconsideration.[305] At the time of this writing, the Attorney General had not yet issued his decision, but his decision to reconsider the relevance of a duress defense suggests that he may well overrule the BIA's decision.

299. Negusie, 27 I. & N. Dec. 347 (B.I.A. 2018); *see also* Negusie v. Holder, 555 U.S. 511 (2009).
300. Negusie, 27 I. & N. Dec. at 363.
301. *Id.* at 364–65.
302. *Id.* at 364.
303. *Id.* at 368.
304. *Id.*
305. Negusie, 27 I. & N. Dec. 481 (B.I.A. 2018).

At least one court has also recognized self-defense to as a defense to the persecutor bar. In *Vukmirovic v. Ashcroft*, the Ninth Circuit held that acts of self-defense do not count as persecution of others.[306] There, the petitioner was a Bosnian Serb who admitted that he had beaten Croats who attacked his town in 1990 with sticks.[307] The immigration judge deemed him ineligible for asylum based on the persecutor bar, finding no exception for acts of self-defense.[308] In rejecting that reasoning, the Ninth Circuit explained that for the bar to apply, persecution must be on account of certain grounds, and acts of self-defense are not on account of any of those grounds.[309] The court further reasoned that it would be contrary to the INA's purpose to deny asylum to victims of oppression who "had the temerity to resist persecution by fighting back."[310] Finally, the court described self-defense as "nature's eldest law" and one "of the most elemental characteristics of the human species."[311] A 2005 opinion by the Attorney General cites *Hernandez* with approval for the proposition that "[i]t is appropriate to look at the totality of the relevant conduct in determining whether the [persecutor] bar to eligibility applies."[312]

In addition to duress and self-defense, infancy has been raised as a defense to the persecutor bar. There is no clear guidance under international criminal law regarding age as a defense, but decisions by prior war-crime tribunals generally have not prosecuted children under age fifteen.[313] In the United States, there are currently no published decisions on point, but in at least one unpublished decision, the BIA upheld an immigration judge's decision finding that a child soldier was not barred from asylum based on persecution of others, reasoning that because he "was a boy between the ages of 11 and 13 during the relevant period, we are not persuaded that he had the requisite personal culpability for ordering, inciting, assisting or otherwise participating in the persecution of others."[314]

306. Vukmirovic v. Ashcroft, 362 F.3d 1247, 1252–53 (9th Cir. 2004).
307. *Id.* at 1249.
308. *Id.* at 1250, 1253.
309. *Id.* at 1251–52.
310. *Id.* at 1252.
311. *Id.*
312. A-H-, 23 I. & N. Dec. 774, 785 (B.I.A. 2005); *see also* Miranda Alvarado v. Gonzalez, 449 F.3d 915, 927 (9th Cir. 2006) (explaining that determining whether a petitioner "assisted in persecution" requires a particularized evaluation of both personal involvement and purposeful assistance in order to ascertain culpability).
313. *See supra* notes 288– 290, 293, and accompanying text.
314. Brief for Human Rights First et al. as Amici Curiae Supporting Petitioner, at *25, Negusie v. Holder, 555 U.S. 511 (2009) (No. 07-499), 2008 WL 2597010 (quoting BIA's decision in E-O-).

The cases discussed in this Subpart show that common law defenses have already played a role in interpreting the persecutor bar, but they have generally done so in an ad hoc manner without clear guidance from the BIA or Supreme Court, resulting in inconsistencies across cases. Furthermore, besides the BIA's recent decision in *Negusie* addressing a duress exception to the persecutor bar, which may soon be overruled by the Attorney General, the BIA has not clearly defined the elements of common law defenses in the deportation context. Nor have federal appellate courts done so. The BIA's addition of proportionality as an element to the defense duress, which departs from the standard elements of duress in U.S. law, indicates that the elements may be modified in immigration cases. It also remains unclear whether common law defenses are mitigating factors or complete defenses to deportation. The description of these defenses as exceptions in the case law, rather than as affirmative defenses, also obscures the larger question about how the common law interacts with the INA.

C. INA Provisions With No Explicit Mens Rea Requirement

The third category of cases in which common law defenses may be especially relevant involves INA provisions with no explicit mens rea requirement. If an inadmissibility or deportability ground has a mens rea requirement, an individual who committed an offense because of duress, self-defense, infancy, or insanity may lack the necessary mental state. For example, in *McAllister v. Attorney General*, the court noted that an eight-year-old child or a mentally ill institutionalized individual would likely not satisfy the intent element for terrorist activity under the INA.[315] When dealing with INA provisions that have no mens rea requirement, on the other hand, there is no backdoor for introducing such facts. The ability to raise common law defenses therefore becomes more important.

Take, for example, the INA provisions that render a noncitizen inadmissible and deportable for making a false claim to citizenship.[316] This charge is often brought against individuals who use a fake U.S. passport or birth certificate to enter the country. If an immigration or border patrol officer finds an individual has made a false claim to citizenship, there is no waiver available, and that person will be permanently barred from the United States. Imagine a child whose parent gave her a fake U.S. passport or birth certificate and told her to show it to the officer at the port of entry. The child may be too young to

315. McAllister v. Attorney Gen., 444 F.3d 178, 186 (3d Cir. 2006).
316. *See* 8 U.S.C. § 1182(a)(6)(C)(ii) (2018) (inadmissibility ground); *id.* § 1227(a)(3)(D)(i) (deportability ground).

understand what the document is or what it means to show it to the officer. Should this child be permanently barred from the country if the border patrol officer discovers the document is fake? Could a common law infancy defense be raised in this situation?

Unlike federal statutes such as the Higher Education Act, the INA does not expressly prohibit an infancy defense.[317] However, since many INA provisions make explicit exceptions for children,[318] and the false claim to citizenship provision does not, one could argue that Congress did not intend to carve any exceptions for children when it comes to making a false claim to citizenship. On the other hand, one could invoke the same child-specific INA provisions to make the opposite argument—the INA's distinction between children and adults reflects Congress's recognition that children should be treated more leniently.

Unfortunately, there is a dearth of precedent by the BIA and federal courts addressing whether an infancy defense can be made to various inadmissibility and deportability grounds, including the false claim to citizenship ground. In an Eighth Circuit case, *Sandoval v. Holder*, the petitioner argued that the false claim to citizenship inadmissibility ground excluded unaccompanied minors. The court observed:

> At oral argument, in contrast to the brief, the government conceded the statute would not apply to an eight-year-old child whose parents armed her with a fraudulent birth certificate and instructed her to say she was a United States citizen if asked by the officer. Having thereby departed from the black-and-white construction of the statute in favor of the case-by-case approach, the government nevertheless struggled to articulate why Sandoval fell on the wrong side of the divide.[319]

317. The Higher Education Act explicitly preempts an infancy defense based on state law. *See* 20 U.S.C. § 1091a(b)(2) (2018) ("[I]n collecting any obligation arising from a loan made under part B of this subchapter, a guaranty agency or the Secretary shall not be subject to a defense raised by any borrower based on a claim of infancy.").

318. For example, children under eighteen do not accrue unlawful presence in the United States. *See* 8 U.S.C. § 1182(a)(9)(B)(iii)(I) (2018). Children under eighteen are not subject to the one-year deadline for applying for asylum. *See id.* § 1182(a)(2)(A)(ii)(I). There is an exception to the inadmissibility ground for crimes involving moral turpitude if the crime was committed when the individual was less than eighteen years old and more than five years have passed since she committed the crime. *See id.* Unaccompanied minors at ports of entry are permitted to withdraw their applications for admission and avoid removal proceedings. *See id.* § 1232(2)(B)(i). Unaccompanied minors in removal proceedings are allowed to submit an affirmative asylum application to U.S. Citizenship and Immigration Services (USCIS) instead of filing it with the immigration court, giving them the special benefit of having "two bites at the apple." *See id.* § 1158(a)(2)(D); 8 C.F.R. § 208.4(a)(5)(ii) (2018). There are special requirements for serving children under fourteen. *See id.* § 1240.10(c). The government only fingerprints children over fourteen. *See id.* § 1240.38.

319. Sandoval v. Holder, 641 F.3d 982, 987 (8th Cir. 2011).

Here, recognizing a common law infancy defense could have helped both parties articulate a rule to justify the divide. Frustrated by the BIA's repeated failure to issue a precedent decision on point, the court suggested at least three options for the BIA to consider: "(a) that the statute applies indiscriminately to any alien, no matter what the age; (b) that the statute has to be interpreted on a case-to-case basis with an eye toward certain factors; or (c) that the statute applies, perhaps presumptively, to all individuals above a certain age designated by the agency, but that age happens to be lower than eighteen."[320] In suggesting these options, however, even the court did not mention the common law infancy defense.

Although the BIA still has not addressed this issue, the State Department and DHS have. In March 2016, the State Department issued guidance on false claims to citizenship that has been incorporated into the Foreign Affairs Manual (FAM).[321] The FAM now provides two affirmative defenses to the false claim ground. One defense is that the false claim was not made knowingly, although the INA does not specify a mens rea.[322] A separate affirmative defense is that the noncitizen was "(a) under the age of 18 at the time of the false citizenship claim; and (b) at that time lacked the capacity (i.e., the maturity and the judgment) to understand and appreciate the nature and consequences of a false claim to citizenship."[323] The noncitizen bears the burden of establishing these affirmative defenses.

This State Department guidance is consistent with USCIS's most recent policy manual, which adopts the same rule as the FAM and further explains that in determining whether the noncitizen lacked capacity, officers should consider all relevant factors, including age, education level education, background, mental capacity, level of understanding, and ability to appreciate the difference between true and false.[324] The policy manual stresses that although lack of capacity may arise most often in cases in which the noncitizen was under eighteen at the time of the false claim, age alone is insufficient to show lack of

320. *Id.*
321. U.S. DEP'T OF STATE, 9 FOREIGN AFFAIRS MANUAL 302.9-5(B)(1) (2018). The Foreign Affairs Manual provides guidance to State Department employees, but is not binding on DHS employees, which includes USCIS. *See* Avena v. INS, 989 F.Supp. 1 (D.D.C. 1997); Bosuego, 17 I. & N. Dec. 125 (B.I.A. 1979).
322. 9 FOREIGN AFFAIRS MANUAL 302.9-5(B)(1)(a)(1) (2018).
323. *Id.*
324. U.S. DEPT' OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGR. SERVS., 8 U.S. CITIZENSHIP AND IMMIGRATION SERV. POLICY MANUAL, pt. K, ch. 2, D(4) (2018), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume8-PartK-Chapter2.html#S-A [https://perma.cc/N8VF-EVP3].

capacity.[325] The officer must also determine whether the person who made the false claim "had the maturity and the judgment to understand and appreciate the nature and consequences of his or her actions at the time the false claim was made."[326]

Establishing lack of capacity is not an easy feat. In a nonprecedential decision, the USCIS Administrative Appeals Office (AAO) addressed an applicant's argument that he "lacked the capacity to understand and appreciate the nature and consequences of a false claim to U.S. citizenship, because he was a minor at the time."[327] The applicant in that case was a minor whose mother had told him to use his cousin's U.S. birth certificate to enter the United States. The AAO rejected this argument on its merits, reasoning that the applicant was aware that he was not a U.S. citizen at the time of the false claim and had stated that he believed using his cousin's birth certificate "was not a good idea, demonstrating knowledge of falsity."[328] The AAO also used his initial resistance to the plan proposed by his family members as evidence that "he was old enough at the time of the misrepresentation to be held accountable for his actions."[329]

In concluding that the minor had made a false claim to U.S. citizenship, the AAO examined cases by the Sixth and Seventh Circuits addressing whether fraud by a parent could be imputed to a child. The Sixth Circuit had found that immigration fraud committed by a five-year-old child's parents could not be imputed to the child, as fraudulent conduct requires "both knowledge of falsity and an intent to deceive."[330] However, in another case involving two seventeen-year-old brothers whose father had misrepresented their identities, nationality, and religious affiliation when he listed them as derivatives on his asylum application, the Seventh Circuit found that the brothers could be held accountable for that fraud. The court reasoned that "given their ages at the time," they were accountable for the misrepresentations, as "they were old enough to know better and to be held accountable for their actions."[331] The court noted that young is a "relative term" and that "[b]eing over 16—and eligible for a driver's license—is quite different than being 10."[332]

This characterization of capacity is generally consistent with the way that the infancy defense operated at common law. Sir Mathew Hale divided

325. *Id.*
326. *Id.*
327. Applicant, 2015 WL 4607762, at *1 (Dep't of Homeland Sec., AAO July 6, 2015).
328. *Id.* at *3.
329. *Id.*
330. Singh v. Gonzales, 451 F.3d 400, 407 (6th Cir. 2006).
331. Malik v. Mukasey, 546 F.3d 890, 892–93 (7th Cir. 2008).
332. *Id.* at 892.

individuals under eighteen into four categories and assigned them legal accountability accordingly.[333] Lack of capacity was assumed for children under seven, and they could not be prosecuted. A child between the ages of seven and eleven received a rebuttable presumption of incapacity. Children ages twelve to fourteen also enjoyed a presumption, but a weaker one, as they were attributed greater physical and emotional maturity. Between ages fourteen and eighteen, a child was presumed sufficiently mature to have capacity. The AAO's finding above that a sixteen-year-old is different than a ten-year-old is generally consistent with this common law scheme which recognizes changes in capacity as a child matures.

While the false claim to citizenship ground has generated the most debate in terms of its application to children, other inadmissibility and deportability grounds that lack a mens rea requirement also raise similar questions. Long before the false claim provision even existed in the INA, for example, prostitution was an inadmissibility ground without any exceptions based on infancy or duress. Yet, in a 1956 case involving a minor who had been coerced into prostitution after being promised a different type of job in the United States, the BIA found that the prostitution ground did not apply. The BIA explained that "those to whom respondent was indebted reduced her to such a state of mind that she was actually prevented from exercising her free will through the use of wrongful, oppressive threats or unlawful means."[334] This decision suggests that the BIA was considering, without explicitly naming, common law defenses of infancy and duress.

The inadmissibility ground for alien smuggling also does not specify a mens rea and invites potential defenses of infancy and duress.[335] Organizations have documented that gangs use children to smuggle people into the United States.[336] Similarly, the inadmissibility ground pertaining to child-soldier recruitment makes no exception for situations in which the recruiter is a child.[337] Owing to the lack of precedents on these points, adjudicators who are faced with these situations currently have to make their own decisions regarding whether to take a child's age, mental capacity, and other circumstances into consideration in deciding whether the inadmissibility ground applies.

333. Lara A. Bazelon, Note, *Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 168 (2000).
334. M-, 7 I. & N. Dec. 251, 252 (B.I.A. 1956).
335. *See* 8 U.S.C. § 1182(a)(6)(E) (2018).
336. *See* Lucina Melesio & John Holman, *Mexico Cartels Recruit Children to Smuggle People to US*, AL JAZEERA (Oct. 30, 2017), http://www.aljazeera.com/news/2017/10/mexico-cartels-recruit-children-smuggle-people-171030103553245.html [https://perma.cc/ 3QGV-TJ3P].
337. 8 U.S.C. § 1182(a)(3)(G) (2018).

This ad hoc, arbitrary approach to common law defenses in cases involving the draconian consequence of removal from the United States defies notions of fundamental fairness. Unless adjudicative bodies adopt a more thoughtful and structured approach, there will be no uniform way of handling these defenses, resulting in unpredictable approaches and inconsistent decisions.

IV. CHALLENGES IN INVOKING FEDERAL COMMON LAW DEFENSES

Even if courts agree that noncitizens should be allowed to raise common law defenses in removal proceedings, noncitizens will not necessarily prevail more often. In assessing whether these defenses are likely to succeed, it is helpful to examine immigration-related criminal prosecutions.[338] Prosecutions for immigration violations currently comprise 52 percent of all federal criminal prosecutions.[339] Courts have considered necessity, duress, and insanity defenses in cases involving federal prosecutions for illegal entry,[340] illegal reentry,[341] alien smuggling,[342] document misuse,[343] and resisting departure under a deportation

338. *See, e.g.*, United States v. Alvarez-Ulloa, 784 F.3d 558, 568 (9th Cir. 2015) (recognizing the insanity defense in a former boxer's prosecution for illegal reentry in which the defendant argued that he suffered from brain damage that prevented him from understanding the nature of his presence in the United States); United States v. Portillo-Vega, 478 F.3d 1194 (10th Cir. 2007) (recognizing duress defense in a prosecution for illegal reentry after deportation); United States v. Solorzano-Rivera, 368 F.3d 1073 1080–81 (9th Cir. 2004) (holding that duress did not negate the voluntariness of illegal reentry into the United States where the defendant had jumped the fence to escape harm by the Mexican police).

339. *Immigration Now 52 Percent of All Federal Prosecutions*, TRAC (Nov. 28, 2016), http://trac.syr.edu/tracreports/crim/446 [https://perma.cc/KJ56-NYLQ]; *see also* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009) (explaining how federal officials are using the criminal prosecution of migration-related offenses to regulate the migration flow); Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282, 2287 (2013) (explaining that "immigration crime is the largest single category of crime prosecuted by the federal government"); Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257, 1259 (2014) (noting the upward trajectory of "crimes of migration" prosecutions over the past decade).

340. *See, e.g.*, United States v. Grainger, 239 F. App'x 188, 190 (6th Cir. 2007) ("[C]ommon law justification defenses like necessity and duress may be employed as a defense to a statutory crime such as illegal reentry into the United States.").

341. *See supra* note 338.

342. United States v. Aguilar, 883 F.2d 662, 693 (9th Cir. 1989), *cert denied*, 498 U.S. 1046 (1991) (finding that defendants criminally charged with bringing and harboring Central Americans into the United States in violation of 8 U.S.C. § 1324 failed to make a threshold showing for the necessity defense because they failed to establish that there were no other legal alternatives).

343. United States v. Odeh, 815 F.3d 968 (6th Cir. 2015) (recognizing that the defendant's diminished mental capacity may have affected how she answered questions on the naturalization application).

order.[344] The legal hurdle defendants face in these types of cases is not whether courts have the authority to consider common law defenses, which is taken for granted in the criminal context, but whether the defense meets the threshold requirements to present to a jury.[345]

In cases involving illegal entry, for instance, judges have found that defendants failed to show imminent harm where threats to their life were deemed too vague, past beatings did not objectively establish a "present, imminent, and impending" threat of death or serious bodily injury, or a medical condition was not "dire."[346] Judges have found that defendants failed to satisfy the direct causal relationship prong if they had already escaped a

344. United States v. Kpomassie, 323 F. Supp. 2d 894 (W.D. Tenn. 2004) (holding that a defendant charged with preventing and hampering his departure pursuant to a deportation order made a prima facie showing of a necessity defense based on his fear of persecution in Togo).

345. Defendants face challenges satisfying the threshold requirements in other situations as well, such as in civil disobedience cases. James L. Cavallaro, Jr., *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and* United States v. Schoon, 81 CALIF. L. REV. 351 (1993) (explaining that the last two prongs of the four-prong test for necessity present the biggest challenge and often prevent a jury from hearing the defense in federal civil disobedience cases, but defendants often win in state court using the necessity defense).

346. *See, e.g.*, United States v. Vasquez-Landaver, 527 F.3d 798, 803 (9th Cir. 2008) (finding that a defendant charged with illegal reentry failed to demonstrate duress because he failed to show imminent threat of serious bodily harm based on vague threats against him and his family); United States v. Flores-Vasquez, 279 F. App'x 312 (5th Cir. 2008) (finding that a duress defense was not warranted for defendant's illegal reentry because an "objective view of the evidence" did not establish that he was under a "present, imminent, impending" threat of death or serious bodily injury when he illegally reentered the United States in January 2007, despite his claim that he was fleeing for his life from a gang in Honduras that had murdered his business partner in 2004, severely beaten him, and continued to threaten him); United States v. Xian Long Yao, 302 F. App'x 586, 587–88 (9th Cir. 2008) (holding that the defendant, who reentered Guam illegally, failed to show that he faced imminent harm in Saipan based on his fear of persecution by the Chinese government and failed to demonstrate that there were no lawful alternatives); United States v. Perdomo-Espana, 522 F.3d 983 (9th Cir. 2008) (holding that the defendant failed to demonstrate the imminent harm required to present a necessity defense based on his medical condition of diabetes because his medical doctor concluded that his blood sugar levels were high but not dire when he was treated in the emergency room after crossing the border); United States v. Garcia, 182 F. App'x 731 (9th Cir. 2006) (holding that the defendant could not make a duress defense because he did not face an immediate threat of death or serious bodily injury from a Guatemalan vigilante squad when he entered the United States six weeks after his attack in Guatemala and had escaped the harm he faced in Guatemala when he fled to Mexico); United States v. Brizuela, No. B-13-CR-476-1, 2014 WL 2257405 (S.D. Tex. May 29, 2014) (finding no imminent harm to support a duress defense where the 18th Street gang threatened the defendant two weeks before he came to the United States and tried to make him smuggle drugs across the border and also finding that the defendant failed to show that reasonable alternatives were not available because the defendant never tried to relocate within El Salvador or the two countries through which he traveled before reaching the United States).

dangerous situation or settled in a safe country before entering the United States.[347] Furthermore, judges have found that defendants failed to demonstrate the absence of legal alternatives to illegal reentry, reasoning, for example, that they could have applied for asylum, gone to another country, relocated within their own country, applied for special permission to reenter the United States, gone to a legal entry point, or sought assistance from the police in their own country.[348] These decisions suggest that necessity is an exceedingly tough defense to establish.

It is particularly difficult to prevail with a common law defense in a case involving illegal entry or reentry, which courts consider a continuing offense.[349] This means a defendant must show that the requirements for the defense existed throughout the entire period of the defendant's time in the United States. This reasoning would also likely apply in removal cases where the person is charged simply for being present in the United States without legal status. Therefore, as a strategic matter, these cases are likely poor

347. *See, e.g.*, United States v. Ramirez-Chavez, 596 F. App'x 290 (5th Cir. 2015) (finding that a defendant charged with illegal reentry who had been kidnapped and badly beaten by smugglers in Mexico after hiring them to take him to the United States could not present duress evidence to the jury, because he had (1) already escaped his captors when he illegally entered the United States, (2) negligently placed himself in a dangerous situation by hiring a smugger, and (3) had other alternatives, like going to the police or to a legal entry point, once he escaped his captors); United States v. Grainger, 239 F. App'x 188 (6th Cir. 2007) (finding that the defendant failed to satisfy the threshold requirements for a necessity defense because, inter alia, he did not establish a direct causal relationship between his illegal reentry into the United States and the avoidance of imminent harm as he was already safely living in Canada when he illegally reentered the United States and took no steps to "discontinue his illegal conduct" during the two years he lived illegally in the United States).

348. *See, e.g.*, United States v. Polanco-Gomez, 841 F.2d 235, 238 (8th Cir. 1987) (finding the defendant was not entitled to the necessity defense to illegal reentry charges, despite alleged persecution in his home country, because he could not show that he had attempted to apply for political asylum and had not attempted to go to another country); *Brizuela*, 2014 WL 2257405 (finding that the defendant failed to show reasonable alternatives were not available because he never tried to relocate within El Salvador or the two countries through which he traveled before entering the United States); United States v. Crown, No. 99 CR. 1044(AGS), 2000 WL 709003 (S.D.N.Y. May 31, 2000) (holding that a defendant who was HIV positive and illegally reentered the United States after deportation to Belize did not satisfy the threshold requirements for a necessity defense because he could have applied for permission to reenter).

349. *See* United States v. Jimenez, 605 F.3d 415, 422 (6th Cir. 2010), *abrogated on other grounds by* Tapia v. United States, 564 U.S. 319 (2011); United States v. Portillo-Vega, 478 F.3d 1194, 1198–99 (10th Cir. 2007) (reasoning that to be entitled to a jury instruction about a duress defense, a defendant charged with illegal reentry under 18 U.S.C. § 1326(a) needed to show not only that he reasonably feared death or serious bodily injury when he reentered, but also throughout the duration of his illegal stay); United States v. Santana-Castellano, 74 F.3d 593, 598 (5th Cir. 1996).

candidates for raising common law defenses.[350] It may be counterintuitive that a "pure" immigration violation, like being in the country without permission, would not have a defense, while violations more intertwined with a criminal offense would, since deportation seems a more disproportionate response to a pure immigration violation than a criminal offense.[351] But recognizing common law defenses to unlawful presence in the United States would also come closest to rendering Congress's legislative scheme ineffective by allowing the exceptions to swallow the rules and would therefore be especially vulnerable to attack under *City of Milwaukee* and other cases discussed in Part I above. The three categories discussed in Part III above, on the other hand, provide much better starting points for introducing common law defenses, because they are narrow enough that they do not render Congress's legislative scheme ineffective. Making strategic decisions about when to raise common law defenses and which defenses are most likely to succeed will be important in laying the groundwork for bringing these defenses in immigration court.

In addition to the legal hurdles imposed by the exacting elements of certain common law defenses, there are also significant factual hurdles. Gathering and presenting facts tend to be difficult for noncitizens in removal proceedings due a combination of factors including high detention rates, low representation rates, language and cultural barriers, and geographical and financial obstacles involved in obtaining witnesses and evidence often located in another country.[352] While there is no magic fix to these problems, access to representation certainly helps and needs to be part of any broader strategy to address the asymmetry of power and availability of remedies in immigration court.

350. *See* 8 U.S.C. § 1182(a)(6)(A) (2018) (inadmissibility ground for aliens present without admission or parole).

351. *See* Stumpf, *supra* note 210 (arguing that the concept of proportionality should be introduced into immigration law and that deportation's costs would outweigh the benefits in situations involving minor violations, such as violating entry conditions); Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1 (2017) (proposing that immigration officials could adopt a cooperative-enforcement approach, whereby they would assist unauthorized immigrants who are low priorities for removal to legalize their status). Under the REAL ID Act, an applicant must provide corroborating evidence to the immigration court unless the applicant "cannot reasonably obtain the evidence." REAL ID Act of 2005, Pub. L. No. 109-113 § 101(a)(3), 119 Stat. 231, 303 (2005); 8 U.S.C. § 1158(b)(1)(B)(ii) (2018). Failure to provide corroborating evidence to support a defense could therefore easily defeat it.

352. As Judge Berzon on the Ninth Circuit has noted, factfinding generally "serves as a one-way ratchet that always favors the government." United States v. Aguila-Montes de Oca, 655 F.3d 915, 962 n.18 (9th Cir. 2011) (Berzon, J., concurring), *abrogated by* Descamps v. United States, 133 S. Ct. 2276 (2013).

Beyond these legal and factual challenges, some might argue that pushing for the explicit recognition of common law defenses in removal proceedings could actually backfire and end up hurting noncitizens instead of helping them. As discussed above, the BIA and circuit courts have not yet articulated the elements of duress, self-defense, and other defenses in the removal context. These defenses' conception therefore remains somewhat vague and malleable which could cut in a noncitizen's favor. Explicitly adopting common law defenses could well lead to stricter evaluations of the elements required to establish a defense, such as the five-element standard for duress in *Negusie*, potentially resulting in the removal of some individuals who may have prevailed under the current, inchoate standards.[353]

One way to address this concern, and perhaps also to mitigate the legal and factual challenges discussed above, is to propose modified standards for establishing common law defenses in removal proceedings. Variations already exist among states and circuit courts regarding the exact elements of these defenses, and two Supreme Court justices have expressly invited the BIA to establish the elements of duress, indicating that there is room to formulate a definition specific to removal proceedings.[354] There is precedent for such a move, as other administrative agencies have adopted their own standards for defenses such as duress.[355] The BIA should seize this opportunity and formulate a modified version of common law defenses that take into consideration the unique aspects of removal proceedings including the asymmetries built into the system. Indeed, one of the advantages of common law doctrines is that they allow for greater innovation and self-correction than

353. Negusie, 27 I. & N. Dec. 347 (B.I.A. 2018).

354. Negusie v. Holder, 555 U.S. 511, 537–38 (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part) ("I would leave for the Attorney General—and, through his own delegation, the BIA—the question how the voluntariness standard should be applied. The agency would retain the ability, for instance, to define duress and coercion; to determine whether or not a balancing test should be employed; and, of course, to decide whether any individual asylum-seeker's acts were covered by the persecutor bar.").

355. Johnson v. Dep't of Transp., FAA, 735 F.2d 510, 515 (Fed. Cir. 1984). In this case involving a decision to remove a federal employee from his position for participation in the Professional Air Traffic Controllers Organization's strike of 1981, the Merits Systems Protection Board (Board) rejected as "the appropriate standard for establishing a defense of coercion or duress, either the standard in criminal cases (threat of imminent death or personal bodily injury that the actor could not avoid) or that in civil cases generally (threats of most kinds of injury to persons or property)." Instead, the Board adopted a standard providing that the federal employee "must demonstrate, by a preponderance of the evidence, that his failure to report for work was the result of a threat or other intimidating conduct, directed toward him, sufficient to instill in him a reasonable fear of physical danger to himself or others, which a person of ordinary firmness would not be expected to resist." *Id.* at 513.

stringent statutory rules which could help create more just and equitable immigration policy.[356]

CONCLUSION

While a small patchwork of case law already exists recognizing federal common law defenses in removal proceedings, the viability of such defenses in this context needs to be more thoroughly and systematically explored. Under the current approach, adjudicators tend to discuss defenses such as duress and self-defense in an ad hoc manner, without explicit reference to common law's role or how it interacts with the INA. This makes it difficult for noncitizens and their attorneys to know whether to raise a particular defense and what elements they must meet to prove it. The effect of establishing duress, self-defense, or other traditional defenses is also currently unclear. In some cases, courts simply treat them as mitigating circumstances that factor into a balancing test regarding culpability, while in others, they function as complete defenses. It behooves the BIA and federal appellate courts to issue precedents on point in order to promote consistency, fairness, and predictability in immigration adjudication.[357]

356. Henry N. Butler, *A Defense of Common Law Environmentalism: The Discovery of Better Environmental Policy*, 58 CASE W. RES. L. REV. 705, 707 (2008) ("Common law processes allow for greater experimentation and innovation than do set and rigid statutory rules.").

357. *See* Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 990 (2004) ("Faithful to the separation of powers doctrine, federal courts must in all cases look first to the text, purpose, and drafting history of a treaty even in the exercise of their implied gap-filling authority. Only when these more direct sources of guidance fail will federal courts have the responsibility to serve the needs of national uniformity by crafting a uniform rule of federal law."); Daniel J. Meltzer, Comment, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513, 539 (2002) ("[I]n a legal tradition that has always relied on common lawmaking, that enacts limited statutes against the background of an existing corpus juris of common law rather than comprehensive rules like those of the civilians, and in which coherent, well-crafted legislation is difficult to enact (far harder, for example, than in parliamentary systems), federal common lawmaking has been seen by as a 'centripetal tool incalculably useful to our federal system.'" (quoting Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 421 (1964))).