

Terrorism and the Inherent Right to Self-Defense in Immigration Law

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The Immigration and Nationality Act (INA) deems an individual inadmissible to the United States for having engaged in terrorist activity. Both “engaged in terrorist activity” and “terrorist activity” are terms of art that are broadly defined under the INA to include activity that courts, scholars, and advocates agree stretches the definition of terrorism. An individual found inadmissible on terrorism-related grounds is barred from nearly all forms of immigration relief, including adjustment of status to lawful permanent resident, refugee status, asylum, withholding of removal, and cancellation of removal. These INA provisions, meant to exclude terrorists from accessing immigration relief, have been perversely interpreted to deny relief to individuals who have taken actions in self-defense, although state and federal courts, state constitutions, and scholars alike describe self-defense as a right so fundamental as to be inherent. There is no principled reason to deny noncitizens the right to present a self-defense justification with respect to acts that may otherwise qualify as terrorist activity in the immigration context. In fact, when properly interpreted, the INA as currently written already excludes force used in self-defense from the definition of terrorist activity; the challenge lies in the fact that the current exclusion is too burdensome for adjudicators to apply properly and too narrow to shield all individuals who have taken actions in self-defense from being denied immigration relief. Given this perplexing state of affairs, Congress should adopt reforms to ensure that the government does not deny immigration relief to individuals who have exercised the most basic of rights—that of self-preservation. These reforms can accomplish two desired immigration law goals: excluding terrorists and providing protection to individuals fleeing persecution.

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INTRODUCTION

On February 17, 2011, Libyans engaged in mass protests against the repressive forty-two-year rule of Colonel Muammar Gaddafi.¹ The protests soon evolved into the First Libyan Civil War as various opposition groups engaged in an armed struggle against Gaddafi’s regime.² Forces loyal to the Gaddafi regime attempted to regain control of opposition-held areas through the indiscriminate firing of weapons, including rockets and cluster bombs, into residential neighborhoods and other areas.³ To protect his community against the violence of Gaddafi’s armed forces and other armed groups during the civil war, Adam and other young men from his community formed a neighborhood self-defense unit.⁴ On more than one occasion, pro-regime groups attacked his community and forced Adam to defend himself by shooting at the assailants. Armed groups opposing the government later kidnapped, detained, brutally beat, and threatened Adam. Eventually, Adam fled to the United States to seek safety through asylum.

The Immigration Judge (IJ) denied Adam asylum after finding that the self-defense unit was a terrorist organization and that Adam had engaged in terrorist activity as defined by the Immigration and Nationality Act (INA) when he used a dangerous device with the intent of causing death or physical injury.⁵ The IJ rejected Adam’s argument that he did not engage in terrorist activity because he acted in self-defense, holding that neither involuntariness nor duress were exceptions to the terrorism bar. The Board of Immigration Appeals (BIA) affirmed the IJ’s ruling denying Adam asylum, and he was deported to Libya.

1. AMNESTY INT’L, NO PLACE OF SAFETY: CIVILIANS IN LIBYA UNDER ATTACK 2 (2011).

2. *See id.*

3. *Id.*

4. Adam is a former client of the Center for Applied Legal Studies at Georgetown University Law Center, where the author previously worked as a Clinical Teaching Fellow and Supervising Attorney. To protect Adam’s privacy, this Article has altered his name and other facts.

5. The IJ also found that Adam had engaged in terrorist activity because he received military-type training from the self-defense unit and provided the unit “material support” as defined in the INA.

Like Adam, Enders joined the Oromo Liberation Front (OLF) to protect his community in Ethiopia. The OLF sought to protect the Oromo people's rights from the Ethiopian government, where successive regimes have oppressed and persecuted the Oromo people.⁶ Enders informed the general public about the OLF's mission, recruited members, and solicited funds for the OLF.⁷ On two occasions, the government detained Enders for twenty-five and forty-five days, respectively.⁸ During these detentions, government agents interrogated Enders about his involvement with the OLF and repeatedly beat and brutalized him.⁹ Eventually, Enders fled to the United States, where he sought safety through asylum. At his asylum hearing, Enders admitted to knowing that some OLF factions engaged in armed resistance against the Ethiopian government.¹⁰

The IJ found that Enders was ineligible for asylum because he had engaged in terrorist activity by soliciting funds and members for the OLF, which the IJ deemed a terrorist organization as defined by the INA.¹¹ The BIA affirmed the IJ's decision denying Enders asylum.¹² Enders filed a petition for review with the Ninth Circuit, where he argued that the OLF could not be a terrorist organization because the organization's actions against the Ethiopian government were based on self-defense.¹³ The Ninth Circuit denied his petition.¹⁴ Years later, on October 2, 2013, the Acting Secretary of Homeland Security exercised his discretionary authority under the INA to grant an exemption from the terrorism-related inadmissibility grounds (TRIG) to applicants for voluntary activities and associations relating to the OLF. Specifically, the Acting Secretary determined that the TRIG would not apply to those, like Enders, who had solicited funds or members, provided material support, or received military-type training from, or on behalf of, the OLF.¹⁵ Enders himself was ineligible for this exemption.¹⁶

The reach of the TRIG extends far beyond Enders and Adam. Other persecuted individuals who use force in self-defense are also at risk of being denied immigration relief for having engaged in "terrorist activity." Vigilante

6. Petitioner's Opening Brief at 6, *Abdu v. Holder*, 345 F. App'x 295 (9th Cir. 2009) (No. 06-71098).

7. *Id.*

8. *Id.* at 6-7.

9. *Id.* at 6.

10. *Id.* at 7.

11. *Id.* at 4.

12. *Abdu*, 345 F. App'x at 296.

13. Petitioner's Opening Brief, *supra* note 6, at 11.

14. *Abdu*, 345 F. App'x at 297.

15. See Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act 1 (Oct. 2, 2013), https://www.uscis.gov/sites/default/files/document/legal-docs/October_2_2013_Exercise_of_Authority_OLF.pdf [<https://perma.cc/HGC2-T4CT>].

16. The exemption specifically excluded individuals who had "been placed in removal proceedings unless such proceedings were terminated prior to an entry of an order of removal for reasons unrelated to potential eligibility under this Exercise of Authority." Exercise of Authority Under Section 212 (d)(3)(B)(i) of the Immigration and Nationality Act, at 3.

mobs burned entire Rohingya villages and shot Rohingya villagers at random in Burma.¹⁷ If the Rohingya had shot members of the mob to protect themselves, the government would deem them inadmissible under the TRIG and deny them refugee status in the United States. The Islamic State of Iraq and Syria (ISIS) captured and enslaved countless Yazidi women in Iraq.¹⁸ If any of these women had banded together and used a weapon or dangerous device (even a sharp rock) to knock their captors unconscious to escape, the government would also deem them inadmissible under the TRIG and deny them immigration status in the United States.

Immigration adjudicators have interpreted the TRIG to bar immigration relief to individuals who have taken actions in self-defense, despite the fact that state and federal courts, state constitutions, and scholars alike have described self-defense itself as an inherent, natural, or inalienable right.¹⁹ Based on the importance of self-defense, as recognized under both state and federal law, there is no principled reason to deny individuals the right to argue that acts that may qualify as terrorist activity were justified by self-defense in the immigration context. In fact, when properly interpreted, the INA as currently written excludes actions taken in self-defense from the definition of “terrorist activity.” The opening clause of the definition describes “terrorist activity” as any activity that is “unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State).”²⁰ Because actions taken in self-defense are *lawful* activity, they are necessarily excluded from the definition of “terrorist activity” in the INA. However, the current exclusion requires immigration adjudicators to engage in a burdensome analysis—determining whether the activity meets self-defense requirements of federal law, the laws of *each* of the fifty states, and the law of the place where the activity was committed. The analysis is also too limited to protect all individuals who have acted in self-defense from being denied immigration relief for having engaged in terrorist activity. This Article recommends a broader self-defense exclusion to the TRIG that both excludes terrorists²¹ from obtaining immigration status and prevents

17. *Rohingya Exodus Amid Ethnic Cleansing in Myanmar*, AMNESTY INT’L (Sept. 14, 2017), <https://www.amnesty.org/en/latest/news/2017/09/rohingya-exodus-amid-ethnic-cleansing-in-myanmar/> [https://perma.cc/4YV3-P78R].

18. Skye Wheeler, *Yezidi Women After Slavery: Trauma*, HUM. RTS. WATCH (Apr. 18, 2016), <https://www.hrw.org/news/2016/04/18/yezidi-women-after-slavery-trauma> [https://perma.cc/5SX8-UFPP].

19. See *infra* Part II.B.

20. INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii).

21. In this Article, terrorists and terrorism used without quotation marks refer to the common understanding of those terms. “Engage(d) in terrorist activity” or “terrorist activity” (used with or without quotation marks) refers to the statutory definitions of those terms in INA section 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(iv), and in INA section 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii), respectively.

the United States from denying immigration relief to noncitizens who have acted in self-defense.

Part I of this Article describes the current statutory framework supporting the TRIG, the wide-reaching immigration consequences of the TRIG, and the limited waivers available for those found inadmissible under the TRIG. Part II summarizes the right to self-defense and explains how it is an essential right under the common law, federal law, and the laws of all fifty states. Part II further explores how self-defense has been discussed in BIA and immigration-related federal courts of appeal cases. Part III describes the INA's current self-defense exclusion and how it is too burdensome and narrow to effectively shield all individuals who have acted in self-defense from denial of immigration relief. Part III further tackles anticipated arguments against applying self-defense to the TRIG. Finally, Part IV concludes with suggested reforms to immigration law to ensure that no noncitizen is denied immigration relief for having engaged in the most elemental of rights: self-preservation.

I.

THE TERRORISM-RELATED INADMISSIBILITY GROUNDS (TRIG)

Popular conceptions of terrorism entail violent activity or the threat of such activity to achieve political ends. Dictionary definitions of terrorism include “the use of violence and threats to intimidate or coerce, especially for political purposes.”²² By contrast, the INA's definition of “terrorist activity” requires no such political motivations. In fact, courts, scholars, and advocates have all agreed that the TRIG stretch the definition of terrorism and have resulted in many innocent individuals, even *victims* of terrorism, being denied immigration relief in the United States.²³ This Section will summarize the current TRIG, describe the harsh immigration consequences for an individual deemed inadmissible under one of the TRIG, and explore the limited waivers available for those swept under the TRIG.

22. *Terrorism*, DICTIONARY.COM, <https://www.dictionary.com/browse/terrorism?s=t> [<https://perma.cc/6XQV-DUMB>].

23. See *Hussain v. Mukasey*, 518 F.3d 534, 537 (7th Cir. 2008) (“[The INA's terrorism-related] definitions are broad”); *McAllister v. Att’y Gen. of the United States*, 444 F.3d 178, 187 (3d Cir. 2006) (“[W]e concede that the INA's definition of ‘terrorist activity’ certainly encompasses more conduct than our society, and perhaps even Congress, has come to associate with traditional acts of terrorism, e.g., car bombs and assassinations”); Geoffrey A. Hoffman & Susham M. Modi, *The War on Terror as a Metaphor for Immigration Regulation: A Critical View of a Distorted Debate*, 15 J. GENDER RACE & JUST. 449, 467–69 (2012) (“The terrorism-related grounds . . . are detailed and exhaustive; the definition of ‘terrorist activity’ is breathtakingly broad.”); HUM. RTS. FIRST, DENIAL AND DELAY: THE IMPACT OF THE IMMIGRATION LAW'S “TERRORISM BARS” ON ASYLUM SEEKERS AND REFUGEES IN THE UNITED STATES 1 (2009), <https://web.archive.org/web/20190614102323/http://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-DenialandDelay-FULL-111009-web.pdf> (“[T]housands of legitimate refugees who pose no threat to the United States have had their applications for asylum, permanent residence, and family reunification denied or delayed due to overly broad provisions of U.S. immigration law that were intended to protect the United States against terrorism.”).

A. Current TRIG Statutory Framework

INA section 212(a)(3)(B)(i) deems inadmissible any noncitizen who (1) has “engaged in terrorist activity”; (2) “a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity”; (3) has incited “terrorist activity”; (4) is a representative of a terrorist organization or a group that endorses or espouses “terrorist activity”; (5) is a member of a Tier I or II terrorist organization; (6) is a member of a Tier III terrorist organization, “unless the [noncitizen] can demonstrate by clear and convincing evidence that the [noncitizen] did not know, and should not reasonably have known, that the organization was a terrorist organization”; (7) endorses or espouses “terrorist activity” or persuades others to do so or to support a terrorist organization; (8) has received military-type training from a terrorist organization; or (9) is the spouse or child of anyone found inadmissible under the TRIG within the last five years.²⁴

A noncitizen is also inadmissible under INA section 212(a)(3)(F) if the Secretary of State or Attorney General (AG), in consultation with the other, determines that the noncitizen has “been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States.”²⁵

“Terrorist activity” is in turn defined in INA section 212(a)(3)(B)(iii) as any activity “which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State).”²⁶ It involves a series of six different types of activity, including, fifth, the use of any biological or chemical agent, nuclear weapon or device, explosive, firearm, or other weapon or dangerous device with the intent to endanger the safety of one or more individuals or to cause substantial damage to property, and, sixth, a threat or attempt to do any of the listed activity. The fifth provision resulted in the denial of asylum to Adam and would result in the denial of refugee status to the Rohingya villagers and Yazidi women described above for their use of self-defense.

INA section 212(a)(3)(B)(iv) defines “engage in terrorist activity” in part as being directly involved in terrorist activity, either “in an individual capacity” or “as a member of an organization,” by (1) committing or inciting to commit, under circumstances indicating an intention to cause death or serious bodily injury, a “terrorist activity”; (2) preparing or planning a “terrorist activity”; or (3) gathering information on potential targets for “terrorist activity.”²⁷ Actions that further terrorist activity or benefit terrorist organizations or its members also

24. INA § 212(a)(3)(B)(i), 8 U.S.C. § 1182(a)(3)(B)(i).

25. INA § 212(a)(3)(F), 8 U.S.C. § 1182(a)(3)(F).

26. INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii).

27. INA § 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(iv).

qualify as engaging in terrorist activity. These actions include (1) soliciting funds or other things of value for a “terrorist activity” or a Tier I, II, or III terrorist organization; (2) soliciting any individual to engage in “terrorist activity,” or for membership in a Tier I, II, or III terrorist organization; or (3) committing an act that the actor knows, or reasonably should know, affords “material support” for the commission of a “terrorist activity,” to any individual who the actor knows, or reasonably should know, has committed or plans to commit a “terrorist activity,” or to a Tier I, II, or III terrorist organization or any member of such an organization.²⁸

Lastly, the INA describes three “tiers” of terrorist organizations. Tier I terrorist organizations are designated by the Secretary of State in accordance with INA section 219,²⁹ which requires the Secretary to find (1) that the organization is a foreign organization, (2) that it engages in terrorist activity as defined by INA section 212(a)(3)(B) or retains the capability or intent to engage in terrorist activity or terrorism, and (3) that the activity or terrorism threatens United States nationals or the national security of the United States.³⁰ Currently designated Tier I organizations include the Revolutionary Armed Forces of Colombia (FARC), al-Qa’ida, Boko Haram, and ISIS.³¹ A Tier II terrorist organization is an organization designated by the Secretary of State after a finding that the organization engages in “terrorist activity” as defined by INA section 212(a)(3)(B).³² Designated Tier II organizations include the Lord’s Resistance Army and Turkish Hizballah.³³ Tier III terrorist organizations are defined as “a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in” “terrorist activity” as defined by INA section 212(a)(3)(B).³⁴ Tier III terrorist organizations are known as “undesigned terrorist organizations” because, unlike Tier I and II terrorist organizations, they are defined by their activity alone without undergoing a formal designation process. The IJs deemed Adam’s self-defense unit and the organization that Enders supported, the OLF, Tier III terrorist organizations.³⁵

28. *Id.* These latter three actions do not qualify with respect to a Tier III terrorist organization if the noncitizen “can demonstrate by clear and convincing evidence that [they] did not know, and should not reasonably have known, that the organization was a terrorist organization.” *Id.*

29. INA § 212(a)(3)(B)(vi)(I), 8 U.S.C. § 1182(a)(3)(B)(vi)(I).

30. INA § 219(a)(1), 8 U.S.C. § 1189(a)(1).

31. *See Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, BUREAU OF COUNTERTERRORISM, <https://www.state.gov/foreign-terrorist-organizations/> [<https://perma.cc/4LCL-LU3A>] (providing a full list of all current foreign terrorist organizations).

32. INA § 212(a)(3)(B)(vi)(II), 8 U.S.C. § 1182(a)(3)(B)(vi)(II). Unlike for Tier I terrorist organizations, the designation process for Tier II terrorist organizations is not fully laid out in the INA. Nevertheless, the State Department follows a similar procedure. *See Terrorist Exclusion List*, U.S. DEP’T OF STATE, BUREAU OF COUNTERTERRORISM, <https://www.state.gov/j/ct/rls/other/des/123086.htm> [<https://perma.cc/35XV-QNS7>].

33. *See Terrorist Exclusion List*, *supra* note 32.

34. INA § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(3)(B)(vi)(III).

35. *See* Petitioner’s Opening Brief, *supra* note 6, at 4.

Unlike Tier I and II determinations, immigration adjudicators determine whether a group is a Tier III organization on a case-by-case basis, in connection with the review of an application for an immigration benefit.³⁶ Thus, a wide range of immigration adjudicators, including consular officers, asylum and refugee officers, and immigration judges, can deem an organization a Tier III organization.³⁷ Because the determination is made on a case-by-case basis, an immigration adjudicator may deem an organization a Tier III organization in one case but not in another.³⁸

The Tier III scheme has been criticized for both “adopt[ing] a stunningly broad definition of terrorism *and* . . . let[ting] low-level officials decide on an ad hoc basis whether a foreign group is a ‘terrorist organization,’ even if the group doesn’t appear on any government list.”³⁹ In fact, under the scheme, “[t]wo . . . teenagers who planned to smash up a storefront with a baseball bat for kicks would likely qualify as a Tier III terrorist group.”⁴⁰ The breadth of the INA’s definitions of “terrorist activity” and terrorist organizations is particularly problematic given the harsh immigration consequences of the TRIG.

B. Immigration Consequences of the TRIG

The immigration consequences of the TRIG at INA sections 212(a)(3)(B) and 212(a)(3)(F) are extensive. As grounds of inadmissibility, the TRIG make noncitizens ineligible for visas and admission to the United States as either nonimmigrants or immigrants through the denial of either a visa or entry into the United States at a border.⁴¹ Noncitizens “described in” either ground are also removable from the United States⁴² and subject to mandatory detention during their removal proceedings.⁴³ Noncitizens who are found inadmissible or removable under terrorism-related grounds are also ineligible for nearly all forms

36. See *A.A. v. Att’y Gen. of the United States*, 973 F.3d 171, 178–79 (3d Cir. 2020); *Uddin v. Att’y Gen. of the United States*, 870 F.3d 282, 285 (3d Cir. 2017).

37. For a thorough discussion of how IJs determine whether an organization qualifies as a Tier III terrorist organization, see Denise Bell, *Tier III Terrorist Organizations: The Role of the Immigration Court in Making a Terrorist Determination*, 10 IMMIGR. L. ADVISOR, July 2016, at 1, <https://www.justice.gov/eoir/file/880381/download> [<https://perma.cc/D3P4-VKNB>].

38. See, e.g., *Uddin*, 870 F.3d at 285 (“[S]omething is amiss where, time and time again, the Board finds the BNP is a terrorist organization one day, and reaches the exact opposite conclusion the next.”).

39. Jesse Lempel, *Tier III Terrorist Designations: The Trump Administration and Courts Move in Opposite Directions*, LAWFARE (Dec. 5, 2017), <https://www.lawfareblog.com/tier-iii-terrorist-designations-trump-administration-and-courts-move-opposite-directions> [<https://perma.cc/9PAQ-7S7E>].

40. *Id.*

41. See INA § 212, 8 U.S.C. § 1182.

42. INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B).

43. INA § 236(c)(1)(D), 8 U.S.C. § 1226(c)(1)(D); *id.* § 236A(a), 8 U.S.C. § 1226a(a).

of immigration relief, including refugee status,⁴⁴ asylum,⁴⁵ withholding of removal,⁴⁶ adjustment of status to lawful permanent resident,⁴⁷ cancellation of removal,⁴⁸ temporary protected status (TPS),⁴⁹ T nonimmigrant status,⁵⁰ U nonimmigrant status,⁵¹ and voluntary departure.⁵²

Deferral of removal under the Convention Against Torture (CAT) is one of the only forms of immigration relief available to those who are inadmissible

44. INA § 207(c)(1), 8 U.S.C. § 1157(c)(1). The association with TRIG at INA section 212(a)(3)(F) may be waived for refugees “for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.” INA § 207(c)(3), 8 U.S.C. § 1157(c)(3).

45. INA § 208(b)(2)(A)(v), 8 U.S.C. § 1158(b)(2)(A)(v). Individuals who are “described in” INA section 212(a)(3)(B)(i)(IV) (a representative of a terrorist organization or a group that endorses or espouses terrorist activity, 8 U.S.C. § 1182(a)(3)(B)(i)(IV)) may be granted asylum if the AG determines “that there are not reasonable grounds for regarding the [noncitizen] as a danger to the security of the United States.” INA § 208(b)(2)(A)(v), 8 U.S.C. § 1158(b)(2)(A)(v).

46. Withholding of removal is a mandatory form of relief that an IJ must grant to an individual who establishes that their life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A). If “there are reasonable grounds to believe” an individual is a “danger to the security of the United States,” they are barred from receiving withholding of removal. *See id.* § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B). The statute mandates that an individual “described in” INA section 237(a)(4)(B), which deems individuals who are in turn “described in” any of the TRIG at INA sections 212(a)(3)(B) or 212(a)(3)(F) removable, “shall be considered to be a[] [noncitizen] with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.”

47. INA § 245(a), 8 U.S.C. § 1255(a).

48. INA § 240A(c)(4), 8 U.S.C. § 1229b(c)(4). Cancellation of removal is available in removal proceedings for both lawful permanent residents (LPRs) and non-LPRs; both types result in the cancellation of removal and the grant of lawful permanent residence. INA § 240A(a), 8 U.S.C. § 1229b(a) (LPRs); INA § 240A(b), 8 U.S.C. § 1229b(b) (non-LPRs).

49. INA § 244(c)(2)(B)(ii), 8 U.S.C. § 1254a(c)(2)(B)(ii). The secretary of homeland security may designate a country for TPS due to temporary conditions in that country—such as ongoing armed conflict, an environmental disaster, or other extraordinary conditions—that prevent the country’s nationals from returning safely or where the country is unable to handle the return of its nationals adequately. INA § 244(b)(1), 8 U.S.C. § 1254a(b)(1).

50. 8 C.F.R. § 212.16(b) (2020). T nonimmigrant status may be granted to certain victims of a severe form of trafficking who have assisted law enforcement in the investigation or prosecution of trafficking. INA § 101 (a)(15)(T), 8 U.S.C. § 1101(a)(15)(T). While some grounds of inadmissibility are waivable for applicants for T nonimmigrant status, the TRIG are not included. INA § 212(d)(13)(B), 8 U.S.C. § 1182(d)(13)(B).

51. U nonimmigrant status may be granted to certain victims of crime who have suffered physical or mental abuse and have been, are, or will be helpful to law enforcement or government officials investigating or prosecuting the crime. INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U). Applicants otherwise eligible for U nonimmigrant status may apply for a waiver of the TRIG. INA § 212(d)(14), 8 U.S.C. § 1182(d)(14).

52. INA § 240B(a)(1), (b)(1)(C), 8 U.S.C. § 1229c(a)(1), (b)(1)(C). Voluntary departure allows an individual who is otherwise removable to depart the country, at their own expense and within a designated period of time, without an order of removal. INA § 240B(a)(1), (b)(1)(C), 8 U.S.C. § 1229c(a)(1), (b)(1)(C). Voluntary departure is preferable to a formal order of removal because the individual may be able to reenter the country legally later without facing the bars of entry relating to those who have final orders of removal.

under the TRIG.⁵³ Deferral of removal under the CAT is granted to an individual who has been ordered removed but has proven that they are more likely than not to be tortured in the country of removal.⁵⁴ This is an extremely limited form of relief: the government may remove the individual to any country other than the one where they are more likely than not to be tortured, the relief will not necessarily result in the individual's release from detention, and the relief may be terminated if conditions in the country of removal change such that the individual is no longer more likely than not to be tortured there.⁵⁵ CAT relief is not a grant of lawful immigration status and can never lead to permanent residency or naturalization.⁵⁶

C. Waivers of the TRIG under INA § 212(d)(3)(B)(i)

Recognizing the TRIG's breadth, Congress included a scheme in the INA through which certain grounds may be waived.⁵⁷ However, the scheme and its implementation have several significant limitations that have hindered its ability to truly protect noncitizens impacted by the TRIG's sweeping scope. First, only the secretaries of state and homeland security may authorize waivers. Second, there is no formal process for applying for waivers for individuals not in removal proceedings; for those in removal proceedings, the process for obtaining a waiver cannot begin until after the individual receives a final order of removal. Finally, the government can take years to adjudicate waiver requests. These limitations, each discussed in turn, mean that many individuals have no available waiver, and even those who are eligible for a waiver are left in vulnerable positions for years.

INA section 212(d)(3)(B)(i) grants the secretaries of state and homeland security, in consultation with the AG, the "sole unreviewable discretion" to authorize exemptions from certain sections of INA section 212(a)(3)(B).⁵⁸ However, the following individuals remain ineligible for any waiver: members or representatives of Tier I or II terrorist organizations, individuals who voluntarily and knowingly engaged in (or endorsed, espoused, or persuaded others to endorse, espouse, or support) "terrorist activity" on behalf of a Tier I or II terrorist organization, and individuals who voluntarily and knowingly received military-type training from a Tier I or II terrorist organization.⁵⁹

53. 8 C.F.R. § 208.17 (2020). In addition to deferral of removal under CAT, the TRIG also do not bar applications for naturalization. See U.S. CITIZENSHIP & IMMIGR. SERVS., TERRORIST-RELATED INADMISSIBILITY GROUNDS (TRIG) INSTRUCTOR GUIDE 6 (2012), <https://www.aila.org/File/DownloadEmbeddedFile/82777> [<https://perma.cc/9YFA-RY7Q>].

54. 8 C.F.R. § 208.17(a).

55. *Id.* § 208.17(b), (d)(4).

56. See *id.* § 208.17(b)(1)(i).

57. INA § 212(d)(3)(B), 8 U.S.C. § 1182(d)(3)(B). This waiver was expanded in 2007 to include nearly all of the TRIG under section 212(a)(3)(B). See Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 691, 121 Stat. 1844, 2364 (2007) (codified as amended at 8 U.S.C. § 1182 & note).

58. INA § 212(d)(3)(B)(i), 8 U.S.C. § 1182(d)(3)(B)(i).

59. INA § 212(d)(3)(B)(i), 8 U.S.C. § 1182(d)(3)(B)(i).

Using INA section 212(d)(3)(B)(i)'s grant of authority, the Secretary of Homeland Security has exempted the following acts from INA section 212(a)(3)(B): (1) "material support" provided under duress to a terrorist organization;⁶⁰ (2) solicitation under duress of funds or other things of value for a terrorist organization;⁶¹ (3) receipt of military-type training under duress from, or on behalf of, a terrorist organization;⁶² (4) provision of medical care to individuals that the noncitizen knew, or reasonably should have known, committed or planned to commit a "terrorist activity," or to members of a terrorist organization;⁶³ (5) provision of certain limited "material support" to a Tier III terrorist organization or to a member of such an organization;⁶⁴ and (6) provision of insignificant "material support" to a Tier III terrorist organization or to a member of such an organization.⁶⁵

INA section 212(d)(3)(B)(i) further grants the Secretaries of State and Homeland Security the discretion to exempt an entire group from the Tier III

60. Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act (Feb. 26, 2007), <https://www.uscis.gov/sites/default/files/document/legal-docs/2.26%20exercise%20of%20authority.pdf> [<https://perma.cc/ZM4A-CTEK>] (for undesignated terrorist organizations); Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act (Apr. 27, 2007), https://www.uscis.gov/sites/default/files/document/news/Duress_Waiver_27ap07.pdf [<https://perma.cc/A4GV-UMT3>] (for designated terrorist organizations).

61. Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 76 Fed. Reg. 14,419 (Mar. 16, 2011).

62. Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 76 Fed. Reg. 14,418 (Mar. 16, 2011).

63. Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act (Oct. 13, 2011), https://www.uscis.gov/sites/default/files/document/legal-docs/10%2013%20exercise%20authority_voluntary%20provision%20medical%20care.pdf [<https://perma.cc/TQ6X-UK46>].

64. Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 79 Fed. Reg. 6914, 6914 (Feb. 5, 2014). This exemption includes certain routine commercial transactions, certain routine social transactions, certain humanitarian assistance, and material support provided under substantial pressure that do not rise to the level of duress ("sub-duress pressure"). *Id.*; *Terrorism-Related Inadmissibility Grounds (TRIG) - Situational Exemptions*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-trig-situational-exemptions> [<https://perma.cc/9CXT-LJT9>].

65. Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 79 Fed. Reg. 6913, 6913 (Feb. 5, 2014). The Secretary has also exercised discretion not to apply the terrorism bars to certain noncitizens who participated in the Iraqi uprisings against the government of Saddam Hussein in Iraq from March 1 through April 5, 1991, Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act I (Aug. 17, 2012), <https://www.uscis.gov/sites/default/files/document/legal-docs/Iraqi%20Uprisings.pdf> [<https://perma.cc/7MKG-N3SJ>], and for certain noncitizens with existing immigration benefits who were currently inadmissible under INA section 212(a)(3)(B)(i), Exercise of Authority Under the Immigration and Nationality Act, 77 Fed. Reg. 49,821, 49,821 (Aug. 17, 2012). In two executive orders, President Trump directed the Secretaries of State and Homeland Security, in consultation with the AG, to consider rescinding the exercises of authority relating to the TRIG. *See* Exec. Order No. 13,769, sec. 6, 3 C.F.R. § 272 (2018); Exec. Order No. 13,780, sec. 7, 3 C.F.R. § 301 (2018). They did not rescind the exemptions before the end of the Trump administration. On his first day in office, President Biden revoked this and other executive orders. Proclamation No. 10,141, 86 Fed. Reg. 7005 (Jan. 25, 2021).

terrorist organization definition, except where such a group is one that “has engaged [in] terrorist activity against the United States or another democratic country or that has purposefully engaged in a pattern or practice of terrorist activity that is directed at civilians.”⁶⁶ The Secretaries of State and Homeland Security, in consultation with the AG, have granted group-based exemptions to over thirty-five organizations.⁶⁷

IJs cannot grant waivers under INA section 212(d)(3)(B) because the INA gives the Secretaries of State and Homeland Security the “sole unreviewable discretion” to authorize such exemptions.⁶⁸ The Department of Homeland Security (DHS) will not consider a waiver for an individual in removal proceedings until they receive an administratively final order of removal.⁶⁹ At that time, the U.S. Immigration and Customs Enforcement (ICE) Office of the Chief Counsel handling the case will forward it to U.S. Citizenship and Immigration Services (USCIS) for exemption consideration.⁷⁰ This will occur only if the IJ denied relief solely on a ground of inadmissibility for which the Secretaries have exercised exemption authority.⁷¹ For individuals who are not in removal proceedings, there is no formal process for applying for a waiver, leaving advocates with no choice but to make ad hoc requests.⁷²

66. INA § 212(d)(3)(B)(i), 8 U.S.C. § 1182(d)(3)(B)(i).

67. *Terrorism-Related Inadmissibility Grounds (TRIG) - Group-Based Exemptions*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-trig-group-based-exemptions> [<https://perma.cc/44BB-TZ6V>].

68. INA § 212(d)(3)(B)(i), 8 U.S.C. § 1182(d)(3)(B)(i).

69. U.S. CITIZENSHIP & IMMIGR. SERVS., DEPARTMENT OF HOMELAND SECURITY IMPLEMENTS EXEMPTION AUTHORITY FOR CERTAIN TERRORIST-RELATED INADMISSIBILITY GROUNDS FOR CASES WITH ADMINISTRATIVELY FINAL ORDERS OF REMOVAL I (2008), https://www.uscis.gov/sites/default/files/document/fact-sheets/USCIS_Process_Fact_Sheet_-_Cases_in_Removal_Proceedings.pdf [<https://perma.cc/TE8W-ACT5>]. The waiver is available only to individuals who were issued a final order of removal on or after September 8, 2008. *Id.* Removal orders are generally deemed administratively final if the BIA has either affirmed an order of removal or the period in which the individual may seek review of the order has expired. *Id.* For the history of DHS’s implementation of the waiver process and a discussion of its flaws, see HUM. RTS. FIRST, *supra* note 23, at 41–47, 55–59.

70. U.S. CITIZENSHIP AND IMMIGR. SERVS., *supra* note 69.

71. *Id.*

72. See *Sesay v. Att’y Gen. of the United States*, 787 F.3d 215, 223 n.7 (3d Cir. 2015) (“[A]lmost ten years after Congress granted the Executive Branch the power to grant waivers, there remains no published process for requesting one, although as represented by government counsel, numerous requests have been granted through ad hoc submissions to counsel for the Department of Homeland Security.”); Anwen Hughes, Thomas K. Ragland & David Garfield, *Combating the Terrorism Bars Before DHS and the Courts*, in IMMIGRATION PRACTICE POINTERS 450, 457 (2010-2011 ed. 2010) (“There was (and is still) no formal procedure for ‘applying’ for an exemption; USCIS determined that it was capable of identifying and adjudicating exemption-eligible cases on its own, and this remains the procedure.”).

As of September 30, 2017, USCIS had granted ninety-two TRIG exemptions and denied sixteen for individuals in removal proceedings.⁷³ For individuals not in removal proceedings, USCIS had granted 22,981 exemptions, denied 197, and left 1,169 cases impacted by TRIG on hold.⁷⁴

Advocates have criticized the waiver scheme provided in the INA for a number of reasons. Common critiques include that it is unduly cumbersome and inadequate, that it causes years-long delays in applications, that it leaves all impacted applicants in protracted states of limbo and some in lengthy detention, and that it results in prolonged separation between applicants and family abroad.⁷⁵

Although adjudicators, such as the IJ in Adam's case, have found that self-defensive force falls under the gambit of "terrorist activity," there is currently no exemption for such force. This absence of protection may be because the application of self-defense in immigration cases, as explained below in Part II, has rarely been addressed.

II.

SELF-DEFENSE AND TERRORISM

Part I described the current TRIG and the wide range of consequences that result from a finding that an individual is inadmissible under those grounds, including mandatory detention, denial of nearly all forms of immigration relief, and removal from this country. This Section explores how criminal law self-defense theories may apply in immigration cases where an individual is accused of engaging in "terrorist activity" or other violent activity. It begins with an overview of self-defense, including a summary of its origin, parameters, and its status under federal and state law. It then concludes with a discussion of how the federal courts of appeals and the BIA treat self-defense in immigration cases. Although this Article focuses on self-defense in the criminal context, because that is where the defense has developed, self-defense is also available as a defense in civil actions.⁷⁶

73. U.S. CITIZENSHIP AND IMMIGR. SERVS., USCIS TRIG STATISTICS 1–2 (2017), https://knightcolumbia.org/documents/f346ab88bc/20180629_USCIS-Chart-USCIS-TRIG-Statistics5.pdf [<https://perma.cc/Z2F4-L73V>].

74. *Id.*

75. See HUM. RTS. FIRST, *supra* note 23, at 7–11.

76. See, e.g., *Aguilar v. Drug Enf't Agency*, 14 F. App'x 994, 995 (9th Cir. 2001) (holding that self-defense did not justify a DEA agent's actions in a claim brought under the Federal Tort Claims Act). The parameters of the civil law defense are virtually the same as the criminal law defense. See Caroline Forell, *What's Reasonable?: Self-Defense and Mistake in Criminal and Tort Law*, 14 LEWIS & CLARK L. REV. 1401, 1403 (2010) ("With little or no consideration of the different purposes for criminal and tort law, the requirements for self-defense in tort law follow those in criminal law.").

A. *Self-Defense as a “Justification” Defense*

Under criminal law, self-defense belongs to the realm of “justification” defenses, or defenses that define otherwise criminal conduct “which under the circumstances is socially acceptable and which deserves neither criminal liability nor even censure.”⁷⁷ Thus, successful invocation of a justification defense proves that conduct by the defendant that would have normally been deemed *unlawful* was in fact *lawful*.⁷⁸ Justification defenses are often contrasted with “excuse” defenses, in which the defendant admits to committing unlawful conduct but asserts that they should not be punished for it because of an extenuating circumstance, such as duress or insanity.⁷⁹ By contrast, justified conduct is “conduct that is ‘a good thing, or the right or sensible thing, or a permissible thing to do.’”⁸⁰

B. *Self-Defense as an Essential Right*

Scholars have described self-defense as a federal constitutional right (rooted in the Second Amendment),⁸¹ as a human right,⁸² and, most often, as an innate or natural right.⁸³ While the Supreme Court has never explicitly stated that self-defense is a constitutional right,⁸⁴ it has described it as a “basic right,

77. Peter D. W. Heberling, Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 916 (1975); see also John L. Diamond, *An Ideological Approach to Excuse in Criminal Law*, 25 NEW ENG. J. CRIM. & CIV. CONFINEMENT 1, 2–3 (1999) (“Justifications . . . exonerate an actor’s use of force against another because the conduct is ‘justified’ or appropriate under the circumstances. The actor has behaved properly, potentially for the public good, and there is no reason to criminalize his behavior.” (footnote omitted)).

78. See 2 PAUL ROBINSON, CRIMINAL LAW DEFENSES § 121 (2020) (“Justification defenses describe conduct that, if not justified, would constitute an offense but, if justified, does not constitute criminal or wrongful conduct.”).

79. See Diamond, *supra* note 77, at 3 (“‘Excuses’ are not instances where the actor behaved properly or desirably, but rather, situations in which society excuses a defendant for wrongful behavior due to extenuating circumstance, like insanity or duress.” (footnotes omitted)).

80. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 204 (7th ed. 2015) (quoting J. L. Austin, *A Plea for Excuses*, 57 PROC. ARISTOTELEAN SOC’Y 1 (1957), reprinted in FREEDOM AND RESPONSIBILITY 6, 6 (Herbert Morris ed., 1961)).

81. See, e.g., Kindaka Sanders, *A Reason to Resist: The Use of Deadly Force in Aiding Victims of Unlawful Police Aggression*, 52 SAN DIEGO L. REV. 695, 704–10 (2015) (describing the constitutional basis for the right to self-defense); Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 910 (2013) (“It is apparent that the common law right to self-defense is constitutionalized to some degree.”).

82. See, e.g., David B. Kopel, Paul Gallant, & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 130 (2007) (“If any principle of international human rights law can be discerned from the universal agreement of major legal systems, it is the right of self-defense.”).

83. See, e.g., David B. Kopel, *The Natural Right of Self-Defense: Heller’s Lesson for the World*, 59 SYRACUSE L. REV. 235, 240–43 (2008) (examining the natural law roots of the right to self-defense); 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.”).

84. Darrell A. H. Miller, *Self-Defense, Defense of Others, and the State*, 80 LAW & CONTEMP. PROBS. 85, 85 (2017) (“Self-defense often is described as being innate, inalienable, and individual. But the Supreme Court has never expressly held self-defense to be a constitutional right.”).

recognized by many legal systems from ancient times to the present day”⁸⁵ that is also “deeply rooted in this Nation’s history and tradition.”⁸⁶ In another case, the Supreme Court referred to self-defense as both an “inherent right” and a “natural right.”⁸⁷ Unlike federal law, twenty-one state constitutions have provisions recognizing self-defense as an inherent, natural, or inalienable right.⁸⁸ Maine’s Constitution declares that self-defense is inherent, natural, *and* inalienable: “All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty”⁸⁹ It is clear that self-defense is essential under both federal and state law.

C. *The Elements of Self-Defense*

Modern self-defense laws are derived from the common law.⁹⁰ At common law, the privileged use of force in self-defense provided a complete defense to crimes like murder, voluntary manslaughter, assault and battery, and attempted murder.⁹¹ The common law generally permitted the use of force in self-defense when the actor possessed a reasonable belief that force was necessary to protect against the imminent use of unlawful physical force against themselves by an aggressor.⁹² The law only authorized the use of deadly force in self-defense when the actor reasonably believed that its use was necessary to prevent imminent and unlawful use of deadly force by an aggressor.⁹³ An initial aggressor did not have the right to use self-defense.⁹⁴ An actor had no duty to retreat before using non-deadly force in self-defense; however, prior to using deadly force in self-defense, the law generally required the actor to “retreat to the wall” (i.e., as far as they could without putting themselves in danger).⁹⁵ However, some jurisdictions under the common law allowed an actor to use *deadly* force in self-defense even when they could retreat in complete safety without using such force.⁹⁶ An actor was

85. McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).

86. *Id.* at 768 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

87. District of Columbia v. Heller, 554 U.S. 570, 585, 628 (2008).

88. See Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 TEX. REV. L. & POL. 399, 401–07 (2007) (collecting state constitutional provisions relating to self-defense and cases interpreting these provisions).

89. ME. CONST. art. I, § 1.

90. Miller, *supra* note 84, at 87–95 (describing the history of the common law right to self-defense).

91. RUSSELL L. WEAVER, LESLIE W. ABRAMSON, JOHN M. BURKOFF, & CATHERINE HANCOCK, *CRIMINAL LAW: CASES, MATERIALS & PROBLEMS* 458–59 (3d ed. 2009).

92. *Id.* at 459.

93. DRESSLER, *supra* note 80, at 223.

94. *Id.*

95. 40 C.J.S. *Homicide* § 216 (2020).

96. WEAVER ET AL., *supra* note 91, at 479 (“At common law, a person who could safely retreat was not required to run away before using nondeadly force. Perhaps in the frontier spirit, many jurisdictions also allowed a defendant to use deadly force for self-protection even though [they] could have retreated safely without using the lethal force.”).

never required to retreat prior to using deadly force in self-defense if the assailant attacked the actor in their home.⁹⁷

Because of variations across common law definitions, the Model Penal Code (MPC) proposed a uniform definition to determine when force is justified by self-defense. Under the MPC, force is justified in self-defense “when the actor believes that such force is immediately necessary for the purpose of protecting [themselves] against the use of unlawful force by such other person on the present occasion.”⁹⁸ The MPC permits the use of deadly force in self-defense only when “the actor believes that such force is necessary to protect [themselves] against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat.”⁹⁹

Today, each of the fifty states permits non-deadly and deadly force in self-defense. Forty-five states have entirely or partially codified this right,¹⁰⁰ while courts in four states—Maryland, Rhode Island, Virginia, and West Virginia—have continued to apply the self-defense justification that existed under their common law.¹⁰¹ While no federal statute codifies the right to self-defense,¹⁰²

97. Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 242–43 (2008) (describing the general duty to retreat and the castle doctrine at common law).

98. MODEL PENAL CODE § 3.04(1) (Westlaw through 2019 Annual Meeting of American Law Institute).

99. *Id.* § 3.04(2)(b).

100. ALA. CODE § 13A-3-23 (2015 & Supp. 2020); ALASKA STAT. §§ 11.81.330–340 (2020); ARIZ. REV. STAT. ANN. §§ 13-404 to -406 (2020); ARK. CODE ANN. §§ 5-2-606 to -607, -614 (2013 & Supp. 2019); CAL. PENAL CODE §§ 197–198.5 (West 2014 & Supp. 2020); COLO. REV. STAT. § 18-1-704 (2020); CONN. GEN. STAT. § 53a-19 (2019 & Supp. 2020); DEL. CODE ANN. tit. 11, §§ 464–465 (2015); FLA. STAT. § 776.012 (2020); GA. CODE ANN. §§ 16-3-21, -23.1 (2019); HAW. REV. STAT. §§ 703-304 to -305 (2020); IDAHO CODE § 18-4009 (2016 & Supp. 2020); *id.* §§ 19-202, -203 (2017 & Supp. 2020); 720 ILL. COMP. STAT. ANN. 5/7-1 (West 2016); IND. CODE § 35-41-3-2 (2020); IOWA CODE §§ 704.1–2A, .3 (2021); KAN. STAT. ANN. §§ 21-5221 to -5222, -5224, -5230 (Supp. 2020); KY. REV. STAT. ANN. §§ 503.050, .070 (West 2016); LA. STAT. ANN. §§ 14:19–:20, :22 (2016); ME. STAT. tit. 17-A, § 108 (2020); MASS. GEN. LAWS ch. 278, § 8A (2018); MINN. STAT. §§ 609.06–.065 (2020); MISS. CODE ANN. § 97-3-15 (2020); MO. REV. STAT. §§ 563.011, .031 (Supp. 2020); MONT. CODE ANN. §§ 45-3-101 to -102, -110 (2019); NEB. REV. STAT. §§ 28-1409, -1414 (2016); NEV. REV. STAT. §§ 193.240, 200.120–130, .160, .200, .275 (2020); N.H. REV. STAT. ANN. § 627:4 (2016); N.J. STAT. ANN. §§ 2C:3-4 to -5, -9 (West 2015); N.M. STAT. ANN. § 30-2-7 (2020); N.Y. PENAL LAW § 35.15 (McKinney 2009); N.C. GEN. STAT. §§ 14-51.2–.3 (2019); N.D. CENT. CODE § 12.1-05-03 to -04, -07 to -07.1, -12 (2012); OHIO REV. CODE ANN. §§ 2901.05, .09 (LexisNexis 2014); OKLA. STAT. tit. 21, § 643 (2018 & Supp. 2020); *id.* § 733 (2015); OR. REV. STAT. §§ 161.209, .219 (2019); 18 PA. CONS. STAT. §§ 505–06 (2020); S.C. CODE ANN. § 16-11-440 (2020); S.D. CODIFIED LAWS §§ 22-5-9, 22-16-34 to -35 (2017); TENN. CODE ANN. §§ 39-11-611 to -612 (2018); TEX. PENAL CODE ANN. §§ 9.31–.33 (West 2019); UTAH CODE ANN. § 76-2-402 (LexisNexis Supp. 2020); VT. STAT. ANN. tit. 13, § 2305 (LEXIS through Act 1 of 2021 Sess.); WASH. REV. CODE §§ 9A.16.020, .050 (2020); WIS. STAT. § 939.48 (2019–20); WYO. STAT. ANN. §§ 6-2-502, -602 (2019).

101. *Jones v. State*, 745 A.2d 396, 403–04 (Md. 2000); *State v. D’Amario*, 568 A.2d 1383, 1385 (R.I. 1990); *Yarborough v. Commonwealth*, 234 S.E.2d 286, 290 (Va. 1977); *State v. Harden*, 679 S.E.2d 628, 641 (W. Va. 2009).

102. *See, e.g., United States v. Tunley*, 664 F.3d 1260, 1262 n.3 (8th Cir. 2012) (“Self-defense as a justification for killing is not codified by federal statute, but is instead a ‘basic right, recognized by

federal courts have nonetheless looked to the common law to recognize the availability of self-defense as a justification for federal crimes.¹⁰³

While federal law and the laws of all fifty states recognize the right to use force in self-defense, the exact parameters of the defense vary from jurisdiction to jurisdiction. However, a number of elements from the common law—including the requirements of unlawfulness, necessity, imminence, and proportionality—are commonly seen across jurisdictions. In addition, some jurisdictions continue to impose the common law duty to retreat before using deadly force, while others have implemented “stand your ground” provisions. This Section summarizes each of these key elements under both state and federal law. Because the right to self-defense is not codified in federal law, model criminal jury instructions produced by several federal courts of appeals are examined below when discussing the justifiable use of force under federal law.

1. *Unlawfulness of Force*

The unlawfulness element requires that the aggressor’s initial threat of force against the actor must have been unlawful or unjustified, i.e., criminal or tortious.¹⁰⁴ Thus, an arrestee cannot use force in self-defense when a police officer uses justified force to effect an arrest.¹⁰⁵ While most jurisdictions incorporate this element when describing situations in which force is justified, a few jurisdictions fail to include it.¹⁰⁶

2. *Reasonable Belief in Necessity of Force*

The necessity element requires that the actor use force “only when and to the extent necessary” to protect themself.¹⁰⁷ In addition, the actor’s belief in the necessity of force to protect themself must be subjectively and objectively

many legal systems from ancient times to the present day.” (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010))

103. See, e.g., *United States v. Waldman*, 835 F.3d 751, 754 (7th Cir. 2016) (“While 18 U.S.C. § 111 does not explicitly address self-defense, when a statute is silent on the question of affirmative defenses, we are to effectuate the defense as ‘Congress may have contemplated it,’ looking to the common law as a guide.” (quoting *Dixon v. United States*, 548 U.S. 1, 13–14 (2006))).

104. *WEAVER ET AL.*, *supra* note 91, at 459, 472. The MPC defines “unlawful force” as “force, including confinement, that is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort or would constitute such offense or tort except for a defense (such as the absence of intent, negligence, or mental capacity; duress; youth; or diplomatic status) not amounting to a privilege to use the force.” MODEL PENAL CODE § 3.11(1) (Westlaw through 2019 Annual Meeting of American Law Institute).

105. *ROBINSON*, *supra* note 78, § 131(b)(2); *WEAVER ET AL.*, *supra* note 91, at 472. Some jurisdictions disallow self-defense even in the case of an *unlawful* arrest. See, e.g., HAW. REV. STAT. § 703-304(4)(a). The MPC adopts this rule as well. MODEL PENAL CODE § 3.04(2)(a)(i).

106. See, e.g., CONN. GEN. STAT. ANN. § 53a-19 (2019 & Supp. 2020).

107. *ROBINSON*, *supra* note 78, § 121(a)(2) (footnotes omitted).

reasonable.¹⁰⁸ In many states, necessity and the reasonableness of the actor's belief are explicit requirements in their self-defense statutes.¹⁰⁹

Under federal law, the placement of “necessary” varies across model jury instructions. The First and Third Circuits’ model instructions do not include a necessity requirement at all, thus allowing the use of force even when it is unnecessary so long as the actor met the other requirements.¹¹⁰ The Sixth and Tenth Circuits’ model instructions use “necessary” only in reference to the amount of force used; therefore, an actor may use force even when it is unnecessary so long as the amount of force used was reasonable.¹¹¹ The Seventh and Eleventh Circuits’ model instructions include “necessary” to describe the need to use force but are silent on whether the amount of force used must be necessary, unless, in the Seventh Circuit, it is deadly force.¹¹² The Fifth and Ninth Circuits’ model instructions employ “necessary” to describe both the need to use force and the amount of force used.¹¹³

108. 2 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 10.4(c) (3d ed. 2017 & Supp. 2020).

109. *See, e.g.*, TEX. PENAL CODE ANN. § 9.31(b) (West 2019) (“[A] person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other’s use or attempted use of unlawful force.”); UTAH CODE ANN. § 76-2-402(2)(a) (LexisNexis Supp. 2020) (“An individual is justified in threatening or using force against another individual when and to the extent that the individual reasonably believes that force or a threat of force is necessary to defend the individual or another individual against the imminent use of unlawful force.”).

110. Unlike the model instructions of the other courts of appeals, the model instructions of the First and Third Circuits both include a duty to retreat—under the First it is described as a “reasonable opportunity to escape, or otherwise frustrate the threat,” *PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT* § 5.04 (U.S. DIST. CT. FOR THE DIST. OF ME. 2019), while under the Third it is a “reasonable, lawful opportunity to avoid the threatened harm,” *MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE THIRD CIRCUIT* § 8.04 (COMM. ON MODEL CRIM. JURY INSTRUCTIONS WITHIN THE THIRD CIRCUIT 2018)—that may serve a similar function as a “necessity” requirement.

111. *See* *PATTERN CRIMINAL JURY INSTRUCTIONS* § 6.06(2) (SIXTH CIRCUIT COMM. ON *PATTERN CRIM. JURY INSTRUCTIONS* 2019) (“A person is entitled to defend [themselves] against the immediate use of unlawful force. But the right to use force in self-defense is limited to using only as much force as reasonably appears to be necessary under the circumstances.”); *CRIMINAL PATTERN JURY INSTRUCTIONS* § 1.28 (CRIMINAL PATTERN JURY INSTRUCTION COMMITTEE OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT 2011) (same).

112. *THE WILLIAM J. BAUER PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT* § 6.01 (COMM. ON FED. CRIM. JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 2020) (“A person may use force when [they] reasonably believe[] that force is necessary to defend [themselves/another person] against the imminent use of unlawful force. [A person may use force that is intended or likely to cause death or great bodily harm only if [they] reasonably believes that force is necessary to prevent death or great bodily harm to [[themselves]; someone else].]” (fourth and sixth alterations in original)); *ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS* §§ O1.1–2 (CRIMINAL CASES) (COMM. ON PATTERN JURY INSTRUCTIONS OF THE JUD. COUNCIL OF THE ELEVENTH CIRCUIT 2020) (“[Y]ou can’t find that a forcible assault occurred if you believe that the Defendant acted only on a reasonable good-faith belief that self-defense was necessary to protect against an assault by a private citizen . . .”).

113. *PATTERN JURY INSTRUCTIONS (CRIMINAL CASES)* § 1.39 (COMM. ON PATTERN JURY INSTRUCTIONS DIST. JUDGES ASS’N FIFTH CIRCUIT 2019) (“The use of force is justified when a person

3. *Imminence of Force*

Most jurisdictions require that the threat of force by the aggressor against the actor was “imminent.”¹¹⁴ The reasoning for this requirement is that if an attack is not imminent, there may be other ways for the actor to avoid harm than by injuring or killing the aggressor.¹¹⁵ However, if the attack is “imminent,” the actor does not have alternative options; therefore, the use of force is necessary and justified.¹¹⁶ For this reason, some argue that the imminence requirement is more properly understood as a modification of the necessity rule.¹¹⁷

Scholars have criticized the way the imminence requirement has been applied to victims of domestic violence who use deadly force against their abusers.¹¹⁸ Such relationships involve cyclical and inevitable, but not always imminent, violence. However, the imminence requirement limits the availability of a self-defense justification for victims who take action when the abuser is not immediately attempting to harm them. Thus, victims who kill abusers during a lull in the abuse cannot assert self-defense, even though the abuse will continue at some later point.¹¹⁹ For this reason, some scholars have advocated for the abolition of the imminence requirement.¹²⁰ Professor Richard Rosen argued, “Because imminence serves only to further the necessity principle, if there is a conflict between imminence and necessity, necessity must prevail. If action is *really* necessary to avert a threatened harm, society should allow the action, or at least not punish it, even if the harm is not imminent.”¹²¹ Therefore, Professor Rosen argued that an abuse victim should be permitted to use deadly force if

reasonably believes that force is necessary for the defense of oneself or another against the immediate use of unlawful force. However, a person must use no more force than appears reasonably necessary under the circumstances.”); MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT § 6.08 (NINTH CIRCUIT JURY INSTRUCTIONS COMM. 2020) (same).

114. See, e.g., ALA. CODE § 13A-3-23 (2015 & Supp. 2020); COLO. REV. STAT. § 18-1-704 (2020); FLA. STAT. § 776.012 (2020); 720 ILL. COMP. STAT. ANN. 5/7-1 (West 2016).

115. LAFAVE, *supra* note 108, § 10.4(d).

116. ROBINSON, *supra* note 78, § 131(b)(3); WEAVER ET AL., *supra* note 91, at 464; Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 380 (1993).

117. ROBINSON, *supra* note 78, § 131(b)(3) (“Although the word ‘imminent’ appears to modify the nature of the triggering conditions, it seems, and the drafters of the Model Penal Code agree, that the restriction is more properly viewed as a modification of the necessity requirement. That is, as a practical matter, actions taken in the absence of an imminent threat may not be necessary.” (footnote omitted)); Rosen, *supra* note 116, at 380 (“In self-defense, the concept of imminence has no significance independent of the notion of necessity.”).

118. See Rosen, *supra* note 116, at 410–11, 410 n.102.

119. See Jane Campbell Moriarty, “*While Dangers Gather*”: *The Bush Preemption Doctrine, Battered Women, Imminence, and Anticipatory Self-Defense*, 30 N.Y.U. REV. L. & SOC. CHANGE 1, 2 (2005) (“Many courts decide as a matter of law that a battered woman who kills has no right to introduce evidence relevant to self-defense if she does not kill her abuser at the exact moment the attack is occurring.”).

120. See, e.g., Jeffrey B. Murdoch, Comment, *Is Imminence Really Necessity? Reconciling Traditional Self-Defense Doctrine with the Battered Woman Syndrome*, 20 N. ILL. U. L. REV. 191, 217–18 (2000); Fritz Allhoff, *Self-Defense Without Imminence*, 56 AM. CRIM. L. REV. 1527, 1552 (2019).

121. Rosen, *supra* note 116, at 380.

such force was necessary, even if the harm was not imminent at the very moment that they used the force.¹²²

4. Proportionality

“Proportionality” requires that the amount of force used by the actor must have been reasonable in relation to the harm the aggressor threatened to use against them.¹²³ Thus, an actor may not use deadly force (usually defined as force likely to cause death or serious bodily injury) in self-defense if the aggressor threatened to use non-deadly force against them.¹²⁴ Jurisdictions use different language to convey the requirement of proportionality.¹²⁵ Moreover, many jurisdictions do not explicitly mention the amount of force that self-defense justifies; however, most jurisdictions do have provisions specifying when deadly force is or is not justified.¹²⁶ These provisions are essentially based on the idea of proportionality.

5. Aggressor and Provocateur Limitations

The law completely bars certain actors from invoking self-defense to justify their actions. The most common bar found in modern self-defense statutes is the limitation on an initial aggressor’s right to invoke the defense.¹²⁷ In addition,

122. *See id.*

123. LAFAVE, *supra* note 108, § 10.4(b).

124. *Id.*

125. *See, e.g.*, IND. CODE § 35-41-3-2(c) (2020) (“A person is justified in using reasonable force against any other person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force.”); N.D. CENT. CODE § 12.1-05-07 (2012) (“An individual is not justified in using more force than is necessary and appropriate under the circumstances.”); VT. STAT. ANN. tit. 13, § 2305 (LEXIS through Act 1 of 2021 Sess.) (“If a person kills or wounds another under any of the circumstances enumerated below, [they] shall be guiltless . . . in the just and necessary defense of the person’s own life . . .”).

126. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-19 (2019 & Supp. 2020) (“[D]eadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm.”); DEL. CODE ANN. tit. 11, § 464 (2015) (“The use of deadly force is justifiable under this section if the defendant believes that such force is necessary to protect the defendant against death, serious physical injury, kidnapping or sexual intercourse compelled by force or threat.”).

127. *See, e.g.*, COLO. REV. STAT. § 18-1-704(3)(b) (2020); CONN. GEN. STAT. ANN. § 53a-19(c)(2); GA. CODE ANN. § 16-3-21(b)(3) (2019); 720 ILL. COMP. STAT. ANN. 5/7-1(b) (West 2016); ME. STAT. tit. 17-A, § 108(1)(B) (2020); MO. REV. STAT. § 563.031(1) (Supp. 2020); N.H. REV. STAT. ANN. § 627:4(I)(b) (2016); N.Y. PENAL LAW § 35.15(1)(b) (McKinney 2009); N.D. CENT. CODE § 12.1-05-03(2)(b); UTAH CODE ANN. § 76-2-402(2)(a)(iii) (LexisNexis Supp. 2020).

An initial aggressor may regain the right to use force if they withdraw from the encounter and effectively communicate that to the other person, but the latter person nevertheless continues or threatens the use of unlawful physical force. *See, e.g.*, COLO. REV. STAT. § 18-1-704(3)(b); CONN. GEN. STAT. ANN. § 53a-19(c)(2); GA. CODE ANN. § 16-3-21(b)(3); 720 ILL. COMP. STAT. ANN. 5/7-1(b); ME. STAT. tit. 17-A, § 108(1)(B); MO. REV. STAT. § 563.031(1); N.H. REV. STAT. ANN. § 627:4(I)(b); N.Y. PENAL LAW § 35.15(1)(b); N.D. CENT. CODE § 12.1-05-03(2)(b); UTAH CODE ANN. § 76-2-402(2)(a)(iii).

many statutes disallow the justification of self-defense when an actor, with the intent to cause physical injury or death, provoked the use of force.¹²⁸

6. *Duty to Retreat*

Under common law, an actor had a duty to retreat as far as they could prior to using deadly force in self-defense.¹²⁹ Today, a number of jurisdictions continue to apply this rule.¹³⁰ However, even in these jurisdictions, the duty is not imposed unless there is a place of complete safety to which the actor can retreat.¹³¹ Some jurisdictions have expanded the traditional duty to retreat to require the actor to take additional measures before using deadly force in self-defense. For instance, the actor may need to “surrender[] possession of property to a person asserting a claim of right thereto, or . . . comply[] with a demand that [they] abstain” from performing an act which they are not obliged to perform.¹³²

Under federal law, only the First and the Third Circuits’ model jury instructions impose a duty to retreat before using lethal force if there is a reasonable opportunity to escape.¹³³ The Third Circuit’s instructions further require that the actor did not recklessly put themselves in a situation where they would be forced to use lethal force.¹³⁴

128. See, e.g., ALA. CODE § 13A-3-23(c)(1) (2015 & Supp. 2020); ALASKA STAT. § 11.81.330(a)(2) (2020); ARIZ. REV. STAT. ANN. § 13-404(B)(3) (2020); ARK. CODE ANN. § 5-2-606(b)(1) (2013 & Supp. 2019); COLO. REV. STAT. § 18-1-704(3)(a); CONN. GEN. STAT. ANN. § 53a-19(c)(1); GA. CODE ANN. § 16-3-21(b)(1); ME. STAT. tit. 17-A, § 108(1)(A); NEB. REV. STAT. § 28-1409(4)(a) (2016); N.H. REV. STAT. ANN. § 627:4(I)(a).

Some jurisdictions allow the provocateur to regain the right to use force under the same conditions as an aggressor. See ARIZ. REV. STAT. ANN. § 13-404(B)(3)(a); TENN. CODE ANN. § 39-11-611(e)(2) (2018); TEX. PENAL CODE ANN. § 9.31(b)(4) (West 2019).

129. C.J.S. *Homicide*, *supra* note 95, § 216.

130. DRESSLER, *supra* note 80, at 230.

131. See, e.g., ALASKA STAT. § 11.81.335(b); ARK. CODE ANN. § 5-2-607(b); CONN. GEN. STAT. ANN. § 53a-19(b).

132. CONN. GEN. STAT. ANN. § 53a-19(b); see also ARK. CODE ANN. § 5-2-607(b)(2); DEL. CODE ANN. tit. 11, § 464(e)(2) (2015); HAW. REV. STAT. § 703-304(5)(b) (2020); ME. STAT. tit. 17-A, § 108(2); N.H. REV. STAT. ANN. § 627:4(III); N.J. STAT. ANN. § 2C:3-4(b)(2)(b) (West 2015). These statutes follow the MPC, which does not permit deadly force in self-defense if

the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action that he has no duty to take.

MODEL PENAL CODE § 3.04(2)(b)(ii) (Westlaw through 2019 Annual Meeting of American Law Institute).

133. PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT § 5.04 (U.S. DIST. CT. FOR THE DIST. OF ME. 2019); MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE THIRD CIRCUIT § 8.04 (COMM. ON MODEL CRIM. JURY INSTRUCTIONS WITHIN THE THIRD CIRCUIT 2018).

134. MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE THIRD CIRCUIT § 8.04.

a. “Castle” Doctrine

Even in jurisdictions that do impose a duty to retreat, there is a universally accepted exception known as the “castle” doctrine. Under this exception, the law does not impose a duty to retreat when the actor is in their home, even if they know of a place to which they can retreat in complete safety.¹³⁵ Generally, the exception does not apply if the actor was the initial aggressor.¹³⁶ At least one jurisdiction continues to specify that the exception does not apply if a co-occupant attacked the actor at home.¹³⁷ This is a limitation that most other jurisdictions have abandoned because of concerns that it places victims of domestic violence in dangerous positions.¹³⁸

b. “Stand Your Ground” Provisions

Today, many jurisdictions have replaced the common law duty to retreat with “stand your ground” provisions.¹³⁹ These provisions allow an actor to use deadly force when threatened with an unlawful deadly attack, even if they are aware of a place to which they can retreat in complete safety.¹⁴⁰ Generally, these provisions apply to situations where an actor used lethal force in self-defense and at the time they were not engaged in unlawful conduct, they were in a place where they had a right to be, and they did not provoke the attack.¹⁴¹

In summary, although the exact parameters of self-defense vary from jurisdiction to jurisdiction, every state and federal law permits the use of both deadly and non-deadly force in self-defense. This is unsurprising given that self-defense is often described as an inherent or natural right. However, despite the universal recognition of self-defense, its application to immigration cases is unclear.

D. Self-Defense in Immigration Cases

The federal circuit courts and the BIA have rarely addressed the issue of whether an individual can raise self-defense in immigration cases. The two federal circuit courts that have addressed the issue (the Third and the Ninth Circuits) have agreed that noncitizens can raise self-defense in immigration

135. See, e.g., N.H. REV. STAT. ANN. § 627:4 III(a); N.J. STAT. ANN. § 2C:3-4(b)(2)(b); N.Y. PENAL LAW § 35.15(2)(a) (McKinney 2009).

136. See, e.g., CONN. GEN. STAT. ANN. § 53a-19(b); ME. STAT. tit. 17-A, § 108(2)(C)(3)(a).

137. See N.D. CENT. CODE § 12.1-05-07(2)(b)(2) (2012).

138. See *Widdison v. State*, 410 P.3d 1205, 1210–11 (Wyo. 2018) (acknowledging that “[t]he majority of jurisdictions that have considered the issue conclude that a cohabitant does not have a duty to retreat in his own home when, through no fault of his own, he is assailed by another cohabitant” and adopting the majority rule in part because such a rule better protects victims of domestic violence).

139. LAFAVE, *supra* note 108, § 10.4(f).

140. *Id.* (“The majority of American jurisdictions holds that the defender (who was not the original aggressor) need not retreat, even though he can do so safely, before using deadly force upon an assailant whom he reasonably believes will kill him or do him serious bodily harm.” (footnote omitted)).

141. See, e.g., FLA. STAT. § 776.012(2) (2020); S.C. CODE ANN. § 16-11-440(C) (2020); TENN. CODE ANN. § 39-11-611(d) (2018); TEX. PENAL CODE ANN. § 9.31(e) (West 2019).

cases.¹⁴² By contrast, the BIA has twice stated that noncitizens cannot use self-defense to justify actions that otherwise qualify as “terrorist activity” under the INA.¹⁴³ However, the BIA cases did not involve traditional uses of self-defense, and the BIA’s statements regarding self-defense in those cases can be characterized as dicta. It, therefore, remains an open question whether the BIA would hold that self-defense does not apply to an individual’s use of force in a traditional self-defense case (e.g., that of the Yazidi women or Rohingya refugees described in the Introduction).

I. McAllister v. Attorney General of the United States

In *McAllister v. Attorney General of the United States*, the Third Circuit reviewed a BIA decision in which it had found McAllister ineligible for asylum and removable for having “engaged in terrorist activity.”¹⁴⁴ On appeal to the Third Circuit, McAllister argued that the INA’s definition of terrorist activity at INA section 212(a)(3)(B)(iii) was unconstitutionally overbroad because it encompassed common crimes that no reasonable person would consider to be terrorist acts.¹⁴⁵ In support of his argument, McAllister provided three hypothetical examples of conduct, two of them relevant here, which he claimed would unconstitutionally fall under the statutory definition of “terrorist activity.”¹⁴⁶ The relevant examples were a boy who carries a baseball bat to defend himself against bullies and a woman who uses kitchen utensils to protect herself from domestic violence.¹⁴⁷ The Third Circuit found that neither situation would constitute “terrorist activity” under the INA because “both the little boy and the battered wife have acted in self-defense, which negates the ‘unlawful’ element” of INA section 212(a)(3)(B)(iii),¹⁴⁸ which provides that “terrorist activity” is any activity “which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State).”¹⁴⁹

142. *McAllister v. Att’y Gen. of the United States*, 444 F.3d 178, 186–87 (3d Cir. 2006); *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004).

143. *In re S-K-*, 23 I. & N. Dec. 936, 941 (B.I.A. 2006), *overruled on other grounds by* *Matter of Negusie*, 28 I. & N. Dec. 120 (A.G. 2020); *Matter of A-C-M-*, 27 I. & N. Dec. 303, 304 (B.I.A. 2018).

144. 444 F.3d at 181. McAllister was a citizen of Northern Ireland and a member of the Irish National Liberation Army (INLA). As an INLA member, he was involved in two incidents that led the IJ to deem him ineligible for asylum for having “engaged in terrorist activity”: first, he acted as an armed look-out while other INLA members used firearms to shoot a police officer, and second, he was a member of a conspiracy to shoot and kill another police officer. *Id.* at 181–82. He and his wife fled Northern Ireland after loyalist forces and the police subjected them to violent attacks, including attacking their home with gunfire and throwing his wife out of a moving vehicle while she was pregnant. *Id.* at 182. The Third Circuit agreed that McAllister was ineligible for asylum for having “engaged in terrorist activity.” *Id.* at 191.

145. *Id.* at 185.

146. *Id.* at 186.

147. *Id.*

148. *Id.* at 186–87.

149. INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii).

2. *Vukmirovic v. Ashcroft*

In *Vukmirovic v. Ashcroft*, the Ninth Circuit reviewed a BIA decision in which it affirmed the IJ's denial of Vukmirovic's application for asylum and withholding of removal because he had engaged in the persecution of others on the basis of race and religion.¹⁵⁰ The persecutor bar is separate from the TRIG and prevents the grant of asylum or withholding of removal to "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."¹⁵¹ Vukmirovic was a Bosnian Serb from Bosnia-Herzegovina.¹⁵² He joined a group that was formed to defend his Serbian town against attacks.¹⁵³ During Vukmirovic's time, the group defended the town from Bosnian Croats, who often committed violence against the Serbs.¹⁵⁴ When Croats entered his town, members of the group would defend it.¹⁵⁵ During these skirmishes, Vukmirovic admitted to physically attacking and harming Croats.¹⁵⁶ He explained that "most" of these skirmishes occurred when the Croats attacked.¹⁵⁷

The IJ held that Vukmirovic's "use of the word 'most' [led] the court to believe that [he] also attacked the Croats. Even though some of these action [sic] occurred in self-defense, there is no provision under the law that exempts acts of self-defense from qualifying as persecution since the state of mind of the individual is irrelevant."¹⁵⁸ The Ninth Circuit found that the IJ erred as a matter of law when he held that acts of self-defense constituted persecution under the INA, explaining that such an interpretation would contradict the purpose of the statute because, among other things:

It would deny asylum to any victim of oppression who had the temerity to resist persecution by fighting back. The right of self-defense is one of the most ancient in Anglo-American law. As the English poet John Dryden observed, "[S]elf-defense is nature's eldest law." William Blackstone described self-defense as one of the "absolute rights of the individual."¹⁵⁹

The court remanded the decision so that the IJ could conduct a new hearing and render a decision applying the proper legal analysis.¹⁶⁰

150. *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1250–51 (9th Cir. 2004).

151. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

152. *Vukmirovic*, 362 F.3d at 1249.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 1250.

158. *Id.* (third alteration in original) (quoting IJ decision).

159. *Id.* at 1252 (citation omitted).

160. *Id.* at 1253.

3. *Matter of S-K-*

In contrast to the decisions in *McAllister* and *Vukmirovic*, the BIA has stated that a noncitizen cannot use self-defense as a justification for TRIG charges. In the case *Matter of S-K-*, the applicant, a Christian citizen of Burma and member of the Chin ethnic group, donated money to the Chin National Front (CNF), an organization that fought to secure the freedom of the Chin people.¹⁶¹ S-K- fled to the United States after the Burmese military confiscated goods she attempted to donate to the CNF and the military learned of her identity.¹⁶² The IJ found that S-K- had established a well-founded fear of persecution to qualify for asylum but denied her application after finding that the CNF was a Tier III organization and that S-K- had provided material support to it.¹⁶³ On appeal, S-K- argued, among other things, that the CNF could not be a terrorist organization because it used force only in self-defense.¹⁶⁴ The BIA disagreed, explaining that “the fact that Congress included exceptions elsewhere in the Act . . . and that it has not done so in section 212(a)(3)(B), indicates that the omission of an exception for justifiable force was intentional.”¹⁶⁵ The only relief for S-K-, according to the BIA, was to seek a waiver from DHS.¹⁶⁶ Following the decision, the Secretary of Homeland Security created a TRIG exemption for individuals who provided material support to the CNF.¹⁶⁷ Congress also named ten organizations in the Consolidated Appropriations Act of 2008 (CAA), including the CNF, which are not to be considered Tier III organizations.¹⁶⁸ The AG certified the decision in *S-K-* to himself and remanded it to the BIA for further action in light of these developments.¹⁶⁹

4. *Matter of A-C-M-*

In the case *Matter of A-C-M-*, the BIA again stated that there is no self-defense exclusion to the terrorism bar.¹⁷⁰ A-C-M-, a Salvadoran woman, had been kidnapped by guerillas in El Salvador and coerced into undergoing weapons training and performing forced labor for the guerillas.¹⁷¹ In immigration court,

161. 23 I. & N. Dec. 936, 937 (B.I.A. 2006), *overruled on other grounds by* *Matter of Negusie*, 28 I. & N. Dec. 120 (A.G. 2020).

162. *Id.*

163. *Id.*

164. *Id.* at 938–39.

165. *Id.* at 941.

166. *Id.* at 941–42.

167. Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 9,957, 9,957 (Mar. 6, 2007).

168. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 691(b), 121 Stat. 1844, 2365.

169. *In re S-K-*, 24 I. & N. Dec. 289, 290 (A.G. 2007). On remand, the BIA vacated its prior ruling and granted S-K- asylum in light of the Congressional action exempting CNF. *Matter of S-K-*, 24 I. & N. Dec. 475, 478 (B.I.A. 2008). Nonetheless, the BIA reaffirmed the precedential nature of its conclusions in the original *In re S-K-* decision. *Id.* at 477.

170. 27 I. & N. Dec. 303, 304 (B.I.A. 2018).

171. *Id.*

she applied for cancellation of removal.¹⁷² The government argued that she was barred from cancellation for receiving military-type training from the guerillas, a Tier III organization, and for providing material support to them by cooking, cleaning, and washing clothes for them.¹⁷³ The IJ disagreed, finding that the forced labor was not “material” support as contemplated by the statute or regulations.¹⁷⁴ Even if it were, the IJ concluded that A-C-M- did not know that the labor was material to the guerillas and therefore her actions did not fall within the parameters of the bar, which requires “commission of an ‘act that the actor knows or reasonably should know, affords material support.’”¹⁷⁵ The IJ further characterized A-C-M-’s forced labor as acts of self-defense because had she not committed these acts, “she would have been killed.”¹⁷⁶ Quoting the Third Circuit’s decision in *McAllister*, the IJ concluded that acts of self-defense do not qualify as “terrorist activity” under the INA.¹⁷⁷ The IJ also found that A-C-M- had not received military-type training from the guerillas because she had foiled their attempts to train her.¹⁷⁸

In an unpublished and non-precedential decision, the BIA disagreed with the IJ and found that the applicant was ineligible for cancellation for providing material support to and receiving military-type training from the guerillas.¹⁷⁹ The BIA stated the following about a self-defense exclusion to the terrorism bar:

We are unable to find any basis for the Immigration Judge’s assertion that there is a self-defense (or duress) exception in the statute. *Cf. McAllister v. Att’y Gen.*, 444 F.3d 178 (3d Cir. 2006); *see* section 212 (a)(3)(B) of the Act. Rather, Congress intentionally drafted this bar to relief broadly. And, Congress did not narrow the scope of the bar by providing for an explicit duress or involuntariness exception. *See Alturo v. U.S. Att’y Gen.*, 716 F.3d 1310, 1314 (11th Cir. 2013); *cf.* section 212(a)(3)(D) of the Act (barring the admission of [noncitizens] affiliated with totalitarian regimes but *expressly* exempting those who can establish that affiliation was involuntary).¹⁸⁰

The BIA remanded the proceedings to the IJ to consider whether A-C-M- was eligible for any other relief or protection.¹⁸¹ On remand, the IJ considered A-C-M-’s eligibility for asylum, withholding of removal, and relief under the

172. Oral Decision of the Immigration Judge at 2, Matter of A-C-M-, No. [REDACTED] (Immigr. Ct. Dec. 15, 2011).

173. *Id.* at 13–14, 17.

174. *Id.* at 16.

175. *Id.*

176. *Id.* at 18.

177. *Id.*

178. *Id.* at 17.

179. Decision of the Board of Immigration Appeals at 2–3, Matter of A-C-M-, No. [REDACTED] (B.I.A. Jan. 14, 2014).

180. *Id.* (citation omitted).

181. *Id.* at 3.

CAT.¹⁸² The IJ ultimately found she was ineligible for asylum and withholding for having provided material support to the guerillas but granted her relief under the CAT.¹⁸³

On appeal, A-C-M- argued that the IJ erred by finding that she was subject to the material support bar because any assistance she provided the guerillas was de minimis and thus not “material.”¹⁸⁴ In the precedential decision, *Matter of A-C-M-*, the BIA rejected that interpretation and held that no quantitative limitation exists to the material support bar.¹⁸⁵ Applying this standard to A-C-M-’s case, the BIA found that she provided material support to the guerillas because “if she had not provided the cooking and cleaning services she was forced to perform, another person would have needed to do so.”¹⁸⁶ Lastly, the BIA held that the IJ had provided insufficient fact-finding and analysis regarding A-C-M-’s request for CAT relief and remanded the case to the IJ to conduct further proceedings and to issue a new decision.¹⁸⁷ Significantly, when reciting the procedural history of the case, the BIA referenced its earlier unpublished decision and stated that it “found no basis for the Immigration Judge’s assertion that there is a self-defense or duress exception” to the terrorism bars at INA section 212(a)(3)(B).¹⁸⁸

The foregoing cases do not impair the viability of the self-defense exclusion. While the BIA twice stated that a noncitizen cannot use self-defense to justify activity that would otherwise qualify as “terrorist activity” under the INA, these decisions are not definitive for three reasons. First, the BIA was not confronted with traditional uses of self-defense (such as those used by the Rohingya villagers or Yazidi women) in either case. In *Matter of S-K-*, the BIA considered whether material support charges were appropriately brought against an applicant who did not herself use force in self-defense but had provided support to a Tier III organization that, in turn, used force against the government. In *Matter of A-C-M-*, self-defense arose because the IJ argued that if A-C-M- had not provided the guerillas her services, the guerillas would have killed her. However, a duress defense would have been more appropriate in this case because duress generally covers unlawful activity in response to a threat, while self-defense specifically covers the use of force, and providing services is not traditionally seen as a use of force. The BIA clearly recognized that it was really analyzing a duress argument because it equated the two defenses in its decision

182. Oral Decision of the Immigration Judge at 11, *Matter of A-C-M-*, No. [REDACTED] (Immigr. Ct. Aug. 8, 2016).

183. *Id.* at 10. For a discussion of CAT relief and its limitations, see *supra* Part I.B.

184. *Matter of A-C-M-*, 27 I. & N. Dec. 303, 306 (B.I.A. 2018).

185. *Id.* The BIA’s decision in *A-C-M-* contradicts at least one earlier unpublished decision in which the BIA had found that an asylum applicant who had given 5000 Burundian francs (roughly four United States dollars) and a bagged lunch to members of a rebel group had not provided material support to a terrorist organization because four dollars and a bagged lunch could not be considered “material” under the INA. See HUM. RTS. FIRST, *supra* note 23, at 33–34.

186. *Matter of A-C-M-*, 27 I. & N. Dec. at 310.

187. *Id.* at 311–12.

188. *Id.* at 304.

when it stated, “We are unable to find any basis for the Immigration Judge’s assertion that there is a self-defense (or duress) exception in the statute.”¹⁸⁹ However, as described in Part II.A above and in more detail below in Part III.C., duress and self-defense are very different defenses, and therefore should not have been equated in this manner. Second, the BIA’s statements about self-defense in each case can be characterized as dicta because they did not concern the primary legal questions at stake in either case.¹⁹⁰ Third, the BIA was not presented with and did not address the strongest argument for why self-defense does apply to TRIG charges: self-defense is a lawful act that the text of the INA, as currently written, excludes.

The Third and Ninth Circuits’ decisions finding that self-defense is appropriately applied in immigration cases were rooted in the goals of the INA and its language, as well as the importance of self-defense in American law. The Ninth Circuit based its decision on the fact that finding otherwise would undermine the goals of the INA’s asylum provisions by denying “asylum to any victim of oppression who had the temerity to resist persecution by fighting back.”¹⁹¹ The Ninth Circuit further acknowledged that such a finding would conflict with the fact that “[t]he right of self-defense is one of the most ancient in Anglo-American law.”¹⁹² The Third Circuit found that self-defense applies to the TRIG specifically because the definition of “terrorist activity” requires that the activity be “unlawful”; therefore, the definition excludes self-defensive force as “lawful” force.¹⁹³ Part III will expand upon the Third and Ninth Circuit’s reasoning to explain why self-defense should apply to TRIG charges.

III.

THE EXISTING SELF-DEFENSE EXCLUSION UNDER THE INA AND CHALLENGES TO ACCURATE APPLICATION

Part II of this Article has established that while self-defense is a fundamental criminal and civil defense under federal law and the laws of each state, its application to charges brought under the INA is far from clear. This

189. Decision of the Board of Immigration Appeals, *supra* note 179, at 2–3.

190. In *Matter of S-K-*, the BIA described the primary questions in the case as follows:

(1) [W]hat standards or definition should be used to assess whether the term ‘material support’ should be defined narrowly or more broadly; whether it should take into consideration the mens rea of the provider, as proposed by the respondent; and whether it includes the type of support provided by the respondent to the CNF; and (2) to what extent, in light of our precedent, we should factor in an organization’s purpose and goals in order to assess whether an organization, like the CNF, is engaged in terrorist activity.

23 I. & N. Dec. 936, 938 (B.I.A. 2006) (footnote omitted), *overruled on other grounds by* *Matter of Negusie*, 28 I. & N. Dec. 120 (A.G. 2020). The first BIA decision in *A-C-M-* was unpublished and therefore holds no precedential value. In the published *A-C-M-* decision, the BIA described the principle issue as whether “the statutory definition of ‘material support’ has any limitation based on the extent and type of support rendered.” 27 I. & N. Dec. at 305.

191. *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004).

192. *Id.*

193. *McAllister v. Att’y Gen. of the United States*, 444 F.3d 178, 186–87 (3d Cir. 2006).

Section begins by describing the INA's narrow existing self-defense exclusion and the challenges immigration adjudicators and pro se individuals will face in accurately applying this exclusion. It then dismantles general counterarguments to the application of self-defense in immigration cases. Lastly, this Section describes why the argument for a self-defense exclusion survives despite the limited success that the duress defense—another criminal law defense derived from the common law—has had in the same or similar contexts.

A. *The INA's Narrow Existing Self-Defense Exclusion*

When properly interpreted, a self-defense exclusion to the TRIG is, in fact, available under current immigration law. Before describing the specific actions that constitute “terrorist activity,” there is a crucial opening clause to the INA’s definition of “terrorist activity.” This clause states that “terrorist activity” is any activity “which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State).”¹⁹⁴ Force used in self-defense is justified conduct and thus does not constitute criminal or wrongful conduct.¹⁹⁵ Actions taken in self-defense are therefore *lawful* activity. As such, a noncitizen charged with engaging in terrorist activity must be allowed to demonstrate that the activity was lawful self-defense and therefore not terrorist activity.¹⁹⁶

In addition to the Third Circuit in *McAllister*, two other federal circuit courts appear to agree with this argument. In *FH-T v. Holder*, the IJ denied asylum and withholding of removal to the petitioner, an Eritrean citizen, because he had “engaged in terrorist activity” by providing material support to the Eritrean People’s Liberation Front, which the IJ deemed a Tier III organization.¹⁹⁷ The Seventh Circuit denied the applicant’s petition for review.¹⁹⁸ However, the court noted that its finding in the case “may well have been different,” i.e., in petitioner’s favor, had petitioner raised the argument presented in this Article: that the court cannot deem the petitioner’s activities “terrorist activity” because they were neither unlawful in the place where they were committed nor unlawful under U.S. law.¹⁹⁹ The Ninth Circuit agreed with this interpretation in *Khan v. Holder*.²⁰⁰ In *Khan*, the applicant, a citizen of India,

194. INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii).

195. *See supra* note 78.

196. In her article arguing that federal common law defenses should be used in immigration cases, Fatma Marouf wrote, “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 [a noncitizen] has engaged in unlawful conduct.” Fatma E. Marouf, *Invoking Federal Common Law Defenses in Immigration Cases*, 66 UCLA L. REV. 142, 181 (2019).

197. *FH-T v. Holder*, 723 F.3d 833, 835, 838 (7th Cir. 2013).

198. *Id.* at 836.

199. *Id.* at 838–42.

200. 584 F.3d 773, 781 (9th Cir. 2009) (“An action would be lawful within the meaning of § 1182(a)(3)(B)(iii) if the law of the country in question incorporates international law such that the conduct in question is no longer ‘unlawful’ under the country’s domestic law . . .”).

argued that the Jammu Kashmir Liberation Front, an organization dedicated to the establishment of an independent Kashmir, was not a terrorist organization.²⁰¹ Khan argued that the definition of “terrorist activity” in the INA incorporates international law and thus excludes legitimate armed resistance against military targets.²⁰² The Ninth Circuit disagreed, explaining that an action would be lawful under the INA’s definition of “terrorist activity” only “if the law of the country in question incorporates international law such that the conduct in question is no longer ‘unlawful’ under the country’s domestic law.”²⁰³ Because Khan made no argument that India’s domestic laws incorporated international law, his argument based purely on international law failed.²⁰⁴

In addition, USCIS, which adjudicates immigration benefits for noncitizens who are present in the United States, agreed with this argument at one point. A 2012 instructor’s guide on the TRIG states: “No exception for self-defense or repelling an attack. However, it must be illegal to qualify as terrorist activity. *Therefore, if one engages in self-defense in a lawful manner, then that activity does not fall within the definition of ‘terrorist activity.’*”²⁰⁵

But what laws must the adjudicator examine to determine whether an individual’s actions were indeed committed in self-defense? The Seventh Circuit mentioned only the laws of the country where the activities took place and “U.S. law.”²⁰⁶ However, the statute as currently written mentions *three* sets of laws: (1) the laws of the place where the activity was committed, (2) the laws of the United States (federal law), and (3) the laws of “any” state.²⁰⁷ An activity is “terrorist activity” if it is unlawful under *any* of these three sets of laws (technically any of these *fifty-two* sets of laws—the laws of the place where the activity was committed, federal law, or the laws of *any* of the fifty states). This means that an activity is *lawful* only if it is lawful under the laws of the place where it is committed, lawful under federal law, *and* lawful under the laws of each of the fifty states.

Applying the current self-defense exclusion presents a practical hurdle for adjudicators because while federal law and the laws of all fifty states recognize self-defense, the exact parameters of the defense vary from jurisdiction to jurisdiction, and may continue to evolve.²⁰⁸ Moreover, because the activity must be lawful under the laws of each of the fifty-two jurisdictions, an applicant will

201. *Id.* at 778.

202. *Id.* at 781.

203. *Id.*

204. *Id.*

205. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 53, at 12 (emphasis added). A 2017 instructor’s guide on TRIG states only that there is “no exception for self-defense or repelling an attack. However, the act must be illegal to qualify as terrorist activity.” U.S. CITIZENSHIP & IMMIGR. SERVS., TERRORISM-RELATED INADMISSIBILITY GROUNDS (TRIG): INSTRUCTOR GUIDE, BSC 234, at 22 (2017) (on file with author).

206. *FH-T v. Holder*, 723 F.3d 833, 835, 838–42 (7th Cir. 2013).

207. INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii).

208. *See supra* Part II.A–C.

be subject to the most restrictive elements of self-defense law. Thus, an entire defense may be unavailable because one jurisdiction continues to apply a restriction that all other jurisdictions have abandoned. The following list serves as a rough outline of the questions an adjudicator would need to resolve at a minimum in order to determine if federal law and the laws of every state justified the deadly force used in self-defense:

1. Was the force used deadly force?
 - a) Deadly force: force likely to cause death or great bodily injury.
2. If deadly force was used:
 - a) Did the actor believe that deadly force was necessary to prevent the use of deadly force by the aggressor? (subjective belief)
 - If yes, move to next question.
 - If no, actor's use of deadly force is not justified.
 - b) Was that belief reasonable? (objective belief)
 - If yes, move to next question.
 - If no, actor's use of force is not justified.
 - c) Was the aggressor's use of deadly force against the actor unlawful?
 - If yes, move to next question.
 - If no, actor's use of force is not justified.
 - d) Was the aggressor's use of deadly force against the actor imminent?
 - If yes, move to next question.
 - If no, actor's use of force is not justified.
 - e) Was the force used no more than reasonably necessary? (proportionality)
 - If yes, move to the next question.
 - If no, actor's use of force is not justified.
 - f) Did the actor recklessly place themselves in a situation where they would be forced to use deadly force?
 - If no, move to next question.
 - If yes, actor's use of force is not justified.
 - g) Could the actor have avoided the use of deadly force by surrendering possession of a thing to a person asserting claim of right thereto?
 - If no, move to next question.
 - If yes, actor's use of force is not justified.
 - h) Could the actor have avoided the use of deadly force by complying with a demand that they abstain from performing an act that they were not obliged to perform?

- If no, move to next question.
 - If yes, actor's use of force is not justified.
3. Did the actor attempt to retreat prior to using deadly force?
- a) If yes, actor's use of force is justified.
 - b) If no, move to next question.
4. If no attempt to retreat was made prior to using deadly force:
- a) Was the actor a police officer or private person assisting the officer at the officer's direction?
 - If no, move to next question.
 - If yes, actor's use of force without attempting to retreat is justified.
 - b) Was there a reasonable opportunity to escape?
 - If no, move to next question.
 - If yes, actor's use of force without attempting to retreat is not justified.
 - c) Could the actor have retreated with complete safety to themselves and to others?
 - If no, move to next question.
 - If yes, actor's use of force without attempting to retreat is not justified.
 - d) Was the actor at their home? ("castle" doctrine)
 - If no, move to next question.
 - If yes, was the other person a co-occupant?
 - If yes, actor's use of force without attempting to retreat is not justified.
 - If no, actor's use of force without attempting to retreat is justified.
 - e) Was the actor at their place of work?
 - If no, move to next question.
 - If yes, was the other person a co-worker and did the actor know that?
 - If yes, actor's use of force without attempting to retreat is not justified.
 - If no, actor's use of force without attempting to retreat is justified.
 - f) Was the actor engaged in lawful activity?
 - If yes, move to next question.
 - If no, actor's use of force without attempting to retreat is not justified.
 - g) Was the actor in a place they had a right to be?

- If yes, move to next question.
 - If no, actor's use of force without attempting to retreat is not justified.
- h) Was the actor the initial aggressor or did they provoke the situation?
- If yes, actor's use of force without attempting to retreat is not justified.
 - If no, actor's use of force is justified.

In addition, the adjudicator must determine whether the law of the country in which the activity was committed allows the use of deadly force in self-defense and, if so, the parameters of the defense and whether the actions of the actor met those parameters. Moreover, as suggested by the court in *Khan*, the adjudicator must also investigate whether the law of the country incorporates international law and, if so, determine whether the actor's use of force meets the parameters of self-defense under international law.²⁰⁹

Immigration adjudicators will likely find conducting such a painstaking analysis time-consuming and burdensome, particularly as most immigration cases are decided under difficult conditions and tremendous time-pressures. Refugee officers conduct adjudications overseas for short periods at a time and often under difficult working conditions, such as within refugee camps, during which they attempt to interview as many applicants as possible. Due to a huge increase in the number of asylum applicants and the expansion of expedited removal and credible-fear processes, the affirmative asylum system is stretched to its limits and faces a backlog of over 300,000 cases.²¹⁰ IJs work under perhaps the most difficult conditions and face the high pressure to decide cases quickly. Despite an unprecedented backlog of nearly one million cases in immigration court,²¹¹ a recent report by the American Bar Association's Commission on Immigration found that immigration courts remain under-resourced and overworked, and it described the entire immigration court system as "on the

209. See *supra* notes 202–204 and accompanying text.

210. DORIS MEISSNER, FAYE HIPSMAN, & T. ALEXANDER ALEINIKOFF, *MIGRATION POL'Y INST., THE U.S. ASYLUM SYSTEM IN CRISIS* 4, 15 (2018), <https://www.migrationpolicy.org/sites/default/files/publications/MPI-AsylumSystemInCrisis-Final.pdf> [<https://perma.cc/RMR4-9PXH>] ("In recent years, a confluence of factors—including an increase in the number of asylum applications, as well as the expansion of expedited removal and credible-fear processes at the U.S.-Mexico border—has once again put staggering weight on the system."); *Asylum in the United States: How the Case Backlog Grew to Hundreds of Thousands*, USAFACTS (May 5, 2019), <https://usafacts.org/articles/asylum-united-states-how-case-backlog-grew-hundreds-thousands/> [<https://perma.cc/RQ6R-UB6U>].

211. EXEC. OFF. FOR IMMIGR. REV., *EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ADJUDICATION STATISTICS* (2019), <https://www.justice.gov/eoir/page/file/1060836/download> [<https://perma.cc/M23P-MTBF>] (indicating that 987,274 cases remained pending as of the end of fiscal year 2019).

brink of collapse.”²¹² Requiring immigration adjudicators to engage in an analysis that involves examining *fifty-two* sets of laws under these pressures will inevitably lead to inaccurate adjudications.

More importantly, such a complicated analysis is a nearly impossible undertaking for pro se individuals, who currently make up the vast majority of respondents in immigration court. Nationwide, only 37 percent of non-detained individuals and 14 percent of detained individuals have legal representation in removal proceedings based on data from 2007 to 2012.²¹³ Examining fifty-two sets of laws is a particularly onerous burden to place on a pro se individual as once the government makes a threshold showing that a terrorism bar may apply, the burden shifts to the noncitizen to rebut it.²¹⁴

The INA’s current self-defense exclusion not only requires a time-consuming and burdensome analysis, but it is also unduly narrow because it covers self-defense law under both federal law and the laws of all fifty states. For example, under the current exclusion, an actor who is attacked at home by a co-occupant has a duty to retreat prior to using deadly force, although it appears that only one state continues to impose such a requirement.²¹⁵ Most jurisdictions abandoned this requirement after recognizing that it adversely impacts victims of domestic violence.²¹⁶ Globally, domestic violence remains a serious problem considering one in three women have experienced domestic violence in their lifetime and 38 percent of murders of women are committed by a male intimate partner.²¹⁷ Barring noncitizens from asserting self-defense without retreating when using deadly force because a minority jurisdiction continues to disallow it does not seem to serve a purpose. After all, immigration law is federal law, and federal law itself defines when the force used in self-defense is justified.

212. COMM’N ON IMMIGR., AM. BAR ASS’N, REFORMING THE IMMIGRATION SYSTEM 2-3 (2019),

https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf [<https://perma.cc/B3PB-UZHE>].

213. INGRID EAGLY & STEVEN SHAFTER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 2 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [<https://perma.cc/D3MJ-35Z3>].

214. See *Budiono v. Lynch*, 837 F.3d 1042, 1048 (9th Cir. 2016) (“[W]e require a threshold showing of particularized evidence of the bar’s applicability before placing on the applicant the burden to rebut it.”).

215. See N.D. CENT. CODE § 12.1-05-07(2)(b)(2) (2012) (“An individual is not required to retreat within or from that individual’s dwelling . . . unless the individual . . . is assailed by another individual who the individual knows also dwells . . . there.”); *State v. Leidholm*, 334 N.W.2d 811, 821 (N.D. 1983) (finding no issue with the requirement that an actor must retreat prior to using deadly force if attacked within her home by a co-occupant).

216. See *supra* note 138 and accompanying text.

217. *Violence Against Women*, WORLD HEALTH ORG. (Nov. 29, 2017), <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> [<https://perma.cc/7M9B-R93V>].

B. Self-Defense Should Apply in Civil Immigration Cases

One argument against asserting the right to self-defense in immigration cases is that self-defense is a doctrine of criminal law, and immigration cases have long been considered civil rather than criminal in nature.²¹⁸ Based on the distinction between civil and criminal cases, rights guaranteed to criminal defendants, such as the right to counsel that the Sixth Amendment provides, do not apply to individuals in removal proceedings.²¹⁹ In addition, as a defense derived from the common law, one could argue that Congress intended to exclude the defense in immigration cases because it did not specifically address self-defense in the INA. These arguments fail because (1) self-defense is more than just a criminal law defense—it is an inherent or natural right, and a civil defense; (2) courts have applied other common law doctrines that Congress did not explicitly mention in the INA in immigration cases; and (3) there is simply no moral reason for denying noncitizens the right to assert self-defense to TRIG charges.

1. Self-Defense Should Apply in Immigration Cases Because, as an Inherent or Natural Right and a Civil Defense, It Is Distinct from Other Criminal Law Defenses.

First, the right to self-defense is distinct from other criminal law protections, such as the Sixth Amendment's right to counsel, because it has been described by state constitutions and by courts as an inherent or natural right. The Supreme Court itself has suggested that self-defense is a right that "pre-exist[s]" the written Constitution.²²⁰ Noncitizens, simply by virtue of their *humanity*, have the right to use self-defense when confronted with unlawful force. Noncitizens should also have the right to assert self-defense to justify the use of force when confronted with charges under the INA because such charges can lead to results that impact their basic rights as human beings. These results can include banning an individual from entering the United States, such as a refugee seeking lifesaving protection from persecution. They can also include permanently banishing an individual from the United States and separating them from family, such as a lawful permanent resident (LPR) who calls this country their home. LPRs, having passed several immigration hurdles to achieve their status, are "invited to become part of our community, to sink roots—permanent roots—and to

218. See, e.g., *Immigr. & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry . . . Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.")

219. See, e.g., *id.* at 1038–39.

220. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). The Supreme Court in *Heller* was specifically discussing the right to keep and bear arms for self-defense; however, others have argued that "the 'primary' right of self-defense predates the Constitution as much as the 'auxiliary' right to have arms for that purpose," see Miller, *supra* note 84, at 85 n.6.

chart out life plans in reliance on enduring rights to remain.”²²¹ Moreover, the right to seek asylum and to family integrity are universally recognized human rights²²² that are also acknowledged under our own federal law.²²³ Thus, it makes little sense to deny noncitizens the right to assert self-defense to charges under the INA because removal proceedings are civil rather than criminal.

Second, the argument that criminal law protections do not apply to removal proceedings because they are civil in nature fails because self-defense is not only a doctrine of criminal law; it is also available as a defense in civil proceedings.²²⁴

Third, even if self-defense was a purely criminal law defense, courts have applied other criminal law defenses in immigration cases. For example, in *Keathley v. Holder*, the Seventh Circuit found that noncitizens could assert the entrapment by estoppel defense in removal proceedings.²²⁵ A state official who knew that Keathley was not a U.S. citizen asked her if she would like to vote, and she said “yes.”²²⁶ The state then sent Keathley a voter registration card, and she voted in a federal election.²²⁷ An IJ ordered Keathley removed because he found that she violated 18 U.S.C. § 611 by unlawfully voting.²²⁸ In immigration court, Keathley argued that although she had voted, she did not violate § 611 because the state officials’ actions gave her the defense of entrapment by estoppel.²²⁹ However, the IJ and the BIA refused to consider her argument because both believed that entrapment by estoppel, as a doctrine of criminal law, was irrelevant in immigration proceedings.²³⁰ The Seventh Circuit disagreed. The court explained that because unlawfully voting makes a noncitizen inadmissible, the IJ had to determine whether Keathley violated the relevant

221. David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 102 (“Historically and psychologically, admission in [the LPR] category amounts to an invitation to full membership in the society and eventually the polity. Immigrants—that is, [noncitizens] selected for lawful permanent resident status—pass through the most rigorous screening our immigration system imposes. But having done so, they are then invited to become part of our community, to sink roots—permanent roots—and to chart out life plans in reliance on enduring rights to remain.”).

222. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 12, 14.

223. See, e.g., INA § 208(a)(1), 8 USC § 1158(a)(1) (providing that any noncitizen “who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such [noncitizen’s] status, may apply for asylum”); *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (“[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”).

224. See *Forell*, *supra* note 76. Unlike other bars in the INA, the INA’s terrorism bars do not require a conviction for any offense, so re-adjudication of a self-defense claim that a judge in a criminal or civil case previously raised and decided will usually not be an issue. In fact, given the breadth of the INA’s terrorism bars and the fact that they do not align with common conceptions of terrorism, the immigration case will likely be the first time the individual has been confronted with an accusation of having engaged in terrorism and thus the first time they are asserting self-defense to justify their actions.

225. 696 F.3d 644, 646 (7th Cir. 2012).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

criminal statute, “[a]nd 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.”²³¹

The Seventh Circuit then went on to explain how self-defense is also relevant in immigration cases:

Suppose a statute declares that murder is a crime and defines murder as the intentional killing of a human being. A person who kills in self-defense, however, is not guilty of murder. A provision in the Immigration and Nationality Act withholding benefits from [a noncitizen] who has “committed murder” requires the agency to decide, not only whether the [noncitizen] killed someone, but also whether the killing was justified (and thus not “murder”).²³²

The court remanded the case to allow the IJ to make factual findings relating to the entrapment by estoppel defense.²³³

2. *Self-Defense Should Apply in Immigration Cases Because It Is a Well-Established Common Law Doctrine and Applying It Would Be Consistent with the Goals of the INA.*

Federal courts have applied other common law doctrines in immigration cases, despite the fact that the INA does not specifically address these doctrines. In *Duvall v. Attorney General of the United States*, the Third Circuit held that noncitizens can assert the doctrine of collateral estoppel against the government in removal proceedings.²³⁴ Although the INA does not explicitly mention collateral estoppel or expressly bar the government from relitigating issues previously decided, the court explained:

The absence of discussion cannot be viewed as dispositive. Congress is expected to legislate against the backdrop of well-established common law principles. An accepted common law doctrine should be implied in a statutory scheme, despite the absence of express authorization, if application of the doctrine is consistent with the structure and purpose of that scheme.²³⁵

Applying this standard to the present case, the court first noted that the Supreme Court has recognized collateral estoppel as a well-established common law principle.²³⁶ The court further found that the structure of the INA is consistent

231. *Id.*

232. *Id.*

233. *Id.* at 646–47. Other criminal protections, such as the rule of lenity, which requires the court to construe ambiguities in criminal statutes in favor of the defendant, have also been imported into the immigration context because of the harshness of deportation. See Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 519–25 (2003) (describing the origin, scope, and constitutional status of the rule of lenity in immigration cases).

234. 436 F.3d 382, 390 (3d Cir. 2006).

235. *Id.* at 387 (citation omitted).

236. *Id.*

with collateral estoppel. Under the INA, the court explained that the government bears the burden of proving that an individual is subject to removal by clear and convincing evidence, but:

Imposition of this burden would be rendered largely meaningless if the INA is not interpreted to incorporate principles of collateral estoppel. Failure to satisfy the burden of proof at one hearing before one immigration judge would have no effect on the government's ability to bring successive proceedings in front of successive immigration judges. The same evidence could be introduced and the same witnesses could be interrogated, over and over, until the desired result is achieved.²³⁷

Taking all of this together, the court concluded that collateral estoppel should apply in immigration cases because “[i]t would require, consistent with the INA, that the [government] present all available evidence against the individual during a single hearing.”²³⁸

Therefore, like the doctrine of collateral estoppel, the common law right to self-defense should apply in immigration cases, although the INA fails to explicitly mention its availability as a defense. As discussed above in Part II.B., the Supreme Court has described self-defense as “deeply rooted in this Nation’s history and tradition.”²³⁹ Thus, like the court found in *Duwall* with regard to the doctrine of collateral estoppel, self-defense is a well-established common law principle.

Permitting a self-defense exclusion to TRIG is also consistent with the INA’s goals, while failing to apply it would be inconsistent with the INA’s asylum and refugee provisions. The court in *Duwall* came to its conclusion because it found that applying collateral estoppel in immigration cases is consistent with the INA, while failing to apply it would be inconsistent with at least one INA provision.²⁴⁰ The same can be said here. Asylum and refugee laws seek to protect noncitizens who have suffered persecution, or have a well-founded fear of persecution, in their home countries on account of a protected ground and whose governments are unable or unwilling to protect them.²⁴¹ The TRIG seek to protect the nation by preventing the entry of noncitizens who have

237. *Id.* Like the Third Circuit, other courts of appeals have found that the common law doctrines of estoppel apply in immigration cases. *See, e.g.,* *Oyeniran v. Holder*, 672 F.3d 800, 806 (9th Cir. 2012) (stating that it is “beyond dispute that the doctrine of collateral estoppel (or issue preclusion)” applies in immigration cases); *Hamdan v. Gonzales*, 425 F.3d 1051, 1059 (7th Cir. 2005) (stating that *res judicata* does apply to immigration proceedings). The BIA has been reluctant to state that estoppel applies in immigration cases. *See, e.g.,* *Matter of 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.”). Other common law defenses have also been applied in immigration cases. *See* Marouf, *supra* note 196, at 158–75 (describing various common law defenses that have been applied in immigration cases).

238. *Duwall*, 436 F.3d at 388.

239. *McDonald v. City of Chicago*, 561 U.S. 742, 767–68 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

240. *Duwall*, 436 F.3d at 387.

241. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

engaged in terrorism or are likely to engage in terrorism after entry.²⁴² Allowing a noncitizen who has applied for asylum or refugee status to assert self-defense to a charge of engaging in terrorism would not subvert the goals of the TRIG. This is because there are already other mechanisms in place within immigration law to screen out potential security threats.²⁴³ Meanwhile, not permitting a self-defense exclusion to the TRIG would undermine the INA's asylum and refugee protections by requiring persecuted individuals to face an impossible choice: use self-defense to survive the persecution but lose the chance of seeking safety in the United States, or forgo the right to self-defense and face possible death or serious bodily injury but keep the door to safety open (if they live past the encounter). Permitting a self-defense exclusion would serve both goals by keeping asylum and other crucial immigration benefits available to those who merit them while simultaneously excluding those who pose security threats.

3. *Self-Defense Should Apply in Immigration Cases Because There Is No Principled Reason to Deny Noncitizens the Right to Assert the Defense.*

Finally, there is simply no principled reason to deny noncitizens the right to present a self-defense justification argument with respect to acts that may otherwise qualify as “terrorist activity” in the immigration context. Federal law and the laws of every state universally recognize and permit self-defense as a complete defense in both civil and criminal proceedings. Discussing the importance of the defense, one scholar wrote, “Abolition of the defense – ‘thereby leaving one a Hobson’s choice of almost certain death through violent attack now or statutorily mandated death [or life imprisonment] through trial and conviction of murder later’ – seems impossible to imagine. Indeed, if a state legislature *were* to abolish the defense of self-defense, it would likely violate the

242. The House Judiciary Committee’s report on the Immigration Exclusion and Deportation Amendments of 1988, which included the definitions of “engage in terrorist activity” and “terrorist activity” that the Immigration Act of 1990 later adopted, H.R. 4427, 100th Cong. § 2(a) (1988), explained that “[t]he bill combats international and domestic terrorism by excluding from admission those who have engaged in terrorist activities or who are likely to engage in such activity after entry to the United States.” H.R. REP. NO. 100-882, at 4, 29 (1988).

243. Refugees, for example, go through a rigorous years-long vetting process that includes checks by U.S. domestic and international intelligence agencies, including the National Counterterrorism Center and the U.S. Intelligence Community. See *Rigorous Refugee Vetting Process for the U.S.*, CTR. FOR VICTIMS OF TORTURE, <https://www.cvt.org/Refugee-Vetting-Process> [<https://perma.cc/T4P9-V5W3>]. In addition, an actual terrorist cannot successfully raise self-defense to justify their actions. As described above in Part II.C.5, aggressors or those who have provoked the use of force against themselves may not raise self-defense to justify their actions. Moreover, the force used against the person who invokes the defense must have been “unlawful.” See *supra* Part II.C.1. A victim or a law enforcement official who uses force against a terrorist (e.g., to stop the attack or to effect an arrest or detention of the terrorist) would be using *lawful* force and, therefore, the terrorist would not be able to assert self-defense to justify force used against these individuals. See *supra* Part II.C.1.

United States Constitution.”²⁴⁴ A separate conceptualization of self-defense under immigration law—one requiring noncitizens to submit passively to unlawful force used against them or lose the chance to seek protection or remain in the United States—is patently unfair. As described above, subjecting noncitizens to this impossible choice subverts, rather than furthers, immigration law policy.

C. Self-Defense Should Apply in Immigration Cases Although the Duress Defense Has Had Limited Success

Another argument one could raise against a self-defense exclusion to the TRIG is the fact that a duress defense—a criminal law defense rooted in the common law and often compared to self-defense—to the “material support” bar of the TRIG was unsuccessful in the BIA’s *Matter of M-H-Z-* decision.²⁴⁵ The AG also recently vacated the BIA’s *Matter of Negusie* decision in which it found a limited duress exception to the persecutor bar.²⁴⁶ This Section will first summarize the decisions in *M-H-Z-* and *Negusie* and will then explain why the argument for a self-defense exclusion is morally and statutorily stronger than the argument supporting a duress exception.

1. The BIA’s Duress Decisions

For years advocates, scholars, and even legislators argued for an implied duress exception to the “material support” bar at INA section 212(a)(3)(B)(iv)(VI).²⁴⁷ The “material support” bar deems inadmissible any actor who has committed “an act that the actor knows, or reasonably should know, affords material support” to any individual who the actor knows, or reasonably should know, has committed or plans to commit “terrorist activity,” or to a terrorist organization, or to any member of such an organization.²⁴⁸ *Matter of M-H-Z-*, a precedential BIA decision, finally declared that the INA does not include an implied exception for an individual who has provided material support under duress.²⁴⁹

M-H-Z-, a Colombian hotelier, applied for asylum based on her fear of the FARC.²⁵⁰ She received threatening messages from the FARC demanding goods

244. DRESSLER, *supra* note 80, at 223 (quoting *Griffin v. Martin*, 785 F.2d 1172, 1186 n.37 (4th Cir.), *aff’d and withdrawn*, 795 F.2d 22 (4th Cir. 1986) (en banc)).

245. 26 I. & N. Dec. 757, 761–64 (B.I.A. 2016).

246. *Matter of Negusie*, 28 I. & N. Dec. 120, 120–21 (A.G. 2020).

247. See generally Gregory F. Laufer, *Admission Denied: In Support of a Duress Exception to the Immigration and Nationality Act’s “Material Support for Terrorism” Provision*, 20 GEO. IMMIGR. L.J. 437 (2006); *The “Material Support” Bar: Denying Refuge to the Persecuted?: Hearing Before the Subcomm. on Hum. Rts. & the L. of the S. Comm. on the Judiciary*, 100th Cong. 119–20 (2007) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary).

248. INA § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(IV).

249. 26 I. & N. Dec. at 761–64.

250. *Id.* at 757–58.

and money.²⁵¹ After receiving a number of threats, she acceded to their demands.²⁵² Every three months, M-H-Z- supplied products that the FARC requested.²⁵³ She also housed government officials at her hotel, which she believed resulted in more serious threats against her by the FARC.²⁵⁴ In immigration court, M-H-Z- applied for asylum, withholding of removal, and relief under the CAT.²⁵⁵ The IJ denied her applications for asylum and withholding after finding that M-H-Z- afforded material support to the FARC, a terrorist organization.²⁵⁶ On appeal, the BIA agreed with the IJ but remanded the case so that the IJ could make an explicit determination of whether, in the absence of the material support bar, M-H-Z- would otherwise be eligible for relief, which would allow her to request a waiver of the material support bar from DHS.²⁵⁷ The IJ subsequently held that but for the material support bar, M-H-Z- would be eligible for asylum.²⁵⁸ M-H-Z- filed a petition for review with the Second Circuit.²⁵⁹ The Second Circuit remanded the case to the BIA to determine whether the INA contained an implied exception to the material support bar for those whose support was supplied under duress.²⁶⁰

Because the INA is silent as to whether a duress exception is implicit in the material support bar, the BIA looked to the language and design of the statute as a whole to determine its legislative purpose.²⁶¹ The BIA noted that the INA contains a provision rendering any individual inadmissible “who is or has been a member of or affiliated with the Communist or any other totalitarian party,” but Congress included an explicit exception to that provision for an individual who establishes that “the membership or affiliation is or was involuntary.”²⁶² Thus, the BIA concluded that if Congress had intended to make duress an exception for individuals who provided material support to a terrorist organization, it would have enacted a similar provision.²⁶³ The BIA found that Congress’s creation of a waiver to avoid the harsh consequences of the bar further undermined the case for an implied duress exception.²⁶⁴ The applicant argued that because duress may be a defense to negate culpability in the criminal context, a duress exception should similarly apply to the material support bar.²⁶⁵

251. *Id.* at 758.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 759. For a discussion of the waiver process for individuals in removal proceedings, see *supra* Part I.C.

258. *Matter of M-H-Z-*, 26 I. & N. Dec. at 759.

259. *Id.*

260. *Id.*

261. *Id.* at 761.

262. *Id.* (quoting INA § 212(a)(3)(D)(i), (ii), 8 U.S.C. § 1182(a)(3)(D)(i), (ii)).

263. *Id.*

264. *Id.*

265. *Id.* at 763.

The BIA dismissed this argument because “unlike criminal proceedings, immigration proceedings are civil in nature” and “even in criminal cases, duress is not always a defense.”²⁶⁶

A few years later, in *Matter of Negusie*, the BIA found that there is an implied duress exception to the persecutor bar.²⁶⁷ Negusie was forcefully conscripted into the Eritrean military and subsequently imprisoned for two years because of his refusal to fight against fellow Ethiopians.²⁶⁸ While incarcerated, he was subjected to forced labor, beaten, and exposed to the hot sun.²⁶⁹ He was then forced to serve as an armed guard in a prison operated by the Eritrean military.²⁷⁰ His duties involved guarding prisoners to make sure they did not escape, including prisoners who were placed in the hot sun as punishment.²⁷¹ On at least two occasions, Negusie disobeyed orders and assisted prisoners, for which he received verbal reprimands and death threats from his superiors.²⁷² Two of his friends were executed after they tried to escape duty as guards.²⁷³ Negusie managed to escape and fled to the United States.²⁷⁴ He applied for asylum, withholding of removal, and relief under the CAT.²⁷⁵ The IJ denied his application for asylum and withholding after finding that Negusie was subject to the persecutor bar because he guarded prisoners who were tortured and left to die on account of a protected ground.²⁷⁶ The BIA dismissed Negusie’s appeal, holding that it was immaterial that he was forced to act as a prison guard.²⁷⁷ The Fifth Circuit affirmed the BIA’s decision, but the Supreme Court reversed and remanded to the BIA.²⁷⁸ The Supreme Court held that the INA’s silence with regard to a duress exception to the persecutor bar was not conclusive and that the statute was ambiguous on that point.²⁷⁹

On remand the BIA recognized a narrow duress exception, finding such an exception reasonable because it fulfilled the purposes of both the persecutor bar and the overall purposes of the Refugee Act of 1980,²⁸⁰ the 1951 United Nations Convention Relating to the Status of Refugees²⁸¹ (“the Convention”), and the

266. *Id.* at 763–64.

267. 27 I. & N. Dec. 347, 347–63 (B.I.A. 2018), *vacated*, 28 I. & N. Dec. 120 (A.G. 2020).

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 348, 352.

273. *Id.* at 352.

274. *Id.* at 349.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. Pub L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C. and 22 U.S.C.).

281. *Opened for signature* July 28, 1951, 189 U.N.T.S. 137.

1967 United Nations Protocol Relating to the Status of Refugees²⁸² (“the Protocol”).²⁸³ The BIA first found that the INA’s persecutor bar provision parallels Article 1F(a) of the Convention and that Congress intended the bar to be interpreted in accord with predecessors to the Convention.²⁸⁴ The BIA then explained that Article 1F(a) excludes individuals from protection who have committed “a crime against peace, a war crime, or a crime against humanity” and states that these three crimes are defined in “international instruments drawn up to make provision in respect of such crimes.”²⁸⁵ The BIA went on to find that Article 1F(a)’s reference to the definitions of “war crimes” and “crimes against humanity” indicated that the drafters of the Convention chose the term “crime” intentionally and intended to include international criminal law concepts such as duress.²⁸⁶ The BIA further found that precluding a duress defense would have serious adverse consequences, where an individual, such as a child soldier, “who is otherwise fully eligible for asylum or withholding of removal would be barred from relief for conduct that he or she finds completely abhorrent but that was undertaken wholly under severe duress, such as imminent threat of loss of life or subjection to torture.”²⁸⁷

Based on formulations of the duress defense from U.S. criminal law and international law, the BIA held that to meet the minimum threshold requirements for a duress defense to the persecutor bar, an applicant must establish that they “(1) acted under an imminent threat of death or serious bodily injury to [themselves] or others; (2) reasonably believed that the threatened harm would be carried out unless [they] acted or refrained from acting; (3) had no reasonable opportunity to escape or otherwise frustrate the threat; (4) did not place [themselves] in a situation in which [they] knew or reasonably should have known that [they] would likely be forced to act or refrain from acting; and (5) knew or reasonably should have known that the harm [they] inflicted was not greater than the threatened harm to [themselves] or others.”²⁸⁸ The BIA stressed that this standard “is intended to apply only in rare and extraordinary circumstances,” and ultimately found that Negusie himself failed to meet it.²⁸⁹ The BIA reasoned that the death threats Negusie received did not constitute an *imminent* threat of death or serious bodily injury and that he had had a reasonable opportunity to escape or otherwise avoid guarding the prisoners.²⁹⁰

In October 2018, the AG referred the BIA’s *Negusie* decision to himself to review “[w]hether coercion and duress are relevant to the application of the

282. *Opened for accession* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

283. 27 I. & N. Dec. at 353.

284. *Id.* at 357.

285. *Id.* at 355.

286. *Id.* at 358.

287. *Id.* at 360.

288. *Id.* at 363.

289. *Id.* at 363, 368.

290. *Id.*

Immigration and Nationality Act’s persecutor bar,”²⁹¹ a move most advocates saw as the end of the exception.²⁹² In November 2020, advocates’ fears were confirmed when the AG issued a decision vacating the BIA’s *Negusie* decision, after finding that the persecutor bar contains no exception for conduct committed under duress or coercion.²⁹³ Like the BIA in *M-H-Z*, the AG partially based his decision on the argument that if Congress had wanted to exclude such conduct it would have done so explicitly, as it has done in other provisions in the INA.²⁹⁴

2. *The Argument for a Self-Defense Exclusion Survives Although the Duress Defense Has Failed or Faltered.*

One must return to the roots of the two defenses to understand why the argument that a noncitizen should have a right to assert self-defense to charges under the INA is stronger than the argument for a duress defense. Under criminal law, self-defense is a “justification” defense, while duress is an “excuse” defense; a distinction that has particular importance here.²⁹⁵ Professor George Fletcher succinctly described the importance of this distinction:

Claims of justification concede that the definition of the offense is satisfied, but challenge whether the act is wrongful; claims of excuse concede that the act is wrongful but seek to avoid the attribution of the act to the actor. A justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a concededly wrongful act.²⁹⁶

Professor Joshua Dressler described how justified actions imply that no social harm has occurred, while excused activity concedes social harm:

A defendant who raises a justification defense in a criminal prosecution says, in essence, “I did nothing wrong for which I should be punished.” To say that conduct is justified is to suggest that something which ordinarily would be considered wrong or undesirable—i.e., that would constitute a “social harm,”—is, in light of the circumstances, socially acceptable or tolerable. A justification, in other words, negates the social harm of an offense.

291. *Matter of Negusie*, 27 I. & N. Dec. 481, 481 (A.G. 2018).

292. *See, e.g.*, Paul Wickham Schmidt, *Gonzo’s World: Bogus “Court System” Revealed in All of Its Disingenuous Ingloriousness — Sessions Moves to Trash the “Limited Duress” Defense for Asylees Before Trump Turns Him Back Into a Pumpkin (After Halloween) — Why Have a BIA if It Is Only Permitted to Decide Major Issues in Favor of the DHS Position?* — *Matter of Daniel Girmai NEGUSIE*, 27 I&N Dec. 481 (A.G. 2018), IMMIGR. COURTSIDE (Oct. 18, 2018), <https://immigrationcourtside.com/2018/10/18/gonzos-world-bogus-court-system-revealed-in-all-of-its-disingenuous-ingloriousness-sessions-moves-to-trash-the-limited-duress-defense-for-asylees-before-trump/> [https://perma.cc/9Z5E-D4RH].

293. *Matter of Negusie*, 28 I. & N. Dec. 120, 120–21 (A.G. 2020).

294. *Id.* at 132–33.

295. *See* Joshua Dressler, Foreword, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1167–74 (1987) (examining the differences between justifications and excuses and arguing that the distinction between the two is important).

296. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 10.1 (2000).

An excuse is in the nature of a claim that although the actor has harmed society, [they] should not be blamed or punished for causing that harm. The criminal defendant who asserts an excusing defense says, in essence, "I admit, or you have proved beyond a reasonable doubt, that I did something I should not have done, but I should not be held criminally accountable for my actions." Whereas a justification negates the social harm of an offense, an excuse negates the moral blameworthiness of the actor for causing the harm.²⁹⁷

Finally, Professor Marcia Baron described the difference between the two defenses bluntly when she wrote:

[D]uress is "only an excuse," and this . . . brings me to a point that I hope is uncontroversial: "justified" and "excused" are not quite on a par, morally. Given a choice between having some action of mine deemed justified and having it deemed excused, I would rather that it be deemed justified.²⁹⁸

Self-defense is thus morally superior to the duress defense because successful assertion of self-defense proves that the defendant's actions were socially acceptable, and they committed no social harm. Duress, while negating the defendant's blameworthiness, means some social harm has occurred. From a policy standpoint, Congress may have wished to exclude individuals who have committed acts under duress and not those who have acted in self-defense for exactly this reason.

Self-defense is not only morally superior to the duress defense; it is also distinct from it in other ways that reveal its superiority over duress. First, every jurisdiction in the United States permits the use of force, even deadly force, in self-protection, and federal and state laws have described the right to self-defense as an inherent, natural, or inalienable right.²⁹⁹ Second, self-defense is so fundamental that successful assertion of the defense results in the complete exoneration of even murder.³⁰⁰ Third, as a justification defense, the right to self-defense may be universalized; if an individual is in a situation where they have the right to use force in self-defense, others may use force on their behalf.³⁰¹

By contrast, the duress defense has not been described as an inherent right nor has it been fully embraced. Describing the history of the duress defense, one scholar wrote, "Our society has a love-hate relationship with the criminal law defense of duress. Although 'of venerable antiquity,' the defense was frequently condemned as illegitimate, narrowly defined at common law, comparatively

297. Dressler, *supra* note 295, at 1161–63 (footnotes omitted).

298. Baron, *supra* note 295, at 389.

299. See *supra* Part II.B.

300. WEAVER ET AL., *supra* note 91, at 459.

301. FLETCHER, *supra* note 296, § 10.1.1, at 761–62 ("Claims of justification lend themselves to universalization. That the doing is objectively right (or at least not wrongful) means that anyone is licensed to do it. The only requirement is that the act be performed for the justificatory purpose Excuses, in contrast, are always personal to the actor; one person's compulsion carries no implications about whether third parties will be excused if they act on behalf of the endangered defendant.").

rarely invoked in criminal prosecutions, and not often successfully pleaded.”³⁰² In addition, duress is not a defense to an intentional killing under the common law, by statute in seventeen states today, and by case law in fourteen additional states³⁰³ (the BIA specifically noted in *M-H-Z-* that duress is not always a defense in criminal cases).³⁰⁴ Therefore, a defendant who kills another even under threat of death to themselves is still guilty of murder. Lastly, as an excuse defense, duress is personal to the actor and others cannot assert it on their behalf.³⁰⁵

On the whole, self-defense is simply a better and stronger defense than the duress defense—it is morally superior, fully embraced by all jurisdictions, described as essential, capable of universalization, and results in complete exoneration of even the worst crime one could commit. When self-defense and duress are viewed in this light, the fact that the duress defense has had limited success becomes less relevant to the question of whether an individual has a right to assert self-defense to charges under the INA. Finally, as described above, unlike the duress defense, self-defense does not have to be implied or read into the statute. The INA as currently written already excludes self-defense from the definition of “terrorist activity” under the TRIG. Therefore, the BIA’s argument in *M-H-Z-* that if Congress wanted to include a duress exception, it would have done so explicitly,³⁰⁶ does not apply to the self-defense exclusion.

While the INA does currently exclude actions taken in self-defense from the definition of “terrorist activity,” the exclusion is far from perfect as described in Part III.A. The next Section describes reforms to the TRIG that will better protect noncitizens who have used force in self-defense.

IV.

RECOMMENDATIONS FOR REFORM

Given the burdensome and narrow nature of the INA’s current self-defense exclusion and the pressures under which immigration adjudicators work, accurate application of the existing exclusion will prove difficult. Furthermore, the fact that “terrorist activity” can be any activity that is unlawful under the laws of *any* state produces unfair results for at least one particularly vulnerable population: domestic violence victims. This Section proposes reforms, both immediate and permanent, to ensure that no noncitizen is denied immigration relief for exercising their inherent right to self-defense. To tackle the problem under existing law, USCIS, which houses the Refugee Affairs Division, the

302. Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1331–32 (1989) (footnotes omitted).

303. Joshua Dressler, *Duress*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 269, 272 (John Deigh & David Dolinko eds., 2011); 2 CRIMINAL PRACTICE MANUAL § 42:3 (2020).

304. *Matter of M-H-Z-*, 26 I. & N. Dec. 757, 761–64 (B.I.A. 2016).

305. *See supra* note 301.

306. 26 I. & N. Dec. 757, 761 (B.I.A. 2016).

Asylum Office, and Field Offices where adjustment of status applications are adjudicated, and the Executive Office for Immigration Review (EOIR), which houses the immigration courts and the BIA, should apply the self-defense exclusion currently written into the INA. However, because of the limitations of the exclusion, the Secretary of Homeland Security should issue a TRIG exemption for force used in self-defense. To fully and permanently protect noncitizens who have used force in self-defense, Congress should act to amend the definition of “terrorist activity” and include a definition of self-defense within the INA based on the MPC and international law.

A. Immediate Solutions

Because a finding that a noncitizen is inadmissible under the TRIG can lead to dire consequences,³⁰⁷ the government should implement two solutions to immediately protect noncitizens who have used force in self-defense. First, immigration adjudicators should apply the law as currently written to find that self-defensive force does not qualify as “terrorist activity.” Second, the Secretary of Homeland Security should issue a TRIG exemption explicitly exempting self-defensive force from the definition of “terrorist activity.”

As a starting point, immigration adjudicators should interpret the current INA properly to find that self-defense is already excluded from the definition of “terrorist activity.” To ease the burden of this process and to ensure greater accuracy in adjudications, the EOIR and USCIS should dedicate staff to compile self-defense laws under federal law, the laws of each state, and the laws of the countries from where the majority of their applicants come. Based on these laws, EOIR and USCIS staff should prepare and disburse a list of questions, similar to the one in Part III.A., that will guide adjudicators through the self-defense requirements of each relevant jurisdiction. The staff should update this list of questions regularly to keep up with changes in the law.

Because the existing self-defense exclusion is so narrow and burdensome to apply, a better immediate solution would be for the Secretary of Homeland Security to exercise their discretionary authority under INA section 212(d)(3)(B)(i) to grant an exemption from the TRIG to applicants who have committed acts in self-defense. The government has used the waiver scheme as the primary solution thus far to deal with the overbreadth of the terrorism bars. In fact, various Secretaries of Homeland Security under both Democratic *and* Republican administrations have already granted a number of exemptions.³⁰⁸ The promulgation of a TRIG exemption would be most helpful for the Rohingya villagers and Yazidi women described in the Introduction because refugee

307. See *supra* Part I.B.

308. See *supra* Part I.C.

officers (ROs), who have the authority to grant TRIG exemptions,³⁰⁹ would decide their applications for refugee status.

However, a TRIG exemption solution is imperfect for a number of reasons. First, the Secretary generally grants an exemption only after many noncitizens have been denied relief or TRIG issues have indefinitely delayed their cases. Furthermore, even after the Secretary issues an exemption, it can take years for DHS to grant a waiver to an applicant.³¹⁰ Second, the BIA has viewed the Secretary's exercise of exemption authority as proof that the INA does not already cover the exempted activity. For example, in *Matter of A-C-M-*, the BIA found that the existence of a waiver for insignificant material support was "clear evidence that the DHS regards the [material support] bar as extending to the provision of even 'insignificant' support."³¹¹ Thus, the Secretary's promulgation of a self-defense *exemption* may cause IJs to believe that the INA does not have a self-defense *exclusion* that they may apply. Noncitizens in removal proceedings (such as Adam or Enders) would be forced to wait for a final removal order before applying for a self-defense exemption. This is because DHS's current policy requires a final removal order to consider an exemption for those in proceedings before the EOIR.³¹² Finally, the current or a later Secretary can always rescind the exemption, once again leaving noncitizens at risk of losing immigration relief for acts committed in self-defense. Therefore, rather than relying on this piecemeal waiver approach, there must be more permanent solutions to address the law and its interpretation.

B. Permanent Solutions

Two permanent solutions, both requiring legislative action, would best ensure that noncitizens who have engaged in self-defense are not denied

309. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 205, at 43.

310. *See generally* HUM. RTS. FIRST, *supra* note 23 (describing how thousands of individuals, including refugees and LPRs, have had their cases denied or significantly delayed prior to the Secretary's issuance of TRIG exemptions and delineating the protracted process to obtain a waiver once the Secretary has issued an exemption).

311. 27 I. & N. Dec. 303, 309 (B.I.A. 2018).

312. *See supra* note 69 and accompanying text. The government could mitigate this issue if DHS were to revise its current policy to allow individuals in removal proceedings to apply for an exemption prior to receiving a final order of removal. This would not be unusual as there are other forms of relief that only DHS can grant (e.g., U and T nonimmigrant status) that do not require a final order of removal. *See generally* U.S. CITIZENSHIP & IMMIGR. SERVS., PM-602-0029, GUIDANCE FOR COORDINATING THE ADJUDICATION OF APPLICATIONS AND PETITIONS INVOLVING INDIVIDUALS IN REMOVAL PROCEEDINGS; REVISIONS TO THE ADJUDICATOR'S FIELD MANUAL (AFM) NEW CHAPTER 10.3(i): AFM UPDATE AD 11-16 (2011) (detailing how USCIS and EOIR should coordinate to identify applications by people in removal proceedings that only USCIS can grant). The government could mitigate this issue if Congress were to grant the AG (who in turn were to delegate the authority to the IJs and BIA members) the authority to grant TRIG exemptions that the Secretaries have issued. Currently, asylum officers (AOs) and ROs have the authority to grant TRIG exemptions as they are DHS employees. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 205, at 43. However, IJs and members of the BIA, as employees of the U.S. Department of Justice, do not have this same authority although they are just as, if not more, qualified than AOs and ROs to make these determinations.

immigration relief. First, Congress should amend the definition of “terrorist activity” to take out the references to the law of the place where the activity was committed and the laws of any state, leaving only the federal law. Second, Congress should create an explicit exclusion to the TRIG that specifies that actions taken in self-defense are not “terrorist activity.” Congress should further include a definition of self-defense that omits the common law’s imminence requirement, such as the MPC definition, and that incorporates international law to fully protect all noncitizens who have used force in self-defense.

1. Congress Should Amend the Definition of “Terrorist Activity” so that Only Federal Law Is Relevant.

Currently, the INA defines “terrorist activity” as any activity “which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State).”³¹³ Congress should amend the definition of “terrorist activity” to take out reference to the law of the place where the activity was committed and the laws of any state, leaving only “the laws of the United States” (i.e., federal law). Immigration law, as federal law, does look to foreign and state law in other circumstances, but usually to fill in a gap where federal law does not have a relevant counterpart. For example, because there is no federal marriage law, in order to determine whether a marriage is valid for purposes of immigration law, an adjudicator must determine whether it is valid under the law of the jurisdiction where the marriage took place.³¹⁴ However, U.S. immigration law does not recognize marriages that violate federal public policy, such as polygamous marriages, or a strong public policy of the couple’s state of residence, such as incestuous marriages, even if these marriages are valid where they were performed.³¹⁵ In contrast, federal criminal law already defines unlawful activity, so there is no need to look to the laws of other jurisdictions when defining what “terrorist activity” is under our immigration law.³¹⁶ Moreover, even where immigration law requires an adjudicator to examine state law (e.g., to determine whether a noncitizen’s conviction of a state crime renders them removable), the adjudicator must determine whether that law fits into a category as defined by federal immigration law (e.g., whether that state crime is

313. INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii).

314. See, e.g., *In re Lovo-Lara*, 23 I. & N. Dec. 746, 748 (B.I.A. 2005); *Matter of da Silva*, 15 I. & N. Dec. 778, 779 (B.I.A. 1976); *Matter of H-*, 9 I. & N. Dec. 640, 641 (B.I.A. 1962).

315. *Chapter 2 - Marriage and Marital Union for Naturalization*, U.S. CITIZENSHIP & IMMIGR. SERVS.: POL’Y MANUAL (Feb. 10, 2021), <https://www.uscis.gov/policy-manual/volume-12-part-g-chapter-2> [<https://perma.cc/RDF7-2Y3G>].

316. In *In re S-K-*, the applicant argued that Congress’s use of the term “unlawful” rather than “illegal” was significant. 23 I. & N. Dec. 936, 939 n.3, *overruled on other grounds by* *Matter of Negusie*, 28 I. & N. Dec. 120 (A.G. 2020). According to the applicant, “lawful” implies an ethical content, while “illegal” denotes compliance with technical rules. *Id.* The BIA was not convinced that Congress intended different meanings for “unlawful” and “illegal,” pointing to the fact that Black’s Law Dictionary defines both terms as against, contrary to, or unauthorized by the law. *Id.*

an “aggravated felony” as defined by INA section 101(a)(43),³¹⁷ conviction of which renders a noncitizen removable under INA section 237(a)(2)(A)(iii)³¹⁸.³¹⁹

In fact, looking to the laws of other jurisdictions may lead to unfair results that place vulnerable populations in greater danger and may violate federal public policy. As already described in Part III.A, adjudicators must currently apply the outdated co-occupant exception to the “castle” doctrine because a single state continues to apply it, even though every other state has abandoned it in recognition of its harmful impact on domestic violence victims. In addition, if a country did not allow for the use of force in self-defense under its criminal law, an applicant who used force against a persecutor to save their life would be barred from immigration relief, even though the United States recognizes self-defense as an inherent right.

2. *Congress Should Create an Explicit Exclusion to TRIG for Force Used in Self-Defense.*

Congress should create an explicit exclusion to the TRIG that specifies that actions taken in self-defense are not “terrorist activity.” The BIA has read the TRIG expansively and has been reluctant to find exceptions where Congress has not included them explicitly,³²⁰ so this solution would best protect noncitizens who have used force in self-defense. Congress should further amend the TRIG to include a definition of self-defense. Federal criminal law does not define when force used in self-defense is justified; instead, federal courts rely on the common law to fill this gap.³²¹ However, as described in Part II.C, this has resulted in variations in federal jury instructions on self-defense in some important respects. Providing a definition of self-defense would avoid this issue and ensure consistency in the application of the defense.

3. *Congress Should Adopt a Definition of “Self-Defense” that Is Based on the MPC and International Law.*

Congress should adopt a definition of “self-defense” that omits the imminence requirement, like the MPC definition, as the imminence requirement is unnecessarily restrictive.³²² Scholars have criticized the imminence requirement for its application in domestic violence cases;³²³ however, that is not the only situation where its application is problematic. Take, for example, the

317. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

318. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).

319. *See, e.g.,* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1568 (2017) (“Under that approach, we ask whether “the state statute defining the crime of conviction” categorically fits within the “generic” federal definition of a corresponding aggravated felony.” (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013))).

320. *See supra* Parts II.D.3, II.D.4.

321. *See supra* notes 102–103 and accompanying text.

322. *See supra* note 99 and accompanying text.

323. *See supra* Part II.C.4.

situation of Yazidi women in Iraq held by ISIS as slaves. If these women use deadly force against their captor to escape when the captor is not immediately attempting to harm them, the imminence requirement would bar them from using self-defense to justify their actions. The adjudicator would find that the women have “engaged in terrorist activity” and would deny their applications for refugee status in the United States. Professor Paul Robinson described a similar situation where the application of the imminence requirement seemed unfair:

Suppose *A* kidnaps and confines *D* with the announced intention of killing [them] one week later. *D* has an opportunity to kill *A* and escape each morning as *A* brings [them] [their] daily ration. Taken literally, the *imminent* requirement would prevent *D* from using deadly force in self-defense until *A* is standing over [them] with a knife, but that outcome seems inappropriate.³²⁴

Professor Robinson went on to conclude, “If the concern of the [imminence] limitation is to exclude threats of harm that are too remote to require a response, the problem is adequately handled by requiring simply that the response be ‘necessary.’”³²⁵

By adopting a definition of self-defense that does not include the imminence requirement, Congress can prevent these kinds of unfair results. This is not as radical a recommendation as it may seem when compared to the drafters of the MPC also abandoning the imminence requirement. The MPC’s provision on the use of non-deadly force in self-defense reads, “the use of force . . . is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting [themselves] against the use of unlawful force by such other person on the present occasion.”³²⁶ “Immediately necessary . . . on the present occasion” may seem like an imminence requirement, but the commentary explains that it is not. The MPC’s self-defense provision focuses on the need to *use* force, rather than on the imminence of the harm:

The actor must believe that [their] defensive action is immediately necessary and the unlawful force against which [they] defend[] must be force that [they] apprehend[] will be used on the present occasion, but [they] need not apprehend that it will be used immediately. There would, for example, be a privilege to use defensive force to prevent an assailant from going to summon reinforcements, given a belief that it is necessary to disable [them] to prevent an attack by overwhelming numbers—so long as the attack is apprehended on the “present occasion.” The latter words are used in preference to “imminent” or “immediate” to introduce the necessary latitude for the attainment of a just result in cases of this kind.³²⁷

324. ROBINSON, *supra* note 78, § 131(c)(1) (footnote omitted).

325. *Id.*

326. MODEL PENAL CODE § 3.04(1) (Westlaw through 2019 Annual Meeting of American Law Institute).

327. MODEL PENAL CODE & COMMENTS. pt. I, § 3.04 cmt. 2(c) (AM. L. INST. 1985).

Moreover, the MPC provision on the use of deadly force in self-defense omits even the “immediately necessary . . . on the present occasion” language, permitting deadly force where it is simply necessary. The MPC allows deadly force when “the actor believes that such force is necessary to protect [themselves] against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat.”³²⁸

Some states follow the MPC approach, using the “immediately necessary” language to describe when non-deadly force is justified but permitting the use of deadly force when it is only necessary.³²⁹ For example, in Nebraska, “[t]he use of deadly force shall not be justifiable . . . unless the actor believes that such force is necessary to protect [themselves] against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat.”³³⁰ Similarly, other states have retained the common law’s imminence requirement (or a version of it) for non-deadly force, but allow the use of deadly force simply when it is necessary.³³¹ Indiana, for example, permits deadly force when a “person reasonably believes that that force is necessary to prevent serious bodily injury to the person . . . or the commission of a forcible felony.”³³² Some states have abandoned the imminence requirement altogether, simply allowing the use of all force when it is necessary.³³³ Minnesota, for example, permits “reasonable force . . . when used by any person in resisting . . . an offense against the person.”³³⁴

The impermissible force that is described in the definition of “terrorist activity” (“the use of any biological or chemical agent, nuclear weapon or device, explosive, firearm, or other weapon or dangerous device with the intent to endanger the safety of one or more individuals”³³⁵) and that Adam, the Yazidi women, and the Rohingya villagers used in self-defense, was deadly force. Therefore, Congress’s definition of self-defense need only cover when the use of deadly force is permitted. Given the issues with the imminence requirement, Congress should follow the lead of the MPC and the states described above to permit the use of deadly force simply when it is “necessary.” Federal jury

328. *Supra* note 99.

329. *See, e.g.*, DEL. CODE ANN. tit. 11, § 464(a) (2015); HAW. REV. STAT. § 703-304(1) (2020); NEB. REV. STAT. § 28-1409(1) (2016).

330. NEB. REV. STAT. § 28-1409(4).

331. *See, e.g.*, GA. CODE ANN. § 16-3-21 (2019); IND. CODE § 35-41-3-2(c) (2020); LA. STAT. ANN. § 14:19 (2016); N.D. CENT. CODE § 12.1-05-07 (2012); OKLA. STAT. tit. 21, § 733 (2018); VT. STAT. ANN. tit. 13, § 2305 (LEXIS through Act 1 of 2021 Sess.). In contrast, Wisconsin permits non-deadly force when the actor reasonably believes it is necessary but retains the imminence requirement for the use of deadly force. WIS. STAT. § 939.48 (2019–20).

332. IND. CODE § 35-41-3-2(c).

333. *See, e.g.*, MINN. STAT. § 609.06 (2020). A few states permit homicide both when it is simply necessary and also when the harm is imminent. *See, e.g.*, CAL. PENAL CODE § 197(1)–(2) (West 2014 & Supp. 2020); N.M. STAT. ANN. § 30-2-7(A)–(B) (2020).

334. MINN. STAT. § 609.06.

335. INA § 212(a)(3)(B)(iii)(V), 8 USC § 1182(a)(3)(B)(iii)(V).

instructions describing when deadly force is permissible already follow this approach.³³⁶

Finally, Congress should incorporate international law into the definition of self-defense. Self-defense, as described under federal law, is an individual right, and thus it does not apply as neatly to the cases of Enders and S-K- (unlike Adam and the Rohingya villagers and Yazidi women described in the Introduction). Enders and S-K- were both members of organizations that had used self-defense against governments seeking to suppress their ethnic groups. They were deemed inadmissible under the TRIG because of their group's use of self-defense, not because of their individual use of self-defense. Unlike self-defense under federal law, Protocol I to the Geneva Conventions (the core international humanitarian law treaties), which the United States has not ratified, permits the use of force in "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."³³⁷ Enders and S-K- were both members of ethnic minorities that had been the victims of systematic human rights violations by oppressive regimes. They joined or helped organizations that fought for self-determination for their communities, and thus, these organizations' use of force was lawful under international law.³³⁸ Incorporating international law into the definition of self-defense would ensure that the government does not deny immigration relief to individuals like Enders and S-K- simply because the federal definition of self-defense does not easily apply to their circumstances.³³⁹

336. See *supra* notes 111–113; MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 9.04 (JUD. COMM. ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT 2017) ("If a person reasonably believes that force is necessary to protect [themselves] [another person] from what [they] reasonably believe[] to be unlawful physical harm about to be inflicted by another and uses such force, then [they] acted in [self defense] [defense of _____].") (second, sixth, and seventh alterations in original).

337. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1, June 8, 1977, 1125 U.N.T.S. 17,512; see also Aleksandar Marsavelski, *The Crime of Terrorism and the Right of Revolution in International Law*, 28 CONN. J. INT'L L. 243, 247 (2013) ("Contemporary international law incorporates one aspect of the right of revolution under the right of self-determination, which permits the use of force against colonial domination, alien occupation and racist regimes."); Catherine Bruce, Angus Grant & Catherine Reynolds, *Out of the Fire and into the Pot: The Eritrean Liberation Movement, the Right to Self-Determination and the Over-Breadth of North American Immigration Security Provisions*, 25 GEO. IMMIGR. L.J. 859, 860 (2011) ("International law does not prohibit the use of armed struggle to achieve self-determination by people subject to alien domination. In the immigration context, applying this principle would ensure that those whose only 'crime' was participation in legitimate struggles for self-determination are not rendered inadmissible . . .").

338. See, e.g., *Ethiopia: The Oromo Liberation Front (OLF), Including Origin, Mandate, Leadership, Structure, Legal Status, and Membership: Treatment of Members and Supporters by Authorities (2014-2015)*, IMMIGR. AND REFUGEE BD. OF CAN. (May 2015), <https://irb-cisr.gc.ca/en/country-information/rir/Pages/index.aspx?doc=455883> [<https://perma.cc/6UVF-UPB6>].

339. Adam's self-defense unit used force against both armed opposition groups and the Gaddafi regime. The force against the Gaddafi regime was used in the context of a revolution against a

The proposals suggested here are reasonable as both Congress and the Executive Branch are aware of the overbreadth of the TRIG and have taken actions to temper the provisions. For example, Congress has amended the TRIG when necessary to resolve unfair results. In the Illegal Immigration Reform and Immigrant Responsibility Act, Congress amended the INA provision that deems a noncitizen inadmissible for being a member of a terrorist organization to require that the noncitizen knew or should have known that the organization of which they are a member is a terrorist organization in order for them to be inadmissible because of such membership.³⁴⁰ In the CAA, Congress, at the request of the Bush administration, amended the TRIG again. This time, Congress amended INA section 212(d)(3)(B)(i) to give the Secretaries of Homeland Security and State discretion not to apply nearly all of the terrorism-related provisions.³⁴¹ Prior to this amendment, the Secretaries had very narrow exemption authority, e.g., to exempt individuals from the material-support bar. The CAA also provided that a number of specific groups could not be considered terrorist organizations under the INA.³⁴² After receiving this expanded authority, the Secretaries, under both Democratic and Republican administrations, have issued a number of exemptions.³⁴³ In fact, in early 2019, the Trump administration's Secretary of State granted a group-based exemption to the Lebanese Forces and Kataeb Militias.³⁴⁴ Congress can and should also amend the TRIG as suggested in this Article to ensure that acts taken in self-defense are no longer deemed "terrorist activity" by immigration adjudicators.

dictatorship, but the Gaddafi regime was not a colonial or alien occupier or racist against Adam's ethnic group. See Won Kidane, *The Terrorism Bar to Asylum in Australia, Canada, the United Kingdom, and the United States: Transporting Best Practices*, 33 *FORDHAM INT'L L.J.* 300, 307–11 (2010) (describing how whether the right to self-defense "extends to resistance movements opposing tyranny where there is no racially based oppression or alien domination continues to be a subject of great controversy" under international law). However, incorporating international law into the definition of self-defense may still help individuals such as Adam. The force used by Gaddafi's regime against Adam (and his town) was unlawful because intentional attacks against civilians are a "war crime" under international law. See AMNESTY INT'L, *MISRATAH – UNDER SIEGE AND UNDER FIRE* 31–32 (2011), https://www.amnestyusa.org/wp-content/uploads/2017/04/mde190192011en_11.pdf [<https://perma.cc/2HZ8-LU7Q>].

340. Pub. L. No. 104-208, div. C, § 355, 110 Stat. 3009-546, -644 (1996) (codified as amended at 8 U.S.C. § 1182).

341. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 691(a), 121 Stat. 1844, 2364 (codified as amended at 8 U.S.C. § 1182).

342. *Id.* § 691(b), 121 Stat. at 2365.

343. See *supra* Part I.C.

344. Exercise of Discretionary Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act; Notice of Determination, 84 Fed. Reg. 18,108, 18,108 (Apr. 29, 2019) (relating to the Kataeb militias); Exercise of Discretionary Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act (March 21, 2019) (relating to the Lebanese Forces militias), https://www.uscis.gov/sites/default/files/document/legal-docs/LF_Exemption.pdf [<https://perma.cc/STZ4-PLUG>].

CONCLUSION

Immigration laws aimed at excluding and removing noncitizens who have engaged in terrorism or intend to engage in terrorism after entering the United States are without a doubt logical. However, interpreting the TRIG to bar persecuted noncitizens from receiving immigration relief for taking actions in self-defense—the very acts necessary to survive persecution—contradicts both the elevated status given to self-defense under state and federal law and the United States' longstanding commitment to providing humanitarian protection to individuals fleeing persecution. Interpreting the TRIG to ban or banish other noncitizens likewise contradicts our values. For example, removing LPRs—noncitizens who have been invited to live permanently in our American community—from this country for taking actions to protect themselves makes little sense given the high status of LPRs under our immigration laws. This Article attempts to demonstrate that the immigration law's goals of protecting the country from terrorists and providing safety to persecuted noncitizens and others need not be in conflict.³⁴⁵

Resolving this issue is particularly important in our current historical moment. The United Nations High Commissioner for Refugees reports that there are an unprecedented 79.5 million people, including 26 million refugees and 4.2 million asylum seekers, around the world who have been forcibly displaced from their homes because of conflict, persecution, and civil strife and are in need of safety and protection.³⁴⁶ Refugees and asylees, like Adam and Enders, have endured unimaginable persecution, often involving torture, physical abuse, rape, death threats, and prolonged detentions. For too long, the United States has denied immigration relief to these people for using force in the exercise of their inherent right to self-defense. Congress should pass the necessary reforms described in this Article to ensure that our own immigration laws do not continue this unacceptable cycle of victimization.

345. In fact, the 1951 United Nations Convention Relating to the Status of Refugees specifically excludes individuals who have committed some serious crimes from protection, even if they otherwise meet the definition of a refugee. U.N. Convention Relating to the Status of Refugees, *supra* note 281, art. 1F.

346. See *Figures at a Glance*, U.N. HIGH COMM'R FOR REFUGEES, <https://www.unhcr.org/en-us/figures-at-a-glance.html> [<https://perma.cc/HV9K-3ZFS>].