Creatively Searching for Fairness

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Tagged as : Immigration

Date : December 10, 2019

Fatma Marouf, *Invoking Common Law Defenses in Immigration Cases*, 66 **UCLA L. Rev.** 142 (2019).

Immigration lawyers search for ways to squeeze fairness out of a system that bristles at the concept. Professor Marouf's article, *Invoking Common Law Defenses in Immigration Cases*, is a wonderful contribution to this immigration law tradition of creatively searching for fairness in the system. The harshness of immigration law creates the need for Professor Marouf's contribution. The value of her contribution stems not only from her creative approach, but because her efforts serve as a reminder that immigration law desperately needs reform to become fair.

Professor Marouf is driven to explore the applicability of common law defenses in immigration cases precisely because immigration law is not fair. If consequences were proportional, if more robust relief from removal were available, or if the grounds of removal were not so broad, there would be less of a need for creative approaches such as Professor Marouf's. As Professor Marouf states in her article, "all possible defenses must be explored."

Immigration law is harsh. The grounds for removal (deportation) are broad and often no statute of limitations applies. The law fails to incorporate proportionality. There is a one-size-fits-all punishment associated with a variety of immigration violations: removal. There is no graduated system of consequences. Also, equities play a very small role in immigration law. Even the existence of a close US citizen relative, such as a spouse or child, cannot, on its own, cancel removal. The law demands a showing of exceptional and extremely unusual hardship to the US citizen relative. Hardship caused by separation alone is not enough.

Additionally, immigration law's progression has been stunted by a reluctance to recognize rights accepted in other contexts. For example, the Supreme Court has given Congress and the President wide constitutional latitude in immigration law based on the perception that immigration law is somehow different from other areas of law. The grounds for removal are broad, removal is the ubiquitous punishment, relief from removal is hard to obtain, and policy choices about immigration receive little judicial supervision.

Immigration lawyers try to blunt the force of an unfair system. For example, because there is so little statutory relief from removal, immigration attorneys may seek out prosecutorial discretion for a client. If the government does not begin removal proceedings, then the client can avoid the harsh statutory results. Adjudicating ad hoc requests for prosecutorial discretion is not transparent, however, and reliance on prosecutorial discretion will be fruitless during a presidential administration that refuses to be discretionary in its prosecution. In her article, Professor Marouf contributes to this ongoing effort to ease the harshness of immigration law by exploring how common law defenses might apply in immigration law. Specifically, she looks at necessity, self-defense, duress, lack of capacity (infancy and insanity), entrapment by estoppel, equitable estoppel and laches. Professor Marouf persuasively argues that these common law defenses have a role to play in civil immigration law. She asks why these defenses, which certainly are not novel in other areas of law, have not taken more root in immigration

law.

According to Professor Marouf, there are two main scenarios where common law defenses should be considered in immigration cases. The first is where the Immigration and Nationality Act attaches immigration consequences to unlawful conduct without requiring that conduct to be adjudicated unlawful by any court. The statute calls on civil immigration adjudicators to judge the lawfulness of acts within the civil immigration proceeding. Professor Marouf argues that civil immigration adjudicators should consider common law defenses to determine whether the conduct was, in fact, unlawful. For example, some behavior bars a person from receiving asylum. If a common law defense applies, then a bar to asylum is not appropriate. The second category includes situations where the Immigration and Nationality Act provides for no *mens rea* requirement. One of Professor Marouf's examples is the provision rendering an individual removable if he or she made a false claim to citizenship. Could infancy be raised as a defense?

Professor Marouf also argues that if and when common law defenses are incorporated in immigration law, it should be done in a transparent way. She argues that the agency appellate body, the Board of Immigration Appeals, should establish explicit standards "for establishing common law defenses in removal proceedings." Here, Professor Marouf reminds us of another major problem facing immigration law, that immigration law can be very opaque. Finding (or forcing) fairness into the system often involves a case by case approach where lawyers rely on novel theories or obscure internal agency documents. As Professor Marouf points out, there has to be a better way.

I wonder, though, if Professor Marouf is looking to the best source to make her goals a reality. I question whether the Board of Immigration Appeals is the best place to look for an ally in transparently establishing the use of common law defenses in removal cases. The Board has never been independent (its adjudicators are mere employees of the Department of Justice), and its independence is even further squeezed in the Trump Administration. Also, President Trump's Attorneys General have enthusiastically embraced their power to certify Board decisions to themselves to overrule Board precedent. Therefore, even if the Board of Immigration Appeals did establish the use of common law defenses in immigration cases, that precedent could be easily overruled by the attorney general.

Perhaps a two-pronged approach is best. Push for the Board to recognize common law defenses, but also work towards statutory reform. Congress must act. Reform of the Immigration and Nationality Act should include narrowing the grounds of removal, creating consequences other than removal, and allowing adjudicators to consider equities to cancel removal. With statutory reform, immigration attorneys will not need to spend as much time creatively searching for fairness.

Cite as: Jill Family, *Creatively Searching for Fairness*, JOTWELL (December 10, 2019) (reviewing Fatma Marouf, *Invoking Common Law Defenses in Immigration Cases*, 66 **UCLA L. Rev.** 142 (2019)), https://lex.jotwell.com/creatively-searching-for-fairness/.