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Defending Criminal(ized) "Aliens" After *Padilla*: Toward a More Holistic Public Immigration Defense in the Era of Crimmigration

Andrés Dae Keun Kwon

ABSTRACT

The unprecedented U.S. system of mass incarceration and the intensifying merging of criminal and immigration law have devastated individuals, families, and entire communities, especially poor communities of color. Noncitizens who come into contact with the criminal justice system are too often stripped of even the slightest chance of reintegration; returning home means removal to their countries of origin. Removal is often impossible to fight post conviction and is thereby virtually inevitable. And civil immigration legal service providers are not equipped to meet the immense need for immigration representation. Therefore, public defenders are usually the first and last line of legal defense for indigent noncitizens charged with crimes. Indeed, in light of recent U.S. Supreme Court decisions, including its groundbreaking decision in *Padilla v. Kentucky* requiring that counsel provide affirmative advice on the immigration consequences of criminal dispositions, public defenders must provide effective immigration defense. *Padilla* can be an opening for public defender offices committed to serving all their clients—citizens and noncitizens alike—to proactively fight for equality and racial justice and defend immigrants' rights.

This Comment provides the first in-depth exploration of the holistic model of immigration defense within public defender offices. It does so by presenting case studies of two public defender organizations that have developed more holistic models: The Bronx Defenders (Bronx County, New York) and the Office of the Alameda County Public Defender (Alameda County, California). By introducing original information, the case studies emphasize insights and best practices both for immigration defense within public defender offices and for strategies to develop more holistic models. The holistic model of immigration defense is three-fold. First, immigration defense attorneys are embedded within the public defender office, working seamlessly alongside criminal defenders to avoid or mitigate negative immigration consequences. Second, offices provide full services, including direct representation in immigration court, to address clients' underlying immigration needs. Third, offices organize and advocate for structural reform to roll back mass incarceration and sever the criminal-immigration link. Ultimately, this Comment argues for public defender offices to launch and build more holistic immigration practices.

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INTRODUCTION

Against the backdrop of the "crimmigration" crisis,[1] the U.S. Supreme Court recognized in *Padilla v. Kentucky* that "[t]he 'drastic measure' of [removal] . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes."[2] As the outcome of a criminal case often seals a person's fate in immigration court, state criminal courts have become de facto immigration courts.[3] In this context, the *Padilla* Court required, under the Sixth Amendment, that defense counsel provide affirmative advice on the immigration consequences of convictions.[4]

For indigent noncitizens charged with crimes, public defender offices are typically the first—and often last—line of legal defense. That is, public defenders (hereinafter "defenders") are most often the only legal advocates standing between the government and the immigrant poor who face criminal charges and resulting removal proceedings. Civil immigration legal providers, as with other areas of civil legal assistance for the poor, are not equipped to meet the immense and growing need for counsel.[5]

Unlike in criminal court, noncitizens in removal proceedings have no right to legal representation at government expense,[6] even though removal may lead to the permanent separation from family, community, and home—the loss "of all that makes life worth living."[7] And besides the ultimate removal of noncitizens,

1. Crimmigration stands for the phenomenon over the past two decades of the intensifying merging of criminal and immigration law and enforcement policies. *See generally* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376–78 (2006) (coining the term "crimmigration" and explaining the increasing convergence of criminal and immigration law as one creating "an ever expanding population of the excluded and alienated"). For a sampling of the literature in the field studying the merging of criminal and immigration law, see generally *id.*; Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); Ingrid V. Eagly, Gideon's *Migration*, 122 YALE L.J. 2282 (2013). Throughout this Comment, I use the term "crimmigration" to signify this phenomenon of the merging of criminal and immigration law. In addition, I use the term "criminal-immigration law" to denote the technical intersection of the two areas of law, as commonly faced and evaluated by public defender offices and immigration attorneys.
2. Padilla v. Kentucky, 559 U.S. 356, 360 (2010).
3. Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 555 (2013).
4. 559 U.S. at 369.
5. *See* Eagly, *supra* note 1, at 2289 ("As in other areas of civil legal assistance for the poor, the unmet need for immigration counsel is dire. . . . [T]hose unable to obtain representation are more likely to be deported . . . .").
6. Immigration and Nationality Act (INA), 8 U.S.C. § 1229a(b)(4) (2012); 8 C.F.R. § 1003.16 (2015).
7. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (Brandeis, J., dictum).

removal proceedings can lead to significant loss, such as the loss of liberty due to prolonged immigration detention in inhumane, jail-like conditions in facilities that are often geographically isolated, and the loss of employment as a result of such detention.[8] Yet, as a recent national study on the access to counsel in immigration court shows, only 37 percent of noncitizens facing removal appeared in immigration court with counsel between 2007 and 2012; for noncitizens in immigration detention, the rate was even lower—a dismal 14 percent.[9] The study also found that noncitizens facing removal with counsel are 15 times more likely than noncitizens without counsel to seek relief from removal and 5.5 times more likely to win their cases.[10] Further, even when noncitizens are able to afford representation, it falls all too often below basic competency standards.[11] Unethical lawyers and nonlawyers, such as notarios, also prey on vulnerable noncitizens who are unfamiliar with the complex immigration legal system.[12] The deplorable state of noncitizens' access to counsel in removal proceedings raises alarming due process concerns.[13] Indeed, in light of the crimmigration crisis, there has been a renewed call for a right to counsel in removal proceedings.[14] But establishing such a constitutional right is unlikely in the foreseeable future.[15]

8. *See generally* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1382–92 (2014).
9. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2 (2015).
10. *Id.*
11. *See* Peter L. Markowitz et al., *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 388–93 (2011) (finding that almost half of immigration representation falls below basic competency standards).
12. *See, e.g.*, Sam Dolnick, *As Barriers to Lawyers Persist, Immigrant Advocates Ponder Solutions*, N.Y. TIMES, May 4, 2011, at A24 [http://perma.cc/5XXG-EP5A].
13. For example, the American Bar Association has supported "the due process right to counsel for all persons in removal proceedings." AM. BAR ASS'N COMM'N ON IMMIGRATION, REPORT TO THE HOUSE OF DELEGATES ON THE RIGHT TO COUNSEL 1 (2006). For a discussion on the due process right to removal defense, see STUDY GRP. ON IMMIGRANT REPRESENTATION, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS 9–10 (Dec. 2012), http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf [http://perma.cc/62NJ-E39V].
14. *See* Eagly, *supra* note 1, at 2301. *See generally* Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of* Gideon*: Immigration, Deportation, and the Right to Counsel*, 39 HUM. RTS. 14 (2013); Kevin R. Johnson, *An Immigration* Gideon *for Lawful Permanent Residents*, 122 YALE L.J. 2394 (2013); Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299 (2011).
15. There has been progress in the fight to establish a right to counsel in immigration proceedings. Most notably, in *Franco-Gonzales v. Holder*, U.S. District Court Judge Dolly Gee ordered the federal government to provide legal representation in immigration proceedings to certain noncitizen detainees who are incompetent to represent themselves because of a serious mental disorder. 767 F. Supp. 2d 1034, 1038 (C.D. Cal. 2010). After the *Franco* decision, the U.S.

Therefore, the need to focus representation of noncitizens proactively at the front end[16]—at public defender offices—is heightened. Because representation at the front end can seal noncitizens' fate at the back end,[17] and because noncitizens are highly unlikely both to be represented in removal proceedings and, relatedly, to have the opportunity to reintegrate into their families and communities, they have a uniquely pressing need to resolve their criminal cases in ways that address immigration consequences proactively and effectively.

This Comment provides the first in-depth exploration of the holistic model of immigration defense within public defender offices. Several articles discuss models of immigration defense that have been developed over the years,[18] but none comprehensively analyze what this Comment describes as the holistic model. Under this model, public defender offices foster a culture and practice of seamless integration of criminal and civil immigration defense. Defenders under this model zealously and creatively advocate for criminal dispositions that avoid or mitigate negative immigration consequences.[19] Further, the holistic

Department of Justice adopted a nationwide policy to provide legal representation to certain unrepresented and detained noncitizens who are mentally incompetent to represent themselves. *See National Qualified Representative Program (NQRP)*, U.S. DEP'T OF JUST., http://www.justice.gov/eoir/national-qualified-representative-program-nqrp [https://perma.cc/ZZ6L-ACFA] (last visited Mar. 18, 2016).

In the absence of judicial and legislative action, certain jurisdictions have begun to create innovative programs to provide indigent noncitizens with direct representation in removal proceedings. *See generally* Robert A. Katzmann, *Innovative Approaches to Immigrant Representation: Exploring New Partnerships*, 33 CARDOZO L. REV. 331 (2011). The New York Immigrant Family Unity Project (NYIFUP), which was spearheaded by Chief Judge Robert Katzmann of the Second Circuit Court of Appeals, is the first program to provide universal representation to detained indigent noncitizens who are in removal proceedings. *See New York Immigrant Family Unity Project*, VERA INST. OF JUST., http://www.vera.org/project/new-york-immigrant-family-unity-project [http://perma.cc/782V-BDY3] (last visited Mar. 26, 2016).

16. By "front end," I refer to the stage of criminal proceedings, during which a particular disposition is reached. I use the term "back end" to refer to the stage following criminal proceedings, during which noncitizens can seek relief from removal in immigration proceedings or other types of post-conviction relief.

17. *See, e.g.*, Lee, *supra* note 3, at 555 (noting that, in many cases, a noncitizen's only meaningful chance to avoid removal at the back end is to negotiate a deal at the front end of criminal proceedings that provides immunity against removal).

18. *See generally* PETER L. MARKOWITZ, IMMIGRANT DEF. PROJECT & N.Y. STATE DEFS. ASS'N, PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER IMMIGRATION SERVICE PLAN (2009), http://immigrantdefenseproject.org/wp-content/uploads/2011/03/Protocol.pdf [http://perma.cc/6E77-L68F]; Ronald F. Wright, Padilla *and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515 (2011).

19. Of course, clients must choose to avoid immigration consequences; when given the choice, clients very often prefer preventing harsh immigration consequences over maximizing liberty interests. *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 368 (2010) ("[P]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." (quoting INS v. St. Cyr, 533 U.S. 289, 322 (2001))); Hernandez-Cruz v. Holder, 651 F.3d 1094,

model seeks to provide a full and comprehensive set of immigration legal services to address clients' underlying immigration issues—services ranging from affirmative applications for benefits or relief from removal to direct representation in immigration court. Finally, public defender offices under this model engage in organizing and structural reform. This Comment ultimately argues for public defender offices to initiate and develop more holistic immigration practice.

Part I provides background on the crimmigration crisis that has emerged. It situates immigration consequences within the broader context of reentry and collateral consequences—or rather, enmeshed penalties—of criminal justice contact. Part I then discusses defenders' ability to make a difference in avoiding or mitigating immigration consequences during criminal proceedings.

Part II examines *Padilla*'s mandate in the context of indigent defense. This Part synthesizes the various duties established under *Padilla* and subsequent case law, and explores their potential implementation through public defender offices. *Padilla* could serve to stand against racism and xenophobia, and help turn the tide against the crimmigration crisis—but only if public defender offices and other stakeholders act proactively and decisively to bring about urgent change. This Part includes an initial exploration of possible impact litigation—in the form of systemic deficiency challenges based on constructive denial of counsel in light of *Padilla* and subsequent precedent—to strengthen public defender offices' capacity to provide effective immigrant representation.

Part III presents the holistic model of immigration defense through case studies of two public defender organizations: The Bronx Defenders (Bronx County, New York) and the Office of the Alameda County Public Defender (Alameda County, California).[20] By introducing original information from these

1110–11 (9th Cir. 2011) (discussing a plea in which "[t]he state secured convictions on the charges that are punished more harshly under state law without incurring the expense and hassle of a trial" and the defendant "agreed to plead guilty to a charge that, although more serious, had a smaller chance of causing adverse immigration consequences"); Robin Steinberg, *Heeding* Gideon's *Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 963 (2013) ("Clients often cared more about the life outcomes and civil legal consequences of a criminal case than about the case itself.").

20. The Bronx Defenders (BxD) and the Office of the Alameda County Public Defender (ALCO PD) are roughly comparable, as they each have annual caseloads of between 30,000 to 40,000 cases and serve populations that are similar in size and foreign-born composition. In 2013, Bronx County had an estimated population of about 1.4 million people, of which 33.7 percent was foreign born. *State & County QuickFacts, Bronx County, New York*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/36/36005.html [http://perma.cc/68VM-PNTR] (last updated Dec. 2, 2015). In 2013, Alameda County had an estimated population of about 1.5 million people, of which 30.8 percent was foreign born. *State & County QuickFacts, Alameda County, California*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/06/06001.html [http://perma.cc/LT95-GAEY] (last updated Dec. 2, 2015).

two offices, the case studies help shed light on the essential components and practices of a holistic model of immigration defense, as well as challenges and potential areas of improvement. This Part also explores the development of each office's immigration practice, drawing out insights regarding the transition to more holistic models. I chose The Bronx Defenders because, even long before *Padilla*, the office has had an immigration practice with immigration defense attorneys embedded within the office, providing comprehensive services that range from plea consultations to direct representation in immigration court. I selected the Office of the Alameda County Public Defender because the office has recently transitioned to a more holistic model, through measures such as embedding two immigration defense attorneys in-house. With an enhanced capacity, the office became the first public defender office outside of New York City to represent noncitizen clients in removal proceedings.

Part IV synthesizes main takeaways from the two case studies. This Part also addresses important challenges public defender offices may face as they develop and sustain more holistic models. The holistic model of immigration defense is an important step toward fighting for equality and racial justice and defending immigrants' rights.

I. CRIMMIGRATION, IMMIGRATION CONSEQUENCES, AND EFFECTIVE CRIMINAL DEFENSE

This Part provides background on the crimmigration crisis that has taken hold over the past two decades. It examines the effects of this intersection of criminal and immigration law and enforcement in the context of reentry and collateral consequences, which are more accurately described as enmeshed penalties. Against this backdrop, defenders can provide effective representation to noncitizen clients and thereby make a significant difference in their clients' lives.

A. "Felons, Not Families": Crimmigration and the Categorization of So-Called Criminal Aliens

In announcing executive actions expanding the Deferred Action for Childhood Arrivals (DACA) program and introducing the Deferred Action

Only a few other public defender offices provide the type of holistic immigration defense that BxD provides. These offices include the Neighborhood Defender Service of Harlem, Brooklyn Defender Services, and The Legal Aid Society. Adding data from these offices would not produce new insights in ways that conform with the need to keep within space limitations for this Comment. *See generally* JOHN W. CRESWELL, RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS APPROACHES 204 (4th ed. 2014).

for Parents of Americans and Lawful Permanent Residents (DAPA) program, President Obama also emphasized that the Administration would continue to focus its deportation priorities on "[a]ctual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mom who's working hard to provide for her kids."[21] But who are these dangerous felons and so-called criminal aliens?

The hard truth is that the United States has been living through a "crimmigration" crisis.[22] Over the past two decades, the U.S. government has increasingly criminalized immigration offenses and has embedded harsher immigration consequences in an ever-expanding list of nonimmigration criminal offenses.[23] The escalating criminalization of immigrants, coupled with the intensifying of immigration enforcement through the criminal justice system,[24] has contributed dramatically to a record number of removals.[25] In particular, removals based on crimes have skyrocketed.[26] Just between 2008 and 2013, the number of

21. Barack Obama, President of the U.S., *Remarks by the President in Address to the Nation on Immigration*, WHITE HOUSE (Nov. 20, 2014), http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration [http://perma.cc/S4RV-B4T3].

22. *See* discussion and sources cited *supra* note 1.

23. There are scores of scholarly works on this topic. *See, e.g.*, HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 191 (2014) ("Criminalization has steadily accelerated since the 1990s, when Congress added several new immigration-related crimes and increased penalties for existing ones."); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1141 (2013) ("Over the past two decades, Congress has steadily expanded the types of crimes that can lead to removal from the United States."); Eagly, *supra* note 1, at 2287 ("[I]mmigration crime is the largest single category of crime prosecuted by the federal government and noncitizens are over one-fourth of federal prisoners.").

24. *See, e.g.*, THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 943 (7th ed. 2012) ("[U.S. Immigration and Customs Enforcement] increasingly relies on noncitizen encounters with the criminal justice system as a way to identify persons who are a priority for removal and to take them into custody."); Eagly, *supra* note 23, at 1139, 1141 ("A criminal conviction—or, sometimes, even just a criminal arrest—functions as a selection mechanism for choosing which of the millions of undocumented residents will be deported. . . . These shifts in the legal terrain for noncitizens convicted of crimes are further promoted by the federal decision to prioritize the removal of noncitizens who come into contact with the criminal justice system . . . ."). For a more comprehensive discussion of the integration of criminal and immigration enforcement, see Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 90–102 (2013).

25. *See, e.g.*, Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Data Shows*, N.Y. TIMES, Apr. 7, 2014, at A1. Removals have more than doubled over the past decade. ALEINIKOFF ET AL., *supra* note 24, at 471.

26. *See, e.g.*, Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 114 (2012) ("The annual rate of deportations based on criminal law contact increased from 1978 in 1986, to over 88,000 in 2004."). In fiscal year 2013, 59 percent of noncitizens were deported for crimes. *See* Jens Manuel Krogstad & Ana Gonzalez-Barrera, *In 2013, 59% of Deported Immigrants Convicted of a Crime*, PEW RESEARCH CENTER (Mar. 18, 2014), http://www.pewresearch.org/fact-tank/2014/03/18/in-2013-59-of-deported-immigrants-convicted-of-a-crime [http://perma.cc/RDZ5-QE9A].

immigrants deported for criminal offenses increased by approximately 90 percent.[27] Yet, the reality is that two-thirds of the over two million removals under President Obama's administration have involved people who have only committed minor infractions, such as traffic violations.[28]

Whereas criminal law has made some movement towards reducing harsh punishments for crimes, including reclassifying certain offenses from felonies to misdemeanors,[29] immigration law has increasingly doled out one reigning penalty for violations: removal from the United States.[30] A vast range of nonserious, nonviolent offenses—such as turnstile jumping, possession of stolen bus transfers, or public urination, to name only a few—did not make noncitizens, including long-time lawful permanent residents, deportable twenty years ago; now, these minor offenses can expose noncitizens to removal,[31] even retroactively.[32] Even minor misdemeanor offenses that carry few criminal penalties

27. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT (2014), http://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf [https://perma.cc/WG2D-667R].

28. *See, e.g.*, Thompson & Cohen, *supra* note 25; Eagly, *supra* note 23, at 1140–41 ("[T]he criminal alien category includes all noncitizens convicted of crimes . . . . For example, . . . migrants convicted of petty traffic offenses.").

29. There have been efforts underway to begin to reign in the sprawling mass incarceration system in the United States. Decisionmakers are beginning to acknowledge the unjustifiable harshness and disparate impact of the so-called war on drugs. In 2013, for example, the Office of the Attorney General refined its charging policy regarding mandatory minimums for certain nonviolent, low-level drug offenders. *See* Memorandum from Attorney Gen. Eric Holder to the U.S. Attorneys and Assistant Attorney Gen. for the Criminal Div. (Aug. 12, 2013), http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policypon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf [https://perma.cc/3V5L-ALN6]. In California, Proposition 47 made certain nonviolent, low-level felony and wobbler offenses now chargeable only as misdemeanors. *See infra* note 120 and accompanying text.

30. The Eighth Amendment is supposed to protect against cruel and unusual punishment in criminal proceedings. U.S. CONST. amend. VIII. Some scholars have argued that Eighth Amendment definitions of punishment should include removal, especially in light of the Supreme Court's recognition in *Padilla v. Kentucky* that removal for a criminal conviction is an integral part of the penalty. *See, e.g.*, Maureen Sweeney & Hillary Scholten, *Penalty and Proportionality in Deportation for Crimes*, 31 ST. LOUIS U. PUB. L. REV. 11 (2011).

31. These offenses can be considered crimes involving moral turpitude (CIMTs) and can thereby be grounds for removal, depending on the circumstances of the particular case. *See* MARKOWITZ, *supra* note 18, at 5 ("Criminal incidents as minor as shoplifting, turnstile jumping . . . can all put even long term permanent residents with U.S. citizen family members at risk of deportation.") (citations omitted); Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 595 (2011) ("[V]ery minor offenses have been deemed CIMTs even though they are of the sort that states often prosecute without appointing counsel, such as possession of stolen bus transfers, public urination . . . .").

32. *See generally* ALEINIKOFF ET AL., *supra* note 24, at 665–67 (discussing the retroactive application of expanded criminal grounds for deportability, including CIMTs).

and often no actual term of incarceration[33] can nevertheless brand someone a so-called criminal alien and trigger removal and other crushing immigration consequences.[34] The Obama Administration has actually prioritized misdemeanants for immigration enforcement.[35] Further, an ample array of offenses categorically prevents noncitizens from pursuing increasingly limited relief from removal based on equities.[36]

Minor offenses, drug offenses, and low-level arrests, however, have been the major driving force behind the tremendous expansion of the criminal justice system.[37] Indeed, a new regime of Jim Crow social control has emerged during the past four decades.[38] Even though violent crimes have declined continuously during the past two to three decades,[39] the number of people behind bars, under some form of supervision, or with criminal records, has expanded dramatically.[40]

33. Even people convicted of felonies are often sentenced only to probation. *See, e.g.*, Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1805 (2012).

34. *See generally* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C.D. L. REV. 277, 297–303 (2011) (providing examples of major immigration consequences including deportation, loss of federal student loan assistance, and the inability to obtain and keep work, among others). For example, a low-level marijuana offense, such as possessing a marijuana cigarette, can "effectively banish a lawful permanent resident from the United States for a lifetime." Jordan Cunnings, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLA L. REV. 510, 548 (2015).

35. *See* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot., Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., Alan D. Bersin, Acting Assistant Sec'y for Policy 3–4 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [https://perma.cc/NJS4-U4J4].

36. *See, e.g.*, Eagly, *supra* note 23, at 1141 ("[G]rounds for discretionary relief for those convicted of crimes have been narrowed or, in some cases, eliminated.").

37. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6 (rev. ed. 2011) ("[T]he U.S. penal population exploded . . . with drug convictions accounting for the majority of the increase."); ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009), http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf [https://perma.cc/WQY4-RMDF] (finding as of 2006 that approximately 10.5 million non-traffic misdemeanors were prosecuted per year, dwarfing felony prosecutions); Steinberg, *supra* note 19, at 966 ("Millions of low-level arrests per year serve as the gateway into a backward criminal justice system . . . .").

38. *See generally* ALEXANDER, *supra* note 37.

39. *See* MATT TAIBBI, THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP xv (2014) (noting that violent crime has dropped more than 44 percent during the past two decades).

40. *See* ALEXANDER, *supra* note 37, at 6 ("In less than thirty years, the U.S. penal population exploded from around 300,000 to more than 2 million . . . ."); Chin, *supra* note 33, at 1805 ("[A]pproximately sixty-five million adults have a criminal record of some kind, although some of those involve arrests not leading to conviction.").

Prison systems such as California's have been bursting at the seams.[41] Individuals returning home after prison or jail, and nearly one in four adults in the United States who have criminal records,[42] face often insurmountable barriers to successful reentry and reintegration to society. Noncitizens who get caught up in the expansive net of nonserious, nonviolent offenses and low-level arrests are frequently stripped of any chance of reentry and reintegration; returning home too often means removal to their countries of origin, sometimes even regardless of the results of their criminal cases.[43]

This system of mass criminalization, mass conviction,[44] and mass incarceration has come down disproportionately on poor communities of color.[45] These communities include noncitizens and recent immigrants, who are predominantly people of color[46] and poorer than the general population.[47] The

41. *See* Brown v. Plata, 131 S. Ct. 1910, 1923 (2011) (holding California prisons' overcrowding unconstitutional).

42. Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1218 (2010).

43. *See* Eagly, *supra* note 23, at 1134–35 (discussing how noncitizens are often deported before the dispositions of their criminal cases).

44. Chin, *supra* note 33, at 1803–06.

45. This area has been studied in depth. *See, e.g.*, ALEXANDER, *supra* note 37, at 100 ("The racial bias inherent in the drug war is a major reason that 1 in every 14 Black men was behind bars in 2006, compared with 1 in 106 white men."); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Convictions*, 6 J. GENDER RACE & JUST. 253, 262 (2002) ("Although . . . African Americans made up only 12.9% of the population in 2000, they were 46.2% of those incarcerated; the 12.5% of the population which was Latino or Hispanic made up 16.4% of the prison population."). Relatedly, over 80 percent of people charged with crimes are "too poor to afford an attorney." J. McGregor Smyth, Jr., *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, 24 CRIM. JUST. 42, 43 (2009).

46. As of 2014, over 50 percent of the U.S. foreign-born population was nonwhite. *State Immigration Data Profiles: United States Demographics & Social*, MIGRATION POLICY INST., http://www.migrationpolicy.org/data/state-profiles/state/demographics/US [https://perma.cc/VRB3-ZWXK] (last visited Mar. 28, 2016). Of the total foreign-born population, 51.6 percent was born in Latin America, 30.1 percent was born in Asia, and 4.6 percent was born in Africa. *Id.* In 2013, the top fourteen countries of birth, accounting for 55 percent of all persons who received lawful permanent resident status, were from Latin America, the Caribbean, Asia, and the Middle East. *See* Jie Zong & Jeanne Batalova, *Green-Card Holders and Legal Immigration to the United States*, MIGRATION POLICY INST., tbl. 1 (Oct. 1, 2015), http://www.migrationpolicy.org/article/green-card-holders-and-legal-immigrationunitedstates#Country of Birth [https://perma.cc/94VE-3N8B]. In addition, in the 2008 to 2012 period, people from Mexico comprised the majority of the unauthorized migrant population, at 58 percent, while other countries in Latin America made up 20 percent; Asia accounted for 13 percent. *See* Jie Zong & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL'Y INST. (Feb. 26, 2015), http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states [http://perma.cc/9S6J-27L8].

47. In 2014, 24.6 percent of noncitizens were below 100 percent of the poverty level, while 11.6 percent of naturalized citizens and 15 percent of U.S.-born citizens were below that level. *State*

combination of overpolicing and rampant police practices of racial profiling in minority, immigrant, and poor communities[48] have made noncitizen minorities particularly vulnerable to criminal justice contact, such as stops, arrests, and criminal charges.[49] Federal authorization of local law enforcement has further exacerbated the effect of racial profiling.[50] On top of racially skewed local law enforcement practices, immigration law and federal enforcement have been historically rife with racial discrimination.[51] These policies have had a particularly devastating impact on Latino communities.[52] For example, only

Immigration Data Profiles: United States Income & Poverty, MIGRATION POL. INST., http://www.migrationpolicy.org/data/state-profiles/state/income/US [https://perma.cc/9CCD-JBEX] (last visited Mar. 28, 2016). Additionally, 28.6 percent of noncitizens fell between 100 and 199 percent of the poverty level, while 18.7 percent of naturalized citizens and 18 percent of U.S.-born citizens fell in the same category. *Id.* The median household income for noncitizens was $40,085, while naturalized citizens' median household income was $59, 072 and U.S.-born citizens' was $54,565. *Id.*

48. *See, e.g.*, MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA 16–25 (2012) (noting that racial profiling and enforcement priorities have enhanced policing in minority communities); Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1553–55 (2011) (finding that wide discretion in policing is a stage in the criminal process that is ripe for racial profiling).

49. A prominent example is the vulnerability of people of Latino descent, including legal permanent residents, from enforcement laws such as Arizona's SB 1070. *See* MOTOMURA, *supra* note 23, at 60. The government can still use "apparent Mexican ancestry" as one factor in establishing reasonable suspicion that occupants of a car are unauthorized migrants. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 877 (1975). Even U.S. citizens have been swept up, detained, and even deported because of their apparent Latino ancestry. *See id.* at 886–87; AARTI KOHLI ET AL., SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 2 (2011), https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf [https://perma.cc/M4WF-F5WS] ("3,600 United States citizens have been arrested by ICE through the Secure Communities program.").

50. *See, e.g.*, Tanya Golash-Boza & Pierrette Hondagneu-Sotelo, *Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program*, 11 LATINO STUD. 271, 271–92, 279 (2013) ("Cooperation between criminal law enforcement and immigration law enforcement increases the impact of racial profiling, because even routine traffic stops can lead to deportations. Latino immigrant men in public spaces are most likely to be targeted.").

51. *See, e.g.*, KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 121 (2004) ("Often overlooked in the study of 'criminal aliens' is the impact of racially skewed U.S. law enforcement on the deportation of immigrants."); MOTOMURA, *supra* note 23, at 96–102 (providing an overview of the racially skewed history of immigration law); McLeod, *supra* note 26, at 160–64 (discussing the racially discriminatory history of immigration law and enforcement, and how the intensifying convergence of criminal and immigration law holds powerful sway because it serves to relieve pervasive cognitive dissonance regarding immigration in relation to racial concerns). *See generally* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (discussing immigration law's impact on Asian and African Americans).

52. *See, e.g.*, Cox & Miles, *supra* note 24, at 90 (finding that ICE enforcement has been concentrated in Latino communities). *See generally* Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a Post-Racial World*, 76 OHIO ST. L.J. 599 (2015). The crimmigration crisis has also impacted other minority noncitizens. *See generally* Elizabeth R. OuYang, *Immigrants With*

about 78 percent of unauthorized migrants were of Latino descent during the 2008 to 2012 period;[53] yet, greater than 96 percent of all noncitizens removed in 2012 were of Latino descent.[54] Noncitizen minorities, especially the poor, have thus been multiply burdened, facing manifold yet interconnected dimensions of marginalization[55]—and government policies have effectively colluded to zero in on them. While mass incarceration has created "a growing undercaste, permanently locked up and locked out of mainstream society,"[56] the crimmigration crisis has generated a growing outcast minority population, forever banished from U.S. society.

For all these reasons, the simplistic, disingenuous binaries put forth in President Obama's categorization[57] of "felons, not families" could not be further from the truth, which is much more nuanced.[58] Further, people with criminal records have families. So-called criminal aliens have children. They include moms as well as dads who work hard to provide for their kids. As of 2010, one in every twenty-eight children in the United States—2.7 million children—had a parent behind bars.[59] In 2013, 25 percent of all children under age eighteen—17.4 million children—lived at home with at least one immigrant parent.[60] About 4.5 million U.S. citizen children have an unauthorized migrant parent.[61] The crimmigration crisis has affected not just so-called criminal aliens

Prior Criminal Record Risk Removal From the United States—Impact on Asian Immigrants, 18 ASIAN AM L.J. 157 (2011).

53. *See* Zong & Batalova, *supra* note 46.

54. *See* JOHN F. SIMANSKI, IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 6 (2014), http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf [http://perma.cc/J7CQ-WPHB].

55. *Cf.* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139–40 (1989) (arguing that intersectionality must be at the center of analysis to sufficiently address the particular, complex manner in which Black women and others who are multiply burdened are marginalized).

56. ALEXANDER, *supra* note 37, at 7.

57. For an excellent and deeply insightful discussion of the powerful use of categories, stories, and arguments, see generally Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984). *See also* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000).

58. For a more comprehensive and timely discussion of, and a robust challenge to, the so-called "criminal alien" categorization, see Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594 (2016). Of note, I find particularly perceptive her description of deferred action recipients as "only one police stop away from being 'criminal aliens,' targeted for immigration enforcement practices." *Id.* at 599.

59. Press Release, The Pew Charitable Trusts, Pew Quantifies the Collateral Costs of Incarceration and the Economic Mobility of Former Inmates, Their Families, and Their Children, (Sept. 28, 2010), http://famm.org/wp-content/uploads/2013/09/Pew-Center-on-the-States1.pdf [http://perma.cc/DX2G-DKWW].

60. Zong & Batalova, *supra* note 46.

61. Julia Preston, *Risks Seen for Children of Illegal Immigrants*, N.Y. TIMES, Sept. 21, 2011, at A17.

and every noncitizen with the potential to be swept into the ever-widening net of nonserious, nonviolent offenses and low-level arrests—but also their children, families, and loved ones. As families are torn apart by these policies, communities have had to deal with the ramifications, including the deterioration of the physical and mental health of family members—especially children[62]—who remain in the United States as well as families' financial and economic devastation, which in turn, have increasingly burdened the social safety net.[63]

B. Immigration Consequences in the Context of Collateral Consequences, Enmeshed Penalties, and Reentry

Collateral consequences are civil disabilities that attach to (but are legally separate from) criminal convictions.[64] They are vestiges of the "civil death" that criminal convictions carried in England, where a person with a serious conviction lost all political, civil, and legal rights.[65] The person remained physically present in the community but was no longer acknowledged as an "autonomous legal subject" capable of participating in civic life.[66]

In the United States, collateral consequences are additional penalties imposed by various federal, state, and local laws and regulations, and they are vast and devastating.[67] They include, for example, exclusion from government-assisted housing and other forms of assistance, ineligibility for employment and various types of employment-related licenses, sex offender registration, and voter

62. *See, e.g.*, HEATHER KOBALL ET AL., HEALTH AND SOCIAL SERVICE NEEDS OF US-CITIZEN CHILDREN WITH DETAINED OR DEPORTED IMMIGRANT PARENTS 5–11 (2015), http://www.urban.org/research/publication/health-and-social-service-needs-us-citizen-children-detained-or-deported-immigrant-parents; JONATHAN BAUM ET AL., IN THE CHILD'S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION 4–6 (2010), https://www.law.berkeley.edu/files/Human_Rights_report.pdf [https://perma.cc/WA2F-A5Z4].

63. *See, e.g.*, DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 135–57 (2012); KOBALL ET AL., *supra* note 62; Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law Into the Criminal Justice System*, 54 HOW. L.J. 639, 668–73 (2011); Bryan Lonegan, *American Diaspora: The Deportation of Lawful Residents From the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55, 70–76 (2007).

64. *See* Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry Into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1074–75 (2004). Collateral consequences often attach to mere criminal justice contact, without requiring a conviction. *See id.*

65. Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 478 (2010).

66. Audrey Macklin, *Citizenship Revocation, The Privilege to Have Rights and the Production of the Alien*, 40 QUEEN'S L.J. 1, 8 (2014).

67. *See* Pinard, *supra* note 42, at 1214.

disenfranchisement.[68] During the past two to three decades, these collateral consequences have accumulated and expanded dramatically. Much of this proliferation was directly caused by tough-on-crime policies, especially the so-called war on drugs.[69] This unprecedented use of "civil death"[70] has exacerbated existing pressures of poverty and racism, driving poor communities of color "deeper into a cycle of crime and virtually [ensuring] that they could never break free."[71] People with criminal records are more burdened and marginalized today than at any point in history.[72] These legal barriers, both individually and collectively, have frustrated and "impede[d] the reentry process."[73]

Despite the pervasive nature and complex reality of collateral consequences, reentry practices have traditionally remained "narrow and stratified," and the overall needs of people with criminal records have been largely unmet.[74] Reentry efforts have tended to focus on various back-end—that is, post-conviction—transitional needs, including housing, mental health, and employment.[75] These efforts have not addressed collateral consequences "critically at the front end of the criminal justice system."[76]

Collateral consequences have been mostly ignored throughout criminal proceedings, stemming largely from the view that they are not legally central or even relevant to the criminal process.[77] Judges, prosecutors, and even defense attorneys are often unaware of or unconcerned with collateral consequences and fail to incorporate them into advocacy and sentencing practices.[78] In particular, public defender offices generally do not offer civil legal services or social services to prevent or address collateral consequences, neither in-house nor through

68. *Id.*
69. Pinard, *supra* note 64, at 1075–76. *See also* Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 770–74 (2011) (discussing the expansion of collateral consequences in the past two decades).
70. *See* Chin, *supra* note 33 (proposing that a new civil death has surreptitiously reemerged in the United States); Macklin, *supra* note 66.
71. Smyth, *supra* note 45, at 55. *See also* Pinard, *supra* note 65, at 470–71 (discussing the racial animus and effect implicated in promulgating collateral consequences, such as disenfranchisement and welfare and public benefits restrictions tied to drug offenses, which are widely known to disproportionately impact Blacks and Latinos).
72. Pinard, *supra* note 42, at 1219. *See also* Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 638 (2006).
73. Michael Pinard, *A Reentry-Centered Vision of Criminal Justice*, 20 FED. SENT'G REP. 103, 103 (2007).
74. *Id.*
75. Pinard, *supra* note 72, at 669.
76. *Id.*
77. *Id.* at 629.
78. *See id.* at 639; Pinard, *supra* note 42, at 1215.

partnerships.[79] Indeed, civil legal aid and indigent criminal defense have been mostly kept in silos, in great part by exclusive funding, such as the Legal Services Corporation's funding restrictions on civil legal assistance for people with criminal justice contact.[80] As a result, people charged with crimes often plead guilty completely unaware of the pervasive network of collateral consequences and the devastating impact these are likely to have on their lives.[81]

Discussions of collateral consequences and reentry generally assume the back-end presence of people with criminal records in their communities or their return. In this context, advocates can seek to mitigate collateral consequences post conviction through strategies such as expungements, certificates of relief, or the sealing of records.[82] In the immigration context, however, these strategies are virtually moot, and the back-end presence or return of noncitizens with criminal records or criminal justice contact cannot be presumed. For example, with an exception in the Ninth Circuit, state expungements of state convictions that make a noncitizen deportable have no practical impact on one's deportability, which is determined via federal law.[83] Instead, mandatory immigration detention and subsequent removal are exceedingly common consequences even for noncitizens who have gotten their records expunged. And for many noncitizens, the civil death of exile can actually mean a death sentence.[84]

The Supreme Court in *Padilla v. Kentucky* recognized the near-automatic and severe consequence of removal following criminal proceedings and convictions for noncitizens.[85] The Court confirmed that removal "is an integral part—indeed sometimes the most important part—of the penalty that may be imposed

79. *See* Steinberg, *supra* note 19, at 971.

80. *See id.* at 972. Legal Services Corporation (LSC) also proscribes the use of LSC funding for legal assistance to the majority of unauthorized migrants. *See* Legal Services Corporation Act, 42 U.S.C. § 2996–2996l (2012); Omnibus Consolidated Recissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321; *see also About Statutory Restrictions on LSC-Funded Programs*, LEGAL SERVS. CORP., http://www.lsc.gov/about-statutory-restrictions-lsc-funded-programs [https://perma.cc/N53Z-4FZS] (last visited Mar. 26, 2016).

81. *See* Pinard, *supra* note 72, at 630.

82. These strategies may fare better in some states than in others, given the state-by-state variations in the availability and reach of such strategies.

83. Relief is available only in the Ninth Circuit for first-time state convictions for simple drug possession if the conviction was before July 14, 2011. *See* Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000), *abrogated by* Nunez-Reyes v. Holder, 46 F.3d 684, 690 (9th Cir. 2011) (en banc) (overruling *Lujan-Armendariz* but not retroactively). This crevice of opportunity for relief demonstrates the complexity and variability of the intersection of criminal and immigration law, wherein each federal circuit sets its own precedent.

84. *See, e.g.*, Brief for Asian American Justice Center et al. as Amici Curiae, Padilla v. Kentucky, 559 U.S. 356, 2009 WL 1567358, at *12–*14 (discussing that deportation can send noncitizens back to the countries from which they fled violent persecution).

85. *See* Padilla v. Kentucky, 559 U.S. 356, 360 (2010).

on noncitizen defendants who plead guilty to specified crimes."[86] Since removal is intimately connected to the criminal process, the Court acknowledged that it is "uniquely difficult to classify as either a direct or a collateral consequence."[87] For these reasons, McGregor Smyth argues that neither immigration consequences nor other severe collateral consequences should be deemed collateral; instead, they are more accurately described as "enmeshed penalties" of people's criminal justice contact.[88] As such, the pressure to focus efforts and more resources at the front end is heightened.

In reality, enmeshed penalties and reentry are "interwoven and integrated components along the criminal justice continuum."[89] Defenders' efforts to evaluate potential reentry issues, including enmeshed penalties, and to fully advise and zealously advocate for their clients are part of redefining reentry more holistically as "a process that begins at arrest and continues through community reintegration."[90]

C. Effective Criminal Defense vis-à-vis Immigration Consequences

Courts and practitioners have described immigration law, particularly its crime-based deportability and inadmissibility provisions, as "complex"[91] and "labyrinthine."[92] Certain criminal convictions bring about mandatory deportation, or

86. *Id.* at 364.

87. *Id.* at 366. The Court also asserted that it had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance . . . .'" *Id.* at 365. McGregor Smyth has interpreted these statements by the Court to suggest that *Padilla* also applies to other serious collateral consequences, or "enmeshed penalties"; indeed, professional defense standards do not distinguish deportation from other penalties. McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 800–15 (2011).

88. *See* Smyth, *supra* note 87, at 802 ("[T]hese penalties are intimately related to criminal charges (not just convictions), and are serious, often draconian, and lifelong.").

89. *See* Pinard, *supra* note 72, at 633.

90. Smyth, *supra* note 45, at 46. *See also* American Bar Association, Resolution 107C 4–7 (Aug. 6–7, 2012), http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/ABA Resolution107c.authcheckdam.pdf [https://perma.cc/WW7N-9VPY] [hereinafter "Resolution 107C"] (recommending holistic defense practices of assessing and investigating collateral consequences and representing clients correspondingly, proactively preparing for reentry); Pinard, *supra* note 64, at 1069 (discussing the need for defense attorneys to incorporate both collateral consequences and reentry components into their practices).

91. *Padilla*, 559 U.S. at 369.

92. *See, e.g.*, Corniel-Rodriguez v. INS, 532 F.2d 301, 304 (2d Cir. 1976) ("[U]nfortunately, unintentional injustices too often can be visited upon the naïve albeit honest alien who is understandably unfamiliar with the labyrinthine intricacies of our immigration laws.").

make a noncitizen, including lawful permanent residents, inadmissible.[93] Three of the most prevalent crime-based grounds for removal are aggravated felonies, controlled substances offenses, and crimes involving moral turpitude (CIMTs).

Criminal offenses equating to an aggravated felony, one of the more unsparing deportability grounds under immigration law, can result in mandatory deportation, barring most forms of relief from removal.[94] And, generally, aggravated felonies render a noncitizen permanently ineligible to return to the United States.[95] In 1996, Congress vastly expanded the definition of aggravated felonies, covering an array of criminal offenses, including many nonviolent state misdemeanor offenses, such as theft, receipt of stolen property, and forgery offenses.[96] To define aggravated felonies, the Immigration and Nationality Act (INA) now lists twenty-one categories of offenses, some of which become aggravated felonies if the sentence is at least 365 days or if the amount of loss to the victim is at least $10,000.[97]

93. Crime-based grounds for deportability are found in INA § 237(a). Immigration and Nationality Act (INA) § 237(a), 8 U.S.C. § 1227 (2012). Crime-based inadmissibility grounds are found in INA § 212(a)(2). Inadmissibility becomes important when one is either seeking admission or adjusting status. Lawful permanent residents who return to the United States from a trip abroad are deemed to be seeking admission if they committed a criminal offense under INA § 212(a)(2). Under INA § 237(a)(1)(A), anyone inadmissible (or excludable) at the time of entry or adjustment is deportable. Lawful permanent residents with applicable criminal records are often put into removal proceedings for inadmissibility grounds after a trip abroad. *See, e.g.*, Vartelas v. Holder, 132 S. Ct. 1479, 1480 (2012) (holding that, assuming that a "provision of the Illegal Immigration Reform and Immigrant Responsibility Act superseded prior case law and prevented [a] lawful permanent resident[] . . . from departing, even briefly, from the United States without having to seek admission upon their return, the provision could not be applied retroactively to a lawful permanent resident who committed a felony offense years prior to the provision's effective date."). Unauthorized migrants are generally removed under INA § 212(a)(6)(A)(i) for being present in the United States without admission or parole.

94. *See* INA § 237(a)(2)(A)(iii). By "mandatory deportation," I refer to findings of deportability without availability for relief and consideration of positive factors, such as long residence or extensive family ties in the United States. For example, under INA § 238(b), non-lawful permanent residents with aggravated felonies are subject to expedited removal without the opportunity to contest removal in immigration court. In addition, noncitizens with aggravated felonies are ineligible for cancellation of removal under INA § 240A(a), (b)(1), or (b)(2), and cannot seek asylum under INA § 208(b)(2)(A)(ii). They are not barred from withholding of removal under INA § 241(b) or from the Convention Against Torture (CAT); nevertheless, these types of relief are difficult to receive. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

95. Individuals deported for aggravated felonies, however, may apply for I-212 waivers from the Attorney General under INA § 212.

96. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

97. INA § 101(a)(43); *see also* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 (2000)

Controlled substances offenses make a noncitizen either deportable[98] or inadmissible,[99] when the criminal offense relates to the federal schedule in the Controlled Substances Act.[100] A possible exception is marijuana possession of thirty grams or less.[101]

CIMTs make a noncitizen deportable or inadmissible.[102] A noncitizen is deportable for a single conviction of a CIMT if the qualifying offense was committed within five years of admission and has a possible sentence of at least 365 days.[103] A noncitizen is also deportable for two or more CIMTs at any time after admission.[104] Finally, a noncitizen is inadmissible for a single CIMT, unless the noncitizen was a minor at the time of commission or unless the noncitizen had only one offense with a maximum possible sentence of 365 days or an actual sentence of not more than six months.[105]

In light of these crime-based grounds for removal, it becomes apparent that noncitizen clients can benefit tremendously by receiving effective representation. Defenders are in a unique position to creatively negotiate both the types of offenses of which noncitizen clients are convicted and the length of their actual or possible sentences.[106] Trained and equipped defenders can accurately advise noncitizen clients and creatively advocate for alternative dispositions in order to avoid removal proceedings altogether, or at a minimum to preserve clients' eligibility for some form of relief from removal.[107] Defenders can also structure plea allocutions,[108] such as by admitting or omitting certain information,

(commenting that convictions for shoplifting and simple battery have been deemed aggravated felonies for immigration purposes even when one-year suspended sentences were imposed).

98. INA § 237(a)(2)(B)(i).
99. INA § 212(a)(2)(A)(i)(II).
100. 21 U.S.C. § 802 (2012).
101. *See* INA § 212(h); INA § 237(a)(2)(B)(i).
102. While the definition is elusive, CIMTs generally cover offenses involving intent to commit fraud or intent to harm persons or property. *See supra* note 31 and accompanying text; Pooja R. Dahdania, *The Categorical Approach for Crimes Involving Moral Turpitude After* Silva-Trevino, 111 COLUM. L. REV. 313, 319 (2011).
103. INA § 237(a)(2)(A)(i).
104. INA § 237(a)(2)(A)(ii).
105. INA § 212(a)(2)(A)(ii).
106. *See* MARKOWITZ, *supra* note 18, at 8.
107. For example, unauthorized migrants who have lived in the United States for ten years and meet certain requirements can apply to avoid removal and obtain lawful permanent resident status. *See* INA § 240(A)(b)(1). But they cannot receive this relief from removal if they have been convicted of a single CIMT. *Id.* Defense attorneys in this situation would seek to avoid convictions of CIMTs, even in exchange for dispositions that have higher criminal penalties.
108. A plea allocution is "[a] trial judge's formal address to a convicted defendant, asking whether the defendant wishes to make a statement or to present information in mitigation of the sentence to be imposed." *Allocution*, BLACK'S LAW DICTIONARY (10th ed. 2014). It is also "[a] defendant's admission of guilt made directly to a judge, esp. in response to a series of questions from the judge

to protect clients from certain immigration consequences.[109] Clients can also choose to go to trial.

Defenders can also advise noncitizen clients in real time when urgent matters arise in court, such as during arraignments.[110] For example, for unauthorized migrant clients and others who are otherwise deportable, jail-based screening of clients' immigration status or deportability can haul them into immigration custody.[111] In this context, defenders can seek to secure a disposition that does not involve jail time or negotiate release from jail before any jail-based screening.[112] While an unfavorable criminal disposition may permanently prevent unauthorized migrant clients from legalizing their status, these clients may run a greater risk that their jail contact alone will put them in removal proceedings based on their removability.[113]

Additionally, defenders can provide noncitizen clients with post-plea advisals, such as advice about international travel, risk of deportation, or eligibility for immigration benefits.[114] Relatedly, defenders can provide services, such as affirmative applications, to help address clients' underlying immigration issues. For example, the expanded DACA and the new DAPA programs—their implementation blocked by the Fifth Circuit and to be decided by the Supreme Court this term[115]—can potentially provide deferred action status to unauthorized migrants.[116] While deferred action is limited in that it does not provide a pathway to lawful permanent resident status or citizenship, it does allow

on whether the defendant understands the charges, the right to a trial, the consequences of a guilty plea, and the voluntary nature of the plea." *Id.*

109. MARKOWITZ, *supra* note 18, at 6 (discussing how defense attorneys could structure plea allocutions to protect their clients, knowing for example that the immigration consequences of certain convictions often turn on the underlying crime the client intended to commit).

110. MARKOWITZ, *supra* note 18, at 9.

111. Under the federal Secure Communities program (S-Comm), U.S. Immigration and Customs Enforcement (ICE) had increasing ease of access to local jails, leading to the expansion of transfers of unauthorized migrants and otherwise deportable noncitizens from local law enforcement custody to ICE custody. *See* Cházaro, *supra* note 58, at 616–20. Even though the new federal Priority Enforcement Program (PEP), the enforcement prong of the 2014 executive actions that has been implemented without being challenged by the states, has replaced S-Comm, it appears to be a mere rebranding of S-Comm instead of its dismantling. *See id.* at 621.

112. *See* Eagly, *supra* note 1, at 2296.

113. MARKOWITZ, *supra* note 18, at 9. This strategy depends on the jurisdiction and how it decides to cooperate with PEP.

114. *See id.* at 9–10.

115. Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015), *cert. granted*, No. 15-674, 2016 WL 207257 (Jan. 19, 2016). It is widely opined that the executive actions will be found constitutional. *See, e.g.*, Letter from Steve Legomsky et. al (Mar. 13, 2015), https://pennstatelaw.psu.edu/_file/LAWPROFLTRHANENFINAL.pdf [https://perma.cc/LA37-K79Z].

116. *See* Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1 (2015).

recipients to remain in the United States and obtain employment authorization.[117] Nevertheless, people convicted of any felony, any "significant" misdemeanor, or any three misdemeanors are barred from qualifying for both DACA and DAPA.[118] And eligibility for DAPA, but not DACA, is barred by conviction of an aggravated felony, which includes some misdemeanors that are not "significant."[119] In this context, not only can defenders seek to resolve clients' criminal charges to preserve eligibility for DACA or DAPA, but they can also aid their clients post disposition with DACA or DAPA applications.

What effective strategies defenders pursue with their noncitizen clients depends on the laws and policies in effect in the different jurisdictions in which clients come into criminal justice contact. In California, Proposition 47 made certain nonviolent, nonserious felony and wobbler offenses—mostly simple possession of controlled substances and property crimes—chargeable only as misdemeanors.[120] As a result, coupled with a California law mandating that the maximum possible sentence for a misdemeanor is 364 days,[121] noncitizen clients, including lawful permanent residents, can avoid certain aggravated felonies and CIMTs. Further, defenders can support clients with applications to reclassify certain Proposition 47 felony convictions to misdemeanors.[122] By reclassifying, unauthorized migrant clients who would have otherwise been ineligible for DACA or DAPA because of their felony convictions could potentially be eligible if the programs are implemented.

117. *See* HIROSHI MOTOMURA, AMERICAN IMMIGRATION COUNCIL, THE PRESIDENT'S DISCRETION, IMMIGRATION ENFORCEMENT, AND THE RULE OF LAW 2 (2014), http://www.americanimmigrationcouncil.org/sites/default/files/docs/the_presidents_discretion_immigration_enforcement_and_the_rule_of_law_final_1.pdf [http://perma.cc/ZMK2-T5AX].

118. IMMIGRATION LEGAL RESOURCE CTR. & NAT'L IMMIGRATION PROJECT, CRIMES-RELATED BARS TO DAPA (DEFERRED ACTION FOR PARENTS OF AMERICANS AND LAWFUL PERMANENT RESIDENTS) AND DACA (DEFERRED ACTION FOR CHILDHOOD ARRIVALS) (2015), http://www.ilrc.org/files/documents/chart_dapa_daca_bars_jan_2015.pdf [http://perma.cc/QP3Z-S5U6].

119. *Id.*

120. The law applies to simple drug possession, petty theft under $950, shoplifting under $950, forging or writing a bad check under $950, and receipt of stolen property under $950. CAL. PEN. CODE § 1170.18; *see also* Legislative Analyst's Office, *Proposition 47: Criminal Sentences. Misdemeanor Penalties. Initiative Status* (July 17, 2014), http://www.lao.ca.gov/ballot/2014/prop-47-110414.pdf [http://perma.cc/Y8Z8-WMNZ].

121. *See* CAL. PEN. CODE § 18.5 (West 2014).

122. *See, e.g.*, *Changing Your Record Under Proposition 47*, CALIFORNIANS FOR SAFETY AND JUST., http://www.safeandjust.org/recordchange [https://perma.cc/7U7F-54DM] (last visited Dec. 23, 2015).

The Court has acknowledged defenders' ability to provide effective defense to their noncitizen clients,[123] as developed in various public defender offices and as highlighted in this Subpart and Parts III and IV.

II. *PADILLA*'S MANDATE AND THE HIGHER CALL TO PUBLIC DEFENDERS

Padilla v. Kentucky[124] represents a countertrend to the emergence of the crimmigration crisis and its condemning path.[125] "[C]hanges to our immigration law," the Court acknowledged, "have dramatically raised the stakes of a noncitizen's criminal conviction."[126] Post-*Padilla*, there must be some level of immigration representation during criminal proceedings for noncitizens charged with crimes.[127] *Padilla* has thus brought immigration representation into the fold of *Gideon v. Wainwright*.[128] In Gideon*'s Migration*, Professor Ingrid Eagly writes about *Padilla*, noting: "[T]he Supreme Court's move to make immigration advising a constitutional imperative means that all [defenders] must now incorporate a baseline of immigration consultation into their representation. That alone makes *Gideon* lawyers an essential institutional form of immigration defense."[129]

Padilla applies *Strickland v. Washington*'s[130] Sixth Amendment right to effective assistance of counsel to noncitizen clients regarding their right to remain in the United States.[131] In so doing, *Padilla*'s analysis follows *Strickland*'s two-prong analysis of determining both deficient performance[132] and

123. *See* Padilla v. Kentucky, 559 U.S. 356, 373 (2010) ("Counsel . . . may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence."); *see also* Vartelas v. Holder, 132 S. Ct. 1479, 1492 n.10 (2012) ("Armed with knowledge that a guilty plea would preclude travel abroad, [noncitizens] like Vartelas might endeavor to negotiate a plea to a nonexcludable offense . . . or exercise a right to trial.").

124. 559 U.S. 356 (2010).

125. *Cf.* Yolanda Vázquez, *Realizing* Padilla*'s Promise: Ensuring Noncitizen Defendants Are Advised of the Immigration Consequences of a Criminal Conviction*, 39 FORDHAM URB. L.J. 169, 170 (2011) (commenting on how *Padilla* followed decades of contrary precedent).

126. *Padilla*, 559 U.S. at 364.

127. *See id.* at 374 ("[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation.").

128. 372 U.S. 335 (1963). In *Gideon*, the U.S. Supreme Court declared the right to a lawyer as "fundamental and essential" to fairness in criminal proceedings, and mandated that state-funded appointed counsel be provided to indigent criminal defendants. *Id.* at 344.

129. Eagly, *supra* note 1, at 2294.

130. 466 U.S. 668 (1984).

131. *See Padilla*, 559 U.S. at 366.

132. Performance is deficient when it falls below an "objective standard of reasonableness" under "prevailing professional norms." *Id.* (citing *Strickland*, 466 U.S. at 688).

prejudice[133] in order to find ineffective assistance of counsel post conviction.[134] This Comment, in exploring potential impact litigation for prospective relief, emphasizes in its analysis the deficient performance prong, which is still relevant in systemic deficiency challenges based on constructive denial of counsel.

A. *Padilla*'s Mandate

1. Affirmative Duty to Ascertain Immigration Status and Provide Immigration Advice

Padilla requires defenders to investigate their clients' citizenship status;[135] defenders must initiate this inquiry.[136] Once defenders determine that their clients are likely noncitizens, they must provide some level of immigration advice—that is, providing no advice whatsoever violates *Padilla*.[137] The *Padilla* Court rejected the Solicitor General's request to allow silence regarding immigration consequences.[138] Instead, the Court made it clear that a holding limited to affirmative misadvice would be absurd.[139] This strongly suggests that the Court would not allow a defender to avoid *Padilla*'s mandate by failing to inquire into a client's citizenship status.[140] And advice to inquire with a different, additional attorney about immigration consequences is insufficient to meet

133. The prejudice prong asks whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (citing *Strickland*, 466 U.S. at 694). In particular, where ineffective assistance of counsel leads a client to accept a plea bargain, a different result means that "but for counsel's errors, [the client] would either have gone to trial or received a better plea bargain." United States v. Rodriguez-Vega, 797 F.3d 781, 788 (9th Cir. 2015) (finding prejudice and ineffectiveness of counsel where the client showed a reasonable probability that, but for her counsel's deficient performance, she would have either gone to trial or negotiated a plea agreement that did not trigger removal).

134. *Padilla*, 559 U.S. at 366–69.

135. It can often be complex to determine a client's citizenship status. *See, e.g.*, César Cuauhtémoc García Hernández, *Criminal Defense After* Padilla v. Kentucky, 26 GEO. IMMIGR. L.J. 475, 515–18 (2012) (discussing how defenders can determine clients' citizenship status).

136. *See infra* notes 137–142 and accompanying text; *see also* Resolution 107C, *supra* note 90, at 5 ("Defense counsel should interview the client . . . identify potential so-called 'collateral' consequences . . . . [C]ounsel must be active rather than passive, taking the initiative rather than waiting for questions from the client . . . .").

137. *See Padilla*, 559 U.S. at 368–69.

138. *See id.* at 369–70.

139. *Id.* at 370–71 ("A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. . . . Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available.").

140. García Hernández, *supra* note 135, at 490.

Padilla's mandate.[141] Lower courts have consistently held that counsel has an affirmative duty to ascertain citizenship status and provide advice on the immigration consequences of contemplated criminal dispositions.[142]

2. Affirmative Duty to Provide Accurate Advice

Padilla established that, if the immigration consequences are clear, defenders have an affirmative duty to provide accurate advice.[143] If the immigration consequences are not clear, counsel must at least generally advise that such consequences may ensue.[144] Lower courts have consistently held that, if the immigration consequences of convictions are clear and removal is presumptively mandatory, counsel must at least advise that removal is a virtual certainty.[145]

The question then becomes the following: Just which offenses have clear immigration consequences, and which do not? "Clear" means apparent to the diligent defender. After diligent study of the law and reasonable legal research, both in the immigration statute and controlling case law, immigration

141. *See, e.g.*, Elizondo-Vasquez v. State, 361 S.W.3d 120, 120–21 (Tex. App. 2011) (finding ineffective assistance of counsel when counsel failed to inform Vazquez that a guilty plea would result in deportation, given the clarity of immigration consequence, and reasoning that counsel's suggestion that Vasquez should consult an immigration attorney was not sufficient); People v. Garcia, 907 N.Y.S.2d 398, 399–405 (Sup. Ct. 2010) (finding ineffective assistance of counsel where Garcia's counsel merely advised that Garcia seek outside immigration assistance, resulting in Garcia's taking a plea to misdemeanor possession of a controlled substance after consulting an immigration paralegal who misadvised him that his plea would not trigger adverse immigration consequences).

142. *See, e.g.*, United States v. Bonilla, 637 F.3d 980, 984 (9th Cir. 2011) (finding that trial counsel was ineffective when she failed to accurately advise her client about deportation consequences, even though she had mistakenly believed that her client was a U.S. citizen); Zemene v. Clarke, 768 S.E.2d 684, 690 (Va. 2015) (finding ineffective assistance of counsel when counsel, despite being made aware of his client's noncitizen status in their initial meeting, undertook no effort to learn the precise nature of his client's noncitizen status and provided no advice that the plea agreement would lead to the loss of his client's lawful permanent resident status and subject him to removal proceedings).

143. *See Padilla*, 559 U.S. at 369 ("[W]hen the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.").

144. *See id.* ("When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.").

145. *See, e.g.*, United States v. Rodriguez-Vega, 797 F.3d 781, 786 (9th Cir. 2015) (finding ineffective assistance of counsel when Rodriguez-Vega's conviction rendered her removal "practically inevitable" but her counsel failed to advise her that removal was virtually certain); *Bonilla*, 637 F.3d at 984 ("A criminal defendant who faces almost certain deportation is entitled to know more than that it is possible that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty.") (emphasis omitted) (citing *Padilla*, 559 U.S. at 369); Encarnacion v. State, 763 S.E.2d 463, 663 (Ga. 2014) (finding that where the law is clear, it is not enough to say "maybe" when the correct advice is "almost certainly will").

consequences are not clear only if a defender is unable to conclude with great certainty that the particular offense triggers certain immigration consequences. In *Padilla*, the Court established defenders' duty to read the relevant crime-based sections of the removal statute,[146] which include both deportability and inadmissibility grounds for removal.[147] In addition, defenders must research the controlling case law in their jurisdictions to assess whether precedent expressly identifies the crime of conviction as a ground for removal.[148]

146. *See Padilla*, 559 U.S. at 357 ("The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.").

147. The Court was ultimately concerned with noncitizens losing their substantive right to remain in the United States. García Hernández, *supra* note 135, at 511; *see Padilla*, 559 U.S. at 368 ("[P]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." (quoting INS v. St. Cyr, 533 U.S. 289, 322 (2001))). Both the crime-based deportability and inadmissibility grounds for removal are ways through which noncitizens can lose their right to remain. García Hernández, *supra* note 135, at 512. Therefore, both deportability and inadmissibility grounds should be considered as part of the analysis of whether a noncitizen client will likely be removed if convicted. *Id.*

Lower courts have applied *Padilla* to inadmissibility consequences. *See, e.g.*, Kovacs v. United States, 744 F.3d 44, 50–51 (2d Cir. 2014) (finding ineffective assistance of counsel for counsel's affirmative misadvice on a CIMT inadmissibility ground for removal); *Ex parte* Tanklevskaya, No. 01-10-00627-CR, 2013 WL 4634771, at *8 (Tex. App. Aug. 27, 2013) (discussing a case in which *Padilla* would have applied to a lawful permanent resident who had pled to possession of two ounces of marijuana and had removal proceedings rendered against her upon her return from a trip abroad due to inadmissibility grounds, but for the U.S. Supreme Court's holding that *Padilla* was not retroactive); *see also* Gudiel-Soto v. United States, 761 F. Supp. 2d 234, 238 (D.N.J. 2011) ("Whether a person is removed from the United States or prevented from coming back in makes very little difference in that regard; he is 'exiled' either way."). In addition, the Court has found that the "[l]oss of the ability to travel abroad" based on an inadmissibility ground for removal "is itself a harsh penalty, made all the more devastating if it means enduring separation from close family members living abroad." Vartelas v. Holder, 132 S. Ct. 1479, 1488 (2012).

148. Depending on the jurisdiction, certain state offenses have already been assigned a particular immigration consequence by the Board of Immigration Appeals or the federal circuit court of appeals for the particular jurisdiction. These should be considered clear, and professional standards to conduct reasonable legal research demand no less. *See, e.g.*, Resolution 107C, *supra* note 90, at 6 ("Under no circumstances should defense counsel recommend acceptance of a plea unless appropriate investigation and study of all serious and likely consequences of the contemplated criminal plea has been completed.").

In *Rodriguez-Vega*, 797 F.3d at 786, the Ninth Circuit, citing *Padilla*, 559 U.S. at 369, stated the law as follows: "Where the immigration statute or *controlling case law* expressly identifies the crime of conviction as a ground for removal, 'the deportation consequence is truly clear'" (emphasis added). The court then found that the law was clear on the immigration consequence of Rodriguez-Vega's plea to the misdemeanor of attempted transportation of illegal aliens, which corresponds to an aggravated felony in the immigration context. *Rodriguez-Vega*, 797 F.3d at 784–85. The court reasoned that, as in *Padilla*, the "immigration statute expressly identifies Rodriguez-Vega's conviction as a ground for removal." *Id.* at 786.

For *Padilla* purposes, removal should be considered clear or presumptively mandatory for offenses that correspond to statutorily enumerated aggravated felonies and controlled substances offenses. Regarding aggravated felonies, the INA expressly directs mandatory deportation to noncitizens convicted of offenses corresponding to aggravated felonies.[149] Lower courts finding violations of *Padilla* have consistently held removal to be clear for offenses deemed to be aggravated felonies.[150]

The INA also expressly directs mandatory deportation to noncitizens with controlled substances offenses.[151] *Padilla* itself held a controlled substances offense to be clear ground for removal.[152] Generally, a noncitizen convicted of a controlled substances offense remains eligible for relief from removal that is unavailable for those with aggravated felonies—for example, a lawful permanent resident can remain in the United States via cancellation of removal.[153] Still, the Court deemed a controlled substances offense to be clear and removal to be presumptively mandatory. Lower courts, in finding violations of *Padilla*, have held offenses involving controlled substances to have clear immigration consequences.[154]

Altogether, sections of the INA corresponding to aggravated felonies and controlled substances offenses generally lead to a clear removal consequence. Therefore, defenders have an affirmative duty in these cases to provide accurate advice under *Padilla*.[155]

149. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227 (2012).

150. *See, e.g.*, *Rodriguez-Vega*, 797 F.3d at 784–86; *Encarnacion*, 763 S.E.2d at 466 (finding that the immigration consequence was clear for a plea to burglary, which constitutes an aggravated felony and almost certainly leads to removal proceedings); State v. Kostyuchenko, 8 N.E.3d 353, 357 (Ohio Ct. App. 2014) (holding that a failure to comply felony conviction, chargeable as an aggravated felony and mandating deportation, is a clear ground for removal).

151. *See supra* notes 98–101 and accompanying text.

152. *See Padilla*, 559 U.S. at 368. Even though Padilla's plea to the transportation of a large amount of marijuana could also make him deportable as an aggravated felony, the Court categorized the plea as a controlled substances offense. *See* García Hernández, *supra* note 135, at 498.

153. INA § 240A(a); García Hernández, *supra* note 135, at 498. *See also* discussion and sources cited *supra* note 94.

154. *See, e.g.*, United States v. Urias-Marrufo, 744 F.3d 361 (5th Cir. 2014) (finding a plea to possession with intent to distribute 100 kilograms or more of marijuana—a controlled substances offense—to have clear immigration consequences); Hernandez v. State, 124 So. 3d 757 (Fla. 2012) (finding immigration consequences of a plea to sale of a controlled substance to be clear).

155. The clarity of the aggravated felonies and controlled substances offenses provisions does not mean that they are simple. There are intricacies that defenders may not reasonably be expected to know. For example, state offenses may not fit the INA statutes under the categorical or modified categorical approaches and thus may not constitute grounds for removal. *See generally* Mellouli v. Lynch, 135 S. Ct. 1980 (2015). In addition, the INA statutes for aggravated felonies and controlled substances offenses contain terms of art, such as "conviction," INA § 101(a)(48)(A), and "sentence," INA § 101(a)(48)(B).

Offenses considered crimes involving moral turpitude (CIMTs) are often harder to categorize as having clear immigration consequences under *Padilla*. Aside from the time requirements, the key question is what amounts to moral turpitude. For over a century, courts have tried to answer this question without any unifying precision.[156] State offenses that may seem similar vary widely in their treatment as CIMTs in different federal circuit courts of appeal. In this context, at least those state offenses that have been deemed to be CIMTs by the Board of Immigration Appeals or by the federal circuit court of appeals for the particular jurisdiction should be clear. Some lower courts, in finding violations of *Padilla*, have deemed some offenses corresponding to CIMTs to be clear.[157] In short, under *Padilla*, defenders' duty to provide accurate advice related to CIMTs may vary depending on the jurisdiction.

3. Affirmative Duty to Advocate for "Immigration-Safe" Plea

In light of *Lafler v. Cooper*[158] and *Missouri v. Frye*[159] enriching the mandate of *Padilla*, defenders arguably have an affirmative duty to seek an immigration-safe plea and avoid or mitigate negative immigration consequences—of course, as long as this strategy is consistent with clients' stated goals. In *Lafler*, the Court found ineffectiveness of counsel under *Strickland* when the client, per

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Relief from removal further complicates the directness of the removal consequence. *See generally* García Hernández, *supra* note 135, at 508–10. One example is the availability of relief in the Ninth Circuit for first-time state convictions for simple drug possession if the conviction was before July 14, 2011. *See* discussion and source cited *supra* note 83; *see also* García Hernández, *supra* note 135, at 500.

The analysis of whether removal is presumptively mandatory should therefore turn not on the availability of relief from removal, but on the statutory language describing the covered criminal offenses and the language determining the immigration consequences—as well as on the controlling case law. *See* García Hernández, *supra* note 135, at 508–10; *Rodriguez-Vega*, 797 F.3d at 786 ("That Rodriguez-Vega might theoretically avoid removal under the family member exception for first-time offenders, . . . by receiving withholding of removal, . . . or . . . under the Convention Against Torture, does not alter our conclusion that on the record before us her removal was virtually certain.") (citations omitted); *see also* Zemene v. Clark 768 S.E.2d 684, 690 (Va. 2015) (finding ineffective assistance of counsel even though the client's removal was ultimately withheld under INA § 241(b)).

156. Brian C. Harms, *Redefining Crimes of Moral Turpitude: A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 259–60 (2001) (discussing how, for more than a century, "[n]o court has been able to define with clarity what [CIMT] means").

157. *See, e.g.*, Kovacs v. United States, 744 F.3d 44 (2d Cir. 2014) (finding a plea to misprision of felony to be a clear CIMT ground for inadmissibility); Salazar v. State, 361 S.W.3d 99, 100–01 (Tex. App. 2011) (finding that a plea to theft of property, an offense corresponding to a CIMT ground for deportability given the circumstances of the case, would result in certain deportation).

158. 132 S. Ct. 1376 (2012).

159. 132 S. Ct. 1399 (2012).

counsel's deficient advice that the client could not be convicted at trial, rejected a favorable plea offer and went to trial, only to be convicted and given a sentence that was more severe than if he had taken the plea.[160] In *Frye*, the Court held that counsel's failure to inform clients of potentially favorable formal plea offers could amount to ineffective assistance of counsel if counsel's deficient performance prejudiced clients.[161]

Through *Padilla*, *Lafler*, and *Frye*, the Court has acknowledged the reality of plea bargaining, clarifying further that plea bargaining is a critical stage of criminal proceedings and requiring, as part of the Sixth Amendment, the effective assistance of counsel in connection with plea negotiations.[162] In doing so, the Court has moved defenders' duties in the immigration context closer to

160. *Lafler*, 132 S. Ct. at 1391. The Court found prejudice, reasoning that there was reasonable probability that the client and the court would have accepted the plea, which had significantly more favorable terms than the sentence he received following trial. *Id.*

161. *Frye*, 132 S. Ct. at 1408. In *Frye*, counsel did not inform his client of a favorable plea offer, and after the offer lapsed, the client took a plea to more severe terms. *Id.* at 1404–05. The Court reasoned in part that plea bargaining "*is* the criminal justice system" and is therefore "almost always the critical point for [clients]." *Id.* at 1407. Further, professional standards, which recommend counsel to promptly communicate and explain to clients the prosecution's plea offers, are important guides. *Id.* at 1408.

162. *See* Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (discussing that the Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."); *Lafler*, 132 S. Ct. at 1388 ("[T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences."); *Frye*, 132 S. Ct. at 1407 ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. . . . [P]lea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process . . . .").

The primary reason for pleas is that the criminal justice system, as it is designed and funded, cannot handle too many trials. *See* AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT 115 (2009). Judges, prosecutors, and even defenders benefit from the plea bargaining system, very often at the expense of the indigent accused. Judges, who act as case managers seeking to clear their dockets, often pressure attorneys to strike plea agreements. *Id.* at 93. For prosecutors, pleas help keep conviction rates high, without the possibility to lose at trial. *Id.* at 115. And for defenders, besides avoiding the risk of devastating consequences as a result of trials, pleas can help alleviate excessive caseloads. *Id.*

Given the shocking revelations of wrongful convictions in recent years, one is left wondering how many plea bargains result in convicting the innocent. *See generally* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011). *Cf.* Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1127 (W.D. Wash. 2013) ("[T]he system is broken to such an extent that . . . actual innocence could conceivably go unnoticed and unchampioned. Advising a client to take a fantastic plea deal . . . may appear to be effective advocacy, but not if the client is innocent, the charge is defective, or the plea would have disastrous consequences for his or her immigration status."); Hurrell-Harring v. State, 930 N.E.2d 217, 227 (N.Y. 2010) ("Wrongful conviction, the ultimate sign of a criminal justice system's breakdown and failure, has been documented in too many cases."). Indeed, the plea bargaining system deserves far more careful scrutiny, and it needs to be significantly transformed.

already existing professional standards,[163] which have recommended zealous and effective representation that includes plea negotiations and sentencing advocacy;[164] holistic public defender offices have proved that such practices can produce better outcomes for noncitizen clients.[165] As already established, the Court has recognized defenders' ability to provide creative and effective advocacy beyond mere advisals.[166] Bartering immigration consequences must be an essential part of the plea bargaining process.[167]

Padilla's advisal duty must at least assure informed consideration of the potential immigration consequences of contemplated criminal dispositions.[168] Combined with *Lafler* and *Frye*, given clients' informed consideration and expressed goals, defenders also arguably have the affirmative duty to advocate during plea bargaining to avoid or mitigate adverse immigration consequences. Lower courts have upheld this affirmative duty. For example, in *Rodriguez-Vega*, in finding ineffective assistance of counsel, the Ninth Circuit discussed counsel's duty to advise her client accurately and to negotiate accordingly.[169] The court asserted, "[H]ad she been properly and timely advised, Rodriguez-Vega could have instructed her counsel to attempt to negotiate a plea that would not result in her removal."[170] The court cited to *Frye*: "In order that the[] benefits [of plea bargaining] can be realized, however, criminal defendants require effective counsel during plea negotiations. Anything less . . . might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him."[171]

To provide an informed legal opinion of the disposition's immigration impact and, per clients' wishes, to advocate for immigration-safe dispositions, defenders must inquire into a client's immigration status and goals, investigate the facts of the case, and research the law. To do so, defenders must be sufficiently

163. *See* Vázquez, *supra* note 125, at 182.

164. *See, e.g.*, Resolution 107C, *supra* note 90, at 6 ("In accordance with client goals and needs, defense counsel should seek dispositions and sentences that avoid or minimize all penalties and consequences, criminal and civil."); U.S. DEP'T OF JUSTICE, 2 COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS, at H2 (2000), https://www.mynlada.org/defender/DOJ/standardsv2/welcome.html [http://perma.cc/QQ5L-VAGP] (directing defenders to investigate and explore alternative negotiated dispositions).

165. *See infra* Parts III and IV.

166. *See* sources cited *supra* note 123.

167. *Cf.* Eagly, *supra* note 1, at 2295.

168. *See Padilla*, 559 U.S. at 373 ("[I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process.").

169. United States v. Rodriguez-Vega, 797 F.3d 781, 787 (9th Cir. 2015).

170. *Id.*

171. *Frye*, 132 S. Ct. at 1407–08.

trained and supported.[172] Defenders may also need to consult with immigration experts.[173]

B. *Padilla*, Equality, Racial Justice, and Public Defenders

Some scholars have hailed *Padilla* as the "most important right to counsel case since *Gideon*."[174] *Gideon* was "clearly rooted in the ideal that the division between rich and poor should not predetermine guilt in a criminal case."[175] Arguably, *Gideon* was a case about equality and racial justice. Albeit unsuccessfully, it sought "a level playing field within a society fraught with racial inequalities" and discrimination.[176] Similar to *Gideon*, *Padilla* could potentially serve as a stand against racism, xenophobia, and the criminalization and marginalization of the poor. *Padilla* could help turn the tide against the crimmigration crisis—but only if public defender offices and other stakeholders act proactively and decisively to bring about urgent change.

Just as *Gideon*'s legacy demonstrates, fair proceedings require more than a formal right to effective assistance of counsel.[177] Over fifty years after *Gideon*, it is undisputed that the laughably low standard for effective counsel promulgated in *Strickland* has eroded *Gideon*'s equality ideal and impact.[178] It therefore brings no comfort that a key foundation for *Padilla* is *Strickland*.[179] *Strickland*'s doctrine has generally not served criminal defendants receiving subpar representation, for whom the need to prove prejudice—the second prong in *Strickland*—has made finding post-conviction relief demanding.[180] This practical reality can limit

172. *See* Smyth, *supra* note 87, at 828; *see also* Resolution 107C, *supra* note 90, at 4–7.
173. *See* Resolution 107C, *supra* note 90, at 6 ("An investigation of the [collateral consequences] for a client may include consultation with either in-house civil counsel or other civil counsel with whom defense counsel has a relationship and referral arrangement.").
174. *See, e.g.*, Margaret Love & Gabriel J. Chin, *The "Major Upheaval" of* Padilla v. Kentucky, 25 CRIM. JUST. 36, 37 (2010).
175. Eagly, *supra* note 1, at 2306.
176. *See id.*
177. *Id.* at 2311.
178. *Id.*
179. *See* Darryl K. Brown, *Why* Padilla *Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1407–08 (2011) ("*Padilla* remains a mere refinement of the ineffective assistance doctrine first defined in *Strickland v. Washington*, a doctrine under which state and federal courts have created a long track record of finding poor lawyering to be constitutionally adequate.").
180. Wright, *supra* note 18, at 1535. *But see generally* Jenny Roberts, *Proving Prejudice, Post*-Padilla, 54 HOW. L.J. 693 (2011) (proposing how noncitizens could meet the prejudice requirement). In addition, at least in the plea bargaining context, in light of *Lafler* and *Frye*, it may be more feasible to meet the prejudice prong for *Padilla* purposes. *See, e.g.*, United States v. Rodriguez-Vega, 797 F.3d 781 (9th Cir. 2015) (using *Frye* and *Lafler* in its reasoning to find ineffectiveness of counsel under *Padilla* in the plea bargaining context); *see also* discussion and sources cited *supra* note 133.

Padilla's implementation and impact. Indeed, as with the legacy of resistance against *Gideon*[181] and *Brown v. Board of Education*,[182] courts, jurisdictions, and even public defender offices can resist and attempt to limit *Padilla*'s mandate.[183] For example, courts finding that plea colloquies[184] are significant, if not controlling, evidence weighing against a finding of prejudice[185] is particularly disturbing. The legacy of cases like *Gideon* and *Brown* makes us keenly aware that *Padilla*'s legal mandate can mean little without organizing and advocating for jurisdictions to provide for more effective immigration defense.[186]

In light of *Padilla*, it becomes even clearer that the mantra of traditional public defense training—that is, solely focusing on securing "the least restrictive disposition"—does not necessarily result in the most desirable outcome in the immigration context.[187] The "least restrictive disposition" mantra further exposes a profound misunderstanding of the nature of removal, among other enmeshed penalties, and its interaction with poverty, racism, and xenophobia in affecting poor communities of color and noncitizens.[188] *Padilla*, along with

181. *See generally* Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance after* Gideon v. Wainwright, 122 YALE L.J. 2150 (2013).

182. 347 U.S. 483 (1954). For background on the legacy of resistance to *Brown*, see generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

183. One court refused to find a Sixth Amendment violation when a defense attorney provided general instead of specific advice because the usual practice was to advise clients that the plea *may* impact their immigration status. *See* Coutu v. State, No. 2008-4598, slip op. at 7 (R.I. Super. Ct. July 29, 2010). Other courts have strictly limited *Padilla* to the circumstances of *Padilla*'s case. Lindsay C. Nash, *Considering the Scope of Advisal Duties Under* Padilla, 33 CARDOZO L. REV. 549, 564 (2011).

184. A protection under the Fifth Amendment, plea colloquies are conversations regarding the consequences of the plea before people charged with crimes can enter valid guilty pleas. Danielle M. Lang, Padilla v. Kentucky*: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 YALE L.J. 944, 947 (2012).

185. *See generally id.* at 981–84 (finding that in the majority of fifty-one lower court cases surveyed, plea colloquy warnings contributed to findings against prejudice). Nevertheless, counsel must still affirmatively advise clients, and plea agreements or plea colloquies cannot cure counsel's deficient performance—that is, *Strickland*'s first prong. *See, e.g.*, United States v. Rodriguez-Vega, 797 F.3d 781, 787 (9th Cir. 2015) ("The government's performance in including provisions in the plea agreement, and the court's performance at the plea colloquy, are simply irrelevant to the question whether *counsel*'s performance fell below an objective standard of reasonableness."); United States v. Urias-Marrufo, 744 F.3d 361, 369 (5th Cir. 2014) ("It is counsel's duty, not the court's, to warn of certain immigration consequences, and counsel's failure cannot be saved by a plea colloquy.").

186. *Cf.* Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1137 (W.D. Wash. 2013) ("The notes of freedom and liberty that emerged from *Gideon*'s trumpet a half-century ago cannot survive if that trumpet is muted and dented by harsh fiscal measures that reduce the promise to a hollow shell of a hallowed right.").

187. *See* Steinberg, *supra* note 19, at 974.

188. *See id.*

Lafler and *Frye*, compel us to understand what effective immigration defense looks like in practice.[189]

In the world of indigent defense, improving immigrant representation through institutional public defenders is imperative. Public defender offices can have significantly better outcomes than individual panel private attorneys.[190] Every year, over 950 public defender offices throughout the country stand as the only line of legal defense for hundreds of thousands of noncitizens charged with crimes.[191] Generally, public defender offices do not treat the minimum standards of Sixth Amendment doctrine as an acceptable goal for criminal defense.[192] But "immigration representation, like other aspects of criminal defense work, is affected by the extreme variability in the quality and funding of public defender programs."[193] Many jurisdictions have "developed a strong tradition of funding defense counsel above the minimum level required by law."[194] Defenders, particularly in these sympathetic jurisdictions, can advocate for stronger immigration defense, even above the minimum requirements of the law, especially if their client base has a significant proportion of noncitizen clients.[195]

The potential power of *Padilla* arguably flows less from its application to post-conviction relief and more from the new constitutional leverage it can create to advocate for more robust immigration defense. Defenders can use *Padilla* to promote institutional change, increase resources, and improve individual advocacy.[196] As Parts III and IV show, public defender offices can use *Padilla* to become more holistic. When "committed and innovative public defender offices set high expectations" and achieve better outcomes, they can "influence other offices, national practice standards, and ineffective assistance jurisprudence."[197] *Padilla* can be an opening for defenders committed to serving all their clients, citizens and noncitizens alike, to proactively fight for equality and racial justice and defend immigrants' rights—that is, their clients' rights.

189. *See* Eagly, *supra* note 1, at 2312.
190. *See id.* at 2311–12. Institutional public defender offices' increased efficacy and efficiency can stem from a range of reasons, including, *inter alia*, pooled resources and economies of scale, specialized expertise, leadership and management structures, enhanced accountability, institutional memory, and office cultures seeking to continually improve services.
191. Out of 957 offices in the United States, 427 are funded and controlled at the state level, and 530 are controlled and primarily funded at the local or county level. Wright, *supra* note 18, at 1525.
192. *See id.* at 1535.
193. Eagly, *supra* note 1, at 2293–94.
194. Wright, *supra* note 18, at 1532.
195. *See id.*
196. *See* Smyth, *supra* note 87, at 829; McGregor Smyth, *"Collateral" No More*, 31 ST. LOUIS U. PUB. L. REV. 139, 165 (2011).
197. Roberts, *supra* note 34, at 360.

C. Impact Litigation

If jurisdictions will not fund public defender offices to provide effective immigration defense in light of policy considerations alone, the potential for lawsuits could move the dial. Especially in unsympathetic jurisdictions that have invariably underfunded indigent defense, litigation may be the strongest option to effectuate change. In these jurisdictions, instead of having to prove prejudice in individual ineffective assistance of counsel claims, systemic deficiency challenges could be brought for prospective relief.[198] These structural lawsuits would claim violations of indigent noncitizen clients' Sixth Amendment right to effective assistance of counsel regarding advice and advocacy over immigration consequences. Public defender offices could seek to collaborate with impact litigation organizations to bring such lawsuits.[199]

1. Systemic Deficiency Challenge Based on Constructive Denial of Counsel

In *United States v. Cronic*,[200] the Court recognized that there are circumstances in which ineffectiveness may be presumed without the prejudice inquiry because it is so unlikely that a lawyer could provide effective assistance.[201] The *Cronic* Court dismissed the need to demonstrate prejudice "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not" provide effective assistance.[202] Even though it did not find

198. The availability of ineffective assistance claims should not preclude structural claims. *See, e.g.*, Hurrell-Harring v. State, 930 N.E.2d 217, 226 (N.Y. 2010) ("Neither law, nor logic, nor sound public policy dictates that one form of relief should be preclusive of the other."); *cf.* Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1133 (W.D. Wash. 2013) ("The exact impacts of the constitutional deprivation are widespread but difficult to measure on a case by case basis, making legal remedies ineffective.").

199. This type of impact litigation must be further analyzed and will depend on the distinct circumstances of various jurisdictions. In California, for example, long-standing case law predating *Padilla* establishes defense counsel's duties to provide advice on the immigration consequences of convictions and to advocate for favorable pleas. *See* People v. Bautista, 8 Cal. Rptr. 3d 862 (Ct. App. 2004); People v. Soriano, 240 Cal. Rptr. 328 (Ct. App. 1987). Additionally, this case law and *Padilla v. Kentucky* recently became statutory law under CAL. PEN. CODE §§ 1016.2–1016.3.

200. 466 U.S. 648 (1984).

201. *See id.* at 659–60 ("[A]lthough counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate . . . .").

202. Bell v. Cone, 535 U.S. 685, 696 (2002) (discussing the Court's decision in *Cronic*, 466 U.S. at 659–62). Additional situations where prejudice is presumed under *Cronic*, such that a defendant is entitled to reversal, are (1) "where the accused is denied the presence of counsel at 'a critical stage,'" or (2) "if 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.'" *Id.* at 695–96 (citing *Cronic*, 466 U.S. at 659–62).

the particular facts of the case at hand to warrant a presumption of ineffectiveness, *Cronic* has in effect allowed for structural litigation seeking prospective or injunctive relief.[203] Indeed, lower courts have followed suit in extending the Court's rejection of the need to prove prejudice in systemic deficiency challenges seeking prospective relief.[204] *Strickland*'s first prong of deficient performance, however, remains relevant. Analysis of deficient performance has informed lower courts, as these have stepped in to remedy the rampant crisis in indigent defense services.[205]

Generally, in a suit for prospective relief based on systemic deficiencies in the provision of indigent defense services, plaintiffs must prove the government is responsible for system-wide deficiencies that have caused or are likely to cause "substantial and immediate irreparable injury" to indigent defendants' Sixth

203. *See* Carol S. Steiker, Gideon *at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2701 (2013).

204. *See* Luckey v. Harris, 860 F.2d 1012, 1017–18 (11th Cir. 1988) ("Th[e] [*Strickland*] standard is inappropriate for a civil suit seeking prospective relief."), *rev'd on abstention grounds by* Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992); Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1123, 1127 (W.D. Wash. 2013); Hurrell-Harring v. State, 930 N.E.2d 217, 225 (N.Y. 2010) (discussing the critical distinction between a claim for ineffective assistance and one alleging that the right to the assistance of counsel has been denied, for which inquiry as to prejudice would not be appropriate).

Luckey was litigation brought by the ACLU seeking a remedy for Georgia's then county-based system of indigent defense. The Eleventh Circuit found that plaintiffs had sufficiently stated a claim upon which relief could be granted. *Luckey*, 860 F.2d at 1080. Nevertheless, the court "eventually ruled against the plaintiffs on the grounds of *Younger* abstention, which prevents federal courts from issuing rulings that would interfere with ongoing state criminal prosecutions—a doctrine that has thus far precluded the success of Sixth Amendment structural litigation in the federal courts." Steiker, *supra* note 203, at 2701–02.

A federal district court, however, has recently ordered prospective relief to remedy systematic deprivation of counsel. *Wilbur*, 989 F. Supp. 2d at 1123. According to Cara Drinan, federal courts have erred in refusing to hear prospective Sixth Amendment claims on federalism grounds. Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 465 (2009). The *Younger* abstention should not apply, but even if it does, the doctrine's exceptions should permit the federal courts to hear these cases. *Id.* at 469–70. For more on this issue, see *id.* at 468–69.

205. *See, e.g.*, *Wilbur*, 989 F. Supp. 2d at 1133–37; Pub. Defender, Eleventh Cir. of Fla. v. State, 115 So. 3d 261, 278–79 (Fla. 2013) (intervening prospectively when defenders' excessive caseloads and limited funding resulted in "nonrepresentation and therefore a denial of the actual assistance of counsel guaranteed by *Gideon* and the Sixth Amendment"); *Hurrell-Harring*, 930 N.E.2d at 227 ("[E]nforcement of a clear constitutional or statutory mandate is the proper work of the courts, and it would be odd if we made an exception in the case of a mandate as well-established and as essential to our institutional integrity as the one requiring the State to provide legal representation to indigent criminal defendants at all critical stages."); Duncan v. State, 832 N.W.2d 761, 771 (Mich. Ct. App. 2012) (finding that, without court intervention, "indigent persons who are accused of crimes in Michigan will continue to be subject to inadequate legal representation without remedy unless the representation adversely affects the outcome").

Amendment right to effective assistance of counsel.[206] Short of actual denial of counsel, constructive denial of counsel (or effective counsel) can amount to "substantial and immediate irreparable injury" to indigent defendants' right to effective counsel.[207] Claims based on constructive denial of counsel have usually argued that the pretrial period itself is a critical stage of criminal proceedings.[208] Constructive denial of counsel occurs when counsel's performance is so lacking that the situation may be better understood as "nonrepresentation rather than ineffective representation."[209] This may be evident in (a) substantial structural limitations or in (b) significant compromise system wide in traditional markers of representation, or both as these are usually interrelated.[210] In other words, such systemic deficiencies can collectively result in the constructive denial of counsel and constitutional injury.[211]

Substantial structural limitations can force defenders to represent clients without being able to fulfill the traditional markers of representation, and create systemic deficiencies harming clients' Sixth Amendment right to effective

206. *Luckey*, 860 F.2d at 1017 (quoting O'Shea v. Littleton, 414 U.S. 488, 502 (1974)); *see also Wilbur*, 989 F. Supp. 2d at 1124 (issuing prospective relief after finding "that indigent criminal defendants . . . are systematically deprived of the assistance of counsel at critical stages of the prosecution and that municipal policymakers have made deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused the deprivation."); Simmons v. State Pub. Defender, 791 N.W.2d 69, 76 (Iowa 2010) ("In cases involving systemic or structural challenges . . . . what is required is a showing that the structural feature being challenged threatens or is likely to impair realization of the right to effective assistance of counsel."); *Hurrell-Harring*, 930 N.E.2d at 224–27.

207. *See Hurrell-Harring*, 930 N.E.2d at 226–27 (noting that constructive denial of counsel at critical stages is capable of causing substantial and irreparable injury).

208. These lawsuits have alleged counsel's inability to provide adequate pretrial legal services, such as attorney-client communication, investigation, research, and client advice. *See, e.g.*, *Luckey*, 860 F.2d at 1018; *Wilbur*, 989 F. Supp. 2d at 1127; *Hurrell-Harring*, 930 N.E.2d at 222.

209. *Hurrell-Harring*, 930 N.E.2d at 224; *see also* Bell v. Cone, 535 U.S. 685, 696 n.3 (2002); United States v. Cronic, 466 U.S. 648, 658–60 (1984); *Wilbur*, 989 F. Supp. 2d at 1131 ("While the outright failure to appoint counsel will invalidate a resulting criminal conviction, less extreme circumstances will also give rise to a presumption that the outcome was not reliable. For example, if . . . circumstances exist that make it highly unlikely that any lawyer, no matter how competent, would be able to provide effective assistance, the appointment of counsel may be little more than a sham and an adverse effect on the reliability of the trial process will be presumed.") (citing *Cronic*, 466 U.S. at 658–60). For a more comprehensive explanation of constructive denial of counsel, see generally *Statement of Interest of the United States in* Hurrell-Harring v. New York, No. 8866-07, U.S. DEP'T OF JUST. (Sept. 25, 2014), http://www.justice.gov/crt/about/spl/documents/hurrell_soi_9-25-14.pdf [http://perma.cc/8QKY-GYKK] [hereinafter "DOJ Statement of Interest"].

210. *See* DOJ Statement of Interest, *supra* note 209, at 7 (citing to *Wilbur*, 989 F. Supp. 23 1122, and other cases).

211. *See id.*; Brief for Petitioner, Phillips v. California, No. 15-02201, at *13 (July 14, 2015).

assistance of counsel.[212] In particular, courts have found that excessive caseloads above those admonished in national and state standards create deficiencies violating the Sixth Amendment rights of the indigent accused.[213] National standards provide for no more than 150 felonies per attorney per year, no more than 400 misdemeanors per attorney per year, or no more than 200 juvenile court cases per attorney per year.[214] These caseload standards, according to the American Bar Association, are true maxima and "should in no event be exceeded."[215] The standards assume that attorneys have appropriate experience and adequate training, as well as investigative and administrative support; without these factors, however, the actual maxima must necessarily be lower.[216]

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212. For example, in *Wilbur*, the district court found a Sixth Amendment violation where structural limitations—insufficient staffing, excessive caseloads, and lack of supervision—resulted in a system "broken to such an extent that confidential attorney/client communications [were] rare, the individual defendant [was] not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned." 989 F. Supp. 2d at 1127.

In a lawsuit against the governor of Connecticut, plaintiffs alleged that substantial structural limitations—reflected in the underfunding of the indigent defense system, excessive caseloads, and substandard rates of compensation—led to defenders' inability to spend adequate time interviewing their clients or reviewing clients' files, conducting necessary legal research and factual investigation, counseling, or even explaining basic information. Second Amended Class Action Complaint, Rivera v. Rowland, No. CV-95-0545629 S (Conn. Super. Ct. Jan. 22, 1997), http://www.nlada.net/sites/default/files/ct_riveravrowland_aclucomplaint_01-22-1997.pdf [https://perma.cc/Z643-4T7Q]. The court declined to dismiss the lawsuit, finding that the plaintiffs had alleged specific harms. *See* Margaret A. Costello, *Fulfilling the Unfulfilled Promise of* Gideon*: Litigation as a Viable Strategic Tool*, 99 IOWA L. REV. 1951, 1963 (2014). Ultimately, the litigation settled, providing for a reduction in caseloads through an increase in public defense staffing, new practice and caseload guidelines, and training and oversight. *Id.*

213. *See, e.g.*, *Wilbur*, 989 F. Supp. 2d at 1130–31 (finding that the number of actual cases—far exceeding national and state standards—resulted in a system in which counsel "[had] no idea what the clients' goals [were], whether there [were] any defenses or mitigating circumstances that require investigation, or whether special considerations regarding immigration status, mental or physical conditions, or criminal history exist[ed]"); Pub. Defender, Eleventh Cir. of Fla. v. State, 115 So. 3d 261, 274 (Fla. 2013) (finding that excessive felony caseloads led to a situation in which defenders regularly engaged in "triage" practices, focusing on clients in pretrial custody and allowing out-of-custody clients to go essentially unrepresented for long periods between arraignment and trial); State v. Smith, 140 Ariz. 355, 361–63 (Ariz. 1984).

214. *Standards for the Defense, Standard 13.12 Workload of Public Defenders*, NAT'L LEGAL AID & DEFENDER ASS'N, http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense [http://perma.cc/4AEB-22UT] (last visited Feb. 1, 2016) [hereinafter NAC Standards].

215. ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf [http://perma.cc/B2VU-F6QB] [hereinafter ABA TEN PRINCIPLES].

216. *See, e.g.*, *Wilbur*, 989 F.Supp.2d at 1126 ("[T]he 400 caseload limit applies as long as counsel handles only misdemeanor cases, is employed full-time in public defense, is handling cases of average complexity and effort, counts every matter to which he or she is assigned to provide representation, is fully supported, and has relevant experience. Where counsel diverges from these

Public defender offices must also have adequate support staff, or else they risk creating deficiencies amounting to constitutional injury. With insufficient numbers of investigators, factual investigation is often shoddy, in violation of state and national standards.[217] Similarly, a lack of paralegals and secretaries can lead to a violation of state and national standards.[218]

In finding systemic deficiencies, courts have also evaluated the existence and extent of traditional markers of representation.[219] These markers include, for example, communicating with clients, conducting necessary legal research and factual investigations, and advocating for clients through plea negotiation or trial.[220] If these traditional markers of representation are absent or are seriously compromised, courts have found constructive denial of counsel in violation of the Sixth Amendment.[221]

The Court's recent decisions may facilitate systemic deficiency lawsuits based on constructive denial of counsel. Through decisions such as *Lafler* and *Frye*, the Court has been redefining the Sixth Amendment "as focused not just on the reliability of the ultimate verdict and the fairness of the trial itself, but instead on the [pretrial] procedural fairness of the adversarial process."[222] In *Lafler*, the Court rejected the government's position that "[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining."[223] In *Frye*, the Court held that the missed opportunity of a lapsed plea offer due to

assumptions, the caseload limit must be lowered in an attempt to protect the quality of the representation provided.").

217. *See, e.g.*, ABA TEN PRINCIPLES, *supra* note 215, at 3; STATE BAR OF CAL., GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEM 8–9 (2005).

218. *See* ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, EIGHT GUIDELINES ON PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS 8 n.24 (2009); ABA TEN PRINCIPLES, *supra* note 215 at 3; NAC Standards, *supra* note 214, at 10.

219. Traditional markers of representation are reflected in professional standards, which are the benchmark also for the analysis of the deficient performance prong in *Strickland*-based ineffective assistance of counsel claims. *Strickland*'s deficient performance analysis remains relevant here. *See supra* note 132.

220. *See, e.g.*, *Wilbur*, 989 F. Supp. 2d at 1128 (reasoning that clients met their defenders for the first time in court and immediately accepted pleas, and there was very little evidence of counsel performing factual investigation or legal research); Pub. Defender, Eleventh Cir. of Fla. v. State, 115 So. 3d 261, 278 (Fla. 2013) (finding that defenders did not communicate with clients, were unable to investigate the allegations, and were unprepared for trial); Hurrell-Harring v. State, 930 N.E.2d 217, 224 (N.Y. 2010) (holding that plaintiffs sufficiently pled constructive denial of counsel where they alleged that appointed counsel "were uncommunicative, made virtually no efforts on their nominal clients' behalf during the very critical period subsequent to arraignment, and, indeed, waived important rights without authorization from their clients").

221. *See* Hurrell-Harring, 930 N.E.2d at 224; DOJ Statement of Interest, *supra* note 209.

222. Lauren Sudeall Lucas, *Unintended Consequences: The Impact of the Court's Recent Cases on Structural Ineffective Assistance of Counsel Claims*, 25 FED. SENT'G. REP. 106, 107 (2012).

223. Lafler v. Cooper, 132 S. Ct. 1376, 1385–86 (2012); Lucas, *supra* note 222, at 107.

counsel's deficient performance was unconstitutional.[224] In these and other recent cases, the Court has also been willing to mandate prospective pretrial duties on counsel—duties such as those required by *Padilla*.[225] The Court has recognized that when these specific pretrial duties[226] are unfulfilled, the Court "will make a de facto finding of deficient performance."[227] Structural deficiencies often make these duties impossible to meet.[228]

2. Systemic Deficiency Challenge in the Context of *Padilla*, *Lafler*, and *Frye*

A possible lawsuit may assert the following general claim: As a result of systemic deficiencies, indigent noncitizen clients of a particular jurisdiction's public defender office are constructively denied their Sixth Amendment right to effective representation regarding the immigration consequences of contemplated dispositions during critical stages of criminal proceedings, especially during plea bargaining, as established under *Padilla*, *Lafler*, and *Frye*. Among the various types of constitutional harms indigent noncitizen clients regularly experience is the wrongful denial of advice on the immigration consequences of crimcriminal dispositions, in violation of *Padilla*'s mandate to defense counsel. As a result, indigent noncitizen clients forego their right to trial and accept guilty pleas without informed consideration of the immigration consequences of their pleas. Relatedly, indigent noncitizen clients waive their opportunity to negotiate immigration consequences during plea bargaining, when their counsel do not advocate over immigration consequences, in violation of *Padilla* alongside *Lafler* and *Frye*.[229] As a result, indigent noncitizen clients often receive harsh immigration consequences that would have otherwise been avoidable or able to be mitigated.

First, post-*Padilla*, public defender offices face substantial structural limitations that create systemic deficiencies leading to the harms described above. *Padilla* imposed a new burden on defenders.[230] As a result, the new

224. Missouri v. Frye, 132 S. Ct. 1399, 1407–08 (2012); Lucas, *supra* note 222, at 107.
225. Lucas, *supra* note 222, at 107.
226. Besides looking to professional standards in assessing whether counsel's performance was deficient, the Court has itself established certain duties, such as counsel's duty under *Padilla* to provide advice on the immigration consequences of convictions, or counsel's duty under *Frye* to communicate to clients in a timely manner the prosecution's formal plea offers. *See supra* Part II.A.
227. Lucas, *supra* note 222, at 107.
228. *Id.* at 108.
229. *See* Padilla v. Kentucky, 559 U.S. 356, 373 (2010); Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012); Frye, 132 S. Ct. at 1407–08.
230. *See generally* Chaidez v. United States, 133 S. Ct. 1103 (2013).

constitutional duties under *Padilla*, *Lafler*, and *Frye* intensify individual defenders' responsibilities that are already significantly demanding. Defense lawyering today is much harder than it used to be when the general caseload standards were established over forty years ago.[231] Indeed, those standards are too high today. Experts in the field have indicated that the standards are "outdated and fail to account for the added complexities over the last forty years, including significant collateral consequences resulting from convictions," especially immigration consequences.[232] Further, the guidelines "do not take full account of case complexity or an attorney's non-representational duties, including administration and professional development."[233]

Second, *Padilla*, coupled with *Lafler* and *Frye*, promulgated essential duties which defenders must carry out in order to avoid a finding of deficient performance. As a result, there are certain practices at various public defender offices that are likely deficient, violating the deficient performance prong—again, still relevant as they can reflect system-wide deficiencies. For example, public defender offices that have no uniform system of inquiring about clients' citizenship status likely ignore clients' status on a system-wide basis. As established already, inquiring into clients' citizenship status is a basic predicate to providing advice on immigration consequences, as mandated in *Padilla*.[234]

Notably, many offices rely solely on guides, manuals, or charts that indicate the immigration consequences of particular state convictions.[235] But for defenders only to use guides, without individualized, case-by-case analysis, is likely deficient under *Padilla* alongside *Lafler* and *Frye*. Guides are static resources, without updates that regularly match the rapid pace in which immigration law changes. More importantly, defenders need to know a significant amount of immigration law to even understand and use the guides effectively. A key problem with the guides is that the seemingly apparent is often complicated. For example, the guides include many terms of art used in immigration law. Probabilistic answers are of limited use. Certain pleas may work for people who entered without inspection but not for lawful permanent residents or those

231. Brief for Petitioner, Phillips v. California, No. 15-02201, at *15 (July 14, 2015).
232. *Id.*
233. *Id.*
234. *See supra* Part II.A.1.
235. *See, e.g.*, NORTON TOOBY & KATHERINE BRADY, CALIFORNIA CRIMINAL DEFENSE OF IMMIGRANTS (Amy Righter ed., 2014); MANUEL D. VARGAS, QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES, REPRESENTING IMMIGRANT DEFENDANTS IN NEW YORK (5th ed. 2011), http://immigrantdefenseproject.org/wp-content/uploads/2011/02/FINALappendix-A_Final 5thed2014.pdf [http://perma.cc/Y9X4-XCMQ]. I thank Isaac Wheeler for discussion on this point.

previously admitted. Similarly, some types of affirmative benefits or relief from removal may be successful for some clients but not for others, based on individual circumstances. In short, guides can only be used appropriately by defenders who know a significant amount of immigration law—especially if these guides are to be used in the context of plea negotiations, as defenders must arguably do to comply with *Padilla*, *Lafler*, and *Frye*. Defenders must be sufficiently trained and supported. Guides alone ultimately cannot be relied on to help clients make informed decisions and to avoid or mitigate negative immigration consequences. Finally, many public defender offices do not even have access to existing guides and have very few resources available to assist them in representing their noncitizen clients.

To remedy these structural deficiencies, public defender offices must hire immigration specialists, just like offices must hire investigators and other support staff such as paralegals and secretaries.[236] As discussed already, there are professional caseload standards both for defenders and for investigators and support staff.[237] But caseload standards requiring a certain number of immigration experts for a certain number of noncitizen cases do not yet exist.[238] This is an opening where targeted advocacy can convince criminal defense bars or public defenders' associations to pass professional standards that mandate immigration experts in-house, as determined by numerical caseload standards.

Ultimately, defenders could potentially do the legal research and the plea advisals and advocacy required, as long as they have sufficient time and are adequately trained and equipped. Still, immigration experts are needed, because they can support defenders in ways that maximize comparative advantages, increasing overall efficiency and efficacy. Having immigration expertise in-house can actually decrease defenders' workload and thereby assuage the huge burdens already placed on them. Immigration expertise can ease the demands on individual defenders to figure out clear, yet nuanced, immigration consequences on their own, instead freeing up their time to focus on what they know best—criminal defense. By collaborating with immigration experts, defenders are likely to have more information to discern the most effective case strategies.

Nevertheless, courts are unlikely to adopt ratios of immigration experts to a certain number of defenders or cases of noncitizen clients in the near future.

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236. *Cf.* Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1133–37 (W.D. Wash. 2013) (issuing injunctive relief and ordering the hiring of a part-time Public Defense Supervisor with funds additional to the existing budget for public defense services).

237. *See supra* notes 214–218 and accompanying text.

238. New York is one jurisdiction with recommended standards. *See infra* note 314 and accompanying text.

Courts may resist ordering the hiring of immigration experts to work within public defender offices. In the alternative, public defender offices can contract with outside organizations with criminal-immigration law expertise.[239] This type of hotline option is less ideal; communication channels are not as seamless, increasing transaction costs[240] and decreasing the overall efficiency and efficacy of the immigration representation. As Parts III and IV demonstrate, both defenders and immigration experts can be more efficient and effective if they collaborate on a day-to-day basis, especially if the immigration expert can work directly with clients rather than depend on defenders to collect and relay vital information.

Another less ideal alternative is for courts to order public defender offices to reduce the caseloads of individual defenders, so that they can do the factual investigation, legal research, and plea advisal and advocacy required under *Padilla*, *Lafler*, and *Frye*. This option, however, would still require more funds to hire additional defenders and train them sufficiently to meet the unchanged overall need. Defenders would still need to know a significant amount of immigration law. This option would miss the efficiency and efficacy gains of having immigration experts in-house.

III. CASE STUDIES: MORE HOLISTIC IMMIGRATION DEFENSE

A number of public defender offices serving large noncitizen populations have developed a holistic model of immigration defense even before *Padilla v. Kentucky*.[241] The Bronx Defenders (BxD), a holistic public defender organization, is one such model office.[242] Since its inception in 1997, BxD has

239. Organizations with such expertise include, for example, the Immigrant Defense Project in New York and the Immigration Legal Resource Center in California.

240. *See* Wright, *supra* note 18, at 1529–30.

241. 559 U.S. 356 (2010). In addition to holistic defense, other models of immigration defense within public defender offices include the following: staff-split (the public defender office shares an immigration staff attorney with a local immigration service provider); in-house (the public defender office has one or more staff attorneys as the office's immigration experts); central office (one or more immigration experts are housed in the central office and provide immigration consultations to defenders from the various local offices upon request); and contract (the office outsources its immigration advisals to a separate organization). MARKOWITZ, *supra* note 18, at 10–14.

242. Scholars and practitioners have profiled BxD as a model holistic defender office. *See, e.g.*, Resolution 107C, *supra* note 90, at 7–8. BxD has received numerous awards for its innovative and highly efficient and effective holistic defense. *See, e.g.*, *The Bronx Defenders Wins the National Legal Aid and Defender Association's 2013 Clara Shortridge Foltz Award*, BRONX DEFENDERS, http://www.bronxdefenders.org/the-bronx-defenders-wins-the-national-legal-aid-and-defender-associations-2013-clara-shortridge-foltz-award/ [https://perma.cc/UAF9-WHHY] (last visited Mar. 26, 2016).

pioneered a holistic model of public defense, seamlessly integrating in-house criminal and civil representation, including immigration.[243] Through a partnership with the U.S. Department of Justice, BxD and its Center for Holistic Defense have consulted for and trained scores of public defender offices around the country in becoming more holistic.[244]

Quality public defender programs "understand the defense role as one that seamlessly integrates criminal and immigration counseling."[245] The BxD model has embedded immigration experts within the office working alongside criminal defense attorneys "in courthouses and jailhouse lockups to provide simultaneous immigration and criminal advice" and zealous advocacy "from the point of earliest meeting with a noncitizen client."[246] The holistic model of immigration defense also seeks to provide comprehensive representation on immigration issues "beyond mere advice, plea negotiation, or defending a criminal-immigration charge."[247] For example, BxD has developed a full-service immigration legal services program in-house, providing its noncitizen clients with direct representation in removal proceedings. Post-*Padilla*, BxD was able to use the new constitutional mandate to increase funding for and strengthen its holistic model of immigration defense.[248]

The Office of the Alameda County Public Defender (ALCO PD) has recently transitioned to a more holistic model of immigration defense. The office became the first—and one of only a select few offices—outside of New York City to represent noncitizen clients in immigration court.[249] On a parallel track, ALCO PD has worked with BxD and its Center for Holistic Defense as part of a technical assistance grant from the U.S. Department of Justice to support ALCO PD in becoming more holistic.

243. *See* Steinberg, *supra* note 19.
244. *The Center for Holistic Defense*, BRONX DEFENDERS, http://www.bronxdefenders.org/programs/center-for-holistic-defense [http://perma.cc/PVN5-H4QV] (last visited Feb. 1, 2016).
245. Eagly, *supra* note 1, at 2313.
246. *Id.* at 2295.
247. *Id.* at 2297.
248. Interview with Kate Rubin, Former Managing Dir. of the Civil Action Practice, The Bronx Defenders, in New York City (Mar. 24, 2015).
249. The provision of this service significantly differentiates ALCO PD's model from the regular central office model, which tends not to provide direct immigration services. *See* MARKOWITZ, *supra* note 18, at 13. The San Francisco Public Defender's Office is another office that seeks to more comprehensively provide immigration legal services, including direct representation in removal proceedings. Interview with Jeff Adachi, S.F. Pub. Def., in San Francisco (Apr. 18, 2015).

A. The Bronx Defenders (BxD)[250]

BxD is a holistic public defender office.[251] As an institutional provider, BxD is burdened by the same crushing caseloads and faced with the same funding challenges as many public defender offices around the country.[252] Despite these challenges, BxD has helped to pioneer a holistic model of public defense, which is widely recognized as the most effective in the country.[253] Besides addressing clients' criminal cases, holistic defense attacks the various enmeshed penalties of criminal charges and convictions. For most of BxD's clients, their criminal cases are not the only figurative mountains they face. Rather, enmeshed penalties are imposed on clients largely through civil courts. Clients, however, are indigent and cannot afford a lawyer. Hence, BxD represents them.

At BxD, for every client, there is an interdisciplinary team of expert advocates, including criminal defense attorneys, housing attorneys, family attorneys, general civil action practice attorneys, investigators, parent advocates, legal advocates, social workers, and immigration attorneys who work side-by-side on all aspects of a client's case. Holistic defense begins with seamless in-house access to criminal and civil legal services, as well as to nonlegal services and community support, which are all designed to meet clients'

250. For the BxD case study in this Subpart, I conducted semi-structured interviews with the following individuals: Kate Rubin, Former Managing Director of the Civil Action Practice; Isaac Wheeler, Former Legal Director of Immigration; and Peter Markowitz, who originally spearheaded the development of BxD's holistic immigration practice. Markowitz is now a Clinical Associate Professor of Law and the Director of the Kathryn O. Greenberg Immigration Justice Clinic at Cardozo School of Law. These semi-structured interviews took place during the week of March 23, 2015. For a discussion on semi-structured interviews, see CRESWELL, *supra* note 20, at 203–04. I also spoke on the phone with Jennifer Friedman, Director of Immigration Practice at BxD, on March 9, 2016.

Additionally, on November 3, 2014, I organized a meeting of Los Angeles area immigrants' rights stakeholders. In this meeting, Robin Steinberg, BxD's Executive Director, discussed BxD's immigration practice. I used parts of that discussion to form my factual basis here.

Finally, I have used BxD materials as well as qualitative observation. For a discussion of qualitative observation, see CRESWELL, *supra* note 20, at 203. During the summer of 2014, I served as a legal intern in BxD's immigration practice. Although my unstructured observation as a complete participant was not for the purpose of this Comment, I was otherwise observing and learning for my own career and academic interests. Thus, my researcher identity was not known either to the participants or to me. *See* CRESWELL, *supra* note 20, at 190. Further, I have spoken with Steinberg on several occasions, and I have attended several of her talks regarding holistic defense. These observations have also assisted me in writing this Comment.

251. For a more comprehensive discussion of the holistic public defense model, see generally Steinberg, *supra* note 19.

252. *Id.* at 984.

253. *Id.* at 963; *see also supra* note 242.

needs.[254] BxD seeks to address the root causes of clients' contact with the criminal justice system, challenging the entrenched problems that drive clients into the criminal justice system in the first place and supporting them on pathways to self-sufficiency.

1. BxD's Holistic Immigration Practice

a. Seamless Integration of Criminal and Immigration Defense

Immigration defense at BxD is not a siloed unit or a separate bureaucratic division; rather, it is an integrated practice. As part of its holistic defense model, BxD has cultivated a culture and practice of seamless integration of its criminal and immigration practices. Full-time immigration defense attorneys are embedded in the office and work side-by-side defenders in interdisciplinary teams, which is the unit of client-centered advocacy at BxD.[255] Even their workspaces are adjacent, and teams sit together, allowing immigration experts and defenders to have immediate face-to-face access to one another, right over the cubical wall. Effective communication is highly encouraged.[256] If face-to-face communication is not possible, immigration experts are expected to be accessible to defenders by phone or email.[257] By communicating, working together, and learning from each other, both sides benefit, gain efficiency, and become more effective. Both the team structure and the spatial organization reinforce BxD's seamless integration and the holistic model of defense.

Seamless integration allows for early effective intervention in a client's criminal case in order to avoid or mitigate adverse immigration consequences. Defenders work to spot potential general issues. They are trained to know enough about immigration law to identify whether their clients are noncitizens and gather sufficient information to make a referral to the immigration defense attorney on their teams.[258] Defenders are trained to ask the right questions, without making assumptions—for instance, assumptions of citizen status based on appearance or lack of a foreign accent.[259] They are trained in how to ask these questions, taking a moment to explain the reason for the questions and

254. Steinberg, *supra* note 19, at 963; Smyth, *supra* note 87, at 835.
255. Steinberg, *supra* note 19, at 963.
256. Meeting with Robin Steinberg, Exec. Dir., The Bronx Defenders, in Los Angeles (Nov. 3, 2014).
257. *Id.*
258. Interview with Isaac Wheeler, Former Legal Dir. of Immigration, The Bronx Defenders, in New York City (Mar. 24, 2015).
259. *Id.*

that the answers are completely confidential.[260] In other words, defenders must address clients in ways that inspire trust, or else clients may provide incorrect or missing information.[261]

During intakes, defenders are required to use a general checklist, which takes no more than ten additional minutes to complete.[262] For immigration purposes, they ask clients a combination of the following questions: "Were you born in the United States?" "When and how did you come to this country?" "With what immigration status?" For lawful permanent resident clients, defenders ask, for example, "When did you get your green card?" For non-lawful permanent resident clients, defenders ask, for example, "What is your immigration status?" For unauthorized migrants, defenders ask, for example: "Have you ever had any contact with immigration, been deported, or applied for any immigration benefits?" "Do you have any U.S. citizen or permanent resident family?" If clients were born outside the United States, defenders categorically refer these clients to the immigration specialists on their teams.[263]

BxD's information systems and database further aid the seamless integration of criminal and immigration defense. When defenders mark on the checklist that their clients are noncitizens, they can click a button to make an immediate referral to the immigration defense attorneys on their teams.[264] Instead of having to fill out paperwork and walk over to the immigration attorneys, this streamlined referral system makes the work more efficient. Ultimately, BxD seeks to provide a deluxe service that takes minimal additional investment of time and effort by defenders, who already have high demands on their capacity, in exchange for the tremendous benefits they—and their clients—receive from consulting immigration experts.

Mandatory training and job evaluations based on referrals further support the seamless integration. In its training, BxD underscores immigration as one of the two most important concerns about a criminal case, sometimes dwarfing penal consequences in terms of importance to noncitizen clients and having the potential to radically change the goal of criminal representation.[265] It is thus

260. *Id.*

261. For an insightful understanding of what it means to lawyer in subordinated communities, see generally GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992); *see also* Gerald P. López, *The Work We Know So Little About*, 42 STAN. L. REV. 1 (1989); Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731 (1993).

262. Meeting with Robin Steinberg, *supra* note 256.

263. Interview with Isaac Wheeler, *supra* note 258.

264. *Id.*

265. *Id.*

imperative that defenders collect accurate information from clients and verify that information when possible.

Each year, new attorneys make up the training team, which undergoes an intensive initial training for roughly six to eight weeks.[266] Lawyers in every practice area are trained together and cross-trained in each other's disciplines. By the time they sit in teams, attorneys know a sufficient amount about the path of a criminal case and the path of an immigration case. This type of cross-training facilitates understanding of what colleagues do, helping to break down mental barriers.[267]

The training team also receives intensive support and supervision for a year to ensure that they are effective. During this time, BxD evaluates new attorneys' commitment to holistic defense, primarily based on rates of referrals.[268] Defenders are also evaluated on whether they record the information they gathered in the initial meeting with their clients.[269]

Once immigration defense attorneys receive the referrals from their team members, they conduct more intensive information gathering. They are also always on call for questions from defenders during clients' appearances or arraignments.[270] Speaking directly to clients either in court, in custody, or in the office, immigration experts do in-depth intakes. This practice is different from most other public defender offices that rely solely on defenders to gather information. Immigration specialists at BxD conduct individualized analyses of clients' immigration needs and the potential immigration consequences of contemplated dispositions, accounting for both clients' criminal and immigration histories. Most of BxD's noncitizen clients are lawful permanent

266. Lateral hires receive a reduced version of this training. Sometimes, for attorneys who came up in nonholistic offices, it is more difficult to instill holistic practices. In these cases, instilling holistic practices becomes a question of supervision. Interview with Isaac Wheeler, *supra* note 258.

267. *Id.*

268. Interview with Kate Rubin, *supra* note 248.

269. Interview with Isaac Wheeler, *supra* note 258.

270. If defenders have any doubt, they are encouraged to call the immigration defense attorneys on their teams. In particular, BxD used to be vigilant regarding ICE detainers until New York City stopped honoring them. *See infra* note 289 and accompanying text. ICE detainers are immigration warrants that could "drop" or be executed even during arraignments or pretrial custody. If detainers drop, ICE may be called to pick up the noncitizen at release from custody. Thus, defenders sought to avoid this situation by keeping clients out of custody in every possible way. Strategies for deportable clients to avoid custody have included setting affordable bail levels and having family members pay them, or taking early pleas after checking with the immigration expert. As discussed above, *see supra* notes 111 and 113, the future of jail-based immigration enforcement currently remains to be determined and will likely vary by jurisdiction.

residents,[271] who often present complex immigration questions where accurate legal advice and advocacy can make a big difference.[272] Then, per clients' understanding of their situations and their stated priorities, immigration defense attorneys prepare alongside defenders to advise and advocate for their clients to limit negative immigration consequences.

Besides avoiding deportability and inadmissibility grounds, immigration defense attorneys and defenders advocate to maintain clients' eligibility for relief from removal or their ability to defend future removal proceedings, as well as to maintain clients' eligibility for travel, adjustment of status, and naturalization.[273] Often, clients are advised on how to avoid making their criminal cases potentially worse during their pendency, such as avoiding travel abroad or in certain parts of the United States, or refraining from affirmative applications if clients are deportable.[274] Each plea consultation is different, involving potentially an initial consultation, advisement, advocacy for a favorable plea, or ultimately even trial. BxD conducts an average of 223 plea consultations per month.[275]

b. Full Service

In addition to plea consultations and advocacy, immigration specialists provide services to address the underlying immigration issues of clients who are referred through their teams. In particular, if clients cannot avoid removal proceedings, immigration defense attorneys provide direct representation in immigration court.[276] Immigration experts doing removal defense have had an average removal defense caseload of eight to twelve detained clients and ten nondetained clients.[277] Here, the embedded nature of immigration attorneys is especially important. If removal proceedings follow, the clients already know their immigration defense attorneys, who can intervene early, prepare, and gather evidence in preparation for removal proceedings. This type of early and sustained relationship and trust with clients facilitates the entire process.

271. Interview with Isaac Wheeler, *supra* note 258.
272. For example, lawful permanent residents can often present more opportunities for relief from deportation than unauthorized migrant clients. *See* Wright, *supra* note 18, at 1539–40.
273. Interview with Isaac Wheeler, *supra* note 258.
274. *Id.*
275. E-mail from Jennifer Friedman, Dir. of Immigration Practice, The Bronx Defenders (Mar. 21, 2016, 08:53 PST) (on file with author).
276. Interview with Isaac Wheeler, *supra* note 258.
277. Telephone Interview with Jennifer Friedman, Dir. of Immigration Practice, The Bronx Defenders (Mar. 9, 2016). These ratios correspond to the model described in this Comment. Changes to BxD's practices and ratios are underway in light of NYIFUP. *See infra* notes 307–309 and accompanying text.

In addition, early access to immigration counsel can help avoid problematic concessions that can happen when clients are first processed in pretrial custody by Immigration and Customs Enforcement (ICE) and interviewed without counsel.[278] To avoid this, immigration defense attorneys can seek to get clients out of custody, such as by getting them released on their own recognizance, before ICE can seek to detain them.[279]

As explained in the Introduction, the likelihood that indigent noncitizens convicted of crimes can obtain representation in removal proceedings is slim. But even if clients can afford private immigration lawyers, another significant problem is that these immigration lawyers may not be fluent enough in criminal law.[280] These immigration lawyers may not be asking for the clients' criminal records to analyze them or may not know how to reconstruct the clients' rap sheets. In contrast, at BxD, the immigration specialists are experts on the intersection of criminal-immigration law and have seamless access to criminal defense experts who can discuss in detail their clients' criminal dispositions.[281] This strategy prevents the problem of relying on the clients' subjective understanding of their criminal histories, which can often be mistaken.

Immigration defense attorneys further work to address the nonremoval-related immigration needs of clients with criminal-immigration issues, often through affirmative applications for benefits if these are advisable.[282] Applications can range from U visas,[283] DACA, and Special Immigrant Juvenile Status (SIJS),[284] to VAWA self-petitions,[285] adjustment of status to lawful permanent residence,[286] and naturalization. But just as often, whereas less cautious advocates may urge their clients to proceed with affirmative applications, immigration experts must at times counsel clients against pursuing affirmative benefits because of the likely exposure stemming from clients' criminal convictions.

Finally, immigration defense attorneys keep their teams updated on relevant developments in immigration law and city, state, and federal policies that may affect their noncitizen clients.[287] Through community intakes, immigration

278. Interview with Isaac Wheeler, *supra* note 258.
279. *See also supra* notes 111–113 and accompanying text.
280. BxD immigration experts have even educated immigration judges on New York criminal proceedings. Interview with Isaac Wheeler, *supra* note 258.
281. *Id.*
282. *Id.*
283. INA § 101(a)(15)(U), 8 U.S.C. § 1101 (2012); INA § 214(p).
284. INA § 101(a)(27)(J).
285. INA§ 240A(b)(2).
286. INA§ 245(a).
287. Supervisors assist line immigration attorneys with these responsibilities. Interview with Isaac Wheeler, *supra* note 258.

specialists also respond to walk-in community members, prioritizing those with criminal-immigration issues by briefly advising them on their immigration matters and providing services where feasible.

c. Organizing and Structural Reform

A vital pillar of a holistic immigration defense program is to proactively change laws and policies that are currently stacked against clients.[288] Policy campaigns in which BxD has participated have helped change the landscape of the immigration practice, in turn helping BxD to be more effective. BxD's structural reform campaigns have ranged from ending the local jail's honoring of ICE detainers[289] to curtailing the New York City Police Department's stop and frisk policy that disproportionately stopped and frisked Black and Brown men, including immigrants.[290]

d. Staff Capacity, Supervision, and Support

BxD has seventeen immigration defense attorneys on staff—reaching a capacity that facilitates the seamless integration of BxD's criminal and immigration practices.[291] Three of these attorneys have management and supervisory roles. The Director of Immigration Practice, Jennifer Friedman, manages and administers BxD's entire immigration practice. Among other responsibilities, Friedman engages in fundraising and represents BxD in immigration-related political advocacy.

Supervision consists of guaranteeing the quality of representation of the immigration defense attorneys and supporting their work, answering ad hoc questions and reviewing their written work, especially regarding more complicated or novel legal issues.[292] Supervisors meet with the immigration defense attorneys once a week for at least an hour to review their caseloads.[293] The

288. Interview with Kate Rubin, *supra* note 248.

289. New York City Council 2011-656, passed in November 2011 (and expanded in July 2014), limited the New York City Department of Correction's authority to honor ICE detainers for certain people. N.Y.C. COUNCIL LOCAL LAW NO. 62 (N.Y. 2011). Current policies are in flux in light of ongoing implementation of the federal Priority Enforcement Program (PEP).

290. BxD was an important participant in the organizing against the New York City Police Department's stop and frisk policy and in the lawsuit that ultimately struck it down as unconstitutional. *See, e.g.*, Jeffrey Toobin, *Rights and Wrongs: A Judge Takes on Stop-and-Frisk*, NEW YORKER (May 27, 2013), http://www.newyorker.com/magazine/2013/05/27/rights-and-wrongs-2 [https://perma.cc/Z2NK-3ALG].

291. Telephone Interview with Jennifer Friedman, *supra* note 277.

292. Interview with Isaac Wheeler, *supra* note 258.

293. *Id.*

immigration practice also meets every two weeks to review cases, discuss substantial legal updates, debrief learning experiences, and conduct Continuing Legal Education trainings. In addition to in-house trainings, each immigration expert receives a training stipend to pursue more education on her own.

To further support immigration defense attorneys, BxD has created a team of nonattorney advocates.[294] Three immigration civil legal advocates act as paralegals "plus," for instance retrieving documents, working with clients and witnesses on affidavits and factual development, and helping to prepare clients to testify.[295] In addition, at defenders' direction, BxD's social workers help address noncitizen clients' psychosocial needs and sometimes serve as witnesses.[296]

Finally, the immigration practice is under BxD's Civil Action Practice (CAP). CAP's Managing Director supports with tracking data and fundraising. The Managing Director further assists the immigration practice with policy advocacy and coalition building, in conjunction with BxD's policy organizers who are under the Managing Director's supervision.

2. Developing the Practice[297]

In light of the demographics of the Bronx and the realities BxD defenders were increasingly facing, the need for an immigration practice became clear a few years after BxD's founding.[298] In 2002, Peter Markowitz came to BxD on a Soros Justice Fellowship[299] to develop the practice. Fresh out of law school, Markowitz had very little experience as a criminal-immigration attorney. To address the lack of in-house expertise, Markowitz and BxD partnered with the Immigration Defense Project (IDP)'s Manny Vargas, who is one of the foremost experts on criminal-immigration law. Working the hotline for IDP one day a week was an effective training ground for Markowitz, who was able to address ten to fifteen cases a day and run his analyses by Vargas. Markowitz also brought his BxD cases to Vargas, who would make sure Markowitz was handling them correctly. This partnership was in effect a crash course, and Markowitz got up to speed quickly. In terms of training and support for direct

294. *Id.*
295. *Id.*
296. *Id.*
297. The primary source for this Subpart is largely my interview with Peter Markowitz. *See* Interview with Peter Markowitz, Clinical Assoc. Professor of Law & Dir., Kathryn O. Greenberg Immigration Justice Clinic, Benjamin Cardozo Sch. of Law at Yeshiva Univ., in New York City (Mar. 26, 2015).
298. Meeting with Robin Steinberg, *supra* note 256.
299. *See Soros Justice Fellowships*, OPEN SOC'Y FOUND. (July 10, 2013), https://www.opensocietyfoundations.org/grants/soros-justice-fellowships [https://perma.cc/8M74-5SZY].

representation in immigration court, which Markowitz also provided during his tenure at BxD, more experienced immigration attorneys practicing in removal defense supported him, for instance advising him when he called to ask practice questions.

In the beginning there was resistance to CAP and the immigration practice, even in a progressive and innovative office with a holistic vision like BxD. Cultural change was imperative to make immigration defense a regularized part of the criminal practice. To get defenders' buy-in, it was crucial to show them that tapping in on the emerging immigration expertise could actually make a difference in their clients' lives. After all, defenders universally cared about their clients. Yet immigration defense needed to be incorporated in a way that was not unduly burdensome to defenders' workload.

A major problem was that BxD at the time was not identifying clients' immigration status in a regularized manner. Markowitz thus changed the case files and arraignment sheets to make clients' place of birth one of the arraignment questions, and from that point forward BxD began to collect data on immigration status. Simultaneously, Markowitz created mechanisms for referrals. The key was for Markowitz to be flexible and work with defenders in whatever ways worked for them. If defenders did not have the time to fill out the referral sheet, for example, Markowitz would grab the files, including the complaint and the client's rap sheet, and make the copies that he needed.

The more and more Markowitz worked one-on-one with defenders in crafting creative dispositions, the more defenders saw the difference the immigration practice made in clients' life outcomes. Defenders also felt that the additional work was manageable. As defenders began to trust and appreciate the developing immigration expertise, they came back to Markowitz for assistance with their noncitizen clients. Word of mouth of positive outcomes also helped. Eventually, defenders realized that having another resource for their clients was a great asset. Immigration defense attorneys turned out to be effective at communicating with clients, building relationships and trust, and learning more information from noncitizen clients. Immigration experts could also provide crucial services that clients needed. Further, it had been deeply unsatisfying for defenders to get their noncitizen clients seemingly great offers on the criminal aspect of their cases only for the clients to be shuttled into immigration detention and removal proceedings; the emerging immigration practice sought to avoid this devastating outcome.

Top-down commitment and support from management were crucial in developing the practice. Indeed, Markowitz's fellowship to develop the immigration practice was symbiotic with BxD Executive Director Robin Steinberg's

vision of holistic defense. Without support from Steinberg and BxD's leadership, it would have been difficult, for example, for Markowitz to change the case files and arraignment sheets and require immigration-related questions to be asked. The management also required office-wide trainings from the beginning. When there were success stories, office-wide email blasts would profile these and the crucial role played by the immigration practice. These strategies helped reinforce the shift in culture and practice toward seamless integration of the criminal and immigration practices.

Funding has been critical to make the CAP numbers, including the number of immigration defense attorneys, more leveled with the number of defenders. Reaching a critical mass, particularly having at least one immigration attorney in each interdisciplinary team, has been pivotal in cementing a more seamless culture and practice.[300] BxD was able to convince the City of New York, as well as foundations, law firms, and individual donors, to invest in BxD's broader holistic model, including its immigration practice. Even before *Padilla*, Steinberg convinced the City that immigration defense is a crucial part of the criminal defense function, and the City began to fund plea consultations.[301]

Simultaneously, BxD cobbled together resources to provide services and represent some clients in immigration court. This was accomplished partly through immigration defense attorneys' taking on extra work and partly through private funding that supplemented city funding for plea consultations.[302] BxD also relied on fellowships, such as Markowitz's, and these new positions were continued through private foundation support.[303] Nevertheless, it was not until *Padilla* that the funding and the immigration practice expanded significantly.[304] After *Padilla*, BxD reminded the City of its already-established openness to the view that immigration defense is an integral part of the overall criminal defense role, and made the case that this view now had constitutional support.[305] As a result, City funding now covers all of BxD's plea consultation work.[306]

Finally, BxD has been one of three service provider organizations for the New York Immigrant Family Unity Project (NYIFUP). NYIFUP is the first and only program in the country that provides publicly funded universal representation to all detained indigent noncitizens in removal proceedings in a given

300. Interview with Kate Rubin, *supra* note 248.
301. *Id.*
302. Interview with Isaac Wheeler, *supra* note 258.
303. *Id.*
304. Interview with Kate Rubin, *supra* note 248.
305. *Id.*
306. *Id.*

jurisdiction, in this case New York City.[307] NYIFUP funding and the hiring of additional immigration defense attorneys have strengthened BxD's overall immigration practice, particularly its removal defense capacity.[308] BxD used to be able to represent in immigration court only a limited group of clients; now, BxD represents any plea consult client who is subsequently detained by ICE and is seeking representation.[309] And as BxD has done more removal defense cases, it has been enhancing its experience and expertise in this area. Indeed, the immigration practice has been developing novel legal arguments, issues, and strategies, and building banks of experts, briefs, country conditions, and detailed analyses of complex legal issues.[310]

3. Measuring and Strengthening the Practice

One measure of success is how seamlessly integrated the criminal and immigration practices have become. Primarily, at every client intake, defenders ask clients where they were born—and then they make the referral. This expectation is now ingrained as part of BxD's culture and practice, and it is reinforced in trainings, shadowing, evaluations, and team meetings.[311]

Moreover, the various ratios—that is, the number of immigration defense attorneys to the number of defenders and to the number of cases of noncitizen clients—have improved dramatically since the practice began. BxD's ratio of immigration experts to defenders is now roughly one to ten.[312] The ratio of immigration specialists to cases of noncitizen clients touched in a year is approximately 1 to 380.[313] Peter Markowitz's *Protocol for the Development of a Public Defender Immigration Service Plan* recommends that public defender offices providing full-service immigration representation, including direct representation in removal proceedings, should have at least one full-time immigration expert for every 2500 cases of noncitizen clients per year.[314] Together,

307. *See New York Immigrant Family Unity Project*, VERA INST. OF JUST., http://www.vera.org/project/new-york-immigrant-family-unity-project [http://perma.cc/782V-BDY3] (last visited Feb. 1, 2016).

308. Interview with Isaac Wheeler, *supra* note 258.

309. Email from Jennifer Friedman, Dir. of Immigration Practice, The Bronx Defenders (Mar. 30, 2016, 07:05 PST) (on file with author).

310. *Id.*

311. Interview with Kate Rubin, *supra* note 248.

312. Telephone Interview with Jennifer Friedman, *supra* note 277.

313. Email from Jennifer Friedman, *supra* note 275.

314. MARKOWITZ, *supra* note 18, at 19. Markowitz also recommends other minimum ratios depending on the public defender office's range of services. For offices providing full immigration advice but not any representation in immigration court, the ratio should be at least one full-time immigration attorney for every 5000 cases of noncitizen clients. *Id.* at 19. Offices providing bare-bones

the more established culture and practice of seamless integration of criminal and immigration defense, and the improved ratios to provide full-service immigration representation (which facilitates further integration), enable BxD to more effectively serve its noncitizen clients.

BxD seeks to measure the actual benefits clients receive, though these are not easy to capture. For instance, clients may benefit from advice that helps them understand their situation, which guides them to plead guilty early in the process but minimizes overall time spent in detention; even though BxD does not count this as a victory,[315] it is still of value to clients and positive from an immigration standpoint. Otherwise, the benefits to clients are measured by the actual outcomes, primarily whether the ultimate disposition avoided removal.[316] In fiscal year 2014–15, for example, BxD attorneys prevented 227 deportations, affecting over 200 family members.[317] BxD also accounts for whether plea advisals and advocacy mitigated potential adverse immigration consequences. In 2014–15, for example, 807 plea consultations resulted in an immigration-positive outcome in the criminal case.[318] In addition, BxD tallies the affirmative benefits clients received. For example, forty-seven clients obtained legal immigration status in 2014–15.[319]

To improve the efficiency and efficacy of the office, BxD tracks the time spent on cases.[320] BxD also maintains the details and events of a case; this is less to assess impact but more for the office's own use—that is, for attorneys to be able to cover for each other, for the purpose of supervision, or to possess a clear record in case problems arise.[321] In addition, every attorney is reviewed once a year.[322] The attorney's practice supervisor and the team leader conduct the review, which measures the attorney's commitment to holistic practice, generally by measuring referrals, including referrals to the immigration practice.[323]

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immigration advice—that is, offices in which the immigration attorney consults on criminal cases when called to do so by defenders but does not directly counsel clients—should usually staff one full-time immigration attorney for every 10,000 cases. *Id.* at 19–20.

315. Interview with Kate Rubin, *supra* note 248.
316. *Id.*
317. Email from Jennifer Friedman, *supra* note 275.
318. *Id.* Immigration-positive outcomes include outcomes that are able to altogether avoid immigration consequences or at a minimum to mitigate them by maintaining clients' elibility for some form of relief from removal. Telephone Interview with Jennifer Friedman, *supra* note 277.
319. *Id.*
320. Interview with Kate Rubin, *supra* note 248.
321. *Id.*
322. For the training team, reviews are every six months. *Id.*
323. *Id.*

Finally, BxD seeks to continually maximize its impact. BxD hopes to be more of a community-based resource in the Bronx,[324] which has a dearth of such resources. BxD takes community intake cases when it can, but the organization has to prioritize former clients or people who have some type of criminal justice involvement. BxD would like to do more affirmative benefits for walk-in clients who are neighbors and part of the Bronx community, as well as for their clients' family members who may be eligible.[325] DACA and DAPA are among the services to which BxD wants to expand, if these programs are implemented.[326] In addition, BxD plans to do more community organizing and policy advocacy work on immigration-related issues, and impact litigation.[327]

B. The Office of the Alameda County Public Defender[328]

ALCO PD is becoming a more holistic public defender office. Even before *Padilla*, ALCO PD was providing noncitizen clients advice regarding the immigration consequences of criminal convictions. In January 2014, Raha Jorjani began to work full time as ALCO PD's Deputy Public Defender and Immigration Defense Attorney, creating and implementing the office's first immigration representation model. From 2013 to 2014, with a technical assistance grant from the U.S. Department of Justice, ALCO PD worked with BxD and its Center for Holistic Defense to become more holistic, efficient, and effective. As part of this partnership, Jorjani visited BxD to learn about BxD's holistic immigration practice and its challenges.

ALCO PD's immigration practice is becoming more seamlessly integrated with the criminal defense practice, and is providing more immigration legal services beyond what *Padilla* mandates. In April 2015, ALCO PD also hired a second immigration expert part-time to strengthen its immigration practice. This Subpart focuses on ALCO PD's path in transforming its immigration defense into a more holistic practice.

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324. Interview with Kate Rubin, *supra* note 248.

325. *Id.*

326. *Id.*

327. *Id.*; Interview with Isaac Wheeler, *supra* note 258.

328. For the ALCO PD case study in this Subpart, I conducted a semi-structured interview with Raha Jorjani, Deputy Public Defender and Immigration Defense Attorney at ALCO PD, on March 27, 2015. This interview is the primary source for this Subpart. In addition, Jorjani participated in the Nov. 3, 2014 meeting with Los Angeles area stakeholders. Finally, we last spoke on the phone on March 2, 2016.

1. Developing ALCO PD's Emerging Holistic Immigration Practice

Even before *Padilla*, in providing noncitizens accused of crimes with advice regarding the immigration consequences of convictions, ALCO PD was open and committed to adapt to the needs of its clients. Jorjani, who was already an experienced criminal-immigration attorney, began to work with ALCO PD in 2009 on a part-time basis, providing the office with immigration consultation. At the time, Jorjani was a Clinical Professor at the University of California (UC) Davis School of Law immigration clinic, where she worked on removal defense cases.

In the beginning, some defenders were slower to come for assistance than others. But within a few years, and especially after *Padilla*, consideration of immigration law became a more integral part of ALCO PD's criminal defense practice, thus facilitating the move to a more holistic model. Defenders' buy-in regarding the significance of immigration advice and advocacy in effectively representing noncitizen clients proved crucial. And Jorjani's presence, competence, and flexibility helped immensely.

Adding to the difficulties inherent in creating from scratch an immigration practice within a criminal defense organization, ALCO PD faced structural challenges not faced by BxD: ALCO PD has five offices and one juvenile branch spread throughout Alameda County. Since Jorjani has been physically based in Oakland, she initially visited the other offices, for instance holding brown bag conversations, in order to meet with every defender at ALCO PD face-to-face. Increased exposure to the intricacies of criminal-immigration law led defenders to have not only an increased familiarity with immigration issues, but also a growing appreciation of the need for access to competent and updated immigration advice. Defenders also gained an understanding of the urgency of just what was at stake. Even the most effective and talented defenders could become ineffective without an understanding of how certain offenses can automatically lead to harsh immigration consequences. Learning how devastating the consequences could be for their clients further motivated defenders to seek immigration advice and assistance. And when defenders received good results, they talked to their colleagues. Word of mouth helped further integrate the immigration practice.

Jorjani's experience in removal defense brought an additional benefit to the practice. Jorjani was intimately knowledgeable about how removal proceedings worked and how criminal proceedings practically affected clients' ability to succeed later during removal proceedings. Jorjani knew how to describe to defenders the practical—and not just theoretical—consequences of effective defense

during criminal proceedings. Ultimately, defenders' buy-in came from the very motivation that had inspired them to meet *Gideon*'s call to defend the poor and marginalized effectively and zealously. Zealous, effective advocates will always want to prevent avoidable negative consequences if they can do so and if clients choose such a course of action.

The trust and confidence defenders have developed in Jorjani have been critical to the success of ALCO PD's immigration program. Jorjani believes that the reason the office was able to break ground in the area of immigration representation—and to more seamlessly integrate its immigration and criminal representation—was its years-long investment in providing *Padilla* advice, and gaining an understanding of the intersection between criminal and immigration law. The groundwork laid by ALCO PD's investment in an in-house immigration attorney to provide *Padilla* advice proved crucial in ALCO PD's ultimate decision to welcome a model where direct immigration representation could also be provided.

To become even more embedded and thereby to more seamlessly integrate the criminal and immigration practices, and to provide services including direct representation in immigration court, ALCO PD transformed Jorjani's position from a part-time to a full-time position and recently added an additional immigration attorney. By 2012, Jorjani was contemplating doing more than plea consultations. She had seen, time after time, ALCO PD's noncitizen clients who could not avoid removal proceedings hauled into immigration court, unable to afford legal representation. Jorjani felt that the work of the defender was unfinished. Removal defense was part of a continuum that began with criminal proceedings, and there had to be accountability at the back end. Even when defenders were able to craft successful plea bargains that could be used in removal proceedings to mitigate harsh immigration consequences, there was usually no immigration attorney to stand by the clients and defend those bargains.

In December 2012, Jorjani wrote up a proposal, based on BxD's holistic model, to do a pilot project to provide removal representation to ALCO PD clients who most needed representation. Brendon Woods, who had recently become ALCO PD's Public Defender, was fully supportive, as his entire platform had been to promote holistic defense and redefine it for Alameda County. Woods's agenda was to further transform ALCO PD from the perspective of what the office's clients actually needed, and to become more efficient and effective. This moment coincided with Jorjani's completion of four years working with ALCO PD and observing the organization's needs, especially regarding

noncitizen clients in a county where ICE enforcement had been and continues to be very active.[329]

Padilla had a significant impact on ALCO PD's ability to receive more funds and to implement the new model that provides both *Padilla* advisals and removal defense in immigration court. Affirmative, effective immigration advice during criminal proceedings was no longer a luxury, but a constitutional mandate—it was a prerequisite for a valid conviction. Additionally, ALCO PD recognized that it could not fully comply with the spirit of *Padilla* if the organization could not ensure at the back end of removal proceedings the effectiveness of their front-end plea advisals and bargains. Thus, in January 2014, Jorjani began to work full time, and ALCO PD became the first office outside of New York City to provide direct representation in immigration court.

Prioritizing cases that are more complex, the ALCO PD immigration practice now conducts between eighty and one hundred plea consultations per month.[330] In addition to plea consultations, Jorjani has an active removal defense caseload. In February 2016, Jorjani had approximately twenty-five active cases of noncitizen clients that she was representing in immigration matters.[331] As this caseload does not meet all the need, Jorjani prioritizes vulnerable categories of clients, such as clients who are detained, clients with mental disabilities, and juvenile clients with Special Immigrant Juvenile Status (SIJS) cases. The project has also represented clients in other affirmative applications, such as U-Visas and DACA applications.

Jorjani also takes the time to stay current with changes in criminal and immigration law and train defenders on such changes. This is no small task. For example, in a period of only months, many laws and programs, including Proposition 47, drivers' licenses for unauthorized migrants, and the announcement of the expanded DACA and the new DAPA programs, came about.[332]

Finally, with Woods at the helm, immigration defense is no longer optional but has become mandatory. The office undergoes a mandatory annual training on criminal-immigration law. Defenders are required to inquire into a client's immigration status and investigate immigration consequences. Each year, when Woods gives his state of the office address, he highlights the immigration practice

329. Telephone Interview with Raha Jorjani, Deputy Pub. Defender and Immigration Defense Attorney, Office of the Alameda Cty. Pub. Defender (Mar. 27, 2015) [hereinafter "Telephone Interview with Raha Jorjani, Mar. 27, 2015"].

330. Telephone Interview with Raha Jorjani, Deputy Pub. Defender and Immigration Defense Attorney, Office of the Alameda Cty. Pub. Defender (Mar. 2, 2016) [hereinafter "Telephone Interview with Raha Jorjani, Mar. 2, 2016"].

331. *Id.*

332. Telephone Interview with Raha Jorjani, Mar. 27, 2015, *supra* note 329.

and its successes as an integral part of how the office is moving forward and becoming more holistic. ALCO PD's leadership has bought into the reality that immigration defense is central to the criminal defense practice.

2. Measuring and Strengthening the Practice

Just in the past two years, ALCO PD's immigration practice has taken steps to become more holistic, in particular by making Jorjani's position full time, adding a second immigration defense attorney, and providing select services including direct representation in removal proceedings. Because this development is so recent, ALCO PD has yet to quantitatively measure its efficiency and efficacy. To be sure, qualitatively, the practice is more effective than it used to be. One key indicator is that immigration defense, as discussed above, has become a central part of the overall criminal defense practice.

Nevertheless, the practice still has more growth to do in its path to becoming more holistic. Currently, ALCO PD has a ratio of immigration defense attorneys to defenders of roughly 1 to 68.[333] Some may point out that ALCO PD should not provide direct representation in removal proceedings until its immigration experts can staff every *Padilla* plea consultation, making this central component more robust. For example, ALCO PD's immigration experts could seek to speak directly with every noncitizen client, as is the practice at BxD. Developing an immigration practice within public defender offices, however, is not clear-cut and experimentation is required for innovation and greater efficacy and efficiency.[334] One could make an efficacy argument that removal defense at the back end is imperative to ensure that creative plea bargains struck at the front end hold up. More importantly, as discussed in Part IV, funding limitations constrain the development of an immigration practice. ALCO PD is aware of this context and is committed to continue to enhance its capacity and become more holistic. Indeed, adding an additional immigration expert to work with Jorjani has been a significant step forward.

333. Telephone Interview with Raha Jorjani, Mar. 2, 2016, *supra* note 330.

334. *Cf.* Wright, *supra* note 18, at 1541 (identifying California among several states that are likely to become the laboratories for experimentation with different models of immigration defense).

IV. TOWARD A MORE HOLISTIC PUBLIC IMMIGRATION DEFENSE

A. Insights and Best Practices

1. Insights

Developing a holistic immigration practice requires an "ever-searching" mindset that continually "searches for improved delivery of defense services and constantly presses for role reformation."[335] Grounded in the lived experiences of clients, holistic defense seeks to enhance the office's efficiency and efficacy. Traditional public defense no longer works in the twenty-first century.[336] Traditional defense, for instance, assumes the competence of one attorney assigned to handle all of a client's legal issues for the life of the client's case.[337] It focuses on the "least restrictive disposition" that prioritizes clients' "liberty interests"[338]—often at the expense of clients' immigration needs. In the criminal-immigration context, which is one of the most complex areas of law, these assumptions are wrong in severely consequential ways.[339]

In the context in which defenders must already have expertise on a plethora of criminal laws and procedures as well as localized information and relationships, values of efficiency and efficacy compel a division of labor. Immigration defense attorneys can bring their comparative advantage of focused expertise in criminal-immigration law to support defenders. Further, the wiser and more holistic goal than the least restrictive disposition is to seek the best "life outcome" for clients.[340] For noncitizen clients, defenders can seek their best life outcomes by defending them from removal and the loss "of all that makes life worth living."[341]

A guiding principle for defender offices that seek to become more holistic is to clearly understand their clients' actual (rather than assumed) needs and to grow based on a prioritized set of these needs. For both The Bronx Defenders (BxD) and the Office of the Alameda County Public Defender (ALCO PD), based on their jurisdictions' demographics and their clients'

335. Steinberg, *supra* note 19, at 986.
336. *See id.* at 1018.
337. *See* Wright, *supra* note 18, at 1538.
338. *See* Steinberg, *supra* note 19, at 974.
339. *See supra* Part I.
340. *See* Steinberg, *supra* note 19, at 963.
341. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (Brandeis, J., dictum).

actual needs, developing an immigration practice was obvious. BxD and ALCO PD first cared about their clients, who turned out to have tremendous needs for immigration law expertise, and therefore the offices had to develop expertise in immigration law. This proactive move came even before *Padilla* constitutionally mandated a baseline of immigration defense.

Most defenders, if not all, heeded *Gideon*'s call because some of the most egregious injustices happen in underserved, marginalized communities—the communities of the clients with whom defenders work. And as already discussed, the intersection of criminal and immigration law has created a devastating "perfect storm" on poor immigrant communities of color. Robust defense of these communities is therefore vital. Becoming more holistic ultimately means taking proactive action to help turn the tide against the mass conviction and incarceration of the poor and people of color and against the crimmigration crisis. Becoming more holistic strives to advance rebellious lawyering[342] in the context of institutional indigent defense, with the intentional aim to demarginalize the communities of the clients whom defenders work with and to radically transform systems of subordination.

2. Best Practices

The holistic model of immigration defense is threefold. First, defenders and embedded immigration defense attorneys are trained and set up to work together to provide effective criminal-immigration representation, for instance by negotiating contemplated dispositions that are sensitive to immigration consequences. This requires a culture and practice of seamless integration of the criminal and immigration practices, and a critical number of immigration experts to adequately match the number of defenders and cases of noncitizen clients. Second, offices provide services to meet clients' underlying immigration needs, in particular by accompanying clients who could not avoid immigration consequences to immigration court. This requires a full-service approach. Third, offices also focus on community organizing and systemic advocacy that seeks to sever the harsh merging of criminal and immigration law.

a. Seamless Integration of Criminal and Immigration Defense

The physical presence of embedded immigration defense attorneys within the office is critical for seamless integration, further reinforcing the culture and

342. *See generally* LÓPEZ, *supra* note 261.

practice of making immigration defense central to the criminal defense practice. The physical presence of embedded immigration experts at "the metaphoric water cooler" to discuss their practice, and to monitor and consult cases, can raise the profile of the immigration practice.[343] In other words, presence can affect the office and the routine practices of defenders, putting "immigration questions closer to the forefront of their thinking."[344]

Presence, however, is not enough; the office must create clear and easy paths for communication, collaboration, and immediate access. The presence of embedded immigration experts can add to the practice's flexibility if it creates different modes of access to both clients and defenders, which is more feasible with embedded attorneys. This can also mean that more direct immigration expert advice can be sought in a larger percentage of cases and more frequently.[345]

The immigration practice can be even more integrated if immigration defense attorneys work with defenders in teams, as demonstrated in BxD's team model. As in BxD's case, integrated workspaces can also help. This type of integrated structure encourages advocates to seek advice and assistance from each other, and the exchange of ideas can help the office constantly improve services. Ultimately, a critical mass of immigration specialists, in relationship to defenders and to cases of noncitizen clients, is crucial to becoming more embedded, seamless, and holistic.[346]

Additionally, interdisciplinary cross-training is an important foundation for seamless integration. Through cross-training, defenders learn more about immigration law as it pertains to their practical work with clients; similarly, immigration defense attorneys learn more about the culture and realities of the local criminal defense practice. While neither defenders nor immigration experts are expected to become experts in disciplines other than their own, sufficient knowledge of clients' criminal and immigration legal and nonlegal issues is critical to their ability to effectively meet clients' needs. Immigration specialists can do regular immigration trainings and update defenders on best practices and relevant developments in the law. In particular, it is imperative that defenders are trained to ask the right questions of noncitizen clients.

Given both the complexity of immigration law and the high demands on defenders, it is essential that offices establish streamlined mechanisms and tools

343. MARKOWITZ, *supra* note 18, at 10.
344. Wright, *supra* note 18, at 1533.
345. *See* MARKOWITZ, *supra* note 18, at 10; Wright, *supra* note 18, at 1533.
346. *See supra* note 300 and accompanying text. At least in the BxD context, a critical number has meant having at least one immigration defense attorney in each interdisciplinary team of advocates.

to facilitate the information gathering and referral process. Here, a mandatory, detailed checklist can assist in assuring the right questions are asked and sufficient information is gathered to make intelligent referrals.[347] The lack of a checklist can reflect a broader lack of institutional commitment to providing high-quality legal services or to improving upon its practices. This practice is especially troublesome in the context in which most public defender offices find themselves. Implicit racial biases, which are ubiquitous,[348] can influence defenders' judgments when defenders are dealing with information deficits, limited time, cognitively taxing workloads, and highly discretionary decisionmaking.[349] Requiring defenders to ask several questions and enter the additional information is not an impossible burden, especially when compared to the significant benefits of this procedure. As BxD's experience shows, a comprehensive questionnaire would take no more than ten minutes to complete; for immigration purposes, the time required would be even shorter. Further, defenders already have to input certain information when they open or close a case. Relatedly, a checklist can facilitate the systematic collection of data, without which requesting additional funding to strengthen an immigration practice would be difficult. For all of these reasons, institutionalizing a checklist for all defenders and systematically collecting data are priority steps offices must take.

In short, seamless integration can strengthen the first line of immigration defense at public defender offices. Indeed, it can help revolutionize the field, as both defenders and immigration defense attorneys become more effective by communicating, working together, and learning from each other. Together, they can intervene at the earliest possible moment and provide effective representation to avoid or mitigate adverse immigration consequences.

347. Here, the medical profession, and its revolutionary use of a simple checklist to save thousands of lives, has much to teach us. *See, e.g.*, ATUL GAWANDE, THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT 48 (2009) ("[C]hecklists seem able to defend anyone, even the experienced, against failure in many more tasks than we realized. They provide a kind of cognitive net. They catch mental flaws inherent in all of us—flaws of memory and attention and thoroughness. And because they do, they raise wide, unexpected possibilities."); *id.* at 158 ("We have an opportunity before us, not just in medicine but in virtually any endeavor. Even the most expert among us can gain from searching out the patterns of mistakes and failures and putting a few checks in place.").

348. *See, e.g.*, Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CALIF. L. REV. 1063 (2006).

349. *See* L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2628 (2013).

b. Full Service

Offices becoming more holistic can seek to provide as many prioritized services as feasible to address clients' underlying immigration needs. In particular, offices can consider providing direct representation in removal proceedings to increase the efficacy of the front-end advice and advocacy. Offices can also assist clients with affirmative applications that meet clients' nonremoval-related immigration issues.[350] By resolving some of these underlying issues, often offices can address the very issues that drove clients to come into criminal justice contact in the first place. In the case that public defender offices cannot get the resources to provide direct services, they must seek to create seamless access to whatever services exist in their jurisdictions,[351] and they must strive to connect clients to the services they need "quickly, with certainty and ease."[352]

c. Organizing and Structural Reform

Besides direct representation and services, holistic immigration defense addresses systemic issues that can sever the harsh merging of criminal and immigration law. Even effective criminal-immigration defense is often not sufficient—not when criminal and immigration laws are overwhelmingly stacked against noncitizens charged with crimes, especially the poor and communities of color. Indeed, there has been a vacuum pulling people from the slightest criminal justice contact into immigration enforcement, and hundreds of thousands have been banished from the country as a result. Without pursuing strategies to "[c]onsciously choose to incarcerate far fewer people and deliberately design to decarcerate as many feasible,"[353] coupled with strategies to sever the criminal-immigration link, the likelihood of reducing the devastating social (and economic) costs of mass incarceration and crimmigration is slim. Proposition 47 in California, as discussed in Part I.C, is an early (though imperfect) example of efforts that begin to roll back mass incarceration and push back against the

350. *See* MARKOWITZ, *supra* note 18, at 26 (noting that affirmative applications can have a "prophylactic effect").
351. *See* Steinberg, *supra* note 19, at 989.
352. *Id.* at 988.
353. Gerald P. López, *How Mainstream Reformers Design Ambitious Reentry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control*, 11 HASTINGS RACE & POVERTY L.J. 1, 80 (2014).

crimmigration crisis. For this reason, public defender offices must think creatively about community allies and cultivate effective partnerships.[354]

Structural reform efforts must be grounded in and shaped by the lived experiences of the client communities. Community organizing, as part of a rebellious way of lawyering and problem solving, is therefore imperative. A core belief in organizing is that people—even people in some of the most precarious situations—have the capacity and potential to transform not only their own individual realities but also, linking arms, the future of their communities. Public defender offices must assist their clients and their communities to claim and build power and shape their own narratives, rebelling against the society-created narratives sought to be imposed on them.[355] Offices must assist their clients in building intentional community; doing so, clients can become increasingly aware that they are not isolated, that their experiences have been a part of systems of subordination, and that they have the power to create and take collective action.

B. Challenges and Counterarguments

1. Defenders Cannot Make a Difference Because Prosecutors Hold the Power

Some scholars argue that prosecutors will often prevent improved pleas for clients at risk of deportation even in situations permitted by substantive law. Prosecutors are arguably the most powerful actors in the criminal justice system. From "decisions to charge, demand bail, offer plea deals, and agree to diversion programs, prosecutors have the discretion to choose more productive . . . outcomes—or not."[356] Yet there is no formal process or oversight of prosecutorial discretion[357] and there is no systematic way for voters to monitor the system's

354. *See* THE BRENNAN CTR. FOR JUSTICE, *Taking Public Defense to the Streets*, *in* RAISING VOICES 7–12 (1987); Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. L & SOC. CHANGE 153, 176–78 (2004).

355. Strategic communication and proactively lifting up the voices of immigrants charged or convicted of crimes are crucial strategies to shift the "criminal alien" master narrative and prepare for the inevitable incident in which one person's crime is seized as an opportunity to paint the entire immigrant community as "criminal alien." For a discussion of master narratives, see generally Lisa Ikemoto, *Traces of the Master Narrative in the Story of African-American/ Korean- American Conflict: How We Constructed "Los Angeles"*, 66 S. CAL. L. REV. 1581 (1993).

356. Smyth, *supra* note 45, at 47.

357. BACH, *supra* note 162, at 130 (2009).

workings.[358] As a result, prosecutors have had "carte blanche."[359] In particular, prosecutors' decisions to bring particular criminal charges and their decisions whether to prosecute mildly or excessively often dictate the ultimate disposition of the entire case.[360] In this context, some scholars argue, prosecutors are more likely inclined to facilitate rather than undermine the removal of noncitizen clients,[361] and defenders are thus severely limited in what they can do to avoid or mitigate immigration consequences.

Nevertheless, even if defenders are severely limited, it is exactly this context that calls on defenders to push the envelope. Here, the Supreme Court's recognition in *Padilla v. Kentucky*[362] of creative plea negotiations to avoid or mitigate adverse immigration consequences is instructive.[363] Indeed, *Padilla* can be used to encourage changes in prosecutorial practices regarding noncitizens who are charged with crimes. In California, for example, in codifying *Padilla* into law, the legislature asserted: "The prosecution, in the interests of justice . . . shall consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution."[364] In addition, some district attorneys have created internal policies encouraging prosecutors to consider immigration consequences.[365]

Padilla can also be used to enhance individual advocacy.[366] In particular, misdemeanor defenders have the greatest potential for creative use of information on immigration consequences in plea bargaining.[367] There are a number of reasons for this, including the fact that, in low-level cases, prosecutors may be more flexible in working out bargains that avoid harsh immigration consequences, and defenders often have a number of alternative misdemeanors, noncriminal offenses, or diversion programs from which to choose in proposing solutions.[368] Further, as the overriding interest of prosecutors is securing a

358. *Id.* at 189.
359. *Id.* at 138. For an illuminating exposé of the criminal justice system at work, see MAKING A MURDERER (Netflix Dec. 18, 2015).
360. Pinard, *supra* note 72, at 685.
361. *See* Brown, *supra* note 179, at 1396.
362. 559 U.S. 356 (2010).
363. *See supra* note 123 and accompanying text.
364. CAL. PEN. CODE § 1016.3 (West 2014).
365. *See, e.g.*, Guidelines Regarding the Consideration of Collateral Immigration Consequences During Plea Negotiations, Office of the District Attorney, Alameda County, Nancy E. O'Malley, District Attorney, Oct. 8, 2012.
366. Roberts, *supra* note 34, at 365.
367. *Id.*
368. *Id.*

conviction, it may be less important to them what particular offense people ultimately plead to.

2. Limited Resources

Public defender offices universally need more resources and staffing. All public defender offices face high caseloads. In this context, offices must seek out additional funding, especially in light of *Padilla*, utilizing the constitutional mandate in their favor, as both BxD and ALCO PD have successfully done.[369] Offices can collaborate with community allies, not only because this is the holistic, community-oriented way of public defense[370] but also because it is often difficult to "bite the hand that feeds you." Together, public defender offices and their allies can collaboratively effectuate advocacy campaigns targeting the governmental bodies that fund indigent defense.[371] Offices can also partner with impact litigation organizations to bring systemic deficiency challenges, as discussed in Part II.C.[372] On one occasion, a public defender office forced the government, through litigation, to increase its funding.[373]

Many offices, however, may be forced to seek to become more holistic in meeting clients' immigration needs with minimal to no overall increase in the number of available attorneys.[374] Limited resources are indeed a significant challenge. Nevertheless, despite the universal truth that public defender offices are severely underfunded, the reality is more nuanced. Funding matters, but how offices prioritize and use existing resources also matter. Even with current levels of funding, many public defender offices can become more holistic.

369. Some managers of public defender organizations have expressed the hope that *Padilla* will strengthen their hand during negotiations in the budget process. *See* Wright, *supra* note 18, at 1537.

370. *See* discussion and sources cited *supra* note 354.

371. For an example of a public defender office successfully advocating for funds despite great hostility in the context of a jurisdiction in the South, see BACH, *supra* note 162, at 72.

372. Class-action lawsuits can work to create a type of "interest-convergence" between reformers and lawmakers, who are often incentivized by prospective litigation. A clear example is the litigation strategy of Stephen Bright and the Southern Center for Human Rights to reform indigent defense systems throughout the South. *See, e.g.*, *id.* at 62. For a discussion of interest-convergence, see generally Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

373. The Public Defender for the Eleventh Judicial Circuit of Florida (PD-11) deemed its situation so unacceptable that it declined to take new noncapital felony cases unless the state provided the office with more funding, and the Florida Supreme Court sided with PD-11. *See* Pub. Def., Eleventh Cir. of Fla. v. State, 115 So. 3d 261 (Fla. 2013).

374. *See* Wright, *supra* note 18, at 1537.

In the context of limited resources, it is a false dichotomy that offices should always hire more defenders instead of support staff or immigration defense attorneys. Hiring one more defender does not necessarily result in better case outcomes, nor does hiring an immigration expert mean each defender will have to work harder.[375] Some offices can become more holistic without hiring additional staff by reinvesting resources, for instance by creatively redeploying preexisting staff in order to embed immigration defense attorneys within the office.[376] Often, offices can find more resources by reducing nonpersonnel-related administrative and overhead expenses. BxD has similar cost-per-case ratios as many other institutional public defenders in urban areas, but BxD has still been able to develop a holistic immigration practice. The key issue, then, besides funding level, is political will. Steinberg's case study of the Tribal Defenders of the Confederated Salish and Kootenai Tribes, which has worked with The Center for Holistic Defense, demonstrates that becoming more holistic despite resource constraints is "all about changing agency attitude and goals."[377]

Given limited funding for full programs of immigration defense, transition strategies can involve pilot programs, such as Jorjani's at ALCO PD. For public defender offices with several offices such as ALCO PD, a pilot program can be implemented either at the central office or in a satellite office. Fellows can be helpful as well. At BxD, for example, fellows began projects that were critical to assess areas of need and helped to scale up certain models or practices. Through a two-year fellowship, McGregor Smyth's research and identification of clients' civil legal needs facilitated the development of BxD's Civil Action Practice (CAP).[378] Markowitz's fellowship led the way to create and scale up BxD's immigration practice.

Pilot projects and fellowships can help provide capacity for immigration representation and gather new data. In particular, data can assist defender offices in their appeal for funds by facilitating efficiency arguments. Data can show efficiency gains and cost savings to public defender offices in providing more seamless criminal-immigration defense. For example, data of case dispositions for a team of defenders that is fully supported by an immigration defense

375. *See* Steinberg, *supra* note 19, at 1005.

376. For example, the Public Defender for the Eleventh Judicial Circuit of Florida (PD-11) has redeployed two preexisting defenders to do immigration work on a full-time basis. Carlos J. Martinez et al., *You Are the Last Lawyer They Will Ever See Before Exile*: Padilla v. Kentucky *and One Indigent Defender Office's Account of Creating a Systematic Approach to Providing Immigration Advice in Times of Tight Budgets and High Caseloads,* 39 FORDHAM URB. L.J. 121, 136 (2011).

377. Steinberg, *supra* note 19, at 1011.

378. Interview with Kate Rubin, *supra* note 248.

attorney can be compared to data from a control group, possibly all defenders who do not have embedded immigration expert support. On a broader level, new data and studies can reveal the socioeconomic impact on noncitizens who have had favorable case dispositions and, as a result, have been able to remain in the communities where they have resided for long periods, and have continued to work, pay taxes, and provide for their families.[379] Effective immigration representation can also help keep families together. These economic and social effects can be compared to other measures, such as offices' cost per client. Additionally, research and data can bolster the argument that removal defense work assists courts in enhancing efficiency.[380]

Studies such as these could be used to request additional funding, particularly public funding from the governing body that funds the public defender office. Public funding can significantly expand the institutionalization of more holistic immigration defense. For instance, the City of New York's decision to fund immigration representation at BxD was a pivotal point, establishing the permanence of the emerging immigration practice by helping to transform a one-time fellowship into a budgeted line of funding. Additional support can come from law firms on a pro bono basis, law school clinics and legal interns, and even from foundations and individual donors.[381]

It is urgent that public defender offices begin institutionalizing a checklist. The purpose is not only to provide more seamless integration, but also to seek additional funding. In light of *Padilla*, public defender offices have a window of opportunity to seek more funding. To facilitate fundraising efforts, offices need to collect data. Public defender offices' institutionalization of data collection

379. These studies can have more impact in areas with significant noncitizen populations, where noncitizens make up a large part of the workforce. For example, a recent study in Northern California revealed that: Half of all detained noncitizens represented by surveyed civil legal services providers had resided in the United States for at least ten years; 65 percent were employed before being detained; and 77 percent had family members in the country. Jayashri Srikantiah & Lisa Weissman-Ward, N. CAL. COLLABORATIVE FOR IMMIGRANT JUSTICE, ACCESS TO JUSTICE FOR IMMIGRANT FAMILIES AND COMMUNITIES: STUDY OF LEGAL REPRESENTATION OF DETAINED IMMIGRANTS IN NORTHERN CALIFORNIA 9 (2014), https://media.law.stanford.edu/organizations/clinics/immigrant-rights-clinic/11-4-14-Access-to-Justice-Report-FINAL.pdf [https://perma.cc/F99R-PD56]. Further, represented noncitizen detainees were at least three times more likely to prevail in their removal cases than detainees without counsel. *Id.*

380. *See* Eagly & Shafer, *supra* note 9, at 77 (finding empirically that involvement of counsel was associated with certain gains in court efficiency, as represented respondents did not use valuable court and detention time to seek counsel, were more likely to be released from custody, and, once released, were more likely to appear at their future deportation hearings).

381. *See generally* Eagly, *supra* note 1, at 2291–93. For a more in-depth discussion of public defender offices' collaboration with law school clinics, see generally Stacy Tauber, *Realizing the Promise of* Padilla *Through a Law School/Public Defender Collaboration*, 2015 WIS. L. REV. 399 (2015).

and some form of metrics are therefore a critical step. Important information would include, but not be limited to, the number of cases of noncitizen clients, their immigration status, and the dispositions of their cases, noting in particular whether cases have been resolved favorably in regards to the clients' immigration status.

3. Overworked Defenders and Resistance

A major counterargument is that holistic defense, including holistic immigration defense, increases defenders' workloads, in particular as it hires more support staff and immigration defense attorneys but fewer defenders.[382] Despite this initial reaction, however, studies show that holistic defense can actually decrease defenders' workload.[383] In particular, the goal of holistic immigration defense is to provide a deluxe service that requires very minimal investment of time and effort by defenders. The goal is for defenders not to have to do much beyond making immigration defense part of their initial intake, refer noncitizen clients to immigration defense attorneys, and heed those attorneys' advice. In a more holistic immigration practice, defenders receive more support on each case, and the office can provide services of a higher caliber. Immigration support can take the pressure off individual defenders from having to go down, on their own, what can often be a rabbit hole of immigration consequences—instead freeing up their time to focus on their comparative expertise: criminal defense.[384] This makes the office more efficient.

In addition, in developing a more holistic immigration practice, there can often be deep resistance, especially from senior attorneys, against integrating immigration and criminal defense. Many defenders "can resist multidisciplinary practices for fear of losing control and power over 'the case.'"[385] Some defenders are so invested in what success means strictly in the criminal context—a type of tunnel vision—that they can be blind or even hostile to take immigration consequences into account; prioritizing a noncitizen client's immigration consequence may lead to a less favorable result in the criminal context, such as

382. *See* Steinberg, *supra* note 19, at 1002.
383. *Id.* at 1003.
384. *See id.*
385. Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 126 (2004).

harsher criminal punishment.[386] Further, when change is proposed, inertia and fear of the unknown can conspire to make such change appear impossible.[387]

Shifting the culture and practice of a public defender office to become more holistic requires "clear vision, shared investment, and sustained momentum."[388] The office must be strategic in fostering defenders' buy-in. As shown in the case studies, it is imperative that the immigration practice is flexible and creates mechanisms for defenders that are as easy as possible. Education and training are critical. When defenders realize, through trainings and especially through proven successes, the significant impact that immigration defense can have on their clients, they will likely embrace the embedded immigration expertise. Reminding defenders not only of their ethical, professional, and now constitutional responsibilities but also of the motivations that led them to take up the defender vocation can be effective. Further, it can be deeply frustrating for defenders to get their clients a great bargain—only for the clients to be detained and removed. Through intentional and strategic integration, even the most resistant defenders can begin to understand the value of immigration expertise and collaboration.[389] Just as defenders come to understand investigators to be critical, they can deem immigration experts equally important when it comes to noncitizen clients. By working directly with immigration defense attorneys, preferably as members of a team, defenders can begin to really understand the value of the immigration practice.

Finally, also crucial in shifting the office culture and practice is the leadership's commitment and support. As the case studies show, the leadership must share a unified, holistic vision of what the immigration practice should be. Such a vision understands that life outcomes are as important as case outcomes.[390] Further, implementation of a holistic vision requires courage of conviction. At BxD, for example, despite initial resistance, Steinberg decided that developing a more holistic immigration practice was a decision she could stand by, as this would lead to better outcomes for BxD's clients. BxD encouraged innovation, for example, by giving Markowitz room to experiment and determine what mattered. It implemented a new arraignment system sensitive to immigration consequences. It mandated trainings and integrated immigration defense into personnel evaluation, hiring, and promotion decisions. And

386. *Cf.* Padilla v. Kentucky, 559 U.S. 356, 373 (2010) ("[T]he threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.").

387. *See* Steinberg & Feige, *supra* note 385, at 125.

388. *Id.*

389. *Id.* at 126.

390. *Id.*

instead of just celebrating acquittals, BxD also sent out office-wide emails congratulating life outcomes, sharing success stories of cases where advocates used innovative strategies to avoid or mitigate immigration consequences.

CONCLUSION

The fact that the incarcerated population has expanded exponentially even though rates of crime, especially violent crime, have significantly decreased, shows that the circle constituting criminal behavior vastly exceeds what is needed for public safety. In other words, the criminalization and incarceration strategy dominant in the United States has been way out of proportion with actual public safety needs. In introducing a groundbreaking empirical study, Nobel Laureate Joseph Stiglitz asserts that mass incarceration has had a "limited, diminishing effect on crime" and presently has almost no effect on reducing crime, despite continuing to impose devastatingly drastic fiscal and social costs.[391] Relatedly, as two-thirds of removals under the Obama Administration have been for minor offenses, the crimmigration crisis has been way out of proportion with public safety needs, and it has had catastrophic consequences on the lives of noncitizens.

As one way of addressing the proliferation of the criminalization of immigrants in the face of a gaping lack of services, this Comment argues for public defender offices to build more holistic immigration practices. In light of *Padilla v. Kentucky*,[392] *Lafler v. Cooper*,[393] and *Missouri v. Frye*,[394] offices already must accurately assess the adverse immigration consequences of contemplated dispositions and provide effective representation to avoid or mitigate these consequences. More holistic immigration practices seek to go beyond constitutional mandates by: (1) embedding immigration attorneys and more seamlessly integrating criminal and immigration practices; (2) providing services, including direct representation in removal proceedings and affirmative applications, to address clients' underlying immigration issues; and (3) engaging in organizing and structural reform.

Effective immigration defense during criminal proceedings alone is not sufficient to turn the tide of mass incarceration and the crimmigration crisis.

391. OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUST., WHAT CAUSED THE CRIME DECLINE? 1 (2015), https://www.brennancenter.org/sites/default/files/publications/What_Caused_The_Crime_Decline.pdf [https://perma.cc/W9KN-66X2].

392. 559 U.S. 356 (2010).

393. 132 S. Ct. 1376 (2012).

394. 132 S. Ct. 1399 (2012).

Thus, we must organize. We must pass federal and state legislation and initiatives, building on efforts such as Proposition 47, that significantly reform criminal and immigration statutes to eradicate mass incarceration and sever the criminal-immigration link. We must reinvest the savings from eradicating mass incarceration into programs and partnerships that truly build people and communities. We must strive to transform our criminal and immigration systems to be more compassionate; decriminalize immigrants; and guarantee access to justice for all.[395] And public defender offices must be at the forefront of this radical re-envisioning and transformation.

395. Justice must be tempered with mercy. *See generally* BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014). As Justice Anthony Kennedy once said, "A people confident in its laws and institutions should not be ashamed of mercy." Anthony M. Kennedy, *Speech at the American Bar Association Annual Meeting*, U.S. SUPREME COURT (Aug. 9, 2003), http://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html [https://perma.cc/ER7V-4XMW].