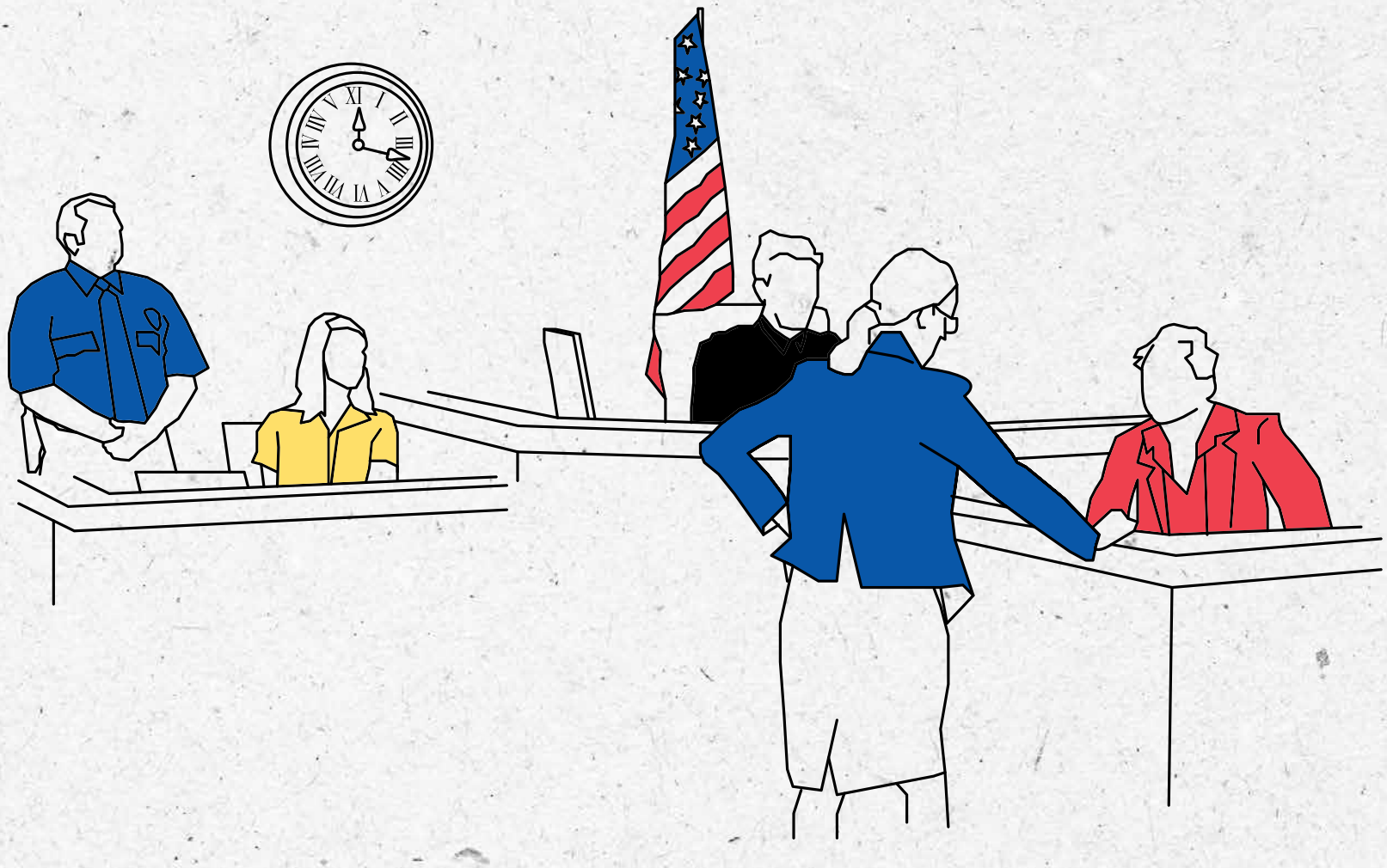
DEFEND L.A.

TRANSFORMING PUBLIC DEFENSE IN THE ERA OF MASS DEPORTATION



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Methodology

In the fall of 2014, the ACLU SoCal, along with various partner community organizations that work on immigrants' rights and criminal justice reform, began to explore how the Los Angeles County public defender offices could partner with community organizations to better serve the holistic needs of poor noncitizens facing prosecution. Since then, the ACLU SoCal has conducted in-person, telephone, and email interviews with dozens of public defenders—from deputy level I through deputy level IV attorneys, as well as managers. Interviews were also conducted with nonprofit and private immigration and post-conviction relief attorneys. These interviews have been conducted confidentially.

In addition, for the case studies of public defender offices serving large noncitizen populations that have developed more holistic immigration defense practices, the ACLU SoCal conducted interviews with key staff and managers at these offices. These offices include The Bronx Defenders and, in California, the offices in Alameda County, Contra Costa County, and neighboring San Bernardino County. These case studies help shed light on the essential components, structures, and practices of the holistic model of immigration defense.

Table of Contents

Part I.
Executive Summary

Los Angeles County has a proud history of providing public defenders to people who cannot afford a lawyer to defend them in criminal court. On January 9, 1914, the county opened the first public defender office in the United States. In addition to being first, this office is the biggest in the nation. The Los Angeles County Public Defender's Office (LACPD) currently employs about 700 public defenders, who handle approximately 300,000 criminal cases a year.

And yet there is a crisis today in our county's public defender system. In particular, LACPD has been grossly under-resourced as measured against recommended staffing ratios and compared to other California public defender offices. As a result, LACPD underserves a large and vital segment of the Los Angeles population: the immigrant community.

This report, ***Defend L.A.***, examines the failures of the county's public defender system and demands legal representation that, at a minimum, meets the standards of the Sixth Amendment to the U.S Constitution for all Los Angeles community members—including immigrants. The report documents many cases in which LACPD's noncitizen clients pleaded to criminal dispositions triggering severe immigration consequences when more immigration-favorable alternative dispositions were available. Uninformed and unaware, LACPD's noncitizen clients have pleaded guilty only to face mandatory deportation and permanent separation from family, community, and home—the loss "of all that makes life worth living."[1]

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Take the real-life case of **Christian P.**, who was brought to the United States in 1992 as a one-year-old and became a lawful permanent resident when he was 15. In 2013, he was charged with driving a vehicle without the owner's consent. Represented by LACPD, he pleaded guilty and accepted a sentence of 365 days in jail, instead of 364 days.

This day count was of monumental importance. The difference of a single day—a sentence of 365 days or more—made the conviction an aggravated felony theft offense. Accordingly, Christian's 365-day sentence subjected him to mandatory deportation, and federal immigration agents initiated removal proceedings against him. If Christian's public defender had been trained and had received adequate immigration law expert support, he could have negotiated a more immigration-favorable sentence of 364 days or less, with dramatically different consequences.

Luckily, a private post-conviction relief attorney familiar with immigration law notified the public defender of the opportunity to seek a one-day reduction in the sentence. With the expert support of LACPD's Immigration Unit, the defender was able to get the sentence reduction, and removal proceedings were halted. Christian is now eligible for citizenship.

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In another case, **Margarita C.** was represented by LACPD in 2012 and pleaded guilty to receiving aid by misrepresentation. She was sentenced to 500 hours of community service and restitution of $49,000 to the Department of Social Services. At the time, Margarita had a work permit and four U.S. citizen children. She had moved to the United States in 1988 when she was 20 years old.

Federal immigration authorities began removal proceedings against Margarita based upon her conviction. It turned out that her conviction was an aggravated felony because the offense involved "fraud or deceit" for which the restitution exceeded $10,000. A simple way for Margarita to have avoided an aggravated felony—and mandatory deportation—would have been a plea to an alternate offense, such as grand theft, with the exact same sentence and restitution.

Prior to filing a habeas petition alleging ineffective assistance of counsel, Margarita's private post-conviction relief attorney contacted LACPD's

Immigration Unit. LACPD's immigration experts successfully moved to withdraw the plea and enter a new plea to grand theft with the prior sentence to remain.

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In yet another case, **Norberto S.** was advised in 2015 by his LACPD attorney to plead guilty to possession for sale of methamphetamine. But that conviction, an aggravated felony under immigration law, subjected Norberto to mandatory deportation. Norberto, who had been diagnosed with a learning disability at an early age, had been a lawful permanent resident since he was 3 years old.

Again, it was a private post-conviction relief attorney who made a crucial difference. The attorney filed a successful motion to allow Norberto to "plead upward" to the more serious offense of transportation. This tactic might seem counterintuitive, but the more serious offense did not amount to an aggravated felony triggering mandatory deportation. As a result, removal proceedings were terminated against Norberto.

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As these cases show, criminal proceedings can have devastating consequences for noncitizens. In addition to incarceration, probation, parole, and civil legal consequences that can flow from criminal convictions, noncitizens can face what for many is the most disastrous outcome of all: deportation. Even minor misdemeanor offenses carrying few criminal penalties and often no actual jail time—offenses such as shoplifting, turnstile jumping, public urination, or possessing a small amount of marijuana for personal use—can trigger deportation.

Thus, quality criminal defense is critically important for noncitizens. In *Padilla v. Kentucky* (2010), the U.S. Supreme Court held that noncitizens' Sixth Amendment right to effective counsel includes receiving affirmative, accurate advice about the immigration consequences of criminal dispositions. The right to effective counsel also includes defense against adverse immigration consequences like deportation through the pursuit of alternative dispositions that avoid or at least minimize such consequences. Defense strategies may include "pleading up" to more serious criminal offenses that have fewer or no immigration consequences.

Such informed legal defense could not be more paramount today, as the Trump Administration expands the federal government's reliance on local criminal justice systems to advance its deportation agenda.

Nevertheless, in the entire LACPD staff of more than 1,100 employees, there are just two attorneys designated as immigration law experts. These two attorneys attempt to provide expert support to about 700 public defenders, who annually handle approximately 51,900 cases involving noncitizen clients. A dramatic staffing expansion is urgently needed, not only because of LACPD's extraordinarily large number of noncitizen cases, but also because of the enormous complexity of the intersection between federal immigration law and state criminal law and increasingly aggressive federal immigration enforcement practices.

LACPD lags far behind many public defender offices in California with respect to the number of in-house immigration experts it employs. With only two immigration experts, LACPD's ratio of immigration experts to public defenders is about 1:350. LACPD's ratio is significantly worse than the ratios of offices in neighboring San Bernardino County (1:96), Contra Costa County (1:75), and Alameda County (1:22), as well as the County of Los Angeles Alternate Public Defender Office (APD) (1:100)—which represents the indigent accused when LACPD has a conflict of interest or is otherwise unavailable.

Importantly, each LACPD immigration expert attempts to support defenders on approximately 25,950 noncitizen cases per year. LACPD's ratio of immigration experts to the annual caseload of noncitizen clients is thus about 1:25,950. Even using outdated standards for public defender offices, LACPD falls far short of the 1:5,000 recommended ratio for offices like LACPD that seek to provide full immigration advice but no direct immigration representation. Indeed, LACPD's resulting ratio is about *five times* the recommended standard. In comparison, APD and each office profiled in this report abide by the recommended standards.

It is not only with respect to in-house staffing and expertise that LACPD lags far behind—it has also maintained deficient institutional practices. Unlike standard practices in other public defender offices, foundational trainings on immigration law and its intersection with criminal law are not required for all defenders, except for new hires. LACPD's basic intake sheet contains no entries on immigration status, and defenders are not required to ask key questions to ascertain immigration status when first meeting with

COMPARISON OF CALIFORNIA PUBLIC DEFENDER OFFICES

Public Defender Office	The Office of the Alameda County Public Defender	The Contra Costa County Office of the Public Defender	The Law Offices of the San Bernardino Country Public Defender	The Los Angeles County Public Defender's Office
Annual Criminal Caseload	38,100	19,000	45,000	300,000
Annual Noncitizen Caseload	5,677	2,451	4,995	51,900
Full Time Equivalent of Public Defenders	108	75	120	700
Full Time Equivalent of Immigration Experts	5	1	1.25	2
Ratio of Immigration Experts to Noncitizen Caseload	1:1,135	1:2,451	1:3,996	1:25,950
Ratio of Immigration Experts to Public Defenders	1:22	1:75	1:96	1:350

their clients. It is impossible to adequately advise about, and defend against, immigration consequences if defenders do not even know their clients' immigration status. Further, defenders are not required to consult with their immigration experts when they are uncertain about the immigration consequences of contemplated dispositions or available immigration-favorable alternative dispositions.

As a result, despite the often-heroic work of individual defenders and the two immigration experts, LACPD defenders have systematically lacked the necessary resources, expert support, and institutional structures and practices to provide constitutionally mandated, quality representation to all their noncitizen clients.

It doesn't have to be this way. Other public defender offices serving large noncitizen populations have pioneered more holistic immigration defense practices that strive to meet the radically changed landscape of criminal defense in the twenty-first century. In particular, the holistic model of immigration defense cultivates a culture and practice of seamless integration of criminal and immigration defense whereby public defenders and embedded immigration experts work closely together to provide high-quality, client-centered criminal-immigration representation. This approach requires an adequate number of in-house immigration experts to correspond to the number of defenders, the noncitizen client caseload, and their overall workload. Further, more holistic offices employ in-house immigration attorneys who provide comprehensive services to meet noncitizen clients' underlying immigration needs—for instance, by ensuring the continued representation of clients who cannot avoid immigration consequences.

First, LACPD can and must be fully equipped and set up to ensure effective representation. To fully comply with *Padilla* and related federal and state law, the office must dramatically expand its Immigration Unit and reform deficient institutional practices. Only then would LACPD public defenders be able to fully defend all their noncitizen clients and prevent, where possible, avoidable criminal convictions that trigger severe immigration consequences.

Further, both LACPD and APD should develop more holistic immigration defense practices. As part of this process, LACPD and APD should build appropriate

in-house capacity to collaborate more closely and systematically with Los Angeles Justice Fund and One California nonprofit providers and thereby complement these innovative programs. If adequately equipped, the immigration units at LACPD and APD could provide nonprofit providers with critical value-added expert support on criminal-immigration legal matters, such as post-conviction relief for noncitizens, in a more systematic way. In addition, LACPD and APD should provide their noncitizen clients with targeted direct immigration representation, starting with particularly vulnerable groups of clients, such as juvenile clients.

Today, as the Los Angeles County Board of Supervisors enters a second year in the search for a qualified, experienced chief public defender for LACPD, it should create a new, bolder, transformative vision for the county's overall provision of indigent defense services. Indeed, the Board of Supervisors has already declared its commitment to create a "holistic, client-based representation model" of public defense.[2] It should make this commitment a reality. As the historic first to create a public defender office, Los Angeles County should lead again.

Key Recommendations

For the Los Angeles County Board of Supervisors

- Dramatically expand LACPD's Immigration Unit to provide adequate immigration expert support to public defenders:
  - Create 15 additional in-house immigration expert budgeted positions. The total additional funding necessary for this expansion would amount to no more than $3 million—about 1/100 of one percent of the total county budget.
- Move LACPD and APD toward a comprehensive service model:
  - Build the capacity of LACPD and APD to collaborate more closely and systematically with Los Angeles Justice Fund and One California nonprofit providers, delivering critical value-added expert support on criminal-immigration legal matters.
  - Fund in-house immigration attorney positions at LACPD and APD dedicated to the continued representation of particularly vulnerable groups of noncitizen clients, such as juveniles clients.

For LACPD's Leadership and Management

- Restructure the Immigration Unit strategically:
  - Create a central supervisorial group of experienced immigration experts.
  - Embed the additional immigration experts focusing on *Padilla* plea consultations strategically across LACPD's branch offices.
- Reform deficient institutional practices:
  - Require and expand foundational criminal-immigration law trainings for all defenders.
  - Institutionalize a comprehensive intake form and establish a policy requiring defenders, when first meeting with clients, to ask key questions to ascertain immigration status and gather critical information.
  - Develop and enforce a protocol to ensure that defenders consult with their immigration experts in cases involving noncitizen clients when they are uncertain about immigration consequences or available alternative dispositions.

For Los Angeles County Prosecutor's Offices

- Fully implement California Penal Code Section 1016.3(b), which created a mandate for all prosecutors to "consider the avoidance of adverse immigration consequences . . . in an effort to reach a just resolution"[3]:
  - In the interest of ensuring a just outcome, actively participate in securing immigration-safe dispositions for noncitizens, including by declining to charge, expanding the use of pre-charge and pre-plea diversion programs, and negotiating pleas that avoid or at least mitigate adverse immigration consequences.
  - Develop formal policies for the meaningful consideration of immigration consequences, pursuant to Section 1016.3(b).

Part II.
This Moment: The Crimmigration Crisis and the Critical Role of Defense Counsel

> *"As states and localities struggle to define their role, desired or not, as partners in immigration enforcement,* ***defense counsel must embrace his or her new role as a 'crimmigration' attorney, if counsel is to provide effective assistance.*** *"*
> – Iowa Supreme Court in *Diaz v. State* (2017)[4]

In 2010, in response to what scholars have dubbed the "crimmigration crisis,"[6] the U.S. Supreme Court recognized in *Padilla v. Kentucky* that "[t]he 'drastic measure' of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes."[7] "[C]hanges to our immigration law," the Court acknowledged, "have dramatically raised the stakes of a noncitizen's criminal conviction."[8] As the Court noted, "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[9] Changes to the immigration laws over the past three decades now mean that a criminal conviction may seal a person's fate in the immigration system. As a result, state criminal courts have become de facto immigration courts.[10]

In this context, the Court held in *Padilla* that the Sixth Amendment requires defense counsel to provide noncitizen clients with affirmative, accurate advice on the immigration consequences of convictions.[11] This informed advice is particularly paramount today as the federal government expands its reliance on local criminal justice systems to aid its deportation agenda. "[D]efense counsel must embrace his or her new role as a 'crimmigration' attorney, if counsel is to provide effective assistance."[12] Indeed, as the *Padilla* Court confirmed, defense counsel's role is critical in "[p]reserving the client's right to remain in the United States," which "may be more important to the client than any potential jail sentence."[13]

Long before *Padilla* was decided, California law recognized the requirement that defense counsel accurately advise about and defend against adverse immigration consequences of criminal dispositions.[14]

In this report, we refer to "**crimmigration**" as the merging of criminal and immigration laws and enforcement practices, whereby noncitizens who come into contact with the criminal justice system increasingly face deportation as a result. We also use the term "criminal-immigration law" to denote the technical intersection of the two areas of law, as commonly faced and evaluated by public defenders and immigration attorneys.[5]

The California Legislature has proactively responded to the crimmigration crisis, for instance, by codifying *Padilla* and California constitutional law into state statutes[15] and by allocating state funds to begin to support public defenders with desperately needed immigration law resources.[16] In California, defense counsel are mandated to "provide accurate and affirmative advice about the immigration consequences of a proposed disposition, and . . . defend against those consequences."[17]

A. The Crimmigration Crisis and California's Response

i. Crimmigration and Mass Incarceration

Over the past three decades, Congress has increasingly merged criminal and immigration law by criminalizing immigration violations, such as unlawful reentry after removal (8 U.S.C. § 1326), and by dramatically expanding the list of criminal offenses that trigger mandatory detention and deportation, even retroactively.[18] Even minor misdemeanor offenses that carry few criminal penalties and often no actual

term of incarceration[19]—offenses such as turnstile jumping, possession of stolen bus transfers, shoplifting, public urination,[20] or simple drug possession[21]—can nevertheless trigger deportation and other severe immigration consequences.[22] Intertwined with this ever-widening net of deportable crimes is the fact that immigration enforcement practices have shifted over the past decade to significantly rely on the criminal justice system, creating a deportation pipeline that has enabled skyrocketing levels of deportations under President Barack Obama and now under the current administration.[23] Now, often all that it takes to trigger deportation is some contact with the criminal justice system, including arrests for low-level offenses.[24]

"To banish [noncitizens] from home, family, and adopted country is punishment of the most drastic kind whether done at the time when they were convicted or later."

– California Supreme Court in *In re Resendiz* (2001)[25]

In the criminal context, low-level arrests, minor misdemeanor offenses, and drug offenses are responsible for the unprecedented levels of incarceration in the United States today.[26] Even though violent crimes have declined continually during the past two to three decades,[27] the number of people behind bars, under some form of supervision, or with criminal records, has increased dramatically.[28] Prison systems such as California's have been bursting at the seams.[29] Nearly one in four adults in the United States has a criminal record.[30] People returning home after jail or prison face often insurmountable barriers to successful reentry and reintegration to society. *Noncitizens* released from jail or prison are frequently stripped of any chance of reentry and reintegration; too often returning home means removal to their countries of origin.

This system of mass criminalization, mass conviction,[31] and mass incarceration has disproportionately impacted poor communities of color.[32] These communities include noncitizens, who are predominantly people of color[33] and poorer than the general U.S. citizen population.[34] The combination of over-policing and police racial profiling in minority, immigrant, and poor communities[35] has made noncitizen people of color particularly vulnerable to criminal justice contact, such as stops, arrests, and criminal charges.[36] Federal authorization of local law enforcement to engage in immigration enforcement has further exacerbated the effect of over-policing and racial profiling.[37] On top of racially skewed local law enforcement practices, federal immigration enforcement has been rife with racial discrimination.[38] These policies have had particularly devastating effects on Latino communities.[39] For example, about 77 percent of unauthorized immigrants were of Latino descent from 2010 to 2014,[40] yet more than 96 percent of all removals in fiscal year 2016 were of Latinos.[41]

Noncitizen people of color, especially the poor, have thus faced multiple dimensions of marginalization.[42] While mass incarceration has created "a growing undercaste, permanently locked up and locked out of mainstream society,"[43] the crimmigration crisis has generated a growing outcast population of longtime U.S. residents who are now forever banished from the United States.

This banished population includes veterans of the U.S. Armed Forces, who thought they became citizens through their service—only to discover after their encounters with the criminal justice system that they were not citizens and that their convictions subjected them to mandatory deportation.[44] The banished population also includes individuals adopted and brought to the United States as toddlers by U.S. citizens who mistakenly assumed that their adoption had automatically conferred citizenship on their children, when in fact it had not.[45]

The impact of deportation has been catastrophic for individuals, families, and entire communities. The physical and mental health of family members—especially children—who remain in the United States drastically deteriorate.[46] In addition to the harms of deportation, criminal convictions often mean that people are detained for prolonged, often indefinite periods in immigration jails while they fight their cases.[47] These jails are usually remote, compromising one's access to legal, family, and community support. While detained, people usually lose employment and the ability to provide for their families.[48] Families' financial devastation, in turn, increasingly burdens the social safety net.[49]

ii. A Brief History of Crimmigration

Until a few decades ago, "there was no such creature as an automatically deportable offense."[50] For example, the criminal sentencing judge could make a judicial recommendation against deportation, which was

Seaman Salomon Loayza was brought to the United States from Ecuador in 1973. Loayza enlisted in the Navy in 1975, at the age of 19. He served on active duty for four years before being honorably discharged, then served another four years in the Naval Reserve. Loayza's reentry into civilian life was largely successful—he married, had a son, went to college, started a small business, coached youth soccer, and was a beloved member of his community for 26 years. In 2000, however, he was deported after being convicted of mail fraud, an aggravated felony. In his case, Loayza's criminal defense attorney never advised him that his mail fraud conviction would carry immigration consequences.

binding on the Executive.[51] Through the 1990s, there were other forms of relief that would also permit a noncitizen to stay in the United States despite a criminal conviction.[52] These options for remaining in the United States largely reflected the recognition that many noncitizens subject to deportation were deeply rooted in the United States.[53]

In 1988, Congress established a new category of deportable crimes: "aggravated felonies."[54] While initially limited to murder, drug trafficking, and firearms trafficking, aggravated felonies proved significant because, eventually, those with convictions triggering this deportable ground for removal would not be eligible for most forms of relief.[55] Since the inception of the aggravated felony category, "[v]irtually every . . . change to U.S. immigration law has included an expansion of [its] definition."[56]

The most dramatic expansion to the aggravated felony definition came in 1996. That year, Congress passed—and President Bill Clinton signed—the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). This set of laws has been described as "the most sweeping immigration law changes in the history of the United States."[57] In particular, the aggravated felony definition suddenly expanded to include over 20 categories of crimes,[58] many of them neither felonies nor crimes traditionally understood to be aggravated.[59] As previously available forms of relief were also eliminated, many more noncitizens became subject to mandatory deportation.[60]

"I pray that soon the good men and women in our Congress will ameliorate the plight of families like the [petitioners] and give us humane laws that will not cause the disintegration of such families."

- Judge Harry Pregerson,
Ninth Circuit Court of Appeals[61]

While AEDPA and IIRIRA laid the blueprint for the crimmigration crisis, the explosion in deportations they foreshadowed has been carried out through increasingly aggressive immigration enforcement. Under the Secure Communities program, launched in March 2008 by Immigration and Customs Enforcement (ICE), local law enforcement agencies share with ICE the fingerprints of people they book into custody.[62] Upon reviewing database entries triggered by the fingerprints, ICE then issues detainers requesting that local law enforcement agencies notify ICE of noncitizens' release dates and, in violation of the Fourth Amendment, hold the noncitizens beyond their release dates in order to facilitate their transfers.[63] Through the Secure Communities program, ICE gained increasing ease of access to local jails, leading to the expansion of transfers of noncitizens from local law enforcement custody to ICE custody. In addition, the 287(g) program, which was scaled up in 2008, increased the federal government's immigration enforcement capabilities by deputizing local law enforcement agents to perform the functions of federal immigration agents.[64]

President Obama significantly escalated immigration enforcement—for example, by spreading Secure Communities from only 14 counties, the number under President Bush in 2008, to 88 counties by the end of 2009 and to all 3,181 U.S. jurisdictions by 2013.[65] Removals under the Obama Administration rose to unprecedented levels, reaching a historic high of 409,849 in fiscal year 2012 alone[66] and 2.7 million

overall.[67] Faced with overwhelming criticism and condemnation of these programs, which were premised on racial profiling and unconstitutional detentions, the Obama Administration scaled back the use of 287(g) agreements beginning in 2014[68] and formally replaced the Secure Communities program in November 2014 with a new Priority Enforcement Program (PEP).[69] Under PEP, President Obama for the first time prioritized the deportation of noncitizens *convicted* of crimes—rather than simply targeting noncitizens who had been arrested or had other types of contact with the criminal justice system.[70] He infamously insisted that his administration would target "[f]elons, not families. Criminals, not children. Gang members, not a mom who's working hard to provide for her kids."[71] By that point, however, the damage had been inflicted and the deportation infrastructure was fully entrenched in the criminal justice system. Roughly two-thirds of removals under the Obama Administration involved people who had no criminal records or had committed only minor infractions, such as traffic violations or immigration-related offenses.[72] Dubbed the "Deporter-in-Chief," President Obama built the massive deportation machine that Donald Trump has now inherited.

Trump's election as president in 2016 marked another turning point in immigration enforcement. In particular, his policies have put noncitizens with criminal convictions—especially nonserious, nonviolent convictions—at even greater risk of deportation than under the Obama Administration. Days after entering office, President Trump issued three immigration-related executive orders (EOs).[73] While the Muslim Travel Ban was met with the most public outcry and spurred waves of protests and lawsuits, EO Number 13768 ("Enhancing Public Safety in the Interior of the United States") marked a significant change in the interior enforcement landscape. EO Number 13768 eviscerated President Obama's formal policies to prioritize people with certain criminal convictions for deportation, and instead made virtually everyone subject to removal a priority for deportation.[74] The EO expressly prioritized individuals with unresolved criminal charges and even individuals who have allegedly committed acts that constitute a chargeable criminal offense.[75] Significantly, the EO restored the Secure Communities program and expanded the use of 287(g) agreements.[76] In the first year of Trump's presidency, ICE arrests, detainers, and interior removals increased substantially compared to the two previous years.[77] Effectively, President Trump sent a clear message that noncitizens with any interaction with the criminal justice system are at extreme risk for deportation.[78]

iii. California's Response

California adopted limitations on police-ICE cooperation so as not to aid inhumane dragnet operations that destabilize communities, undermine trust in the police and enhance an agenda motivated by racial hatred, not sensible policy. And it adopted these limitations because time and again, courts have said that what ICE is asking of local law enforcement violates the 4th Amendment.

– Jennie Pasquarella, ACLU SoCal[79]

California has passed numerous laws in recent years to protect immigrants and to challenge federal immigration practices. With more than ten million immigrants, a population greater than that of any other state, California has the greatest need for strong, meaningful immigrant protections.[80] The laws that California has recently enacted to protect immigrants are too numerous to list here and span areas including housing, employment, education, workers' rights, healthcare, criminal justice, law enforcement, immigration detention, gang databases, and more.[81]

Appendix A includes some highlights of California's laws that seek to protect people who have had interactions with the criminal justice system. These include, among others, California Penal Code Section 18.5, Propositions 47 and 64, AB 208, and the TRUST, TRUTH, and California Values Acts. In addition, California has codified *Padilla* and California constitutional law into state statutes,[82] has added an important post-custodial mechanism through which noncitizens can seek post-conviction relief,[83] and has allocated state funds to begin to support public defenders with desperately needed immigration law resources.[84]

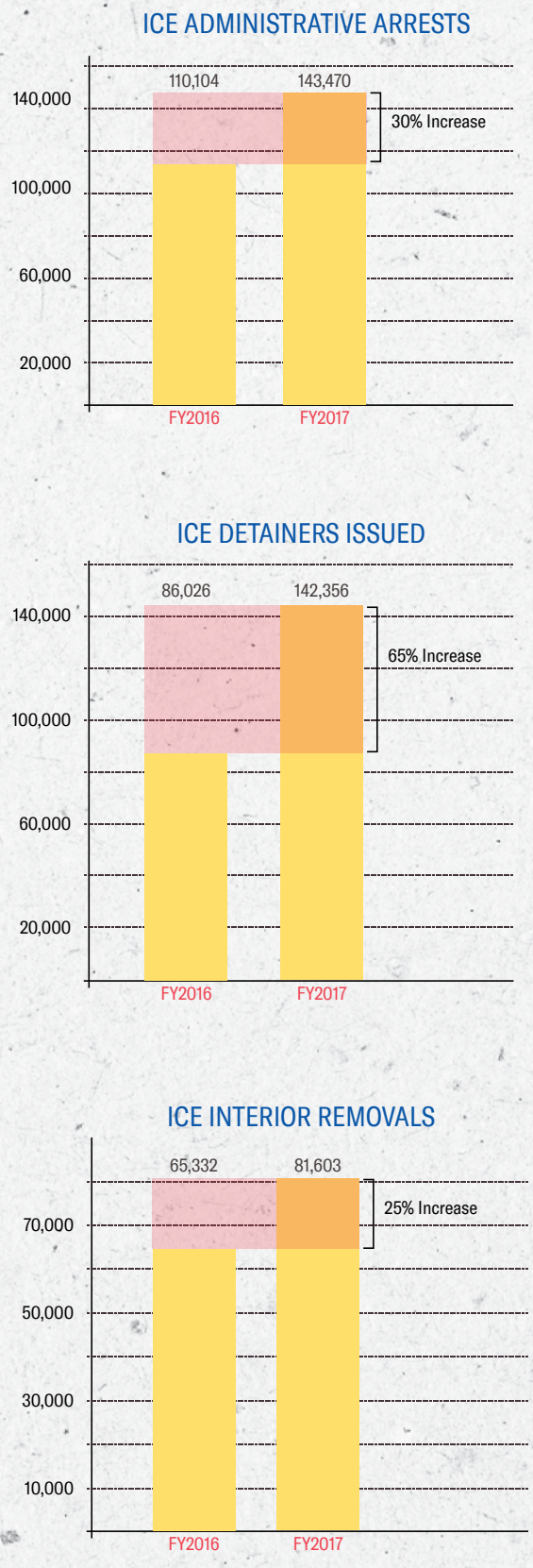
B. The Critical Role of Defense Counsel

"The right to counsel . . . goes to the core of who we are as Americans, because it is a question of liberty versus tyranny"

– David Carroll, Sixth Amendment Center[85]

America's mass incarceration system has grown more than tenfold over the past 50 years, from having

ICE Enforcement Statistics FY2016-2017



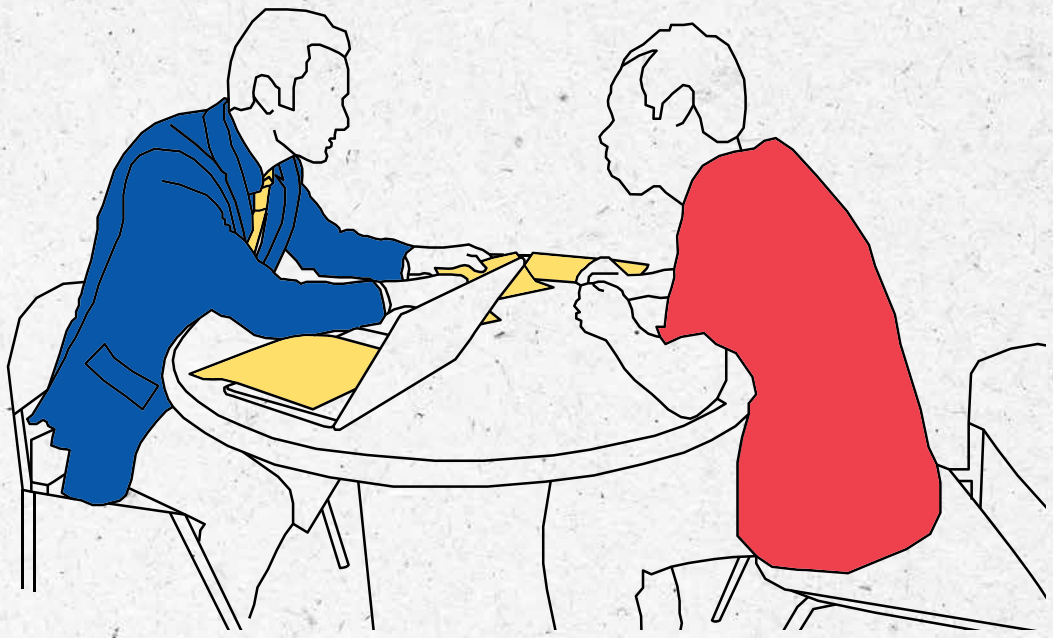
217,000 incarcerated people to about 2.3 million.[86] With incarceration at this level, the criminal justice system by necessity has become a system of plea bargaining.[87] Further, the explosion of immigration and collateral consequences of criminal charges and convictions has significantly raised the stakes of criminal proceedings, especially for misdemeanor offenses. In particular, noncitizens increasingly face deportation and the permanent separation from family, community, and home—the loss "of all that makes life worth living."[88]

In this context, quality legal representation at the front end[89]—during criminal proceedings—can usually make all the difference. For many noncitizens, effective defense during their criminal cases can be practically a matter of life and death. Indeed, state and national professional standards have shifted to meet the changing landscape of the criminal justice system and its intersection with poverty, race, and immigration. Importantly, courts and legislatures have gradually acknowledged these changes, moving counsel's constitutional duties for the effective representation of noncitizen clients to match prevailing professional standards.[90]

i. Professional Standards for Plea Bargaining in the Context of Immigration and Collateral Consequences

Collateral consequences are legal penalties, disabilities, or disadvantages automatically imposed after a criminal conviction, even for minor misdemeanor offenses,[91] and often after a mere arrest.[92] They are vestiges of the "civil death" that serious criminal convictions carried in England, where a person lost all political, civil, and legal rights.[93] Authorized by various federal, state, and local laws and regulations, collateral consequences have expanded dramatically over the past two to three decades.[94] They include, for example, exclusion from government-assisted housing and other forms of assistance, ineligibility for employment and various types of employment-related licenses, and voter disenfranchisement.[95]

This unprecedented use of "civil death" in the United States[96] has exacerbated the 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."[97] Returning individuals already struggle to find shelter and food and rarely achieve sustained economic security absent strong social support or access to long-term public benefits.[98] Adding convoluted layers of collateral consequences



has frustrated and "impede[d] the reentry process,"[99] increasing recidivism.[100] Two out of three returning individuals are likely to be rearrested within three years.[101]

For noncitizens, the added immigration impact of criminal convictions can be exceedingly devastating. For citizens with criminal records, collateral consequences and reentry generally assume their return to their communities. In this setting, advocates can, for instance, seek to mitigate collateral consequences through strategies such as expungements, certificates of relief, or the sealing of records.[102] Yet, for noncitizens with criminal justice contact, these strategies are often virtually moot, and their return cannot be presumed. For example, state expungements of state convictions that make a noncitizen deportable have largely no effect on one's deportability, which is determined by federal law.[103] Instead, mandatory immigration detention and deportation are common consequences for noncitizens who have had their records expunged. For noncitizens, the "civil death" of exile can sometimes mean an actual death sentence in their countries of origin.[104]

Defense attorneys' obligations under national and state professional standards have been established to meet the evolving demands of the profession. In particular, defense counsel have significant responsibilities during plea bargaining—usually "the most critical period."[105] They must be aware of, advise about, and, per client's wishes, defend against immigration and collateral consequences. From as early as 1995, defense attorneys have had to "be fully aware of, and make sure the client is fully aware of . . . other consequences of conviction such as deportation."[106] They "must be active rather than passive, taking the initiative rather than waiting for questions from the client;" they must "interview the client" and affirmatively "identify potential so-called 'collateral' consequences that may flow from the client's contact with the justice system and social services needs that may have contributed to that contact."[107] Then, in accordance with clients' needs and goals, defense counsel must "seek dispositions and sentences that avoid or minimize all penalties and consequences, criminal and civil."[108] To perform these duties, they must be adequately trained and supported,[109] including by having access to civil attorneys, such as immigration experts.[110]

More specifically, to provide informed advice about a criminal disposition's immigration consequences and to advocate for alternative dispositions, defense counsel must take certain necessary steps. First, attorneys must inquire into a client's goals and circumstances, including immigration status.[111] They must "determine a client's citizenship and immigration status, assuring the client that such information is important for effective legal representation and that it should be protected by the attorney-client privilege," all the while avoiding any actions that might alert the government to information that could adversely affect the client.[112]

If defense counsel determine that their client is not a U.S. citizen, they must research the law, including the specific immigration consequences of a criminal disposition.[113] They must "investigate and identify particular immigration consequences that might follow possible criminal dispositions,"[114] including but not limited to "removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client's immediate family."[115] Then, they must "advise the client of all such potential consequences and determine with the client

the best course of action for the client's interests and how to pursue it," including by trying to obtain an alternate disposition and avoid those consequences.[116]

ii. Noncitizens' Right to Effective Counsel

Both the U.S. Constitution and the California Constitution guarantee the accused the right to the assistance of counsel.[117] This right to counsel is the right to *effective* counsel.[118] Effective counsel is especially important for the noncitizen accused, for whom the consequences of a conviction can be far more severe than they may be for a citizen. In addition to incarceration, probation, parole, and a host of collateral consequences that can flow from criminal convictions, noncitizens face what is often the most disastrous consequence of all: deportation.

Taking guidance from professional standards, the U.S. Supreme Court has acknowledged defense counsel's duties during plea bargaining. The Court has recognized the reality of plea bargaining in today's criminal justice system:

> "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."[119] Plea bargaining therefore "*is* the criminal justice system," and so "defense counsel have responsibilities in the plea bargain process."[120]

Once lawyers enter into plea negotiations, they have a constitutional duty to negotiate effectively.[121] In particular, the Court held in *Padilla* that the right to effective counsel requires defense attorneys, at a minimum, to affirmatively and accurately advise noncitizen clients about the immigration consequences of convictions.[122]

Today, federal and state constitutional law, along with recent California statutes, mandate that providing counsel to the noncitizen accused entails, among others, two important duties during criminal proceedings: (a) providing affirmative, accurate advice about the specific immigration consequences of a contemplated disposition; and (b) pursuing available dispositions that avoid or mitigate those consequences.

a. Affirmative Duties to Ascertain Immigration Status, Investigate Specific Immigration Consequences of a Criminal Disposition, and Provide Accurate Advice

Under *Padilla*, and in California, under case law that long predates *Padilla*,[123] defense counsel who represent noncitizens must embrace a constitutional, affirmative duty to provide their clients with accurate advice about the specific immigration consequences of criminal dispositions.[124] This means that defense attorneys must ascertain their clients' immigration status.[125] They must conduct a diligent study of the law and reasonable legal research, both in the immigration statutes and in the controlling case law, in order to discover what impact a criminal conviction will have on their clients' immigration status.[126] Then, counsel's advice must be case-specific.[127] For example, where "the immigration statute or controlling case law expressly identifies the crime of conviction as a ground for removal," counsel must clearly advise that the "conviction [renders] her removal virtually certain, or words to that effect."[128] These minimal constitutional standards that defense counsel must meet are ordered by federal and California case law, and by the high courts of other states.[129]

b. Affirmative Duties to Investigate, Advise About, and Pursue Available Immigration-Favorable Dispositions

For decades, California courts have recognized that effective assistance of counsel includes defense against adverse immigration consequences.[130] Defense counsel must investigate, advise about, and pursue available dispositions that avoid or at least mitigate adverse immigration consequences. For example, the California Court of Appeals in *People v. Bautista* held that "the attorney's failure to investigate, advise, and utilize defense alternatives" to avoid mandatory deportation—including by pleading to a different but related offense or by "pleading upward" to a greater offense—was constitutionally deficient.[131] There, counsel correctly advised that his client "would be deported" for a conviction of possession of marijuana for sale, an aggravated felony.[132] Counsel, however, never considered the option to "plead upward" to alternative offenses that were more serious, yet were not aggravated felonies, and therefore would not necessarily lead to mandatory deportation.[133]

Federal and state courts, including the U.S. Supreme Court, have recognized that, during plea negotiations, constitutionally competent counsel will defend their noncitizen clients by seeking dispositions that avoid or minimize adverse immigration consequences.[134] According to the Supreme Court, defense 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."[135] Through *Padilla* and more

recent decisions in *Lafler v. Cooper*[136] and *Missouri v. Frye*,[137] the Court has emphatically declared that plea bargaining is a critical stage of criminal proceedings, thereby requiring counsel to be effective during plea negotiations.[138] Indeed, "[a]nything less . . . might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'"[139]

iii. California Penal Code Sections 1016.2-3 and 1473.7

In 2015, the California Legislature enacted **Penal Code Sections 1016.2-3**, codifying *Padilla* and California case law, including *People v. Soriano*,[140] *People v. Barocio*,[141] and *People v. Bautista*.[142] Pursuant to Section 1016.3(a), defense counsel must "provide accurate and affirmative advice about the immigration consequences of a proposed disposition."[143] The statute also provides that defense counsel must "defend against" adverse immigration consequences "when consistent with the goals of and with the informed consent of the defendant, and consistent with professional standards."[144]

The legislative findings and declarations within Section 1016.2 recognize that deportation may result from "a single minor offense" and that it "may be by far the most serious penalty flowing from the conviction."[145] Section 1016.2 declares the Legislature's intent to further justice by ensuring that the noncitizen accused can avoid or at least mitigate adverse immigration consequences, which often cause irreparable damage.[146] The Legislature found that "immigration consequences of criminal convictions have a particularly strong impact in California."[147] It noted, for instance, that about "50,000 parents of California United States citizen children were deported in a little over two years."[148]

Importantly, Section 1016.3 also created a mandate for *prosecutors*, stating: "The prosecution, in the interests of justice, and in the furtherance of the findings and declarations of Section 1016.2, shall consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution."[149] To avoid unduly harsh treatment of noncitizens, as the Legislature intended in Section 1016.2, and thereby to reach a just outcome, prosecutors must meaningfully consider immigration consequences and approve modifications to charges or sentences where appropriate. According to the U.S. Supreme Court, the exercise of such discretion is consistent with the goals of the prosecutor's office. The Court has observed that "informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process," and "[b]y bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties."[150]

Furthermore, in enacting **Penal Code Section 1473.7** in 2016, the Legislature found that defense counsel duties under Penal Code Section 1016.2–3 are so essential—and their violation so disastrous—that they merited the creation of an entirely new legal vehicle specifically for defendants no longer in custody to be able to vacate their convictions by alleging that their defense counsel were ineffective.[151] Prior to Section 1473.7's enactment, California had no post-custodial mechanism to challenge legally invalid convictions. If noncitizens became aware that a conviction or sentence made them removable *after* the completion of custody, there was simply no way to go back into court to raise a claim that the conviction was unconstitutional because of ineffective counsel. Thus, Section 1473.7 created a post-conviction relief vehicle for a person, no longer in custody, to vacate a criminal conviction or sentence based on prejudicial error damaging the person's "ability to meaningfully understand, defend against, or knowingly accept" the immigration consequences of the conviction or sentence.[152]

Courts and legislatures have gradually recognized the emergence of the crimmigration crisis and defense counsel's critical role often as the sole legal advocate standing between their noncitizen clients and deportation. To provide effective assistance, defense counsel must accurately advise about adverse immigration consequences and defend against those consequences. Today, as criminal and immigration laws and enforcement practices have merged as never before, enhancing the quality of criminal defense of the noncitizen accused is critical to defending immigrant family and community members. In particular, for indigent noncitizens charged with crimes, public defenders stand as their first—and often only—line of vital legal defense. Indeed, given that defending against immigration consequences is constitutionally required for a conviction to be legally valid, it is incumbent on state and local governments to provide public defender offices with the resources necessary to ensure that they can effectively represent noncitizens during criminal proceedings.

Part III. Realizing the Promise of *Gideon* and *Padilla*: Transforming Public Defense for the Twenty-First Century

> *"[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for [them]."*
> – U.S. Supreme Court in *Gideon v. Wainwright* (1963)[153]

In 1963, the U.S. Supreme Court unanimously declared in *Gideon v. Wainwright* that the Sixth Amendment right to a lawyer was "fundamental and essential" to fairness in criminal proceedings.[154] The "noble ideal" of "equal justice under law" cannot be realized if the accused lack the "guiding hand of counsel at every step in the proceedings."[155] The Court thus extended the fundamental right to counsel to the states, mandating that government-funded attorneys be provided to the indigent accused of crimes.[156] The decision was "rooted in the ideal that the division between rich and poor should not predetermine guilt in a criminal case."[157] It also sought "a level playing field within a society fraught with racial inequalities."[158] *Gideon* promised equality under the law and racial and economic justice.

Like *Gideon*, *Padilla* promises to serve as a stand against the criminalization and marginalization of the poor, racism, and xenophobia. Scholars and practitioners have hailed *Padilla* as the "most important right to counsel case since *Gideon*."[159] This is because, in part, noncitizens have yet to gain the right to government-funded counsel in removal proceedings.[160] Immigration lawyers can make a significant difference here: 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.[161] Yet, the vast majority of noncitizens who cannot afford a lawyer effectively do not get their day in immigration court.[162] In this context, the Court's move in *Padilla* to require immigration advisals as a constitutional imperative in criminal proceedings means that all *Gideon* lawyers "must now incorporate a baseline of immigration consultation into their representation."[163] *Gideon* lawyers—in particular, public defenders—are thus "an essential institutional form of immigration defense" for hundreds of thousands of indigent noncitizens who increasingly face removal proceedings as a result of criminal justice contact.[164]

Nevertheless, the distance between *Gideon*'s promise and its real impact on the ground has grown wider in recent decades. State and local governments have treated *Gideon* "not as a bright star pointing the way to justice, but as an unfunded mandate to be resisted."[165] In finding that local municipalities were systematically depriving the Sixth Amendment right to counsel to the indigent accused, a federal court recently declared: "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."[166] Poverty—not justice—still dictates outcomes.[167]

The fierce opposition to groundbreaking constitutional reforms like *Gideon* and *Brown v. Board of Education*[168] makes us keenly aware of what we face in fully implementing *Padilla*. *Gideon* teaches us that fair proceedings require more than simply a formal right to counsel.[169] *Padilla*'s promise means little without jurisdictions stepping up to provide quality representation of noncitizens as part of significantly enhanced indigent defense systems.

As we near the tenth anniversary of *Padilla*, only if public defender offices and other key stakeholders act decisively to bring about urgent reform can we realize *Padilla* and use this watershed decision to help revitalize *Gideon*'s promise. Public defender offices must not only meet constitutional mandates, but also seek to provide the highest-quality defense possible for *all* their clients—citizens and noncitizens alike. The changing criminal justice landscape and emerging needs of the twenty-first century demand no less. We must transform public defense and, in the process, help realize the promise of *Gideon* and *Padilla*.

In the Beginning

"For every public prosecutor, there should be a public defender . . . ."

– Clara Shortridge Foltz[170]

In 1893, seventy years before the U.S. Supreme Court decided *Gideon* and mandated indigent defense, suffragist and trailblazing lawyer Clara Shortridge Foltz launched the public defender movement.[171] Foltz insisted that the right to counsel must mean that the accused is entitled to defense, and this defense shall be full, adequate, and free. Indeed, she argued that the right to counsel was a constitutional guarantee, and that it was the duty of the government to defend "life and liberty from unlawful invasion."[172] In Foltz's words, "[f]or every public prosecutor, there should be a public defender chosen in the same way and paid out of the same fund."[173] Public defense would not be charity, or a training ground for inexperienced lawyers, or a plea mill run by court-appointed lawyers who did not have the resources to put up a real fight. Instead, public defenders "would hold an honored position, even more important than the prosecutor."[174]

Foltz's own life story illuminates the origins of her extraordinary determination and intellectual wisdom. Deserted by her husband during an economic depression, and unwavering as a twenty-nine-year-old single mother determined to raise her five children, Foltz had decided to become a lawyer to earn a living.[175] At the time in 1877, however, women could not vote, and California law allowed only "white male citizen[s]" to be admitted to the bar.[176] Foltz was neither deterred nor discouraged. She drafted the "Woman Lawyer's Bill" in order to open the practice of law to any "citizen or person" in California and, with fellow suffragists, relentlessly lobbied for its ultimate passage in 1878.[177] On September 5, 1878, less than a year after choosing to become a lawyer, Foltz became the first woman admitted to the California bar.[178]

Foltz came to believe in the idea of a public defender based on her own experiences as one of only a small number of women lawyers across the country.[179] In her first years of practice, Foltz mostly represented dependent women in divorce cases and the poor accused—people desperate enough to turn to a woman lawyer.[180] As an outsider and newcomer to the criminal courts, Foltz keenly observed with fresh eyes the injustices the poor accused suffered—the utter disregard of their plight by the court system and its actors, who were "deadened in feeling by constant contact."[181] She saw "innumerable innocent boys and girls, men and women . . . robbed by shysters . . . neglected by irresponsible court appointees."[182]

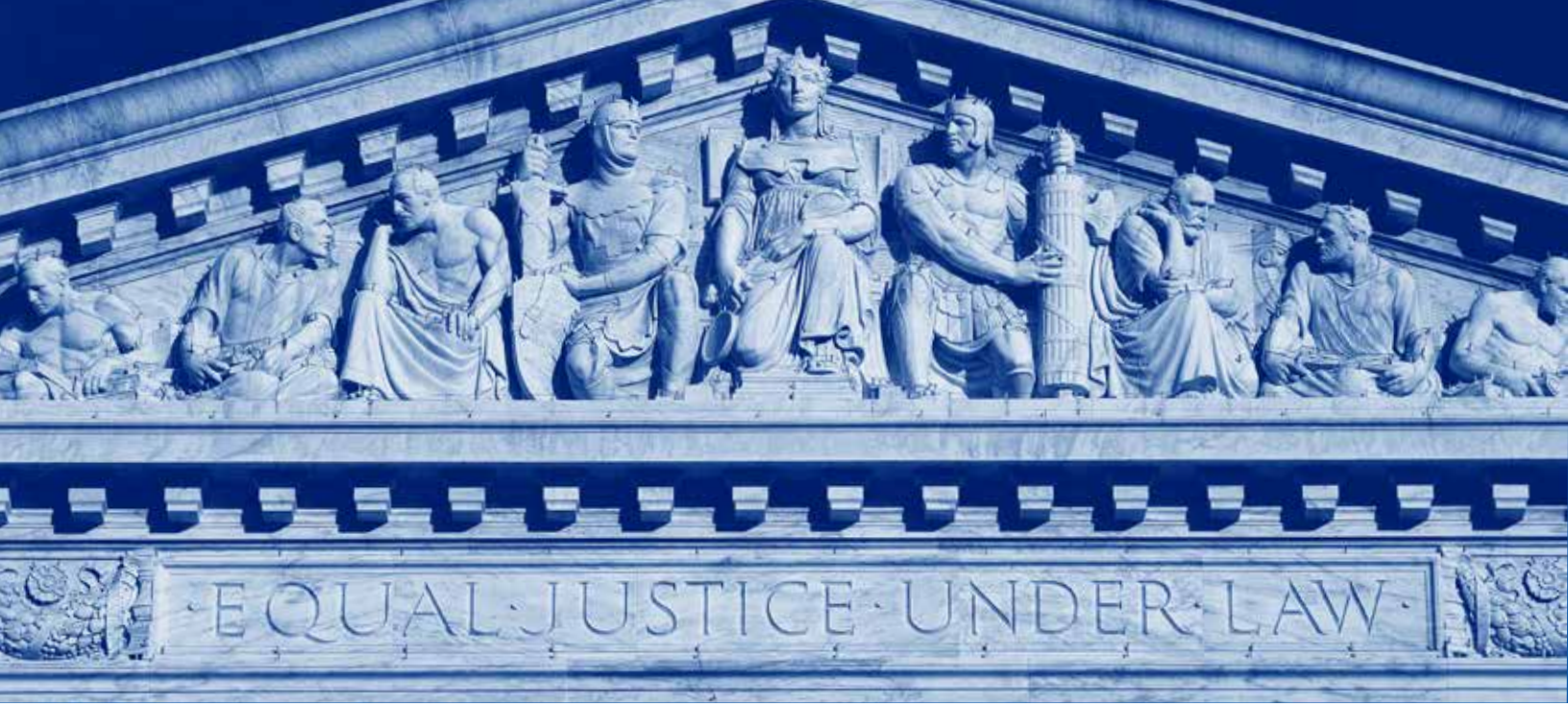
Foltz's experiences as a woman lawyer and early exposure to the plight of the poor accused led her to conceive the idea of a public defender—in the full sense of a defender of the public. During the summation of one of her cases in 1892, Foltz said forcefully: "I deplore the fact that the law does not provide for a public defender as well as a public prosecutor. Do you think this poor innocent man would have applied to a woman to defend him if he had money to pay some distinguished male member of the bar?"[183] She was as blunt about social realities as she was farsighted in how to alter them.

Foltz imagined a public defender who would equalize the criminal justice system. Only then, in her view, could fairness in the courts be assured. She believed that the prosecutor was generally no longer the "minister[] of public justice," but had become a "violent advocate seeking only to win"[184]—an "indiscriminate public persecutor[]"[185] who "misrepresents the facts he expects to prove, attempts to get improper testimony before the jury, garbles and misstates what is allowed, slanders the prisoner and browbeats the witnesses."[186] Foltz envisioned the public defender "as a powerful, resourceful figure to counter and correct the prosecutor, to balance the presentation of the evidence, and to make the proceedings orderly and just."[187]

Upon her 1893 speech introducing the public defender concept, Foltz launched the public defender movement, which became, importantly, directly connected with the movement for women's rights and suffrage.[188] A few years after her speech, she drafted legislation, known as the Foltz Defender Bill, which was introduced in at least 12 states by 1897 and 32 states by 1922.[189] In 1906, Foltz moved to Southern California, where she continued to advocate for the public defender.[190] She also continued to work in the suffrage movement. In California, women won the right to vote in 1911, casting their ballots for the first time in 1912, before women won suffrage nationally in 1920. On a parallel track, Foltz's efforts to create a public defender bore fruit, when Los Angeles County established the first public defender office in the country in 1914. This historic feat became "an inspiration to the nationwide public defender movement," and similar offices were soon established.[191] In 1921, the Foltz Defender Bill became law in California.[192] Foltz set the stage for *Gideon* and illuminated the path toward a system of "equal justice under law" that we continue to strive for.

“For every public prosecutor, there should be a public defender . . . .”

– Clara Shortridge Foltz



A. Public Defenders' Compromised Capacity in Ensuring "Equal Justice Under Law"[193]

"You have the right to an attorney. If you cannot afford an attorney, one will be provided for you."

– From the standard *Miranda* Warning[194]

Television and motion pictures have popularized the standard warning, required by *Miranda v. Arizona*,[195] advising arrestees of their Sixth Amendment right to counsel under *Gideon*: "You have the right to an attorney. If you cannot afford an attorney, one will be appointed to you by the [government] at no expense."[196] More than 80 percent of people charged with crimes are too poor to afford an attorney.[197] The role of *Gideon* lawyers could not be more critical today.

In jurisdictions across the country, public defenders are the *Gideon* lawyers representing some of the most vulnerable community members among us, who are often in the most desperate times in their lives—people who cannot afford a lawyer even when their liberty or life is at stake.[198] Every year, over 15,000 public defenders in nearly 1,000 offices across the country represent hundreds of thousands of poor people charged with crimes.[199] In particular, public defenders stand as the first—and often only—line of vital legal defense for indigent noncitizens. Public defenders thus have a crucial role in ensuring "equal justice under law."[200]

Nonetheless, *Gideon*'s promise has been trampled, and public defenders have been largely hamstrung. The "unrealistic and damaging"[201] standard generally set for effective counsel—most notably with the Supreme Court's 1984 decision in *Strickland v. Washington*[202]—has eroded what *Gideon*'s equality ideal means in action.[203] State and local governments have failed shamefully to ensure strong, adequately resourced, independent indigent defense systems. With some distinguished exceptions, the "perfunctory representation and 'meet 'em and plead 'em' processing of human beings through the courts" has become the norm.[204]

i. Public Defender Offices' Outdated Workload and Resource Standards

a. Criminal Defense Practice

Since 1973, national caseload standards have provided, per full-time public defender, for no more than 150 felonies a year, 400 misdemeanors (excluding traffic court cases) a year, 200 juvenile court cases a year, 200 mental health cases a year, or 25 appeals a year.[205] According to the American Bar Association (ABA), these numerical caseload standards are true ceilings and "should in no event be exceeded."[206] These standards assume that public defenders are working full time without any administrative or non-representational responsibilities and handling cases of average complexity and effort,[207] and that they have appropriate experience and adequate training and supervision.[208]

Even where offices meet the caseload standards, these are long "outdated and fail to account for

the added complexities over the last forty years, including significant collateral consequences resulting from convictions."[209] Public defenders' responsibilities encompass more than the direct representation of clients. For example, defenders "keep abreast of recently decided cases and new laws and rules," "perform administrative tasks, and many have supervisory responsibilities."[210] While these responsibilities may take the defender away from direct client representation, they are essential to the functioning of an effective public defender office.[211] Thus, the amount of time defenders must spend to competently represent their clients is not accurately reflected by the number of clients alone.[212] Instead, defenders' active caseloads combined with their additional duties constitute their full workloads.[213]

Workload standards should be seen as part of the effort to ensure that public defender offices overall have adequate staff and resources to competently represent their clients.[214] Besides defenders, offices must have adequate levels of experts and support staff, such as paralegals, investigators, and administrators,[215] as well as workplace technology and legal research services.[216] According to the U.S. Department of Justice's Bureau of Justice Assistance, the ratio of support staff to defenders should be as follows: (a) at least one paralegal for every four felony attorneys, five misdemeanor attorneys, four juvenile attorneys, or two mental health attorneys; (b) one investigator for every four felony attorneys, six misdemeanor attorneys, and six juvenile attorneys; and (c) one secretary for every four felony attorneys, six misdemeanor attorneys, and five juvenile attorneys.[217] County public defender offices that do not maintain these recommended ratios must reduce their caseload limits, for instance, to 100-150 felonies and 300 misdemeanors per defender per year, as well as their workload expectations.[218] After all, defenders' workload "should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations."[219]

b. Immigration Defense Practice

In the immigration context, public defender offices must employ adequate levels of in-house immigration experts, just as they employ other experts and support staff.[220] While "trainings and reference manuals are necessary components to educate indigent defenders on the law of immigration consequences, . . . they are not sufficient. Indigent defenders . . . also require access to expert assistance to meet their *Padilla* obligations."[221] Indeed, public defender offices "should develop, or seek funding for, such immigration expertise within their offices."[222]

In-house immigration experts are critical, because they support public defenders in ways that maximize comparative advantages, increasing the office's overall efficiency and effectiveness. Defenders must already have intricate knowledge of criminal law and procedure, of how to try a case from start to finish, and of the culture of the court and the dynamics of the court's other stakeholders. Having an adequate level of in-house immigration expertise can assuage the huge burdens already placed on defenders. Immigration experts can ease the demands on individual defenders to figure out often-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 for noncitizen clients.

Professional standards establishing the necessary level of in-house immigration experts, as determined by numerical caseload standards, have existed since 2009. In *Protocol for the Development of a Public Defender Immigration Service Plan* (*Protocol*), the New York State Defenders Association and the Immigrant Defense Project jointly recommended certain ratios of immigration experts to an office's annual caseload involving noncitizen clients.[223] Public defender offices providing full-service immigration representation—that is, full immigration advisals and targeted direct immigration representation—should employ at least one full-time immigration expert for every 2,500 cases of noncitizen clients per year.[224] "Full immigration advisals" means that the immigration expert gives pre-plea immigration advice (including short file memos and client counseling) in most or all of the cases involving noncitizen clients, post-plea advice at the conclusion of representation, and on-demand advice when urgent matters arise in court.[225] The immigration expert also provides "targeted direct immigration representation" in a select number of cases, usually in the form of removal defense cases or affirmative immigration applications.[226] In addition, for offices providing only full immigration advisals but no direct immigration representation, the ratio should be at least one full-time immigration expert for every 5,000 cases of noncitizen clients per year.[227]

Nevertheless, just like general caseload standards, these ratios of immigration experts to noncitizen cases are necessarily outdated and insufficient today. For one, these ratios were established in 2009, before the *Padilla* decision in 2010. Nearly a decade since, federal

immigration law—in particular, its intersection with state criminal law—has become even more "complex"[228] and "labyrinthine"[229] and is in constant flux. For instance, in California, various new state laws for alternative immigration-favorable dispositions and post-conviction relief for noncitizens have been enacted since 2010, adding layers of intricacy to the plea consultation role of immigration experts.[230]

Moreover, immigration experts have many responsibilities besides consulting on individual cases to provide constitutionally mandated plea advice and advocacy. Immigration experts train other attorneys. They advise on policies and practices pertinent to noncitizen clients. They serve as liaisons with law enforcement, immigration officials, and other governmental stakeholders. Immigration experts also engage in other advocacy efforts relevant to the representation of noncitizens, such as facilitating the continued representation of noncitizen clients by nonprofits that provide vital immigration legal services and supporting these nonprofits with post-conviction relief matters. In California, immigration experts are collaborating with a new army of pro bono immigration counsel funded by the state's One California program and similar local programs; many nonprofit clients have criminal records and need public defender offices' support with receiving records, advice, and information. Furthermore, public defender offices in California are uniquely positioned to monitor local law enforcement collaboration with ICE, as well as their compliance with state laws such as the TRUTH and California Values Acts.

Therefore, to accurately reflect immigration experts' increasing crimmigration demands, the professional standards for public defender offices' immigration experts should be updated.

ii. *Gideon*'s Trampled Promise

> *"[T]he law is a system that protects everybody who can afford a good lawyer."*
>
> – Mark Twain[231]

Clara Foltz warned that the "evils" of inadequate representation for the poor accused are "the constant subject of comment by courts and bar associations, but the wrongs continue."[232] During our time, countless articles, reports, and books have commented on *Gideon*'s unrealized promise, seemingly at every anniversary of *Gideon*. But the problems persist.

Around *Gideon*'s fortieth anniversary, the ABA came to the "disturbing conclusion," after a long series of

COUNTY-BASED PUBLIC DEFENDER OFFICES BY OFFICE CASELOAD, 2007

Office Caseload	Number of Offices	Median Population Served	Median Number of Cases Received	Median FTE Litigating Attorneys	Median Total Office Expenditures
All Offices	530	116,810	2,482	7	$707,510
Less than 1,000 cases received	136	27,789	429	2	$133,771
1,000-2,500	123	69,973	1,553	5	$553,791
2,501-5,000	103	144,466	3,595	9	$1,000,000
More than 5,000	154	430,317	10,093	28	$3,000,000

hearings, "that thousands of persons are processed through America's courts each year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation."[233] Because of underfunding and understaffing, crushing caseloads, and the inability to match the power and resources of prosecutors, "indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction."[234] Except in some select jurisdictions, clients may have lawyers, but lawyers "who, through no fault of their own, provide second-rate legal services, simply because it is not humanly possible for them to do otherwise."[235]

Today, *Gideon*'s promise has been trampled. For the majority of the poor accused, a truly adversarial system has been a mirage. From the start, the U.S. Supreme Court imposed in *Gideon* an unfunded mandate for state and local governments to implement.[236] Later, in *Strickland*, the Court undermined a key enforcement mechanism whereby the judiciary could find ineffective assistance of counsel.[237] In this context, myopic state and local governments have seen no political advantage in doing justice for some of the most vulnerable community members among us. They have utterly failed to adequately fund public defense systems, leading to the violation of professional standards and, increasingly, creating systemic deficiencies that violate the U.S. and state constitutions.[238] Indeed, as the Supreme Court and legislatures have shirked their responsibilities to remedy the crisis in our nation's indigent defense systems, state and lower federal courts have stepped in.[239]

a. Underfunding, Understaffing, and Crushing Caseloads

State and local governments have starved public defender offices. In one of the most comprehensive studies done on *Gideon*, the National Right to Counsel Committee stated: "Inadequate financial support continues to be the single greatest obstacle to delivering 'competent' and 'diligent' defense representation, as required by the rules of the legal profession, and 'effective assistance,' as required by the Sixth Amendment."[240] In light of this underfunding, public defender systems have suffered from substantial structural limitations. Unsurprisingly, the most conspicuous is the grim reality of understaffed public defenders toiling under punishing caseloads.

Even when measured by outdated caseload standards, public defender offices consistently exceed caseload limits. As of the last national census of public defender offices, 22 states operated public defender offices, and only four of the 17 states that reported full caseload

information to the U.S. Department of Justice's Bureau of Justice Statistics met caseload standards for felonies and misdemeanors.[241] Out of 530 county-based offices operating in 27 states, only 27 percent reported having sufficient levels of public defenders to meet the caseload standards.[242] Importantly, offices also lack the resources necessary to hire and retain vital defense staff—including investigators, paralegals, administrators, social workers, mental health experts, and immigration experts—in violation of state and national standards.[243]

As a result, no matter how dedicated or brilliant public defenders in under-resourced offices may be, they have been forced to represent clients without being able to fulfill the traditional markers of representation. Defenders have been forced to "violate their oaths as members of the bar and their duties to clients."[244] The poor accused have suffered directly. They have routinely pleaded guilty without any awareness, much less informed understanding, of immigration and collateral consequences that have a devastating impact in their lives.

Challenging Systemic Deficiencies in Public Defender Systems

Drawing upon ethical standards, including the ABA's *Ten Principles of a Public Defense Delivery System*, individual defenders are "obligated to decline appointments" to additional cases until excessive workloads are reduced.[245] Importantly, chief public defenders should refuse to accept a workload that exceeds the office's capacity to provide competent, quality representation in every case.[246] Offices should inform governmental officials and request funding and personnel that are adequate to meet the office's workload.[247] Offices should alert the courts and seek judicial relief; courts, in turn, should direct offices to refuse to accept additional cases until adequate resources are provided.[248]

Such an approach is not pie-in-the-sky thinking. Courts have increasingly held that public defender offices' substantial structural limitations have created systemic deficiencies that harm clients' Sixth Amendment right to effective assistance of counsel.[249] In particular, courts have found that caseloads in excess of national and state standards create systemic deficiencies that violate the Sixth Amendment rights of the indigent accused.[250] For example, in *Wilbur v. City of Mount Vernon*, the U.S. District Court found 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[d] investigation, or whether special considerations regarding *immigration status*, mental or physical conditions, or criminal history exist[ed]."[251]

In finding systemic deficiencies, courts have employed traditional markers of representation as standards by which to measure competency. These markers include, for example, communicating with clients, conducting necessary legal research and factual investigations, and advocating for clients through plea negotiation or trial.[252] When these traditional markers of representation have proved to be seriously compromised, courts have found violations of the Sixth Amendment.[253]

b. Mass Criminalization and Prosecutors' Lopsided Power and Resources

"Tough on crime" politics leading to the dramatic expansion of behaviors constituting a criminal offense—especially minor, poverty-related offenses and drug offenses—and "broken windows" policing have combined with the broad, unchecked power that prosecutors possess to manufacture a system that is anything but adversarial. Prosecutors routinely bring too many cases, often maximizing the gravity of a case. Public defender offices have largely been unable to keep up in this system.[254] For instance, of the 17 states that had a state public defender program in 1999, criminal caseloads increased from 1999 to 2007 by 20 percent—the largest share for misdemeanors and ordinance violations.[255]

Prosecutors have immense power, exclusive access to information, and vast resources. 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."[256] They can decide to overcharge precisely to enhance their bargaining power.[257] In particular, prosecutors' decisions to bring certain criminal charges and whether to prosecute overzealously can often dictate the ultimate disposition of the case, with little or no input from defense counsel.[258] In the immigration context, as President Trump's EO Number 13768 significantly expanded the definition of "criminal" to include anyone charged with a crime, decisions to charge alone are

often determinative. Yet, there is virtually no formal process or oversight of prosecutorial discretion, and generally there has been no systematic way for voters to monitor the system's workings.[259] Although prosecutors are, in theory, bound by the ethical rules, disciplinary measures are virtually never imposed on prosecutors.[260] Prosecutors have effectively had "carte blanche."[261]

In addition, the level of resources between prosecutors and public defenders could hardly be more disproportionate—in direct violation of the ABA's principles calling for "parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts)."[262] For example, in 2007, there were 957 public defender offices employing 15,000 full-time staff, on a total budget of $2.3 billion; on the other side, 2,330 prosecutor offices employed 78,000 full-time staff, with a total budget of $5.8 billion.[263] About that same year, in California, for every dollar spent on prosecution, counties spent an average of 53 cents on public defense.[264]

In short, America's adversarial system that is premised on "the principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question"[265] has been a sham.

"...for every dollar spent on prosecution, counties spent an average of 53 cents on public defense."

Philadelphia District Attorney Larry Krasner

Prosecutors, Mass Incarceration, and Crimmigration

Prosecutors should follow the growing bipartisan realization that mass incarceration is way out of proportion with actual public safety needs, having had a "limited, diminishing effect on crime" and currently almost no effect on reducing crime, despite continuing to impose drastic social and fiscal costs.[266] For example, in 2017, the Major Cities Chiefs Association and the National District Attorneys Association (NDAA) wrote jointly that "[t]oo many resources go toward arresting, prosecuting and imprisoning low-level offenders, and those suffering from mental illness and drugs or alcohol addiction, making it difficult for law enforcement to address more serious crime."[267] In Philadelphia, District Attorney Larry Krasner recently issued a memorandum regarding assistant district attorneys' discretionary decisions on charging, diversion, plea offers, and sentencing with the purpose of "end[ing] mass incarceration and bring[ing] balance back to sentencing."[268]

Prosecutors should consider proportionality of punishment, including immigration and collateral consequences, in order to achieve justice. The ABA specifically states that "[t]he prosecutor should consider collateral consequences of a conviction before entering into a disposition agreement."[269] As early as 2001, Robert Johnson, then the president of NDAA, issued the following message:

> At times, the collateral consequences of a conviction are so severe that we are unable to deliver a proportionate penalty in the criminal justice system without disproportionate collateral consequences. . . . As a prosecutor, you must comprehend this full range of consequences that flow from a crucial conviction. If not, we will suffer the disrespect and lose the confidence of the very society we seek to protect.[270]

Regarding *Padilla*, Johnson asserted: "However 'justice' might be defined by a prosecutor, the Supreme Court's recognition of the importance of collateral consequences to a just resolution of a matter should influence a prosecutor's views."[271]

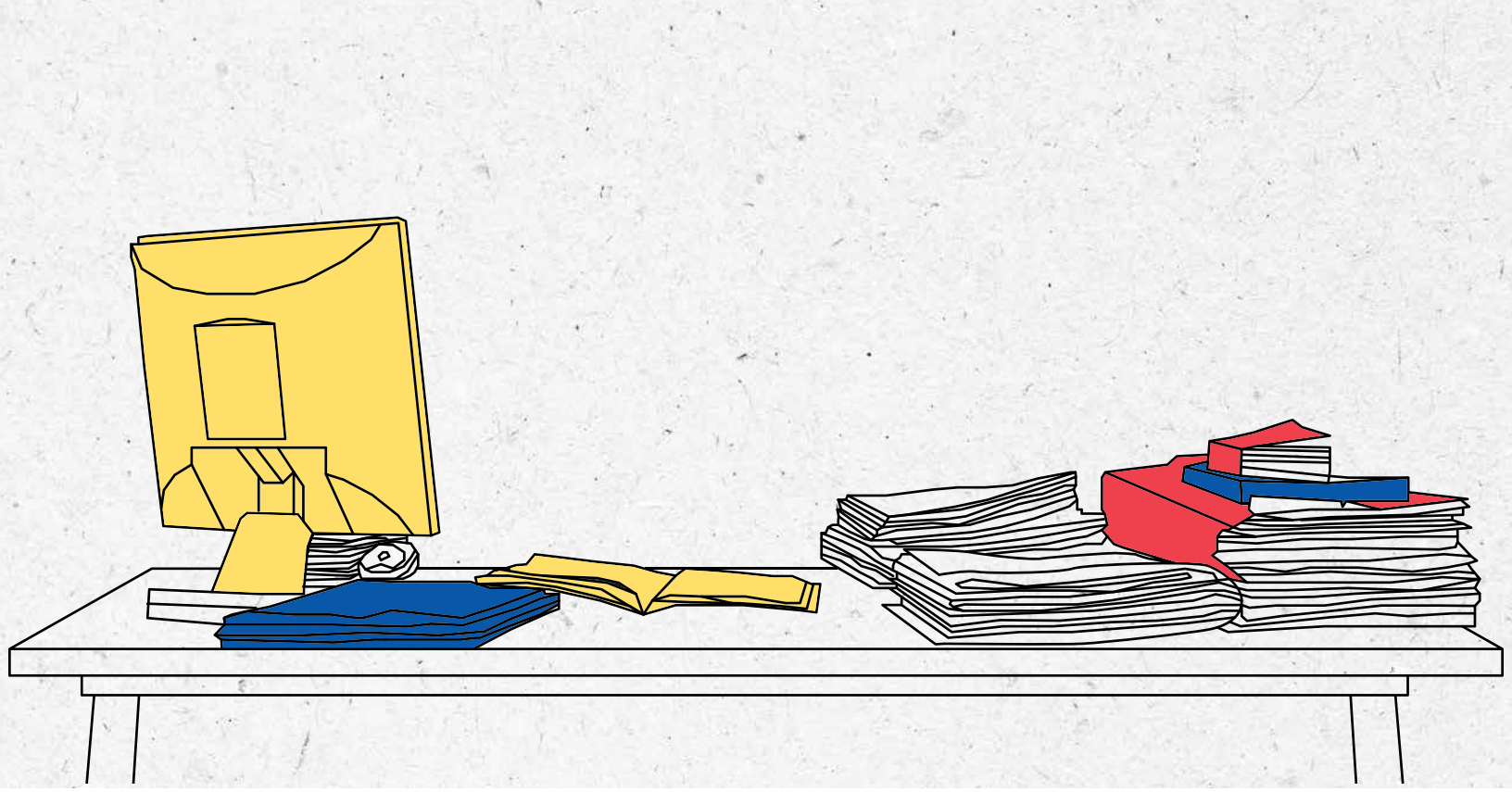
For noncitizens accused of crimes, prosecutors should seriously consider the increasingly devastating nature and reality of the immigration consequences of criminal charges and convictions, which heighten existing prosecutorial obligations to consider and mitigate their adverse impact. The ABA recognized this obligation in its amicus brief on behalf of the petitioner in *Padilla*, promoting a more active role for both prosecutors and defense counsel in avoiding or minimizing immigration consequences.[272] The U.S. Supreme Court acknowledged in *Padilla* that the consideration of immigration consequences "can only benefit both the State and noncitizen defendants" and that "the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties."[273]

Prosecutors should actively participate in securing immigration-safe dispositions, including by declining to charge and expanding the use of pre-charge and pre-plea diversion programs. Because of the automatic sharing of booking and fingerprint information between local law enforcement and federal immigration authorities following an arrest, even a mere arrest, combined with criminal charges and pre-trial detention, can expose noncitizens to deportation. In this context, prosecutors should revise filing guidelines to limit unnecessary arrests and establish policies to avoid unnecessary detention.[274] For lower-level, first-time, or public-health-related offenses, such as nonviolent drug, property, and "quality-of-life" offenses, prosecutors should avoid filing charges at all, or file charges without immigration consequences, where possible.[275] Prosecutors should also offer pre-plea and informal diversion—where there is no guilty plea entered onto the record and thus generally no immigration consequences.

If the prosecution believes that there must be a conviction, there are many creative ways to craft immigration-safe dispositions that still carry the type of conviction and sentence exposure a prosecutor may want. In determining an appropriate plea offer, sentence, or record of conviction, prosecutors should engage with defense counsel and take into account diverse factors, including the history and character of the noncitizen accused; the impact of the disposition upon their immigration status; and humanitarian considerations, such as any hardship that they and their families would face as a result of immigration detention or deportation. Prosecutors should meet with defense counsel off the record to allow defense counsel to explain, and maintain as confidential, the potential consequences and mitigating information.[276] In addition, prosecutors should "agree not to oppose post-conviction relief motions" and "clear out old warrants."[277]

In King County, Washington, for example, the prosecuting attorney has developed a policy ordering prosecutors to "be mindful" of immigration consequences "in charging decisions, plea offers, and sentence recommendations."[278] In Brooklyn, New York, the acting district attorney recently announced a similar policy for all prosecutors to consider immigration consequences and to offer immigration-safe dispositions that "neither jeopardize . . . public safety nor lead . . . to removal or to any other disproportionate collateral consequence."[279] The Baltimore City State's Attorney's Office has required all prosecutors to "think twice before charging [noncitizens] with minor, non-violent crimes," as the Trump Administration's deportation dragnet has "increased the potential [] consequences to certain immigrants of minor, non-violent criminal conduct."[280]

In California, the district attorney offices in the counties of Alameda and Santa Clara have also had formal written policies for the consideration of immigration and collateral consequences.[281] Notably, these policies were instituted before California Penal Code Section 1016.2–3 created a mandate for all prosecutors to "consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution."[282]



B. Transforming Public Defense for the Twenty-First Century: Holistic Defense

"[P]overty is a condition of helplessness—of inability to cope with the conditions of existence in our complex society. . . . The inability of a poor and uneducated person to defend himself unaided by counsel in a court of criminal justice is both symbolic and symptomatic of his larger helplessness. But we, as a profession, have backed away from dealing with that larger helplessness. We have secured the acquittal of an indigent person—but only to abandon him to eviction notices, wage attachments, repossession of goods and termination of welfare benefits."

– Robert F. Kennedy, U.S. Attorney General[283]

In light of *Padilla*, it becomes even clearer that the mantra of traditional public defense—that is, solely focusing on securing "the least restrictive disposition"—does not necessarily result in the most desirable "life outcome" for clients, neither in the immigration nor in the reentry context.[284] In particular, immigration and collateral consequences have been mostly ignored throughout criminal proceedings, stemming largely from the misguided view that they are not relevant to the criminal process.[285] Yet, in reality, immigration and collateral consequences are "interwoven and integrated components along the criminal justice continuum,"[286] and, in the immigration context, along the criminal justice system-to-deportation pipeline. Public defenders' efforts to evaluate, advise about, and defend against immigration and collateral consequences are part of redefining public defense more holistically as "a process that begins at arrest," or often earlier, "and continues through community reintegration."[287]

Today, we must transform public defense for the twenty-first century, and, in the process, help realize the promise of *Gideon* and *Padilla*. Some select jurisdictions have led the way. They have provided a combination of resources, training, staffing, structure, supervision, and independence that enables public defenders to provide high-quality representation. After all, quality public defender offices do not treat the minimum standards of the Sixth Amendment doctrine as acceptable goals for indigent defense.[288] These jurisdictions have developed "a strong tradition of funding defense counsel above the minimum level required by law."[289]

As a result, as "committed and innovative public defender offices [have set] high expectations" and have achieved better outcomes, they "[have influenced] other offices, national practice standards, and ineffective assistance jurisprudence."[290] For example, before

Padilla, various offices serving large noncitizen populations helped to pioneer more holistic practices for the provision of quality representation to their noncitizen clients—practices that the Supreme Court in *Padilla* endorsed.[291] *Padilla* can be an opening for offices committed to serving *all* their clients—citizens and noncitizens alike—to bring about holistic defense reform and proactively fight for equality, racial justice, and immigrants' rights.[292]

i. Holistic Defense

a. Overall Holistic Defense Practice

Holistic defense is an emerging institutional model of public defense that strives to fully meet the radically changed landscape of criminal defense in the twenty-first century.[293] This model has gained tremendous traction over the past twenty years based in part on the understanding that traditional public defense cannot meet the challenges of the unprecedented mass incarceration system, the crimmigration crisis, and the explosion of collateral consequences. Indeed, it has been widely recognized as one of the most effective models of public defense. For instance, with funding from the U.S. Department of Justice's Bureau of Justice Assistance, The Bronx Defenders' (BxD) Center for Holistic Defense has trained and provided technical assistance to offices across the country seeking to adopt the holistic model.[294]

Holistic defense recognizes that focusing on the "least restrictive disposition" does not necessarily lead to the most desirable "life outcome" for clients.[295] As the ABA has concluded, "[b]y identifying the full range of a client's legal and social services needs, defense counsel can build better client relationships, identify concrete client goals, and achieve better criminal case results and client life outcomes." Thus, through high-quality, client-centered representation, holistic defense addresses clients' underlying civil legal and social needs that may have contributed to their involvement with the criminal justice system in the first place.

First, holistic defense creates interdisciplinary teams of advocates that provide seamless and early access to criminal and civil legal services, as well as to nonlegal services and community support.[296] Besides criminal defenders, these teams include civil attorneys such as immigration, housing, and family attorneys, as well as social workers, investigators, and other vital defense staff.[297] Through cross-trainings, team members further cultivate an interdisciplinary skill set, such as the ability to identify a variety of clients' key legal and social needs.[298] Dynamic communication is also required among team members and with clients, creating clear and easy paths for information sharing and collaboration.[299]

Further, a holistic defender office must have a strong connection to, and a deep understanding of, the communities it serves.[300] Thus, what holistic defense means for a particular office will depend largely on the client community's makeup and priority needs. This connection compels offices to engage in systemic advocacy through community organizing,[301] policy and media advocacy, and impact litigation.[302] For this purpose, holistic offices think creatively about community allies and cultivate effective partnerships.[303] Ultimately, holistic defense seeks to address the underlying issues contributing to a client's entanglement in the criminal justice system, support clients on pathways to self-sufficiency, and break the vicious cycle of arrest and incarceration.

b. Holistic Immigration Defense Practice

The holistic model of immigration defense is threefold.

First, this model cultivates a culture and practice of seamless integration of criminal and immigration defense. Public defenders and embedded immigration experts are cross-trained and set up strategically to communicate and work closely together to provide high-quality, client-centered criminal-immigration representation—for instance, by advocating for dispositions that are sensitive to immigration consequences. This requires a critical number of in-house immigration experts to adequately match the number of defenders, the noncitizen client caseload, and the experts' overall workload.

Second, holistic offices provide comprehensive services to meet clients' underlying immigration needs. In particular, offices continue the representation of noncitizen clients who cannot avoid immigration consequences in immigration court or, at a minimum, facilitate such representation. This requires in-house immigration attorneys or strong partnerships with legal service providers.

Third, holistic offices engage in systemic advocacy to address problems that affect their noncitizen clients.

Case Studies of More Holistic Immigration Defense Practices

The Bronx Defenders[304]

The Bronx Defenders (BxD) is a holistic public defender office. With the full-time equivalent of 77 public defenders, the office expects to open approximately 24,000 criminal defense cases in the 2017-18 fiscal year.[305] BxD serves Bronx County, one of the poorest counties in the United States.[306] With a total population of about 1,471,000, Bronx County is also one of the most diverse counties in the country.[307] The county is home to more than 513,000 immigrants, over a third of the county's population, and its noncitizen makeup is approximately 18.4 percent.[308]

Since its inception in 1997, BxD has helped to pioneer the holistic model of public defense, seamlessly integrating criminal and in-house civil legal representation, including immigration. 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 across the country in becoming more holistic.[309] Scholars, practitioners, and the ABA have praised BxD as a model holistic office, and BxD has received numerous awards for its pioneering work.[310] For example, in 2013, BxD won the Clara Shortridge Foltz Award of the National Legal Aid and Defender Association (NLADA), which the association co-sponsors with the ABA.[311] Recently, the Los Angeles Times editorial board profiled BxD as a "trendsetting" holistic defense office.[312]

At BxD, for every client, there is an interdisciplinary team of expert advocates, including criminal defense attorneys, immigration attorneys, housing attorneys, family attorneys, general civil action practice attorneys, investigators, parent advocates, legal advocates, and social workers 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, all of which are designed to meet clients' needs.[313] BxD ultimately seeks to address the root causes of clients' contact with the criminal justice system, challenging the entrenched problems that drive clients into the system in the first place and supporting them on pathways to self-sufficiency.

Since 2002, immigration defense at BxD has not been designed to be a siloed unit or a separate bureaucratic division; rather, it has been a practice integrated with BxD's other practices.[314] The BxD model has embedded immigration experts working alongside the criminal defenders "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."[315] BxD provides representation on immigration issues "beyond mere advice, plea negotiation, or defending a criminal-immigration charge."[316] BxD has developed a comprehensive in-house immigration legal services program, providing noncitizen clients of its criminal defense and family defense practices with direct representation in affirmative and defensive matters. Post-*Padilla*, BxD was able to use the new constitutional mandate to increase funding for, and strengthen, its holistic model of immigration defense.[317]

BxD provides full immigration advisals and universal direct immigration representation.[318] To do this work, BxD has attained some of the best ratios in the country. BxD's ratio of immigration experts to noncitizen criminal cases is significantly better than the 2009 *Protocol* recommendations. For example, using the percentage of Bronx County's noncitizen population to roughly estimate BxD's noncitizen caseload, the ratio is approximately 1:630.[319] In the alternative, using the total annual number of *Padilla* plea consultation cases opened by BxD's immigration experts, the ratio is about 1:178.[320] Further, BxD's ratio of immigration experts to criminal defenders is about 1:11.[321] As these ratios show, BxD is a leader in the field.

Seamless Integration of Criminal and Immigration Defense

Access. In-house immigration experts are embedded in the office and work side by side with criminal defenders in interdisciplinary teams, which constitute the units of client-centered advocacy at BxD.[322] Even their workspaces are adjacent, and team members sit together, allowing immigration experts and criminal defenders to have immediate face-to-face access to one another, right over the cubical walls.[323] Effective communication is highly encouraged. If in-person

communication is not possible, immigration experts are accessible to criminal defenders by cellphone or email. By communicating, working together, and learning from each other, both sides benefit, gain efficiency, and become more effective. In short, BxD's team structure, spatial organization, and effective modes of communication reinforce BxD's seamless integration of criminal and immigration defense and the overall holistic model of defense.

Training. Trainings are mandatory. Each year, new attorneys make up the training team, which undergoes an intensive initial training for roughly six to eight weeks.[324] 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.[325]

In its trainings, BxD underscores immigration as one of the most important concerns about a criminal case, often dwarfing penal consequences in terms of importance to noncitizen clients and having the potential to radically change the goal of criminal representation.[326] It is thus imperative that criminal defenders collect accurate information from clients and verify that information when possible. Criminal defenders are trained to know enough about immigration law to identify whether their clients are noncitizens and to gather sufficient information to make a consultation request to the immigration expert on their teams.[327]

In addition, criminal defenders are trained to ask the right questions, without making assumptions—for instance, assumptions of citizenship status based on appearance or lack of a foreign accent.[328] They are trained also in how to ask these questions, taking a moment to explain the reason for the questions and that the answers are completely confidential.[329] In other words, they must address clients in ways that inspire trust, or else clients may provide incorrect or missing information.[330]

Intakes. During intakes, criminal defenders are required to use a general checklist.[331] To ascertain clients' immigration status and gather important immigration-related information, they ask a combination of questions: "Were you born in the United States?" "When and how did you come to the country?" "With what immigration status?" "Do you have any U.S. citizen or lawful permanent resident family?" For lawful permanent resident clients, criminal defenders ask, for example: "When did you get your green card?" For nonlawful permanent resident clients, they ask, for instance: "What is your immigration status?" BxD's current checklist can be found in Appendix B.[332]

Consultation. If clients were born outside the United States, criminal defenders refer these clients to the immigration experts in their teams.[333] They can input information in the case management system and click a button to make an immediate consultation request to the immigration expert on their teams.[334] This streamlined system has helped to increase the rates of consultation requests and make the overall work more efficient. Ultimately, BxD provides an efficient service that takes minimal additional investments of time and effort by criminal defenders—in exchange for the tremendous benefits they and their clients receive from consulting the immigration experts.

Once the immigration experts receive the consultation requests from their team members, they conduct more intensive information gathering. Speaking directly to clients either in court, in custody, or in the office, immigration experts usually do more in-depth intakes. This practice is different from those of most other public defender offices that rely solely on criminal defense attorneys to gather information.

Immigration experts then conduct individualized analyses of clients' immigration needs and the immigration consequences of contemplated dispositions, accounting for clients' criminal and immigration histories. For example, a large proportion of BxD's noncitizen clients are lawful permanent residents, who often present more complex immigration questions where accurate legal advice and advocacy can make a crucial difference.[335] Immigration experts are also always on call for questions during clients' court appearances.[336]

Per clients' understanding of their situations and their stated priorities, immigration experts prepare alongside criminal defenders to advise and advocate for their clients to limit negative immigration consequences. Aside from avoiding deportability and inadmissibility grounds, immigration experts and criminal 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.[337] Often, clients are advised about how to prevent making their immigration cases worse during the pendency of

their criminal cases, such as by not traveling abroad or in certain parts of the country, or by refraining from affirmative applications if clients are deportable.[338]

In short, each plea consultation is different, involving potentially an initial consultation, advisal, advocacy for a more immigration-favorable plea, or ultimately even trial. BxD opens an average of 100 new *Padilla* plea consultation cases per month.[339]

Comprehensive Services

In addition to plea consultations and advocacy, immigration attorneys provide services to address the underlying immigration issues of clients who are referred through their teams. In particular, if clients cannot avoid removal proceedings, BxD provides direct representation in immigration court.[340] BxD is one of three service providers for the New York Immigrant Family Unity Project (NYIFUP). NYIFUP is the first program in the country to provide publicly funded universal representation to all detained indigent noncitizens in removal proceedings in a given jurisdiction, in this case New York City.[341]

NYIFUP funding and the hiring of a significant number of additional immigration attorneys have strengthened BxD's overall immigration defense practice, particularly its removal defense capacity.[342] Before NYIFUP, BxD used to be able to represent only a limited number of clients in immigration court. Now, BxD has the capacity to represent many more individuals in removal proceedings, in both the detained immigration court docket (through NYIFUP) and the nondetained docket. As BxD has done more removal defense cases, it has been enhancing its experience and expertise in this area. The immigration defense practice has been developing novel legal arguments and strategies, and building banks of experts, briefs, country conditions, and other detailed analyses of complex legal issues.[343]

Furthermore, immigration attorneys also address the non-removal-related immigration needs of noncitizen clients, often through affirmative applications for benefits if these are advisable.[344] On behalf of clients, BxD's immigration attorneys have applied for U visa,[345] Deferred Action for Childhood Arrivals (DACA),[346] Special Immigrant Juvenile Status (SIJS),[347] Violence Against Women Act (VAWA),[348] adjustment of status to lawful permanent residence,[349] Temporary Protected Status (TPS),[350] and naturalization.[351] But just as often, whereas less cautious advocates may urge their clients to proceed with affirmative applications, BxD immigration experts at times counsel clients otherwise because of the likely exposure to removal proceedings stemming from clients' criminal records. In addition, through community intakes, immigration experts respond to walk-in community members, prioritizing those with criminal immigration legal issues by briefly advising them and providing services where feasible.

Systemic Advocacy

Systemic advocacy is a major pillar in BxD's holistic immigration defense model. Policy campaigns in which BxD has participated have helped change the landscape of the immigration defense practice, in turn helping BxD to be more effective. BxD's campaigns have ranged from ending the local jail's honoring of ICE detainers[352] to curtailing the New York City Police Department's stop-and-frisk policy, which disproportionately targeted Black and Brown people, including immigrants.[353] More recently, BxD attorneys have protested ICE's enforcement in Bronx County courthouses, even walking out collectively.[354]

Institutional Capacity, Leadership, and Evaluation

Capacity. BxD's immigration defense practice comprises 33 staff members, including 28 immigration attorney staff positions—reaching a capacity that facilitates the seamless integration of BxD's criminal and immigration defense practices.[355] Six attorneys, including the managing director of immigration and the legal director of immigration, have management and supervisory roles.[356] Seven attorneys, including a supervisory attorney, focus on *Padilla* consultations.[357] In addition, 15 attorneys, including three supervisory attorneys, provide direct immigration representation through NYIFUP.[358] BxD also has three Immigrant Justice Corps fellows.[359]

To support the immigration experts, BxD has created a team of nonattorney advocates.[360] 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.[361] Further, three dedicated social workers help address noncitizen clients' psychosocial needs and sometimes serve as witnesses.[362]

The managing director of immigration, Sarah Deri Oshiro, manages and administers BxD's entire immigration defense practice. Among other duties, Ms. Deri Oshiro is responsible for hiring staff for the practice and ensuring that staff are properly trained

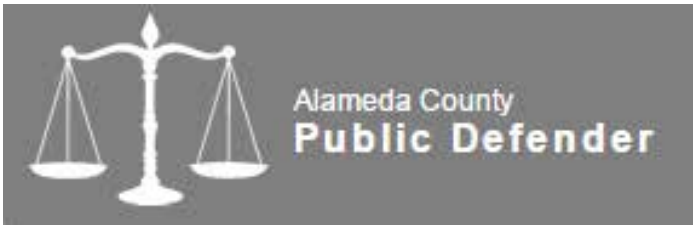
and supervised.[363] She supervises the supervisory attorneys and the team of nonattorney advocates.[364] Ms. Deri Oshiro also manages the practice's budget, tracks and analyzes data, and engages in fundraising.[365] In addition, she is a liaison with other BxD managing directors and represents BxD in immigration-related stakeholder engagement and policy advocacy.[366] Moreover, the legal director of immigration further assists with general legal matters, spearheads training initiatives, and pursues effective litigation strategies.[367]

Leadership. The commitment, support, and vision from BxD's leadership were crucial in developing the immigration defense practice. Without then-Executive Director Robin Steinberg's vision of holistic defense, it would have been difficult, for example, to change the case files and arraignment sheets and require immigration-related questions to be asked. The management also mandated office-wide trainings from the beginning. When there were success stories, office-wide email blasts would profile these victories and the crucial role played by the immigration defense practice. BxD also integrated immigration defense into personnel evaluation, hiring, and promotion decisions. These strategies helped to reinforce the shift in culture toward seamless integration of the criminal and immigration defense practices.

Evaluation. Job evaluations based on plea consultation requests have further supported BxD's seamless integration. Every criminal defender is reviewed once a year.[368] The attorney's practice supervisor and the team leader conduct the review, which measures the attorney's commitment to holistic practice.[369] This commitment is measured in part through tracking the frequency and type of referrals made, including consultation requests to the immigration defense practice.[370] All criminal defenders are also evaluated on whether they record the information they gathered in the initial meeting with their clients.[371]

Through its information and case management system, BxD collects key data and measures outcomes in order to continually improve the office's efficiency and efficacy. For example, BxD tracks the time spent on cases.[372] It also maintains all the details and events of a case; this practice is helpful for attorneys to be able to cover for each other, for the purpose of supervision, and to possess a clear record in case problems arise.[373] Moreover, BxD seeks to measure the actual benefits clients receive, though these are often difficult to capture.

In the fiscal year ending in 2017, BxD's team-based *Padilla* attorneys had the following outcomes in cases of noncitizen clients where they provided plea advice and advocacy: clients obtained a favorable plea in 222 cases; obtained an immigration-safe plea offer in 250 cases; had all criminal charges dismissed in 337 cases; and avoided deportation in 113 cases.[374] In addition, BxD's *Padilla* attorneys obtained positive outcomes in 82 immigration matters falling outside of NYIFUP cases.[375] These included affirmative applications—including naturalization, adjustment of status, TPS, and work authorization applications—as well as some removal defense cases.[376] Furthermore, BxD's NYIFUP attorneys successfully won the deportation cases of 41 clients and secured the release of 103 clients from immigration detention.[377]



The Office of the Alameda County Public Defender[378]

The Office of the Alameda County Public Defender (ALCO PD) was chartered in 1927 by then-Alameda County District Attorney Earl Warren.[379] With a budget of over $39 million and 108 public defenders, the office expects to open approximately 38,100 criminal defense cases in the 2017-18 fiscal year.[380] ALCO PD serves a county with a total population of about 1,663,000.[381] The county is home to over 527,000 immigrants, nearly one third of the county's total residents, and the noncitizen population is estimated to be 14.9 percent.[382]

Under the leadership of Chief Public Defender Brendon Woods, ALCO PD has become a more holistic office. Months into taking the helm, Mr. Woods secured a technical assistance grant from the U.S. Department of Justice to work with BxD's Center for Holistic Defense to support ALCO PD in becoming more holistic.[383] Today, ALCO PD is a model office in California.

ALCO PD offers a variety of services to meet clients' needs. For example, since 2014, social workers on staff have worked to connect clients to services during their criminal cases and to prepare clients with reentry.[384] Social workers have provided services such as crisis intervention and help with finding housing

and employment.[385] They have also served as experts to help judges understand clients' circumstances.[386] In addition, through community outreach and programs, ALCO PD seeks to create stronger ties with the community. In collaboration with East Bay Community Law Center, ALCO PD's Clean Slate Program assists clients in overcoming barriers to employment, housing, public benefits, education, and voting.[387] Its L.Y.R.I.C. (Learn Your Rights In California) project educates high school students about their rights and how to interact with police safely.[388] As part of L.Y.R.I.C., Mr. Woods himself regularly conducts know-your-rights workshops in schools.[389] The office also hosts a community block party every year.[390]

With respect to noncitizen clients, ALCO PD was open to adapting to their needs even before *Padilla*. Raha Jorjani, an experienced criminal-immigration attorney, began to work with ALCO PD in 2009 on a part-time basis, providing the office with much-needed criminal-immigration law consultation. At the time, Ms. Jorjani was a clinical professor at the University of California Davis School of Law immigration clinic, where she worked on removal defense cases. With Mr. Woods's strong support and his vision for holistic defense, ALCO PD hired Ms. Jorjani full time in 2014 and launched its Immigration Representation Unit (IRU). With Ms. Jorjani's full-time hiring, ALCO PD became the first office—and still one of only a select number of offices—outside of New York City to represent noncitizen clients in immigration court.[391] According to ALCO PD, "effective representation does not end at the courthouse doors," and this major step was "an important shift toward a more holistic model of indigent defense."[392]

Since the IRU's launch, it went from having one to now approximately five full-time attorneys.[393] At present, the IRU consults with public defenders on the immigration consequences of convictions, represents noncitizen clients in removal proceedings and other types of immigration cases, and litigates cutting-edge criminal-immigration legal issues. The IRU's zealous representation of ALCO PD's noncitizen clients was awarded the California Public Defenders Association's 2016 Public Defender Program of the Year.[394]

ALCO PD provides full immigration advisals and targeted direct immigration representation. ALCO PD's ratios are significantly better than the standards set in the 2009 *Protocol*. ALCO PD's ratio of immigration experts to noncitizen criminal cases is approximately 1:1,135, significantly better than the 1:2,500 ratio recommended for offices that provide full advisals and targeted direct representation.[395] The ratio of immigration experts to defenders is approximately 1:22.[396]

Seamless Integration of Criminal and Immigration Defense

"It's priceless to have someone in the office you can talk to every day."

– Brendon Woods, ALCO PD[397]

Access. Currently, the IRU is housed in the Oakland branch office, which is ALCO PD's main office among six locations throughout the county. The Oakland branch office's open plan allows the IRU staff to more fully integrate themselves with the criminal defense staff. Sharing the same office space, embedded IRU attorneys and defenders regularly interact and discuss daily experiences in court. Additionally, all defenders work in the Oakland branch office for at least a short period during their onboarding process, during which time they meet IRU attorneys in person. Moreover, all correspondence between IRU attorneys and defenders occurs primarily over phone and email.

Training. ALCO PD public defenders attend at least one annual mandatory training on criminal-immigration law. During this training, IRU attorneys provide updates on any changes in immigration law that have implications on criminal defense. The training also serves to reinforce the mandate from *Padilla* and related law, reminding defenders of their duties.

In addition, defenders are trained to ask questions during their first client meetings in ways that inspire trust. For example, in his December 2013 memorandum titled *Immigration*, Mr. Woods spelled out the importance of building trust. He wrote:

> You will want to preface these questions by explaining to your client that we have an immigration specialist to help with potential immigration problems and therefore it is in the client's interest to be honest when answering the following questions. In other words, build some trust with your client up front so that he knows we're here to help and that anything she/he tells us is strictly confidential.[398]

Intakes. ALCO PD defenders are required to inquire into a client's immigration status during their first meeting and are trained to do so upon first joining the office. Months into becoming the chief public defender, Mr. Woods made this component mandatory, stating in his 2013 memorandum that "the 'Immigration Problems' section of [the] Intake Form MUST BE FILLED OUT IN EVERY CASE."[399] When first meeting with a client, defenders must complete a general intake form. As part of this process, they are required to ask and note where the client was born. As the memorandum explains: "It's important to ask 'where were you born?' because this will give you the best sense of whether or not your client is a citizen or not. As you know, a long time Legal Permanent Resident . . . may (erroneously) believe that she/he is a citizen."[400]

If clients respond that they were not born in the United States, additional steps follow. Defenders must complete questions about clients' immigration status.[401] In his memorandum, Mr. Woods emphasized the mandatory nature of taking these steps when interviewing a client:

> These steps must be taken. . . . NEVER LEAVE THE "IMMIGRATION PROBLEMS" SECTION OF THE INTAKE FORM BLANK. This information is critical. We can't meaningfully assist our non-citizen clients unless we take every step to determine whether or not they are non-citizens. Moreover, immigration lawyers file habeas petitions to collaterally attack convictions all the time and we do not want our lawyers to have to testify at an evidentiary hearing and answer questions about whether or not they failed to inquire about an ex-client's immigration status.[402]

Consultation. After the first meeting, defenders generally email the immigration intake form to the IRU's attorney whose primary role is to provide *Padilla* plea consultations (*Padilla* attorney). This email exchange oftentimes initiates an ongoing conversation between the IRU and the defender to determine the best options for the noncitizen client. This constant communication on individual cases has helped to foster the seamless integration between the criminal and immigration defense practices.[403] In the event that the *Padilla* attorney needs additional information to complete a thorough analysis of the client's options, she communicates directly with the client to obtain the information. If the client has been incarcerated, the *Padilla* attorney conducts a video interview or calls the client's family to obtain the relevant information.

The IRU analyzes the immigration consequences for every noncitizen client whose case it receives. When reviewing cases, the *Padilla* attorney assesses the client's eligibility for relief from removal. Typically, the *Padilla* attorney responds to the defender over email with a memorandum describing what criminal offenses the defender should avoid and recommending alternative immigration-favorable pleas. The IRU's analysis and documents relevant to assessing immigration consequences are recorded in ALCO PD's case management system.

The amount of time to complete the immigration consultation depends on the complexity of the case, but on average each case takes about 30 minutes of the *Padilla* attorney's time. The turnaround time for the analysis also depends on the urgency of the case. At times, the IRU receives calls from defenders in court representing noncitizens who require immediate advisals. The majority of the time, however, the IRU responds to a case within a few weeks after receiving the client's immigration intake form. The *Padilla* attorney generally prioritizes cases based on the client's next court date.

At present, the IRU completes approximately 100 plea consults each month, prioritizing cases that are more complex.[404]

Comprehensive Services

By 2012, Ms. Jorjani saw the need for ALCO PD to continue representing noncitizen clients who could not avoid removal proceedings. Time after time, she had seen the office's noncitizen clients hauled into immigration court, unable to afford legal representation. Where defenders were able to craft plea bargains that could be used in removal proceedings to mitigate adverse immigration consequences, noncitizen clients had no immigration attorneys to stand by their side and defend those bargains. Even when clients could afford immigration attorneys, many of these lawyers did not sufficiently understand criminal proceedings.

Since 2014, ALCO PD has offered targeted direct immigration representation. At first, as Ms. Jorjani's capacity did not meet the overwhelming need, she prioritized vulnerable categories of clients, such as clients who were detained, clients with mental disabilities, and juvenile clients. In 2017, ALCO PD hired three additional immigration attorneys, allowing the IRU to provide representation in a significant number of additional cases. While the IRU still represents clients in particularly vulnerable positions

first, it now reviews every noncitizen client who is either in removal proceedings or at risk of being put in removal proceedings for possible representation.[405]

The IRU offers a wide range of immigration services, from removal defense cases—including asylum, withholding of removal, and cancellation of removal cases—to affirmative cases, such as U Visa and SIJS applications. In addition, the IRU assists with post-conviction relief matters. With the ultimate goal for each IRU attorney of handling 125 direct representation cases per year, each attorney currently takes on approximately 33 cases per year.[406] Since joining the IRU in 2017, the three immigration attorneys have represented noncitizen clients in 62 cases.[407]

As the *Padilla* attorney completes the analysis of immigration consequences, she also screens for direct representation opportunities.[408] Clients who may be eligible for post-conviction relief are also referred internally. Approximately one client per week is referred internally for the IRU to assess direct representation opportunities.[409] Finally, in the event that the IRU is not able to represent a client, the client is often referred to local immigration service providers.[410]

Systemic Advocacy

Beyond direct representation, the IRU is committed to litigating cutting-edge issues at the intersection of criminal and immigration law. The IRU has filed federal lawsuits to challenge the constitutionality of immigration detention decisions.[411] For example, in 2016 the IRU brought a habeas claim challenging the immigration detention of a noncitizen client, asserting that the immigration judge had improperly relied on a police report in finding that the client was a danger to the community. Ms. Jorjani has also expressed an interest in litigating immigration enforcement matters, given ALCO PD's unique position to monitor issues such as immigration detainers.[412]

Importantly, being in a county with a relatively cooperative prosecutor's office has helped facilitate the IRU's success. In 2012, Alameda County District Attorney Nancy O'Malley issued a formal written policy instructing all prosecutors to consider immigration consequences during plea negotiations.[413] Ms. Jorjani worked directly with Ms. O'Malley to advocate for this policy.[414] Given the policy, IRU attorneys have been able to craft *Padilla* consults with the understanding that their recommendations have a strong likelihood of being accepted by the prosecutor. As a result, the IRU can complete *Padilla* consults more efficiently than in a county with a less sympathetic prosecutor's office.

Institutional Capacity, Leadership, and Evaluation

Capacity. The IRU consists of seven staff members. The IRU has six attorneys: one director, one attorney whose primary role is *Padilla* consultations, three immigration attorneys focusing on direct immigration representation, and one immigration attorney fellow. In addition, the IRU has one project administrator.

Ms. Jorjani, the IRU director, oversees the unit and supervises all unit staff. She mentors attorneys on individual cases, completes administrative tasks, and writes the unit's grant proposals for funding. She also keeps the IRU abreast of important litigation and advocacy developments. In addition to identifying training opportunities and developing materials for defenders, Ms. Jorjani provides local and national trainings to community advocates, attorneys, and judges. Furthermore, she works closely with Mr. Woods to keep him informed of the IRU's activities and immigration developments. Despite all her managerial duties, Ms. Jorjani has still continued to provide *Padilla* consults, take on direct representation cases, and pursue cutting-edge litigation.[415]

Rachael Keast has been the primary *Padilla* attorney since April 2015. Ms. Keast and the IRU are able to provide *Padilla* consultations for every request they receive. To fill Ms. Keast's role, the IRU sought candidates with at least five years of experience in complex removal defense litigation and advising criminal defense counsel.[416] Ms. Keast had over ten years of experience in immigration law, having worked as an attorney at the immigration court in San Francisco, as a Florence Immigrant and Refugee Rights Project attorney representing immigrant detainees, and as an associate at the Law Office of Michael K. Mehr. As Ms. Keast joined the IRU, the responsibility of providing *Padilla* consultations largely shifted from Ms. Jorjani to Ms. Keast.

While ALCO PD's immigration practice is hailed as a success, the IRU recognizes areas for improvement. For example, ALCO PD may consider expanding and embedding immigration experts in its branch offices. This would further facilitate access and communication between the defenders, clients, and the IRU, and help provide more immediate advisals to noncitizen clients in court. Additionally, in light of changing immigration enforcement practices, attorney responsibilities might shift depending on needs.

Leadership. Mr. Woods has provided strong, visionary, and transformative leadership to develop a more holistic immigration defense practice at ALCO PD. Months into his position, he partnered with BxD to learn how ALCO PD could become more holistic. He also successfully advocated for Ms. Jorjani to become full time and for ALCO PD to provide direct immigration representation. In his 2013 memorandum, Mr. Woods gave notice to all public defenders that they must fulfill their particular representational duties to noncitizen clients, and that, to do so, they must follow certain critical steps. He had every public defender sign and date that they received, understood, and would comply with the memorandum.[417]

Evaluation. ALCO PD has a good case management system, but Mr. Woods believes that the office has yet to use it to its full potential.[418] For example, Mr. Woods believes that the system should be retooled, so that the office can begin to track actual client outcomes and conduct better data collection overall.[419] ALCO PD was recently one of six public defender offices nationally to receive an award from NLADA to develop more sustainable data collection practices.[420]

The Contra Costa County Office of the Public Defender[421]

With a budget of over $20 million and 75 public defenders, the Contra Costa County Office of the Public Defender (CCCPD) expects to open approximately 19,000 criminal defense cases in the 2017-18 fiscal year.[422] Contra Costa County is home to more than 1,147,000 people, 27 percent of whom are foreign born and 12.9 percent are noncitizen.[423] Based on CCCPD audits in May 2015 and May 2016, approximately 12 percent of CCCPD clients are noncitizens.

CCCPD boasts of the various holistic components of its model. For example, in the past year, CCCPD's Clean Slate Program expanded and coordinated the office's countywide record-clearance work.[424] CCCPD obtained reductions of over 5,000 felony cases since the passage of Proposition 47. It has "conducted extensive community outreach, hosted countywide Clean Slate events and formed partnerships with various government departments and community-based organizations."[425] CCCPD recently expanded the program to include outreach to the thousands of individuals possibly benefiting from Proposition 64's record-clearance provision.[426] In addition, CCCPD's mental health unit has worked to advance policy, case law, and legislation to help mentally ill individuals.[427]

CCCPD's immigration defense practice has consisted of one full-time attorney, Ali Saidi. Mr. Saidi started working with CCCPD on a part-time, contract basis. In late 2015, he became a full-time deputy public defender III (immigration consultant). Mr. Saidi's work consists primarily of *Padilla* consultations and immigration-specific post-conviction relief. Recently, he began administering CCCPD's new rapid-response program, which officially launched on March 1, 2018. Mr. Saidi has worked closely with Ms. Jorjani to help CCCPD become more holistic.

CCCPD provides full immigration advisals but no direct immigration representation. The office's ratios abide by the 2009 *Protocol* recommended standards. CCCPD's ratio of immigration experts to noncitizen criminal cases is about 1:2,451, significantly better than the 1:5,000 ratio recommended for offices that only provide full advisals and no direct representation.[428] CCCPD's ratio of immigration experts to defenders is about 1:75.[429]

Seamless Integration of Criminal and Immigration Defense Practices

"The embedded nature is crucial for early effective intervention"

– Ali Saidi, CCCPD[430]

Access. From his own experience being at CCCPD first on a part-time, contract basis to then becoming full time, Mr. Saidi believes that the embedded nature is crucial for early effective intervention. Mr. Saidi further promotes early effective intervention by stressing its need in regular trainings, including an intake form with immigration-related questions in every client's file, and building rapport with defenders. He splits

his time between CCCPD's two offices, so that he is physically available to all defenders. Mr. Saidi also accommodates defenders who prefer to work in person or over the phone rather than by email, but he has found email to work best.

Training. Through regular, mandatory trainings for the entire office, Mr. Saidi stresses to defenders that they should not receive or solicit offers from the prosecutors until they know the potential immigration consequences and have a mitigation strategy. He holds at least one mandatory training for each unit of the office every year. The units include felony, misdemeanors, juvenile, Clean Slate, investigators, and paralegals. For the new misdemeanor defenders, Mr. Saidi provides at least three trainings per year. Training topics have included, for example: Immigration Consequences for New Misdemeanor Lawyers; New Developments in Law; Immigration Consequences for New Felony Attorneys; Juvenile Confidentiality in Immigration Proceedings; Negotiating Cases with Immigration Issues; and Juvenile Delinquency Representation of Minors with Immigration Issues.

Notably, Mr. Saidi also trains defenders on how to conduct first meetings with noncitizen clients. He reminds defenders of the importance of establishing rapport with their clients so that they can collect accurate information about their clients' immigration status. Mr. Saidi reminds them that many of their noncitizen clients distrust authority. As a result, defenders must be sensitive when seeking information related to immigration status. Defenders should explain their *Padilla* duties and the attorney-client privilege before asking any questions on the intake form.

Intakes. In the first meetings with clients, all defenders are required to use the intake form. The form includes key questions, including the question "Where were you born?" The intake form is in English and Spanish, and it is included in every file.

Consultation. When defenders need a *Padilla* consult, they email Mr. Saidi a scanned copy of the intake form, the complaint, the client's rap sheet, the next court date, and any other relevant information. Mr. Saidi has set up his email so that all *Padilla* consultation requests go into a central folder. He then reviews the information provided to see whether there is any additional information he needs. In the event that he needs more information, he often follows up directly with clients.

The structure of Mr. Saidi's response depends on the timing of the client's case, but a typical response includes three parts: (1) the client's background and current immigration status; (2) the charges the client currently faces and how they would impact the client; and (3) an alternative offer or mitigation strategy. Mr. Saidi writes his email responses in a way that allows defenders to use these responses as a template for how to speak with their clients. He also includes post-plea advisals on matters such as travel. Most of the time, defenders advise their clients about the potential immigration consequences and possible alternative dispositions, but sometimes they ask Mr. Saidi to advise their clients directly, especially in complex cases.

Overall, the bulk of Mr. Saidi's work focuses on *Padilla* compliance. In the 2014-15 fiscal year, Mr. Saidi provided 508 consults, or about 42 a month.

Comprehensive Services

CCCPD administers Contra Costa County's new Stand Together Contra Costa—a rapid-response, legal services, and community education project to support safety and justice for immigrant families in the county.[431] This project is an important public-private collaboration between CCCPD and philanthropic and community-based organizations. As part of this collaboration, Mr. Saidi and CCCPD work closely with immigration lawyers who represent indigent noncitizens in immigration court—many of whom are former CCCPD clients. This close collaboration makes the information flow more efficient and facilitates the quality representation of noncitizens in removal proceedings. For instance, CCCPD provides support with immigration post-conviction relief matters, such as by assisting noncitizens with California Penal Code Sections 1473.7 and 1203.43 motions. In this context, the close collaboration and pre-existing relationships established as part of Stand Together Contra Costa can significantly streamline post-conviction relief cases handled by nonprofits. Stand Together Contra Costa officially launched on March 1, 2018.[432]

In addition, CCCPD has a formal referral process for SIJS cases. The office used to do SIJS work in-house through a pilot project. Now, Catholic Charities of the East Bay does many of the SIJS applications, and CCCPD assists with getting the predicate orders. The office also informally refers clients to other nonprofits.

Systemic Advocacy

Mr. Saidi is the office's liaison to the county, the Sheriff's Department, and the Probation Department. He also holds know-your-rights events in the community. Moreover, Mr. Saidi is working with Public Defenders for Racial Justice (PDRJ), which consists of defenders from Alameda, Contra Costa, and San Francisco counties. PDRJ recently held an all-day crimmigration training during Cesar Chavez Day.

Institutional Capacity, Leadership, and Evaluation

Capacity. To support 75 defenders, CCCPD has one full-time immigration expert in Mr. Saidi, a deputy public defender III. The office also hired an administrative analyst, who started in November 2017. The analyst assists Mr. Saidi with Stand Together Contra Costa.

Leadership. The leadership of CCCPD's Chief Public Defender Robin Lipetzky has been crucial in bringing Mr. Saidi on board and turning his position full time.

Evaluation. Mr. Saidi has conducted audits of the office's noncitizen clients and has performed quality control of the intake forms in order to ensure that defenders are reaching out to him when they should be. For instance, he has conducted audits where defenders are asked to report how many noncitizen clients they have. After the audits, the frequency of requests for *Padilla* consultations increased. Moreover, when Mr. Saidi reviews intake forms, he checks whether there is missing information. If the defender has missed relevant portions, he uses this as an opportunity to train the defender.

The Law Offices of the San Bernardino County Public Defender[433]

"Individual deputies can't be expected to do this on their own, on top of their caseload. The deputies are on the line if they don't advise on immigration consequences, both through state bar proceedings . . . and for lawsuits for malpractice. More importantly, the client's status is at risk if we don't take this seriously. It's a lawsuit waiting to happen and it's not going away anywhere. You can't afford not to invest."

– Daniel DeGriselles, SBCPD[434]

The Law Offices of the San Bernardino County Public Defender (SBCPD) serves a county with a total population of more than 2,157,000.[435] About 27 percent of the county's population is foreign born, and the noncitizen population is estimated to be 11.1 percent.[436] With a budget of over $39 million and 120 public defenders, the office handles approximately 45,000 criminal defense cases per year.[437]

According to the San Bernardino County 2016-17 recommended budget, SBCPD "seeks to increase client opportunities for achieving self-sufficiency" by using "a holistic approach."[438] The budget document praised, for instance, SBCPD's integrated use of social service practitioners with the adult divisions to increase the number of referrals for adult cases to support client rehabilitation and self-sufficiency.[439] The county has celebrated the fact that SBCPD received the National Association of Counties award for its Removing Every Barrier and Rehabilitating (REBAR) program, which is designed to provide legal, social, and practical support through reentry events, clinics, and community outreach.[440]

SBCPD recognized the need for an immigration expert in 2008, before *Padilla*. At that time, Daniel DeGriselles

was asked to become the immigration expert, as he had prior experience and training in the immigration consequences of criminal convictions. Mr. DeGriselles, already a deputy public defender, was promoted to a deputy attorney V for subject matter expertise when he became the immigration expert. In 2015, his position as the immigration expert became full time. In addition, as of the writing of this case study, Mr. DeGriselles has been training SBCPD defender Nereyda Higuera, who has added to SBCPD's immigration expert capacity. Mr. DeGriselles and Ms. Higuera advise defenders on the immigration consequences of convictions and keep the office up to date on immigration-related developments.

SBCPD provides full immigration advisals but no direct immigration representation. In doing so, SBCPD's ratios abide by the 2009 *Protocol* recommended standards. SBCPD's ratio of immigration experts to noncitizen criminal cases is about 1:3,996,[441] which is better than the 1:5,000 ratio recommended for offices that only provide full advisals and no direct representation. SBCPD's ratio of immigration experts to defenders is about 1:96.[442]

Seamless Integration of Criminal and Immigration Defense Practices

Access. Mr. DeGriselles seeks to be physically available to all defenders. He and Ms. Higuera travel to all four courthouses within SBCPD's jurisdiction on a regular basis. They usually spend a day each in these locations. They are present physically in each courthouse with the purpose of encouraging defenders to consult with them about noncitizen clients as early as possible. They are also available for questions through office visits.

Training. All new attorneys, regardless of their experience, attend a two-week training program that includes a foundational session on immigration law. In addition, Mr. DeGriselles teaches refresher courses regularly on more complex approaches to immigration consequences. These trainings consist of about three or four sessions throughout the office on three or four different topics in immigration law.

Intakes. In August 2015, with the assistance of SBCPD defender Allen Phou, Mr. DeGriselles designed a questionnaire for SBCPD modeled after that of the Immigration Legal Resource Center (ILRC).[443] Mr. DeGriselles did away with the sections on prior charges, offers, and immigration relief in order to keep the questionnaire to one page and to ensure that more defenders fill out the form for every noncitizen client. Defenders include enough information so that Mr. DeGriselles can find the case in SBCPD's case management system, view the digital file directly, and collect the pertinent information from the rap sheet himself. As needed, he interviews clients himself.

Consultation. In response to the questionnaires, Mr. DeGriselles details the immigration consequences of the various charges and provides defenders with suggestions for possible better plea options. He tries to give defenders various pleading options, as feasible. Mr. DeGriselles also covers post-plea advisals, such as travel restrictions, green card issuance and renewal requirements, and how convictions can affect various forms of immigration status and affirmative relief. Generally, he attempts to return answers a few days before the next court date, but his capacity usually permits completing responses on the day before the next court date.

Mr. DeGriselles believes that the number of requests is increasing as defenders become more aware of his presence and of the importance of immigration consequences for noncitizen clients. Mr. DeGriselles receives about 60 *Padilla* consultation requests a month. In November 2017, he had twenty-four cases pending and 2,400 archived cases since mid-2013.

Institutional Capacity, Leadership, and Evaluation

Capacity. Besides Mr. DeGriselles's full-time position, he has been training Ms. Higuera to take over before he retires in about a year and a half. Ms. Higuera, who has had an exceptional reputation as a juvenile defender, has been in training for over a year and a half. As part of her training, Mr. DeGriselles assigns her live cases and questions, and she prepares responses for his review. Ms. Higuera has added to Mr. DeGriselles' capacity. The team does not have support staff.

Mr. DeGriselles hopes SBCPD's immigration expert capacity will be augmented. He believes there is enough demand for additional capacity for *Padilla* consultations. Once he retires, another full-time immigration expert to complete plea consults, besides Ms. Higuera, would greatly benefit SBCPD and its noncitizen clients. Further, Mr. DeGriselles would ideally like to ask for an immigration attorney who could continue representation of SBCPD clients in immigration court.

Leadership. In 2015, Mr. DeGriselles created a protocol that reminds defenders of their expanded duties to noncitizen clients. The protocol describes the role of defenders and the importance of contacting Mr. DeGriselles at the beginning of the case. Chief Public Defender Phyllis Morris signed and issued the final protocol office-wide.[444]

Evaluation. The fact that defenders' answers to the questionnaire and Mr. DeGriselles's advice are annotated in each client's digital file—as part of SBCPD's case management system—supports the integration of the criminal and immigration defense practices.

ii. Insights and Best Practices from More Holistic Immigration Defense Practices

A number of public defender offices serving large noncitizen populations have developed more holistic models of immigration defense. In this report, we present case studies from four public defender offices: The Bronx Defenders (BxD),[445] the Office of the Alameda County Public Defender (ALCO PD),[446] the Contra Costa County Office of the Public Defender (CCCPD), and the Law Offices of the San Bernardino County Public Defender (SBCPD). These case studies help shed light on the essential components, structures, and practices of the holistic model of immigration defense.

a. Insights

1. Grounded in Clients' Lived Experiences

Developing a holistic defense model requires an "ever-searching" mind-set that continually "searches for improved delivery of defense services and constantly presses for role reformation."[447] Grounded in the lived experiences of clients, holistic defense seeks to enhance the office's efficiency and efficacy and thereby provide the highest-quality representation to all its clients. A guiding principle is to clearly understand clients' actual needs and to grow based on a prioritized set of these needs.

For all the offices profiled, based on their jurisdictions' demographics and clients' actual needs, developing an immigration defense practice was obvious. The offices first cared about their clients, who turned out to have immense needs for criminal-immigration legal representation, and therefore they had to develop this expertise within the office. Since then, as the need for representation grew, they realized they needed to develop more holistic models—which would necessarily look different in each jurisdiction, given the particular client needs, institutional challenges, and existing community assets.

2. Shifting Institutional Culture

In developing a more holistic immigration defense practice, there can often be resistance against integrating criminal and immigration defense. Some defenders are so invested in what success means strictly in the criminal context that they can be blind to taking immigration consequences into account. Prioritizing a noncitizen client's immigration needs may sometimes lead to a less favorable result in the criminal case, such as more severe criminal punishment. Further, when institutional change is proposed, inertia and fear of the unknown can combine to make change appear impossible.[448]

Thus, shifting the culture of an office to become more holistic requires "clear vision, shared investment, and sustained momentum."[449] Public defender offices must be strategic in fostering defenders' buy-in. Through an intentional integration approach, even the most resistant defenders can begin to understand the value of immigration expertise and collaboration.[450] The immigration defense practice should be flexible and create mechanisms for defenders that make consultations as easy as possible. Education and mandatory trainings are also critical. As defenders realize through trainings and especially through proven successes the significant impact that immigration defense can have for their noncitizen clients, they tend to embrace the available immigration expertise. By working directly with immigration experts, preferably as members of a team, defenders realize how these experts are critical in the representation of their noncitizen clients, just as investigators, for instance, are critical in the overall criminal case.

It is important to note that a primary goal of a holistic immigration defense practice is to provide a deluxe service that supports defenders in ways that reduce their overall workload. The goal is for defenders to know enough, so that they integrate immigration questions as part of their initial intake, conduct preliminary analyses of immigration consequences, and consult with the immigration experts on the vast majority of cases involving noncitizen clients. Immigration expert support can take pressure off individual defenders from having to go down, on their

own, what can often be a rabbit hole of immigration consequences—thus freeing up their time to focus on their comparative expertise: criminal defense. In more holistic immigration defense practices, because they have in place adequate levels of immigration experts and certain institutional practices, defenders receive more support on each case, enabling services of a higher caliber.

Finally, reminding defenders not only of their constitutional responsibilities but also of the motivations that led them to take up the defender vocation can further encourage them to change. After all, most defenders, if not all, heeded *Gideon*'s call because some of the most egregious injustices happen in underserved, marginalized communities—the very communities of the clients with whom they work. Defenders understand that a robust defense of these communities is vital. Becoming more holistic ultimately means striving to demarginalize clients' communities and radically transform systems of subordination.

b. Best Practices

1. Seamless Integration of Criminal and Immigration Defense

Access. The physical access of embedded immigration experts within the office is paramount for the seamless integration of the criminal and immigration defense practices. The access that defenders have to immigration experts at "the metaphoric water cooler"[451] to discuss their work and consult on cases can put "immigration questions closer to the forefront of their thinking" and raise the profile of immigration defense within the office.[452] Ideally, immigration experts would work alongside defenders in teams, as in BxD's team model. Integrated workspaces also help. Short of these structures, especially for offices that have more than one branch location, the immigration experts can regularly visit the various locations in order to provide some level of physical access. Overall, intentionally creating more physical access affects the routine practices of defenders, encouraging them to seek advice and assistance, and making immigration defense central to the criminal defense practice.

In addition, the office must create clear and easy paths for communication. The physical access of embedded immigration experts can enhance the practice's flexibility if it creates different modes of communication, such as via cellphone, email, and text. The easier it is to communicate, the more expert advice will be sought in a larger percentage of cases and more frequently.[453]

Training. Foundational trainings must be mandatory for all defenders. Trainings must emphasize the significance of immigration consequences for noncitizen clients and highlight defenders' constitutional duties. Trainings must ensure that defenders have sufficient knowledge to be able to ascertain a client's immigration status, gather relevant information, and spot potential issues. In particular, it is imperative that defenders are trained to ask the right questions of noncitizen clients during their first meetings. Moreover, as criminal-immigration law is continually in flux, trainings must be offered regularly in order to update defenders on relevant developments and best practices. There should be refreshers for all defenders at least annually and ongoing updates on legal developments.

Notably, interdisciplinary cross-trainings are an important foundation for seamless integration. Through cross-training, defenders can learn more about immigration law and enforcement practices as they pertain to their practical work with noncitizen clients. Similarly, immigration attorneys can learn more about the culture and realities of the local criminal defense practice. While neither defenders nor immigration attorneys are expected to become experts in disciplines other than their own, sufficient knowledge of clients' criminal and immigration issues—both legal and nonlegal—is critical to their ability to competently meet clients' needs.

Intakes. Given both the complexity of criminal-immigration law and the high demands on defenders, it is essential that offices establish streamlined mechanisms and tools to facilitate the information gathering process.

Inquiring into clients' immigration status is a basic predicate to providing effective representation to noncitizen clients. Common among every office profiled is the first question defenders are required to ask during their first meetings with clients: "Where were you born?" Once a defender ascertains that the client is not a U.S. citizen, several other key questions must be asked to gather important categories of information, such as clients' particular immigration status, immigration and family history, and criminal history. While some offices have more in-depth immigration screenings, which are more helpful to the immigration experts, other offices include only key questions, with the intention that more defenders complete the initial screening.

Requiring defenders to ask several critical questions as part of the intake process and enter this information is not an impossible burden—especially when compared to the significant benefits of this practice. Defenders already have to input certain information when they open or close a case. In this context, inputting even a limited amount of critical information for noncitizen clients can make a difference.

Here, the medical profession—in particular, its revolutionary use of a simple checklist to save thousands of lives—has much to teach us.[454] Doctors, like defenders, are not flawless. Indeed, mental flaws are "inherent in all of us—flaws of memory and attention and thoroughness."[455] Just as doctors use mandatory checklists to minimize mistakes, so should defenders use a mandatory checklist during intakes. Doing so assists defenders in ensuring that the right questions get asked and sufficient information is gathered in order to make intelligent consultation requests with the immigration experts.

Consultation. Best practices suggest that, after a preliminary analysis of noncitizen clients' cases, defenders should consult with the immigration expert on the vast majority of cases. At BxD and ALCO PD, for example, plea consultations with the immigration experts are largely required.

Further, consultations should be formalized and streamlined. At BxD, its information systems are advanced enough to streamline the consultation system, boiling it down to a click on the case management system. For all other offices, consultations happen largely electronically, via email. Consultations are typically triaged, especially within offices with a smaller immigration expert capacity. The immigration experts usually respond within a reasonable amount of time, depending on the timeline of a particular case. There are also urgent cases for which immigration experts must often drop everything to address, such as during clients' court appearances. Immigration experts are thus always on call, either by phone or text.

Related to the intake component, consultation requests usually contain certain highly relevant information, such as the initial intake form, the charging document, and the client's rap sheet. At CCCPD, for example, defenders send by email a scanned copy of the intake form, the complaint, the client's rap sheet, the next court date, and any other relevant information. On the other hand, at SBCPD, in order to encourage more defenders to request consultations, the questionnaire was streamlined, and defenders only include information sufficient for the immigration expert to find the case in SBCPD's case management system, where the expert can view the file and rap sheet directly. In the event that more information is needed to assess a client's options, the immigration experts often communicate directly with clients or their families.

With all the necessary information, immigration experts prepare a memorandum describing all the immigration consequences of contemplated dispositions, the criminal offenses that should be avoided, and, as feasible, alternative immigration-favorable pleas. This analysis and other documents relevant to assessing the client's immigration consequences are then recorded in the case management system. Per clients' wishes, the immigration experts support defenders in advocating not only to avoid deportability and inadmissibility grounds for removal, but also to maintain clients' eligibility for relief from removal, as well as their eligibility for travel, adjustment of status, and naturalization. In addition, clients receive post-plea advisals.

2. Comprehensive Services

Offices that become more holistic provide as many prioritized services as feasible to address clients' underlying immigration needs. Offices adopt a more comprehensive services model, through which in-house attorneys with experience practicing immigration law continue the representation of noncitizen clients in their immigration cases. In particular, holistic offices increasingly represent noncitizen clients in removal proceedings. As ALCO PD defenders realized, it can be deeply frustrating to get their noncitizen clients favorable plea bargains mitigating immigration consequences—only to see the clients detained and deported without putting to use the successful bargains because they had no immigration counsel. As with BxD and ALCO PD, offices can creatively seek funding for this essential service. For the vast majority of offices that do not have the resources to cover all noncitizen clients, as BxD is able to do through the New York Immigrant Family Unity Project (NYIFUP), they can at least provide select representation to particularly vulnerable groups of clients, such as juvenile clients, clients with mental disabilities, and clients in immigration detention.

In addition, offices can assist clients with services meeting their immigration needs that are not part of removal proceedings. Offices can support clients with affirmative applications for immigration benefits, such

as naturalization or adjustment of status.[456] Helping clients with post-conviction relief efforts to vacate prior convictions or sentences is becoming an increasingly needed service—one that sometimes can help clients avoid removal proceedings altogether.

Here, the embedded nature of immigration attorneys is especially important. This model can significantly raise the quality of representation of noncitizen clients in both their criminal and immigration matters. On criminal matters, immigration attorneys can draw upon their experiences with immigration proceedings to support defenders in best predicting the type of immigration consequences that follow certain dispositions. For example, many immigration benefits or forms of relief require a favorable discretionary decision by an immigration judge or officer, and one's chances of winning are often specific to varying factors such as the individual judge, the ICE trial attorney, and the court or office location. While a competent lawyer who understands criminal-immigration law can determine whether a person is legally eligible for a form of discretionary relief, it often takes an attorney with experience in immigration court to know realistically how a judge may rule based on the facts. In-house immigration attorneys can consult on the more complex plea consultations and increase the efficacy of such consultations.

On immigration matters, if removal proceedings follow, clients already know their immigration attorneys, who can intervene early, prepare, and gather evidence. This early access to immigration counsel can also help avoid problematic concessions that can happen when clients are first processed in pretrial custody by ICE and interviewed without counsel. In short, this type of early and sustained relationship and trust can facilitate the client's defense in removal proceedings.

Additionally, even if clients can afford private immigration lawyers, these lawyers may not be sufficiently fluent in criminal law. 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, for example, not only do immigration attorneys have specialized expertise on criminal-immigration law, but they also have seamless access to the defenders, who can discuss in detail their clients' criminal dispositions.[457] In short, in-house immigration attorneys are in the best position to put to best use the favorable bargains that defenders win during criminal proceedings.

Finally, in the event that offices cannot get the resources to provide direct representation, they create seamless access to whatever services exist in their jurisdictions.[458] Offices strive to connect clients to the services they need "quickly, with certainty and ease."[459]

3. Systemic Advocacy

Besides direct immigration representation, holistic immigration defense addresses systemic issues that can help to transform the crimmigration crisis. Even effective representation is often not sufficient—not when criminal and immigration laws are steeply stacked against noncitizens charged with crimes, especially the poor and communities of color. Thus, holistic offices pursue strategies to "deliberately design to decarcerate as many feasible,"[460] coupled with strategies to sever the merging of criminal and immigration law and enforcement practices. For instance, offices can advocate alongside community stakeholders for prosecutor's offices to adopt office-wide policies to meaningfully consider immigration consequences during charging, pre-charge and pre-plea diversion, plea negotiation, and sentencing decisions. Moreover, as defenders are the first line of defense, they are uniquely positioned to monitor new laws and collect key data.

4. Institutional Capacity, Leadership, and Evaluation

Capacity. Ultimately, a critical mass of in-house immigration experts—corresponding to the number of defenders, to the annual caseload of noncitizen clients, and to the experts' overall workload—is crucial for offices to become more holistic. For both BxD and ALCO PD, their ratios of immigration experts to the annual noncitizen caseload are substantially better than the 2009 *Protocol* standard for offices providing full advisals and targeted direct immigration representation. CCCPD and SBCPD, as offices providing full advisals but no direct representation, have ratios that are also better than the 2009 *Protocol* standard. For instance, ALCO PD's Immigration Resource Unit has one project administrator to support six attorneys.

Leadership. Critical in shifting the office culture and institutional practices is the leadership's vision, commitment, and support. As the case studies show, the leadership must share a unified, holistic vision of what the immigration defense practice should be, understanding that life outcomes are as important as case outcomes. Implementation of this vision requires courage of conviction. At BxD, for example, despite initial resistance, then-Executive Director

Robin Steinberg decided that developing a more holistic immigration defense practice was a decision she could stand by, as this would lead to better life outcomes for BxD's noncitizen clients. She therefore encouraged innovation. With Ms. Steinberg's support, BxD implemented a new arraignment system sensitive to immigration consequences. It mandated trainings and integrated immigration defense into personnel evaluation, hiring, and promotion decisions. Instead of just celebrating acquittals, BxD sent out office-wide emails congratulating life outcomes and sharing success stories of cases where advocates used innovative strategies.

ALCO PD's example is also remarkable. The holistic vision and transformative leadership of Chief Public Defender Brendon D. Woods have been crucial in ALCO PD's becoming more holistic. First, he applied for and secured a federal grant to work with BxD's Center for Holistic Defense to support ALCO PD's development of its holistic model. Under Mr. Woods's leadership, the office has become more community-oriented, through programs such as the L.Y.R.I.C program, which conducts know-your-rights workshops in schools. When it came to immigration, Mr. Woods's strong support of ALCO PD's immigration expert Raha Jorjani allowed the office to become the first outside of New York City to represent noncitizen clients in immigration court, and to go from having one to now approximately five full-time immigration experts. Last but not least, his December 2013 memorandum on immigration, which required defenders to take certain steps for the effective representation of noncitizen clients and asked every defender to sign and date the document, is a testament to the need for strong leadership and office-wide policies in order to develop more holistic immigration defense practices.[461]

Evaluation. Public defender offices should include immigration as a factor in evaluations and promotions. As in BxD's case, offices could evaluate defenders for the rate at which they consult with the immigration experts on cases involving noncitizen clients. Offices could also require defenders to demonstrate proficiency on immigration consequences for promotion purposes. As in CCCPD's case, offices could do regular audits to ensure that defenders are reaching out to the immigration experts when they should be.

Additionally, offices' institutionalization of data collection and metrics is a critical step in becoming more holistic. The systematic collection of data and outcomes can support offices' requests for funding to strengthen their immigration defense practices. This information can show the efficiency gains and cost savings of providing holistic immigration defense. For example, important information would include, but not be limited to: the number of cases of noncitizen clients; their immigration status and history; the number of plea consultations; and the dispositions of their cases, noting in particular whether cases have been resolved favorably regarding the clients' immigration status.

Part IV.
Los Angeles County in Perspective: Public Defender Offices' Inability to Meet the Immense Need for Criminal-Immigration Legal Representation

Today, the public defender offices in Los Angeles County are unable to meet the immense need for criminal-immigration legal representation. The Los Angeles County Board of Supervisors (Board of Supervisors) must equip public defenders with the resources, staffing, and support necessary to provide quality representation to indigent noncitizens facing prosecution. In particular, to fully comply with *Padilla* and related federal and state law, the Los Angeles County Public Defender's Office (LACPD) must dramatically expand its Immigration Unit and reform deficient institutional practices. In addition to LACPD, the County of Los Angeles Alternate Public Defender Office (APD)—which represents the indigent accused when LACPD has a conflict of interest or is otherwise unavailable—should also take steps to enhance its noncitizen representation.

As the Board of Supervisors enters a second year in the search for a qualified, experienced chief public defender for LACPD, it should create a new, bolder, transformative vision for the county's overall provision of indigent defense services. Indeed, the Board of Supervisors has already declared its commitment to create a "*holistic,* client-based representation model" of public defense.[462] It should make this commitment a reality. As the historic first to create a public defender office, Los Angeles County should lead again.

A. Los Angeles County's Immigrants and the Immense Need for Criminal-Immigration Legal Representation

Los Angeles County is the most populous county in the country, with more than 10 million residents.[463] The county has a bigger population than 41 states.[464] It also has the largest immigrant population in the country and the highest share of California's immigrant population.[465] Foreign-born people constitute nearly 35 percent of the county's population.[466] More than 1.7 million people—or about 17.3 percent of the total population—are noncitizens.[467] In addition, about 57 percent of children have at least one immigrant parent, and about 22 percent of children have at least one unauthorized immigrant parent.[468]

Because of its immigrant-rich makeup, Los Angeles County has been the constant target of the federal government's immigration enforcement apparatus. Under the Trump Administration, ICE raids have been a regular fixture throughout Southern California.[469] ICE has used increasingly cruel tactics—for example, arresting parents dropping their children at school, as in the case of Rómulo Avelica-Gonzalez,[470] or showing up at courthouses to arrest immigrants who are often seeking restraining orders.[471] Immigration agents have also targeted Deferred Action for Childhood Arrivals (DACA) recipients who had done nothing to disqualify them from DACA.[472] In 2017, the Los Angeles metropolitan area suffered an increase of 10 percent in ICE arrests from the previous year.[473] In the same period, the Los Angeles County jail system was close second among local jail systems nationwide in terms of the total number of ICE detainers it received.[474] Los Angeles County was first with respect to the total number of removal cases initially filed by the Department of Homeland Security in 2017.[475] Of these initial filings, the majority of people had no legal representation.[476]

Los Angeles County has suffered enormously from the devastating impact of immigration detention, deportations, and the permanent tearing apart of families. For example, as of 2011, about a fifth of all children nationwide in foster care because of the deportation of a parent—more than 1,000 children—lived in Los Angeles County.[477] The initiation of removal proceedings alone can lead to the loss of liberty due to prolonged immigration detention in facilities like the Adelanto Detention Facility, as well as the loss of employment and income needed to sustain one's family.[478]

The Los Angeles Justice Fund was created to help meet the immense need for vital immigration legal services in Los Angeles County. The Board of Supervisors contributed $3 million over two years into the $10 million public-private fund, which would provide immigration lawyers for poor immigrants unable to afford a lawyer, for services including removal defense.[479] In addition, through One California, the state of California made available $45 million for the 2017-18 fiscal year for nonprofits to provide immigration legal services, including applications for relief or benefits, removal defense, and post-conviction relief.[480] Supervisor Sheila Kuehl has said: "Legal representation is fundamental to the exercise of basic rights . . . . Given the threats now faced by so many in our immigrant communities, the County has taken special steps through the L.A. Justice Fund to ensure that no one is deported without a strong legal defense."[481] Indeed, under the leadership of Supervisors Hilda Solis and Kuehl, the Board of Supervisors has made immigration a top county priority.[482]

Nevertheless, the Los Angeles Justice Fund and One California alone cannot fully resolve the immense need for legal representation for noncitizens—especially the need for *criminal-immigration* representation. First, the Los Angeles Justice Fund's $10 million fund over two years falls short of meeting the overwhelming demand for removal defense. For example, it would cost more than $18 million annually in Los Angeles County just to represent all detained noncitizens, one of the most vulnerable groups of noncitizens facing deportation.[483] In addition, while Los Angeles-area nonprofits received more than $10 million of One California funding for the 2017-18 fiscal year, the majority of these funds were not for removal defense.[484]

Second, nonprofit providers have had significant capacity challenges. It has been difficult for nonprofits to absorb the increase in funding and scale up the capacity to provide immigration legal services such as removal defense. In particular, organizations like the Central American Resource Center (CARECEN) that provide high-volume legal services in complex immigration matters have lacked the capacity and expertise to represent clients in criminal matters, such as post-conviction relief matters. There is a great need for post-conviction relief legal representation for poor noncitizens.

Third, as already explained in Parts II and III, the need to bolster the representation of noncitizens at the front end of criminal proceedings is ever more important. The Trump Administration has prioritized immigration enforcement on so-called "criminal aliens" and broadened its very definition to include anyone charged with a criminal offense. Because representation at the front end can seal noncitizens' fate at the back end,[485] and because noncitizens—especially the poor—are still unlikely to be represented in removal or post-conviction relief proceedings, they have a uniquely pressing need to resolve their criminal cases in ways that effectively address the immigration ramifications of criminal proceedings.

Los Angeles County must enhance noncitizens' Sixth Amendment right to effective counsel during criminal proceedings, when noncitizens are provided a lawyer if they cannot afford one. For indigent noncitizens charged with crimes, public defenders are the first—and often only—line of vital legal defense. As such, public defenders must be adequately equipped, so that, in Supervisor Kuehl's words, "no one is deported without a strong legal defense."[486]

B. The Los Angeles County Public Defender's Office (LACPD)

We live in a world of criminal defense that has changed dramatically, even just over the past few years. California has gone through significant reforms. In the face of the 2016 presidential election, and with the advent of laws in California seeking boldly to push back against the intensifying merging of criminal and immigration law and enforcement, quality public defender offices have realized that their responsibilities to noncitizen clients have expanded. While ensuring effective *Padilla* representation, which is essential and constitutionally mandated, quality public defender offices have also developed more holistic immigration defense practices, so that, for example, they can meet noncitizen clients' underlying immigration needs.

To achieve the "*holistic*, client-based representation model" to which the Board of Supervisors aspires, it must dramatically enhance LACPD's Immigration Unit, which has been grossly under-resourced. In the entire LACPD staff of more than 1,100 employees, there are just two attorneys designated as immigration law experts. These two attorneys attempt to provide expert support to about 700 public defenders, who annually handle approximately 51,900 cases involving noncitizen clients. A dramatic staffing expansion is urgently needed, not only because of LACPD's extraordinarily large number of noncitizen cases, but also because of the enormous complexity of the intersection

between federal immigration law and state criminal law and increasingly aggressive federal immigration enforcement practices. Adequate levels of staffing, in addition to reforms of institutional structures and practices, will allow LACPD not only to comply with *Padilla* and related law but also to provide more holistic immigration defense. In the process, LACPD can reclaim its position as a leader in the field.

i. LACPD in Perspective

LACPD is Los Angeles County's main public defender office and provider of indigent defense services.[487] With offices in about 40 locations throughout the county, and with approximately 700 attorneys and 1,159 budgeted positions, LACPD is the largest public defender office in the nation.[488] With an annual caseload of more than 300,000 cases, including about 85,000 felony cases, 200,000 misdemeanor cases, 25,000 juvenile cases, and more than 10,000 mental health commitment cases, LACPD handles the bulk of the county's criminal caseload.[489] LACPD's recommended budget for fiscal year 2018-19 is approximately $227 million—with a net cost of $221 million to the county.[490]

ii. The Immigration Unit's Work

LACPD has an in-house Immigration Unit. For years, Graciela Martinez, an expert on the intersection of criminal and immigration law in California, was LACPD's only in-house immigration expert. Ms. Martinez had been in the appellate department for 12 years before becoming the only immigration point person in 2002, well before *Padilla*, at first devoting 50 percent of her time to this role.[491] The time Ms. Martinez spent as the immigration expert gradually increased, ultimately becoming full time in 2016.[492] Also in 2016, as a result of a successful motion by Supervisors Solis and Kuehl, Albert Camacho, a deputy public defender III with nearly 20 years of public defense experience, transitioned to become the second full-time attorney in the newly formed Immigration Unit.[493] Mr. Camacho's position was designed to provide support with post-conviction relief matters to assist current and former clients in qualifying for immigration benefits and relief.[494] Today, LACPD's Immigration Unit comprises these two attorneys, in addition to a paralegal and an administrative assistant.

LACPD's Immigration Unit has had a wide range of vitally important areas of work. For LACPD to meet constitutional, statutory, and professional standards, the unit must consult with defenders on all the adverse immigration consequences of criminal dispositions and advise them about possible alternative dispositions that could avoid or mitigate those consequences. Further, there are many additional responsibilities technically falling outside the process of *Padilla* advice and advocacy that are nonetheless crucial for the quality representation of noncitizen clients. These services complement each other and help make up a greater whole, enhancing the office's ability to fulfill its core function of providing effective *Padilla* representation. These responsibilities include providing support on post-conviction relief matters and monitoring the implementation of new laws protecting noncitizens who are justice-involved. LACPD does not provide direct immigration representation.

a. *Padilla* Plea Consultations

Providing *Padilla* plea consultations is the Immigration Unit's main priority. Accurate and thorough plea advisals can range from straightforward to incredibly complex and labor intensive. Factors that increase the complexity of plea consultations include the client's immigration status, the nature of the alleged offense, the client's immigration and family history, the number and types of prior convictions the client has, whether the client is juvenile or has mental health issues, and whether the client is represented by immigration counsel. After research and analysis, defenders must advise clients about all the adverse immigration consequences—that is, not only about deportability and inadmissibility grounds but also about eligibility for forms of immigration relief or benefits. With clients' informed consent, defenders must then defend against adverse immigration consequences. LACPD noncitizen clients are eligible for myriad forms of alternative immigration-safe dispositions and post-conviction relief, many of which have become law only in recent years. Defenders must be aware of these additional relief mechanisms and know how to effectively use them.

Defenders must carry out all these duties, all the while the Trump Administration has targeted Los Angeles with increasingly aggressive immigration enforcement. In today's climate, it has become even more important to advise noncitizen clients about whether they will become or already are people whom local law enforcement can lawfully transfer to ICE custody. This work requires comparing their charges and prior convictions with a list of qualifying offenses and ascertaining whether ICE has already issued a detainer request.[495] In the context of juvenile court, the U.S. Citizenship and Immigration Service (USCIS)

has become more aggressive in seeking records from juvenile cases, thus heightening the importance for juvenile defenders to be mindful of a variety of factors when representing noncitizen minors. In short, the present political climate has made the quality representation of noncitizen clients even more complex and urgent.

In LACPD's large institutional setting, effective, regular in-house trainings and up-to-date guidance and resources are imperative to efficiently increase the quality representation of noncitizen clients. The Immigration Unit must conduct trainings for all defenders and create dynamic, regularly updated practice advisories, bulletins, and other tools on immigration law and emerging trends. This component is "critical to educating defense counsel about the basic analysis involved in determining the immigration consequences of criminal convictions."[496] Both this function and providing accurate plea consultations require the immigration experts to stay abreast of the ever-changing criminal-immigration legal landscape, which includes state and federal court decisions, legislation, and policies. As criminal-immigration law is one of the most complex bodies of law, training new hires and even veteran defenders can be a demanding task. Additionally, the unit must train defenders on immigration enforcement. For example, defenders must be able to properly advise noncitizen clients about their rights in the event that ICE attempts to interview them in local law enforcement custody, or must know what to do if ICE comes to the courthouse or if law enforcement refuses to release a client for purposes of transferring them to ICE.[497]

Trainings and resources, however, are not enough; defenders must have "access to expert assistance to meet their *Padilla* obligations."[498] The Immigration Unit attorneys encourage defenders to reach out to them via phone, email, or even text. Over the past year, defenders have requested the Immigration Unit's services at an increasing rate, leading to a sharp increase in the unit's workload. For example, in October 2015, when Ms. Martinez was the only immigration expert and was permitted to devote only 80 percent of her time to this position, she would conduct approximately 100 plea consultations a month.[499] In 2017, with two full-time immigration experts and a legal fellow admitted to the bar, the Immigration Unit was able to handle an average of 438 consultation requests a month.[500] As already explained, consultations have become more complex, further burdening the unit's workload.

Overall, the two immigration experts possess the required expertise to create effective trainings and resources, and to provide detailed, complex *Padilla* consultations. Ms. Martinez, the leader of the Immigration Unit, is a widely recognized expert in criminal-immigration law, and her colleague Mr. Camacho now brings about two years of experience in this highly complex area of the law. Nevertheless, it is impossible for two immigration experts to fully support 700 defenders. Hence, the unit has been in constant triage mode.[501]

b. Additional Services

Besides *Padilla* plea consultations, the Immigration Unit seeks to provide additional services that are critical for the quality representation of noncitizen clients. For one, the unit attempts to prepare noncitizen clients for the aftermath of their criminal cases. While the Immigration Unit attorneys do not provide direct immigration representation, such as removal defense in immigration court or affirmative applications, they still strive to support noncitizen clients with accessing vital immigration legal services.

One class of clients that has especially needed proactive involvement is noncitizen juveniles, including unauthorized immigrant minors who are eligible for lawful immigration status through Special Immigrant Juvenile Status (SIJS). One route to qualify for SIJS is by getting a predicate order from a delinquency court judge. Juvenile defenders must be equipped to screen this type of client, refer the client to immigration practitioners who can apply for SIJS, and obtain the predicate order from the court. This process is complicated—more so now that USCIS has started more aggressively seeking records associated with juvenile cases. Thus, juvenile defenders must be increasingly cautious that the juvenile case triggering SIJS eligibility does not simultaneously provide federal immigration officials with harmful facts that could lead to an adverse discretionary decision. In 2014, the Immigration Unit set up a referral process through which many SIJS-eligible juvenile clients were placed with Public Counsel for representation. The unit facilitated this referral process and advised defenders on how to best help their clients' SIJS applications. As a result, many LACPD juvenile clients were able to receive SIJS status and avoid deportation.[502]

Carlos's Story

In 2015, Ms. Martinez referred Carlos,[503] a noncitizen juvenile client of LACPD, to Public Counsel. Carlos was already a ward of the court's juvenile division and was also facing removal proceedings in immigration court. Immigration authorities had apprehended him entering the United States as an unaccompanied minor and had placed him in proceedings. Carlos did not have an immigration attorney.

Public Counsel's Equal Justice Works Emerson Fellow, Jesús Mosqueda, who worked from 2014 until 2016 as a legal fellow focusing exclusively on representing justice-involved noncitizen youth, did an intake of Carlos and quickly determined that he qualified for SIJS. Mr. Mosqueda represented Carlos, ultimately securing SIJS and filing an application to adjust his status to lawful permanent resident. After Mr. Mosqueda left Public Counsel, senior staff attorney Joseph Weiner completed Carlos's case, representing him at his adjustment interview and terminating proceedings in immigration court once USCIS granted his application for permanent residence. In short, because of the work by Ms. Martinez and Public Counsel, Carlos went from being an unaccompanied minor who was facing removal to becoming a lawful permanent resident who sees a bright future for himself in the United States.

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The Immigration Unit has regularly advised, supported, and coordinated with the immigration bar, including with nonprofits such as Public Counsel and CARECEN, on issues relating to criminal-immigration law. As Los Angeles nonprofits have been able to represent more people given the infusion of county and state funds for direct immigration representation, they have also increasingly requested the Immigration Unit's criminal-immigration legal expert assistance. In particular, the unit seeks to provide significant support on post-conviction relief matters. As California has recently enacted new laws that help noncitizens receive post-conviction relief and avoid deportation, the need to pursue such relief has increased dramatically. The unit has supplied records and expert advice to nonprofit and private attorneys; in some cases, it has taken on the post-conviction relief cases directly.

Lorena's Story

The expert criminal-immigration legal support of LACPD's Immigration Unit is often critical to nonprofits representing individuals seeking immigration relief. This support often means the difference between lawful permanent residence and deportation. In a recent case, LACPD's Immigration Unit represented Lorena,[504] a CARECEN client in jeopardy of losing the Temporary Protected Status (TPS) she has held for nearly two decades. A private criminal defense attorney had advised Lorena to accept a drug possession plea rendering her ineligible for TPS and subject to deportation, despite the conviction's being her only offense in the quarter-century she had lived in the United States. Upon CARECEN's request for assistance, the Immigration Unit worked to successfully vacate Lorena's plea. This move allowed CARECEN to renew Lorena's TPS and prepare an application for permanent residence through her adult U.S. citizen son. Instead of facing deportation to Honduras, Lorena is in the process of becoming a lawful permanent resident within a year. While the Immigration Unit was able to take on Lorena's case, the unit cannot accept many more cases because of capacity limitations.

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The Immigration Unit has responded to, and in some cases has provided support with, post-conviction relief cases claiming ineffective assistance of counsel against LACPD attorneys. In particular, California Penal Code Section 1473.7 is a recently enacted post-custodial mechanism to vacate a conviction or sentence based on prejudicial error damaging the person's "ability to meaningfully understand, defend against, or knowingly accept" immigration consequences.[505] While an order pursuant to Section 1473.7 does not necessarily require a finding of ineffective assistance of counsel, the majority of Section 1473.7 motions claim ineffective counsel.[506] These motions—and claims of ineffective assistance of counsel generally—create significant problems for LACPD. First, defenders on the original cases are exposed to potential California State Bar discipline.[507] Second, LACPD must respond to claims of ineffective counsel, triggering resource-intensive processes, such as pulling and reviewing case files that are often very old, interviewing the defenders, responding to the motions, and often appearing in the

hearings. In many occasions, the Immigration Unit attorneys have assisted former clients in reaching more immigration-favorable dispositions without the need to litigate the claims of ineffective assistance of counsel.

This post-conviction work has been a significant drain on the Immigration Unit's capacity, creating an inefficient feedback loop. As the immigration experts respond to post-conviction relief cases, they cannot spend precious time supporting defenders in their provision of effective pre-conviction representation, creating a considerable risk that there may be new, future claims of ineffective assistance of counsel. Post-conviction relief cases also generate additional costs for the county, such as court and prosecution costs.

José B.'s Story

In September 2013, José B., a longtime lawful permanent resident since 1991, was a client of LACPD and pleaded guilty to possession for sale of methamphetamine (California Health and Safety Code Section 11378)—an aggravated felony in immigration law. José, who suffered from major depressive disorder, had been married for 25 years with six children, including three young ones living in the United States. The case was factually similar to *People v. Bautista*, in which the petitioner was also a lawful permanent resident and pleaded to possession for sale of a controlled substance, instead of pursuing a plea to the greater offense of transportation, which would not have been an aggravated felony. In 2013, the strategy of defending a lawful permanent resident against an aggravated felony when charged with possession for sale of a controlled substance by "pleading up" to transportation was well established, as this strategy was spelled out in practice guides and in *Bautista* in 2004.

As a result of the conviction, federal immigration authorities initiated removal proceedings against José. Pursuant to *Franco*, after finding that José was incapable of representing himself based on a serious mental disorder, the immigration court appointed immigration counsel.[508] Appointed counsel then obtained funding for a post-conviction relief attorney, who filed a petition for writ of habeas corpus in the trial court. After the trial court denied it, counsel refiled in the California Court of Appeal. The petition alleged that José was deprived effective assistance of counsel by his public defender's failure to defend against the aggravated felony, specifically by failing to pursue the greater offense of transportation. The Court of Appeal sent the case back to the trial court and directed the government to show cause as to why the relief requested should not be granted.

After the matter was sent back to the trial court, José's post-conviction relief attorney contacted Ms. Martinez. Through her contacts, Ms. Martinez was able to secure an agreement with the District Attorney's office whereby José was permitted to withdraw his plea to possession for sale and entered a new plea to transportation. José then withdrew the habeas petition.

José's story is only one of many in which LACPD's noncitizen clients pleaded to criminal dispositions triggering severe immigration consequences when more immigration-favorable alternative dispositions were available. While the Immigration Unit was able to assist José in reaching a more immigration-favorable result post-conviction, this story highlights the urgent need for effective pre-conviction defense against adverse immigration consequences. Many others are not as fortunate as José to have free immigration and post-conviction relief counsel.

Christian P.'s Story

Christian P. was brought to the United States when he was about one year old in 1992 and became a lawful permanent resident when he was 15. He graduated from high school and attended community college. In 2013, he was charged with driving a vehicle without the owner's consent (Vehicle Code Section 10851). Represented by LACPD, Christian pleaded guilty and accepted a sentence of 365 days in jail, instead of 364 days.

This day count was of monumental importance. The difference of a single day—a sentence of 365 days or more—made the conviction an aggravated felony theft offense. Accordingly, Christian's 365-day sentence subjected him to mandatory deportation, and federal agents put him in removal proceedings based on the conviction. If Christian's public defender had been trained and had received adequate immigration law

expert support, he could have negotiated a more immigration-favorable sentence of 364 days or less, with dramatically different consequences.

Post-conviction counsel sent a letter to the public defender who had represented Christian, asking him what efforts he had made to obtain a non-aggravated-felony sentence. At this point, Ms. Martinez got involved to assist Christian to seek a sentence reduction of one day, so that he could avoid the aggravated felony determination. With Ms. Martinez's support, the defender was able to get the sentence reduction, and removal proceedings were halted. Christian is now eligible for citizenship.

Christian's story highlights the inefficient system in which ill-equipped LACPD defenders fail to fully defend against adverse immigration consequences and, instead, precious resources must be used post-conviction to vacate dispositions in order to avoid or minimize those consequences.

Margarita C.'s Story

Margarita C.'s story is yet another story of the failure of LACPD to fully defend against adverse immigration consequences and the resources the office must expend post-conviction to correct the initial failure. In 2012, represented by LACPD, Margarita pleaded guilty to receiving aid by misrepresentation (Welfare and Institution Code Section 10980(c)(2)). She was sentenced to 500 hours of community service and restitution of $49,000 to the Department of Social Services. At the time, Margarita had a work permit and four U.S. citizen children. She had moved to the United States in 1988 when she was 20 years old.

Immigration authorities began removal proceedings against Margarita based upon this conviction. It turned out that the conviction was an aggravated felony because it was as an offense involving "fraud or deceit" for which the restitution exceeded $10,000. A simple way for Margarita to have avoided an aggravated felony would have been a plea to an alternate offense, such as grand theft (Penal Code Section 487(a)), with the exact same sentence and restitution. In 2012, prevailing professional norms specifically suggested that on "fraud or deceit" cases where the loss exceeds $10,000, the defense attorney should attempt to plea to a theft offense so long as the sentence was less than one year.

Prior to filing a habeas petition alleging ineffective assistance of counsel, Margarita's post-conviction attorney contacted Ms. Martinez. With the public defender who staffed the courtroom and had strong working relationships with the courtroom prosecutor and judge, Ms. Martinez and post-conviction counsel crafted an oral motion to withdraw the plea and enter a new plea. The defender then orally moved to withdraw the prior plea and entered a new plea to grand theft with the prior sentence to remain.

Norberto S.'s Story

In yet another case, Norberto S. was nineteen years old in 2015 when his LACPD attorney advised him to plead guilty to possession for sale of methamphetamine (Health and Safety Code Section 11378)—without regard that this conviction would trigger the aggravated felony ground for deportation. Norberto, who had been diagnosed with a learning disability at an early age, had been a lawful permanent resident since he was 3 years old. His entire family—including his father, mother, and eight siblings—were all U.S. citizens or lawful permanent residents. But now, based on the conviction, he became subject to mandatory deportation.

Again, it was a private post-conviction relief attorney who made a crucial difference. The attorney filed a successful motion alleging ineffective assistance of counsel to allow Norberto to "plead upward" to a more serious offense (Health and Safety Code Section 11379(a)). As a result, removal proceedings against Norberto were terminated.

c. Systemic Advocacy

The Immigration Unit strives to monitor immigration enforcement practices and incorporate changing practices into LACPD's defense strategies. LACPD is uniquely positioned to monitor the collaboration of the Los Angeles Sheriff's Department (LASD) with ICE, as well as LASD compliance with the TRUST, TRUTH, and California Values Acts. For instance, pursuant to the TRUTH Act, LACPD receives ICE detainer requests, which the Immigration Unit tracks

in order to advise clients who have detainers. The unit also tries to respond in individual cases when a law enforcement agency appears to violate individuals' Fourth Amendment rights by prolonging custody in order to facilitate an ICE detainer request. These are all vital functions, but they also present yet another drain on limited resources.

J.G.'s Story

In February 2018, ICE officers showed up at a juvenile facility and arrested J.G., an LACPD client who had appeared in court for a pending juvenile case. It appears that LASD deputies at the juvenile facility had been advised that ICE was authorized to take custody of J.G., based on an adult conviction after turning 18 but before his juvenile case had been resolved. Indeed, this information was publicly available on LASD's website, in clear contravention of state law. Juvenile case information—including date, time, location, and petition number of the case—are all confidential under California law, even for someone who is 18 or older.[509] Thus, LASD's disclosure of J.G.'s juvenile information to ICE and to the public violated California law. In this case, LACPD's role as J.G.'s attorney led it to discover this violation, and the Immigration Unit's legal expertise and relationships allowed LACPD to understand the legal implications and develop a quick and appropriate response. J.G. is now represented by an attorney at one of the Los Angeles Justice Fund nonprofit providers.

J.V.'s Story

In February 2018, an LACPD public defender was able to have her client, J.V., resentenced, resulting in the court ordering J.V.'s immediate release. Instead of complying with the court's order, California Department of Corrections and Rehabilitation (CDCR) officials at Soledad State Prison prolonged J.V.'s detention for the purpose of transferring him to ICE custody, in violation of his Fourth Amendment rights. Because the LACPD defender represented J.V. in state criminal court and was monitoring CDCR compliance with the court's order, this attorney was able to quickly learn of the violation and take swift action. The defender called upon the Immigration Unit to help her win J.V.'s release. The immigration experts drew on their expertise with ICE detainers to quickly write a habeas petition and utilized their network of contacts across the state, including the ACLU SoCal. Their efforts secured J.V.'s release before ICE arrived at the prison, in compliance with the court's order.

• • •

Further, the Immigration Unit is frequently consulted in local and state legislative and policy efforts that advocate for immigrants, and it provides guidance to LACPD's leadership and other county agencies regarding immigration issues. For example, Ms. Martinez, who has served on the Board of Directors of the California Public Defenders Association (CPDA), has been recently tasked with providing cross-trainings to Los Angeles Justice Fund nonprofit providers on issues involving noncitizens in criminal proceedings. The unit has had to cultivate effective working relationships outside the office and possess the most current information on the law, immigration enforcement patterns, and other important developments that affect the quality representation of noncitizen clients.

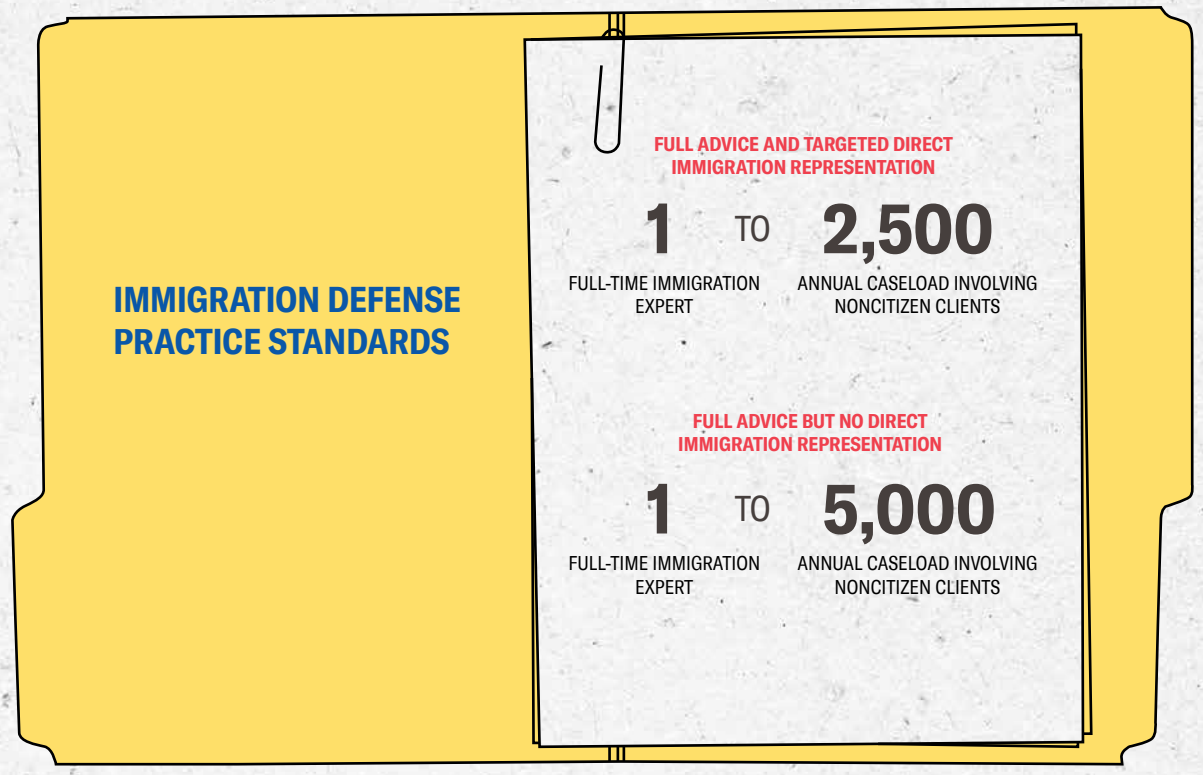
• • •

Advocacy with Attorney General Xavier Becerra

LACPD's Immigration Unit was instrumental in convincing California Attorney General Xavier Becerra to remove immigration questions from the Prohibited Persons Relinquishment Form, a new form required by the enactment of Proposition 63.[510] Without these changes, many noncitizen clients across the state would have been required to reveal to the court sensitive information on their immigration status.

• • •

Importantly, LACPD's Immigration Unit has participated in efforts to advocate for prosecutors to fully implement Penal Code Section 1016.3(b), which mandates prosecutors to meaningfully consider immigration consequences. The unit's attorneys have worked with a community coalition, including the ACLU SoCal, the National Day Laborer Organizing Network, and other community stakeholders, to advocate that the Los Angeles City Attorney's office adopt more progressive policies for the meaningful consideration



of immigration consequences throughout deputy city attorneys' discretionary decisions, including charging, pre-plea diversion, and plea negotiation decisions.[511]

iii. Substantial Structural Limitations: Excessive Workloads

LACPD currently seeks to provide full immigration advisals but no direct immigration representation. With only two attorneys in the Immigration Unit, however, it has been impossible for the unit to fully support 700 defenders so that they can, in turn, provide effective *Padilla* advice and advocacy on approximately 51,900 cases involving noncitizen clients.[512] Notably, LACPD's noncitizen caseload is approximately ten times greater than those of the offices compared in this report.

Two full-time immigration experts are nowhere near the number needed to sustain the Immigration Unit's demanding mandate and wide-ranging duties, most importantly *Padilla* plea consultations. The two Immigration Unit attorneys attempt to provide expert immigration support to 700 public defenders—that is, each immigration expert is supposed to support 350 defenders. Further, each immigration expert seeks to support defenders on approximately 25,950 cases involving noncitizen clients per year. LACPD's current ratios are approximately (a) one immigration expert to about 350 defenders (1:350); and (b) one immigration expert to approximately 25,950 cases of noncitizen clients per year (1:25,950).

In comparison to LACPD's 1:350 ratio of immigration experts to the number of defenders, the public defender office in Alameda County, for example, employs five immigration experts and 108 defenders (thus, its ratio is approximately 1:22). The office in Contra Costa County has one immigration expert and 75 defenders (1:75). The office in San Bernardino County employs one immigration expert, along with a defender who is training with the immigration expert full time, and 120 defenders (1:96). For years, LACPD has lagged far behind its sister public defender offices in California, even neighboring San Bernardino County.

In addition, LACPD's ratio of immigration experts to the annual noncitizen caseload falls far short of the recommended standard for offices like LACPD that seek to provide full immigration advisals but no direct representation. To provide full immigration advice, public defender offices should have a ratio of at least 1:5,000, although, as discussed in Part III, this ratio must be updated today. But even using this outdated standard, LACPD's ratio is about *five times* that under the recommended standard. In comparison, each office profiled in this report abides by the recommended standards.

Even if LACPD's two immigration experts were to only provide individual *Padilla* consultations, they would still not have the capacity to review even a

COMPARISON OF CALIFORNIA PUBLIC DEFENDER OFFICES

Public Defender Office	The Office of the Alameda County Public Defender	The Contra Costa County Office of the Public Defender	The Law Offices of the San Bernardino Country Public Defender	The Los Angeles County Public Defender's Office
Annual Criminal Caseload	38,100	19,000	45,000	300,000
Annual Noncitizen Caseload	5,677	2,451	4,995	51,900
Full Time Equivalent of Public Defenders	108	75	120	700
Full Time Equivalent of Immigration Experts	5	1	1.25	2
Ratio of Immigration Experts to Noncitizen Caseload	1:1,135	1:2,451	1:3,996	1:25,950
Ratio of Immigration Experts to Public Defenders	1:22	1:75	1:96	1:350

fraction of all the cases involving noncitizen clients that require consultation. Yet, the immigration experts have a range of additional important responsibilities. As a result, despite the often-heroic work of individual defenders and the Immigration Unit attorneys, defenders have lacked the necessary capacity, training, and expert support to provide constitutionally mandated, quality representation to all their noncitizen clients.

In light of the Immigration Unit's excessive workloads, the unit must be expanded significantly. The Board of Supervisors must provide the resources necessary to remedy excessive workloads. On this important matter, the State Bar of California has written that public defenders "shall not accept nor be burdened with excessive workloads that compromise the ability . . . to render competent and quality representation in a timely manner."[513] In particular, the State Bar puts the onus on the chief public defender:

> Chief Defenders bear the ultimate responsibility for assuring workloads are not excessive in volume for any individual institutional public defender employee. . . . [Chief Defenders] must ensure that the nature of the required tasks to properly prepare, settle or try each matter are accurately identified and that only employees competent to accomplish those tasks are assigned the duty to do so. . . . The Chief Defender is responsible for maintaining a workload assignment system that causes only those with the required knowledge, experience and motivation to be entrusted with the duty of completing such tasks. . . . [S]ome tasks are more complex than others and carry with them more services and weightier consequences. . . . The nature of the workload is often dynamic and the Chief Defender should take whatever steps are necessary to be cognizant of any changes and to adjust workloads commensurately. . . . New laws enacted and case law decisions often have an impact on workload.[514]

The chief public defender must "secure the additional resources necessary" to address excessive workloads.[515] The failure of chief public defenders to effectively address workloads can result in personal liability for an adverse civil judgment and jeopardize their right to practice law in any capacity.[516]

iv. Deficient Institutional Practices

Over the years, LACPD's deficient institutional practices have frustrated defenders' ability to provide quality representation to their noncitizen clients.

Impediments to Access. Embedding immigration experts throughout LACPD's branch offices would make the office's provision of criminal and immigration defense be more seamlessly integrated. The physical presence and easy access of embedded immigration experts would greatly improve their ability to provide *Padilla* consultations, investigate critical facts, handle post-conviction relief matters, and monitor practices that raise immigration issues.

LACPD's two immigration experts, who are located in the appellate unit in the central office, clearly cannot be embedded in the nearly 40 branch offices throughout the county. To meet the immense needs identified in this report, the Immigration Unit must comprise a critical number of immigration experts—and these experts must be embedded strategically.

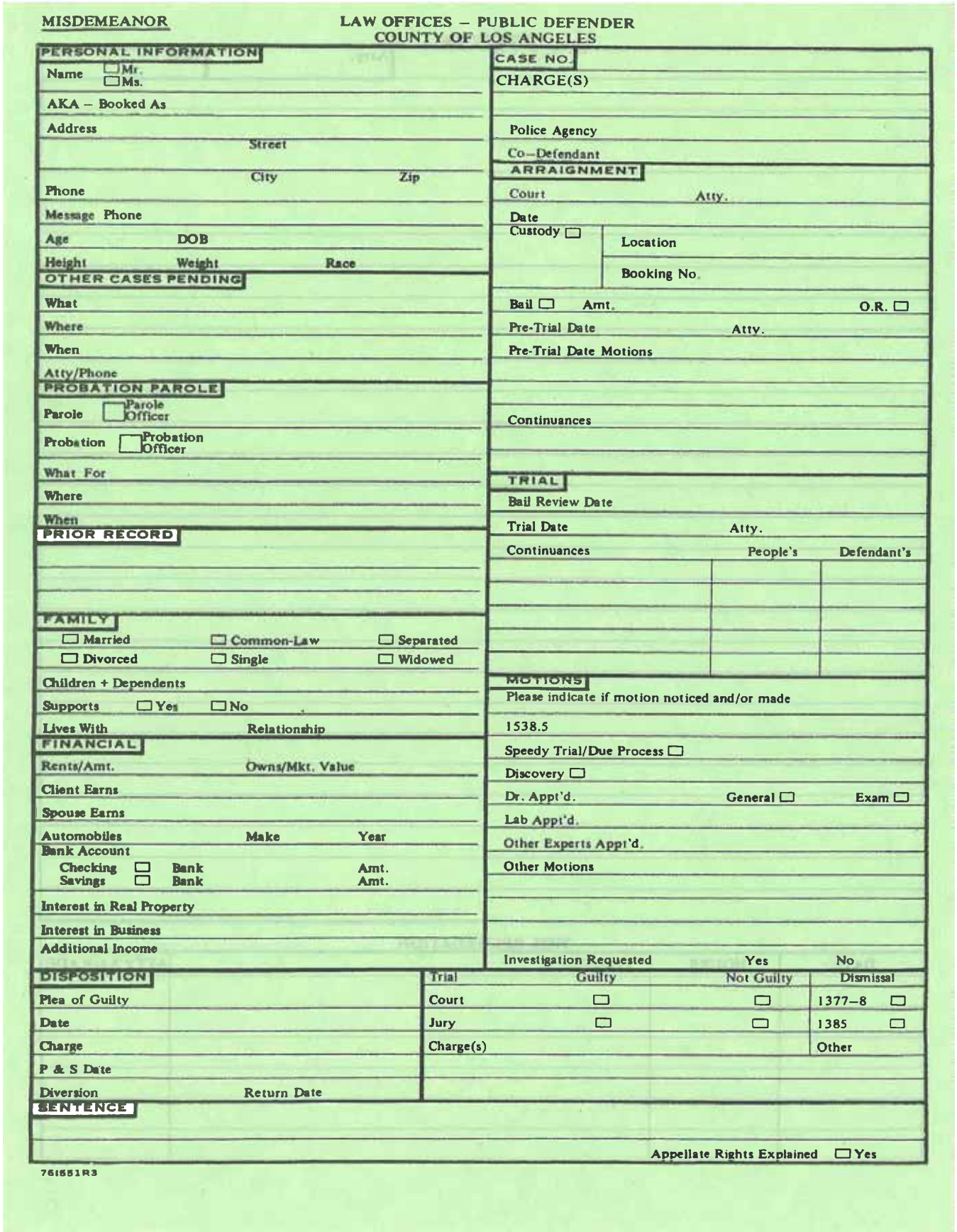
Non-Mandatory Training. Mandatory trainings are crucial to create, at a minimum, a baseline of proficiency among defenders on how to ascertain clients' immigration status and ensure that they consult with the immigration experts when they are uncertain about a contemplated disposition's immigration consequences or alternative immigration-favorable dispositions.

Based on interviews with current and former defenders, however, foundational trainings on criminal-immigration law have not been mandatory for all defenders, except for new hires. This practice at LACPD is unlike standard practices in offices across the country. It is no surprise then to hear, for example, of a veteran defender of more than 15 years who had not attended immigration trainings, did not know what DACA was, and yet represented DACA recipients in misdemeanor cases unaware that a significant misdemeanor like a DUI (driving under the influence) offense could disqualify them from DACA and initiate removal proceedings.[517]

At a minimum, LACPD must require all defenders to attend foundational criminal-immigration law trainings, as well as regular trainings on important legal developments.

Intakes Lacking Key Questions to Ascertain Immigration Status. Ascertaining whether a client is a noncitizen is a basic predicate to providing effective *Padilla* representation. Gathering additional information is also imperative. At a minimum, an intake form that includes key immigration questions—essentially, a checklist—can defend even the experienced "against failure," providing "a kind of cognitive net" that can "catch mental flaws inherent in all of us—flaws of memory and attention and thoroughness."[518] These mental flaws can be exacerbated in the context in which most public defender offices, including LACPD, find themselves. Defenders are constantly dealing with information deficits, limited time, cognitively taxing workloads, and highly discretionary decision-making.[519] "Even the most expert among us can gain from . . . putting a few checks in place."[520]

Nevertheless, asking and documenting key immigration-related questions are not consistently required protocols as part of the intake process. In particular, in contrast to standard practices in offices across the country, LACPD's basic intake sheet contains no entry on immigration status. While the Immigration Unit attorneys advise and encourage defenders whom



MISDEMEANOR

LAW OFFICES – PUBLIC DEFENDER
COUNTY OF LOS ANGELES

PERSONAL INFORMATION

Name ☐ Mr. ☐ Ms.

AKA – Booked As

Address

Street

City Zip

Phone

Message Phone

Age DOB

Height Weight Race

OTHER CASES PENDING

What

Where

When

Atty/Phone

PROBATION PAROLE

Parole ☐ Parole Officer

Probation ☐ Probation Officer

What For

Where

When

PRIOR RECORD

FAMILY

☐ Married ☐ Common-Law ☐ Separated

☐ Divorced ☐ Single ☐ Widowed

Children + Dependents

Supports ☐ Yes ☐ No

Lives With Relationship

FINANCIAL

Rents/Amt. Owns/Mkt. Value

Client Earns

Spouse Earns

Automobiles Make Year

Bank Account

Checking ☐ Bank Amt.

Savings ☐ Bank Amt.

Interest in Real Property

Interest in Business

Additional Income

CASE NO.

CHARGE(S)

Police Agency

Co–Defendant

ARRAIGNMENT

Court Atty.

Date

Custody ☐ Location

Booking No.

Bail ☐ Amt. O.R. ☐

Pre-Trial Date Atty.

Pre-Trial Date Motions

Continuances

TRIAL

Bail Review Date

Trial Date Atty.

Continuances	People's	Defendant's

MOTIONS

Please indicate if motion noticed and/or made

1538.5

Speedy Trial/Due Process ☐

Discovery ☐

Dr. Appt'd. General ☐ Exam ☐

Lab Appt'd.

Other Experts Appt'd.

Other Motions

Investigation Requested Yes No

DISPOSITION

Plea of Guilty

Date

Charge

P & S Date

Diversion Return Date

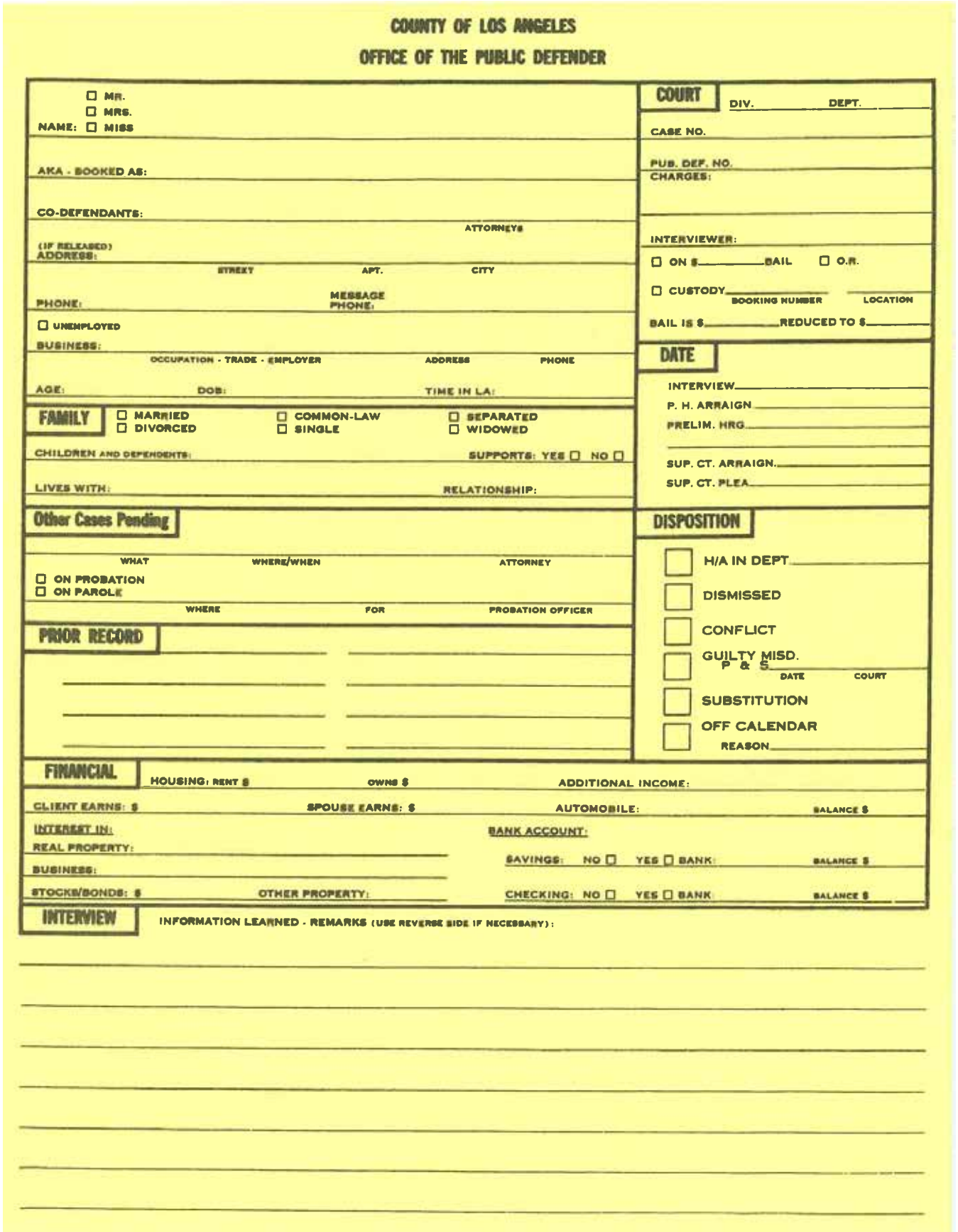
Trial	Guilty	Not Guilty	Dismissal
Court	☐	☐	1377–8 ☐
Jury	☐	☐	1385 ☐
Charge(s)			Other

SENTENCE

Appellate Rights Explained ☐ Yes

76I551R3

Misdemeanor Intake Sheet



COUNTY OF LOS ANGELES

OFFICE OF THE PUBLIC DEFENDER

☐ MR. ☐ MRS. ☐ MISS NAME:

AKA - BOOKED AS:

CO-DEFENDANTS:

ATTORNEYS

(IF RELEASED) ADDRESS: STREET APT. CITY

PHONE: MESSAGE PHONE:

☐ UNEMPLOYED

BUSINESS: OCCUPATION - TRADE - EMPLOYER ADDRESS PHONE

AGE: DOB: TIME IN LA:

FAMILY ☐ MARRIED ☐ DIVORCED ☐ COMMON-LAW ☐ SINGLE ☐ SEPARATED ☐ WIDOWED

CHILDREN AND DEPENDENTS: SUPPORTS: YES ☐ NO ☐

LIVES WITH: RELATIONSHIP:

Other Cases Pending

WHAT WHERE/WHEN ATTORNEY

☐ ON PROBATION ☐ ON PAROLE

WHERE FOR PROBATION OFFICER

PRIOR RECORD

COURT DIV. DEPT.

CASE NO.

PUB. DEF. NO.

CHARGES:

INTERVIEWER:

☐ ON $ BAIL ☐ O.R.

☐ CUSTODY BOOKING NUMBER LOCATION

BAIL IS $ REDUCED TO $

DATE

INTERVIEW

P. H. ARRAIGN

PRELIM. HRG

SUP. CT. ARRAIGN.

SUP. CT. PLEA

DISPOSITION

☐ H/A IN DEPT

☐ DISMISSED

☐ CONFLICT

☐ GUILTY MISD. P & S DATE COURT

☐ SUBSTITUTION

☐ OFF CALENDAR REASON

FINANCIAL

HOUSING: RENT $ OWNS $ ADDITIONAL INCOME:

CLIENT EARNS: $ SPOUSE EARNS: $ AUTOMOBILE: BALANCE $

INTEREST IN: BANK ACCOUNT:

REAL PROPERTY:

BUSINESS: SAVINGS: NO ☐ YES ☐ BANK: BALANCE $

STOCKS/BONDS: $ OTHER PROPERTY: CHECKING: NO ☐ YES ☐ BANK: BALANCE $

INTERVIEW

INFORMATION LEARNED - REMARKS (USE REVERSE SIDE IF NECESSARY):

Felony Intake Sheet

they train to ask key immigration-related questions, including country of birth and immigration status, it appears that LACPD's leadership has not made these questions mandatory.

"Immigration status is not a question on our standard arraignment forms or standardized in any other way in our files. It's my practice to have a full immigration conversation with each client I meet, regardless of how many prior appearances have been made in the case, because it's not always possible to determine whether a prior attorney has addressed the question of immigration status with a client."

– Confidential Source G[521]

Public defender offices that have no uniform system of inquiring about clients' immigration status likely ignore clients' status on a system-wide basis. According to surveys the ACLU SoCal has conducted over the past few years of detainees in immigration custody in Southern California, of those who had criminal convictions in Los Angeles County since *Padilla* and were represented by LACPD attorneys, about 37 percent alleged that their lawyer never asked them about their country of birth or immigration status.[522]

Inadequate Consultation System. Effective *Padilla* plea consultations typically cannot occur without defenders' first obtaining various categories of information about their clients. Consultations are often highly complex and may require a range of actions and types of analyses to get to the point of determining the best possible defense strategies. An informal, inconsistent intake and consultation process inevitably leads to the overlooking of important facts or analytical steps and, ultimately, the provision of suboptimal representation. In this context, it is best practice to create a formal and streamlined consultation process, which should be required for defenders to use when they are uncertain about the immigration consequences of a contemplated disposition or the available immigration-favorable alternatives.

LACPD has recently established a more formal and streamlined consultation process. In late March 2018, LACPD for the first time sent out office-wide a procedure which defenders are encouraged to follow when consulting with the Immigration Unit.[523] Before March, consultations that occurred had lacked standardization, and defenders were left to approach the *Padilla* analysis in different and inconsistent ways. This new protocol now asks defenders to use a new central email address for the Immigration Unit, which would be the preferred method over a new phone line and voicemail system the unit has set up. Defenders are also encouraged to gather various categories of important information.

Nevertheless, while this protocol is an important step forward, it only encourages defenders to "[p]lease consider" it and does not yet *require* important action steps. Defenders are still not mandated to gather critical information. Defenders are not required to consult with the immigration experts when they are uncertain about immigration consequences or alternative dispositions. As a result, even though the number of consultation requests that the Immigration Unit receives has risen since President Trump's election, this number is still relatively low given LACPD's size and its noncitizen client caseload, and in comparison with the offices profiled in Part III.[524]

No Evaluation. Based on interviews with current and former defenders, it appears that LACPD does not systematically include fluency in immigration issues or representation of noncitizen clients as factors in evaluations and promotions. This practice likely reinforces an institutional notion that immigration considerations are not important.

In addition, LACPD's information system has not included important entries or options whereby defenders can record information relevant to clients' immigration status and case analysis. Accordingly, defenders are not able to keep track of this important information. There is, however, currently some movement to overhaul LACPD's information system. For example, the 2017-18 recommended budget states: "Improving assessment and performance measures through the acquisition and development of a case management system (CMS). The Public Defender plans to roll out its new statistics system in the summer of 2018, which employs key performance indicators as a basis for assessing and comparing attorney workloads."[525] If the new case management system is indeed rolled out in the summer of 2018, it should include key data and outcomes relating to the representation of noncitizen clients.

v. Noncitizen Clients' Underlying Immigration Needs Go Largely Unmet

Many LACPD noncitizen clients are eligible for forms of immigration relief or benefits. Yet, their only option

is to find free or low-cost immigration representation. Unlike other California public defender offices, such as those in Alameda and San Francisco counties, LACPD does not provide direct immigration representation.

Aiding noncitizen clients to secure immigration representation is paramount for particularly vulnerable groups of noncitizen clients, such as juvenile clients or clients who have significant mental health needs potentially falling under the *Franco* class.[526] At a minimum, the Immigration Unit should continue to utilize the strong working relationships with Los Angeles immigration legal service providers that it has already developed, allowing the unit to make direct referrals and increase the chances that clients can find life-changing representation.

Nevertheless, despite recent increases in state and local funding for immigration legal services, nonprofits are still significantly limited. Finding representation for indigent clients, especially when they have criminal convictions, remains challenging. As a result, LACPD noncitizen clients' underlying immigration needs go largely unmet.

C. County of Los Angeles Alternate Public Defender Office (APD)

The County of Los Angeles Alternate Public Defender Office (APD) was created by the Board of Supervisors in 1993. APD represents the indigent accused when LACPD has a conflict of interest or is otherwise unavailable. In addition to the central office in downtown Los Angeles, APD has 12 branch offices throughout the county.[527] APD's recommended budget in fiscal year 2018-19 is more than $74 million, with a net county cost of almost $73 million.[528] With Janice Fukai as APD's chief public defender since 2002, the office has had stable, strong leadership and management over the years.

APD's overall immigration needs are significantly smaller than those of LACPD. APD's total caseload and noncitizen caseload are about one-tenth the size of LACPD's. With 200 public defenders and 334 budgeted positions, APD handles approximately 30,000 cases a year, including felony, misdemeanor, and juvenile cases.[529] About 5,190 cases are estimated to involve noncitizen clients.[530] Notably, as APD's caseload is more felony-heavy than LACPD's, and APD clients tend to both have prior records and face more serious charges than LACPD's clients, APD's noncitizen clients often have less wiggle room to secure immigration-safe pleas. Nevertheless, APD defenders must still advise about immigration consequences and seek more immigration-favorable pleas.

APD provides full immigration advisals but no direct immigration representation. At APD, two veteran defenders—Jean Costanza and Felicia Grant—are available full time for *Padilla* plea consultations.[531] As a result, the office's ratios abide by the 2009 *Protocol* standard. APD's ratio of immigration experts to noncitizen cases is roughly 1:2,595, better than the 1:5,000 recommended standard for offices that provide full advisals and no direct representation.[532] APD's ratio of immigration experts to defenders is about 1:100.

Additionally, APD's institutional practices have largely kept up with best practices across the country. Foundational trainings on criminal-immigration law are mandatory, including at branch locations. Two updates a year are also required for all defenders. Even though APD's basic intake sheet does not contain foundational immigration-related questions and the case management system is not yet able to capture this information, defenders are required to ask about immigration status in their first meeting with clients. Consultations with the immigration point people are encouraged office-wide.

Importantly, in the county's recommended budget for the 2018-19 fiscal year, APD stated, under its strategic planning initiatives, the office's need to "[r]efine and upgrade the Department's Immigration Rights Unit to enable the Department's attorneys to respond to anticipated changes to federal law and to support the County's effort to protect immigrant rights."[533] One key area APD could "refine and upgrade" would be incorporating key immigration-related questions in its intake form and, correspondingly, enabling its case management system to capture this information. Furthermore, as the underlying immigration needs of APD's noncitizen clients go largely unmet for the same reasons as with LACPD, APD should enhance its capacity to provide more comprehensive services, including targeted direct immigration representation.

Part V.
Recommendations

For the Los Angeles County Board of Supervisors

A. Dramatically Expand LACPD's Immigration Unit

To fully comply with *Padilla* and related federal and state law, LACPD's Immigration Unit must be dramatically enhanced. LACPD's Immigration Unit must be expanded with at least 15 additional budgeted positions for in-house immigration experts, given the office's exceeding size and massive caseload involving noncitizen clients.

LACPD's two immigration experts are simply too few to fully support 700 defenders in satisfying their constitutional mandates. Even by outdated standards, to meet the 1:5,000 recommended ratio of immigration experts to the annual noncitizen caseload, LACPD must employ at least 10 immigration experts who exclusively provide *Padilla* consultations.[534] Measured by a more realistic appraisal of the complexity of immigration experts' roles and expanded duties, the Immigration Unit needs more than a total of 10 *Padilla* attorneys. A modest adjustment would be to ensure that at least 12 immigration experts focus primarily on *Padilla* consults. Furthermore, three additional attorneys should join Ms. Martinez and Mr. Camacho in shouldering the Immigration Unit's additional responsibilities, including the provision of more comprehensive services and systemic advocacy.

In the county's recommended budget for the 2018-19 fiscal year, LACPD has acknowledged that additional funding for "attorney and support staffing for the immigration office" is among its unmet needs.[535] The total funding for the Immigration Unit's expansion by 15 additional immigration experts would amount to no more than $3 million—approximately 1/100 of one percent of the total county budget.[536] Just as the Board of Supervisors directly provided the Immigration Unit with $364,000 starting with the 2015-16 fiscal year budget, which led to Mr. Camacho's addition to the unit as a budgeted position,[537] the additional 15 attorney positions should be budgeted positions starting with the 2018-19 fiscal year budget.

B. Move LACPD and APD Toward a Comprehensive Service Model

Building on the county's innovative efforts to expand immigration legal services for low-income individuals, the Board of Supervisors, along with the County Office of Immigrant Affairs, should support LACPD and APD in developing a comprehensive service model.

To start, if the immigration units at LACPD and APD are equipped with adequate levels of experts, they could collaborate more closely and systematically with nonprofit providers that are part of the Los Angeles Justice Fund and One California, thereby complementing these programs. LACPD and APD could provide critical value-added expert support on criminal-immigration legal matters. For example, the offices could take on a significantly higher number of post-conviction relief cases involving nonprofit clients. LACPD and APD could also expand their role and serve more formally as local criminal-immigration law experts for the immigration bar, providing trainings and criminal-immigration legal analysis. In addition, the offices could do full screenings for possible immigration relief, including post-conviction relief, not only of their respective noncitizen clients but also more broadly of other county residents who are at risk of removal based on criminal justice contact. LACPD and APD could screen all noncitizens in the Los Angeles County Jail who have ICE detainers and connect them with nonprofit providers.

Furthermore, the Board of Supervisors should fund in-house immigration attorney positions at LACPD and APD dedicated to the continued representation of particularly vulnerable groups of noncitizen clients, such as juveniles. Instead of expending precious resources and time trying to place these vulnerable clients with nonprofit providers that have limited capacity, the seamless provision of in-house direct immigration representation would save resources

and time, which is often critical in immigration proceedings. This type of investment for in-house representation would not be a first among county agencies. For instance, the Los Angeles County Department of Children and Family Services (DCFS) has a robust Special Immigrant Status Unit, which filed more than 3,000 SIJS applications between 2011 and 2015, with a 98 percent acceptance rate.[538] For reasons already discussed in Part III, these attorneys should have experience in immigration court.

Finally, the county should continue to improve the processes by which county agencies, including LACPD and APD, connect noncitizen clients with vital immigration legal services. The county should support LACPD and APD in creating a more robust referral process whereby public defenders, with the immigration experts' assistance, can directly refer their noncitizen clients to nonprofits or government entities with the capacity and expertise to represent them in their immigration cases. This referral process cannot merely be handing the client a list of numbers and names of providers. Instead, more formalized and streamlined referral processes should be established to connect clients to services "quickly, with certainty and ease."[539] The Board of Supervisors is best positioned to bring together county agencies and nonprofit and community stakeholders to develop and implement stronger referral processes.

For LACPD's Leadership and Management

A. Restructure the Immigration Unit Strategically

LACPD's Immigration Unit should have (a) a central supervisorial group of experienced immigration experts located in the central office and (b) immigration experts embedded strategically throughout LACPD's branch offices. The embedded immigration experts focusing primarily on *Padilla* plea consultations should be seasoned public defenders who are committed to holistic defense, and they must be adequately supported.

i. Establish a central supervisorial group of experienced immigration experts

The Immigration Unit's supervisorial group would be responsible for high-level tasks that are necessary for the unit and the office as a whole. These responsibilities include the following:

1. Supervise, evaluate, and manage the Immigration Unit, including gathering and analyzing key immigration-related data and statistics.
2. Review and approve complex *Padilla* plea consultations and consult on specialized and work-intensive cases, such as those involving juvenile or mental health issues.
3. Handle emergencies that involve noncitizen clients, such as ICE courthouse arrests or violations of laws protecting noncitizens.
4. Develop up-to-date materials and provide regular, mandatory trainings on criminal-immigration law and emerging enforcement trends.
5. Develop and implement crucial immigration-specific policies.
6. Cultivate effective partnerships and participate in systemic advocacy efforts.
7. Provide guidance on immigration issues affecting the criminal justice system to LACPD's leadership and other county entities, such as the Office of Immigrant Affairs and County Counsel.

ii. Embed the in-house immigration experts focusing on *Padilla* plea consultations strategically across LACPD's branch offices

The new in-house immigration experts should be embedded strategically across LACPD's branch offices. They would consult on a daily basis with defenders on the majority of cases involving noncitizens. Because these immigration experts are needed on site, there should be one immigration expert at each of the larger juvenile and adult branch offices.

Embedding immigration experts in branch locations would have clear advantages over housing them in the central office. Defenders in branch locations would have ready access to an immigration expert on site. The immigration expert could look at the case file, interview the client if necessary, obtain waivers to speak to immigration counsel, and discuss in person the immigration consequences and strategies with the defender. This seamless access between defenders and embedded immigration experts could lead to faster responses to immigration questions. The rate of consultation requests from defenders would likely increase. As a result, noncitizen clients would likely benefit by having a better understanding of how their immigration and criminal cases relate to each other. Clients would be more likely to have the

necessary information to decide whether to seek more immigration-favorable alternate dispositions that may be available or take their cases to trial.

Besides consulting more quickly in pending cases, the embedded immigration experts could handle other matters that require specific criminal-immigration legal expertise. For example, the immigration expert could appear on immigration-related post-conviction actions, such as those relating to Penal Code Sections 1203.43, 1018, 1016.5, 1473.7, 1170.18, and 1203.4, as well as to Proposition 36, habeas petitions, and more. Ideally, embedded immigration experts would have their own local relationships and could speak directly with prosecutors and judges to resolve complex criminal-immigration issues for noncitizen clients.

iii. The embedded immigration experts focusing on *Padilla* plea consultations should be seasoned public defenders

> *"If you're bringing in an immigration attorney, make sure it's someone with deportation defense experience in immigration court. You also need someone who understands criminal procedure, ideally someone who knows how things work in your county so that they can make realistic recommendations in their advisals. Having someone who already knows the office culture is a big plus. You need someone more senior too—you need credentials for the more senior lawyers."*
>
> – Graciela Martinez, LACPD[540]

The new immigration experts focusing on *Padilla* plea consultations should not only be committed to holistic immigration defense but also have significant experience as public defenders. A deep understanding of the criminal court system and the nuances of criminal defense are critical for many reasons. First, crafting immigration-favorable dispositions requires the ability to develop a realistic defense strategy against adverse immigration consequences and to explain to a defender how to implement such a strategy. To know what alternative dispositions are possible and realistic in a fast-paced, often chaotic criminal court requires an in-depth understanding of how criminal negotiations work; how sentences can be carefully crafted to avoid or minimize adverse immigration consequences; how to work with judges, prosecutors, and court staff; and more.

Second, seasoned public defenders would bring with them the relationships and trust they have developed over years, helping to further the shift in the culture of branch locations and the broader office. Immigration advice from someone who knows the ins and outs of criminal courts and whose reputation defenders know and trust can create more buy-in from defenders.

iv. Ensure Immigration Unit attorneys are adequately supported

The Immigration Unit must employ at least one paralegal and one administrative staff working with the central supervisorial group. The unit already has this support structure. In addition, the embedded immigration experts must be supported appropriately within the branch office structure.

B. Reform Deficient Institutional Practices

LACPD must prioritize the reform and improvement of existing institutional practices, which are currently deficient. Not only will these nonbudgetary institutional reforms move LACPD to become more seamlessly integrated in its criminal and immigration representation, but they will also help shift the office's culture to place much needed emphasis on immigration consequences.

i. Expand mandatory trainings

LACPD must require all defenders to attend foundational criminal-immigration law trainings and regular trainings on important legal developments. An initial, comprehensive review of immigration law and its intersection with criminal law must be mandatory for all defenders. There must also be an obligatory training on how to build trust with noncitizen clients. Additionally, brush-up courses, including annual or biannual updates in legal developments, must be made mandatory.

ii. Institutionalize comprehensive intakes and require defenders to ascertain clients' immigration status

LACPD must institutionalize a comprehensive intake sheet and establish a policy requiring defenders, during their first meetings with clients, to ask key questions to ascertain immigration status and gather critical information. In particular, a combination of the following questions should be required:

1. Where were you born?

2. Are you a lawful permanent resident (green card holder)?
3. If you are not a lawful permanent resident, what is your immigration status?
4. How long have you held your current status?
5. Do you know your A number, and, if so, what is your A number?
6. When, and under what status, did you enter the United States (include all entries and exits)?
7. Have you ever come into contact with U.S. immigration authorities? Have you ever been deported, or do you have a final order of removal?
8. Do you have any U.S. citizen or lawful permanent resident family?
9. What is your preferred language, and do you need a translator?
10. What is more important for you—the best criminal outcome or the best immigration outcome to avoid or mitigate immigration consequences (such as deportation)?

Among these questions, the first—"Where were you born?"—is the most important in ascertaining whether a client is a noncitizen and should be required. In addition, the second and third questions would help defenders determine clients' particular immigration status.

iii. Ensure plea consultations in cases involving noncitizens

LACPD must develop and enforce a protocol to ensure that defenders consult with the immigration experts when they are uncertain about the immigration consequences of a contemplated disposition or the available immigration-favorable alternatives. Defenders must conduct a preliminary analysis of their noncitizen clients' immigration consequences and then consult with the Immigration Unit. To facilitate these consultations and increase their efficiency, LACPD should further formalize and streamline the consultation process. For instance, LACPD should create a digitalized case management system where critical immigration-related information can be entered and allow this information to be sent directly to the Immigration Unit. Through a more uniform system, cases can be calendared more efficiently, freeing up parts of the immigration experts' days for emergency consultations that come from court. Having immigration experts embedded on site would further streamline the consultation process.

iv. Include immigration issues as factors in evaluations and promotions

LACPD must include the quality representation of noncitizen clients as a factor in evaluations and promotions. For example, LACPD can evaluate defenders on their rate and quality of consultation requests on cases involving noncitizen clients. In addition, for promotion purposes, LACPD must require defenders to demonstrate a foundational proficiency in immigration consequences and in the overall representation of noncitizen clients.

v. Enhance and institutionalize data collection and analysis

Data collection of key information and outcomes can assist LACPD in analyzing its efficiency and effectiveness, as well as in its appeal for necessary funds. For example, data can show efficiency gains and cost savings to LACPD and the county in providing more seamless criminal-immigration defense. Thus, defenders must enter important immigration-related information in LACPD's new case management system. LACPD should collect some or all of the information in the following partial list:

1. Clients' immigration status and history.
2. Clients' family history.
3. Defenders' rate of consultation requests to immigration experts on cases involving noncitizen clients.
4. Number of inquiries for plea consults submitted to each immigration expert per year.
5. Number of plea consults actually handled by each immigration expert per year.
6. Types of cases where a plea consult occurred.
7. Clients' final dispositions.
8. Number of plea consults that attained mitigated or avoided immigration consequences.
9. Number of clients whose deportation was prevented through creative pleas.

C. Move Toward a Comprehensive Service Model

LACPD should seek support from the Board of Supervisors in developing a comprehensive service model. In particular, LACPD should request to have the in-house capacity to provide targeted direct immigration representation. LACPD should also continue to build more robust referral processes with immigration legal service providers, in collaboration with the Board of Supervisors and other county agencies.

D. Continue and Expand Community Partnerships and Systemic Advocacy

As the largest public defender office in the country, LACPD should continue to use its perspective and position to consult on local and state legislative and policy efforts that support immigrant communities and the poor accused. LACPD is made up of public defenders who understand the realities of their clients as well as the intricacies of criminal court and procedure. LACPD can leverage this expertise for the purpose of developing laws and policies that are informed and grounded in clients' lived experiences. In doing so, LACPD should build upon and develop new partnerships with community stakeholders.

Just as importantly, LACPD is often well-positioned to play an important role in the enforcement and implementation of legislative and policy victories that protect indigent clients. A great many policy victories matter on the ground only when the very advocates representing the people impacted by the policies help to implement them. For instance, LACPD is uniquely positioned to monitor LASD collaboration with ICE, as well as LASD compliance with the TRUST, TRUTH, and California Values Acts, and so it should continue this role, alongside community partners.

E. Conduct Analysis for Broader Holistic Defense Reforms

LACPD should do an in-depth analysis of how it can develop a holistic model of defense that also meets clients' civil legal and social needs. Besides immigration consequences, there are major collateral consequences and other civil legal and social needs that LACPD clients experience. LACPD should aim to provide seamless access to key services, so that it can proactively address a wide range of issues, such as juvenile justice, mental health, public housing and homelessness, child welfare, loss of employment and professional licenses, and more. Moreover, LACPD should have a more robust connection to the various communities it serves and engage more strategically, as feasible, in urgent criminal justice reform efforts that are underway. To develop a more holistic approach to public defense, LACPD should work more collaboratively with other county agencies, such as DCFS, and with community stakeholders who also serve the very communities that LACPD clients are members of.

For APD's Leadership and Management

A. Reform Deficient Institutional Practices

i. Institutionalize comprehensive intakes

ii. Ensure plea consultations in cases involving noncitizens

iii. Include immigration issues as factors in evaluations and promotions

iv. Enhance and institutionalize data collection and analysis

B. Move Toward a Comprehensive Service Model

C. Conduct Analysis for Broader Holistic Defense Reforms

For the California Public Defenders Association and the Immigrant Legal Resource Center

In light of the state's particular challenges and opportunities, CPDA and ILRC should jointly issue updated statewide standards and guidelines for how public defender offices in California can ensure effective noncitizen representation.

For Los Angeles County Prosecutor's Offices

A. Fully Implement California Penal Code Section 1016.3(b)[541]

In the interest of ensuring a just outcome for noncitizens, prosecutors should actively participate in securing immigration-safe dispositions, including by declining to charge, expanding the use of pre-charge and pre-plea diversion programs, and negotiating pleas that avoid or at least mitigate adverse immigration consequences. Prosecutor's offices should develop formal policies for the meaningful consideration of immigration consequences, pursuant to California Penal Code Section 1016.3(b), which created a mandate for

all prosecutors to "consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution."[542] To assist prosecutors with this important obligation, prosecutor's offices should make specialized immigration-related trainings and resources available and seek technical advice from the immigration units at LACPD and APD or from technical assistance providers such as ILRC.

Endnotes

1. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (Brandeis, J., dictum).
2. County of Los Angeles Public Defender Search (July 2017), Appendix F, *available at* https://www.aclusocal.org/defend-la.
3. Cal. Pen. Code § 1016.3(b) (West 2016).
4. 896 N.W.2d 723, 728 (Iowa 2017) (citations omitted) (emphasis added).
5. For decades, practitioners such as Kathy Brady of the Immigrant Legal Resource Center (ILRC), Manuel Vargas of the Immigrant Defense Project (IDP), and Norton Tooby have been on the forefront of criminal-immigration law, developing innovative resources for defense counsel and public defenders.
6. *See generally* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367, 376–92 (2006) (describing the "crimmigration crisis" as the increasing convergence of criminal and immigration law–their substance, enforcement mechanisms, and procedural regimes–that has created "an ever expanding population of the excluded and alienated"); *see also* Cristopher N. Lasch, *A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis*, Yale L. Forum (Oct. 24, 2017), https://www.yalelawjournal.org/forum/a-common-law-privilege-to-protect-state-and-local-courts-during-the-crimmigration-crisis#_ftnref27; César Cuauhtémoc García Hernández, *Creating Crimmigration*, Border Criminologies (Mar. 5, 2014), https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2014/03/creating.
7. Padilla v. Kentucky, 559 U.S. 356, 360 (2010) (citations omitted).
8. *Id.* at 364.
9. *Id.*
10. Stephen Lee, *De Facto Immigration Courts*, 101 Calif. L. Rev. 553, 555 (2013).
11. *Padilla*, 559 U.S. at 369.
12. Diaz v. State, 896 N.W.2d 723, 728 (Iowa 2017) (citations omitted) (emphasis added).
13. *Padilla*, 559 U.S. at 368.
14. *See* People v. Soriano, 194 Cal. App. 3d 1470, 1480–82 (Cal. Ct. App. 1987); People v. Barocio, 216 Cal. App. 3d 99, 109 (Cal. Ct. App. 1989); People v. Bautista, 115 Cal. App. 4th 229, 242 (Cal. Ct. App. 2004).
15. Cal. Pen. Code §§ 1016.2–3 (West 2016).
16. *See* Legislative Analyst's Office, The 2017-2018 Budget: California Spending Plan 66 (2017), http:// www.lao.ca.gov/reports/2017/3694/spending-plan-2017.pdf; One California: Immigrant Services Funding (Jul. 28, 2017), https://ready-california.org/wp-content/uploads/2017/07/2017.18ExpandedOneCalifornia CDSSprogram.7.7.17-1.pdf.
17. Cal. Pen. Code § 1016.3(a) (West 2016).
18. 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, Gideon*'s Migration*, 122 Yale L.J. 2282, 2287 (2013) ("[I]mmigration crime is the largest single category of crime prosecuted by the federal government and noncitizens are over one-fourth of federal prisoners."); 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."); T. Alexander Aleinikoff et al., Immigration and Citizenship: Process and Policy 665–67 (7th ed. 2012) (discussing the retroactive application of expanded criminal grounds for deportability, including crimes involving moral turpitude).
19. 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).
20. These offenses can be considered crimes involving moral turpitude (CIMTs) and can trigger deportability grounds for removal, depending on the circumstances of the particular case. *See, e.g.*, Peter L. Markowitz, Immigrant Def. Project & N.Y. State Defs. Ass'n, Protocol for the Development of a Public Defender Immigration Service Plan 5 (2009), http://immigrantdefenseproject.org/ wp-content/uploads/2011/03/Protocol.pdf ("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 . . . .").
21. Controlled substances offenses make a noncitizen deportable when the criminal offense relates to the federal schedule in the Controlled Substances Act. *See* 8 U.S.C. § 1227(a)(2)(B)(i); 21 U.S.C. § 802. 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). A possible exception is marijuana possession of thirty grams or less. *See* 8 U.S.C. §§ 1182(h), 1227(a)(2)(B)(i).
22. *See, e.g.*, Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. Davis L. Rev. 277, 297–303 (2011) (providing examples of major immigration consequences including deportation); Eagly, *supra* note 18, at 1140–41 ("[T]he criminal alien category includes all noncitizens convicted of crimes . . . . For example, . . . migrants convicted of petty traffic offenses.").

    Certain criminal convictions bring about mandatory deportation or make a noncitizen inadmissible or ineligible for relief from removal. Crime-based deportable grounds are found in the Immigration and Nationality Act (INA) Section 237(a). 8 U.S.C. § 1227 (2012). Crime-based inadmissibility grounds are found in INA Section 212(a)(2). 8 U.S.C. § 1182(a)(2) (2012). 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 Section 212(a)(2). 8 U.S.C. § 1101(a)(13)(C) (2012). Under INA Section 237(a)(1)(A), anyone inadmissible (or excludable) at the time of entry or adjustment is deportable. 8 U.S.C. § 1227(a)(1)(A) (2012). 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). Unauthorized immigrants are generally removed under INA Section 212(a)(6)(A)(i) for being present in the United States without admission or parole. 8 U.S.C. § 1182(a)(6)(A)(i) (2012).
23. U.S. Immigration and Customs Enforcement, Fiscal Year 2016 ICE Enforcement and Removal Operations Report 2, https://www.ice.gov/sites/default/files/documents/Report/2016/removal-stats-2016.pdf [hereinafter 2016 ICE ERO Report]; U.S. Immigration and Customs Enforcement, Fiscal Year 2017 ICE Enforcement and Removal Operations Report, https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf [hereinafter 2017 ICE ERO Report]; *see also* Bill Ong Hing, American Presidents, Deportations, and Human Rights Violations: From Carter to Trump (forthcoming 2018); Gerald P. López, *Don't We Like Them Illegal?*, 45 U.C. Davis L. Rev. 1713 (2012).
24. *See* García Hernández, *supra* note 6.
25. 25 Cal. 4th 230, 251 (Cal. 2001), *abrogated on other grounds by* Padilla v. Kentucky, 559 U.S. 356, (2010) (quoting *Lehmann v. U.S. ex rel. Carson*, 353 U.S. 685, 691 (1957) (Black, J., concurring)).
26. *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 11 (2009), https://www.nacdl.org/reports/misdemeanor/ (finding that approximately 10.5 million non-traffic misdemeanors were prosecuted in 2006, dwarfing felony prosecutions); 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, 966 (2013) ("Millions of low- level arrests per year serve as the gateway into a backward criminal justice system . . . ."). For a more comprehensive discussion on the role of misdemeanors in the criminal justice system, see generally Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313 (2012); Alexandra Natapoff, Gideon*'s Servants and the Criminalization of Poverty*, 12 Ohio St. J. Crim. L. 445 (2015); Issa Kohler- Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 Stan. L. Rev. 611 (2014).
27. *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).
28. *See* Alexander, *supra* note 26, 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 19, 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.").
29. *See* Brown v. Plata, 563 U.S. 493 (2011) (holding California prisons' overcrowding unconstitutional).

30. Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. Crim. L. & Criminology 1213, 1218 (2010).
31. Chin, *supra* note 19, at 1803–06.
32. This area has been studied in depth. *See, e.g.*, Alexander, *supra* note 26, 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."). 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).
33. As of 2016, about 54 percent of the U.S. foreign-born population was nonwhite. Jie Zong & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, Migration Policy Inst. (Feb. 8, 2018), https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Demographic. Of the total foreign-born population, 45 percent reported their race having Hispanic or Latino origins, 27 percent reported their race as Asian, and 9 percent as Black. *Id.*
34. In 2016, 21.9 percent of noncitizens were below 100 percent of the poverty level, while 10.8 percent of naturalized citizens and 13.7 percent of U.S.-born citizens were below that level. Migration Policy Inst., State Immigration Data Profiles: United States Income & Poverty, https://www.migrationpolicy.org/data/ state-profiles/state/income/US. Additionally, 26.6 percent of noncitizens fell between 100 and 199 percent of the poverty level, while 17.6 percent of naturalized citizens and 17.1 percent of U.S.-born citizens fell in the same category. *Id.* The median household income for noncitizens was $44,076, compared to $63,302 for naturalized citizens and $58,402 for U.S.-born citizens. *Id.*
35. *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).
36. A prominent example is the use of "stop and frisk" policies that depend on express racial classifications targeting young Black and Latino men, in violation of the Fourteenth Amendment. *See generally* Floyd v. City of New York, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013). The government can still use "apparent Mexican ancestry" as one factor in establishing reasonable suspicion that occupants of a car are unauthorized immigrants. *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, e.g.*, *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 ("3,600 United States citizens have been arrested by ICE through the Secure Communities program."); Paige St. John & Joel Rubin, *ICE held an American man in custody for 1,273 days. He's not the only one who had to prove his citizenship*, L.A. Times (Apr. 27, 2018), *available at* http://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htmlstory.html.
37. *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.").
38. *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."); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 Am. Crim. L. Rev. 105, 160–64 (2012) (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).
39. *See, e.g.*, Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. Chi. L. Rev. 87, 90 (2013) (finding that ICE enforcement has been concentrated in Latino communities); 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, e.g.*, Jeremy Raff, *The "Double Punishment" for Black Undocumented Immigrants*, The Atlantic (Dec. 30, 2017), *available at* https://www.theatlantic.com/politics/archive/2017/12/the- double-punishment-for-black-immigrants/549425/; 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).
40. *See* Zong & Batalova, *supra* note 33.
41. *See* Bryan Baker, Dep't of Homeland Sec., Immigration Enforcement Actions: 2016 9 (Dec. 2017), https://www. dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf.
42. *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).
43. Alexander, *supra* note 26, at 7.
44. ACLU of Cal., Discharged, then Discarded: how U.S. Veterans are Banished by the Country They Swore to Protect 32 (July 2016), https://www.aclusandiego.org/wp-content/uploads/2017/07/DischargedThenDiscarded- ACLUofCA.pdf [hereinafter Discharged, then Discarded].
45. *See, e.g.*, Choe Sang-Hun, *Deportation a 'Death Sentence' to Adoptees After a Lifetime in the U.S.*, N.Y. Times (Jul. 2, 2017), *available at* https://www.nytimes.com/2017/07/02/world/asia/south-korea-adoptions-phillip-clay- adam-crapser.html; Tara Bahrampour, *They grew up as American citizens, then learned that they weren't*, Wash. Post (Sept. 2, 2016), *available at* https://www.washingtonpost.com/local/social-issues/thousands-of-adoptees- thought-they-were-us-citizens-but-learned-they-are-not/2016/09/02/7924014c-6bc1-11e6-99bf-f0cf3a6449a6_story. html?utm_term=.9f50e901aeef.
46. *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.
47. *See* Cecilia D. Wang, *For Immigrants, the Threat of Indefinite Detention*, N.Y. Times (Dec. 19, 2016), https:// www.nytimes.com/2016/12/19/opinion/indefinite-immigrant-detention-opdocs-vr.html ("[T]housands of people [have] been incarcerated for no good reason—leaving their families without financial support, hampering their own ability to defend against the government's deportation case, and suffering from often abominable prison conditions and crushing despair."). Certain noncitizens who are charged with removal based on a criminal offense are subject to mandatory detention. *See* 8 U.S.C. § 1226(c).

    In *Jennings v. Rodriguez*, the U.S. Supreme Court recently held that the INA authorizes the prolonged detention of certain noncitizens without a custody hearing during their removal cases. 138 S.Ct. 830 (2018). *Jennings* reversed an important Ninth Circuit Court of Appeals decision requiring a custody hearing before an immigration judge. *Id.* at 836, 842–47.

    In the decision below, the Ninth Circuit held that prolonged detention without a hearing under INA Sections 1225(b), 1226(a), and 1226(c) raised serious due process concerns and that neither of these detention provisions clearly authorized such detention. Rodriguez v. Robbins, 804 F.3d 1060, 1074–77 (9th Cir. 2015). Applying the canon of constitutional avoidance, the Ninth Circuit construed the statutes to require an automatic bond hearing before an immigration judge at six months of detention. *Id.* at 1078–85. The court also ordered periodic bond hearings every six months for detainees who are not released after their first hearing. *Id.* at 1087–89.

    Critically, the Ninth Circuit never reached the constitutional question of whether the Fifth Amendment's Due Process Clause requires a custody hearing over prolonged detention. The *Jennings* Court remanded for the Ninth Circuit to decide this question in the first instance. *Jennings*, 138 S.Ct. at 851.
48. *See generally* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. Rev. 1346, 1382–92 (2014).
49. *See, e.g.*, Daniel Kanstroom, Aftermath: Deportation Law and the New American Diaspora 135–57 (2012); Koball et al., *supra* note 46; 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).
50. Padilla v. Kentucky, 559 U.S. 356, 362 (2010).
51. *Id.* at 361–62. Once obtained from the sentencing court, a judicial recommendation against deportation (JRAD) was absolutely binding upon the U.S. Attorney General and left no discretionary authority to remove. People v. Barocio, 216 Cal. App. 3d 99, 108 (Cal. Ct. App. 1989). Thus, a JRAD was a significant tool available at the time to forestall removal. *Barocio*, 216 Cal. App. 3d at 108; *see also Padilla*, 559 U.S. at 363 (discussing how the Sixth Amendment right to effective counsel included a JRAD request). The JRAD was eliminated by Congress in 1990. *Id.*

52. Relief from deportation included, for example, the suspension of deportation and 212(c) waivers of deportation for lawful permanent residents. *See* Human Rights Watch, Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy 13–14 (July 2007), https://www.hrw.org/sites/default/files/reports/ us0707_web.pdf [hereinafter Forced Apart].
53. Discharged, then Discarded, *supra* note 44.
54. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7341–7344, 102 Stat. 4470.
55. *See* T. Alexander Aleinikoff et al., Immigration and Citizenship Process and Policy 681 (8th ed. 2016).
56. Forced Apart, *supra* note 52, at 12.
57. *See id.* at 18–20, 22–23, 25, 31.
58. Aleinikoff et al., *supra* note 55, at 681.
59. Am. Immigration Council, Aggravated Felonies: An Overview 1 (Dec. 2016), https://www. americanimmigrationcouncil.org/sites/default/files/research/aggravated_felonies.pdf.
60. *US: 20 Years of Immigrant Abuses*, Human Rights Watch (Apr. 25, 2016), https://www.hrw.org/ news/2016/04/25/us-20-years-immigrant-abuses (last visited Mar. 1, 2018).
61. Cabrera-Alvarez v. Gonzales, 423 F.3d 1006, 1015 (9th Cir. 2005) (Pregerson, J., dissenting).
62. *See, e.g., Secure Communities ("S-COMM")*, ACLU, https://www.aclu.org/other/secure-communities-s-comm (last visited Mar. 1, 2018).
63. *See* Jennie Pasquarella, *California: Let's Put a Hold on ICE*, ACLU of S. Cal. (June 17, 2014), https://www. aclusocal.org/en/news/california-lets-put-hold-ice. Recently, in the combined cases of *Roy v. Cnty. of Los Angeles* and *Gonzalez v. ICE*, the ACLU of Southern California and its partners brought class action litigation culminating in a landmark decision. In *Roy*, the U.S. District Court held that the Los Angeles Sheriff's Department (LASD) was liable for violating the Fourth Amendment rights of thousands of inmates it detained without probable cause of any crime, including some who were held for days after they should have been released. Roy v. Cnty of Los Angeles, No. CV1209012ABFFMX, 2018 WL 914773, at *24 (C.D. Cal. Feb. 7, 2018). The decision also held that LASD unconstitutionally incarcerated thousands of individuals with low bail amounts who would not even have been booked into jail if it were not for unconstitutional immigration detainers. *Id.* at *25. In addition, the decision issued in *Gonzalez* held that ICE's practice of issuing detainers based on evidence of a person's foreign place of birth and no other information about a person's citizenship or immigration status violates the Fourth Amendment. *Id.* at *20. *See also* Illinois v. Caballes, 543 U.S. 405, 407 (2005) (holding that a seizure that is initially lawful "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission"); Morales v. Chadbourne, 793 F.3d 208, 217 (1st Cir. 2015) ("Because Morales was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes—one that must be supported by a new probable cause justification."); Miranda-Olivares v. Clackamas Cty., No. 3:12-CV-02317-ST, 2014 WL 1414305, at *9–11 (D. Or. Apr. 11, 2014) (finding that the defendant maintained "a custom or practice in violation of the Fourth Amendment to detain individuals over whom the [defendant] no longer ha[d] legal authority based only on an ICE detainer which provide[d] no probable cause for detention").
64. *See* Am. Immigration Council, The 287(g) Program: An Overview 1 (2017), https://www. americanimmigrationcouncil.org/sites/default/files/research/the_287g_program_an_overview_0.pdf [hereinafter The 287(g) Program].
65. *The Growth of the U.S. Deportation Machine*, Am. Immigration Council (Mar. 1, 2014), https://www. americanimmigrationcouncil.org/research/growth-us-deportation-machine.
66. 2016 ICE ERO Report, *supra* note 23, at 2.
67. *See, e.g.*, Lasch, *supra* note 6; Sarah Gonzalez, *No One Expected Obama Would Deport More People Than Any Other U.S. President*, WNYC (Jan. 19, 2017), https://www.wnyc.org/story/no-one-thought-barack-obama-would- deport-more-people-any-other-us-president/.
68. *See* The 287(g) Program, *supra* note 64, at 2.
69. *See, e.g.*, Kate Linthicum, *Obama Ends Secure Communities Program as Part of Immigration Action*, L.A. Times, (Nov. 21, 2014, 4:00 AM), *available at* http://www.latimes.com/local/california/la-me-1121-immigration- justice-20141121-story.html. Nevertheless, the Priority Enforcement Program (PEP) left in place many of the same practices that caused the federal courts to find that the Secure Communities program violated the constitution. *See, e.g.*, Jennie Pasquarella, *ICE Is Playing the Name Game*, ACLU of S. Cal. (June 25, 2015), https://www.aclusocal.org/en/news/ice-playing-name-game. In particular, in failing to require that detainers include a judicial warrant, judicial determination of probable cause, or an individual, particularized statement of probable cause, PEP, like the Secure Communities program, plainly failed to satisfy the Fourth Amendment's basic protections. *Id.*
70. *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 Protection, 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. PEP prioritized for immigration enforcement not only people with felony convictions but also individuals convicted of misdemeanors. *Id.*
71. Barack Obama, President of the U.S., *Remarks by the President in Address to the Nation on Immigrants*, White House (Nov. 20, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president- address-nation-immigration.
72. *See, e.g.*, Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Data Shows*, N.Y. Times, Apr. 7, 2014, at A1; Christie Thompson & Anna Flagg, *Who is ICE Deporting?*, Marshall Project (Sept. 26, 2016), https://www.themarshallproject.org/2016/09/26/who-is-ice-deporting.
73. Exec. Order No. 13767, 82 Fed. Reg. 8,793 (Jan. 30, 2017); Exec. Order No. 13768, 82 Fed. Reg. 8,799 (Jan. 30, 2017); Exec. Order No. 13769, 82 Fed. Reg. 8,977 (Feb. 1, 2017).
74. *See* Exec. Order No. 13768, 82 Fed. Reg. 8,799, 8,800.
75. *See id.*
76. *See id.*
77. ICE arrests went up 30 percent from 2016 to 2017. Kristen Bialik, ICE arrests went up in 2017, with biggest increases in Florida, northern Texas, and Oklahoma, Pew Research Ctr. (Feb. 8, 2018), http://www.pewresearch. org/fact-tank/2018/02/08/ice-arrests-went-up-in-2017-with-biggest-increases-in-florida-northern-texas-oklahoma/; 2017 ICE ERO Report, *supra* note 23, at 2. In the same period, ICE detainers went up 65 percent. 2017 ICE ERO Report, *supra* note 23, at 8. ICE interior removals increased by 25 percent. *Id.* at 12.
78. For a small sample of the people who have been impacted by Executive Order Number 13678, see *Human Consequences of the Interior Immigration Enforcement Executive Orders*, FWD.us, https://www.fwd.us/consequences (last visited Mar. 1, 2018).
79. Jennie Pasquarella, *Jeff Sessions' lawsuit is an invitation for California to break the law*, L.A. Times (Mar. 8, 2018), http://www.latimes.com/opinion/op-ed/la-oe-pasquarella-sessions-californialawsuit-20180307-story.html.
80. Joseph Hayes, *Just the Facts: Immigrants in California*, Pub. Policy Inst. of Cal. (Jan. 2013), http://www.ppic. org/publication/immigrants-in-california.
81. *See, e.g., California Laws Passed in 2017 Pertaining to Immigrants*, Immigrant Legal Res. Ctr. (Dec. 2017), https://www.ilrc.org/sites/default/files/resources/ca_laws_2017_2.pdf. Following repeated threats to withhold funding from so-called "sanctuary" jurisdictions, the Trump Administration sued the State of California over recently-enacted laws, including the California Values Act. This lawsuit is about undermining "constitutional protections against unreasonable searches and seizures and the guarantee of due process [] intended to limit the government›s ability to harm people by unjustly arresting and detaining them." Pasquarella, *supra* note 79.
82. Cal. Pen. Code §§ 1016.2–3 (West 2016).
83. Cal. Pen. Code § 1473.7 (West 2017).
84. *See supra* note 16.
85. Alysia Santo, *How Conservatives Learned to Love Free Lawyers for the Poor*, Politico (Sept. 24, 2017), *available at* https://www.politico.com/magazine/story/2017/09/24/how-conservatives-learned-to-love-free-lawyers-for-the- poor-215635.
86. Jaeah Lee et. al, *Charts: Why You're in Deep Trouble if You Can't Afford a Lawyer*, Mother Jones (May 6, 2013), *available at* https://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts/.
87. 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); Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. Times (Mar. 10, 2012), *available at* https://www.nytimes.com/2012/03/11/ opinion/sunday/go-to-trial-crash-the-justice-system.html.
88. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (Brandeis, J., dictum).

89. By "front end," we refer to the stage of criminal proceedings during which a particular disposition is reached. We 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.
90. Professional norms are significant because the standard for effective assistance of counsel "is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Padilla v. Kentucky, 559 U.S. 356, 366 (2010) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).
91. A.B.A, A.B.A. Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons Std. 19-1.1(a) (3d ed. 2004), *available at* https://www.americanbar.org/content/dam/aba/ publishing/criminal_justice_section_newsletter/crimjust_standards_ collateralsanctionwithcommentary. authcheckdam.pdf; Boruchowitz et al., *supra* note 26, at 12.
92. A.B.A., Resolution 107C 1 (Aug. 6–7, 2012), http://www.americanbar.org/content/dam/aba/administrative/ criminal_justice/ABAResolution107c. authcheckdam.pdf [hereinafter A.B.A. Resolution 107C].
93. Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. Rev. 457, 478 (2010). The person remained physically present in the community but was no longer acknowledged as an "autonomous legal subject" capable of participating in civic life. Audrey Macklin, *Citizenship Revocation, The Privilege to Have Rights and the Production of the Alien*, 40 Queen's L.J. 1, 8 (2014).
94. *See* Pinard, *supra* note 30, at 1214.
95. *Id.* For a list of collateral consequences in California, see *California Compilation of Collateral Consequences*, Collateral Consequences Res. Ctr., http:// california.ccresourcecenter.org/ (last visited Feb. 28, 2018).
96. *See* Chin, *supra* note 19 (proposing that a new civil death has surreptitiously reemerged in the United States).
97. Smyth, Jr., *supra* note 32, at 55.
98. A.B.A. Resolution 107C, *supra* note 92, at 1.
99. Michael Pinard, *A Reentry-Centered Vision of Criminal Justice*, 20 Fed. Sent'g Rep. 103, 103 (2007).
100. A.B.A. Resolution 107C, *supra* note 92, at 4.
101. *Id.* at 1.
102. 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.
103. 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 criminal- immigration law, wherein each federal circuit largely sets its own precedent.
104. *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 (noting that deportation can send noncitizens back to the countries from which they fled violent persecution).
105. United States v. Rodriguez-Vega, 797 F.3d 781, 791 (9th Cir. 2015) ("[B]y the time of her sentencing hearing plea bargaining had ended and with it Rodriguez-Vega's ability to derive benefit from her counsel's advice during *the most critical period*.") (emphasis added).
106. Nat'l Legal Aid & Defender Ass'n, Performance Guidelines for Criminal Representation ¶ 6.2 (1995) [hereinafter NLADA Performance Guidelines]; *see also* A.B.A, A.B.A. Standards for Criminal Justice, Defense Function Std. 4-6.2 (4th ed. 2015), https://www.americanbar.org/groups/criminal_justice/ standards/ DefenseFunctionFourthEdition-TableofContents.html [hereinafter A.B.A. Standards for Criminal Justice, Defense Function] ("Defense counsel should ensure that the client understands any proposed disposition agreement, including its direct and possible collateral consequences.").
107. A.B.A. Resolution 107C, *supra* note 92, at 5; State Bar of Cal., Guidelines on Indigent Defense Services Delivery Systems 8–9 (2006) [hereinafter State Bar of Cal., Guidelines on Indigent Defense].
108. A.B.A. Resolution 107C, *supra* note 92, at 6; *see also* U.S. Dep't of Justice, Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance H2 (Dec. 2000), https://www.mynlada.org/ defender/DOJ/standardsv2/welcome.html (directing defenders to investigate and explore alternative negotiated dispositions).
109. *See* J. 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, 828 (2011); *see also* Sejal Zota & John Rubin, Am. Constitution Soc'y, Immigration Assistance for Indigent Defenders 2 (Oct. 2010), *available at* https://www.acslaw. org/files/Zota%20Rubin%20-%20Immigration%20Assistance.pdf (noting that training is "critical to educating defense counsel about the basic analysis involved in determining the immigration consequences of criminal convictions"); A.B.A. Resolution 107C, *supra* note 92, at 4–7; State Bar of Cal., Guidelines on Indigent Defense, *supra* note 107, at 20–21.
110. A.B.A. Standards for Criminal Justice, Defense Function, *supra* note 106, at Std. 4-5.5(c).
111. NLADA Performance Guidelines, *supra* note 106, at ¶ 2.2(a) (noting that information that must be acquired includes "the client's ties to the community . . ., family relationships, *immigration status* . . . .") (emphasis added); A.B.A. Resolution 107C, *supra* note 92, at 5; State Bar of Cal., Guidelines on Indigent Defense, *supra* note 107, at 8–9.
112. A.B.A. Standards for Criminal Justice, Defense Function, *supra* note 106, at Std. 4-5.5(a).
113. *See, e.g., id.* at Std. 4-6.2 ("Defense counsel should investigate and be knowledgeable about sentencing procedures, law, and alternatives, collateral consequences and likely outcomes, and the practices of the sentencing judge, and advise the client on these topics before permitting the client to enter a negotiated disposition."); A.B.A. Resolution 107C, *supra* note 92, at 6 ("In addition to the criminal issues, defense counsel should investigate the civil and social services issues that were brought up in the client interview."); State Bar of Cal., Guidelines on Indigent Defense, *supra* note 107, at 8–9; *see also* Cal. Crim. Law Proc. & Practice § 52.8 (2015) ("A general warning of the possible [immigration] consequences similar to what the court is required to give . . . is not sufficient advice by *defense counsel*, who must also advise a client of the specific immigration consequences that will be triggered in the defendant's particular case.") (emphasis in original).
114. A.B.A. Standards for Criminal Justice, Defense Function, *supra* note 106, at Std. 4-5.5(b).
115. *Id.* at Std. 4-5.5(c).
116. *See id.;* Cal. Crim. Law Proc. & Prac. § 52.8 (2014) ("Defense counsel who fails to investigate and advise the defendant of the specific immigration consequences of a guilty plea, and *who fails to try to avoid those consequences by obtaining an alternate disposition*, may be found to have provided ineffective assistance of counsel.") (emphasis added).
117. U.S. Const. amend. VI; Cal. Const. art. I, § 15 ("The defendant in a criminal cause has the right . . ., to have the assistance of counsel for the defendant's defense"). California statutory law also establishes the right to counsel. Cal. Pen. Code § 987.
118. Strickland v. Washington, 466 U.S. 668, 686–87 (1984); People v. Ledesma, 43 Cal. 3d 171, 215 (Cal. 1987).
119. Missouri v. Frye, 566 U.S. 134, 143 (2012).
120. *Id.*
121. *See* Lafler v. Cooper, 566 U.S. 156 (2012) (clarifying that plea bargaining is a critical stage of litigation requiring the effective assistance of counsel in connection with plea negotiations); *Frye,* 566 U.S. 134 (holding that counsel's failure to inform his client of a favorable plea offer was ineffective assistance of counsel).
122. Padilla v. Kentucky, 559 U.S. 356, 374 (2010). *Padilla* applies *Strickland*'s Sixth Amendment right to effective assistance of counsel analysis to noncitizen clients regarding their right to remain in the United States. *See id.* at 366. In so doing, *Padilla* follows *Strickland*'s two-prong analysis of determining both deficient performance and prejudice in order to find ineffective assistance of counsel post conviction. *Id.* at 366–69. Performance is deficient when it falls below an "objective standard of reasonableness" under "prevailing professional norms." *Id.* at 366 (citing *Strickland*, 466 U.S. at 688). 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). Prejudice is shown if the accused establish it was "reasonably probable [they] would not have pleaded guilty if properly advised." People v. Martinez, 57 Cal. 4th 555, 559 (Cal. 2013); Lee v. United States, 137 S. Ct. 1958, 1967 (2017) ("[W]e conclude that Lee has adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation."). A showing of a reasonable likelihood of a more favorable outcome is not required. *See* Lee, 137 S. Ct. at 1965. Rather, prejudice can be established with "a reasonable probability that, even in the absence of a more favorable plea agreement, [the petitioner] would have gone to trial." United States v. Rodriguez-Vega, 797 F.3d 781, 789 (9th Cir. 2015); *Lee,* 137 S. Ct. at 1965. Prejudice can be shown if there is a

reasonable likelihood the accused would have gone to trial *even if* they had no viable defenses and the prospect of acquittal at trial was grim. *Lee,* 137 S. Ct. at 1965.

123. *See* People v. Soriano, 194 Cal. App. 3d 1470, 1480–82 (Cal. Ct. App. 1987); People v. Barocio, 216 Cal. App. 3d 99, 109 (Cal. Ct. App. 1989); People v. Bautista, 115 Cal. App. 4th 229, 242 (Cal. Ct. App. 2004).

124. *See Padilla*, 559 U.S. at 367–74. According to the *Padilla* Court, "[i]t is quintessentially the duty of *counsel* to provide her client with available advice about an issue like deportation and the failure to do so clearly satisfies the first prong of the *Strickland* analysis." *Id.* at 371 (citations omitted) (emphasis added). For example, advice to consult with a different attorney about immigration consequences is insufficient to meet *Padilla*'s mandate. *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 consequences, 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).

125. The *Padilla* Court rejected the Solicitor General's request to allow silence regarding immigration consequences. *See Padilla*, 559 U.S. at 369–70. Instead, the Court made it clear that a holding limited to affirmative misadvice would be absurd. *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."). Thus, the Court would not allow defense counsel to avoid *Padilla*'s mandate by failing to inquire into a client's citizenship status.

Lower courts have consistently held that defense counsel must ascertain a client's immigration status. *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, as 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).

126. In *Padilla*, the Court established defense counsel's duty to read the relevant crime-based sections of the removal statute, which include both deportability and inadmissibility grounds for removal. *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."). In addition, counsel must research the controlling case law in their jurisdictions to assess whether precedent expressly identifies the crime of conviction as a ground for removal. *See* Rodriguez-Vega, 797 F.3d at 786–90. Depending on the jurisdiction, certain state offenses have been assigned a particular immigration consequence by the Board of Immigration Appeals or the federal circuit court of appeals for the particular jurisdiction.

Lower courts have applied *Padilla* to all the adverse immigration consequences of criminal dispositions, including inadmissibility consequences and bars to relief from removal. *See, e.g.*, Diaz v. State, 896 N.W.2d 723, 732 (Iowa 2017) ("[C]ounsel has an obligation to inform his or her client of *all* the adverse immigration consequences that competent counsel would uncover. We do not believe clients expect their counsel to only advise them that the chances of deportation are certain or possible. . . . This approach is integrated into the ABA guidelines, which instruct counsel to determine and advise of the 'potential adverse consequences from the criminal proceedings, including removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client's immediate family.' Certainly, any person contemplating a plea of guilty to a crime that could lead to deportation would want to know the full meaning and consequences of deportation.") (citing to *Padilla*, 559 U.S. at 368) (emphasis added); 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); 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.").

127. *See Padilla*, 559 U.S. at 368–71; *see also Rodriguez-Vega*, 797 F.3d at 790; *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 in original).

128. *Rodriguez-Vega*, 797 F.3d at 790. The analysis of whether removal is presumptively mandatory does not turn 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, e.g.*, *id.* 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); *Zemene*, 768 S.E.2d at 690 (finding ineffective assistance of counsel even though the client's removal was ultimately withheld under INA Section 241(b)).

129. *See, e.g.*, *Diaz*, 896 N.W.2d at 732; Budziszewski v. Comm'r of Correction, 142 A.3d 243, 249 (Conn. 2016) (holding that the constitution's Sixth Amendment's guarantee of effective assistance of counsel required counsel to unequivocally convey to petitioner that federal law mandated deportation as the consequence for pleading guilty to possession of controlled substance with intent to sell); Commonwealth v. DeJesus, 9 N.E.3d 789, 794–96 (Mass. 2014) (holding that defense counsel was ineffective when he merely advised his client that he would be "eligible for deportation" and "would face deportation" if he pleaded guilty to possession with intent to distribute a controlled substance, and reasoning this advice did not convey what was clearly stated in federal law—"that all of the conditions necessary for removal would be met by the defendant's guilty plea, and that, under [f]ederal law, there would be virtually no avenue for discretionary relief once the defendant pleaded guilty"); Encarnacion v. State, 763 S.E.2d 463, 466 (Ga. 2014) (holding that it is not enough to say "maybe" when the correct advice is "almost certainly will").

130. *See* People v. Soriano, 194 Cal. App. 3d 1470, 1480–82 (Cal. Ct. App. 1987); People v. Barocio, 216 Cal. App. 3d 99, 109 (Cal. Ct. App. 1989); People v. Bautista, 115 Cal. App. 4th 229, 242 (Cal. Ct. App. 2004). The U.S. Supreme Court confirmed this principle, already established in California, in *Padilla*, 559 U.S. 356.

131. 115 Cal. App. 4th. at 240–42.

132. *Id.* at 238.

133. *Id.*

134. *See, e.g.*, *Padilla*, 559 U.S at 373; United States v. Rodriguez-Vega, 797 F.3d 781, 787 (9th Cir. 2015) ("[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.").

135. *Padilla*, 559 U.S at 373.

136. 566 U.S. 156 (2012).

137. 566 U.S. 134 (2012).

138. *Padilla*, 559 U.S. at 373; *Lafler*, 566 U.S. 156 (clarifying that plea bargaining is a critical stage of litigation requiring the effective assistance of counsel in connection with plea negotiations); *Frye,* 566 U.S. 134 (holding that counsel's failure to inform his client of a favorable plea offer was ineffective assistance of counsel).

139. *Frye,* 566 U.S. at 144.

140. 194 Cal. App. 3d 1470 (Cal. Ct. App. 1987).

141. 216 Cal. App. 3d 99 (Cal. Ct. App. 1989).

142. 115 Cal. App. 4th 229 (Cal. Ct. App. 2004).

143. Cal. Pen. Code § 1016.3(a) (West 2016).

144. *Id.*

145. Cal. Pen. Code § 1016.2 (West 2016).

146. *Id.*

147. *Id.*; *see also id.* ("One out of every four persons living in the state is foreign-born. One out of every two children lives in a household headed by at least one foreign-born person. The majority of these children are United States citizens.").

148. *Id.* This finding follows closely the *Padilla* Court's policy considerations for its holding: "the concomitant impact of deportation on families living lawfully in this country." Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

149. Cal. Pen. Code § 1016.3(b) (West 2016).
150. *Padilla*, 559 U.S at 373.
151. Cal. Pen. Code § 1473.7 (West 2017).
152. *Id.* It is important to note that a finding of ineffective assistance of counsel is not necessarily required to vacate a criminal conviction or sentence under Section 1473.7. Anytime a defendant is meaningfully unaware of the specific immigration consequences of a conviction, they may, potentially, avail themselves of this motion. The reason for the lack of awareness may sometimes—even often—be due to a failure on the part of defense counsel, but it could also be the result of other factors including inadequate translation of court proceeding or if a defendant entered a plea without an attorney. *See, e.g.*, People v. Giron, 11 Cal.3d 793 (Cal. 1974); People v. Patterson, 2 Cal. 5th 885 (Cal. 2017), *as modified on denial of reh'g* (May 24, 2017). Section 1473.7 also created a legal vehicle for citizens or noncitizens to raise claims of actual innocence. Cal. Pen. Code §1473.7(a)(2) (West 2017).
153. 372 U.S. 335, 344 (1963).
154. *See id.* at 343–45.
155. *Id.* at 344–45 (citations omitted).
156. *Id.* at 343–45. While *Gideon* applied to felony cases, the U.S. Supreme Court later extended the right to appointed counsel to all cases in which the accused may be deprived of their liberty, whether characterized as a felony or a misdemeanor. *See* Argersinger v. Hamlin, 407 U.S. 25, 40 (1972). The Court also established that children in delinquency proceedings who faced commitment to an institution are entitled to counsel as a matter of due process. In re Gault, 387 U.S. 1, 34–42 (1967).
157. Eagly, *supra* note 18, at 2306.
158. *See id.*
159. *See, e.g.*, Margaret Love & Gabriel J. Chin, *The "Major Upheaval" of* Padilla v. Kentucky, 25 Crim. Just. 36, 37 (2010).
160. *See* 8 U.S.C. § 1229a(b)(4) (2012); 8 C.F.R. § 1003.16 (2015). In *Franco-Gonzales v. Holder*, however, 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).
161. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 2 (2015).
162. A recent national study on the access to counsel in immigration court shows that 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. *Id.*
163. Eagly, *supra* note 18, at 2294.
164. *Id.*
165. Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance after* Gideon v. Wainwright, 122 Yale L.J. 2150, 2174 (2013).
166. Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1137 (W.D. Wash. 2013).
167. Bright & Sanneh, *supra* note 165, at 2150. According to the U.S. Department of Justice's Bureau of Justice Statistics, those with publicly funded counsel are more likely to be incarcerated for longer than those with privately paid counsel. Caroline W. Harlow, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Defense Counsel in Criminal Cases (Nov. 2000), https://www.bjs.gov/content/pub/pdf/dccc.pdf.
168. 347 U.S. 483 (1954). For background on the legacy of opposition to *Brown v. Board of Education*, see generally Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707 (1993).
169. *See* Eagly, *supra* note 18, at 2311; *cf. Wilbur*, 989 F. Supp. 2d at 1131 ("Mere appointment of counsel to represent an indigent defendant is not enough to satisfy the Sixth Amendment's promise of the assistance of counsel.").
170. Clara S. Foltz. *Public Defenders–Rights of Persons Accused of Crimes–Abuses Now Existing*, 48 Alb. L.J. 248 (1893).
171. *See* Ruth B. Ginsburg, *Woman Lawyer: The Trials of Clara Foltz. by Barbara Babcock*, 65 Stan. L. Rev. 399, 405 (2013).
172. Barbara A. Babcock, Woman Lawyer: The Trials of Clara Foltz 309–11 (2011).
173. Foltz, *supra* note 170.
174. Barbara A. Babcock, *Inventing the Public Defender*, 43 Am. Crim. L. Rev. 1267, 1272 (2006).
175. *See* Ginsburg, *supra* note 171, at 401; Babcock, *supra* note 172, at 8, 14.
176. *See* Ginsburg, *supra* note 171, at 400; Babcock, *supra* note 172, at 14, 21.
177. *See* Ginsburg, *supra* note 171, at 401; Babcock, *supra* note 172, at 21–30.
178. *See* Ginsburg, *supra* note 171, at 402; Babcock, *supra* note 172, at 31.
179. In 1878, fewer than 50 women practiced law across the country. Babcock, *supra* note 172, at 8. According to the 1890 census, there were 208 women lawyers in the country. Babcock, *supra* note 174, at 1280.
180. For women lawyers, especially those practicing without a male partner, it was virtually impossible, at least at first, to attract paying clients. Babcock, *supra* note 174, at 1281.
181. Clara S. Foltz, *Public Defenders*, 31 Am. L. Rev. 393, 393 (1897).
182. *Id.*
183. *The Case Argued*, S.F. Examiner, Oct. 15, 1892, at 3.
184. Foltz, *supra* note 181, at 395.
185. Clara S. Foltz, *Duties of District Attorneys in Prosecutions*, 18 Crim. L. Mag. & Rep. 415, 415–16 (1896) (emphasis added).
186. Foltz, *supra* note 170.
187. Babcock, *supra* note 174, at 1271.
188. A report on women professional workers written in 1921 explained the connection between suffrage and the public defender: "[w]omen lawyers and leaders in the long fight for the franchise have gained an extensive legal and political education which they are putting at the disposal . . . of the ignorant and helpless and exploited everywhere." Elizabeth K. Adams, Women Professional Workers 73 (1921). Women lawyers "devote themselves to the human and preventive side of law, to the cause of 'Justice and the Poor' . . . . They seem admirably fitted to fill the post of 'public defender' now so widely advocated." *Id.* at 73–74. *See also* Babcock, *supra* note 174, at 1296.
189. Foltz, *supra* note 181, at 393; Historical and Contemporary Rev. of Bench and Bar in Cal. 109 (The Recorder Mar. 1926) (Foltz entry) [hereinafter Bench and Bar in Cal.].
190. Babcock, *supra* note 174, at 1271.
191. Ginsburg, *supra* note 171, at 405.
192. Bench and Bar in Cal., *supra* note 189, at 109.
193. "Equal Justice Under Law" is a phrase engraved on the front of the U.S. Supreme Court building.
194. *What Are Your Miranda Rights?*, MirandaWarning.org, http://www.mirandawarning.org/whatareyourmirandarights.html (last visited Mar. 1, 2018).
195. 384 U.S. 436 (1966).
196. D. Christopher Dearborn, *"You Have the Right to an Attorney," but Not Right Now: Combating Miranda's Failure by Advancing the Point of Attachment Under Article Xii of the Massachusetts Declaration of Rights*, 44 Suffolk U. L. Rev. 359, 414 (2011). This excerpt is from the standard *Miranda* warning given in Quincy, Massachusetts but is typical of warnings given nationally. *See Miranda*, 384 U.S at 444 ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a *right to the presence of an attorney, either retained or appointed.*") (emphasis added).

    It is important to note here that in 43 states *Gideon* attorneys come at a cost to the indigent accused. Devon Porter, *Paying for Justice: The Human Cost of Public Defender Fees*, ACLU of S. Cal. (June 2017), https://www.aclusocal.org/sites/default/files/pdfees-report.pdf. Twenty-seven of these states, including California, even allow for upfront "registration fees" administered before public defenders take on the representation of indigent clients. *Id.* In 2007, more than two in five county-based public defender offices charged registration fees, which typically ranged from $10 to $200 depending on the state and the type of case. Donald J. Farole, Jr. & Lynn Langton, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, County-based and Local Public Defender Offices, 2007 6 (Sept. 2010), https://www.bjs.gov/content/pub/pdf/clpdo07.pdf.

In Los Angeles County, under the leadership of Supervisors Sheila Kuehl and Mark Ridley-Thomas, the $50 registration fees the county used to charge have been eliminated. Nina Agrawal, *L.A. County ends public defender 'registration fee'*, L.A. Times (June 6, 2017), *available at* http://www.latimes.com/local/lanow/la-me-ln-registration-fee-20170606-story.html.

197. Smyth, Jr., *supra* note 32, at 43.

198. Instead of establishing public defender offices, many jurisdictions contract with individual private attorneys whom the courts appoint. The crisis of indigent defense can be even more acute in these jurisdictions, as public defender offices tend to have significantly better outcomes than individual court-appointed attorneys. *See* Eagly, *supra* note 18, at 2311–12; *see also* James Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 Yale L.J. 154 (2012). Institutional defender offices' increased efficacy and efficiency stems 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 improve services. In addition, the dynamic in which individual attorneys are appointed by the very judges before whom they have to appear on a regular basis can discourage a robust defense, leading to an emphasis on resolving cases quickly. *See, e.g.*, Richard A. Oppel, Jr., *His Clients Weren't Complaining. But the Judge Said This Lawyer Worked Too Hard*, N.Y. Times (Mar. 29, 2018), *available at* https://www.nytimes.com/2018/03/29/us/indigent-defense-lawyer-texas.html. Judges have incentives to appoint attorneys "who file fewer pretrial motions, ask fewer questions during voir dire, raise fewer objections, and present fewer witnesses." *Id.*

199. As of 2007, out of 957 offices in the United States, 427 were funded and controlled at the state level, and 530 are controlled and primarily funded at the local or county level. Ronald F. Wright, Padilla *and the Delivery of Integrated Criminal Defense*, 58 UCLA L. Rev. 1515, 1525 (2011). Public defender offices handle about 80 percent of all criminal cases. *See, e.g.*, Simon Waxman, *Pleading Out: America's Broken Public Defense System*, Los Angeles Review of Books (Mar. 18, 2013), https://lareviewofbooks.org/article/pleading-out-americas-broken-public-defense-system/.

200. *Supra* note 193.

201. William S. Sessions, *Foreword to* Norman Lefstein, A.B.A. Standing Comm. on Legal Aid & Indigent Defendants, Securing Reasonable Caseloads: Ethics and Law in Public Defense ix (2011), http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf.

202. 466 U.S. 668 (1984).

203. *Strickland*'s doctrine has generally not served the poor accused receiving subpar representation, for whom the need to prove prejudice—the second prong in *Strickland*—has made finding post-conviction relief demanding. Justice Thurgood Marshall, the sole dissenter in *Strickland*, had warned the standard was "so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts." Strickland, 466 U.S. at 707 (Marshall, J., dissenting). It therefore brings no comfort that a foundation for *Padilla* is *Strickland*. *See, e.g.*, 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."). Nevertheless, in light of *Lafler*, *Frye*, and related federal and state case law, it may be more feasible to meet the prejudice prong for *Padilla* purposes in the plea-bargaining context. *See, e.g.*, United States v. Rodriguez-Vega, 797 F.3d 781 (9th Cir. 2015) (using *Lafler* and *Frye* in its reasoning to find ineffectiveness of counsel under *Padilla* in the plea-bargaining context).

204. Bright & Sanneh, *supra* note 165, at 2152.

205. Nat'l Legal Aid & Defender Ass'n, Standards for the Defense, Standard 13.12 Workload of Public Defenders, [http://perma.cc/4AEB-22UT] [hereinafter NAC Standards]. States have also established caseload standards. *See* U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Assistance, Keeping Defender Workloads Manageable (Jan. 2001), https://www.ncjrs.gov/pdffiles1/bja/185632.pdf [hereinafter Keeping Defender Workloads Manageable].

206. A.B.A. Standing Comm. on Legal Aid & 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 [hereinafter A.B.A. Ten Principles].

207. Keeping Defender Workloads Manageable, *supra* note 205, at 8 ("[Caseload standards] do not take into consideration administrative or supervisory work, waiting or travel time, or professional development activities. Furthermore, they do not differentiate the amount of time required to work on various types of cases . . . . For example, all felonies, whether straightforward burglary charges or complicated child sex abuse charges, are given equal weight by NAC standards").

208. *See, e.g.*, Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1126 (W.D. Wash. 2013) ("[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 assumptions, the caseload limit must be lowered in an attempt to protect the quality of the representation provided.").

209. Brief for Petitioner, Phillips v. California, No. 15-02201, at *15 (July 14, 2015).

210. Keeping Defender Workloads Manageable, *supra* note 205, at 3–4.

211. *Id.* at 4.

212. *Id.* at 3.

213. *Id.* at 4.

214. *Id.* at 7.

215. Public defender offices must have adequate defense 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. Similarly, a lack of paralegals and administrators can lead to violations of standards. *See, e.g.*, A.B.A., A.B.A. Standards for Criminal Justice, Providing Defense Services Std. 5-1.4 (3d ed. 1992), https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_blk.html [hereinafter A.B.A. Standards for Criminal Justice, Providing Defense Services] ("The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation.").

216. Boruchowitz et al, *supra* note 26, at 21.

217. Keeping Defender Workloads Manageable, *supra* note 205, at 10.

218. *Id.*

219. A.B.A. Ten Principles, *supra* note 206, at 2; *see also* A.B.A. Standards for Criminal Justice, Providing Defense Services, *supra* note 215, at Std. 5-5.3 ("Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation . . . .").

220. *See* A.B.A. Standards for Criminal Justice, Defense Function, *supra* note 106, at Std. 4-5.5(c); A.B.A. Resolution 107C, *supra* note 92, at 6; *see also* Cal. R. Prof. Conduct 3-110 (providing, under the section titled "Failing to Act Competently," that any member of the bar who does not have sufficient learning and skill when legal service is undertaken should "associat[e] with or . . . professionally consult[] another lawyer reasonably believed to be competent"); *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).

221. Zota & Rubin, *supra* note 109, at 2.

222. A.B.A. Standards for Criminal Justice, Defense Function, *supra* note 106, at Std. 4-5.5(c); *see also* A.B.A. Resolution 107C, *supra* note 92, 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.").

223. Markowitz et al., *supra* note 20.

224. *Id.* at 19. As noted in the 2009 *Protocol for the Development of a Public Defender Immigration Service Plan*, this staffing level requires each immigration expert to complete about eight plea consultations a day. *Id.* The *Protocol* explains that this goal is impracticable, in part, because a significant part of minor cases is disposed of at arraignment with favorable dispositions unlikely to carry immigration consequences, and consultations in these cases are often not possible. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. Padilla v. Kentucky, 559 U.S. 356, 373, 369 (2010).
229. *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.") (emphasis added).
230. For highlights of these new laws, see Appendix A, *available* at https://www.aclusocal.org/defend-la.
231. Karen Houppert, *Legal aid for indigent clients needs help*, Wash. Post (Mar. 15, 2013), *available at* https://www.washingtonpost.com/opinions/legal-aid-for-indigent-clients-needs-help/2013/03/15/65dcbe56-8cc9-11e2-b63f-f53fb9f2fcb4_story.html?utm_term=.1f936faf3abb.
232. Foltz, *supra* note 181, at 397.
233. A.B.A. Standing Comm. on Legal Aid & Indigent Defendants, Gideon's Broken Promise: America's Continuing Quest for Equal Justice iv (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [hereinafter Gideon's Broken Promise].
234. *Id.* at 38.
235. Nat'l Right to Counsel Comm., The Constitution Project, Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel 7 (Apr. 2009), http://constitutionproject.org/pdf/139.pdf [hereinafter Justice Denied].
236. *See generally* Erwin Chemerinsky, *Lessons from* Gideon, 122 Yale L.J. 2150, 2685–91 (2013).
237. *See generally id.*
238. In *United States v. Cronic*, 466 U.S. 648 (1984), the U.S. Supreme Court recognized that there are circumstances in which ineffectiveness may be presumed without the prejudice inquiry because it is unlikely that a lawyer could provide effective assistance. *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 . . . ."). 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.'" Bell v. Cone, 535 U.S. 685, 695–96 (2002) (citing *Cronic*, 466 U.S. at 659–62). Even though the *Cronic* Court did not find the particular facts of the case at hand to warrant a presumption of ineffectiveness, the decision has in effect allowed for structural litigation seeking prospective or injunctive relief. *See* Carol S. Steiker, Gideon *at Fifty: A Problem of Political Will*, 122 Yale L.J. 2694, 2701 (2013).

    Lower courts have followed suit in extending the Court's rejection of the need to prove prejudice in systemic deficiency challenges seeking prospective relief. *See, e.g.*, Luckey v. Harris, 860 F.2d 1012, 1017–18 (11th Cir. 1988), *rev'd on abstention grounds by* Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992) ("Th[e] [*Strickland*] standard is inappropriate for a civil suit seeking prospective relief."); 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); Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1123, 1127 (W.D. Wash. 2013); Phillips v. California, No. 15-02201, at *4–5 (Apr. 12, 2016) ("Since no individual convictions are being challenged, the court will only address the question of whether there is a claim of systemic deprivation. . . . Plaintiffs correctly point out that mere token appointment of counsel does not satisfy the Sixth Amendment right to counsel.").
239. *See, e.g.*, *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."); 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"). 240. Justice Denied, *supra* note 235, at 6–7.
241. Lynn Langton & Donald J. Farole, Jr., U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, State Public Defender Programs, 2007 13 (Sept. 2010), https://www.bjs.gov/content/pub/pdf/spdp07.pdf.
242. Farole, Jr. & Langton, *supra* note 196, at 3, 10.
243. Boruchowitz et al, *supra* note 26, at 9. As of 2007, for example, only a minute fraction of both state and county-based offices met the accepted professional guideline for the ratio of investigators to public defenders. Langton & Farole, Jr., *supra* note 241, at 16; Farole, Jr. & Langton, *supra* note 196, at 12.
244. Justice Denied, *supra* note 235, at xi.
245. A.B.A. Ten Principles, note 206, at 2; A.B.A. Standards for Criminal Justice, Defense Function, *supra* note 106, at Std. 4-1.8(a).
246. Am. Council of Chief Defenders, Ethics Opinion 03-01 (Apr. 2003), http://nlada.net/sites/default/files/accd_ethicsopinion03-01caseloads04-2003.pdf.
247. A.B.A. Standards for Criminal Justice, Defense Function, *supra* note 106, at Std. 4-1.8(c).
248. *Id.*; NAC Standards, *supra* note 205.
249. For example, in *Wilbur v. City of Mount Vernon*, a federal 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 1123, 1127 (W.D. Wash. 2013).

    In another example, plaintiffs sued the governor of Connecticut, alleging 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), *available at* http://www.nlada.net/sites/default/files/ct_riveravrowland_aclucomplaint_01-22-1997.pdf. 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.*

    In a more recent case, plaintiffs sued the State of New York over the state's failure to create and support a public defense system that ensured the indigent accused would receive effective assistance of counsel. *See generally* Hurrell-Harring v. State, 930 N.E.2d 217 (N.Y. 2010). The case culminated in a historic settlement bringing about major reform in five New York State counties outside of New York City. *Settlement Begins Historic Reformation of Public Defense in New York State*, NYCLU (Oct. 21, 2014), https://www.nyclu.org/en/press-releases/settlement-begins-historic-reformation-public-defense-new-york-state. Reforms included, among other measures: ensuring a lawyer will be provided at the first court appearance; requiring the state of New York to hire sufficient lawyers, investigators, and support staff; and setting caseload standards that substantially limit the number of cases a lawyer can carry. *Id.*

    In California, the ACLU of Northern California, on behalf of plaintiffs, recently sued Fresno County and the State of California to overhaul the county's deficient public defense system. *See generally* Brief for Petitioner, Phillips v. California, No. 15-02201 (July 14, 2015). The lawsuit alleges many structural deficiencies in Fresno's indigent defense system, including: excessive caseloads; case management practices that create conflicts of interest for attorneys; inadequate resources; and inadequate supervision. *Id.* The lawsuit alleges that these structural deficiencies cause the system to provide for representation that falls below minimum constitutional and statutory standards, for instance, through: inadequate preparation; lack of conflict-free legal representation; lack of continuous representation; inadequate opportunity for consultation; interference with competent representation due to inadequate training and support from supervisors; inadequate factual investigation; and lack of meaningful adversarial testing. *Id.* In 2016, the court ruled against the defendants in their efforts to avoid responsibility for ensuring indigent defendants are provided with effective counsel. *See* Phillips v. California, No. 15-02201 (Apr. 12, 2016). In particular, the court found that plaintiffs' allegations were sufficient to state a claim against Fresno County for systemically depriving indigent defendants of assistance of counsel. *Id.* at *15.
250. *See, e.g.*, *Wilbur*, 989 F. Supp. 2d at 1130–31; 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 public 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).

251. *Wilbur*, 989 F. Supp. 2d at 1130–31.
252. *See, e.g.*, *Wilbur*, 989 F. Supp. 2d at 1128 (finding 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*, 115 So.3d at 278 (finding that defenders did not communicate with clients, were unable to investigate the allegations, and were unprepared for trial); *Hurrell-Harring*, 930 N.E.2d at 224 (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").
253. *See* Hurrell-Harring, 930 N.E.2d at 224; *Statement of Interest of the United States in* Hurrell-Harring v. New York, No. 8866-07, U.S. Dep't of Justice 210 (Sept. 25, 2014), http://www.justice.gov/crt/about/spl/documents/hurrell_soi_9-25-14.pdf.
254. *See* Alexander, *supra* note 87.
255. Langton & Farole, Jr., *supra* note 241, at 1.
256. Smyth, Jr., *supra* note 32, at 47.
257. *See generally* Bright & Sanneh, *supra* note 165, at 2158. For a recent, illuminating exposé of prosecutors' power and practice of overcharging, see Abacus: Small Enough to Jail (2017); *see also* Lorraine Ali, *'Frontline' takes an absorbing look at the big story of a little bank in 'Abacus: Small Enough to Jail'*, L.A. Times (Sept. 11, 2017), *available at* http://www.latimes.com/entertainment/tv/la-et-st-frontline-abacus-review-20170912-story.html; Jiayang Fan, *The Accused: When a Chinatown bank was investigated for fraud, a community's financial way of life was put on trial*, New Yorker (Oct. 12, 2015), *available at* https://www.newyorker.com/magazine/2015/10/12/the-accused-jiayang-fan.
258. *See* 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, 685 (2006); Bright & Sanneh, *supra* note 165.
259. Bach, *supra* note 87, at 130, 189. In this context, innovative advocates are creating new strategies to hold prosecutors accountable through elections. *See, e.g.*, Shaun King, *Drastically Changing How We Fight for Justice in America*, Medium (Feb. 15, 2018), https://medium.com/@ShaunKing/drastically-changing-how-we-fight-for-justice-in-america-bea5ce648b41; Brandon E. Patterson, *When Being "Tough on Crime" Is a Political Liability*, Mother Jones (Apr. 12, 2018), https://www.motherjones.com/crime-justice/2018/04/when-being-tough-on-crime-is-a-political-liability/.
260. *See* Bright & Sanneh, *supra* note 165, at 2159.
261. Bach, *supra* note 87, at 138.
262. A.B.A. Ten Principles, *supra* note 206, at 2.
263. Waxman, *supra* note 199.
264. Laurence A. Benner et al., Systemic Factors Affecting the Quality of Criminal Defense Representation, http://www.cpda.org/publicarea/CCFAJ/Professional-Responsibility-DAs-and-Defenders/Professional-Responsibility-DAs-and-Defenders/Supplemental%20Report%20Benner.pdf.
265. Bright & Sanneh, *supra* note 165, at 2156.
266. Oliver Roeder et al., Brennan Ctr. for Justice, What Caused the Crime Decline? 1 (2015), https://www.brennancenter.org/sites/default/files/publications/What_Caused_The_Crime_Decline.pdf.
267. Letter from Association of Prosecuting Attorneys et al. to Hillary Clinton & Donald Trump (July 13, 2016), http://www.lawenforcementleaders.org/wp-content/uploads/2016/07/Law-Enforcement-Letter.pdf.
268. *See* Shaun King, *Philadelphia DA Larry Krasner Promised a Criminal Justice Revolution. He's Exceeding Expectations*, Intercept (Mar. 20, 2018), https://theintercept.com/2018/03/20/larry-krasner-philadelphia-da/.
269. A.B.A., A.B.A. Prosecution Function Standards, Standard 3-5.6 (c) (4th ed. 2015).
270. Robert Johnson, *Collateral Consequences*, 16 Crim. Just. 32, 33 (2001).
271. Robert Johnson, *A Prosecutor's Responsibility Under* Padilla, 31 St. Louis Pub. Rev. 129, 136 .(2011).
272. *See* Brief for the American Bar Association as *Amicus Curiae* Supporting Petitioner at 15-26, Padilla v. Kentucky, 559 U.S. 356 (2010) (No. 08-651).
273. Padilla, 559 U.S at 373.
274. For example, Seattle's Law Enforcement Assisted Diversion (LEAD) allows for pre-booking diversion inresponse to low-level drug and prostitution offenses. *Evaluation*, LEAD, http://leadkingcounty.org/lead-evaluation/ (last visited Mar. 15, 2018). Developed with community groups, law enforcement agencies, and public officials, the program has demonstrated better results—including recidivism rates, costs, and access to services—than the typical criminal justice model.
275. In New York City, for example, the Criminal Justice Reform Act was passed to divert the most common low-level and quality-of-life offenses—such as public urination, turnstile jumping, and open container offenses—away from the criminal justice system by issuing civil summonses to offenders rather than arresting them. *See Mayor de Blasio Signs the Criminal Justice Reform Act*, City of New York (June 13, 2016), http://www1.nyc.gov/office-of-the-mayor/news/530-16/mayor-de-blasio-signs-criminal-justice-reform-act.
276. Representations by defense counsel regarding specific biographical information, including attestations of immigration status, coupled with relevant legal authority, should satisfy the prosecutor that an individual's immigration status is or would be affected as a result of the charge, prosecution, or particular disposition. Defense counsel should not be required to provide corroborating documents attesting to the client's immigration status that are not already available to law enforcement.
277. Fair Punishment Project et al., The Promise of Sanctuary Cities and the Need for Criminal Justice Reforms in an Era of Mass Deportation 25 (2017), http://fairpunishment.org/wp-content/uploads/2017/04/FPP-Sanctuary-Cities-Report-Final.pdf.
278. Filing and Disposition Standards § 2(V), King County Prosecuting Attorney's Office (May 2016), *available at* http://www.kingcounty.gov/~/media/depts/prosecutor/documents/2016/fads-may-2016.ashx?la=en.
279. *For Immediate Release: Acting Brooklyn District Attorney Eric Gonzalez Announces New Policy Regarding Handling of Cases Against Non-Citizen Defendants*, Eric Gonzalez, District Attorney Kings County (Apr. 24, 2017), *available at* http://www.brooklynda.org/2017/04/24/acting-brooklyn-district-attorney-eric-gonzalez-announces-new-policy-regarding-handling-of-cases-against-non-citizen-defendants/.
280. Justin Fenton, *Baltimore prosecutors told to consider consequences for prosecuting illegal immigrants for minor crimes*, Baltimore Sun (Apr. 28, 2017), *available at* http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-states-attorney-immigrants-20170428-story.html.
281. *See* Guidelines Regarding the Consideration of Collateral Immigration Consequences During Plea Negotiations, Nancy E. O'Malley, Office of the District Attorney, Alameda County (Oct. 8, 2012), *available at* http://libguides.law.ucla.edu/ld.php?content_id=13656338; Memorandum Regarding Collateral Consequences from Jeff Rosen, District Attorney, Santa Clara District Attorney's Office to Fellow Prosecutors (Sept. 14, 2011) *available at* http://www.ilrc.org/files/documents/unit_7b_4_santa_clara_da_policy.pdf.
282. Cal. Pen. Code § 1016.3(b) (West 2016).
283. Robert F. Kennedy, Attorney Gen., Address at the University of Chicago Law School (May 1, 1964), https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/05-01-1964.pdf. Attorney General Kennedy gave this address shortly after the *Gideon* decision and recognized the need for public defenders to address clients' civil, legal, and social service needs.
284. *See* Steinberg, *supra* note 26, at 974.
285. *See* Pinard, *supra* note 258, at 629.
286. *See id.* at 633.
287. Smyth, Jr., *supra* note 32, at 46. *See also* A.B.A. Resolution 107C, *supra* note 92, at 4–7 (recommending public defenders proactively prepare for reentry); Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry Into Criminal Defense Lawyering*, 31 Fordham Urb. L.J. 1067, 1069 (2004) (discussing the need for defense attorneys to incorporate both collateral consequences and reentry components into their practices).
288. Wright, *supra* note 199, at 1535.
289. *Id.* at 1532.
290. Roberts, *supra* note 22, at 360.

291. Padilla v. Kentucky, 559 U.S 356, 373 (2010).
292. McGregor Smyth has argued that *Padilla* should also apply to other serious collateral consequences, as these are also intimately connected to the criminal process. Smyth, Jr. *supra* note 109, at 802 ("[T]hese penalties are intimately related to criminal charges (not just convictions), and are serious, often draconian, and lifelong."). Collateral consequences are more accurately described as "enmeshed penalties" of people's criminal justice contact. *Id.*
293. Holistic defense seeks to advance rebellious lawyering 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. *See generally* Gerald P. López, Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice (1992); Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. Rev. L & Soc. Change 153, 176–78 (2004); Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. Inst. for Study Legal Ethics 199 (1999); Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 Geo. L.J. 2419 (1996); Charles J. Ogletree, *An Essay on the New Public Defender for the 21st Century*, 58 Law & Contemp. Probs. 81 (1995). For a more recent, comprehensive discussion of the holistic public defense model, see generally Steinberg, *supra* note 26; *see also* Cynthia G. Lee et al., *The Measure of Good Lawyering: Evaluating Holistic Defense in Practice*, 78.3 Alb. L. Rev. 1215, 1216 (2014/2015).
294. *The Center for Holistic Defense*, Bronx Defenders, http://www.bronxdefenders.org/programs/center-for-holistic-defense (last visited Feb. 26, 2018).
295. Steinberg, *supra* note 26, at 974.
296. *Id.* at 987–91 (2013). If offices are unable to provide these services in house, they must create seamless access to whatever services exist in the community. *Id.* at 989.
297. *Id.* at 987–91.
298. *Id.* at 995–97.
299. *Id.* at 991–95.
300. *Id.* at 997–1002; Cynthia G. Lee et al., *supra* note 293, at 1224.
301. Structural reform efforts should 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 important. 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 can assist their clients and their communities to claim and build power and shape their own narratives, rebelling against the societally created narratives imposed on them. Offices can 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.
302. Steinberg, *supra* note 26, at 997–1002; Cynthia G. Lee et al., *supra* note 293, at 1224.
303. *See* Taylor-Thompson, *Taking It to the Streets*, *supra* note 293, at 176–78.
304. This case study has been developed over time since 2014, through in-person meetings, phone interviews, and email correspondence with former Executive Director Robin Steinberg, former Managing Director of the Civil Action Practice Kate Rubin, former Director of the Immigration Practice Jennifer Friedman, former Legal Director of Immigration Isaac Wheeler, Managing Director of the Criminal Defense Practice Alice Fontier, and Managing Director of Immigration Practice Sarah Deri Oshiro. For a discussion on the development of the immigration defense practice, see Andrés Dae Keun Kwon, *Defending Criminal(ized) "Aliens" After* Padilla: *Toward a More Holistic Public Immigration Defense in the Era of Crimmigration,* 63 UCLA L. Rev 1034, 1085–88 (2016).
305. Telephone Interview with Alice Fontier, Managing Dir. of CDP, and Sarah Deri Oshiro, Managing Dir. of Immigration, The Bronx Defenders (Mar. 8, 2018) (on file with author) [hereinafter Telephone Interview with Alice Fontier and Sarah Deri Oshiro].
306. *See QuickFacts, Bronx County, New York,* U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/bronxcountybronxboroughnewyork/PST045217 (last visited Mar. 1, 2018).
307. *See id.*
308. *See id.*; *American FactFinder, Selected Characteristics of the Native and Foreign-Born Populations, 2012-2016 American Community Survey 5-Year Estimates*, U.S. Census Bureau, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_16_5YR_S0501&prodType=table (last visited Mar. 1, 2018) [hereinafter *2012-2016 ACS 5-Year Estimates*].
309. *The Center for Holistic Defense*, Bronx Defenders, http://www.bronxdefenders.org/programs/center-for-holistic-defense (last visited Feb. 26, 2018).
310. *See, e.g.*, A.B.A. Resolution 107C, *supra* note 92, at 7–8.
311. *The Bronx Defenders Wins the National Legal Aid and Defender Association's 2013 Clara Shortridge Foltz Award*, Bronx Defenders (Oct. 17, 2013), https://www.bronxdefenders.org/the-bronx-defenders-wins-the-national-legal-aid-and-defender-associations-2013-clara-shortridge-foltz-award/.
312. The Times Editorial Board, *Is the new public defender ending or stoking office turmoil?*, L.A. Times (Feb. 9, 2018), *available at* http://www.latimes.com/opinion/editorials/la-ed-public-defender-20180209-story.html.
313. Steinberg, *supra* note 26, at 963; Smyth, Jr., *supra* note 109, at 835.
314. The Bronx Defenders (BxD)'s Immigration Defense Practice is one among several practices, including the Criminal Defense Practice, the Family Defense Practice, and the Civil Action Practice. *See Our Work*, Bronx Defenders, http://www.bronxdefenders.org/programs/center-for-holistic-defense (last visited Feb. 26, 2018).
315. Eagly, supra note 18, at 2295.
316. *Id.* at 2297.
317. Interview with Kate Rubin, Former Managing Dir. of the Civil Action Practice, The Bronx Defenders, in New York City (Mar. 24, 2015) [hereinafter Interview with Kate Rubin].
318. This universal model of direct immigration representation is unique to the New York Immigrant Family Unity Project (NYIFUP). As explained later in the text above the line, BxD employs 15 immigration attorneys exclusively for NYIFUP, which provides universal representation to all detained indigent noncitizens in New York City. This universal model was not discussed in the 2009 *Protocol*. Thus, to calculate ratios for this report, we use the full-time equivalent of seven attorneys who largely focus on *Padilla* consultations and provide some targeted direct immigration representation.
319. For comparison purposes, because public defender offices generally do not track exact figures, the estimate of an office's noncitizen caseload is derived from the county's noncitizen makeup. In their 2009 *Protocol*, the New York State Defenders Association and the Immigrant Defense Project used the county noncitizen makeup to determine public defender offices' needs for immigration expertise. Markowitz et al., *supra* note 20, at 19. Studies have born out the relatedness of the noncitizen population in a given jurisdiction to the noncitizen population in the public defender system. For example, the Contra Costa County Office of the Public Defender (CCCPD)'s audits of its clients in 2015 and 2016 found that about 12 percent of its clients were noncitizen—virtually identical to Contra Costa County's noncitizen makeup of 12.9 percent. *See infra* note 423 Whether noncitizens offend at lower rates than U.S. citizens is inconclusive from the literature. *See, e.g,* Alex Nowrasteh, *Immigration and Crime – What the Research Says*, Cato Inst. (July 14, 2015), https://www.cato.org/blog/immigration-crime-what-research-says (explaining the complications of these types of studies, the poor nature of census data on immigration status, incarceration, and criminal convictions, and the heightened difficulties of gathering data for unauthorized immigrants); Jörg L. Spenkuch, *Understanding the Impact of Immigration on Crime*, Am. Law & Econ. Rev. 16:1 (Mar. 2014), *available at* https://academic.oup.com/aler/article-abstract/16/1/177/135166?redirectedFrom=PDF; Michael Kiefer, *Migrant Rate of Crime Even with Numbers*, Arizona Republic, (Feb. 25, 2008) (reporting that a review of criminal justice statistics in Maricopa County, which includes Phoenix, revealed that undocumented immigrants are charged with criminal activity at the same rate as the general population). Moreover, noncitizens—as a population that is predominantly of color and poorer—face disproportionate rates of criminalization, over-policing, and over-prosecution. *See supra* notes 33–35.

    To calculate the rough estimate of BxD's caseload involving noncitizen clients, we take its total criminal caseload of 24,000 cases and apply the percentage of noncitizen residents of Bronx County, which is about 18.4 percent. BxD's annual noncitizen caseload is thus approximately 4,400. Finally, this figure is divided by the number of BxD's immigration experts who work on *Padilla* consultations, which is seven attorneys.
320. BxD's seven *Padilla* attorneys opened 1,246 plea consultation cases in fiscal year 2017. Email from Sarah Deri Oshiro, Managing Dir. of Immigration, The Bronx Defenders (Apr. 9, 2018) (on file with author). BxD believes this method provides a more accurate ratio. *Id.*
321. BxD has the full-time equivalent of 77 defenders. This number, divided by the seven immigration experts working on *Padilla* consultations, is equal to 11.
322. Steinberg, *supra* note 26, at 963.

323. Meeting with Robin Steinberg, Exec. Dir., The Bronx Defenders, in Los Angeles (Nov. 3, 2014) [hereinafter Meeting with Robin Steinberg].
324. Interview with Isaac Wheeler, Former Legal Dir. of Immigration, The Bronx Defenders, in New York City (Mar. 24, 2015) [hereinafter Interview with Isaac Wheeler].
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. For an insightful understanding of what it means to lawyer in subordinated communities, see generally López, *supra* note 293; 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).
331. Meeting with Robin Steinberg, *supra* note 323.
332. Appendix B, *available* at http://aclusocal.org/defend-la.
333. Interview with Isaac Wheeler, *supra* note 324.
334. *Id.*
335. *Id.* Lawful permanent residents can often present more opportunities for relief from removal than unauthorized immigrant clients. *See* Wright, *supra* note 199, at 1539–40.
336. If the criminal defenders have any doubt, they are expected to call the immigration experts on their teams.
337. Interview with Isaac Wheeler, *supra* note 324.
338. *Id.*
339. Telephone Interview with Alice Fontier and Sarah Deri Oshiro, *supra* note 305.
340. Interview with Isaac Wheeler, *supra* note 324.
341. *See New York Immigrant Family Unity Project,* Vera Inst. of Justice, https://www.vera.org/blog/new-york-immigrant-family-unity-project-lays-groundwork-for-constitutional-victory (last visited Apr. 1, 2018). Other local governments and advocates are building similar programs. *See SAFE Cities Network*, Vera Inst. of Justice, https://www.vera.org/projects/safe-cities-network (last visited Apr. 1, 2018).
342. Interview with Isaac Wheeler, *supra* note 324.
343. *Id.*
344. *Id.*
345. 8 U.S.C. §§ 1101(a)(15)(U); 1184(p) (2012).
346. Memorandum from Secretary Janet Napolitano, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.
347. 8 U.S.C. § 1101(a)(27)(J) (2012).
348. 8 U.S.C. § 1229b(b)(2) (2012).
349. 8 U.S.C. § 1255(a) (2012).
350. 8 U.S.C. § 1254a (2012).
351. *See* 8 U.S.C. § 1427 (2012).
352. 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).
353. BxD was an important participant in the campaign against the New York City Police Department's stop-and-frisk policy and in the lawsuit that ultimately struck it down as unconstitutional. *See* 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.
354. *See, e.g.*, Gwynne Hogan, *Public Defenders Walk Out of Bronx Courthouse After College Student Detained by ICE*, WNYC (Feb. 8, 2018), https://www.wnyc.org/story/public-defenders-walk-out-bronx-courthouse-after-college-student-detained-ice/.
355. Telephone Interview with Alice Fontier and Sarah Deri Oshiro, *supra* note 305.
356. *Id.*
357. *Id.*
358. *Id.*
359. *Id.*; Immigrant Justice Corps, http://justicecorps.org/ (last visited Mar. 1, 2018).
360. Interview with Isaac Wheeler, *supra* note 324.
361. *Id.*; Telephone Interview with Alice Fontier and Sarah Deri Oshiro, *supra* note 305.
362. Telephone Interview with Alice Fontier and Sarah Deri Oshiro, *supra* note 305.
363. *Id.*
364. *Id.*
365. *Id.*
366. *Id.*
367. *Id.*
368. For the training team, reviews are every six months. Interview with Kate Rubin, *supra* note 317.
369. *Id.*
370. *Id.*
371. Interview with Isaac Wheeler, *supra* note 324.
372. Interview with Kate Rubin, *supra* note 317.
373. *Id.*
374. Email from Sarah Deri Oshiro (Apr. 7, 2018) (on file with author).
375. *Id.*
376. *Id.*
377. *Id.*
378. Telephone Interview with Raha Jorjani, Dir., Immigration Representation Unit, Alameda Cnty. Pub. Defender (Nov. 28, 2017) [hereinafter Telephone Interview with Raha Jorjani]; Telephone Interview with Rachael Keast, Attorney, Immigration Representation Unit, Alameda Cnty. Pub. Defender (Nov. 30, 2017) [hereinafter Telephone Interview with Rachael Keast]. These interviews are the main sources for this case study.
379. Alameda Cnty. Pub. Defender, http://www.co.alameda.ca.us/defender (last visited Feb. 1, 2018).
380. E-mail from Rachael Keast, Attorney, Immigration Representation Unit, Alameda County Public Defender (Dec. 14, 2017) (on file with author) [hereinafter E-mail from Rachael Keast (Dec. 14, 2017)]; *FY 2017-18 MOE Budget,* Alameda Cnty. Pub. Defender, https://acgov.org/MS/OpenBudget/pdf/FY17-18/PD%20MOE%20Budget%20Presentation%2017-18%20Final%2004.10.17.pdf.
381. *QuickFacts, Alameda County, California,* U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/alamedacountycalifornia/PST045216.
382. *See id.*; *2012-2016 ACS 5-Year Estimates*, *supra* note 308.
383. Telephone Interview with Brendon Woods, Chief Pub. Defender, Alameda Cnty. Pub. Defender (Dec. 13, 2017) [hereinafter Telephone Interview with Brendon Woods].
384. *Services,* Alameda Cnty. Pub. Defender, http://www.co.alameda.ca.us/defender/services (last visited Feb. 1, 2018).
385. *Id.*

386. *Id.*
387. *Id.*
388. *Id.*
389. Telephone Interview with Brendon Woods, *supra* note 383.
390. *Id.*
391. Press Release, Alameda Cnty. Pub. Defender, California's First County Public Defender Immigration Representation Project, Alameda Cnty. Pub. Defender, http://www.acgov.org/defender/documents/PRESSRELEASEJorjanihiringChorneyedits.pdf [hereinafter ALCO PD Press Release]. The San Francisco Public Defender's Office is another model office that seeks to more comprehensively provide immigration legal services, including direct representation in removal proceedings.
392. *Id.*
393. This is an approximate full-time equivalent of the number of attorneys in the Office of the Alameda County Public Defender (ALCO PD)'s Immigration Representation Unit (IRU).
394. *Immigration*, Alameda Cnty. Pub. Defender, http://www.co.alameda.ca.us/defender/services/immigration.htm (last visited Feb. 1, 2018).
395. The estimate of ALCO PD's annual caseload involving noncitizen clients is calculated by taking its total caseload of 38,100 cases and applying the percentage of noncitizen residents of Alameda County, which is 14.9 percent. ALCO PD's annual noncitizen caseload is thus approximately 5,677. Finally, this figure is divided by the number of ALCO PD's immigration experts, which is approximately the full-time equivalent of five attorneys.
396. ALCO PD employs about 108 defenders. This number is divided by the full-time equivalent of five IRU attorneys.
397. Telephone Interview with Brendon Woods, *supra* note 383.
398. Memorandum form Brendon D. Woods, Chief Pub. Defender, Alameda Cnty. Pub. Defender, to PD Attorneys, Post Bar Clerks, Interns, Regarding Immigration (Dec. 4, 2013). Appendix C, *available at* https://www.aclusocal.org/defend-la.
399. *Id.*
400. *Id.*
401. *Id.*
402. *Id.*
403. Telephone Interview with Raha Jorjani, *supra* note 378.
404. Telephone Interview with Rachael Keast, *supra* note 378.
405. *Id.*
406. *Id.*
407. E-mail from Rachael Keast (Dec. 14, 2017), *supra* note 380.
408. Telephone Interview with Rachael Keast, *supra* note 378.
409. *Id.*
410. *Id.*
411. E-mail from Raha Jorjani, Dir., Immigration Representation Unit, Alameda County Public Defender (Dec. 11, 2017) (on file with author) [hereinafter mail from Raha Jorjani].
412 Telephone Interview with Raha Jojani, *supra* note 378.
413. *Supra* note 281; Matt O'Brien, *Some Immigrants Charged in Alameda County Could Avoid Deportation Under DA's New Guidelines,* Mercury News (Oct. 31, 2012), http://www.mercurynews.com/2012/10/31/some-immigrants-charged-in-alameda-county-courts-could-avoid-deportation-under-das-new-guidelines.
414. E-mail from Raha Jorjani, *supra* note 411.
415. ALCO PD Press Release, *supra* note 391.
416. E-mail from Raha Jorjani, *supra* note 411.
417. Appendix C, *available at* https://www.aclusocal.org/defend-la.
418. Telephone Interview with Brendon Woods, *supra* note 383.
419. *Id.*
420. *Id.*
421. Telephone Interview with Ali Saidi, Deputy Pub. Defender III (Immigration Consultant) (Nov. 21, 2017) [hereinafter Telephone interview with Ali Saidi]. This interview is the primary source for this section.
422. *Fiscal Year 2017-2018 Recommended Budget*, Cnty. of Contra Costa, Cal., http://www.contracosta.ca.gov/DocumentCenter/View/45407 [hereinafter *FY 2017-2018 Recommended Budget*]; Correspondence with Ali Saidi (Mar. 1, 2018) (on file with author) [hereinafter Correspondence with Ali Saidi].
423. *See QuickFacts, Contra Costa County, California,* U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/contracostacountycalifornia,CA/PST045217; *2012-2016 ACS 5-Year Estimates*, *supra* note 308.
424. *FY 2017-2018 Recommended Budget*, *supra* note 422.
425. *Id.*
426. *Id.*
427. *Id.*
428. The estimate of CCCPD's annual caseload involving noncitizen clients is calculated by taking its total caseload of 19,000 and applying the percentage of noncitizen residents of Contra Costa County, which is 12.9 percent. CCCPD's annual noncitizen caseload is thus approximately 2,451. Finally, this figure is divided by the number of immigration experts, which is one full-time expert.
429. CCCPD employs 75 defenders. This number is divided by the full-time equivalent of one immigration attorney.
430. Phone Interview with Ali Saidi, *supra* note 421.
431. Stand Together Contra Costa, https://standtogethercontracosta.org/ (last visited Mar. 1, 2018).
432. Correspondence with Ali Saidi, *supra* note 422.
433. Interview with Daniel DeGriselles, Deputy Five Attorney with Special Expertise in Immigration Consequences of Criminal Convictions, San Bernardino Cnty. (Nov. 2, 2017). This interview is the primary source for this case study.
434. Immigrant Legal Res. Ctr., *Protocols for Ensuring Effective Defense of Noncitizen Defendants in California* (Oct. 2015) [hereinafter ILRC *Protocols*].
435. *QuickFacts, San Bernardino County, California,* U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/sanbernardinocountycalifornia,CA/PST045217.
436. *See id.*; *2012-2016 ACS 5-Year Estimates*, *supra* note 308.
437. *2017-2018 Recommended Budget*, San Bernardino Cnty., http://cms.sbcounty.gov/Portals/59/Content/2017-2018/2017-18-Recommended-Budget.pdf (last visited Feb. 1, 2018); Email from Daniel DeGriselles (Feb. 27, 2018) (on file with author).
438. *2016-2017 Recommended Budget*, San Bernardino Cnty., http://www.sbcounty.gov/Uploads/CAO/Budget/2016-2017-0/County/Recommended/LawandJusticeS/Public_Defender.pdf (last visited Feb. 1, 2018).
439. *Id.*
440. *For Immediate Release: County first in the nation with 46 NACo Awards*, San Bernardino Cnty., http://www.sbcounty.gov/uploads/CAO/pressreleases/content/PR_NACo_Awards_6-9-15-3.pdf (last visited Feb. 1, 2018).
441. The estimate of SBCPD's annual caseload involving noncitizen clients is calculated by taking its total caseload of 45,000 and applying the percentage of noncitizen residents of San Bernardino County, which is 11.1 percent. SBCPD's annual caseload involving noncitizen clients is thus approximately 4,995. Finally, this caseload is divided by the full-time equivalent number of immigration experts, which is approximately 1.25. This latter number

reflecting SBCPD's immigration expert capacity may grow given Nereyda Higuera's increasing expertise. Nevertheless, as of the writing of this case study, the plan is for Ms. Higuera to take over Daniel DeGriselles once he retires, potentially bringing the capacity back to the full-time equivalent of one immigration expert.

442. The total number of attorneys is approximately 120, which then is divided by the full-time equivalent number of immigration experts, at approximately 1.25.
443. ILRC's questionnaire is in Appendix D, *available at* https://www.aclusocal.org/defend-la. SBCPD's questionnaire is in Appendix E, *available at* https://www.aclusocal.org/defend-la.
444. *See* Appendix E, *available at* https://www.aclusocal.org/defend-la.
445. Only a handful of other offices provide the type of holistic immigration defense that BxD provides. These offices include, for example, Brooklyn Defender Services, The Legal Aid Society, and the Neighborhood Defender Service of Harlem.
446. The San Francisco Public Defender's Office is another model holistic office in California.
447. Steinberg, *supra* note 26, at 986.
448. *See* Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. Rev. L. & Soc. Change 123, 125 (2004).
449. *Id.*
450. *Id.* at 126.
451. Markowitz et al., *supra* note 20, at 10.
452. Wright, *supra* note 199, at 1533.
453. *See* Markowitz et al., *supra* note 20, at 10; Wright, *supra* note 199, at 1533.
454. *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.").
455. *Id.* at 48.
456. *See* Markowitz et al., *supra* note 20, at 26 (noting that affirmative applications can have a "prophylactic effect").
457. *Id.*
458. *See* Steinberg, *supra* note 26, at 989.
459. *Id.* at 988.
460. 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).
461. Appendix C, *available at* https://www.aclusocal.org/defend-la.
462. Appendix F, *available at* https://www.aclusocal.org/defend-la.
463. *See State and County Quick Facts: Los Angeles Cnty., Cal.*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/losangelescountycalifornia/PST045216 [hereinafter *Los Angeles Cnty. Quick Facts*].
464. *For Immediate Release: Idaho is Nation's Fastest-Growing State*, Census Bureau Reports, U.S. Census Bureau (Dec. 20, 2017), https://www.census.gov/newsroom/press-releases/2017/estimates-idaho.html.
465. *U.S. Immigrant Population by State and County*, Migration Policy Inst., https://www.migrationpolicy.org/programs/data-hub/charts/us-immigrant-population-state-and-county (last visited Feb. 2, 2018); *Facts on U.S. Immigrants, 2015*, Pew Research Ctr. (Apr. 12, 2017), http://www.pewhispanic.org/2017/05/03/facts-on-u-s-immigrants-county-maps/ph_stat-portraits_foreign-born-2015_county-maps-2011-2015/.
466. *Los Angeles Cnty. Quick Facts*, *supra* note 463.
467. *2012-2016 ACS 5-Year Estimates*, *supra* note 308. The unauthorized immigrant population of Los Angeles County is estimated to be about one million people. *See, e.g., Profile of the Unauthorized Population: Los Angeles County, CA*, Migration Policy Inst. (last visited Mar. 1, 2018), https://www.migrationpolicy.org/data/unauthorized-immigrant-population/county/6037.
468. Magaly N. Lopez, *Immigrant Integration in Los Angeles County*, Univ. of S. Cal. Ctr. for Study of Immigrant Integration (Nov. 13, 2017) (on file with author).
469. *See, e.g.*, Miriam Jordan, *Immigrant Agents Arrest Hundreds in Sweep of Sanctuary Cities*, N.Y. Times (Sept. 28, 2017), *available at* https://www.nytimes.com/2017/09/28/us/ice-arrests-sanctuary-cities.html; James Doubek, *ICE Detains More Than 100 in Los Angeles-Area Immigration Raids*, NPR (Feb. 15, 2018), https://www.npr.org/sections/thetwo-way/2018/02/15/585973495/ice-detains-more-than-100-in-los-angeles-area-immigration-raids.
470. *See, e.g.*, Andrea Castillo, *L.A. father detained by ICE after dropping daughter at school may be deported*, L.A. Times (July 31, 2017), *available at* http://www.latimes.com/local/lanow/la-me-romulo-avelica-deportation-20170731-story.html.
471. *See, e.g.*, James Queally, *ICE agents make arrests at courthouses, sparking backlash from attorneys and state supreme court*, L.A. Times (Mar. 16, 2017), *available at* http://www.latimes.com/local/lanow/la-me-ln-ice-courthouse-arrests-20170315-story.html.
472. *See, e.g.*, *Court Orders Trump Administration to Restore DACA Status to ACLU Client Jesús Arreola*, ACLU (Nov. 21, 2017), https://www.aclu.org/news/court-orders-trump-administration-restore-daca-status-aclu-client-jesus-arreola.
473. Kristin Bialik, *ICE arrests went up in 2017, with biggest increases in Florida, northern Texas, Oklahoma, Pew Research Center*, Pew Research Ctr. (Feb. 8, 2018), http://www.pewresearch.org/fact-tank/2018/02/08/ice-arrests-went-up-in-2017-with-biggest-increases-in-florida-northern-texas-oklahoma/.
474. *See Use of ICE Detainers: Obama vs. Trump*, TRAC Immigration, http://trac.syr.edu/immigration/reports/479/ (last visited Mar. 5, 2018); Martín Echenique, *Which States and Counties Are Receiving the Most ICE Detention Requests?*, City Lab (Sept. 6, 2017), https://www.citylab.com/equity/2017/09/which-states-and-counties-are-receiving-the-most-ice-detention-requests/538749/.
475. *See Details on Deportation Proceedings in Immigration Court*, TRAC Immigration (last visited Mar. 5, 2018), http://trac.syr.edu/phptools/immigration/nta/.
476. *See id.*; Eagly & Shafer, *supra* note 161, at 2.
477. Seth Freed Wessler, Applied Research Ctr., Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System 24 (Nov. 2011), *available at* https://www.raceforward.org/research/reports/shattered-families.
478. *See generally* García Hernández, *supra* note 48, at 1382–92.
479. *See, e.g.*, Nina Agrawal & Dakota Smith, *L.A. County supervisors OK $3 million to aid legal efforts for immigrants facing deportation*, L.A. Times (June 20, 2017), *available at* http://www.latimes.com/local/lanow/la-me-ln-justice-fund-immigrants-20170620-story.html.
480. *See supra* note 16.
481. *LA Justice Fund to provide legal defense to immigrants facing deportation*, Supervisor Sheila Kuehl (Dec. 13, 2017), http://supervisorkuehl.com/la-justice-fund/.
482. Press Release from Cnty. of Los Angeles, Chief Exec. Office, L.A. Cnty. Office of Immigrant Affairs (Sept. 12, 2017), http://oia.lacounty.gov/los-angeles-county-takes-bold-steps-support-immigrants/.
483. Cal. Coalition for Universal Representation, California's Due Process Crisis: Access to Legal Counsel for Detained Immigrants (June 2016), https://www.aclusocal.org/sites/default/files/access-to-counsel-calif-coalition-report-2016-06.pdf.
484. *Immigration Services Funding*, Cal. Dep't of Human Serv. (Oct. 31, 2017), http://www.cdss.ca.gov/Portals/9/Immigration/FY%202017-18%20Immigration%20Services%20Funding%20Award%20Announcement.pdf?ver=2017-10-31-092359-893; *Immigration Services Contractors*, Cal. Dep't of Human Serv., http://www.cdss.ca.gov/Benefits-Services/More-Services/Immigration-Services/Immigration-Services-Contractors (last visited Mar. 15, 2018).
485. *See, e.g.*, Lee, *supra* note 10, 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).
486. *Supra* note 481.
487. California law allows for county boards of supervisors to set up public defender offices. *See* Cal. Gov. Code § 22770.

488. *See* Cnty. of Los Angeles, 2018–19 Recommended Budget 51.1–7 (Apr. 2018), http://file.lacounty.gov/SDSInter/lac/1036162_2018-19RecommendedBudgetVolumeI.PDF [hereinafter 2018–19 Recommended Budget]; Inter-Agency Council on Child Abuse and Neglect, The State of Child Abuse in Los Angeles County 201 (2016), http://ican4kids.org/Reports/State%20of%20Child%20Abuse/Data_2016.pdf [hereinafter ICAN State of Child Abuse 2016].
489. The Los Angeles County Public Defender's Office (LACPD)'s annual caseload is approximately 300,000 cases. In the 2016-17 fiscal year, this caseload consisted of approximately 85,085 felony cases (26,241 new filings, 25,367 probation violations, and 33,477 miscellaneous cases), 197,904 misdemeanor cases (105,222 new filings, 50,709 probation violations, and 41,973 miscellaneous cases), and 25,000 juvenile cases. *See* Letter from LACPD Public Defenders to Los Angeles Cnty. Bd. of Supervisors (Jan. 19, 2018); Email from Confidential Source B (May 3, 2018). In the 2015-16 fiscal year, LACPD represented clients in approximately 100,124 felony-related proceedings, 208,022 misdemeanor-related proceedings, and 29,903 juvenile delinquency proceedings. ICAN State of Child Abuse 2016, *supra* note 488, at 201.
490. 2018–19 Recommended Budget, *supra* note 488, at 51.1.
491. ILRC *Protocols*, *supra* note 434.
492. As of late 2015, Graciela Martinez was still working as the immigration expert on a less than full-time basis. *Id.*
493. *See* County Deferred Action Task Force Report on Efforts to Support Implementation of the November 2014 Presidential Executive Order, Supervisor Hilda Solis (May 26, 2015), http://hildalsolis.org/wp-content/uploads/2015/06/CDATF-BM-w-attachmentsfinal-052615.pdf [hereinafter County Deferred Action Task Force Report].
494. *See id.*
495. Cal. Pen. Code § 7282.5 (West 2018).
496. Zota & Rubin, *supra* note 109, at 2.
497. For example, on March 1, 2018, LACPD sent office-wide a new protocol regarding potential ICE courthouse arrests, in response to ICE Directive Number 11072.1. The document, titled *Protocol Re: Potential ICE Courthouse Arrests, Instructions for All Public Defenders: How to Protect Non-Citizen Clients Who May Be Arrested by ICE*, was prepared by the Immigration Unit and required defenders to take several steps. *See* Appendix G, *available at* https://www.aclusocal.org/defend-la. First, before a potential ICE courthouse arrest, defenders must advise all noncitizen clients of their rights using the *Advisal Regarding Possible Immigration Interviews and/or Arrests Inside LA County Courthouses* document. *Id.* Defenders must keep this advisal document on them at all times, pre-filled with their contact information. *Id.* The protocols then have particular steps defenders must take during and after their interactions with ICE officers who are seeking to arrest their clients. *Id.*
498. Zota & Rubin, *supra* note 109, at 2 (noting that training is "critical to educating defense counsel about the basic analysis involved in determining the immigration consequences of criminal convictions").
499. ILRC *Protocols*, *supra* note 434.
500. Email from Kathy Brady, Senior Staff Attorney, ILRC (Apr. 4, 2018) (on file with author).
501. *Cf.* L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 Yale L.J. 2626 (2013) (arguing that public defender triage presents a way for implicit racial bias to affect legal outcomes).
502. From 2014 to 2016, Equal Justice Works Emerson Fellow Jesús Mosqueda represented more than 60 youth in their immigration cases. Over the years, Public Counsel has done intakes of or has represented about 350 children in the Los Angeles County juvenile justice system—the majority of whom were LACPD clients. Email from Kristen Jackson, Senior Staff Attorney, Immigrants' Rights, Pub. Counsel (Mar. 8, 2018) (on file with author).
503. For privacy and confidentiality reasons, Carlos is not the client's real name.
504. For privacy and confidentiality reasons, Lorena is not the client's real name.
505. Cal. Pen. Code § 1473.7(a)(1) (2017).
506. *See* supra notes 151–52.
507. According to the California Business and Professions Code, "a court shall notify the State Bar . . . whenever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney." Cal. Bus. and Professions Code § 6086.7(a)(2).
508. *See infra* note 526.
509. Cal. Welfare & Inst. Code §§ 827, 831.
510. *See* Cal. Pen. Code § 29810 et seq. (West).
511. For the community letter to the Los Angeles City Attorney, see Appendix H, *available at* https://www.aclusocal.org/defend-la.
512. Since LACPD does not track this figure, an exact number is difficult to know. Nevertheless, an estimate can be calculated by taking the percentage of noncitizen residents of Los Angeles County, which is approximately 17.3 percent, and applying it to the total annual caseload, which is approximately 300,000 cases.
513. State Bar of Cal., Guidelines on Indigent Defense, *supra* note 107, at 24.
514. *Id.* at 28–29.
515. *Id.* at 29.
516. *Id.* at 30.
517. Interview with Confidential Source S (Oct. 13, 2016).
518. Gawande, *supra* note 454, at 48.
519. *See* Richardson & Goff, *supra* note 501, at 2628.
520. Gawande, *supra* note 454, at 158.
521. Interview with Confidential Source G (Feb. 26, 2018).
522. Out of about 45 individuals surveyed and confirmed to have been represented by LACPD attorneys, 17 people alleged that their defender never inquired into their country of birth or immigration status. The surveys were conducted beginning in the spring of 2015 until December 2017. Further information is not disclosed due to prevailing issues of privacy and confidentiality.
523. New Immigration Consultation Procedure, LACPD (on file with author).
524. Specifically, LACPD's noncitizen caseload is about ten times those of the offices discussed in Part III's case studies. Yet, LACPD's number of monthly plea consultation requests are not similarly higher. For instance, LACPD's monthly consultation level (at approximately 438 a month) is only about four times higher than the levels of BxD and ALCO PD (at 100 monthly plea consultations).
525. Cnty. of Los Angeles, 2017–18 Recommended Budget 51.1 (Apr. 2017), http://ceo.lacounty.gov/pdf/budget/20117-18/2017-18%20Recommended%20Budget%20Volume%20I.pdf.
526. Under *Franco-Gonzales v. Holder*, the federal government must 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. Department of Justice adopted a nationwide policy to provide legal representation to certain unrepresented and detained respondents who are mentally incompetent to represent themselves. *See National Qualified Representative Program (NQRP)*, U.S. Dep't of Justice, http://www.justice.gov/eoir/national-qualified-representative-program-nqrp (last visited Mar. 11, 2016).
527. Cnty. of Los Angeles Alternate Pub. Defender, http://apd.lacounty.gov/Offices.htm (last visited Mar. 1, 2018).
528. Cnty. of Los Angeles, 2017-18 Adopted Budget, *available at* http://ceo.lacounty.gov/pdf/budget/20117-18/2017-18%20Adopted%20Budget%20Charts.pdf.
529. *Id*; 2018–19 Recommended Budget, *supra* note 488, at 3.1; Cnty. of Los Angeles Alternate Pub. Defender, http://hr.lacounty.gov/department-menu/alternate-public-defender/ (last visited Mar. 1, 2018).
530. The estimate of APD's annual caseload involving noncitizen clients is calculated by taking its total caseload of 30,000 and applying the percentage of noncitizen residents of Los Angeles County, which is 17.3 percent. APD's annual noncitizen caseload is thus approximately 5,190.
531. Even though Jean Costanza and Felicia Grant both carry a caseload, given that they are available full-time for *Padilla* consults, the rough full-time equivalent estimate of attorneys we use for this report is two.
532. The noncitizen caseload of 5,190 is divided by the number of immigration experts, which is roughly two full-time experts.

533. 2018–19 Recommended Budget, *supra* note 488, at 3.1.
534. For LACPD to meet the 1:5,000 standard for offices that provide full advisals but no direct immigration representation, the Immigration Unit should comprise at least 10 additional immigration experts providing *Padilla* consultations.
535. 2018–19 Recommended Budget, *supra* note 488, at 51.2.
536. To calculate this figure, we use the county's maximum total expense (including salary and benefits) for Deputy Public Defender (DPD) IIIs, which is approximately $200,000. DPD III salaries are capped at $153,156. *See Los Angeles County Class and Salary Listing*, Cnty. Exec. Office (Jan. 1, 2018), http://ceo.lacounty.gov/pdf/alpha.pdf. In addition, benefits are approximately $45,000. *See, e.g.*, Transparent California, https://transparentcalifornia.com/salaries/search/?page=17&q=Deputy+Public+Defender+III. At the maximum DPD III expense of $200,000, 15 immigration experts amount to no more than $3 million.
537. *See* County Deferred Action Task Force Report, *supra* note 493.
538. Cnty. of Los Angeles Dep't of Children and Family Serv., California – Child and Family Services Review 2011 – 2015 127 (2016), http://dcfs.co.la.ca.us/news/documents/Complete_2011-2015_CSA–Final,5.12.16.pdf.
539. Steinberg, *supra* note 26, at 988.
540. ILRC *Protocols*, *supra* note 434.
541. For a general set of recommendations for prosecutors, see, for example, Fair and Just Prosecution, Issues at a Glance: Addressing Immigration Issues (2017), https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Immigration.9.25.pdf. For a more developed set of local recommendations, see, for example, Appendix H, *available* at https://www.aclusocal.org/defend-la.
542. Cal. Pen. Code § 1016.3(b) (West 2016).

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