



ARTICLE

## Restructuring Public Defense After *Padilla*

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**Abstract.** In the 2010 landmark decision *Padilla v. Kentucky*, the Supreme Court held that the Sixth Amendment right to counsel demands that criminal defense attorneys inform their clients of adverse immigration consequences that may flow from a guilty plea. Although over a decade has passed since *Padilla*, astonishingly little is known about how public defense systems have incorporated this watershed decision on the ground. This Article presents the first empirical study of representation by public defenders in the post-*Padilla* era. By researching *Padilla*'s implementation in California—the state with the largest immigrant population in the nation and a longstanding commitment to public defense—this study shows how immigration expertise has been provided to indigent defendants and identifies weaknesses with the current delivery system.

Our results reveal a patchwork system in which each county in California has created its own approach to immigration advising. Exhibiting efforts at compliance, most large counties with institutional public defender offices have embedded immigration experts within their offices and reshaped attorney understanding of adequate pre-plea advisals and

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plea-bargaining practices. At the same time, however, many other counties have languished: They have not hired immigration experts, developed county protocols for immigration advising, or implemented immigration law training for their attorneys who accept indigent court appointments. The urgency to create a workable *Padilla* delivery system is particularly acute in California's small and rural counties, which generally have not established an institutional public defender office and instead have relied on a county-funded contract system for appointing defense counsel. The lack of state funding for public defense in California contributes to these problems, as does the fact that some county defender systems have been slow to restructure their existing defense services to strengthen their immigration advising and defense. Based on these findings, this Article concludes by offering policy recommendations for how to improve the representation of immigrants in California. These insights are also relevant to other public defender systems throughout the country that are struggling with similar issues.

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## Introduction

In the 2010 landmark decision *Padilla v. Kentucky*, the Supreme Court held that the Sixth Amendment requires appointed counsel in criminal cases to inform their clients of adverse immigration consequences that may flow from a guilty plea.<sup>1</sup> Recognizing that deportation is “intimately related to the criminal process,” the Court concluded that “when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.”<sup>2</sup> The Court added that to avoid adverse immigration consequences, defense lawyers may “plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation.”<sup>3</sup>

*Padilla* garnered an immediate flurry of commentary by legal scholars who celebrated the decision as momentous. Margaret Love and Jack Chin argued that the “systemic impact” of *Padilla*’s new obligation “cannot be underestimated” and “may turn out to be the most important right to counsel case since *Gideon*.”<sup>4</sup> They predicted that the years to come would enshrine a “*Padilla* advisory” at the core of criminal defense practice and revolutionize the practice of plea bargaining.<sup>5</sup> Ronald Wright anticipated that the *Padilla* decision could reshape many defense practices, including by requiring greater teamwork and specialization among public defenders.<sup>6</sup> Malia Brink predicted that *Padilla* could make defense lawyers more “client-centered,” in part by focusing them on consequential aspects of case resolution beyond potential prison sentences.<sup>7</sup>

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1. 559 U.S. 356, 374 (2010).

2. *Id.* at 365, 369.

3. *Id.* at 373.

4. Margaret Colgate Love & Gabriel J. Chin, *Padilla v. Kentucky: The Right to Counsel and the Collateral Consequences of Conviction*, CHAMPION, May 2010, at 18, 19 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)) (predicting that the “‘*Padilla* advisory’ may become as familiar a fixture of a criminal case as the *Miranda* warning”). In this Article, we adopt the term “*Padilla* advisal” to refer to the process of researching, investigating, and counseling a client on the immigration consequences of a criminal conviction.

5. *See id.* at 19, 23-24.

6. *See* Ronald F. Wright, *Padilla and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515, 1530-32 (2011).

7. Malia Brink, *A Gauntlet Thrown: The Transformative Potential of Padilla v. Kentucky*, 39 FORDHAM URB. L.J. 39, 51, 61 (2011) (describing *Padilla* as having “enormous power to bring about transformative changes in how the defense bar practices”). The concept of client-centered interviewing and counseling was introduced by David Binder and Susan Price. Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 370 (2006); *see* DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977). As Katherine Kruse has explained, the groundbreaking Binder–Price model of client counseling “conceptualized legal representation primarily in problem-solving terms

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At the same time, a growing chorus of scholars began to warn that structural impediments to implementing the *Padilla* advisal could threaten the legacy of the Court's ruling. Yolanda Vázquez counseled that implementation of *Padilla* would require attention to the fundamentals of public defense, including "reassessment of educational training" and "enforcement of professional standards."<sup>8</sup> Experts including Darryl Brown, Maureen Sweeney, and Steve Zeidman joined in raising the alarm that the promise of *Padilla* could fail to be realized due to funding shortages facing already overburdened public defender offices.<sup>9</sup> Failure to implement *Padilla* would be devastating to immigrants charged with crimes.

Over the past several decades, the criminal and immigration systems have become deeply intertwined.<sup>10</sup> A single conviction can result in deportation

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and redefined the boundaries of decision-making authority in the lawyer-client relationship." Kruse, *supra*, at 376.

8. Yolanda Vázquez, *Realizing Padilla's Promise: Ensuring Noncitizen Defendants Are Advised of the Immigration Consequences of a Criminal Conviction*, 39 FORDHAM URB. L.J. 169, 172 (2011).
9. Darryl K. Brown, *Why Padilla Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1396 (2011) (highlighting that "pervasive inadequacies of indigent criminal defense, especially in state courts, are unaffected by *Padilla*"); Maureen A. Sweeney, *Where Do We Go from Padilla v. Kentucky? Thoughts on Implementation and Future Directions*, 45 NEW ENG. L. REV. 353, 361 (2011) (acknowledging that implementing *Padilla* would require "significant resources, which can pose a challenge for both publicly funded defense programs and clients of the private bar"); Steven Zeidman, *Padilla v. Kentucky: Sound and Fury, or Transformative Impact*, 39 FORDHAM URB. L.J. 203, 207 (2011) ("It is also beyond question that many of these faulty pleas are the result of the chronic underfunding and resultant overburdening of public defenders who labor under crushing caseloads."); see also Kara Hartzler, *Do I Have to Learn What a Crime of Moral Turpitude Is?: The World Before and After Padilla v. Kentucky*, 24 FED. SENT'G REP. 66, 67 (2011) ("[M]ost criminal defense attorneys . . . dreaded the newfound responsibility [of *Padilla*] that was being placed on their already-burdened shoulders . . ."); Jennifer Welch, Comment, *Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively*, 92 CALIF. L. REV. 541, 563 (2004) ("Without more time and money, overburdened public defenders have difficulty getting training, doing extra research on immigration issues, and retaining immigration attorneys for advice. . . . [T]he lack of resources provides a real hurdle to public defenders representing noncitizens.").
10. Scholars that have called attention to this deepening intersection include Jennifer M. Chacón, Comment, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1835-50 (2007) (chronicling the use of criminal law enforcement as a means to effectuate civil immigration removals); Stephen H. Legomsky, *A New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 476-89, 500-10 (2007) (detailing the ways in which civil immigration enforcement has adopted the methods and priorities of the criminal system); and Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 380 (2006) (arguing that criminal and immigration law are, "at their core, systems of inclusion and exclusion" and that "it is not surprising that these two areas of law have become entwined").

from the United States, even for individuals who are lawful permanent residents.<sup>11</sup> As the Supreme Court has recognized, “deportation is a drastic measure and at times the equivalent of banishment or exile.”<sup>12</sup> Knowledge about immigration consequences prior to pleading guilty, as required by *Padilla*, enables clients to bargain with the prosecutor to achieve an immigration-neutral result<sup>13</sup> or to make an informed decision on going to trial in hopes of avoiding the conviction entirely.

Consider Jose Padilla’s own case. Although Mr. Padilla had been a lawful permanent resident for over four decades and served honorably in the U.S. military, his plea to transportation of marijuana triggered “virtually mandatory” deportation.<sup>14</sup> Yet his lawyer advised him incorrectly, telling him that he “did not have to worry about immigration status since he had been in the country so long.”<sup>15</sup> Had he been given accurate, specific information about the immigration consequence of pleading guilty, Mr. Padilla could have taken the case to trial or bargained with the prosecutor to plead guilty to charges that would not trigger automatic deportation.

Although *Padilla* is now widely understood to demand immigration advising, the Court gave no guidance as to how its decision should be implemented at the local level, in the varied settings where indigent defense is

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11. As highlighted by Jason Cade’s research, even minor misdemeanors can trigger removal proceedings. Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1758-59 (2013). Indeed, even infractions can result in deportation. See, e.g., *Heredia v. Sessions*, 720 F. App’x 376, 379 (9th Cir. 2017) (concluding that California infractions can be “convictions” for purposes of immigration law). Similarly, as Beth Zilberman has shown, children brought into the juvenile legal system are also exposed to possible deportation. Beth K. Zilberman, *The Myth of Second Chances: Noncitizen Youth and Confidentiality of Delinquency Records*, 31 GEO. IMMIGR. L.J. 561, 564 (2017). For an incisive critique of the “crude penalty scheme” of immigration law and the overuse of the sanction of deportation, see generally Shalini Bhargava Ray, *Immigration Law’s Arbitrariness Problem*, 121 COLUM. L. REV. 2049 (2021).
  12. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); see also *Lehmann v. United States ex rel. Carson*, 353 U.S. 685, 691 (1957) (opinion of Black, J.) (“To banish [the noncitizen respondents] from home, family, and adopted country is punishment of the most drastic kind whether done at the time when they were convicted or later.”).
  13. As Bill Hing explains: “If the prosecutor is willing to accept a guilty plea for a charge that does not result in a deportable offense, the client has been provided a great service. The informed client may even be willing to accept more incarceration time in order to avoid conviction of a removable offense.” Bill Ong Hing, *The Pressure Is On—Criminal Defense Counsel Strategies After Padilla v. Kentucky*, 92 DENV. L. REV. 835, 855 (2015).
  14. *Padilla v. Kentucky*, 559 U.S. 356, 359-60 (2010).
  15. *Id.* at 359 (quoting *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008), *rev’d*, 559 U.S. 356).

practiced.<sup>16</sup> Over a decade has passed since the *Padilla* decision, yet no empirical study has evaluated how public defenders go about fulfilling this Sixth Amendment obligation to immigrant clients.<sup>17</sup> Not surprisingly, especially little is known about these matters in small and rural court systems, which have largely escaped the attention of scholars and policymakers.<sup>18</sup>

This Article seeks to fill this gap by evaluating how public defense institutions that provide immigration expertise have evolved after *Padilla*. We approach this problem by studying the post-*Padilla* development of public defense practices in California, the state with the largest immigrant population in the country<sup>19</sup> and a national leader in immigration

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16. This post-*Padilla* moment is not unlike the aftermath of the Supreme Court's watershed 1963 decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963). As Sara Mayeux's historical research has revealed, a clear consensus emerged that publicly funded indigent defense was necessary but that, after *Gideon*, there was "roiling confusion in the criminal court trenches over how to actually implement the consensus." Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15, 55 (2016).
  17. Although no systemic review of statewide implementation efforts exists, there have been some important efforts to highlight the work of select model public defender programs. See, e.g., Talia Peleg & Ruben Loyo, *Transforming Deportation Defense: Lessons Learned from the Nation's First Public Defender Program for Detained Immigrants*, 22 CUNY L. REV. 193, 219-36 (2018) (examining the practices of public defenders in the New York Immigrant Family Unity Project, which provides direct legal representation to immigrants facing deportation proceedings in detention); Andrés Dae Keun Kwon, Comment, *Defending Criminal(ized) "Aliens" After Padilla: Toward a More Holistic Public Immigration Defense in the Era of Crimmigration*, 63 UCLA L. REV. 1034, 1076-94 (2016) (highlighting holistic defense practices at The Bronx Defenders and the Office of the Alameda County Public Defender); IMMIGRANT LEGAL RES. CTR., PROTOCOLS FOR ENSURING EFFECTIVE DEFENSE OF NONCITIZEN DEFENDANTS IN CALIFORNIA (2015), <https://perma.cc/YBS8-7TJ6> (summarizing practices in four California counties); ANDRÉS DAE KEUN KWON, ACLU FOUND. OF S. CAL., DEFEND L.A.: TRANSFORMING PUBLIC DEFENSE IN THE ERA OF MASS DEPORTATION 1-2 (2018), <https://perma.cc/7JZM-973G> (critiquing the insufficient staffing of in-house immigration experts in the Los Angeles County Public Defender's Office).
  18. See, e.g., Jason Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031, 1034-35 (2020) (revealing that local court systems are rarely studied by legal academics or incorporated into law school curricula outside of certain clinical courses); Lisa R. Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway & Hannah Haksgaard, *Legal Deserts: A Multi-state Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15, 23-24 (2018) (arguing that there is a dearth of research regarding the barriers to access to justice in rural America); Pamela Metzger, *What This Law Prof Has Learned About Rural Justice*, A.B.A. J. (Feb. 6, 2020, 11:20 AM CST), <https://perma.cc/826C-DSA3> (highlighting that most research on criminal legal systems focuses on urban justice systems rather than rural courtrooms, which are "underexamined and overlooked, even by criminal justice reformers").
  19. Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://perma.cc/QH96-D55M>. Today, almost 11 million immigrants call California home. HANS JOHNSON, CESAR ALESI PEREZ & MARISOL CUELLAR MEJIA, PUB. POL'Y INST. OF CAL., JUST THE FACTS: IMMIGRANTS IN CALIFORNIA 1 (2021), <https://perma.cc/DX33-H6MP>.

policy.<sup>20</sup> Because California has not adopted a statewide system for public defense,<sup>21</sup> each individual county is responsible for funding and structuring the provision of appointed counsel for its residents.<sup>22</sup> California counties have thus become a laboratory for local experimentation with the representation of immigrants charged with crimes. California’s laboratory is especially useful for an academic study because it holds constant many features of the criminal system, such as the court system and criminal code, while allowing for local variation in defense organization. And the stakes in California—where one out of every four residents is foreign born—could not be higher.<sup>23</sup>

To investigate indigent representation in California, we pursued a mixed-methods approach<sup>24</sup> that included surveys and interviews with public defenders across the state’s fifty-eight counties.<sup>25</sup> Our study—the first of its kind—yields three important sets of findings.

First, our research provides a comprehensive picture of the current structure of public defense in California, with particular attention to how immigration expertise is distributed within the different county ecosystems. We find that the fastest-growing model for immigrant representation in the state is one in which the county’s public defender hires one or more dedicated

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20. See David Scott FitzGerald & John D. Skrentny, *Lessons from California*, in IMMIGRANT CALIFORNIA: UNDERSTANDING THE PAST, PRESENT, AND FUTURE OF U.S. POLICY 1, 1-2 (David Scott FitzGerald & John D. Skrentny eds., 2021) (arguing that immigration policy in California is a “bellwether for other states”).

21. California established an Office of the State Public Defender in 1976, but the office receives limited funding and primarily focuses on representing defendants in postconviction proceedings in death penalty cases. *About Us*, OFF. STATE PUB. DEF., <https://perma.cc/92VV-SMYL> (archived Oct. 22, 2021). As Irene Joe’s work documents, state governments have taken different approaches to structuring their public defender services, including either state-level distribution through the executive or judicial branch or, like California, county-level distribution. Irene Oritseweyinmi Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113, 127-31 (2020).

22. See *infra* Part I.

23. Approximately half of all foreign-born individuals in California are naturalized citizens. JOHNSON ET AL., *supra* note 19, at 1. Although Jose Padilla was a lawful permanent resident, the *Padilla* decision may also extend to naturalized citizens who are not advised of the potential denaturalization consequences of a criminal plea. See generally Amber Qureshi, *The Denaturalization Consequences of Guilty Pleas*, 130 YALE L.J.F. 166, 180 (2020) (arguing that *Padilla* applies “in equal, if not greater, force in the context of denaturalization” when a crime was committed before naturalization).

24. See generally Lois R. Harris & Gavin T.L. Brown, *Mixing Interview and Questionnaire Methods: Practical Problems in Aligning Data*, PRAC. ASSESSMENT, RSCH. & EVALUATION, Jan. 2010, at 1, 1 (describing how mixed methods studies can rely on surveys for “evidence of patterns” across a population, as well as qualitative interviews for “more in-depth insights on participant attitudes, thoughts, and actions”).

25. For detailed information on our study methods, see Appendices A-C below.



experts.<sup>26</sup> These immigration experts—who are also sometimes referred to as “*Padilla* attorneys,” “criminal immigration specialists,” “immigration defense attorneys,” or “immigration attorneys”—are lawyers who have mastered the complex intersection between immigration and criminal law.<sup>27</sup> Although most large counties now have immigration experts on board, many medium-sized counties with sizable budgets and noncitizen populations have not invested in staffed immigration experts or paid contracts for expert consultations. These counties have instead opted to consult informally with immigration practitioners or represent clients without the benefit of such expertise. We find that the challenge to *Padilla* implementation is most acute in small and rural counties that rely on solo practitioners and small law firms to handle their indigent caseloads and for the most part have not yet adopted a protocol for representing their immigrant clients.<sup>28</sup> The underdevelopment of public defense structures in small and rural counties is rooted in the historical development of California’s county-run defense system, a topic we address in Part I. Thus, any comprehensive solution to *Padilla* implementation must grapple with the challenge of structuring indigent defense in these smaller counties.

Second, this study contributes a nuanced understanding of how the so-called “*Padilla* advisal” is understood and delivered by public defenders. Our interviews and survey data provide a rich, descriptive account of how defense lawyers specializing in the intersection of criminal and immigration law perform their counseling obligation under *Padilla*. Our project reveals the sophisticated information gathering, legal analysis, plea-bargaining advocacy, and client counseling required to provide a quality *Padilla* advisal and to prevent undesirable immigration consequences. These findings add urgency to the recommendations we offer in the Conclusion, such as establishing clear protocols for interviewing and counseling immigrant clients and adopting statewide practice standards for *Padilla* advising. We also document the caseloads of immigration experts across the state and, based on these data, recommend a caseload maximum for immigration experts of no more than 1,500 *Padilla* consults per year.<sup>29</sup>

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26. See *infra* Parts II.B.-C.

27. Two terms that are sometimes used for this type of expertise are “crim-imm lawyering” and “cimmigration law.” See Marisol Orihuela, *Crim-Imm Lawyering*, 34 GEO. IMMIGR. L.J. 613, 617-19 (2020) (tracing the merger of criminal and immigration law and the emergence of a new form of legal expertise: “[c]rim-imm lawyering”); Stumpf, *supra* note 10, at 376-78, 380-81 (introducing the term “cimmigration,” which captures the growing intersection of criminal and immigration law and the increasing alienation of immigrants resulting from this merger).

28. See *infra* Parts II.B.-C.

29. See *infra* Table 2; *infra* note 312. As we explain, not all experts, particularly those with less legal experience, should be expected to satisfy this caseload maximum.

Third, we identify the range of tasks beyond the basic *Padilla* advisal that immigration experts who work within public defender programs undertake. These tasks include other core *Padilla* functions such as providing assistance in presenting plea negotiations to prosecutors and training office attorneys about the immigration consequences of common criminal charges. They also encompass other undertakings that are of great importance to immigrant clients, such as monitoring compliance with state and local sanctuary laws, obtaining postconviction relief on convictions that subject clients to adverse immigration consequences, and representing clients in deportation proceedings. This comprehensive understanding of the varied public defender tasks that demand immigration expertise underscores the urgent need for additional funding for immigration-expert positions. Even in the absence of additional funding, public defense systems should reallocate their existing staffing and hiring practices to ensure that the needs of immigrant clients are not ignored.<sup>30</sup>

Although this Article focuses exclusively on defense counsel, an important topic for future study is the role of criminal prosecutors in immigrant case resolution.<sup>31</sup> Indeed, because of their dominant role in plea bargaining, prosecutors have considerable power over whether the parties can arrive at a case resolution that avoids deportation.<sup>32</sup> In 2016, California became the first state to require its prosecutors to take into account immigration consequences in reaching a just resolution of each case.<sup>33</sup> Some prosecutor offices in

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30. See generally Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 428-29 (2016) (highlighting the need to interrogate how resource allocation decisions are made in public defender systems).
31. In a forthcoming article, Talia Peleg outlines what prosecutors who identify as “progressive” can do to avoid unjust immigration consequences. Talia Peleg, *Adopting a Robust Immigration Agenda: The Call for the Progressive Prosecutor to End the Deportation Pipeline*, 36 GEO. IMMIGR. L.J. (forthcoming 2022) (manuscript at 4-5) (on file with authors).
32. See generally Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 6-9, 36 (2012) (arguing that using prosecutorial resources to craft immigration-neutral pleas can ensure outcomes that are proportionate to the charged offenses); Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1198-202 (2016) (describing the impact prosecutorial discretion has on consequences that flow from a guilty plea, including deportation); Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 608 (2013) (revealing how criminal prosecutors act as “gatekeepers” within the immigration system).
33. CAL. PENAL CODE § 1016.3(b) (West 2021); see also Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12, 27-29 (2017) (explaining that California’s new law “marks an important effort to integrate the *Padilla* decision into everyday prosecutorial practice, and to make the standards for immigration plea bargaining more transparent”); MATTIE ARMSTRONG & ROSE CAHN, IMMIGRANT LEGAL RES. CTR., IMMIGRATION-RELATED PROSECUTORIAL CONSIDERATIONS DO NOT VIOLATE THE EQUAL PROTECTION RIGHTS OF CITIZENS 6 (2020), <https://perma.cc/R2SN-54HM> (clarifying that under section 1016.3(b), California  
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California have gone a step further and adopted internal office policies that endorse weighing immigration consequences in plea bargaining.<sup>34</sup>

This Article proceeds in three parts. Part I provides historical context by tracing the development of public defender services in California since the late 1800s. Part II presents our study's findings on the current structure of public defense in California and the distribution of immigration expertise across California's fifty-eight counties. Part III draws on our interviews with public defenders and immigration experts to answer key questions about how these parties understand *Padilla*, attempt to fulfill *Padilla's* mandates, and meet challenges to implementation. We conclude by discussing the implications of our research for policymakers and public defender organizations.

## I. A Brief History of Indigent Defense in California

Given that there is no national program for distributing public defender services, each state or local government decides how to implement the *Padilla* decision. Some states have adopted a statewide public defender system, while others have delegated this role to local governments.<sup>35</sup> Twenty-four states (48%) rely on a state-run public defense system to provide trial-level indigent defense services, while seven states (14%) have a mixed state- and locally-run system.<sup>36</sup> Nineteen states (38%)—including California—use a locally-run public

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prosecutors “are required to consider avoiding immigration-specific adverse consequences”).

34. See Angie Junck, Nadine K. Wettstein & Wendy S. Wayne, *The Mandate of Padilla: How Public Defenders Can and Must Provide Effective Assistance of Counsel to Noncitizen Clients*, CRIM. JUST., Summer 2016, at 24, 26 (pointing out that prosecutors in California “are now recognizing that they have to change their own policies and practices to consider the immigration consequences of criminal charges”). See generally Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 264-71 (2016) (studying plea-bargaining policies adopted by district attorneys' offices in California that embrace negotiating an immigration-neutral result in certain cases). In 2020, George Gascón was elected District Attorney of Los Angeles County, the largest county in the state, on a platform of taking “an immigration-informed prosecutorial approach” that acknowledges that “[i]mmigration status can have a disproportionate adverse impact on noncitizen defendants because of federal immigration law implications.” Press Release, George Gascón, Los Angeles Dist. Att’y, George Gascón’s Plan to Ensure Resolution Parity for the Undocumented (Oct. 14, 2020), <https://perma.cc/XP39-JKG3>; Press Release, George Gascón, Los Angeles Dist. Att’y, George Gascón Declares Victory in Nationally Watched Los Angeles County District Attorney’s Race (Nov. 6, 2020), <https://perma.cc/NXF2-TSHQ>.

35. David Carroll, LIBERTY & JUSTICE FOR ALL: PROVIDING RIGHT TO COUNSEL SERVICES IN TENNESSEE app. C at 96, 102-03 (Indigent Representation Task Force ed., 2017), <https://perma.cc/W6AQ-BW3Q>.

36. *Id.* at 103.

defense system at the trial level.<sup>37</sup> This Part begins by tracing the history that led to California's current eclectic system of county-run indigent defense.

### A. The Invention of a County-Run Defense System

California has long been a national leader in providing rights and protections for indigent defendants. In 1872, California became one of the first states to incorporate a right to counsel for criminal defendants directly into the state's penal code.<sup>38</sup> By order of the California Supreme Court, counsel were required to accept court appointments in criminal cases without compensation for their work.<sup>39</sup> Thus, over a century before *Gideon v. Wainwright* held that the Sixth Amendment applied to the states,<sup>40</sup> California judges were already appointing members of the private bar to represent indigent defendants in the state's criminal courts.<sup>41</sup> In practice, however, appointments often went "to the practitioner who happen[ed] to be in court at the time."<sup>42</sup>

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37. *Id.*

38. See CAL. PENAL CODE § 987 (1872) ("If the defendant appears for arraignment without counsel, he must be informed by the Court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the Court must assign counsel to defend him."); see also Lewis Grossman, *Codification and the California Mentality*, 45 HASTINGS L.J. 617, 617 (1994) ("[I]n 1872, California had moved to the forefront of American legal reform by becoming one of the first states in the nation to codify its complete body of laws."). Prior to 1872, a similar provision was contained in the state's Criminal Practice Act of 1851. Criminal Practice Act, ch. 121, § 271, 1851 Cal. Stat. 452, 457 ("If the defendant appear for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desire the aid of counsel.").

39. The California Supreme Court upheld the requirement that members of the bar take on court appointments without compensation. *Rowe v. Yuba County*, 17 Cal. 61, 63 (1860) ("Counsel are not considered at liberty to reject, under circumstances of this character, the cause of the defenseless, because no provision for their compensation is made by law."). In 1919, twenty-six states, including California, provided for appointment of counsel without compensation, while sixteen states provided compensation at the public expense. Warren F. Spalding, Note, *State Provision for Defending Poor Persons Accused of Crime*, 10 J. AM. INST. CRIM. L. & CRIMINOLOGY 618, 618-20 (1920).

40. See generally 372 U.S. 335 (1963) (finding that due process requires the Sixth Amendment's right to assistance of counsel to apply to the states).

41. See, e.g., Walton J. Wood, *The Public Defender: Unexpected Results from the Establishment of the Office*, 1 SW. L. REV. 30, 31 (1916) (noting that "[i]t is the universal custom to appoint attorneys to defend the accused from those who are in court at the time of arraignment").

42. MAYER C. GOLDMAN, *THE PUBLIC DEFENDER: A NECESSARY FACTOR IN THE ADMINISTRATION OF JUSTICE* 16 (1917); see also Wood, *supra* note 41, at 30 (describing "attorneys of low standing who made a practice of preying upon the unfortunates within the prison walls"); Clara Foltz, *Public Defenders*, 31 AM. L. REV. 393, 399 (1897)  
*footnote continued on next page*

Four decades later, in 1914, Los Angeles County relied on its new county charter to become home to the first-ever public defender office in the nation.<sup>43</sup> This historic move marked an important advance, replacing the existing system of unpaid ad hoc appointments with a salaried chief public defender and several assistant attorneys.<sup>44</sup> This development was thought to improve the quality of defense in the county.<sup>45</sup> Whereas private practitioners accepting court appointments around the state were often not regular practitioners of criminal law, public defenders in Los Angeles were dedicated to indigent defense on a full-time basis.<sup>46</sup> The institutional structure of the public defender office also allowed lawyers to pool resources to receive specialized training, investigate cases, and consult with specialists.<sup>47</sup> As a Los Angeles judge remarked, the public defender produced “a more fair and impartial administration of justice than the methods formerly employed.”<sup>48</sup>

To encourage more counties to follow the lead of Los Angeles, the California legislature passed a new law in 1921 to allow the governing

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(characterizing attorneys who took court appointments as “loafers” and “the young, the untried and inexperienced in the profession”).

43. Los Angeles County Charter, ch. 5, §§ 14, 23, 1913 Cal. Stat. 1484, 1488, 1490-91; *see also* GOLDMAN, *supra* note 42, at 81-83 (explaining that Los Angeles’s first public defender, Walton J. Wood, was also the first public defender in the United States); *Los Angeles County Has Public Defender*, MORNING UNION (Grass Valley & Nevada City, Cal.), Oct. 9, 1913, at 1 (reporting that Los Angeles County’s Board of Supervisors approved the plan for a public defender). The following year, the City of Los Angeles founded the Police Court Defender to represent defendants charged in lower-level municipal court cases. Ellery E. Cuff, *Public Defender System: The Los Angeles Story*, 45 MINN. L. REV. 715, 727-28 (1961).
44. Spalding, *supra* note 39, at 620.
45. Wood, *supra* note 41, at 32-33 (describing some of the benefits of Los Angeles’ new public defender system, including quicker resolutions of cases and work undertaken to secure employment for their clients upon release from jail); Walton J. Wood, *Necessity for Public Defender Established by Statistics*, 7 J. AM. INST. CRIM. L. & CRIMINOLOGY 230, 230-31 (1916) (reporting that public defenders in 1914 had higher acquittal rates and probation rates than attorneys assigned in 1913 that served without pay); Note, *Representation of Indigents in California—A Field Study of the Public Defender and Assigned Counsel Systems*, 13 STAN. L. REV. 522, 564 (1961) [hereinafter *Representation of Indigents in California*] (concluding that “the organization of the public defender system [in California] provides inherent advantages over assigned counsel”).
46. *See County Must Employ Mrs. Peete’s Counsel: Public Defender Asks for Deputy to Be Selected by Supervisors*, L.A. TIMES, Nov. 14, 1920, at 7 (providing that as of 1920 the Los Angeles County Public Defender’s Office employed a chief defender, six deputies, and two stenographers).
47. *Representation of Indigents in California*, *supra* note 45, at 563-64.
48. GOLDMAN, *supra* note 42, at 39 (quoting Judge Frank R. Willis).

executive bodies (known in California as boards of supervisors<sup>49</sup>) of the nine largest counties in California<sup>50</sup> to establish an office with an elected public defender.<sup>51</sup> The public defender was to be paid a salary and given office space, furniture, and salaries for “deputies, clerks, and employees.”<sup>52</sup> That same year, San Francisco relied on the new California law and became the first (and only) county in the state to institute a public defender office led by an elected chief public defender.<sup>53</sup> The requirement that the public defender be elected rather than appointed was, however, a sticking point for other large counties that preferred to maintain more control over their county defense system.<sup>54</sup> For example, Alameda County, which in 1927 became the third county in the state to create a public defender office,<sup>55</sup> did so under the county’s charter,<sup>56</sup> thus allowing its office chief to be appointed at the discretion of the board of

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49. State law in California commands each county to have a governing body known as the board of supervisors which exercises legislative, executive, and quasi-judicial authority. CAL. GOV’T CODE § 25000 (West 2021).

50. The nine counties covered by the law were Los Angeles, San Francisco, Alameda, Fresno, San Diego, Santa Clara, Sacramento, San Joaquin, and San Bernardino. BUREAU OF THE CENSUS, U.S. DEP’T OF COM., 1 FOURTEENTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1920: NUMBER AND DISTRIBUTION OF INHABITANTS 95-96 tbl.49 (1921), <https://perma.cc/TVN8-LU93> (to locate, select “View the live page,” then select “Detailed Tables: Population of Counties, Incorporated Places, and Minor Civil Divisions—Alabama through Mississippi”).

51. Act of May 24, 1921, ch. 245, § 1, 1921 Cal. Stat. 354, 354 (“There is hereby created in each county and city and county of the State of California, the board of supervisors of such county or city and county so deciding, the office of public defender, and the person to be elected to this office shall be known as the public defender.”). The 1921 statute divided California’s fifty-eight counties into different class sizes based on their population. Counties besides the nine largest, as well as counties that adopted a public defender office under a county charter, were exempt from complying with the new law. *Id.* § 2, 1921 Cal. Stat. at 354.

52. *Id.* § 6, 1921 Cal. Stat. at 355. The original inspiration for the bill was Clara Foltz, who in 1897 sent a draft bill to the California legislature to create the office of the public defender. See *Public Defender: Clara Foltz, the Attorney, Wants One Provided For*, SACRAMENTO DAILY REC.-UNION, Feb. 1, 1897, at 4.

53. *Public Defender Is Named in S.F.*, SACRAMENTO UNION, Oct. 4, 1921, at 12 (reporting that the county board of supervisors appointed Frank J. Egan as public defender until January 1, 1922 when an election would be held for the office pursuant to the new law). For a powerful defense of San Francisco’s reliance on public defender elections, see Jeff Adachi, Opinion, *Readers React: An Elected Public Defender Defends Elected Public Defenders*, L.A. TIMES (Mar. 28, 2018, 4:00 AM PT), <https://perma.cc/7WVU-NWPB>.

54. For an exploration of why appointment became the dominant method for selecting public defenders throughout the United States, see Ronald F. Wright, *Public Defender Elections and Popular Control over Criminal Justice*, 75 MO. L. REV. 803, 823-28 (2010).

55. *Shea Sworn in as Defender*, OAKLAND TRIB., Jan. 25, 1927, at 2; Samuel Rubin, *Justice for the Indigent: The Need for Public Defenders*, 39 A.B.A. J. 893, 895 (1953).

56. Anthony Platt & Randi Pollock, *Channeling Lawyers: The Careers of Public Defenders*, 9 ISSUES IN CRIMINOLOGY 1, 4 (1974).

supervisors rather than elected by the public.<sup>57</sup> Soon the California legislature changed course and allowed the nine largest counties to choose between a system with an elected or an appointed public defender without needing to rely on the county's charter.<sup>58</sup>

California's smaller counties continued during this time to rely on an uncompensated appointment system.<sup>59</sup> To encourage counties to abandon this unworkable system, the legislature in 1941 allowed the boards of supervisors in all counties to reimburse appointed lawyers from county funds.<sup>60</sup> Additionally, to further encourage smaller counties to act, the state in 1949 extended the statutory power to open an institutional public defender office to all counties and enabled counties to pool their resources to create multicounty public defender offices.<sup>61</sup> By 1951, public defender offices had also opened in

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57. Act of Jan. 18, 1927, ch. 10, §§ 15, 17, 27, 1927 Cal. Stat. 2029, 2034-36.

58. Act of May 20, 1943, ch. 636, § 2, 1943 Cal. Stat. 2256, 2257 (amending the Act of May 24, 1921, which created the office of public defender in the nine largest California counties, to provide that “the board of supervisors shall, at the time it establishes the office, decide whether the public defender is to be appointed or elected”). Passage of the bill was urged by members of the bar who favored having an appointed public defender rather than an elected official in the position. *See, e.g.*, Letter from Gordon X. Richmond to California Governor Earl Warren (May 7, 1943) (on file with LRI History LLC) (expressing support for having “a Public Defender subject to appointment and . . . avoid[ing] creating a permanent elective office”).

59. *See, e.g.*, Letter from Jack J. Rimel, Partner, Harvey, Rimel & Harvey, to California Gov. Earl Warren (May 7, 1943) (on file with LRI History LLC) (“In many small counties . . . there is, as yet, no Public Defender, and not only is the burden of defense of indigent criminal cases thrust upon the legal profession without compensation, but even more important, the representation which these indigent persons charged with crime, receive in their cases, is not usually of the highest caliber, due to the fact that the majority of lawyers engaged in civil practice do practically no criminal work and are exceedingly ignorant concerning criminal practice.”).

60. Act of May 30, 1941, ch. 451, § 1, 1941 Cal. Stat. 1741, 1741 (codified as amended at CAL. PENAL CODE § 987.2 (West 2021)) (allowing for a “reasonable sum” to be provided as compensation out of public funds for court-appointed counsel). *See generally* Hill v. Superior Court, 293 P.2d 10, 17 (Cal. 1956) (Carter, J., dissenting) (pointing out that the “object” of the law as enacted in 1941 “was to assure more efficient and satisfactory representation of indigent defendants in criminal cases”).

61. *See* Act of July 29, 1949, ch. 1288, § 1, 1949 Cal. Stat. 2272, 2272 (codified at CAL. GOV'T CODE § 27700 (West 2021)) (“The board of supervisors of any county may establish the office of public defender for the county. Any county may join with one or more counties to establish and maintain the office of public defender to serve such counties.”); *see also* Letter and Recommendation on Assembly Bill 2576 from Richard A. McGee, Cal. Dir. of Corr., to Beach Vasey, Legis. Sec'y, Governor's Off. (July 19, 1949) (on file with LRI History LLC) (noting that “[i]t was felt that the provisions for joint public defenders might encourage the establishment of the office in the smaller counties”).

the counties of Orange, Riverside, Sacramento, San Joaquin, and Tulare,<sup>62</sup> but still no small or rural counties had established such an office.

B. Early Development of the Right to Counsel on Immigration  
Consequences

California courts were among the first to impose obligations on defense counsel's handling of immigration consequences. In 1987—over two decades before *Padilla*—a California court of appeal found in *People v. Soriano* that a San Francisco public defender was ineffective when she failed to advise her lawful-permanent-resident client that his plea and sentencing disposition would result in deportation.<sup>63</sup> Mr. Soriano pleaded guilty to assault with a deadly weapon in exchange for a year-long sentence.<sup>64</sup> Under the federal immigration law at the time, Mr. Soriano's conviction made him deportable because it was “a crime involving moral turpitude committed within five years after entry and sentenced to confinement . . . in a prison or corrective institution, for a year or more.”<sup>65</sup> Had counsel bargained instead for a sentence one day shorter than a year, her client could have avoided deportation.<sup>66</sup>

Although Mr. Soriano's counsel knew her client was an immigrant, she did not research whether the plea was “the most advantageous immigration disposition”<sup>67</sup> and instead only advised her client that the plea “could” result in his deportation.<sup>68</sup> Of course, telling clients that they “could” be deported is

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62. EMERY A. BROWNELL, LEGAL AID IN THE UNITED STATES: A STUDY OF THE AVAILABILITY OF LAWYERS' SERVICES FOR PERSONS UNABLE TO PAY FEES 126 (1951). Of these five counties, Tulare was the smallest with a population of 149,264, and Sacramento the largest with a population of 277,140. BUREAU OF THE CENSUS, U.S. DEP'T OF COM., 1 CENSUS OF POPULATION: 1950—NUMBER OF INHABITANTS 5-12 to -13 tbl.5 (1952), <https://perma.cc/5Z6M-22X4> (to locate, select “View the live page,” then select “California”).

63. 240 Cal. Rptr. 328, 330-31, 336 (Ct. App. 1987).

64. *Id.* at 330.

65. *Id.* (quoting 8 U.S.C. § 1251(a)(4) (1982)). In 1996, the immigration law was amended to require deportation if the *potential* sentence was a year or more, instead of the sentence imposed. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 435(a), 110 Stat. 1214, 1274 (codified at 8 U.S.C. § 1227(a)(2)); see Kari Converse, *Criminal Law Reforms: Defending Immigrants in Peril*, CHAMPION, Aug. 1997, at 10, 11 (summarizing how AEDPA changed the crime-based grounds for removal).

66. *Soriano*, 240 Cal. Rptr. at 334 (explaining that Mr. Soriano argued that “he would not have been subject to deportation had he not been sentenced, but instead the imposition of his sentence had been suspended, and had he not been confined for a year, but for a period one day short of a year”).

67. *Id.* at 335. Mr. Soriano's counsel admitted that she would have “tried to negotiate the case differently” had she known that imposition of a sentence of 364 days instead of 365 could have avoided her client's deportation. *Id.*

68. *Id.* at 334.



clearly different from the accurate, specific advice that they will be deported.<sup>69</sup> Citing to both the American Bar Association’s Standards for Criminal Justice,<sup>70</sup> and the San Francisco Public Defender’s “Minimum Standards of Representation,”<sup>71</sup> the court in *Soriano* concluded that defense counsel’s mere “formulaic warning” that the plea “could” result in deportation was ineffective under the state and federal constitutions.<sup>72</sup> Furthermore, the court found that counsel was not absolved of her duty to provide a specific advisal by the judge’s issuance of a standard warning about possible deportation.<sup>73</sup>

In another high-water mark for immigrant defendants’ rights, a California court of appeal in 1989 extended the logic of *Soriano* to require counsel to not just provide accurate advice about immigration consequences but also to actively defend against those consequences.<sup>74</sup> Pedro Barocio pleaded guilty after being advised by his attorney that the conviction could subject him to deportation.<sup>75</sup> But Barocio’s counsel never advised him that he qualified for a Judicial Recommendation Against Deportation<sup>76</sup>—also known as a judicial

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69. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 325 (2001) (“There is a clear difference . . . between facing possible deportation and facing certain deportation.”), *superseded in other part by statute*, REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a), 119 Stat. 302, 310-11 (codified as amended at 8 U.S.C. § 1252(a)); *United States v. Rodriguez-Vega*, 797 F.3d 781, 790 (9th Cir. 2015) (“Warning of the possibility of a dire consequence is no substitute for warning of its virtual certainty.”).

70. *Soriano*, 240 Cal. Rptr. at 335 (“[W]here the defendant raises a specific question concerning collateral consequences (as where the defendant inquires about the possibility of deportation), counsel should fully advise the defendant of these consequences.” (alteration in original) (quoting 3 STANDARDS FOR CRIMINAL JUSTICE 14-3.2 cmt. (AM. BAR ASS’N, 2d ed. 1980))).

71. *Id.* (explaining that San Francisco Public Defender Jeff Brown filed an amicus brief in the case and wrote that staff attorneys in his office have a duty to determine what the impact of the case may have on their client’s immigration status).

72. *Id.* at 334, 336.

73. *Id.* at 331-33, 336 (citing CAL. PENAL CODE § 1016.5) (finding the section 1016.5 advisement to be sound but allowing the defendant to withdraw his guilty plea because counsel rendered ineffective assistance by failing to provide adequate advice about the consequences of the guilty plea). As enacted by the California legislature in 1977, section 1016.5 of the California Penal Code requires judges to provide the following warning to all defendants prior to acceptance of a plea of guilty or nolo contendere: “If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” Act of Sept. 27, 1977, ch. 1088, § 1, 1977 Cal. Stat. 3495, 3495 (codified at CAL. PENAL CODE § 1016.5(a) (West 2021)).

74. *People v. Barocio*, 264 Cal. Rptr. 573, 579 (Ct. App. 1989).

75. *Id.* at 574, 576 (“Respondent does not claim he was not advised or was misadvised regarding the immigration consequences of his plea.”).

76. *Id.* at 575; 8 U.S.C. § 1251(b) (1988) (repealed 1990). The judicial RAD provision was repealed by the Immigration Act of 1990 and is no longer a part of federal immigration  
*footnote continued on next page*

RAD or JRAD—whereby the sentencing judge could issue an order to prevent his deportation.<sup>77</sup> Trial counsel was “unaware” that the judicial RAD provision existed and did not seek one on his client’s behalf.<sup>78</sup> The California court of appeal concluded that the judicial RAD provision was “part of the sentencing process to which the Sixth Amendment safeguards apply” and that counsel was therefore constitutionally ineffective for failing to investigate the procedure and advise his client accordingly.<sup>79</sup>

As the duty to advise clients on immigration consequences developed in the courts, a San Francisco-based nonprofit called the Immigrant Legal Resource Center (ILRC) stood ready to meet the challenge of training defense lawyers to fulfill this duty. The ILRC was founded by immigrant-rights attorney and law professor Bill Hing in 1979.<sup>80</sup> Since then, the ILRC has blossomed into a national resource center that is widely recognized for its work providing technical assistance on immigration law and policy.<sup>81</sup> In 1988, the year *Soriano* was decided, the ILRC worked together with the California Public Defenders Association (CPDA) to publish the first-ever resource for California public defenders on immigration law, aptly called the *Public Defenders Handbook on Immigration Law*.<sup>82</sup> The ILRC also began to provide

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law. Philip L. Torrey, *The Erosion of Judicial Discretion in Crime-Based Removal Proceedings*, IMMIGR. BRIEFINGS, Feb. 2014, at 4, 5; see Immigration Act of 1990, Pub. L. No. 101-649, § 505(a), 104 Stat. 4978, 5050 (codified as amended at 8 U.S.C. § 1227).

77. See *Barocio*, 264 Cal. Rptr. at 578 (“Respondent’s sole complaint to the court below was that counsel was ineffective for failing to advise respondent of his right to request a RAD from the sentencing court.”).

78. *Id.* at 579. As Margaret Taylor and Ronald Wright have found, “the JRAD option was not widely known among criminal defense attorneys.” Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1148-50 (2002).

79. *Barocio*, 264 Cal. Rptr. at 579; see also *People v. Bautista*, 8 Cal. Rptr. 3d 862, 868-70, 872 (Ct. App. 2004) (remanding the case to the trial court to determine the constitutional effectiveness of defense attorney who failed to pursue an “upward” plea that would have preserved the client’s ability to apply for discretionary relief from deportation).

80. *Who We Are*, IMMIGRANT LEGAL RES. CTR., <https://perma.cc/CLB7-WNKD> (archived Oct. 23, 2021) (noting that the ILRC was called the Golden Gate Immigration Clinic at the time of its founding).

81. Bill Ong Hing, *Legal Services Support Centers and Rebellious Advocacy: A Case Study of the Immigrant Legal Resource Center*, 28 WASH. U. J.L. & POL’Y 265, 269-73 (2008) (describing the ILRC’s areas of expertise and many specialized programs); Brenda Montes, *A For-Profit Rebellious Immigration Practice in East Los Angeles*, 23 CLINICAL L. REV. 707, 711 nn.10, 12 (2017) (describing the ILRC as “the nation’s leading immigration organization” that has worked since the 1980s “to identify, to challenge, and to educate others” about what is now often called “cimmigration”).

82. Interview with Immigration Experts Nos. 17 & 18 (Apr. 13, 2020); KATHERINE A. BRADY & DAVID S. SCHWARTZ, IMMIGR. LEGAL RES. CTR., PUBLIC DEFENDERS’ HANDBOOK ON IMMIGRATION LAW (2d ed. 1989).

consultations to attorneys on the immigration consequences of convictions, with reduced fees for public defenders.<sup>83</sup>

In 1992, ILRC staff attorney Katherine Brady reached an even wider audience of criminal defense attorneys by authoring a chapter in a famed California criminal law treatise, *California Criminal Law: Procedure and Practice*, often referred to by practitioners as the “*crim law bible*.”<sup>84</sup> The chapter, titled “*Representing the Noncitizen Criminal Defendant*,” advised that defense attorneys may be found to have provided ineffective assistance of counsel if they failed to “investigate and advise noncitizen defendant[s] of the *specific* immigration consequences of a guilty plea.”<sup>85</sup> Brady’s chapter also warned that “this area of the law changes very quickly and is very complex,”<sup>86</sup> something that would become increasingly true in the coming years.

Congress was already busy expanding the grounds for crime-based deportation. The Anti-Drug Abuse Act of 1988 created the so-called “aggravated felony” category of offenses which triggered automatic deportation.<sup>87</sup> And a pair of laws passed in 1996—the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act<sup>88</sup>—further expanded the number of deportable criminal offenses, while simultaneously reducing the availability of relief from deportation.<sup>89</sup> In the years that followed, the number of deportations rose dramatically,<sup>90</sup> with much of the growth attributable to the wider availability

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83. Katherine A. Brady, *Representing the Noncitizen Criminal Defendant*, in CALIFORNIA CRIMINAL LAW: PROCEDURE AND PRACTICE 491, 493 (Garrick Byers ed., 1992).

84. *Id.*; *California Criminal Law Procedure and Practice 2021*, CEB, <https://perma.cc/9R9M-QBL2> (archived Oct. 23, 2021).

85. Brady, *supra* note 83, at 492.

86. *Id.* at 493.

87. Pub. L. No. 100-690, §§ 7342-7344, 7347, 102 Stat. 4181, 4469-72 (codified as amended in scattered sections of 8 U.S.C.) (defining “aggravated felonies” to include murder, drug trafficking, and certain firearms offenses and establishing these offenses as a ground for deportation and expedited deportation). Today, the list of aggravated felonies has been greatly expanded. *See* 8 U.S.C. § 1101(a)(43) (containing a long list of crimes classified as aggravated felonies).

88. AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of the U.S. Code); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of the U.S. Code).

89. *See generally* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1936-43 (2000) (summarizing the 1996 changes in immigration law).

90. Whereas only 45,674 persons were deported in 1994, that number more than doubled to 114,432 by 1997 and continued to skyrocket in the years that followed, reaching 432,228 in 2013. OFF. OF IMMIGR. STAT., U.S. DEP’T OF HOMELAND SEC., 2019 YEARBOOK OF IMMIGRATION STATISTICS 103 tbl.39 (2020), <https://perma.cc/Z8SS-CWU3>.

of conviction-based removal.<sup>91</sup> This sustained focus on crime-based removals in the United States has had a disproportionate impact on Black and Latinx communities.<sup>92</sup>

Although changes in the immigration law brought more urgency to the task of training criminal defense lawyers to counsel their clients on immigration law, a 2001 decision by the California Supreme Court complicated this task by sanctioning *inaccurate* immigration advice but not the failure to advise.<sup>93</sup> The case involved Hugo Rangel Resendiz, a lawful permanent resident who had pleaded guilty to two drug crimes after the 1996 laws went into effect, triggering his mandatory deportation without eligibility for relief.<sup>94</sup> On habeas review, Mr. Resendiz revealed that his lawyer inaccurately advised him that he would have “no problems with immigration’ except that he would not be able to become a United States citizen.”<sup>95</sup> His attorney disputed this version of facts, claiming instead that he simply followed his standard practice of telling clients that the government was “always wanting” to deport noncitizens convicted of crimes.<sup>96</sup>

In deciding Mr. Resendiz’s case, the California Supreme Court concluded that affirmative misadvice on immigration consequences could constitute

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91. In fiscal year 2013, 59% of removals enforced by U.S. Immigration and Customs Enforcement were of individuals convicted of crimes. U.S. IMMIGR. & CUSTOMS ENF’T, U.S. DEP’T OF HOMELAND SEC., ERO ANNUAL REPORT: FY 2013 ICE IMMIGRATION REMOVALS 1 (n.d.), <https://perma.cc/83GH-G46N>. By 2020, the percentage of crime-based removals had risen to 92% of interior removals. U.S. IMMIGR. & CUSTOMS ENF’T, U.S. DEP’T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2020 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 4 (n.d.), <https://perma.cc/E7WL-AH2P>. For a compelling critique of crime-based removal, see generally David K. Hausman, *The Unexamined Law of Deportation*, 110 GEO. L.J. (forthcoming 2022). See also Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 129-30 (2015) (discussing the enforcement “trend toward targeting noncitizens who had committed crimes”).

92. See, e.g., Carrie L. Rosenbaum, *The Natural Persistence of Racial Disparities in Crime-Based Removals*, 13 U. ST. THOMAS L.J. 532, 533 (2017) (“[O]ver ninety percent of those deported through criminal immigration policing are Latina/o, whereas Latina/o immigrants make up only fifty percent of the United States’ immigrant population.”); Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 665-74 (2011); Tanya Golash-Boza, *Structural Racism, Criminalization, and Pathways to Deportation for Dominican and Jamaican Men in the United States*, SOC. JUST., Nos. 2/3 (2017), at 137, 142; Karla M. McKanders, *Immigration and Racial Justice: Enforcing the Borders of Blackness*, 37 GA. ST. L. REV. 1139, 1143-49 (2021).

93. *In re Resendiz*, 19 P.3d 1171, 1184, 1186 (Cal. 2001), *abrogated by* *Padilla v. Kentucky*, 559 U.S. 356 (2010).

94. *Id.* at 1174.

95. *Id.* at 1175.

96. *Id.* at 1176.

ineffective assistance but declined to resolve the factual dispute over whether he received inaccurate advice.<sup>97</sup> Instead, the court found that Mr. Resendiz could not prevail because he most likely would have been convicted at trial and therefore could not satisfy *Strickland v. Washington's* prejudice prong.<sup>98</sup> Suggesting further limitations on the obligations of defense counsel, California's high court noted in dicta that "[w]e are not persuaded that the Sixth Amendment imposes a blanket obligation on defense counsel, when advising pleading defendants, to investigate immigration consequences or research immigration law."<sup>99</sup>

While the *Resendiz* decision was heralded for rejecting the California Attorney General's position that an attorney providing incorrect immigration advice would never amount to ineffective assistance of counsel,<sup>100</sup> it validated the unfortunate practice of not providing clients with specific advice on immigration consequences. After *Resendiz*, defense lawyers who never ventured to advise their clients could dispose of their obligations, while their colleagues who diligently conducted research but made an error would fall below the minimum standard of competence.<sup>101</sup> As Jenny Roberts has cogently argued, this logic made lawyers "less likely to warn" their clients about

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97. *Id.* at 1186 ("Having examined the record, we are not able to determine with certainty whether counsel conformed to his purported custom and habit or whether he supplemented any customary warning with a more specific, but incorrect, advisement.").

98. *Id.* For a discussion of the *Strickland* test, see note 190 and accompanying text below. As we develop in notes 197-202 and accompanying text below, the U.S. Supreme Court in 2017 rejected the narrow focus on trial outcome adhered to in *In re Resendiz*. See *Lee v. United States*, 137 S. Ct. 1958, 1968-69 (2017). In analyzing prejudice under the *Strickland* test, the Court instead concluded that almost certain conviction at trial cannot preclude a finding of prejudice "if deportation were the 'determinative issue' for an individual in plea discussions." *Id.*

99. *In re Resendiz*, 19 P.3d at 1184.

100. See, e.g., Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 708 (2002) (referring to *In re Resendiz* as "[o]ne potential outlier" in the general state-court pattern finding that immigration consequences are categorically excluded from ineffectiveness analysis); Lindsay VanGilder, *Ineffective Assistance of Counsel Under People v. Pozo: Advising Non-citizen Criminal Defendants of Possible Immigration Consequences in Criminal Plea Agreements*, 80 U. COLO. L. REV. 793, 796 & n.15 (2009) (describing the *Resendiz* decision as an "important exception" to a line of decisions concluding that "the failure to advise a non-citizen criminal defendant of possible deportation consequences does not constitute ineffective assistance of counsel").

101. Prior to *Padilla*, the Ninth Circuit had found that an attorney's performance is constitutionally inadequate when the attorney gives "grossly misleading" advice, but that refraining from advising on the subject does not constitute ineffective assistance of counsel. *United States v. Kwok Chee Kwan*, 407 F.3d 1005, 1015-17 (9th Cir. 2005), *abrogated by Padilla v. Kentucky*, 559 U.S. 356 (2010).

immigration consequences and provided “little incentive [for lawyers] to avail themselves of . . . critical educational opportunities [about immigration law].”<sup>102</sup>

The ILRC worked to counteract this “perverse incentive structure”<sup>103</sup> by making their immigration trainings and educational materials more readily available to defense counsel. In 2002, the ILRC launched the Defending Immigrants Partnership (DIP), together with the National Legal Aid and Defender Association, the Immigrant Defense Project of the New York State Defenders Association, and the National Immigration Project of the National Lawyers Guild.<sup>104</sup> DIP aimed to “ensure that indigent noncitizens accused of crimes receive due process and adequate representation.”<sup>105</sup> In California, the group conducted trainings for public defenders and created free resources, including a frequently updated reference chart summarizing the immigration consequences of the most commonly charged California crimes.<sup>106</sup> Experts in criminal-immigration law also helped to facilitate public defender trainings in the state,<sup>107</sup> and authored essential reference books for practicing lawyers.<sup>108</sup>

### C. The Padilla Revolution

In 2010, the Supreme Court decided the case of *Padilla v. Kentucky*, concluding that “constitutionally competent counsel would have advised [Mr. Padilla] that his conviction for drug distribution made him subject to

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102. Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 148 (2009). Yolanda Vázquez also raised the concern prior to *Padilla* that jurisdictions which only penalized misadvice “inadvertently support[ed] a ‘Don’t Tell’ policy” that incentivized “attorney[s] to remain silent” and not advise clients on immigration consequences. Yolanda Vázquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 BERKELEY LA RAZA L.J. 31, 51-52 (2010).

103. Roberts, *supra* note 102, at 124.

104. Lory Diana Rosenberg, Column, *Preventative Lawyering: How Defense Counsel Can Defend Immigrants’ Rights*, CHAMPION, Mar. 2003, at 43, 43.

105. Hing, *supra* note 81, at 271.

106. See, e.g., *126 Defenders, 31 States, 1 National Training*, IMMIGRANT DEF. PROJECT, <https://perma.cc/7HSJ-8B4H> (archived Oct. 23, 2021); KATHERINE BRADY, IMMIGRANT LEGAL RES. CTR., QUICK REFERENCE CHART FOR DETERMINING SELECTED IMMIGRATION CONSEQUENCES OF SELECTED CALIFORNIA OFFENSES (2005), <https://perma.cc/WWK8-X8AV>.

107. Welch, *supra* note 9, at 560 & nn.108, 110 (recounting that law professor James Smith and criminal defense attorney Norton Tooby both conducted trainings).

108. For examples of respected reference books in this area authored well before the *Padilla* decision, see generally NORTON TOOBY, CRIMINAL DEFENSE OF IMMIGRANTS (1999) (providing criminal defense lawyers with the tools to protect immigrants against the adverse immigration consequences of criminal cases); DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES (1984).

automatic deportation.”<sup>109</sup> The decision marked a pivotal moment in Sixth Amendment jurisprudence—what concurring Justice Samuel Alito called a “major upheaval in Sixth Amendment law.”<sup>110</sup> Three important doctrinal moves framed the Court’s holding and effectively placed criminal defense lawyers on the front line of defending their clients against possible deportation.

First, the *Padilla* decision was remarkable because the Court acknowledged the deep linkages between criminal and immigration law. As Justice John Paul Stevens wrote for the Court, changes in federal immigration law had “dramatically raised the stakes of a noncitizen’s criminal conviction.”<sup>111</sup> In the Court’s view, the two systems were now so “intimately related” that deportation had become “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.”<sup>112</sup> The Court debunked the traditional logic that civil deportation and criminal conviction were separate, a logic that had long kept consideration of deportation “beyond the scope of the Sixth Amendment.”<sup>113</sup>

Second, the Court’s decision was significant because it rejected, at least in the deportation context, the collateral-consequences doctrine, which had placed advising on immigration consequences outside the protection of the Sixth Amendment.<sup>114</sup> The doctrine arose out of a line of Fifth Amendment cases that limited the due process obligation of courts, making advisal on deportation optional and deeming other consequences merely “collateral.”<sup>115</sup> The Kentucky Supreme Court had extended the collateral-consequences rule to deny Mr. Padilla relief by finding that deportation was merely “collateral” and therefore not within “the guarantee of the Sixth Amendment right to counsel.”<sup>116</sup> On review, the Supreme Court clarified that it had “never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’” in its Sixth Amendment

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109. 559 U.S. 356, 360 (2010).

110. *Id.* at 383 (Alito, J., concurring in the judgment).

111. *Id.* at 364 (majority opinion).

112. *Id.* at 364–65 (footnote omitted).

113. Gabriel J. Chin & Margaret Love, *Status as Punishment: Padilla v. Kentucky*, GPSOLO, Mar. 2011, at 26, 26.

114. See generally Roberts, *supra* note 102 (criticizing the collateral-consequences doctrine); Vázquez, *supra* note 102 (same).

115. For a discussion of the evolution of the collateral-consequences doctrine, see 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, 803–05 (2011); Chin & Holmes, *supra* note 100, at 705–09.

116. *Commonwealth v. Padilla*, 253 S.W.3d 482, 485 (Ky. 2008), *rev’d*, 559 U.S. 356.

jurisprudence.<sup>117</sup> Without delving further into the validity of the doctrine, the Court concluded that the collateral–direct distinction was not appropriate at least “in this case because of the unique nature of deportation,” which makes it “uniquely difficult to classify as either a direct or a collateral consequence.”<sup>118</sup>

Third, the *Padilla* decision was notable for its recognition that plea bargaining—rather than trial—has become the dominant mode by which criminal cases are adjudicated.<sup>119</sup> Indeed, as the Court acknowledged, plea bargains now account for “nearly 95% of all criminal convictions.”<sup>120</sup> Within this bartered system, prosecutors choose from among various charges that could satisfy the conduct at issue, and defense lawyers bargain “creatively” on behalf of their clients to “craft a conviction and sentence” that best suits their client’s interests.<sup>121</sup> Together, the parties can arrive at a disposition that “reduce[s] the likelihood of deportation, [such] as by avoiding a conviction for an offense that automatically triggers the removal consequence.”<sup>122</sup> By recognizing the constitutional imperative of effective counsel during the negotiation process,<sup>123</sup> the Court underscored just how critical the information that a defendant receives is to preserving the validity of a criminal conviction. In practice, this means that defense attorneys must discuss plea-bargaining options with their clients and understand their client’s goals.<sup>124</sup>

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117. *Padilla*, 559 U.S. at 365 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

118. *Id.* at 365–66.

119. Stephanos Bibas has called attention to this aspect of the decision, calling it “the Court’s first case to treat plea bargaining as a subject worthy of constitutional regulation in its own right and on its own terms.” Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1120 (2011). For an argument that the Court’s constitutional regulation of plea bargaining began much earlier, see Josh Bowers, *Fundamental Fairness and the Path from Santobello to Padilla: A Response to Professor Bibas*, 2 CALIF. L. REV. CIR. 52, 53 (2011).

120. *See Padilla*, 559 U.S. at 372.

121. *Id.* at 373.

122. *Id.* (“By 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.”). Although the Court claimed that plea bargaining could serve “the interests of both parties,” *id.*, Andrew Crespo has argued that “most knowledgeable observers describe [plea bargaining] as something else: a fundamentally coercive practice,” Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1311 (2018).

123. *Padilla*, 559 U.S. at 373 (“In sum, we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.”).

124. *See infra* Part III. In line with the *Padilla* decision, current California law specifically requires that defense counsel engage in plea negotiations to the extent “consistent with the goals of and with the informed consent of” their client. CAL. PENAL CODE § 1016.3(a) (West 2021).



For defense lawyers practicing in California where the courts had already recognized that affirmative misadvice amounts to ineffective assistance of counsel,<sup>125</sup> the *Padilla* decision did not come as a complete surprise. Indeed, as the Court noted, “[t]he weight of prevailing professional norms”—including practice guides, treatises, and bar rules—already “support[ed] the view that counsel must advise her client regarding the risk of deportation.”<sup>126</sup> But *Padilla* did expand the scope of constitutional imperative beyond that previously articulated by the California Supreme Court. The U.S. Supreme Court held that the Constitution requires advisals in all cases where the immigration consequences are “clear.”<sup>127</sup> In this respect, *Padilla* was a wake-up call for some public defenders in California. Although the ILRC and DIP had done groundbreaking work to train the defense bar, most public defenders still lacked technical expertise in immigration law.<sup>128</sup> There was also a shortage of immigration lawyers with the requisite experience in analyzing the criminal consequences of immigration convictions.<sup>129</sup> Moreover, California’s early decision to adopt a county-run, rather than statewide, public defender system meant that there would be no unified state plan for developing expertise in criminal-immigration law or establishing *Padilla* practice standards. Instead, as Part II explains, each county became a laboratory for funding, staffing, and training public defenders to implement *Padilla*.

## II. Distribution of Criminal Defense Services in California Today

Because California’s trial-level system for court-appointed counsel is administered at the county level, we began by investigating the public defender delivery system in each of California’s fifty-eight counties.<sup>130</sup> Our research

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125. See *Padilla*, 559 U.S. at 370 (citing *In re Resendiz* and other court decisions that limited claims of ineffective counsel to situations involving erroneous advice).

126. See *id.* at 366-68, 372 (“For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea.”).

127. See *id.* at 369 (concluding that “when the deportation consequence is truly clear, as it was in this case, the duty to give *correct advice* is equally clear” (emphasis added)).

128. Welch, *supra* note 9, at 561 (noting that as of 2004 “only some” public defenders had immigration law training and existing efforts were “insufficient because of their limited scope and depth”).

129. See generally Sweeney, *supra* note 9, at 363 (explaining that “many immigration lawyers have historically avoided cases and clients with criminal involvement”).

130. Some larger California counties, such as Los Angeles County and Orange County, have also established an alternate public defender office to handle conflicts cases. See, e.g., *Frequently Asked Questions: What Is an Alternate Public Defender?*, L.A. CNTY. ALTERNATE PUB. DEF., <https://perma.cc/W3Q8-WNL9> (archived Oct. 23, 2021); *FAQs: Who Is the Alternate Defender?*, ORANGE CNTY. PUB. DEF., <https://perma.cc/L4VB-Z3Q8> (archived Oct. 23, 2021). Counties that have not established institutional alternate public defender

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benefitted from the assistance of the CPDA, a nonprofit organization that represents institutional public defender offices in California.<sup>131</sup> The CPDA provided us with their member list, which included counties in California with institutional public defender offices but not those with contract systems for assigning attorneys to indigent defendants. We verified and supplemented these data by visiting each county web page and calling county personnel to obtain information on their public defender services. We were also assisted by the ILRC, a nonprofit that works closely with public defenders throughout the state to support *Padilla* implementation by, among other things, contracting with counties to provide expert consultations.<sup>132</sup> Through this outreach, we sought to identify the model that each county used to (1) appoint counsel for indigent defendants; and (2) provide *Padilla* advisals.

We then pursued more detailed information on how these fifty-eight counties have implemented *Padilla* and any challenges they have encountered. This effort entailed collaborating with the CPDA to identify and survey the chief public defender or lead attorney providing defense services in all California counties. As described further in Appendix A, 81% of California counties completed our survey, providing a robust picture of how they have responded to *Padilla*.

Next, we collaborated with the ILRC to locate and survey all persons employed as dedicated immigration experts in California as of 2020. In total, we identified thirty-seven immigration experts in sixteen counties, all of whom participated in our study. These data contributed valuable information about the role of the *Padilla* specialist and the kinds of work that these attorneys undertake to defend and counsel immigrant clients.<sup>133</sup>

Finally, we followed up on our surveys by conducting twenty-four in-depth semi-structured interviews with leaders of public defender

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offices refer conflict cases to solo practitioners or law firms that have contracted with the county to provide this service. See Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 300 (2009). We limited our surveys and interviews to the principal provider of indigent defense services in each county and did not include alternate defender offices.

131. The CPDA is a nonprofit membership organization that gives indigent defense providers access to a collection of resources including training manuals, seminars, sample motions, and online trainings. *CPDA Membership Join/Renewals*, CAL. PUB. DEFS. ASS'N, <https://perma.cc/SR65-K6DW> (archived Oct. 23, 2021). CPDA also conducts legislative advocacy and writes amicus briefs in state and federal court on issues affecting public defenders and their clients. *Id.*

132. As introduced in Part I above, the ILRC is a San Francisco-based nonprofit that provides technical assistance in immigration law topics, as well as legal trainings and publications. Hing, *supra* note 81, at 269-70.

133. See *infra* Appendix B.

organizations and immigration experts who work closely with trial-level public defenders. These interviews supplied a unique window into how attorneys on the ground understand the *Padilla* decision and implement it in their day-to-day work.

The remainder of Part II is divided into two Subparts. First, we present our findings on the model for indigent defense adopted by each county. Second, we document each county's approach to providing *Padilla* services.<sup>134</sup>

#### A. The Structure of County-Level Defense

As of 2020, thirty-three of the fifty-eight (57%) California counties had adopted an institutional public defender model.<sup>135</sup> Each of these institutional public defender offices was headed by a single chief defender and staffed by salaried attorneys and support staff.

All but one of the remaining counties in California had adopted a contract model for public defense. In these twenty-four counties (41%), the board of supervisors contracted with private attorneys to accept appointments for indigent defendants.<sup>136</sup> Under this contract model, attorneys can apply for open positions by submitting a letter of interest and a resume to the county administrator. If selected, the board of supervisors approves the attorney as a contract employee for a period of years.<sup>137</sup> Sometimes contract attorneys have staff supporting them, but often they do not.<sup>138</sup> Unlike institutional public defender offices, contract systems are not headed by a chief public defender, but often have one attorney who is considered to be the lead attorney for organizational purposes.<sup>139</sup> In some counties, a single law firm handled all

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134. See *infra* Appendix C.

135. Those counties adopting an institutional public defender office were Alameda, Contra Costa, El Dorado, Fresno, Humboldt, Imperial, Kern, Lassen, Los Angeles, Marin, Mendocino, Merced, Monterey, Napa, Nevada, Orange, Riverside, Sacramento, San Bernardino, San Diego, San Francisco, San Joaquin, Santa Barbara, Santa Clara, Shasta, Siskiyou, Solano, Sonoma, Stanislaus, Tulare, Tuolumne, Ventura, and Yolo. See *infra* Table 3.

136. Those counties adopting a contract system were Alpine, Amador, Butte, Calaveras, Colusa, Del Norte, Glenn, Inyo, Kings, Lake, Madera, Mariposa, Modoc, Mono, Placer, Plumas, San Benito, San Luis Obispo, Santa Cruz, Sierra, Sutter, Tehama, Trinity, and Yuba. See *infra* Table 3.

137. See, e.g., Interview with Public Defender Lead of Small Size County (Mar. 13, 2020).

138. See *id.*

139. For example, Kings County designates one attorney as the “Coordinating Attorney” to oversee the activities of the other twenty-three private lawyers who contract with the county to provide defense services. See 1 CNTY. OF KINGS BD. OF SUPERVISORS, COUNTY OF KINGS: 2018-2019 FINAL BUDGET 150 (2018), <https://perma.cc/E43F-LGMA>; see also Laurence A. Benner, *The California Public Defender: Its Origins, Evolution and Decline*, 5 CAL. LEGAL HIST. 173, 208 (2010) (explaining that in counties with contract systems, a  
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county appointments.<sup>140</sup> In other counties, public defender appointments went to one or more solo practitioners.<sup>141</sup>

Only one county in California—San Mateo—had an assigned counsel system. Under this program, the county relies on the San Mateo County Bar Association to appoint private lawyers serving on a panel to represent indigent defendants.<sup>142</sup> This unique program began in 1968 and had 114 participating lawyers at the time of our study.<sup>143</sup>

To further clarify the structure of indigent defense in California, we classified each county by population size, as determined by U.S. Census Bureau's 2018 American Community Survey.<sup>144</sup> We then categorized the fifty-eight California counties into three groups based on their population: large (greater than one million), medium (100,000 to 1,000,000), and small (less than 100,000), yielding nine large (15.5%), twenty-six medium (44.8%), and twenty-three small (39.7%) counties.<sup>145</sup> All of California's large counties ( $n = 9$  of 9) and close to three-fourths of its medium counties ( $n = 19$  of 26) adopted an institutional model. In contrast, among small California counties, almost four-fifths had a contract model ( $n = 18$  of 23).

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primary contractor could win the county's contract bid and serve as a lead attorney by subcontracting out county cases to other attorneys in private practice).

140. For example, in Santa Cruz County, the law firm of Biggam, Christensen & Minsloff has been the indigent defense service provider since 1975. *About*, SANTA CRUZ PUB. DEFS., <https://perma.cc/JN2G-6EED> (archived Oct. 23, 2021).

141. *See, e.g.*, Interview with Public Defender Lead of Small Size County, *supra* note 137.

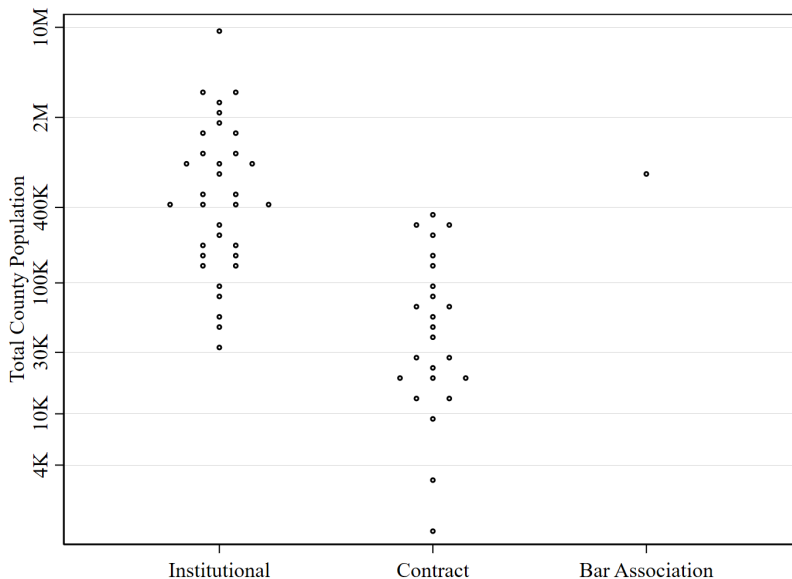
142. *Private Defender Program*, CNTY. SAN MATEO, <https://perma.cc/6W8F-VHMR> (archived Oct. 23, 2021).

143. *Id.*

144. *American Community Survey: Selected Social Characteristics in the United States*, U.S. CENSUS BUREAU (2018), <https://perma.cc/68SH-CB5S> (to locate, select "View the live page," select "2018" tab, select "State," select California from the drop-down menu, select "Get Data Profile Links" tab, follow "Social Characteristics" hyperlink, select "Customize Table" tab, select "1 Geo" tab, then in the expanding table select "County," "California," and "All Counties within California," and select "Close").

145. For more detailed information on county size, see Appendix D below.

**Figure 1**  
Public Defense Structure and County Population



A visual depiction of California’s public defense models by total population appears in Figure 1. No California county with a population above 400,000 has adopted a contract defender system. Yet among counties with between 30,000 and 400,000 residents, there is variation in the model chosen. This finding underscores that county boards of supervisors in mid-sized counties are making different decisions about whether to create an institutional or contract system. Among the smallest counties—those with 30,000 or fewer residents—all had a contract model. No counties have created the multicounty offices suggested by the California legislature in 1949.<sup>146</sup>

#### B. Models for Distributing Immigration Expertise

Following *Padilla*, public defender organizations across the country were faced with the important questions of whether and how to restructure their protocols and staffing to satisfy the new standard. A paper authored just before the *Padilla* decision by the New York State Defenders Association (NYSDA), in

146. See *supra* note 61 and accompanying text.

collaboration with the Immigrant Defense Project and Cardozo School of Law, provided possible answers.<sup>147</sup> According to the authors, institutional offices could incorporate immigration expertise by hiring an in-house immigration expert.<sup>148</sup> Alternatively, public defenders could enter into a contract with an outside immigration expert, such as an immigration lawyer working at a nonprofit organization.<sup>149</sup> The authors did not recommend other approaches, such as relying on informal relationships with immigration attorneys.<sup>150</sup> The NYSDA report focused on institutional defender offices and did not consider contract-based systems like those adopted in two-fifths of California counties. Since the report was published in 2009, there has been no effort, until our project, to compare the report's recommendations to actual practice at a statewide level.

As summarized in Table 1, sixteen out of the fifty-eight counties in California have hired an in-house immigration expert. On-staff immigration experts were largely concentrated within the largest California counties. No small county employed an immigration expert.<sup>151</sup> Although we use the term immigration expert to refer to this position, we acknowledge that there is not yet a uniform title for the position. Rather, it varies from office to office: "immigration resource attorney," "crim-immigration attorney," "criminal constitutional immigration attorneys," "immigration defense attorney," "immigration attorney," and "immigration specialist" were among the different titles in use.<sup>152</sup>

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147. See PETER L. MARKOWITZ, N.Y. STATE DEFS. ASS'N & IMMIGRANT DEF. PROJECT, PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER IMMIGRATION SERVICE PLAN (2009), <https://perma.cc/56N9-D865>.

148. *Id.* at 10.

149. *Id.* at 13-14.

150. See generally MARKOWITZ, *supra* note 147 (declining to address the merits of informal immigration consultations while highlighting the benefits and drawbacks of other, more formal systems). For a discussion on some of the shortcomings of relying on "informal collaborations" to provide immigration advice, see Welch, *supra* note 9, at 575-76.

151. See *infra* Table 1.

152. For more variations on the title of this emerging position, see, for example, Interview with Immigration Expert No. 5 (Mar. 18, 2020) (explaining that the title for the position in this expert's office is "deputy public defender, immigration specialist"); Interview with Immigration Experts Nos. 1 & 2 (Mar. 13, 2020) (using the term "immigration resource attorney"); Interview with Immigration Expert No. 10 (Apr. 20, 2020) (using the term "immigration attorney"); Interview with Immigration Expert No. 8 (Mar. 23, 2020) (using the term "immigration defense attorney"); and Interview with Public Defender Chief of Medium Size County No. 1 (Apr. 16, 2020) (explaining that although people holding expert positions "like to call themselves crim-immigration attorneys . . . I like to call them criminal constitutional immigration attorneys").

Fifteen of the counties with an in-house expert used an institutional public defender model, while one county, Santa Cruz, employed a contract model.<sup>153</sup> In some offices, the immigration-expert position was integrated and paid on par with a public defender trial position. In others, the expert was paid at a lower level and/or a level not reflecting a full-time position's salary.<sup>154</sup>

Of the sixteen county offices with in-house experts, five had more than one expert on staff.<sup>155</sup> The counties with the most immigration experts at the time of our study were Los Angeles and San Francisco—both with nine experts. In offices with more than one expert on staff, attorneys often refer to themselves as part of an “immigration unit.” Within the larger units, immigration experts may specialize in certain types of immigration work. Thus, one attorney may focus on *Padilla* advisals while another represents clients in immigration court or helps clients pursue postconviction relief.<sup>156</sup>

The position of immigration expert has rapidly emerged as a new type of function within public defender services. While only Los Angeles County had an expert on staff in 2000, eight offices had one by 2016, and that number doubled to sixteen by 2020.<sup>157</sup> Among the thirty-seven experts we identified in 2020, seventeen had served in the position for less than one year, and another eleven had served in the position for less than two years.<sup>158</sup> All of the immigration experts we interviewed spent at least part of their time providing *Padilla* advisals.<sup>159</sup> Some experts focused exclusively on advisals and even referred to their position as that of a “*Padilla* attorney.”<sup>160</sup> The growing dedication of resources to immigration experts reflects a shared understanding that consulting with a lawyer specializing in the intersection of criminal and immigration law will lead to more accurate and up-to-date *Padilla* advisals.

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153. See *supra* note 140 and accompanying text.

154. As one chief public defender explained: “For us, our county is very frugal. . . . And the only position that we were able to get [for *Padilla* representation] in terms of the money was a three-quarter position.” Interview with Public Defender Chief of Medium Size County No. 1, *supra* note 152.

155. See *infra* Table 1.

156. See, e.g., Interview with Immigration Expert No. 10, *supra* note 152.

157. These calculations are based on our interviews with immigration experts as well as responses to the immigration expert survey. Immigration Expert Survey, Question Nos. 1, 5 (on file with authors).

158. See Responses to Immigration Expert Survey, Question 5 (on file with authors); Appendix E, available at <https://perma.cc/44EH-A6QV>.

159. See Responses to Immigration Expert Survey, Question 36 (on file with authors); Appendix E, available at <https://perma.cc/44EH-A6QV>.

160. See, e.g., Interview with Immigration Expert No. 10, *supra* note 152; Interview with Immigration Expert No. 11 (Apr. 23, 2020); Interview with Immigration Expert No. 15 (May 23, 2020).

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**Table 1**  
Immigrant Representation Model, by County and Size

	<b>County</b>	<b>Public Defense Structure</b>	<b>County Size</b>
In-House Immigration Expert(s)	Alameda (4)	Institutional	Large
	Contra Costa (2)	Institutional	Large
	Los Angeles (9)	Institutional	Large
	Orange County	Institutional	Large
	Riverside	Institutional	Large
	San Bernardino	Institutional	Large
	Santa Clara	Institutional	Large
	Fresno	Institutional	Medium
	Marin	Institutional	Medium
	Monterey	Institutional	Medium
	Napa	Institutional	Medium
	San Francisco (9)	Institutional	Medium
	Sonoma	Institutional	Medium
	Ventura (2)	Institutional	Medium
	Yolo	Institutional	Medium
Santa Cruz	Contract	Medium	
Contract with the ILRC	Sacramento	Institutional	Large
	El Dorado	Institutional	Medium
	San Joaquin	Institutional	Medium
	Solano	Institutional	Medium
	Stanislaus	Institutional	Medium
	Lassen	Institutional	Small
	Mendocino	Institutional	Small
	Mariposa	Contract	Small
	San Mateo	Bar Ass'n	Medium



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	<b>County</b>	<b>Public Defense Structure</b>	<b>County Size</b>
Consult or Contract with Outside Immigration Expert (other than ILRC)	San Diego	Institutional	Large
	Imperial	Institutional	Medium
	Merced	Institutional	Medium
	Santa Barbara	Institutional	Medium
	Shasta	Institutional	Medium
	Nevada	Institutional	Small
	Tuolumne	Institutional	Small
	Amador	Contract	Small
	Butte	Contract	Medium
	Placer	Contract	Medium
	Glenn	Contract	Small
	Mono	Contract	Small
Sierra	Contract	Small	
Informally Consult with Internal Public Defender	Tulare	Institutional	Medium
	Kings	Contract	Medium
	San Luis Obispo	Contract	Medium
	Del Norte	Contract	Small
No Known Expert Contracts or Consultation	Humboldt	Institutional	Medium
	Kern	Institutional	Medium
	Siskiyou	Institutional	Small
	Madera	Contract	Medium
	Alpine	Contract	Small
	Calaveras	Contract	Small
	Colusa	Contract	Small
	Inyo	Contract	Small
	Lake	Contract	Small
	Modoc	Contract	Small
	Plumas	Contract	Small
	San Benito	Contract	Small
	Sutter	Contract	Small
	Tehama	Contract	Small
Trinity	Contract	Small	
Yuba	Contract	Small	

Rather than using in-house experts, nine California counties relied on a contract with the ILRC, a leading nonprofit organization with expertise in the immigration consequences of criminal convictions.<sup>161</sup> In this model, county public defender systems paid the ILRC an hourly rate for immigration advising on individual cases.<sup>162</sup> Attorneys in participating counties can contact the Attorney of the Day at the ILRC with information about their client's criminal and immigration history, current charges, and any plea offer. In response, the ILRC attorneys provide contracting defender offices with legal analysis of the immigration consequences of pleading guilty and identify potential safe alternative pleas.<sup>163</sup>

Thirteen California counties had a contract or informal consultation plan with an attorney outside their organization other than the ILRC. For example, both Santa Barbara and San Diego public defender offices had contracts with outside immigration lawyers to assist with *Padilla* advisals as well as other related work that necessitates immigration expertise.<sup>164</sup>

One institutional public defender office (Tulare) and three offices with contract systems (Del Norte, Kings, and San Luis Obispo) had a specific defense lawyer within their office who informally helped answer immigration questions.<sup>165</sup> Under this approach, the consulted individual had some training in immigration law but was not designated as the office expert or given a reduced caseload to focus on *Padilla* related work.

Finally, at the time of our study, sixteen counties had no known system for expert consultation on immigration issues.<sup>166</sup> Thirteen of these offices were small counties, and four were medium sized. In these counties, public defenders must provide immigration consultations for their clients with no outside support other than free public online resources, treatises, or other paid online legal research services such as Westlaw or LexisNexis. Alternatively, as a lead attorney for one of these counties explained, attorneys may be able to call a friend who practices immigration law in the county for informal advice.<sup>167</sup>

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161. See *supra* Table 1.

162. Junck et al., *supra* note 34, at 37 (describing the immigration contract model with ILRC); Joel M. Schumm, Conference Report, *Padilla and the Future of the Defense Function*, 39 FORDHAM URB. L.J. 3, 5-6, 6 n.15 (2011) (describing the ILRC model); *Technical Assistance*, IMMIGRANT LEGAL RES. CTR., <https://perma.cc/BCJ3-EJ9T> (archived Oct. 23, 2021) (detailing the Attorney of the Day program).

163. Email from Rose Cahn, Senior Att'y, Immigrant Legal Res. Ctr., to Ingrid Eagly, Professor of L., UCLA Sch. of L. (Aug. 17, 2021, 3:23 PM PDT) (on file with authors).

164. See *supra* Table 1.

165. See *supra* Table 1.

166. See *supra* Table 1.

167. Interview with Public Defender Lead of Small Size County, *supra* note 137.

### C. Public Defender Budgets and Noncitizen Population

This Article has demonstrated that there is considerable local variation in both the structure of public defense as well as approaches to immigrant representation. One possible interpretation of these findings is that county public defense systems are constrained by their budgets. That is, counties with sparse funding from their board of supervisors are unable to hire an immigration expert. A second possible interpretation is that the variation is based on need: Counties without immigration experts have small immigrant populations and therefore do not need a specialist on staff. We set out to evaluate these important questions by gathering data on county-level defense budgets and noncitizen populations. As discussed below, the statewide data we collected reveal a more complex picture. Similarly situated counties in terms of budget and immigrant population are making different discretionary decisions on how to allocate their scarce resources around *Padilla* implementation.

Because California has a county-run public defender system with very little statewide funding, support for public defense is dependent on the willingness of a county's board of supervisors to fund public defender services. To determine current funding levels, we collected publicly released data of the indigent defense expenditures for each county in fiscal year 2018-2019.<sup>168</sup> We then divided the total yearly expenditures on indigent defense by the total county population to calculate a per capita public defense budget in each county.<sup>169</sup> Our results reveal a wide range in county per capita budgets for public defense.<sup>170</sup> In particular, the per capita budgets varied from only \$13 in Sutter County to \$54 in Mono County.<sup>171</sup> Importantly for our analysis of *Padilla* implementation, however, counties with both high and low per capita budgets have hired immigration experts. Among the sixteen counties with in-house immigration experts on staff, per capita defense funding ranged from a

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168. Using the available information in the budgets posted on each county's public webpage, we recorded the total expenditures on public defense in each county. *See infra* Table 3. We included in total expenditures any amounts allocated for conflict counsel, including for alternate public defender offices, to the extent that these amounts were memorialized in the county's budget. *See generally supra* note 130 (describing the role of conflict counsel). We did not subtract from the total expenditures any revenue received by the counties for public defense, including through taxes, grants, or court fees. Finally, we note that the budgets we relied upon were not uniform in their contents and reporting styles. Copies of the county budgets used for this study are on file with the authors.

169. Our data show that the average per capita county-level expenditures for indigent defense in 2018-2019 was \$31 and that the statewide per capita funding was \$29.

170. *See also* Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 241-83 (2010) (identifying "spatial inequality" in county funding levels for indigent defense in Arizona).

171. *See infra* Appendix D.

low of \$22 in Riverside County to a high of \$45 in Santa Cruz and San Francisco Counties.<sup>172</sup> Similarly, among counties with no plan in place for *Padilla* services, budgets ranged from only \$13 per capita in Sutter County to \$51 in Alpine County.<sup>173</sup>

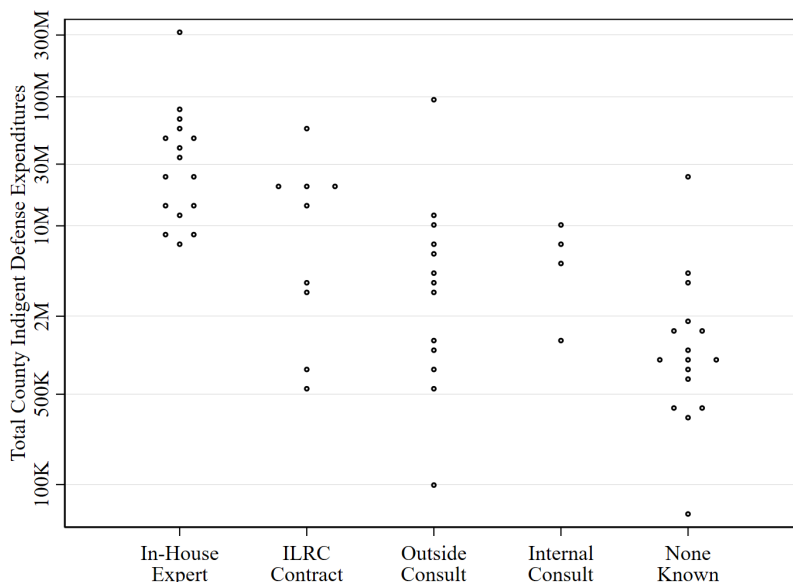
Figure 2 allows for visualization of this finding. All but two counties with an indigent defense budget above \$30 million have adopted an in-house expert model. But among those counties with budgets between \$2 million and \$30 million, there is considerable variation in the approach taken to represent immigrants. Whereas some of these counties have hired an expert, others with the same relative total budget have no plan in place for handling *Padilla* advisals. These findings suggest that discretionary staffing decisions—rather than simply public coffers—are shaping each county’s response to *Padilla*.

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172. *Infra* Appendix D; see also *supra* Table 1 (listing counties with in-house immigration experts).

173. See *infra* Appendix D; see also *supra* Table 1 (listing counties with no plan in place to implement *Padilla*).

**Figure 2**  
Immigrant Representation Model by Total County Indigent  
Defense Expenditures



The size of the immigrant population in each county is also relevant to measuring its progress in implementing a *Padilla* delivery system. In California, 27% of residents are immigrants, and more than half (52%) of these immigrants are naturalized as U.S. citizens.<sup>174</sup> The other half are noncitizens, including lawful permanent residents, undocumented persons, and individuals with some other form of immigration status, such as Temporary Protected Status (TPS) or Deferred Action for Childhood Arrivals (DACA).<sup>175</sup>

Although naturalized citizens may also be protected by *Padilla*,<sup>176</sup> we chose to categorize each California county by the size of its noncitizen population. We did this by relying on data from the U.S. Census Bureau’s 2018 American

174. AM. IMMIGR. COUNCIL, IMMIGRANTS IN CALIFORNIA 1 (2020), <https://perma.cc/9SHD-WW77>.

175. See *id.* at 1-2. Immigration scholar David Martin has referred to in-between forms of immigration status such as TPS and DACA as “twilight statuses.” DAVID A. MARTIN, MIGRATION POL’Y INST., TWILIGHT STATUSES: A CLOSER EXAMINATION OF THE UNAUTHORIZED POPULATION 2 (2005), <https://perma.cc/4B5E-CLYC>.

176. See *supra* note 23.

Community Survey.<sup>177</sup> These data show that noncitizen populations are unevenly distributed across the state: Twelve counties had a noncitizen population of 14% or greater, and six counties had a noncitizen population of 2% or less.<sup>178</sup> Overall, counties with in-house immigration experts had an average noncitizen population of 13.1%, whereas counties with no known immigrant-services plan had an average noncitizen population half that size (6.6%).<sup>179</sup> While this suggests an overall trend of a more solid delivery system in counties with greater need, it is important to also compare *Padilla* implementation among county defense systems with similar immigrant populations.

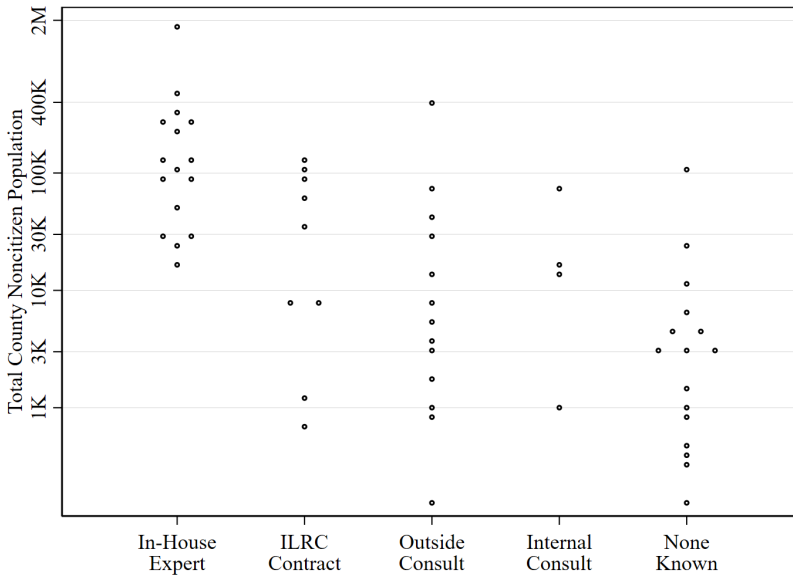
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177. To access these data, see note 144 above.

178. See *infra* Appendix D.

179. See *infra* Appendix D; *supra* Table 1.

**Figure 3**  
Immigrant Representation Model by Total County Noncitizen Population



A more comprehensive picture of the relationship between immigrant representation model and noncitizen population appears in Figure 3. There is considerable variation in the model adopted by counties with between 10,000 and 400,000 noncitizens. Although some of these counties have hired immigration experts, the majority have not. This finding suggests that counties with similar resource needs in terms of their client base have made different decisions about how to allocate scarce public defense budgets. Variation also occurs among counties with 10,000 or fewer noncitizens. Although no counties with 10,000 or fewer noncitizens have hired an in-house immigration expert, there is no consistency in the model that they have chosen: Some have contracted with ILRC or sought outside consultations, while others informally consult a colleague or have no plan in place.

This Part has demonstrated that California public defenders have increasingly relied on immigration experts to advise their clients on immigration consequences. The number of counties hiring an in-house immigration expert has grown considerably, from only one county at the time of the *Padilla* decision to sixteen counties in 2020. Another twenty-two counties have some system for expert consultation in place, such as a contract with the ILRC or an outside immigration expert. Small and rural counties,

where representation is most often through a contract public defender, are the least likely to have an immigrant representation plan in place.<sup>180</sup>

### III. Understanding Public Defense After *Padilla*

By extending the Sixth Amendment’s protections to the context of deportation, the Court in *Padilla* expanded the obligations of defense counsel representing immigrant clients. Parts I and II outlined the development and current structure of California’s approach to defending immigrants charged with crimes. Part III turns to our in-depth interviews with public defenders in California, which provide a closer look at day-to-day practice. We begin by identifying four central implementation challenges that were debated in the wake of *Padilla*. We then explore how public defender offices are navigating these challenges.

#### A. *Padilla* and the Changing Role of Defense Counsel

Well before *Padilla*, it had become an accepted practice for defense counsel to advise defendants about possible immigration consequences. Standards issued by the American Bar Association (ABA) in 1999 recommended that defense counsel advise their clients “[t]o the extent possible” of “the possible collateral consequences that might ensue from entry of the contemplated plea.”<sup>181</sup> Three state Supreme Courts—Colorado, New Mexico, and Oregon—required defense counsel to affirmatively discover the impact that a plea could have on their clients’ immigration status.<sup>182</sup> Twelve states had found that

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180. See *supra* note 157 and accompanying text; *supra* Table 1. Of the sixteen counties with no known consultation or contract for immigration advising, only three (Humboldt, Kern, and Siskiyou) had established institutional public defender offices. See *supra* Table 1; *infra* Appendix D.

181. See ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY 14-3.2(f) (AM. BAR ASS’N, 3d ed. 1999).

182. See *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987) (ruling that if an attorney has “sufficient information to form a reasonable belief that the client was in fact an alien,” the attorney “may reasonably be required to investigate relevant immigration law”); *State v. Paredez*, 101 P.3d 799, 805 (N.M. 2004) (holding that “criminal defense attorneys are obligated to determine the immigration status of their clients” and advise on “the specific immigration consequences of pleading guilty”); *Lyons v. Pearce*, 694 P.2d 969, 977 (Or. 1985) (“One function a criminal defense attorney performs for a client is to disclose the consequences of a guilty plea and conviction. For non-citizen defendants awareness of the possibility of deportation is necessary to an informed plea.”), *abrogated by Chavez v. State*, 364 Or. 654 (2019); see also *Roberts*, *supra* note 102, at 132 & n.47 (documenting that prior to *Padilla* most states had not required advisals on the immigration consequences of a guilty plea but that there were exceptions); *Chin & Holmes*, *supra* note 100, at 708 (citing pre-*Padilla* state court decisions holding “that aliens may be entitled to advice about deportation from their lawyers”); *Vázquez*, *supra* note 102, at 32-34 (explaining that although “[t]he vast majority of courts” held prior to

*footnote continued on next page*



affirmative misadvice by an attorney on immigration consequences could amount to ineffective assistance of counsel.<sup>183</sup> In 2003, twenty-one states instructed judges to advise defendants that a plea agreement could have immigration consequences.<sup>184</sup>

In 2010, the *Padilla* Court took the next step by grounding the duty to advise on immigration consequences in the Sixth Amendment. *Padilla* was clear that criminal defense attorneys must provide affirmative, competent advice to their clients about the immigration consequences of a guilty plea. But questions arose in the wake of the decision. Attempts to resolve these questions have shaped the landscape of *Padilla* implementation in the decade that followed. This Subpart discusses four central debates that emerged post-*Padilla*: (1) Who must receive a *Padilla* advisal?; (2) What must counsel do to investigate immigration consequences?; (3) What must counsel do to defend against immigration consequences?; and (4) Does *Padilla* extend to civil deportation proceedings?

#### 1. Who must receive a *Padilla* advisal?

One crucial question that arose after *Padilla* is the scope of the immigration advising obligation for defense attorneys. In particular, did the decision apply only to lawful permanent residents like Mr. Padilla or more broadly to all immigrants?<sup>185</sup> The Court was clear in *Padilla* that defense lawyers must advise

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*Padilla* that there is “no duty to advise a client on the immigration consequences of a criminal conviction,” some courts had found such an affirmative duty under the Sixth Amendment or the state’s constitution).

183. Brief for Criminal and Immigration Law Professors et al. as Amici Curiae Supporting Petitioner at 13-14, *Padilla v. Kentucky*, 559 U.S. 356 (2010) (No. 08-651), 2009 WL 164242 (citing state court decisions from Alaska, Florida, Georgia, Illinois, Nevada, New Jersey, Tennessee, Utah, Virginia, Wyoming, California, and New York).

184. Attila Bogdan, *Guilty Pleas by Non-citizens in Illinois: Immigration Consequences Reconsidered*, 53 DEPAUL L. REV. 19, 49-50 (2003); see, e.g., Act of Sept. 27, 1977, ch. 1088, § 1, 1977 Cal. Stat. 3495, 3495 (codified at CAL. PENAL CODE § 1016.5(a) (West 2021)) (requiring the court to read the following advisal: “If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States”); Act 252, § 3, 1985 Wis. Sess. Laws 1234 (codified at WIS. STAT. § 971.08(1)(c) (2021)) (requiring the court to read the following advisal: “If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law”).

185. Compare Daniel A. Horwitz, *Actually, Padilla Does Apply to Undocumented Defendants*, 19 HARV. LATINO L. REV., Spring 2016, at 1, 3-4 (arguing that “courts should reject the prevailing view that *Padilla* does not apply to undocumented defendants and should hold instead that undocumented defendants’ *Padilla* claims must be carefully reviewed for prejudice on a case-by-case basis”), with César Cuauhtémoc García Hernández, *footnote continued on next page*

all defendants who face immigration consequences from conviction: “It is our responsibility under the Constitution to ensure that no criminal defendant—whether citizen or not—is left to the ‘mercies of incompetent counsel.’”<sup>186</sup> The Court made no carve out that excluded undocumented defendants from immigration advising by their criminal defense lawyer. Rather, the Court made the seemingly blanket statement that counsel must advise her “client whether his plea carries a risk of deportation.”<sup>187</sup> For the same reason, the obligation of immigration advising may also extend to immigrants who are naturalized citizens and could face denaturalization<sup>188</sup>—and thus deportation—as a result of a guilty plea.<sup>189</sup>

A closely related debate has focused on whether undocumented immigrants who are not properly advised before pleading guilty can later succeed in showing that their counsel was ineffective. To prevail on such a claim, a defendant must prove not just that the counsel fell below “an objective standard of reasonableness” but also that the defendant suffered prejudice as a result of that error.<sup>190</sup> After *Padilla*, some courts found that undocumented

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*Padilla v. Kentucky’s Inapplicability to Undocumented and Non-immigrant Visitors*, 39 RUTGERS L. REC. 47, 47 (2012) (“*Padilla’s* advice mandate . . . does not apply to undocumented individuals and non-immigrants facing criminal charges.”).

186. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

187. *Id.*

188. For analysis of the rise in denaturalization cases under the Trump administration, see Cassandra Burke Robertson & Irina D. Manta, (*Un*)*Civil Denaturalization*, 94 N.Y.U. L. REV. 402, 407-14 (2019); and Emily Ryo & Ian Peacock, *Denying Citizenship: Immigration Enforcement and Citizenship Rights in the United States*, in 84 STUDIES IN LAW, POLITICS, AND SOCIETY 43, 54-55, 54 fig.4 (Austin Sarat ed., 2020).

189. See Qureshi, *supra* note 23, at 168 (arguing that naturalized citizens must be advised of any denaturalization consequences of a guilty plea). Courts are currently exploring whether failure to advise a naturalized citizen on immigration consequences constitutes ineffective assistance of counsel. The Second Circuit recently found that affirmative misadvice from an attorney on immigration consequences of a plea to a naturalized citizen is constitutionally ineffective. *Rodriguez v. United States*, 730 F. App’x 39, 42 (2d Cir. 2018). In a more recent pending case, the Second Circuit will hear an appeal involving a lawyer who failed to advise her client of the denaturalization risk that flowed from a criminal plea. *United States v. Farhane*, No. 18-cv-11973, 2020 WL 1527768 (S.D.N.Y. Mar. 31, 2020), *appeal filed*, No. 20-1666, 2020 BL 2849353 (2d Cir. May 22, 2020).

190. See *Strickland v. Washington*, 466 U.S. 668, 688, 691-92, 694 (1984) (holding that to prevail on a claim for ineffective assistance of counsel the defendant must satisfy a two-prong test, showing both that the defense attorney was objectively deficient and “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”). For a thoughtful discussion of the challenges that defendants face in proving that they have been prejudiced by an attorney’s failure to warn about immigration consequences, see Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 HOW. L.J. 693, 696-97 (2011).

immigrants could not show that they were prejudiced by a failure to advise on immigration consequences because they were already deportable.<sup>191</sup>

These decisions suffer from two fundamental flaws. First, they do not acknowledge that even undocumented immigrants may be saved from deportation by applying for statutory forms of relief from removal, such as asylum or cancellation of removal.<sup>192</sup> Because certain criminal convictions will bar eligibility for relief,<sup>193</sup> undocumented defendants may hinge their decision on whether to take a plea agreement on their desire to remain eligible for deportation relief. Practice guides for criminal defense lawyers,<sup>194</sup> as well as the findings we gathered in this study from immigration experts,<sup>195</sup> make clear that the standard practice is to advise clients on how criminal convictions may adversely impact eligibility for relief from deportation. Other critical consequences, such as being subject to mandatory immigration detention or exposed to federal prosecution for unlawful entry, are also standard components of today's *Padilla* advisals.<sup>196</sup>

Second, these decisions incorrectly center their prejudice analysis on the defendant's immigration status rather than the defendant's strategic decision to plead guilty. The Supreme Court's 2017 decision in *Lee v. United States* clarified

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191. See, e.g., *State v. Guerrero*, 400 S.W.3d 576, 588-89 (Tex. Crim. App. 2013) (“Unlike Jose Padilla, appellee was an undocumented immigrant and was deportable for that reason alone . . . . The prospect of removal therefore could not reasonably have affected his decision to waive counsel and plead guilty.”); *Ibarra v. State*, 125 So. 3d 820, 821 (Fla. Dist. Ct. App. 2013) (per curiam) (affirming denial of defendant's motion for postconviction relief because, as an undocumented immigrant, “appellant had no legitimate expectation that he would be allowed to remain in this country”); *United States v. Batamula*, 823 F.3d 237, 243 (5th Cir. 2016) (en banc) (“The record conclusively established that he was deportable before his guilty plea, and he remained so afterward. Thus, his prejudice claim is frivolous.”).

192. For an explanation of the two stages of removal proceedings and eligibility for basic forms of relief from removal, see Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 957, 958 fig.5 (2015).

193. For example, individuals convicted of a “particularly serious crime” are ineligible for asylum. 8 U.S.C. § 1158(b)(2)(A)(ii). Undocumented individuals convicted of aggravated felonies and a range of other crimes are ineligible for cancellation of removal, a form of relief from deportation. *Id.* § 1229b(b). Convictions can also bar undocumented individuals from qualifying for protection against deportation under DACA. Immigrant Legal Res. Ctr., *Understanding the Criminal Bars to the Deferred Action for Childhood Arrivals* (2012), <https://perma.cc/2BMB-RNYG> (explaining that certain felonies, significant misdemeanors, and three or more nonsignificant misdemeanors will bar eligibility for DACA).

194. See, e.g., IMMIGRANT LEGAL RES. CTR., *IMMIGRATION RELIEF TOOLKIT FOR CRIMINAL DEFENDERS: HOW TO QUICKLY SPOT POSSIBLE IMMIGRATION RELIEF FOR NONCITIZEN DEFENDANTS* (2018), <https://perma.cc/EG96-47X4>.

195. See *infra* Part III.B.

196. See *infra* notes 240-43 and accompanying text.

that the proper focus in analyzing prejudice after *Padilla* is whether there is a “reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.”<sup>197</sup> Although the Court agreed that Mr. Lee had little chance of prevailing at trial, his *Padilla* claim survived the prejudice prong of the ineffective assistance analysis because the “determinative issue” in his decision to plead guilty was avoiding immigration consequences.<sup>198</sup> Indeed, the Court explained, it would not necessarily be “irrational” for a defendant facing possible deportation to reject an unsafe plea “in favor of throwing a ‘Hail Mary’ at trial.”<sup>199</sup>

Mr. Lee was a lawful permanent resident, but undocumented immigrants may also hinge their decision whether to accept a plea on immigration consequences, even if the chances of prevailing at trial are slim. As the Iowa Supreme Court found in 2017, an “unauthorized [immigrant] may rationally choose to reject a plea deal” and instead “roll the dice” and go to trial so as to preserve the “chance to stay in the country” by qualifying for relief from deportation.<sup>200</sup> More recently, the high courts of Arizona and Indiana relied on *Lee* to conclude that undocumented immigrants who receive deficient immigration advice from counsel before pleading guilty can show prejudice by demonstrating that they would have rejected the plea agreement had they received a sufficient immigration advisal.<sup>201</sup> As the Arizona Supreme Court explained, although the defendant “may have had little chance of winning at trial, he was entitled to effective assistance of counsel in deciding whether to take that chance or to accept a plea offer.”<sup>202</sup>

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197. 137 S. Ct. 1958, 1965 (2017) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

198. *Id.* at 1967-68 (quoting the record).

199. *Id.* at 1967, 1969.

200. *Morales Diaz v. State*, 896 N.W.2d 723, 732-34 (Iowa 2017) (reasoning that “removal is not a foregone conclusion for every unauthorized [immigrant]” and that the plea in question had barred the defendant both from some discretionary relief and from most legal reentry to the country).

201. *State v. Nunez-Diaz*, 444 P.3d 250, 254-55 (Ariz. 2019) (finding that under *Lee* and *Padilla* an undocumented immigrant can show prejudice because “[t]here are many reasons that a deportable immigrant may not be removed” and the plea resulted in a permanent bar on return to the United States), *cert. denied*, 140 S. Ct. 2564 (2020); *Bobadilla v. State*, 117 N.E.3d 1272, 1276-79, 1289 (Ind. 2019) (finding that an undocumented teenager who had received deferred action pursuant to DACA was prejudiced when his lawyer failed to advise him that his plea would result in loss of his DACA status and deportation).

202. *Nunez-Diaz*, 444 P.3d at 255. Or as Justice Sonia Sotomayor noted at the oral argument in *Padilla*, a defendant may decide to go to trial and be exposed to a longer prison sentence in the United States because that risk is preferable to being sent to their home country. Transcript of Oral Argument at 36, *Padilla v. Kentucky*, 559 U.S. 356 (2010) (No. 08-651), 2009 WL 3268429, at \*35 (explaining that a defendant may make a “strategic choice” as follows: “I do go to trial and I serve that longer sentence, but it’s here in the U.S. and not in my home country, where I might starve to death. I think I’ll stay here and take that risk”).

2. What must counsel do to investigate immigration consequences?

A second important post-*Padilla* debate concerns how much defense counsel must research the law governing immigration consequences. In *Padilla*, the Court stated that “when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.”<sup>203</sup> But the Court also added that “[w]hen the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.”<sup>204</sup>

Scholars have not yet reached a consensus on the meaning of this language. Although some contend that *Padilla* created a lower duty to investigate immigration law and consequences when the impact is unclear,<sup>205</sup> others maintain that defense lawyers must advise their clients of all possible immigration consequences to the extent that capable research allows.<sup>206</sup> For example, Rebecca Sharpless has persuasively argued in favor of this broader view that the *Padilla* decision demands accurate advice, even if that advice is not “immediately ascertainable.”<sup>207</sup> To read the decision otherwise, Sharpless points out, “would not only ignore the plain meaning of a ‘clear’ consequence but would make an unwillingness to research the law an excuse for deficient lawyering.”<sup>208</sup>

This broader view that competent representation of a criminal defendant requires thorough research of immigration consequences is also supported by professional norms of criminal defense practice. Current guidelines promulgated

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

204. *Id.*

205. See, e.g., César Cuauhtémoc García Hernández, *Strickland-Lite: Padilla’s Two-Tiered Duty for Noncitizens*, 72 MD. L. REV. 844, 850-53 (2013) (arguing that the Court in *Padilla* did not require criminal defense attorneys to fully investigate the law and facts relevant immigration consequences); Colleen A. Connolly, Note, *Sliding Down the Slippery Slope of the Sixth Amendment: Arguments for Interpreting Padilla v. Kentucky Narrowly and Limiting the Burden It Places on the Criminal Justice System*, 77 BROOK. L. REV. 745, 747, 768-70 (2012) (advocating for courts to apply the distinction between clear and unclear immigration consequences strictly so as to limit the obligation of defense counsel to advise under *Padilla*).

206. Lindsay C. Nash, *Considering the Scope of Advisal Duties Under Padilla*, 33 CARDOZO L. REV. 549, 576 (2011) (“[D]efense attorneys must investigate and research the law using available resources and then advise noncitizen defendants about immigration consequences at the level of specificity that research permits.”); Rebecca Sharpless, *Clear and Simple Deportation Rules for Crimes: Why We Need Them and Why It’s Hard to Get Them*, 92 DENV. L. REV. 933, 934-35 (2015) (“[T]he *Padilla* duty requires defense attorneys to research the immigration statute and relevant case law, counsel their clients about predictable immigration consequences, and attempt to negotiate an immigration-safe plea.”).

207. Sharpless, *supra* note 206, at 938.

208. *Id.*

by the ABA provide that attorneys should advise their clients on all “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.”<sup>209</sup> In order to deliver this advice, counsel must “investigate and identify particular immigration consequences that might follow possible criminal dispositions.”<sup>210</sup> Some states have also embraced this broader view. For instance, even before *Padilla*, state ethics rules in New York required defense counsel to provide “the client with full information concerning” matters including “immigration . . . and other collateral consequences under all possible eventualities.”<sup>211</sup>

3. What must counsel do to defend against immigration consequences?

Third, experts have debated what counsel must do, beyond providing an advisal, to defend against immigration consequences. In particular, should they engage in plea bargaining with the prosecutor to achieve an immigration-neutral result?

As the Court noted in *Padilla*, defense lawyers may “plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation.”<sup>212</sup> Thea Johnson has argued that this kind of “creative plea bargaining” by defense lawyers requires advocating for the best possible outcome in every case and avoiding adverse consequences that may flow from a conviction.<sup>213</sup> Defense counsel’s obligation to plea bargain

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209. CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION 4-5.5(c) (AM. BAR ASS’N, 4th ed. 2017). See generally Margaret Colgate Love, *Evolving Standards of Reasonableness: The ABA Standards and the Right to Counsel in Plea Negotiations*, 39 FORDHAM URB. L.J. 147, 158 (2011) (explaining that the ABA Standards require defense counsel, at a minimum, to advise the defendant of developments in plea discussions and promptly communicate and explain all plea offers); Lea McDermid, Comment, *Deportation Is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 CALIF. L. REV. 741, 765 (2001) (arguing, even before *Padilla*, that the ABA rules required advising on immigration consequences).

210. CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION 4-5.5(b) (emphasis added).

211. N.Y. STATE BAR ASS’N, STANDARDS FOR PROVIDING MANDATED REPRESENTATION I-7(e) (2005), <https://perma.cc/UH2N-PNS7>.

212. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010).

213. Thea Johnson, *Measuring the Creative Plea Bargain*, 92 IND. L.J. 901, 910, 915-17, 920-22, 939 (2017) (finding, based on in-depth interviews with public defenders in four states, that public defenders must take into account a range of noncriminal sanctions that fall outside of the charge and sentence); see also Ronald F. Wright, Jenny Roberts & Betina Cutaia Wilkinson, *The Shadow Bargainers*, 42 CARDOZO L. REV. 1295, 1299-30, 1316-22 (2021) (identifying, based on surveys of public defenders, different considerations in a public defender’s plea bargain, including equitable factors, the interests of the client, and the likely trial outcome).

creatively must be understood in light of the Court's growing constitutional regulation of plea bargaining.<sup>214</sup> In *Missouri v. Frye* and *Lafler v. Cooper*, companion cases decided two years after *Padilla*, the Court found that the Sixth Amendment requires defense counsel to communicate plea offers effectively during the "critical" stage of plea bargaining.<sup>215</sup> In doing so, the Court in *Lafler* also issued a resounding rejection of the notion that "[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining."<sup>216</sup> *Padilla*, along with *Frye* and *Lafler*, compel defense lawyers to develop the skills needed to bargain effectively in the shadow of trial.<sup>217</sup>

California has led the way in clarifying that *Padilla* calls for creative defense against immigration consequences. In 2015, the state amended its penal code to require that defense counsel "provide accurate and affirmative advice about the immigration consequences of a proposed disposition, and when consistent with the goals of and with the informed consent of the defendant . . . defend against those consequences."<sup>218</sup> In other words, in California, *Padilla* is now understood to require the defense lawyer to not only advise on immigration consequences but also engage in plea negotiations to achieve an immigration-neutral result, so long as it is "consistent with the goals of and informed consent of the defendant."<sup>219</sup>

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214. *Padilla*, 559 U.S. at 373 ("[W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment.").

215. *Missouri v. Frye*, 566 U.S. 134, 145 (2012) (holding that "defense counsel has the duty to communicate formal offers from the prosecution" for a plea deal); *Lafler v. Cooper*, 566 U.S. 156, 165-66, 174 (2012) (finding that the Sixth Amendment right to effective assistance of counsel was violated by the defense counsel's substandard advice to reject a plea offer and proceed to trial).

216. *Lafler*, 566 U.S. at 169-70. Even if found guilty at an error-free trial, a defendant who relies on faulty advice in rejecting a plea agreement may still "be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence." *Id.* at 166.

217. See generally Zeidman, *supra* note 9, at 222 (predicting that *Padilla* would end the "meet 'em, greet 'em, and plead 'em" practice that has dominated so much of criminal justice"). Despite the centrality of plea bargaining, scholars have warned that training for defense lawyers still emphasizes trial skills rather than negotiation techniques and strategies required for effective plea bargaining. See, e.g., Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445, 1496-98 (2016) (finding that practicing defense lawyers receive limited negotiation training).

218. A.B. 1343, ch. 705, 2015 Cal. Stat. 5365 (codified at CAL. PENAL CODE §§ 1016.2-3 (West 2021)). In codifying the *Padilla* decision into the California Penal Code, the California legislature acknowledged that "immigration consequences of criminal convictions have a particularly strong impact in California." CAL. PENAL CODE § 1016.2(g) (West 2021).

219. PENAL § 1016.2(a).

4. Does *Padilla* extend the right to counsel to civil deportation proceedings?

A decade before *Padilla*, Beth Werlin maintained that due process under the Fifth Amendment demanded a right to appointed counsel in civil immigration proceedings.<sup>220</sup> Others writing before *Padilla* was decided offered views that at least some immigrants should be guaranteed a lawyer in their deportation hearing. For example, Peter Markowitz contended that when the government attempts to expel lawful permanent residents for post-entry conduct, their punishment is more akin to criminal rather than civil sanctions.<sup>221</sup> Therefore, the proceeding should be treated as criminal and, pursuant to the Sixth Amendment, counsel must be appointed at their removal hearing.<sup>222</sup> Some reasoned that particularly vulnerable immigrants, such as children, asylum seekers, or those held in detention, should be appointed counsel in their civil removal proceeding.<sup>223</sup> Undergirding these arguments is the incoherence of the civil–criminal divide that gives those facing criminal charges, but not those facing lifetime banishment, access to appointed counsel.

*Padilla* has renewed calls for a right to appointed counsel in civil immigration proceedings.<sup>224</sup> Although courts have not yet extended *Padilla* to

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220. Beth J. Werlin, Note, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 396, 425 (2000) (favoring “a per se right to appointed counsel in deportation proceedings”).

221. Peter L. Markowitz, *Straddling the Civil–Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 290-91 (2008).

222. *Id.* at 346 (“Undoubtedly, the Sixth Amendment would require the appointment of counsel to indigent defendants in criminal expulsion cases.”); see also Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1935 (2000) (“It is time to recognize that deportation of legal permanent residents for criminal and other post-entry conduct is punishment. If it must be done, then it must be done with specific, substantive constitutional protections.”).

223. See, e.g., John R. Mills, Kristen M. Echemendia & Stephen Yale-Loehr, “*Death is Different*” and a Refugee’s Right to Counsel, 42 CORNELL INT’L L.J. 361, 363-82 (2009) (arguing that the Fifth Amendment demands a finding that counsel be appointed to represent asylum-seekers); Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 116-17 (2008) (maintaining that due process requires the appointment of counsel for detained lawful permanent residents).

224. See, e.g., Kari Hong, *Gideon: Public Law Safeguard, Not a Criminal Procedural Right*, 51 U. PAC. L. REV. 741, 766 (2020) (arguing that noncitizens with criminal convictions should be represented by appointed counsel before an immigration judge determines that a conviction makes them deportable); Christopher N. Lasch, Essay, “*Crimmigration*” and the Right to Counsel at the Border Between Civil and Criminal Proceedings, 99 IOWA L. REV. 2131, 2152, 2158-59 (2014) (noting that while *Padilla* alone does not guarantee noncitizens a right to counsel in removal proceedings, it recognizes a constitutional value in protection against unknowingly subjecting oneself to deportation); Kevin R.

*footnote continued on next page*



require appointment of counsel in immigration court, state and local governments, with the support of private philanthropists, have begun to fund deportation defense work.<sup>225</sup> In some localities, this funding has supported the growth of immigration units at institutional public defender offices,<sup>226</sup> while other localities have directed deportation defense funding to nonprofit organizations.<sup>227</sup>

Whether and to what extent public defenders can or should expand their work to include deportation defense is debated within the indigent-defense community. Public defender offices that we studied in California that take on deportation defense have found it to be an effective and efficient way to advocate for their clients. Through plea bargaining and representation in the criminal case, public defenders have already gathered facts and legal research needed to defend their clients from conviction-based deportation.<sup>228</sup> Nationally, many offices that have welcomed bringing deportation defense into the fold of public defense have adopted an approach known as holistic defense.<sup>229</sup> In this advocacy model, public defenders work in teams with social

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Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2414 (2013) (arguing that affording lawful permanent residents the right to counsel in civil removal proceedings is the “logical extension” of *Gideon*); Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1475, 1514 (2011) (suggesting that *Padilla* may require recognition of a “Fifth-and-a-Half Amendment” right to counsel when there is a risk of deportation, at least in cases “involving long-term permanent residents deported due to criminal convictions”); see also Shani M. King & Nicole Silvestri Hall, *Unaccompanied Minors, Statutory Interpretation, and Due Process*, 108 CALIF. L. REV. 1, 6-7, 48-62 (2020) (outlining why the full-and-fair-hearing provision of the Immigration and Nationality Act necessitates appointed counsel for unaccompanied minors).

225. César Cuauhtémoc García Hernández, *Immigrant Defense Funds for Utopians*, 75 WASH. & LEE L. REV. 1393, 1402 (2018).

226. For example, funding from the New York City Council to the New York Immigrant Family Unity Project has gone to public defender organizations in the city, including The Legal Aid Society, The Bronx Defenders, and Brooklyn Defender Services. Spencer Lee Gallop, *NYC Council Boosts NYIFUP Funding to Support Immigrants Facing Deportation*, LEGAL AID SOC’Y (Sept. 11, 2019), <https://perma.cc/4LKK-KA7M>.

227. For instance, the city of Santa Ana, California has created a deportation defense fund that contracts with the Immigrant Defenders Law Center, a nonprofit legal services organization. See Ben Brazil, *Santa Ana Approves More Funding for Deportation Defense Fund*, L.A. TIMES: DAILY PILOT (June 17, 2021, 2:26 PM PT), <https://perma.cc/5N4W-JU8S>.

228. See *infra* text accompanying notes 275-81. Moreover, as Tania Valdez has shown, criminal and immigration representation are tied together in another important way: Testifying in immigration court can sometimes implicate the noncitizen’s rights in criminal proceedings. See Tania N. Valdez, *Pleading the Fifth in Immigration Court: A Regulatory Proposal*, 98 WASH. U. L. REV. 1343, 1347-48 (2021).

229. See generally Robin Steinberg, *Supreme Court Ruling Speaks of a New Kind of Public Defense*, HUFFPOST (updated May 25, 2011), <https://perma.cc/DVB4-U2Y7> (“The *Padilla* footnote continued on next page

workers, immigration lawyers, and other team members to provide services beyond the confines of traditional criminal representation.<sup>230</sup> Holistic defense is particularly amenable to incorporating civil immigration representation because the multidisciplinary team can work to seamlessly deliver a broader menu of services from the very first client meeting.<sup>231</sup>

## B. *Padilla* on the Ground

As the previous Subparts set forth, defense lawyers in California are required to investigate, defend against, and advise about the immigration consequences of a criminal plea. This Subpart turns to our interview and survey data to examine what these obligations look like on the ground.

### 1. *Padilla* advisals

Although California had a head start on the obligation to advise due to the *Soriano* decision, the attorneys we interviewed all agreed that awareness of the need to advise changed significantly after *Padilla*.<sup>232</sup> As one chief of an institutional public defender office explained, *Soriano* gave at least some public defenders the “understanding that we needed to advise” clients about immigration consequences. But *Padilla* “brought into sharp focus how much we needed to accurately relay to our clients.”<sup>233</sup> She continued:

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decision hands a big victory to the small cadre of public defender offices leading the movement to shift the nature of public defender work toward a more holistic model of client representation.”). In a recent comprehensive study, researchers found that the holistic defense model was associated with some improved outcomes for clients, including reductions in expected sentence length. James M. Anderson, Maya Buenaventura & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 879, 882 (2019).

230. 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, 987-98 (2013) (chronicling the development of The Bronx Defenders and arguing for the holistic model).

231. See, e.g., McGregor Smyth, “Collateral” No More: *The Practical Imperative for Holistic Defense in a Post-Padilla World . . . Or, How to Achieve Consistently Better Results for Clients*, 31 ST. LOUIS U. PUB. L. REV. 139, 167 (2011) (arguing that implementing holistic defense models will help fulfill constitutional duties mandated by *Padilla* and will lead to better outcomes for clients); Kwon, *supra* note 17, at 1041-42, 1076-94 (presenting studies of The Bronx Defenders and the Office of the Alameda County Public Defender to argue that public defender offices should launch and build more holistic immigration practices); Alexandra Natapoff, *Gideon’s Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 459-61 (2015) (noting that some public defenders have embraced holistic representation models based on their need to address the “personal, civil, and pragmatic” consequences of conviction).

232. See *supra* notes 63-73 and accompanying text.

233. Interview with Public Defender Chief of Large Size County No. 1 (June 3, 2020).

I think before *Padilla* lawyers felt comfortable saying, “You’re likely to be deported because of this,” which we’ve subsequently learned is completely inappropriate. We need to be able to give accurate [advice], not just a “You’re likely,” or “It’s possible that you could face immigration consequences.” It needs to be much more precise advice based on the individual’s circumstances and their immigration history as opposed to a general “You’re likely to be deported because of this.”<sup>234</sup>

*Padilla*’s requirement to advise clients “fully and accurately” of how a plea might impact their immigration status was thus transformative.<sup>235</sup> In the years since *Padilla*, what practitioners now call a “*Padilla* advisal” has become a recognized and indispensable part of criminal defense practice.

We learned through our interviews and surveys that there is substantial agreement among California immigration experts regarding what a *Padilla* advisal should include. First, all agreed that the advisal must communicate to the client a full understanding of what would happen in the immigration system as a result of the plea or conviction at trial. As one experienced expert put it:

To me, the *Padilla* advisal is what’s going to happen to this client, given his past criminal record, given how long he’s been a lawful permanent resident, or given the fact that he’s undocumented . . . What is going to be the impact [of this plea or trial] to the client based on his disposition in terms of either . . . triggering ground of deportability, triggering ground of inadmissibility, or being barred from potential needed relief in immigration courts. That, to me, is what . . . the *Padilla* advisal means.<sup>236</sup>

Counseling a client on the immigration result of a plea necessarily incorporates a discussion of any relief from deportation that the client might be eligible for in immigration court. Similarly, for clients with prior criminal history, a thorough immigration advisal takes into account the immigration significance of those earlier convictions and any available postconviction relief that the client might be eligible to pursue.<sup>237</sup>

Experienced California lawyers also explained that a thorough *Padilla* advisal should incorporate creative strategies for plea bargaining. One expert explained her practice this way: “I normally give a lawyer about three to four different options [for alternative pleas] and I rank them from best to worst.”<sup>238</sup> Attorneys agreed that it is important that immigration-safe plea proposals be realistic options that capture the conduct at issue and come with an equivalent

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234. *Id.*

235. *Id.*

236. Interview with Immigration Expert No. 9 (Mar. 30, 2020).

237. Interview with Immigration Expert No. 4 (Mar. 24, 2020) (explaining that “post-conviction relief analysis” is part of *Padilla* review on behalf of a client).

238. Interview with Immigration Expert No. 10, *supra* note 152.

level of punishment. Mere “pie-in-the-sky advice” that does not reflect what you could actually attain from the district attorney—such as obtaining a misdemeanor in the case of a serious violent felony—is not productive.<sup>239</sup>

Finally, *Padilla* advisals generally contain additional warnings regarding how a criminal conviction could impact a client in the immigration system. For example, a *Padilla* advisal should inform clients that an aggravated felony conviction will expose them to mandatory immigration detention<sup>240</sup> pending deportation.<sup>241</sup> Similarly, experts providing *Padilla* advisals caution that certain categories of violent crime convictions result in automatic transfer from the jail or prison into immigration custody.<sup>242</sup> Additionally, *Padilla* advisals include information on the federal consequences of coming across the border after deportation, such as possible criminal prosecution for unlawful reentry.<sup>243</sup>

Each of these components of the *Padilla* advisal—the immigration consequence of conviction (including any eligibility for relief from deportation), alternative possible plea resolutions, and other related immigration warnings—are essential. As one seasoned defense lawyer summarized, every *Padilla* advisal “needs to be a full advisal because every piece counts, and any of those things can be the determining factor about whether a client will accept a plea or decide to fight.”<sup>244</sup>

Central to the *Padilla* advising process is the need to conduct a detailed intake interview with all foreign-born clients.<sup>245</sup> It is imperative that every case have a completed worksheet with basic information gathered from the

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239. Interview with Immigration Expert No. 12 (May 23, 2020).

240. See 8 U.S.C. § 1226(c)(1)(B); *id.* § 1227(a)(2)(A)(iii). For a broader discussion of the immigration consequences of an aggravated felony conviction, see generally AM. IMMIGR. COUNCIL, AGGRAVATED FELONIES: AN OVERVIEW (2021), <https://perma.cc/U4Z8-VH7M>.

241. See Interview with Immigration Expert No. 5, *supra* note 152; see also Interview with Immigration Expert No. 3 (Mar. 16, 2020).

242. See, e.g., Interview with Immigration Expert No. 3, *supra* note 241. In California, such transfers are limited by the California Values Act. S.B. 54, ch. 495, 2017 Cal. Stat. 3733 (codified at CAL. GOV'T CODE § 7284.6(a)(4) (West 2021)).

243. Interview with Immigration Expert No. 12, *supra* note 239. Notably, recent litigation has focused on whether unlawful-reentry criminal prosecutions, pursuant to 8 U.S.C. § 1326, are even constitutional. In an important recent decision, Judge Miranda Du dismissed a § 1326 prosecution as violating the Equal Protection Clause of the Fifth Amendment, finding that the law that passed in 1952 and its predecessor, which was passed in 1929, were both motivated by impermissible racial animus. *United States v. Carillo-Lopez*, No. 20-cr-00026, 2021 WL 3667330, at \*1, \*3-5 (D. Nev. Aug. 18, 2021).

244. Interview with Immigration Expert No. 5, *supra* note 152.

245. Interview with Immigration Expert No. 11, *supra* note 160 (“I do have a standardized form that I use for every single client.”).

client about their immigration status and criminal history.<sup>246</sup> To evaluate eligibility for relief and the risk of deportation, defense counsel need to collect biographical facts such as whether the client has any lawful status in the country, how and when they entered the country, their potential eligibility for relief from deportation, and how long they have resided here. Via modern online file systems, anyone working on the case can access other materials in the client's digital file such as discovery, police report, and intake forms.<sup>247</sup> Particularly important to the *Padilla* analysis and identifying realistic alternative pleas are any criminal-history documents, the police report, the charging instrument, and the proposed terms of any plea agreement.<sup>248</sup>

In cases where immigration experts are consulted, the expert will sometimes conduct a thorough interview with the client.<sup>249</sup> More typically, however, given the high demand for the expert's skills within a public defender office, the assigned trial attorney remains responsible for gathering relevant information and later delivering the advisal.<sup>250</sup> In complex cases, experts sometimes conduct follow-up interviews with the client to clarify necessary information or speak with the assigned attorney to ask additional questions.<sup>251</sup> As one expert explained:

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246. See, e.g., *id.*; Interview with Immigration Expert No. 9, *supra* note 236 (“[W]e have a standard questionnaire that our lawyers use.”); Interview with Immigration Expert No. 13 (June 12, 2020) (“And so after they complete the worksheet they will send it to me and I write up a report.”).

247. Interview with Immigration Expert No. 10, *supra* note 152; Response to Immigration Expert Survey, Question No. 23 (on file with authors). Not all offices, however, use an online case-management system. See, e.g., Interview with Immigration Expert No. 9, *supra* note 236 (lamenting not being able to “pull up the file” because the office does not yet have a “office wide case management system”); Interview with Immigration Expert No. 13, *supra* note 246 (“My office is working on going paperless. And I don’t know when the projected completion of that is, but it seems like it’s probably a ways off still.”).

248. Interview with Immigration Expert No. 10, *supra* note 152.

249. See, e.g., Interview with Immigration Expert No. 11, *supra* note 160 (“So first thing, I get the case and then I will contact the client to set up an interview or, if they’re in jail, I’ll go see them. And I will complete my entire intake, which is pretty extensive. I make sure that I get all of their immigration history, any information about prior deportations, family history, things of that sort . . .”).

250. See Interview with Immigration Expert No. 9, *supra* note 236 (explaining that in order to make “the most efficient use of people who are so highly trained” in immigration law, her office relies exclusively on the line attorneys to conduct client interviews); Interview with Immigration Expert No. 14 (June 19, 2020) (“[A]ll of the [public defenders] in our office do the interview. And sometimes they’ll bring me into [the interview]. But they’re doing the interviews.”); Interview with Immigration Experts Nos. 1 & 2, *supra* note 152 (explaining that their office’s paralegal conducts “an intake with the basic immigration questions”).

251. See, e.g., Response to Immigration Expert Survey, Question 35 (on file with authors) (“If a *Padilla* advisal was requested by another attorney, I would look over the information  
*footnote continued on next page*”)

I occasionally go speak to clients in person, whether it's in the holding tank or in the jails. But just given the fact that I am the only person in the office . . . I can't actually see everyone myself and do the interviews myself. . . . So the attorney—the [public defender] that the case is assigned to[—]is ultimately responsible for everything and they're expected to know everything about the case.<sup>252</sup>

After reviewing the client's file and conducting research, the immigration expert advises the trial attorney. Generally, this advice is also reduced to writing in a memorandum for the file.<sup>253</sup> In the words of one expert, “[I] deliver a completed report to the attorney addressing the potential immigration consequences of a particular disposition, including plea and sentencing.”<sup>254</sup> However, experts also stated that the time-sensitive nature of some defense work requires immediate advisals.<sup>255</sup> In these cases, where there is a “rush need, like, a person has a today-only offer and they are in custody,” the immigration expert may respond quickly over email or text or “come up to court to help the individual.”<sup>256</sup>

Customarily the trial attorney, not the immigration expert, communicates the advisal to the client. But there were instances where the experts we

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provided. If insufficient, I would conduct an intake of their client and either speak to that client in person or provide the attorney a written advisal to convey to the client.”). Another immigration expert noted that immigration experts generally do not interview clients, but in some circumstances do “have to call the clients for follow-up questions” in order to clarify information about the client's situation. Interview with Immigration Experts Nos. 1 & 2, *supra* note 152.

252. Interview with Immigration Expert No. 6 (Mar. 18, 2020).

253. Interview with Immigration Expert No. 11, *supra* note 160 (“I’ll write like a whole memo assessing the priors, their immigration history, and then the current charges and what exactly that means for their immigration status. And when I’m analyzing each charge, I’m also giving alternatives [for pleas]. . . . And so my memos can be pretty lengthy . . . . I make sure that all of that information that’s in that memo is conveyed to the client and then the memo itself is uploaded into our system so that each public defense [attorney] has access to their clients’ immigration files.”).

254. *See* Response to Immigration Expert Survey, Question 35 (on file with authors).

255. *See* Interview with Immigration Expert No. 9, *supra* note 236 (explaining that although some *Padilla* advisals are in writing, about 50% are “via text and phone calls,” causing problems because “sometimes the documentation on the file [or in the text] may not be as good as what was said”); Interview with Immigration Expert No. 15, *supra* note 160 (“[R]ealistically, not every advisal can be performed perfectly in writing. And I do get sometimes . . . the text message, a quick phone call, ‘How about this? The guy’s in custody. DA’s offering this and can get out of custody today.’ And I do those on the phone . . . . But I do keep a record of it so I have a record of what we did.”).

256. Interview with Immigration Expert No. 3, *supra* note 241. As another expert put it:  
[S]ometimes you could be in a situation, for example, when someone calls me from court and, oh my god, they’ve got like attempted murder. I don’t know if they’re going to agree to [some], you know, really [great] plea like right now [and] we got to take it. So that may be . . . more [an] exigency . . . [because] this plea offer is like gold, so we’ve got to . . . stop everything and figure this out.

Interview with Immigration Expert No. 14, *supra* note 250.

interviewed believed that it was important to also be present for the advisal to answer questions and ensure that the information was understood before any plea is entered. One expert explained that “[i]f it’s a complicated case I will personally meet with the client and the family to explain the immigration consequences and then to explain the offer we are trying to obtain.”<sup>257</sup> Another said: “If [public defenders] are having trouble delivering the advisal for whatever reason or are struggling to get the right information from the client or family, I will speak directly with the client or family member, preferably with the [public defender] present.”<sup>258</sup> A third expert explained that she met with the clients in some cases: for example, cases involving younger lawyers or “very serious case[s] where the lawyer wants me to come in and sit down with the supervisor so I can advise them of the immigration consequences.”<sup>259</sup> In such situations, the expert said, being there in person “makes the process so much smoother. . . . [T]hey have a lot of questions, they have a lot of fears, and so I feel like if I can speak to them directly, I can answer their questions and just put them more at ease.”<sup>260</sup>

All offices with immigration experts were working toward a system in which every eligible case received a consultation from the office expert. Most offices with experts had a policy in place requiring consultation on every case involving someone not born in the United States.<sup>261</sup> Even still, experts worried that not all public defenders are obtaining these necessary consultations for their clients. As one expert put it:

I know for a fact that noncitizens are either slipping through the cracks or getting really basic, inadequate advice. . . . [T]his is true at every office. It is always hard to get the attorneys who’ve been practicing for a while . . . to submit a referral or to identify people. And partly I know that because some of them will come and ask like, “Hey, what about this charge?” but won’t submit a referral, won’t ask about, “How do I screen them for relief?” I know they’re not doing that. And then there are other attorneys who I’ve never received a referral from them and I pull the old files, and then . . . I see that they haven’t asked [the clients] where they were born . . . .<sup>262</sup>

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257. Response to Immigration Expert Survey, Question 35 (on file with authors).

258. *Id.*

259. Interview with Immigration Expert No. 10, *supra* note 152.

260. *Id.*

261. As some attorneys we interviewed emphasized, even naturalized citizens need *Padilla* advisals because a conviction could expose them to denaturalization. Interview with Immigration Expert No. 4, *supra* note 237 (explaining that “the basic *Padilla* consult . . . should be done on every single person who is not born in the United States,” including “even naturalized U.S. citizens” given that “we do have a denaturalization system going on”).

262. Interview with Immigration Expert No. 5, *supra* note 152.

Another noted that although the situation was “improving,” the expert felt “like I don’t have maybe even like half compliance” on the requirement of seeking a *Padilla* consult.<sup>263</sup> Others emphasized that more senior attorneys were the least likely to seek input from the office expert.<sup>264</sup> When such patterns arise, some experts bring the issue to the attention of management.<sup>265</sup>

## 2. Immigration-related services beyond *Padilla*

Some counties in California with immigration experts on staff have begun to experiment with a fuller menu of services beyond basic *Padilla* advisals and related plea bargaining. This menu can include training public defenders on best practices for working with immigrant clients, representing clients in immigration court, providing postconviction relief services, and monitoring compliance with state and local laws governing cooperation with immigration authorities. Often attorneys we spoke with referred to these services as “*Padilla* Plus” work, meaning that they go beyond the minimal baseline of the *Padilla* mandate.<sup>266</sup>

**Training.** A central implementation challenge presented by *Padilla* has been the training of criminal defense lawyers on immigration law. The Supreme Court emphasized that “[i]mmigration law can be complex, and it is a legal specialty of its own.”<sup>267</sup> A chief public defender we interviewed put it this way: “It is a whole different field of law. It’s not something that criminal attorneys are used to keeping on top of. And the law changes constantly.”<sup>268</sup>

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263. Interview with Immigration Expert No. 6, *supra* note 252.

264. *See, e.g.*, Interview with Immigration Expert No. 10, *supra* note 152 (“I know that most of the lawyers that are religious about doing [*Padilla* consultations] are the younger lawyers and then I have a lot of senior lawyers who rarely put in a request.”); Interview with Immigration Experts Nos. 1 & 2, *supra* note 152 (acknowledging that “there’s still, with some of the older attorneys, there’s some resistance and just disinterest maybe”); Response to Immigration Expert Survey, Question 27 (on file with authors) (“The older attorneys aren’t as diligent about asking me for input.”).

265. *See, e.g.*, Interview with Immigration Expert No. 3, *supra* note 241 (“And yes, there are some attorneys who do not ask for my help and that is why I’ve had to do the cleanup work. And in those situations if I find a pattern of a person who is consistently not requesting my help . . . I bring it to the attention of my supervisor and my supervisor has a conversation with that individual and then we try to move on from there.”).

266. *See, e.g.*, Interview with Immigration Expert No. 5, *supra* note 152.

267. *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010).

268. Interview with Public Defender Chief of Large Size County No. 2 (June 15, 2020); *see also* Interview with Public Defender Chief of Large Size County No. 1, *supra* note 233 (“[A]s I’m sure you’re aware, immigration law is so complex that your average public defender does not have the ability in and of themselves to become an immigration expert that they need to be to that level.”).



All immigration experts we interviewed indicated that they were responsible for training other attorneys in their office on immigration consequences.<sup>269</sup> The baseline goal of such training is to get “everyone to have minimal competency.”<sup>270</sup> Exposing public defenders to immigration law can also help to “undo th[e] mindset” that public defenders can handle *Padilla* advisals without consulting an expert.<sup>271</sup> New attorneys are generally required to attend an immigration law training: “We onboard every new attorney one on one, or if there’s a group of new attorneys . . . we’ll do a group session with them.”<sup>272</sup> More experienced lawyers also need to be educated on immigration law and update their skills, particularly those who are less likely to request *Padilla* consults.<sup>273</sup> Not all counties, however, have made attending an immigration training mandatory for more senior attorneys.<sup>274</sup>

**Removal defense.** Four of the sixteen counties with immigration experts on staff also provided removal defense services to clients.<sup>275</sup> Removal defense

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269. See, e.g., Interview with Immigration Expert No. 6, *supra* note 252 (“Let’s see, I just did one full round [of office trainings] for all of the attorneys in all of the court offices. And then for our newest class of public defenders, I do a separate training for them as well.”); Interview with Immigration Expert No. 14, *supra* note 250 (describing offering “tons of trainings,” including “weeklong boot camps with select [public defenders]” that were “really successful”); Interview with Immigration Expert No. 5, *supra* note 152 (explaining that part of the immigration expert role is to train all public defenders and that these trainings “are mandatory and . . . done during work hours”).

270. Interview with Immigration Expert No. 14, *supra* note 250.

271. *Id.*

272. See, e.g., Interview with Immigration Experts Nos. 1 & 2, *supra* note 152; see also Interview with Immigration Expert No. 3, *supra* note 241 (“[F]or all new attorneys, . . . I give one-on-one training about . . . what *Padilla* requires about the process for the ICE notifications in our county.”); Interview with Immigration Expert No. 13, *supra* note 246 (“Every single time they hire a new class of interns and a new class of misdemeanor attorneys, I do an introduction to criminal immigration for them.”).

273. See *supra* note 264.

274. See, e.g., Interview with Immigration Expert No. 10, *supra* note 152 (“I do put on trainings for lawyers. I’ve been doing it for the newer lawyers, but I actually do think we need to train the older lawyers too.”); Response to Immigration Expert Survey, Question 27 (on file with authors) (“We provide a detailed training to all new lawyers in our office. The hardest to reach are the older, more senior lawyers who do not have a standard practice of requesting *Padilla* consults.”).

275. The counties providing removal defense were Alameda, Contra Costa, San Francisco, and Santa Clara. Responses to Immigration Expert Survey, Question 39 (on file with authors). California law allows public defenders in the state to represent individuals unable to afford counsel “in any civil litigation in which, in the judgment of the public defender, the person is being persecuted or unjustly harassed.” CAL. GOV’T CODE § 27706(c) (West 2021). Illinois recently took the important step of amending its enabling legislation to provide that public defenders in counties of over three million residents “may act as attorney to noncitizens in immigration cases.” H.R. 2790, 102d Gen. Assemb. (Ill. 2021) (enacted).

involves representing clients in the civil deportation process, which often occurs in immigration court.<sup>276</sup> Although there is a right to counsel in immigration court, there is no right to counsel at government expense.<sup>277</sup> This means that clients who obtain a plea bargain that maintains their eligibility for relief from deportation will be without an immigration lawyer unless they can afford one. And having a lawyer can make a difference in whether a client is deported or allowed to stay.<sup>278</sup>

Public defenders who have included removal defense in their practice praised this approach.<sup>279</sup> By embedding removal defense within criminal defense practice, public defenders are able to provide seamless and efficient representation of their clients from the point of the plea to immigration court. As one interviewee put it:

I think the gold star of immigration representation . . . [is having] public defense and public immigrant defense and removal defense all housed within the same office . . . . [I]t is a much faster, more efficient, more client-centered way of addressing various intersecting legal issues. . . . [U]ltimately [it] just creates better legal outcomes for people if you're thinking so much from a removal defense perspective when you start criminal case representation . . . .<sup>280</sup>

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276. *Removal Defense*, IMMIGRANT LEGAL RES. CTR., <https://perma.cc/UE7Q-YCZB> (archived Oct. 25, 2021). The first public defender program in the country to provide deportation defense representation was the New York Immigrant Family Unity Project. See Peleg & Loyo, *supra* note 17, at 197.

277. 8 U.S.C. § 1229a(b)(4)(A) (“[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings . . . .”); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554 (9th Cir. 1990) (“[A]liens have a due process right to obtain counsel of their choice at their own expense.”).

278. As one study found, detained immigrants with counsel obtained a successful outcome in 21% of cases, a rate ten and a half times greater than that of detained immigrants without counsel. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 9, 49-50, 50 fig.14 (2015). Furthermore, having a lawyer in the removal proceeding is especially crucial because immigration judgments are unlikely to be reversed on appeal. See David Hausman, *The Failure of Immigration Appeals*, 164 U. PENN. L. REV. 1177, 1194-95, 1195 fig.3 (2016); see also Jayanth K. Krishnan, *The Immigrant Struggle for Effective Counsel: An Empirical Assessment*, 2022 U. ILL. L. REV. (forthcoming 2022) (manuscript at 22-29 & tbl.1), <https://perma.cc/EH37-5M6W> (finding that when immigrants challenge their lawyers as ineffective, they are unlikely to prevail).

279. See, e.g., Interview with Immigration Expert No. 10, *supra* note 152 (explaining that incorporating removal defense into public defense by “tak[ing] a case from the inception of the case in the criminal case and then see[ing] it all the way through the deportation proceedings . . . is full representation”). See generally Peleg & Loyo, *supra* note 17, at 224-29 (highlighting some of the key benefits of approaching removal defense from a public defender’s perspective and training background).

280. Interview with Immigration Experts Nos. 17 & 18, *supra* note 82.

Not only do public defenders already understand their clients' specific criminal-immigration issues, but they can also draw on the resources of the public defender office for support.<sup>281</sup>

Even within public defender offices that offer removal defense, current funding levels unfortunately do not guarantee these services for all public defender clients. Rather, services are targeted to select individuals where removal defense would be particularly beneficial and not otherwise available. One immigration expert described her office's targeted approach to removal defense work in this way:

I guess we could say we do a grab bag of representation that isn't full-blown traditional deportation defense. Like, we might do a cancellation case if it's pretty cut and dry . . . . But we did do it sort of on a case-by-case basis, and then amongst ourselves we decide whether . . . [we can take] on the immigration side of things. And then we also try to get referrals if we can't do the immigration case.<sup>282</sup>

Some experts in offices that did not handle removal defense agreed that this would be a beneficial area for future expansion of their services. As one immigration expert said: "I feel super strongly that removal defense needs to be a big part of public defenders. Particularly because the focus [of immigration enforcement] under Obama and under this [Trump] administration [is] so . . . linked to the criminal [conviction] . . . ." <sup>283</sup> Part of the reason for local variability in the offering of removal defense services is that public defender offices are dependent on their local board of supervisors for funding and not all boards have been willing to support this kind of work.<sup>284</sup>

At the same time, not all public defenders agreed that removal defense should be part of the work that their public defender office undertakes. One immigration expert expressed concern regarding removal defense being very time-consuming and wondered if nonprofits might be better suited to take on this representation.<sup>285</sup> Additionally, attorneys practicing in counties far away from immigration detention centers or immigration courts stressed that continuing to represent their clients would involve significant travel and therefore might be cost prohibitive.<sup>286</sup>

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281. Interview with Immigration Expert No. 8, *supra* note 152.

282. Interview with Immigration Experts Nos. 1 & 2, *supra* note 152.

283. Interview with Immigration Expert No. 5, *supra* note 152.

284. Interview with Immigration Expert No. 3, *supra* note 241.

285. Interview with Immigration Expert No. 9, *supra* note 236 (explaining that "it would be incredibly important to now be able to do some . . . removal defense work," but questioning whether it would be prudent "in terms of efficiency and best use of resources").

286. In one county, the immigration expert told us that almost half of their clients are sent to detention centers in other states, rendering removal defense by the public defender office impossible. Interview with Immigration Expert No. 14, *supra* note 250; *see also* Interview with Immigration Expert No. 13, *supra* note 246 ("The biggest barrier is that  
*footnote continued on next page*

**Postconviction relief services.** Postconviction relief can be a pivotal part of protecting a client with a criminal record against deportation.<sup>287</sup> For example, under a recent California law, public defenders can try to vacate a client's conviction or sentence by arguing that there was a prejudicial error that limited a client's ability to understand the immigration impact of the conviction.<sup>288</sup> Public defenders can also assist clients in pursuing a pardon from the Governor of California—a remedy that waives certain criminal grounds for deportation.<sup>289</sup>

Fifteen of the sixteen counties with immigration experts on staff reported that they provide at least some postconviction services for clients.<sup>290</sup> Some California public defender offices have consolidated these services into a “clean slate” program that assists clients in clearing their arrest and conviction records so as to remove significant barriers to reentry.<sup>291</sup> When a client is

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there is not an immigration court near here. So until that happens, I don't see us doing [immigration removal defense] . . . Just because of the physical distance.”)

287. See generally Christopher N. Lasch, *Redress in State Postconviction Proceedings for Ineffective Crimmigration Counsel*, 63 DEPAUL L. REV. 959, 959-62 (2014) (arguing that state courts should grant postconviction relief for *Padilla* violations that occurred before the *Padilla* decision).

288. CAL. PENAL CODE § 1473.7(a)(1) (West 2021) (amended 2021). For a review of how noncitizens can use Penal Code section 1473.7 to challenge a prior conviction, see ROSE CAHN, IMMIGRANT LEGAL RES. CTR., AMENDMENTS TO CALIFORNIA PENAL CODE § 1473.7 (2018), <https://perma.cc/QWZ6-UKFT>. As of January 1, 2022, relief under Penal Code section 1473.7 will be extended beyond guilty pleas to include trial convictions. Under a new amendment, individuals may vacate a trial conviction “based on a prejudicial error damaging to the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence.” Assemb. 1259, 2021 Leg. (Ca. 2021) (enacted).

289. See IMMIGRANT LEGAL RESOURCE CTR. & UCLA CRIM. DEF. CLINIC, GUBERNATORIAL PARDONS IN CALIFORNIA 1-2 (2019), <https://perma.cc/A6VY-XC4E>. See generally Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 384-85 (2012) (highlighting some of the limitations of pardons in stopping deportations); Stacy Caplow, *Governors! Seize the Law: A Call to Expand the Use of Pardons to Provide Relief from Deportation*, 22 B.U. PUB. INT. L.J. 293, 324-31 (2013) (outlining the importance of using the gubernatorial pardon power to protect noncitizens from deportation).

290. Responses to Immigration Expert Survey, Question 50 (on file with authors).

291. Clean-slate programs are based on the idea that every person should be able to earn the right to support themselves and their families without the ongoing barriers to employment, housing, and civic participation that result from a criminal record. See generally Jeffrey Selbin, Justin McCrary & Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM. L. & CRIMINOLOGY 1, 6 (2018). Cases handled by clean-slate units can include expungements, motions to reduce a felony to a misdemeanor, applications for certificates of rehabilitation, and other types of postconviction relief. See, e.g., *Clean Slate*, S.F. PUB. DEF., <https://perma.cc/A2TZ-E55Y> (archived Oct. 26, 2021) (offering assistance in expunging misdemeanor and felony convictions, as well as with obtaining certificates of rehabilitation); *Clean Slate Program*, FRESNO CNTY., <https://perma.cc/8M9X-CZXX> (archived Oct. 26, 2021)

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pursuing postconviction relief for immigration purposes, the clean-slate unit will at times work together with the office's immigration experts to analyze how postconviction relief will assist clients in avoiding immigration consequences.<sup>292</sup>

**Monitoring compliance with state and local sanctuary laws.**

Another growing part of the immigration expert's role is ensuring that clients' rights under state and local sanctuary laws are respected. For example, under the California Values Act, local jails are prohibited from transferring individuals to U.S. Immigration and Customs Enforcement (ICE) custody unless the individual has certain qualifying convictions, such as a felony conviction punishable by imprisonment in state prison.<sup>293</sup> Likewise, local sheriffs and police may have their own policies that govern the extent of local cooperation with ICE.<sup>294</sup> Before a client accepts a plea, therefore, immigration experts in public defender offices are entrusted with reviewing the criminal history of their clients to determine if the individual could be subject to transfer into ICE custody and advising clients about this possibility.<sup>295</sup> Through this work, experts also monitor whether the local jail and other county departments are complying with the laws that limit cooperation with ICE.<sup>296</sup>

### 3. Caseloads for immigration experts

Massive workloads have long been an issue for public defenders. In 1973, in an attempt to address this issue, the National Advisory Commission on Criminal Justice Standards and Goals promulgated recommendations that each public defender carry no more than 150 felonies or 400 misdemeanors.<sup>297</sup> Some scholars, however, have criticized these recommendations as out-of-date, too high for modern standards of practice, and disconnected from empirical

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(offering clean-slate services such as representing clients in reducing felonies to misdemeanors); *Clean Slate Program*, ALAMEDA CNTY. PUB. DEF., <https://perma.cc/SK8X-GZKB> (archived Oct. 26, 2021) (offering assistance with sealing arrest records, obtaining certificates of rehabilitation, and other services).

292. Interview with Immigration Expert No. 12, *supra* note 239.

293. CAL. GOV'T CODE §§ 7282.5, 7284, 7284.6(a)(4) (West 2021).

294. *See* Eagly, *supra* note 34, at 271-80 (discussing different types of sheriff policies in California that limit transfers to ICE custody).

295. Interview with Immigration Expert No. 3, *supra* note 241.

296. *Id.* (explaining the importance of ensuring that the county is "following the law and not creating liability").

297. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS & GOALS, THE DEFENSE (BLACK LETTER) 13.12 (NAT'L LEGAL AID & DEF. ASS'N 1973), <https://perma.cc/YR87-J8YB>.

evidence.<sup>298</sup> Additionally, they were adopted well before immigration advising was a widely recognized part of public defender practice.

In 2006, California adopted an aspirational workload standard for indigent defense services that “[n]o attorney should be assigned more cases than he or she can effectively handle.”<sup>299</sup> The guidelines also acknowledge that “[w]orkloads can have a profound effect on the mental health of an attorney as well as the quality of representation he or she provides to the client.”<sup>300</sup> However, the state has not adopted any bright-line rule limiting the number of cases that defense lawyers or immigration experts practicing in the state can handle.<sup>301</sup>

In 2009, the NYSDA published the first and only set of caseload staffing ratios for immigration experts.<sup>302</sup> To arrive at these ratios, the authors divided the total number of noncitizen clients served by New York public defender offices with immigrant service plans by the number of experts employed within these offices.<sup>303</sup> Importantly, these calculations were not based on information regarding how many cases the experts actually handled.

For offices employing immigration experts to provide only “bare bones” advisals, the NYDSA report recommended a staff ratio of no more than 10,000 cases per year for each immigration expert.<sup>304</sup> In the “bare bones” advisal the expert provides a pre-plea advisal after evaluating possible dispositions “but will not generally directly counsel clients, provide post-plea advisals, or offer any direct immigration services.”<sup>305</sup> For immigration experts providing “full advisals,” the NYDSA recommended no more than 5,000 cases per year.<sup>306</sup> In a

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298. *See, e.g.*, NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 44-48 (2011), <https://perma.cc/3CBC-TU87> (explaining that criminal defense lawyers, even if working in a fully staffed office, could not “effectively defend [that] many clients over a twelve-month period and still furnish genuine quality representation”).

299. STATE BAR OF CAL., GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS 25 (2006), <https://perma.cc/V2ZS-PPB4> (stressing that “[a]ppropriate records should be kept by the administrator to avoid assigning an excessive number of cases to an attorney”).

300. *Id.*

301. Just last year, the California legislature authorized the State Public Defender to study the workloads of California public defenders, in consultation with the California Public Defenders Association and other stakeholders. Assemb. 625, 2021 Leg. (Cal. 2021) (enacted).

302. MARKOWITZ, *supra* note 147, at 18-19. These “general guidelines” acknowledged that it is “difficult to make hard and fast rules about how many experts or what percentage of an expert’s time an office will require.” *Id.* at 18.

303. *Id.* at 18-19, 19 n.34.

304. *Id.* at 19-20.

305. *Id.* at 19.

306. *Id.*

“full advisal” the expert provides pre-plea advice, “short file memos” with legal advice, and client counseling, as well as a post-plea advisal at the conclusion of representation.<sup>307</sup> Finally, for those immigration experts providing both full advisals and “targeted direct immigration representation,” the NYDSA recommended a caseload cap of 2,500 cases a year.<sup>308</sup>

Using these workload standards, an attorney spending forty hours a week on only *Padilla* advisals would spend only 8.7 minutes per advisal if completing 10,000 a year, or 17.4 minutes per advisal if completing 5,000 per year.<sup>309</sup> It is highly unlikely that New York-based immigration experts actually handled such enormous caseloads. As one immigration expert exclaimed during an interview, 5,000 or more advisals in one year would not be “humanly possible.”<sup>310</sup> The immigration expert’s role has also evolved significantly since 2009, when the NYDSA report was published; the role now includes additional tasks such as assisting with postconviction relief, training attorneys, and monitoring compliance with state and local sanctuary laws.

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307. *Id.*

308. *Id.*

309. This calculation assumes that attorneys spend all available working minutes on only *Padilla* advisals. To determine the available amount of attorney time to work on cases, we borrowed estimates by the National Center for State Courts that public defenders have on average 87,375 minutes a year to work on their cases (223 working days for case-related activities, with 6.25 hours per day available for casework). These estimates account for holidays, personal days, vacation and sick leave, and continuing legal education training. See DANIEL J. HALL, NAT’L CTR. FOR STATE CTS. & NAT’L DIST. ATT’YS ASS’N/AM. PROSECUTORS RSCH. INST., A WORKLOAD ASSESSMENT STUDY FOR THE NEW MEXICO TRIAL COURT JUDICIARY, NEW MEXICO DISTRICT ATTORNEYS’ OFFICES AND NEW MEXICO PUBLIC DEFENDER DEPARTMENT 75-77 (2007), <https://perma.cc/G4JS-D2ZQ>.

310. Interview with Immigration Expert No. 3, *supra* note 241. Experts asked about 10,000 yearly cases had similar, if not stronger, reactions. See, e.g., Interview with Immigration Expert No. 10, *supra* note 152 (“No, no, no, no! They take time! . . . I don’t see how that’s possible. It just doesn’t seem humanly possible.”); Interview with Immigration Expert No. 16 (Sept. 25, 2020) (“I think 10,000, even at bare-bones, is a lot.”).

**Table 2**  
Number of *Padilla* Advisals Completed in a Year  
by Immigration Experts in California<sup>311</sup>

<b>Number of Advisals</b>	<b><i>n</i></b>	<b>Percent</b>
1,500	3	9.1%
1,001-1,499	3	9.1%
801-1,000	8	24.2%
401-800	5	15.2%
400 or fewer	14	42.4%
<i>Total</i>	33	100%

Using data gathered from California attorneys serving in this role, we measured the actual caseloads of immigration experts. As displayed in Table 2, we find that the highest number of advisals that any immigration expert reported handling in a single year was 1,500. Only three of the experts in the state were able to complete this high number of advisals in a single year. On the low end, two-fifths of experts indicated that they completed 400 or fewer advisals per year.

Based on these findings, we recommend that public defender offices adopt an outer caseload maximum for immigration experts of no more than 1,500 *Padilla* consults per year. Applying this standard, experts completing only *Padilla* advisals could spend fifty-eight minutes on average on each alvial.<sup>312</sup> Although 1,500 consults per year would not be attainable for many experts, such a caseload standard would provide a more accurate baseline for local defense systems to figure out the minimum number of experts they require to satisfy the needs of their clients.<sup>313</sup> In addition, more experts would be needed to expand existing services and take on other immigration-related work, such

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311. Thirty-three out of the thirty-seven immigration experts participating in our survey shared how many *Padilla* advisals they assisted with annually. Responses to Immigration Expert Survey, Question 38 (on file with authors).

312. This calculation assumes 87,375 minutes a year to dedicate to *Padilla* advisals. See *supra* note 309.

313. Future research on *Padilla* representation could further evaluate caseloads of *Padilla* attorneys while taking into account office-specific factors such as the availability of support staff, attorney experience, and other duties assigned to in-office immigration experts. This research could build on existing “weighted caseload studies” that rely on a variety of measures to understand the quality of public defender outputs and the time required for specific tasks. See generally LEFSTEIN, *supra* note 298, at 140-51 (summarizing the literature on weighted caseload studies).



as training office staff and representing clients in postconviction proceedings or removal defense.<sup>314</sup>

The inconsistency between the NYDSA recommendation of 5,000 to 10,000 advisals in a year and the number that practicing *Padilla* attorneys report that they actually complete is particularly noteworthy because many of the California immigration experts are highly experienced. Among the state's immigration experts, 19% had twenty or more years of legal experience, 53% had eleven to nineteen years of experience, and 17% had six to ten years of experience.<sup>315</sup> Only 11% had five or fewer years of practice experience.<sup>316</sup>

We also recommend abandoning the distinction between “bare bones” and “full” advisals as separate practice models.<sup>317</sup> Most experts we interviewed did not believe that there is such a distinction. There is only one type of adival—a constitutionally sufficient adival—that must be provided every time. To be sure, some experts we interviewed agreed that many advisals are not complex and can be done in as little as ten to twenty minutes.<sup>318</sup> But they also shared the view that other cases are far more time-consuming. As one expert explained:

For more complicated cases, it may take a couple of hours of research, drafting an email response. It may also involve several phone calls or emails if the attorney is obtaining additional information necessary for a response, or is negotiating an immigration friendly plea and needs to consult as to different plea offers or alternatives.<sup>319</sup>

Another expert agreed:

[T]he *Padilla* consults often turn into a giant advocacy campaign on behalf of a client. So, for example, I have one client I probably spend, I don't know, 70 hours on . . . [Our office] did an outreach campaign in the community on this client. She

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314. See *supra* Part III.B.2.

315. Thirty-six of the thirty-seven immigration experts responding to the survey told us how long they had practiced law. Responses to Immigration Expert Survey, Question 3 (on file with authors).

316. *Id.*

317. See *supra* text accompanying notes 304-07.

318. See, e.g., Interview with Immigration Expert No. 10, *supra* note 152 (explaining that “if someone is rushing,” she can complete an adival in fifteen to twenty minutes); Interview with Immigration Expert No. 3, *supra* note 241 (describing how some advisals can be completed in ten to fifteen minutes); Interview with Immigration Expert No. 6, *supra* note 252 (reporting that a “straightforward” case can “take very little time,” as short as five or ten minutes). At least one expert sharply disagreed with whether a short *Padilla* consult qualified as a *Padilla* adival. See Interview with Immigration Expert No. 10, *supra* note 152 (“If you spend five minutes on a *Padilla* consult, you haven't done your job because you haven't talked to the client, you haven't even gotten basic information, you haven't done any analysis, and you're just giving them I would say kind of a worthless *Padilla*. It makes it meaningless, meaningless if you don't spend the time on it.”).

319. See Response to Immigration Expert Survey, Question 35 (on file with authors).

had to do a presentation at a local organization. We had three meetings, [including] one with the DA herself. So that was a giant amount of work just for one client.<sup>320</sup>

The number of criminal charges can also make *Padilla* consults more time-consuming because immigration experts need to analyze each charge independently and propose possible alternative pleas.<sup>321</sup> Another factor that can increase time spent on the *Padilla* consult is the length of the client's criminal history. As an expert explained:

[A] client might have a rap sheet with 30 convictions or 30 arrests, and that takes a lot longer to review to figure out if the person is already deportable—has an [aggravated felony] already, and what relief that they might have available to them. So those take a little bit longer to do an assessment . . . .<sup>322</sup>

Analyzing criminal charges and criminal history is also more time-consuming “when a new law comes out or a new case comes out” because it requires the expert to “read, understand, and then figure out the implications of those decisions.”<sup>323</sup>

Relatedly, some cases are more time-consuming because of the difficulty in identifying the client's immigration status.<sup>324</sup> Although in many cases a client's immigration history is relatively straightforward, other cases require accessing old records, interviewing family members, and contacting the client's former immigration lawyer.<sup>325</sup> All of this takes time.

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320. Interview with Immigration Expert No. 4, *supra* note 237.

321. Interview with Immigration Expert No. 10, *supra* note 152 (“I would say the more charges someone is facing, the more time it takes me to write [the *Padilla* advisal].”).

322. Interview with Immigration Experts Nos. 1 & 2, *supra* note 152; *see also* Interview with Immigration Expert No. 10, *supra* note 152 (“I also look at criminal history and then I look at the RAP sheet and I also give them an advisal. . . . [L]et’s say they pled to an [California Health & Safety Code section] 11377 back in 2014, I need to let them know, ‘Your client is already deportable because that’s a controlled substance offense.’”); *id.* (explaining that rap sheets “are really confusing” and that about half of clients she assists have lengthy rap sheets that “take me a minimum of half an hour” to review carefully); Interview with Immigration Expert No. 14, *supra* note 250 (explaining that some cases “seem to take less time,” but others are more “complex” especially when “there’s a bunch of priors and we don’t have the records because they’re from Alabama or whatever”).

323. Interview with Immigration Expert No. 3, *supra* note 241.

324. Current ABA standards require that “[d]efense counsel should determine a client’s citizenship and immigration status.” CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION 4-5.5(a) (AM. BAR ASS’N, 4th ed. 2017).

325. Interview with Immigration Expert No. 14, *supra* note 250 (“[A] sufficient *Padilla* for me would be like to be able to have access to the person’s immigration history. And there may be none and there may be a ton of stuff. If they’re in proceedings right now, having contact with their immigration lawyer in figuring out like the full panoply of what the lawyer’s trying to get for their client in terms of eligibility, and working with that lawyer to make sure that like we’re all in sync with our goals.”).

Some *Padilla* consultations are labor intensive because they require the expert to become more directly involved in defending against immigration consequences during the plea-bargaining process. One common task is preparing letters to the district attorney describing the immigration consequences that the client faces and why an alternative disposition would be immigration neutral.<sup>326</sup> Such letters often set out legal arguments and equitable factors in favor of granting the plea bargain.<sup>327</sup> The expert's involvement in negotiating the case could also extend to going to court to personally make a pitch for a plea agreement to the prosecutor. One office chief explained that involving the expert in this way in plea bargaining is more effective with both the prosecutor and the judge: "It's not just the public defender whining, 'But this is bad for my client's immigration.' That's not effective. It's a well-respected immigration lawyer presenting information that can make a difference."<sup>328</sup>

Experts may also occasionally go to court to help to negotiate an immigration-neutral disposition or to provide advice in situations where a plea offering is expiring.<sup>329</sup> Of course, all of these aspects of completing a *Padilla* advisal increase the time spent on individual cases and must be accounted for in making staffing decisions.

#### 4. Resource needs

Although the Supreme Court has steadily expanded the scope of work that falls within the umbrella of the Sixth Amendment, *Gideon* and its progeny remain an unfunded mandate.<sup>330</sup> A state commission investigating the criminal

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326. Interview with Immigration Expert No. 7 (Mar. 19, 2020) ("Sometimes the DAs will ask for a letter for the file saying why one particular plea is better than another. And so, then the [public defender] will ask me for that."); Interview with Immigration Expert No. 15, *supra* note 160 ("I do what I call DA letters on a case-by-case basis . . . It's just an analysis but written for a DA, and asking for different alternatives.").

327. Interview with Immigration Experts Nos. 1 & 2, *supra* note 152; *see also* Interview with Immigration Expert No. 4, *supra* note 237 (explaining that writing up the equities in a letter to the District Attorney "requires a long talk with the client and sometimes getting lots of documents together about how great they are" and that the expert has "just sort of tried to jump in and take more responsibility for convincing the DA").

328. Interview with Public Defender Chief of Large Size County No. 1, *supra* note 233.

329. Interview with Immigration Expert No. 10, *supra* note 152; Interview with Immigration Expert No. 3, *supra* note 241.

330. Erwin Chemerinsky, Remarks, *Lessons from Gideon*, 122 YALE L.J. 2676, 2680 (2013) (arguing that the lack of funding for *Gideon* resulted in "an unfunded mandate . . . without any enforcement mechanism" that has undermined the decision's impact); *see also* Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316, 2318 (2013) (explaining that "many jurisdictions have been unable or unwilling to commit the resources necessary to fully implement *Gideon's* vision").

system in California concluded in 2008 that the quality of indigent defense is not uniform in California and “sometimes falls short of the constitutional minimum,” in part due to “inadequate funding of defense services in some California counties.”<sup>331</sup> A study by Laurence Benner, which was supported by a grant from the same commission, further found that the state’s indigent defense system was underfunded by at least \$300 million.<sup>332</sup>

Within this context of resource constraints, our survey of chief and lead public defenders throughout the state asked participants whether their offices had adequate funding to comply with *Padilla*. Respondents from half of the counties indicated that their office did not have sufficient resources to meet the needs of their immigrant clients.<sup>333</sup> The overwhelming majority (86%) of public defender chief or lead attorney respondents ( $n = 37$  of 47) indicated that their office would benefit from additional resources to help meet the needs of their noncitizen clients.<sup>334</sup>

Many county offices indicated that they needed funding to hire their first in-house immigration expert or to increase the number of immigration experts they already have on staff.<sup>335</sup> Attorneys already working as immigration experts in public defender offices agreed that new funding could go toward hiring additional experts or support staff such as social workers or paralegals.<sup>336</sup> Counties without experts on staff expressed interest in obtaining funding to enter into a contract with an immigration expert in the community:

I believe that public defender offices should have access by contract or retainer to the best or at least very competent immigration lawyers in the community.

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331. CAL. COMM’N ON THE FAIR ADMIN. OF JUST., FINAL REPORT 91-100 (Gerald Uelmen & Chris Boscia eds., 2008), <https://perma.cc/W2BL-3HP5>.

332. Benner, *supra* note 130, at 266 n.4, 313; *see also* CONST. PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL; REPORT OF THE NATIONAL RIGHT TO COUNSEL COMMITTEE, at xi (2009), <https://perma.cc/9VEX-GZNN> (finding that funding for indigent defense is “woefully inadequate”).

333. Twenty-one of forty-three responding counties said that their funding was insufficient to meet the needs of their noncitizen clients. Responses to Chief/Lead Survey, Question No. 33 (on file with authors).

334. Only six of forty-two responding counties said that they would not benefit from additional resources. *Id.* Question No. 64.

335. *Id.* Question No. 34.

336. *See, e.g.*, Interview with Immigration Expert No. 8, *supra* note 152 (“The other thing, I think, would be more support staff. More folks like the advocates, and just more like paralegal all support staff.”); Interview with Immigration Expert No. 5, *supra* note 152 (“I think at minimum, we would need an immigration specific paralegal.”); Interview with Immigration Expert No. 10, *supra* note 152 (explaining that a “paralegal assistant” would be a great addition to the immigration unit).

Given our caseloads, trial schedules, and busy lives, it is hard to keep up on all the changes in the statutes and case law affecting immigration consequences.<sup>337</sup>

Representing immigrant clients requires on-staff or contract interpreters to allow public defenders to communicate with their clients. This need is particularly acute in rural counties where qualified interpreters are in short supply. As a chief public defender reported: “As a small rural county, we find that getting interpreters can be an almost insurmountable problem. That includes something as easy as a Spanish language interpreter.”<sup>338</sup>

The chief and lead public defenders that we surveyed overwhelmingly agreed (84%) that providing state funding for training would help public defenders to more competently represent their immigrant clients.<sup>339</sup> One third of counties responding to our survey reported that their office does not currently provide any training whatsoever for its public defenders on immigration consequences.<sup>340</sup> These counties with no training were overwhelmingly small counties.<sup>341</sup>

The dearth of funding for immigration experts and training is associated with inadequate protocols for serving immigrant clients. Respondents from 15% of counties reported that most public defenders in their office do not know the immigration consequences of the most commonly charged crimes.<sup>342</sup> One-fourth of counties indicated that their office does not have a policy in place under which public defenders are instructed to ask about their client’s immigration status.<sup>343</sup> None of these counties lacking proper protocols had hired an immigration expert.

## Conclusion

This Article has sought to explain how California, the state with the largest immigrant population in the nation, has implemented the momentous

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337. Responses to Chief/Lead Survey, Question No. 68 (on file with authors).

338. *Id.* Question No. 67.

339. Thirty-six of forty-three responding counties reported that their attorneys would benefit from free trainings to help their attorneys better represent noncitizen clients. *Id.* Question No. 30.

340. Fifteen of forty-five responding counties indicated that they had no such training for their attorneys. *Id.* Question No. 26.

341. Eleven of fifteen were small counties. The remaining four were medium-sized counties. *Id.*

342. Seven of forty-five responding counties indicated that their attorneys did not know the immigration consequences of commonly charged crimes. Of these seven, four were small counties. *Id.* Question No. 25.

343. Eleven of forty-five responding counties indicated that there was no such policy in place. Two answered, “I do not know.” *Id.* Question No. 17.

*Padilla* decision. Our study reveals that over the past decade a patchwork system has evolved in which each county has developed its own approach to representing immigrant clients. Exhibiting efforts at compliance, most large counties with institutional public defender offices have embedded immigration experts within their offices and reshaped how attorneys understand adequate pre-plea advisals and plea-bargaining practices. At the same time, however, many other counties have languished: They have not yet hired an immigration expert, instituted protocols for immigration advising, or trained all of their attorneys in immigration law. The urgency to create a workable *Padilla* delivery system is particularly acute in California's small and rural counties, which generally have not established a public defender office and instead rely on a county-funded contract system for appointing defense counsel.

Based on these findings, we offer several recommendations for the future development of California's public defender system. Although responsive to the specific needs we identify in California, these improvements can also apply to other state defense systems seeking to improve their representation of immigrant clients.

**Adopt clear protocols for defending immigrants charged with crimes.** One of the important roles of leadership in any indigent defense system is to establish standards that attorneys and staff must meet.<sup>344</sup> Several county public defender offices have already taken important steps in this regard by requiring all attorneys to consult with immigration experts and inquire as to the place of birth and immigration status of every client. Not all counties, however, have basic consultation and intake procedures in place. We recommend that every county adopt a clear plan for mitigating immigration consequences that includes mandatory protocols for gathering and responding to relevant client and case information.<sup>345</sup> Institutional offices and county contractors could promote attorney cooperation with such policies by specifically addressing them during their routine evaluations of staff members.<sup>346</sup>

County administrators also have an important role to play in ensuring that their localities achieve compliance. Boards of supervisors should request

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344. E.g., Cait Clarke & Christopher Stone, Paper, *Bolder Management for Public Defense: Leadership in Three Dimensions*, 29 N.Y.U. REV. L. & SOC. CHANGE 113, 115 (2004).

345. For an excellent discussion of the "vital components" of a protocol for serving immigrant clients, see MARKOWITZ, *supra* note 147, at 7-8.

346. This recommendation is consistent with the ABA's Ten Principles of a Public Defense Delivery System, which advise that defense counsel be "supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards." ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 3 (2002), <https://perma.cc/J7J8-GER3>.

evidence of an immigrant service protocol before awarding indigent defense funding.<sup>347</sup> In addition to other quality controls, *Padilla* compliance could be integrated into the performance measures used to budget for public defense and monitor county contracts.

California public defenders would also benefit from a state or local practice standard for delivering *Padilla*-related services. Such a guideline could, for example, set forth the basic elements of a *Padilla* advisal required for every immigrant client, including the immigration consequence of conviction, alternative possible plea resolutions, and other related immigration warnings.<sup>348</sup> Although immigration advising was already a part of recognized national guidance for defense lawyers prior to *Padilla*,<sup>349</sup> updating and formally incorporating these requirements into state or local practice standards would further emphasize their centrality to defense practice. Together, such efforts would raise the overall quality of public defense.

**Make immigration training available to all attorneys.** Immigration training should be offered to all attorneys accepting indigent appointments in the state. Our study has found that some counties offer their attorneys no training on immigration consequences,<sup>350</sup> whereas other counties offer training but do not require all attorneys to attend.<sup>351</sup> And we have learned that some seasoned attorneys are still practicing under pre-*Padilla* standards by not providing clients with the appropriate immigration advice before those clients enter into a plea or proceed to trial.<sup>352</sup>

Mandatory training is a vital next step. Such continuing education should not be seen as a substitute to consulting with immigration experts, but rather as an essential building block to developing a generation of defense lawyers that fully embrace *Padilla*. Training should ensure that lawyers know how to identify immigrant clients, seek the requisite expert immigration

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347. It is, of course, crucial that such contracts are not awarded based on cost alone. GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES (BLACK LETTER) IV-3 (NAT'L LEGAL AID & DEF. ASS'N 1984), <https://perma.cc/RE4R-K6G3>. For a sobering review of the dangers of competitive bidding for rural defense contracts, see generally Maybell Romero, *Low-Ball Rural Defense*, 99 WASH. U. L. REV. (forthcoming 2022), <https://perma.cc/TXZ9-828F>.

348. See *supra* notes 236-44 and accompanying text.

349. See, e.g., PERFORMANCE GUIDELINES FOR CRIMINAL REPRESENTATION (BLACK LETTER) 2.2(b)(2)(A) (NAT'L LEGAL AID & DEF. ASS'N 2006), <https://perma.cc/KJH7-CJJF> (providing that initial client interviews should gather information on immigration status and past criminal record, as well as other information concerning the case); *id.* 6.2(a) (requiring counsel to make sure their client is “fully aware of” any “consequences of a conviction such as deportation”).

350. See *supra* note 340.

351. See *supra* note 274.

352. See *supra* notes 262-65 and accompanying text.

consultations, and deliver robust advisals to their clients. Moreover, as Jon Rapping has argued, training should be values based, instilling the ethic of client-centered lawyering that recognizes the client’s goals as paramount.<sup>353</sup> Few issues could be more central to clients than the risk of deportation—which the *Padilla* Court recognized as “sometimes the most important part” of the penalty.<sup>354</sup> Training should aim to get all lawyers on board with *Padilla*’s mission by complementing the substance of best practices with the values of why this work is so vital to the clients and communities that public defenders serve.

Law schools also have a leading role to play in educating future lawyers about the fundamentals of crime-based deportation and eligibility for relief.<sup>355</sup> All students planning for careers in criminal defense should consider immigration law to be a necessary course, on par with classes in criminal law, evidence, and criminal procedure. Law schools should also cultivate more specialized courses on the intersection between immigration and criminal law,<sup>356</sup> including experiential opportunities that expose students to this practice area.<sup>357</sup>

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353. According to Jon Rapping, achieving cultural change requires values-based training that emphasizes a lawyer’s duties to her client. Jonathan A. Rapping, *You Can’t Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL’Y REV. 161, 163-64, 177-79 (2009). Values-based mentoring and recruitment are also key. *Id.* at 175-81; see also Eve Hanan, *Big Law, Public Defender-Style: Aggregating Resources to Ensure Uniform Quality of Representation*, 74 WASH. & LEE L. REV. ONLINE 420, 434 (2018) (maintaining that public defender offices have the potential to create an “organizational culture” that fosters “attitudinal shifts” that improve the quality of defense); Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1775, 1814 (2016) (recognizing a “culture of indifference” that affects many criminal defense lawyers and urging that trainings “address these cultural issues”).

354. *Padilla v. Kentucky*, 599 U.S. 356, 364 (2010).

355. See Carol S. Steiker, Keynote Address, *Gideon at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2711 (2013) (“We need to make the most of the opportunities we have as educators to ensure that the next generation does a better job at working to keep [the] promise [of *Gideon*].”).

356. Berkeley Law Professor Leti Volpp teaches an innovative seminar that examines “how the system of ‘cimmigration’ developed historically and how scholars assess its rise.” See *Law Schedule of Classes: Cimmigration*, BERKELEY L., <https://perma.cc/BH56-NPBC> (archived Nov. 10, 2021). For a guide to the law at the intersection between immigration and criminal law, see generally CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* (2d ed. 2021).

357. For instance, Philip Torrey at Harvard Law School founded a Cimmigration Clinic that engages students in “cutting-edge issues regarding the intersection of criminal law and immigration law.” *Cimmigration Clinic*, HARV. L. SCH., <https://perma.cc/7KKF-T93X> (archived Nov. 10, 2021); see also Orihuela, *supra* note 27, at 636-50 (surveying the range of work that lawyers engage in at the intersection of criminal and immigration law).



**Increase the number of immigration experts.** The rising number of immigration experts practicing in California shows that more counties are embracing a professional, staffed model of immigration advising. Yet in a state with nearly eleven million foreign-born residents,<sup>358</sup> thirty-seven immigration experts is obviously insufficient.

Our analysis of caseloads for *Padilla* experts further accentuates the inadequacy of current staffing levels. Even the most experienced and highly trained experts in the state handle no more than 1,500 *Padilla* advisals a year, and most complete far fewer.<sup>359</sup> Given the dominance of plea bargaining in the criminal legal system, public defenders must bring in a sufficient number of immigration experts into their legal team to ensure that pleas adequately protect against harmful immigration consequences.

Staffing levels should be sensitive to the significant amount of time that is required to train new immigration experts and keep them up to date on changes in the immigration law. Relatedly, staffing levels should accommodate the expanding roster of tasks that *Padilla* experts are asked to tackle. For example, as this Article has outlined, it would be beneficial for public defenders to undertake postconviction work so that individuals are not prejudiced by invalid plea bargains.<sup>360</sup> Similarly, more public defender offices are appropriately beginning deportation defense practices to shield their clients from erroneous deportation orders. Public defender systems across the country should learn from these offices, such as the public defenders in Alameda County and San Francisco County, who have led the way in offering more robust and holistic representation for their immigrant clients.<sup>361</sup>

County boards of supervisors have begun to recognize that more funding is needed for offices to hire additional experts and support staff for immigrant consultations. Boards that have not yet funded these positions must accept the constitutional urgency of restructuring public defense in their counties. Counties that have already allocated some funding should evaluate if more positions are needed.

Finally, as our findings underscore, inadequate funding for *Padilla* obligations is not only a matter of total funding levels but also reflects choices regarding resource allocation decisions made at the local level.<sup>362</sup> In addition to pursuing supplemental funding, local public defender systems should ration their existing funding appropriately so that their immigrant clients receive quality representation.

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358. JOHNSON ET AL., *supra* note 19.

359. *See supra* Table 2; *supra* notes 311-16 and accompanying text.

360. *See supra* notes 287-92 and accompanying text.

361. *See supra* note 276 and accompanying text.

362. *See supra* Figures 2 & 3; *supra* notes 168-80 and accompanying text.

**Provide state and federal funding and support for immigrant defense services.** The indigent defense system in California remains county run and severely underfunded. The need to support immigrant defense services is particularly urgent in counties where there is no current or forthcoming support for *Padilla* implementation from their county’s board of supervisors.

Although increasing county-level financial support is imperative, the state also has a role to play in supporting indigent defense. As research has shown, state legislative appropriations are a promising way to ensure steady and systemic support for adequate counsel at the local level.<sup>363</sup>

Since its founding in 1976, California’s Office of the State Public Defender (OSPD) has focused on appellate representation in death penalty cases.<sup>364</sup> Although its role has been limited, the existence of this statewide body provides a potential institutional umbrella for growing state funding to improve California’s *Padilla* response. Promising efforts to expand the work of the OSPD are already underway. In a 2020 settlement agreement, Fresno County and the State of California committed to providing state funding to the OSPD for training and technical assistance to trial-level county services statewide.<sup>365</sup> Also in 2020, the OSPD’s mission was statutorily amended to enable the agency to support local indigent defense systems with training and assistance.<sup>366</sup> And in 2021, state general funds were allocated for the first time to supplement county defense funding for postconviction relief.<sup>367</sup> Going forward, new state funding must be allocated with an eye toward improving

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363. See, e.g., Joe, *supra* note 21, at 143–48 (discussing that state legislative appropriations are the best funding scheme for public defense services); BRYAN FURST, BRENNAN CTR. FOR JUST., A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY 11 (2019), <https://perma.cc/X45B-N42R> (concluding that “fund[ing] indigent defense at the state level from general revenue . . . will ensure higher quality and more consistent representation statewide”).

364. *About Us*, *supra* note 21.

365. Press Release, ACLU of N. Cal., ACLU Settlement Agreement Secures Governor’s Commitment to \$14 Million in Added Support for Public Defense Systems Throughout California and Agency Expansion (Jan. 10, 2020), <https://perma.cc/D86X-KXXC> (describing the settlement in *Phillips v. State of California* which will, among other things, provide funds to “expand the mission of the Office of the State Public Defender”).

366. S.B. 118, ch. 29, § 7, 2020 Cal. Stat. 1663, 1670 (codified at CAL GOV’T CODE § 15420(b) (West 2021)) (allowing the State Public Defender “[t]o provide assistance and training to public defender offices . . . and to engage in related efforts for the purpose of improving the quality of indigent defense”).

367. See Budget Act of 2021, S. 129, 2021 Leg. § 189 (Cal. 2021) (enacted) (allocating \$49,500,000 of state funding per year through January 1, 2025 for a “Public Defense Pilot” to supplement local public defender offices’ work on implementing postconviction relief work); see also *About Us*, *supra* note 21 (citing new general fund grants to “supplement local funding for indigent criminal defense”).

the quality of indigent defense services for clients facing possible immigration consequences.

Finally, the federal government should also underwrite state indigent defense systems as they implement *Padilla*. Given the federal government's role in enforcing a national deportation system that relies so heavily on state criminal convictions, it also has a responsibility to ensure that those convictions are properly obtained. Federal funding could go to support states in providing competent immigration advice on immigration consequences.<sup>368</sup>

**Address the specific challenges of rural defense systems.** This Article has sounded the alarm about the particular challenges of administering indigent defense services in small and rural counties. As we have documented, many of these counties have not yet established institutional public defender offices and instead rely on small law firms or solo practitioners to accept indigent appointments. Lacking the size to scale up and hire an immigration expert, many smaller counties have not yet adopted a plan for implementing *Padilla*.<sup>369</sup> One possible solution is to encourage small counties to contract with the ILRC or another nonprofit for training and consultations. Another option is to move away from an exclusively local system for *Padilla* advising and instead pool resources so that an expert could be hired to serve multiple small counties.<sup>370</sup> Embedding experts at the regional level would allow them to develop valuable regional expertise in charging and plea-bargaining practices that can vary across local court systems.

**Support the work of the ILRC.** Participants in our study uniformly echoed the need to support the ILRC, which serves as the central hub of criminal-immigration expertise in the state.<sup>371</sup> For decades, the ILRC's trainings and resource materials have distributed knowledge about immigration consequences and recent developments in the law to California's

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368. See generally NAT'L IMMIGR. PROJECT, TRANSFORMING THE IMMIGRATION SYSTEM: THE NATIONAL IMMIGRATION PROJECT'S PRIORITIES FOR EXECUTIVE AND LEGISLATIVE ACTION 41 (2021), <https://perma.cc/YG7J-PPYV> (proposing that the U.S. Department of Justice "establish a nationwide task force to implement the *Padilla* decision" and "assist states with providing competent immigration advice").

369. See *supra* Table 1.

370. Such a regional approach would echo the existing state-law statutory option to establish multicounty defense offices. See *supra* note 61 and accompanying text.

371. See, e.g., Responses to Expert Survey, Question No. 27 (on file with authors) (explaining that most attorneys in the office utilize ILRC publications to understand the immigration consequences of criminal convictions); *id.* Question No. 65 (characterizing the ILRC as "a great resource" for challenging legal questions that come up in providing *Padilla* consults); *id.* Question No. 66 ("I very much appreciate the work of the ILRC. Having that resource has made my job much easier and undoubtedly benefited many clients.").

public defenders.<sup>372</sup> The ILRC also provides attorney consultations for public defender offices that do not have immigration experts on staff, including in small counties.<sup>373</sup> Even offices with immigration experts on staff benefit from the ILRC's ongoing mentoring in this complex area of law. Any future state funding to public defense should recognize and strengthen the work of the ILRC in defending immigrants in the state.

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This Article's findings illustrate both the successes and challenges of integrating *Padilla* into the institutional design of indigent defense. Necessary steps have already been taken to make immigration advising and plea bargaining more central to criminal defense practice. Notably, a growing number of public defender offices have hired immigration experts to help ensure that *Padilla* advisals are based on a current and accurate understanding of immigration law. The practice developments we document go beyond the confines of client counseling and plea bargaining to include, for example, assisting clients to obtain postconviction relief and defending clients against deportation in immigration court.

At the same time, however, structural reform of California's public defense system in response to *Padilla* is not yet complete. Further rethinking of how public dollars are distributed, how indigent defense organizations are staffed, and how practice protocols are enforced is needed to fully realize *Padilla*'s promise. Our policy recommendations sketch a path forward and have immediate relevance to policymakers and public defender organizations in California and throughout the country. Over a decade after *Padilla*, the time has come to reassess progress and plan for future improvements.

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372. *See supra* text accompanying notes 80-86, 162-63.

373. *See supra* text accompanying notes 162-63.

## **Appendix A: Survey of Chief and Lead Defenders**

To understand how public defender offices in California are addressing the needs of their immigrant clients, we compiled original data from a number of sources. These appendices describe our study methods, which included informal information gathering, two detailed online surveys of public defenders in California, and in-depth interviews with county public defenders.

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After obtaining information on the public defender systems in every California county, we identified the chief of every institutional public defender in the state as well as the lead attorney in those offices using a contract or assigned counsel system. Next, we designed an online survey, which we distributed to the chief or lead attorney in every county, that focused on how the county structures its indigent defense system, including with respect to immigrant defendants and their attorneys' obligations under *Padilla*.

Among other questions, the survey asked whether the county employed one or more immigration experts. The survey also inquired about the types of trainings offered for county public defenders and protocols in place for interviewing and advising their immigrant clients. The survey concluded by exploring the resources that could help their county's public defense system better serve their clients. Before sending this survey to chief and lead defenders, we received feedback from law professors who teach criminal procedure as well as public defenders in other states. We obtained approval for the survey data collection from the UCLA Institutional Review Board.

The survey contained sixty-nine questions total, but no participant was asked all questions because the survey branched into separate tracks based on the responses received. For example, if a participant answered that their county did not employ an immigration expert, the survey skipped over more detailed questions about in-house experts. The survey was designed to be completed in twenty to forty minutes.<sup>374</sup>

The CDPA (California Public Defenders Association) sent an email invitation to participate in the survey in June 2019, along with a link to complete the Qualtrics survey online. After sending additional reminders about the survey, we received responses from forty-seven out of the fifty-eight chief or lead attorneys surveyed—a response rate of 81%. The responding counties were representative of all county sizes and models, as well as different immigrant populations.<sup>375</sup> Through internet searches, telephone calls to gather

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374. A copy of the Chief/Lead Survey is available at Appendix E, <https://perma.cc/44EH-A6QV>.

375. Of the eleven counties that did not participate in the survey, seven were small counties, three were medium counties, and one was a large county. Additionally, among the eleven counties that did not respond, three had an institutional public defender while  
*footnote continued on next page*

basic information, consultations with experts in the field, our survey of immigration experts, and in-depth interviews of public defenders practicing in the state, we were able to gather information about counties that did not respond to the survey.

### **Appendix B: Survey of Immigration Experts**

The next stage of our research was to identify those California public defender offices that have hired in-house immigration experts. The term “immigration expert” refers to individuals with training in both immigration and criminal law who specialize in *Padilla* advisals, deportation defense, postconviction relief, and other immigration-related defense work. We first asked the ILRC (Immigrant Legal Resource Center), a nonprofit that provides support and training for immigration experts in public defender offices, to help us identify individuals they knew were working in this capacity in California. We supplemented this information by also asking practitioners at nonprofit organizations and public defender offices to identify colleagues serving in the role of immigration expert. Finally, we relied on our survey results of chief and lead defenders in California to provide additional information about whether a county had hired one or more immigration expert. In total, we identified thirty-seven immigration experts employed across sixteen counties in California as of the beginning of 2020.

With the approval of the UCLA Institutional Review Board, we surveyed these experts on the nature of their work. For this purpose, we designed a detailed survey using Qualtrics software. The survey included multiple-choice and open-response questions about the types of matters that these immigration experts handle. The survey also asked respondents about their positions, workloads, and the time it takes them to complete certain types of legal matters. The survey ended with questions about any obstacles that they face in their work and improvements that they believe would assist them in representing their clients. Before sending our survey to immigration experts, we tested it with attorneys and law professors specializing in the intersection of criminal and immigration law.

Although the expert survey contained a total of sixty-eight questions, respondents were not necessarily asked all questions. For example, if they responded that their office did not provide removal defense services, they were not asked any follow-up questions about this type of work. The survey was designed to be completed in twenty to forty minutes.<sup>376</sup>

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eight had a contract system. The median noncitizen population among the non-responders was 11%.

376. A copy of the Immigration Expert Survey is available at Appendix E, <https://perma.cc/44EH-A6QV>.

An attorney with the ILRC sent an email invitation to participate in the survey in June of 2019, along with a link to complete the survey online. As we became aware of other experts working in California, we sent out additional surveys through the beginning of 2020. We received responses from thirty-seven out of the thirty-seven immigration experts practicing in public defender offices in the state—a response rate of 100%.

### **Appendix C: Qualitative Interviews**

The final phase of data collection was a series of semi-structured interviews. Unlike the surveys, the qualitative interviews allowed for study participants to provide more detailed descriptions of their work and reflections on the topics we were studying.<sup>377</sup> In conducting these interviews, we followed a protocol approved by the UCLA Institutional Review Board.

Due to restrictions in place as a result of the global COVID-19 pandemic, these interviews took place over the telephone rather than in person. In total, we interviewed twenty-four attorneys, which included six chief or lead defenders, as well as eighteen immigration experts. Of the eighteen experts, fourteen were on staff at institutional public defender offices, two provided services pursuant to a contract arrangement, and two were experts with a nonprofit organization that consults with public defender offices. These interviews generally took between thirty and ninety minutes and were recorded with the permission of the interviewees. All interviews were professionally transcribed.

Our interviews covered many different topics and allowed for the interviewee to respond to open questions. Several questions were asked of all interviewees. First, we asked interviewees about the procedures, staffing, and training in place in their office for representing noncitizen clients. Second, we asked interviewees how they defined a *Padilla* advisal and what it should include. Third, we inquired about any obstacles that their office faced in assisting noncitizen clients, such as resource constraints in staffing and training. We also spent time discussing what consumes their time on a day-to-day basis and the procedures and protocols that they follow when working on cases. To conclude, we asked immigration experts to describe any work done

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377. See generally Carol A.B. Warren, *Qualitative Interviewing*, in HANDBOOK OF INTERVIEW RESEARCH: CONTEXT AND METHOD 83, 85 (Jaber F. Gubrium & James A. Holstein eds., 2001) (describing qualitative interviewing as “a kind of guided conversation”); Kathryn Roulston, *The Pedagogy of Interviewing*, in THE SAGE HANDBOOK OF INTERVIEW RESEARCH: THE COMPLEXITY OF THE CRAFT 61, 61-74 (Jaber F. Gubrium, James A. Holstein, Amir B. Marvasti & Karyn D. McKinney eds., 2d ed. 2012) (summarizing the existing literature “on how to design and conduct research studies that use interviews”).

by their office beyond basic *Padilla* advisals, including any postconviction relief or representation of clients in immigration court.

#### **Appendix D: County-by-County Noncitizen Population and Funding for Public Defense**

Table 3 summarizes the data we obtained on each county's structure for indigent defense, total population, noncitizen population, and total public defense expenditures. As this Article explained, we identified the county model for distributing defense services by surveying chief and lead public defenders, collaborating with the CPDA and the ILRC, searching county websites, and contacting county personnel. We gathered data on county population and noncitizen population from the U.S. Census Bureau's 2018 American Community Survey.<sup>378</sup> Each county's total expenditures on public defense services for fiscal year 2018-2019 was obtained directly from the county's publicly released budget statement.<sup>379</sup>

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378. *See supra* notes 144-45, 177 and accompanying text.

379. *See supra* notes 168-69 and accompanying text.



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**Table 3**  
Public Defense in California

County	Public Defender Structure	Population Size	Total Population	Total Noncitizen Population	Percent Noncitizen Population	Total Indigent Defense Expenditures	Per Capita Indigent Defense Expenditures
<b>Alameda</b>	Institutional	Large	1,643,700	248,474	15%	\$52,264,675	\$32
<b>Alpine</b>	Contract	Small	1,146	12	1%	\$58,000	\$51
<b>Amador</b>	Contract	Small	37,829	933	2%	\$1,165,250	\$31
<b>Butte</b>	Contract	Medium	227,075	8,013	4%	\$3,892,235	\$17
<b>Calaveras</b>	Contract	Small	45,235	1,354	3%	\$815,218	\$18
<b>Colusa</b>	Contract	Small	21,464	3,375	16%	\$383,944	\$18
<b>Contra Costa</b>	Institutional	Large	1,133,247	130,264	11%	\$32,749,224	\$29
<b>Del Norte</b>	Contract	Small	27,424	1,001	4%	\$1,044,888	\$38
<b>El Dorado</b>	Institutional	Medium	186,661	7,824	4%	\$4,916,846	\$26
<b>Fresno</b>	Institutional	Medium	978,130	126,217	13%	\$25,748,041	\$26
<b>Glenn</b>	Contract	Small	27,897	3,655	13%	\$506,035	\$18

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County	Public Defender Structure	Population Size	Total Population	Total Noncitizen Population	Percent Noncitizen Population	Total Indigent Defense Expenditures	Per Capita Indigent Defense Expenditures
<b>Humboldt</b>	Institutional	Medium	135,768	4,408	3%	\$4,205,881	\$31
<b>Imperial</b>	Institutional	Medium	180,216	28,148	16%	\$3,468,083	\$19
<b>Inyo</b>	Contract	Small	18,085	797	4%	\$828,900	\$46
<b>Kern</b>	Institutional	Medium	883,053	116,323	13%	\$25,999,706	\$29
<b>Kings</b>	Contract	Medium	150,075	17,398	12%	\$4,614,239	\$31
<b>Lake</b>	Contract	Small	64,148	3,163	5%	\$1,533,633	\$24
<b>Lassen</b>	Institutional	Small	31,185	1,120	4%	\$991,758	\$32
<b>Los Angeles</b>	Institutional	Large	10,098,052	1,672,868	17%	\$313,215,000	\$31
<b>Madera</b>	Contract	Medium	155,013	22,317	14%	\$3,448,536	\$22
<b>Marin</b>	Institutional	Medium	260,295	25,364	10%	\$8,046,780	\$31
<b>Mariposa</b>	Contract	Small	17,540	730	4%	\$512,000	\$29

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County	Public Defender Structure	Population Size	Total Population	Total Noncitizen Population	Percent Noncitizen Population	Total Indigent Defense Expenditures	Per Capita Indigent Defense Expenditures
<b>Mendocino</b>	Institutional	Small	87,422	7,456	9%	\$3,282,961	\$38
<b>Merced</b>	Institutional	Medium	269,075	42,291	16%	\$7,623,336	\$28
<b>Modoc</b>	Contract	Small	8,938	504	6%	\$331,925	\$37
<b>Mono</b>	Contract	Small	14,174	1,815	13%	\$768,500	\$54
<b>Monterey</b>	Institutional	Medium	433,212	94,285	22%	\$13,369,351	\$31
<b>Napa</b>	Institutional	Medium	140,530	17,142	12%	\$6,084,317	\$43
<b>Nevada</b>	Institutional	Small	99,092	3,083	3%	\$3,040,143	\$31
<b>Orange</b>	Institutional	Large	3,164,182	442,291	14%	\$82,551,092	\$26
<b>Placer</b>	Contract	Medium	380,077	14,817	4%	\$10,686,611	\$28
<b>Plumas</b>	Contract	Small	18,699	396	2%	\$368,646	\$20
<b>Riverside</b>	Institutional	Large	2,383,286	262,772	11%	\$51,482,457	\$22

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County	Public Defender Structure	Population Size	Total Population	Total Noncitizen Population	Percent Noncitizen Population	Total Indigent Defense Expenditures	Per Capita Indigent Defense Expenditures
<b>Sacramento</b>	Institutional	Large	1,510,023	135,527	9%	\$45,549,948	\$30
<b>San Benito</b>	Contract	Small	59,416	6,908	12%	\$900,137	\$15
<b>San Bernardino</b>	Institutional	Large	2,135,413	227,815	11%	\$53,425,035	\$25
<b>San Diego</b>	Institutional	Large	3,302,833	364,941	11%	\$90,334,891	\$27
<b>San Francisco</b>	Institutional	Medium	870,044	111,731	13%	\$39,206,306	\$45
<b>San Joaquin</b>	Institutional	Medium	732,212	88,294	12%	\$21,566,271	\$29
<b>San Luis Obispo</b>	Contract	Medium	281,455	15,022	5%	\$7,074,268	\$25
<b>San Mateo</b>	Bar Ass'n	Medium	765,935	113,834	15%	\$18,935,188	\$25
<b>Santa Barbara</b>	Institutional	Medium	443,738	67,177	15%	\$14,610,400	\$33
<b>Santa Clara</b>	Institutional	Large	1,922,200	349,329	18%	\$67,450,438	\$35

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County	Public Defender Structure	Population Size	Total Population	Total Noncitizen Population	Percent Noncitizen Population	Total Indigent Defense Expenditures	Per Capita Indigent Defense Expenditures
<b>Santa Cruz</b>	Contract	Medium	273,765	30,713	11%	\$12,373,262	\$45
<b>Shasta</b>	Institutional	Medium	179,085	4,948	3%	\$7,417,315	\$41
<b>Sierra</b>	Contract	Small	2,930	39	1%	\$104,633	\$36
<b>Siskiyou</b>	Institutional	Small	43,540	1,013	2%	\$1,791,332	\$41
<b>Solano</b>	Institutional	Medium	438,530	35,679	8%	\$21,890,404	\$50
<b>Sonoma</b>	Institutional	Medium	501,317	47,499	9%	\$13,643,878	\$27
<b>Stanislaus</b>	Institutional	Medium	539,301	61,820	11%	\$12,855,892	\$24
<b>Sutter</b>	Institutional	Small	95,872	10,553	11%	\$1,250,609	\$13
<b>Tehama</b>	Contract	Small	63,373	3,085	5%	\$880,306	\$14
<b>Trinity</b>	Contract	Small	12,862	342	3%	\$608,500	\$47
<b>Tulare</b>	Institutional	Medium	460,477	68,987	15%	\$10,723,364	\$23

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County	Public Defender Structure	Population Size	Total Population	Total Noncitizen Population	Percent Noncitizen Population	Total Indigent Defense Expenditures	Per Capita Indigent Defense Expenditures
Tuolumne	Institutional	Small	53,932	790	1%	\$1,552,878	\$29
Ventura	Institutional	Medium	848,112	96,199	11%	\$23,003,794	\$27
Yolo	Institutional	Medium	214,977	26,838	12%	\$8,722,281	\$41
Yuba	Contract	Small	75,493	4,617	6%	\$1,196,492	\$16
<b>Total Statewide</b>			<b>39,148,760</b>	<b>5,184,310</b>	<b>13%</b>	<b>\$1,147,066,033</b>	<b>\$29</b>