

REALIZING THE PROMISE OF *PADILLA* THROUGH A LAW SCHOOL/PUBLIC DEFENDER COLLABORATION

STACY TAEUBER*

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INTRODUCTION

The Supreme Court’s 2010 decision in *Padilla v. Kentucky*¹ thrust the issue of the immigration consequences of crime into the legal limelight.² The Court held that the Sixth Amendment’s guarantee of effective assistance of counsel requires defense counsel to provide their noncitizen clients with specific advice regarding immigration consequences.³ Deportation, the Court found, is a uniquely severe penalty that is “intimately related to the criminal process,”⁴ and that, for many noncitizens, is the most important potential consequence of the criminal process.⁵ Suddenly, defense attorneys found themselves

* Clinical Assistant Professor and Director, Immigrant Justice Clinic, University of Wisconsin Law School. I am grateful to Ingrid Eagly, Michael Kagan, Phil Torrey, Jenny Roberts, and Gwendolyn Leachman for their comments and suggestions and to Cecelia Klingele for the opportunity to participate in this Symposium.

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

2. *See generally id.*

3. *Id.* at 374.

4. *Id.* at 365.

5. *Id.* at 364.

deputized as the first line of defense against deportation for their noncitizen clients.⁶ By “plea bargain[ing] creatively,” the *Padilla* Court explained, counsel may be able “to craft a conviction and sentence that reduce the likelihood of deportation.”⁷ Widely hailed as a landmark decision—a “*Gideon* for immigrants”⁸—*Padilla*’s promise has proved elusive in practice, particularly in the realm of indigent defense. Implementing *Padilla* has proven a daunting challenge for defender offices across the country given the complexity of the law, the lack of lawyers with the appropriate expertise, and the already stretched financial and personnel resources of indigent defense offices.⁹

Prior to *Padilla*, courts had almost unanimously held that defense counsel had no affirmative duty under the Sixth Amendment to advise noncitizen clients about the immigration consequences of conviction.¹⁰ A

6. Stephen Lee argues that “state courts have become de facto immigration courts,” since often “a noncitizen’s only meaningful chance to avoid removal is to negotiate a deal in upstream criminal proceedings that provides immunity against downstream removal.” Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 555 (2013); see also César Cuauhtémoc García Hernández, *When State Courts Meet Padilla: A Concerted Effort is Needed to Bring State Courts Up to Speed on Crime-Based Immigration Law Provisions*, 12 LOY. J. PUB. INT. L. 299 (2011).

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

8. Christopher N. Lasch, “*Crimmigration*” and the Right to Counsel at the Border Between Civil and Criminal Proceedings, 99 IOWA L. REV. 2131, 2135 (2014) (quoting Maria Teresa Rojas, *A “Gideon Decision” for Immigrants*, OPEN SOC’Y FOUND. BLOG (Apr. 7, 2010), <http://www.opensocietyfoundations.org/voices/gideon-decision-immigrants>).

9. Some have argued that the realities of poorly funded, low-quality indigent defense mean that *Padilla*’s practical impact is likely to be negligible. See Darryl K. Brown, *Why Padilla Doesn’t Matter (Much)*, 58 UCLA L. REV. 1393 (2011) (“The *Padilla* holding is not a solution for those sources of deficient lawyering.”).

10. See, e.g., *Santos-Sanchez v. United States*, 548 F.3d 327, 329 (5th Cir. 2008); *Broomes v. Ashcroft*, 358 F.3d 1251, 1256–57 (10th Cir. 2004); *United States v. Gonzalez*, 202 F.3d 20, 24 (1st Cir. 2000); *United States v. Del Rosario*, 902 F.2d 55, 56 (D.C. Cir. 1990); *United States v. Yearwood*, 863 F.2d 6, 7 (4th Cir. 1988); *United States v. Campbell*, 778 F.2d 764, 765 (11th Cir. 1985); *Oyekoya v. State*, 558 So. 2d 990 (Ala. Crim. App. 1989); *State v. Rosas*, 904 P.2d 1245, 1247 (Ariz. Ct. App. 1995); *State v. Montalban*, 2000-2739, p. 4–6 (La. 2/26/02); 810 So. 2d 1106, 1110; *Commonwealth v. Frometa*, 555 A.2d 92, 93–94 (Pa. 1989); see also *Padilla*, 559 U.S. at 365, 383; Margaret Colgate Love, *Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 96 (2011); 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, 796–97 (2011). Prior to *Padilla*, only three states—California, Colorado, and New Mexico—imposed an affirmative duty on defense counsel to provide some type of advice on immigration consequences to their noncitizen clients. See *People v. Soriano*, 240 Cal. Rptr. 328, 336 (Cal. Ct. App. 1987); *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987); *State v. Paredes*, 101 P.3d 799, 801 (N.M. 2004). For a discussion of state court holdings prior to *Padilla*, see Tyler Atkins, Note, *Immigration Consequences of Guilty Pleas: What State v.*

defense attorney's duty was limited to the criminal charge and the sentence flowing directly from that charge.¹¹ Immigration consequences were deemed "collateral" to the criminal case and were thus beyond the purview of the Sixth Amendment's effective counsel requirement.¹² In *Padilla*, however, the Supreme Court held that the unique nature of deportation and its close connection to the criminal process took it out of the collateral consequences box and put it squarely in the ambit of the defense attorney's constitutionally required duty of effective representation.¹³ Providing immigration advice was no longer optional; it was a constitutional requirement.

In 2009, one year before *Padilla*, Professor Peter Markowitz published *Protocol for the Development of a Public Defender Immigration Service Plan*, in which he outlined several models that defender offices might use to enable them to incorporate immigration consequences into their practices.¹⁴ These models fall into four general categories, each of which has been used by some defender offices post-*Padilla*. The first involves hiring an in-house expert, usually an immigration attorney, to provide *Padilla* advisals to the public defender's clients.¹⁵ The second involves contracting with outside service providers,

Paredes Means to New Mexico Criminal Defendants and Defense Attorneys, 36 N.M. L. REV. 603, 610–12 (2006).

11. *Santos-Sanchez*, 548 F.3d at 336.

12. *Jamison v. Klem*, 544 F.3d 266, 277–78 (3d Cir. 2008) (stating that a possible mandatory minimum sentence was a direct consequence); *Dalton v. Battaglia*, 402 F.3d 729, 733 (7th Cir. 2005) (noting that the potential length of sentence was a direct consequence); *Steele v. Murphy*, 365 F.3d 14, 17 (1st Cir. 2004) (holding that the potential for future civil commitment was a collateral consequence); *Torrey v. Estelle*, 842 F.2d 234, 236 (9th Cir. 1988); *George v. Black*, 732 F.2d 108, 110–11 (8th Cir. 1984) (holding that there was no duty to advise of a possible civil commitment following completion of sentence, as it was a collateral consequence); *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973) (stating that direct consequences have "a definite, immediate and largely automatic effect on the range of the defendant's punishment"); *State v. Madison*, 120 Wis. 2d 150, 151, 161, 353 N.W.2d 835 (Ct. App. 1984) (holding there was no duty to warn of mandatory license revocation following a guilty plea, as it was a collateral consequence).

13. *Padilla*, 559 U.S. at 364–66.

14. PETER L. MARKOWITZ ET AL., PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER IMMIGRATION SERVICE PLAN (2009), <http://immigrantdefenseproject.org/wp-content/uploads/2011/03/Protocol.pdf>; see also Ingrid V. Eagly, Gideon's Migration, 122 YALE L.J. 2282 (2013).

15. MARKOWITZ ET AL., *supra* note 14, at 10–11. Examples of this model include the San Francisco Public Defender, *Public Defender to Provide Immigration Help*, S.F. PUB. DEFENDER (Aug. 5, 2014), <http://sfpublicdefender.org/news/2014/08/public-defender-to-provide-immigration-help/>, the Alameda County Public Defender, *Immigration*, ALAMEDA COUNTY PUB. DEFENDER, <http://www.co.alameda.ca.us/defender/services/immigration.htm> (last visited Mar. 24, 2015), the Santa Clara County Public Defender, Tracey Kaplan, *Santa Clara County Public Defender Hires Immigration-Law Specialist*, SAN JOSE MERCURY NEWS (Oct. 25, 2014, 12:29 PM), <http://www.>

which may be a local immigration law provider or one of the national advocacy organizations that offer this service.¹⁶ The third model involves sharing an immigration expert between the public defender and local immigration service provider. The fourth model applies to large or state-wide defender offices and involves training some number of existing public defenders to serve as immigration experts for local offices.¹⁷ A new and ideal model, according to Markowitz, would involve the defender office having in-house immigration attorneys who would not only provide *Padilla* advisals but also represent noncitizen clients in any subsequent immigration proceedings.¹⁸ This model mirrors for immigration consequences what has been termed a “holistic defense” model.¹⁹

A holistic defense aims to address the issues underlying and surrounding an individual’s involvement in the criminal justice system with the goal of client empowerment, reduction of recidivism, and crime prevention.²⁰ A holistic defense practice may include social workers, family law attorneys, immigration attorneys, benefits advocates, and others in addition to the criminal defense attorney.²¹ In the immigration context, it involves providing wraparound representation to the client,

mercurynews.com/crime-courts/ci_26798625/santa-clara-county-public-defender-hires-immigration-law?source=infinite, and the Massachusetts Committee for Public Counsel Services, *Immigration Impact Unit*, COMMITTEE FOR PUB. COUNS. SERVICES, <http://www.publiccounsel.net/iuu/> (last visited Mar. 24, 2015).

16. MARKOWITZ ET AL., *supra* note 14, at 13–14. Examples of this model include the Immigrant Legal Resource Center, *Attorney of the Day (AOD) Technical Assistance Program*, IMMIGR. LEGAL RESOURCE CENTER, <http://www.ilrc.org/legal-assistance> (last visited Mar. 24, 2015), and the Immigrant Law Center of Minnesota, *Public Defender Project*, IMMIGR. L. CENTER MINN., <http://www.ilcm.org/aboutus/projects/public-defender-project.html> (last visited Mar. 23, 2015).

17. MARKOWITZ ET AL., *supra* note 14, at 11–12. This is the model employed by the Wisconsin State Public Defender’s Office (WSPD). *Immigration Practice Group*, WIS. ST. PUB. DEFENDERS, <http://wispd.org/index.php/legal-resources/specialty-practices/immigration-practice> (last visited Mar. 24, 2015).

18. MARKOWITZ ET AL., *supra* note 14, at 15–17. Examples that approach this model include the Bronx Defenders and their New York Immigrant Family Unity Project, *New York Immigrant Family Unity Project*, BRONX DEFENDERS, <http://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project/> (Apr. 7, 2015); *Our Mission and Story*, BRONX DEFENDERS, <http://www.bronxdefenders.org/who-we-are/> (last visited Mar. 24, 2015), and the Brooklyn Defender Services, *About: Practice Areas: Immigration*, BROOKLYN DEFENDER SERVICES, <http://bds.org/> (last visited Mar. 24, 2015).

19. See 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 (2011); *Holistic Defense, Defined*, BRONX DEFENDERS, <http://www.bronxdefenders.org/holistic-defense/> (last visited Mar. 24, 2015).

20. See Smyth, *supra* note 19.

21. *Id.*

beginning with the criminal case and continuing through subsequent immigration proceedings.²² The holistic approach recognizes that immigration consequences may be the client's central concern in the criminal case and takes that concern into account.²³ Should the client be allowed to stay in the United States, the holistic approach works to support the individual as they move forward with the goal of preventing further contact with the criminal or immigration enforcement systems.²⁴

In this Article, I describe a hypothetical collaboration between a law school immigration clinic and a local public defender office for the purpose of providing noncitizen defendants with a more holistic service. The collaboration will facilitate the provision of complete and accurate advice on immigration consequences and support plea bargaining efforts in light of those consequences. Once the criminal case is complete, the law school clinic will provide representation in any resulting immigration proceedings. The clinic will provide students a unique pedagogical experience that encompasses both fields of law. As those students graduate and join the workforce as criminal defense or immigration lawyers, they will begin to fill the critical gap in legal expertise in the overlap between these two fields. While this example is specific to immigration consequences, it could serve as a model for expanding collaborations between law school clinical programs and indigent defender offices in order to provide poor people accused of crime with more holistic services around other collateral consequences.

Part I describes the evolution of the "crimmigration crisis"²⁵ and the challenges of implementing *Padilla*. Part II describes the proposed

22. See 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 (2013); see also *Explore Holistic Defense*, BRONX DEFENDERS, <http://www.bronxdefenders.org/who-we-are/how-we-work/> (last visited Mar. 25, 2015).

23. Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1077 n.47 (2004); Travis Stearns, *Intimately Related to the Criminal Process: Examining the Consequences of a Conviction After Padilla v. Kentucky and State v. Sandoval*, 9 SEATTLE J. SOC. JUST. 855, 864–65 (2011); Steinberg, *supra* note 22, at 963.

24. See, e.g., McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 480–81, 490–93 (2005); Steinberg, *supra* note 22, at 963.

25. Juliet Stumpf coined the term "crimmigration" in her article, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006). "Crimmigration" refers to "[t]he criminalization of immigration law." *Id.* This includes broadening the criminal grounds for which a noncitizen may be deported, increasing prosecutions of and harsher sentences for criminal immigration violations, and treating noncitizens as criminals through the increased use of immigration detention. See Eagly, *supra* note 14, at 2286. For more on the criminalization of immigrants, see César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457 (2013); George A. Martinez, *Arizona, Immigration, and Latinos: The Epistemology of*

collaboration between the University of Wisconsin Law School Immigrant Justice Clinic (IJC) and the Wisconsin State Public Defender's Office (WSPD) and details how such a collaboration would work.

I. THE EVOLUTION OF THE CRIMMIGRATION CRISIS
AND THE CHALLENGE OF *PADILLA*

Eduardo²⁶ has lived in the United States since he was four weeks old; it is the only country he has ever known. He speaks English better than Spanish, graduated from high school in Wisconsin, and has been working temporary jobs. Eduardo's mother Maria has lived legally in the United States for over 30 years, since well before Eduardo was born. Eduardo's older and younger siblings were born in the United States and are U.S. citizens. When Maria was pregnant with Eduardo, she took a trip to Mexico to visit her elderly parents. While there, she unexpectedly went into labor with no time to make it back across the border before giving birth. Four weeks later, Maria returned home to Texas with baby Eduardo. Because of this happenstance, Eduardo is a citizen of Mexico rather than the United States. On crossing the border, he was granted lawful permanent resident status—the same status as his mother.

Lawful permanent resident status is not necessarily permanent. A lawful permanent resident can be deported if convicted of certain crimes.²⁷ When Eduardo, at age 20, was charged with burglary, he did not know that a conviction would result in deportation to Mexico. Eduardo's defense attorney did not explain to him the immigration consequences of pleading guilty. She negotiated what she thought was a favorable deal with the prosecutor and advised Eduardo to plead guilty. At sentencing, the judge addressed Eduardo:

[B]efore you came in here, you knew that I had the ability to send you to prison. Now you have that ability. You're the only one in the room that does. . . . If you do well, . . . you'll be able

Whiteness, the Geography of Race, Interest Convergence, and the View From the Perspective of Critical Theory, 44 ARIZ. ST. L.J. 175 (2012); Yolanda Vazquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639 (2011).

26. The following is a description of a case worked on by the University of Wisconsin Immigrant Justice Clinic (IJC). The *Wisconsin Law Review* reviewed court documents for substantiation purposes, and it has omitted citations and changed the client's name for confidentiality reasons.

27. Immigration and Nationality Act (INA) § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2012).

to go on in your life and the victims will know that . . . you have changed, just as you promised that you would do. If you don't change, then you'll be choosing to go to prison, and I hope that you choose to change.

The judge then sentenced Eduardo to probation, with a 365-day jail sentence as a condition of probation, and imposed and stayed a two-year prison sentence. That way, if Eduardo violated the terms of his probation, he would go straight to prison.

Eduardo did choose to change; he was determined to “go on with his life,” as the judge had urged, and not land in prison. In jail, he took full advantage of the classes offered, and after his release he began working and was doing very well on probation. However, 10 months after his release, Immigration and Customs Enforcement (ICE) agents took Eduardo into custody and initiated removal proceedings against him. Under the Immigration and Nationality Act, a burglary conviction with a sentence of one year or more is considered an “aggravated felony.”²⁸ A sentence is deemed to include any period of incarceration ordered by the court “regardless of any suspension of the imposition or execution of that imprisonment or sentence.”²⁹ Thus Eduardo’s 365 days in jail as a condition of probation counted as a “term of imprisonment” of at least one year and so did the two-year prison sentence, even though it was stayed and Eduardo never served a day of it. Under immigration law, aggravated felonies carry the harshest consequences: a permanent resident convicted of an aggravated felony is automatically deportable,³⁰ ineligible for any discretionary relief from deportation,³¹ and subject to mandatory custody without the possibility of bond.³² The immigration judge in Eduardo’s case would have no choice but to order Eduardo deported, and Eduardo would remain in ICE custody until then. The intent of the state court judge to give Eduardo some control over his

28. Immigration and Nationality Act (INA) § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (2012).

29. *Id.* § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B).

30. 8 U.S.C. § 1227(a)(2)(A)(iii).

31. *See, e.g., id.* § 1158(b)(2)(B)(i) (stating that conviction of an aggravated felony is a conviction of a “particularly serious crime” making an individual ineligible for asylum); *id.* § 1182(h) (disallowing waiver of inadmissibility for lawful permanent residents convicted of an aggravated felony); *id.* § 1229b(a)(3) (making noncitizens convicted of an aggravated felony ineligible for “cancellation of removal”); *id.* § 1229c(a)(1), (b)(1)(C) (stating that conviction of an aggravated felony bars eligibility for voluntary departure).

32. *Id.* § 1226(c)(1).

future and a chance to rehabilitate himself and go on with his life would be for naught.³³

Eduardo was lucky; intake volunteers from the University of Wisconsin Law School's IJC encountered Eduardo during one of their monthly visits to the jail in which he was being held. The clinic took Eduardo's case and filed a motion in state court to modify Eduardo's sentence. Clinical law students briefed and argued the contested motion in court. The judge granted the motion, stating that had he been aware of the immigration consequences at the time of sentencing, he would have issued a different sentence. He reduced the 365 days of jail to 364 days and changed the imposed and stayed prison sentence to a withheld sentence. With those small changes, Eduardo was no longer deportable. His immigration case was terminated, and, after eight months in immigration custody, Eduardo was released and reunited with his mother and siblings.

Eduardo's conviction occurred in 2012, two years after *Padilla*, and it represents precisely the type of scenario *Padilla* meant to prevent. Eduardo's criminal defense attorney should have investigated the immigration consequences of the proffered plea before advising Eduardo to accept it. Had she done so, she could have negotiated up front the sentence the clinic achieved later, sparing Eduardo eight months in jail and his family eight months of anguish. Litigating postconviction motions after the fact not only severely impacts clients and their families, but the entire court system must spend time and resources revisiting old cases.³⁴

Unfortunately, Eduardo's case is not unusual. Over the past 20 years, successive changes to the Immigration and Nationality Act have vastly expanded the grounds of removability, eliminated or restricted the forms of relief from removal, curtailed immigration judges' ability to exercise discretion, greatly expanded mandatory detention, and attempted to eliminate the right to habeas corpus.³⁵ This ever-growing

33. From 1917 to 1990, a provision in the Immigration and Nationality Act known as a "judicial recommendation against deportation" (JRAD) allowed the sentencing judge in both state and federal criminal cases to recommend at the time of sentencing that "such alien shall not be deported." 8 U.S.C. § 1251(b) (1988), *repealed by* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. This recommendation was binding on the executive. *Id.*

34. Sejal Zota & John Rubin, *Immigration Assistance for Indigent Defenders*, AM. CONST. SOC'Y FOR L. & POL'Y 2 (Oct. 2010), <https://www.acslaw.org/files/Zota%20Rubin%20-%20Immigration%20Assistance.pdf>.

35. These changes began with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.), and continued with the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8 U.S.C., 18 U.S.C., and 22 U.S.C.), the USA Patriot Act of 2001, Pub. L. No. 107-56,

entanglement of the immigration enforcement and criminal justice system has spawned a new legal specialty: crimmigration. Juliet Stumpf coined the term in a 2006 article,³⁶ in which she uses an imagined future in which all “aliens” have been ruled to be “criminals” to shed light on the phenomenon of criminalizing immigration.³⁷ References to crimmigration can now be found in scholarly literature,³⁸ law school curricula,³⁹ and the mainstream media.⁴⁰

Determining the immigration consequences of state or federal criminal statutes can be tricky. Courts have described immigration law as “a maze of hyper-technical statutes and regulations”⁴¹ that “yield up meaning only grudgingly.”⁴² For instance, some immigration consequences are triggered by the length of sentence *imposed* (as in Eduardo’s case),⁴³ others by the *possible* length of sentence,⁴⁴ and still

115 Stat. 272 (codified as INA § 236A(a)), and the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (codified as amended in scattered sections of 8 U.S.C. and 49 U.S.C.).

36. Stumpf, *supra* note 25.

37. *Id.*

38. See, e.g., Hernández, *supra* note 25; Christopher N. Lasch, ‘Crimmigration’ and the Right to Counsel at the Border Between Civil and Criminal Proceedings, 99 IOWA L. REV. 2131 (2014); Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705 (2011); Adina B. Appelbaum, Note, *Challenging Crimmigration: Applying Padilla Negotiation Strategies Outside the Criminal Courtroom*, 6 GEO. J. L. & MOD. CRITICAL RACE PERSP. 217 (2014).

39. See, e.g., *Course Catalog: Crimmigration: The Intersection of Criminal Law and Immigration Law Clinical Seminar*, HARVARD L. SCH., <http://hls.harvard.edu/academics/curriculum/catalog/index.html?o=66096> (last visited Feb. 8, 2015); *Course Catalog: Crimmigration Legal Theory and Practice: Strategies and Solutions for Non-Citizens Charged with Crimes*, U. MD. FRANCIS KING CAREY SCH. L., https://www.law.umaryland.edu/academics/program/curriculum/catalog/course_details.html?courseNum=549T (last visited Feb. 8, 2015); *Courses@Boalt: Crimmigration: “The Intersection of Criminal and Immigration Law”*, U. CAL. BERKELEY SCH. L., <http://www.law.berkeley.edu/php-programs/courses/coursePage.php?cID=15199&termCode=D&termYear=2014> (last visited Feb. 8, 2015).

40. See, e.g., Tom Barry, *The Border Security and Criminal Alien Consensus*, COUNTERPUNCH (Dec. 21–23, 2012), <http://www.counterpunch.org/2012/12/21/the-border-security-and-criminal-alien-consensus/>; Dianne Solís, *Pew Reports on the Rise of Federal Immigration Crimes, and Prisons Full of Hispanics*, DALLAS MORNING NEWS (Mar. 18, 2014, 3:00 PM), <http://thescoopblog.dallasnews.com/2014/03/pew-reports-on-the-rise-of-federal-immigration-crimes-and-prisons-full-of-hispanics.html>; Alisa Wellek, *Deportation for Possessing a Sock: Supreme Court Case Reflects How the War on Drugs Fuels the War on Immigrants*, HUFFINGTON POST (Jan. 15, 2015, 6:52 PM), http://www.huffingtonpost.com/alisa-wellek/war-on-drugs-immigration_b_6481378.html.

41. *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003).

42. *Dong Sik Kwon v. Immigration & Nationalization Serv.*, 646 F.2d 909, 919 (5th Cir. 1981).

43. See *supra* notes 26–33 and accompanying text.

44. See, e.g., 8 U.S.C. § 1182(a)(2)(A)(ii)(II) (2012) (“[T]he maximum penalty possible for the crime . . . did not exceed imprisonment for one year”); *id.*

others by the *actual* number of days served.⁴⁵ A “crime involving moral turpitude” will render a noncitizen removable, but the statute contains no definition of “moral turpitude.”⁴⁶ Instead, it has been defined and repeatedly redefined by case law,⁴⁷ and what is or is not a crime involving moral turpitude depends on which federal circuit one is in.⁴⁸ While a state court’s expungement of a conviction erases it at the state level,⁴⁹ the conviction generally remains for immigration purposes.⁵⁰

In Part II, I describe a specific proposal for a law school clinic and public defender collaboration to holistically address the immigration consequences of crime. Making the immigration clinic a part of the defense team from the beginning will facilitate the provision of comprehensive *Padilla* advisals and equip the defense attorney with the information and background necessary to negotiate effectively on his client’s behalf. Noncitizen clients will benefit from a continuity of service, as the law school clinic can offer representation in subsequent immigration proceedings.

II. THE IMMIGRATION CLINIC AND PUBLIC DEFENDER COLLABORATION

This Part begins with some background on immigration in Wisconsin and then introduces the partners in this proposed collaboration: the University of Wisconsin Law School IJC⁵¹ and the

§ 1227(a)(2)(A)(i)(II) (“[A noncitizen] . . . convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.”).

45. See, e.g., *id.* § 1101(f)(7) (stating that “no person shall be regarded as, or found to be, a person of good moral character” if the aggregate period of confinement is of 180 days or more); *id.* § 1231(b)(3)(B)(ii), (iv) (stating that aggregate term of imprisonment of at least five years bars eligibility for withholding of removal).

46. See *id.* §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i)(I).

47. See, e.g., *Silva-Trevino*, 24 I. & N. Dec. 687, 688–90, 693–95, 705–07 (B.I.A. 2008); *Torres-Varela*, 23 I. & N. Dec. 78, 82–86 (B.I.A. 2001); *Lopez-Meza*, 22 I. & N. Dec. 1188, 1191–96 (B.I.A. 1999); *Franklin*, 20 I. & N. Dec. 867, 868–71 (B.I.A. 1994).

48. Compare *Mata-Guerrero v. Holder*, 627 F.3d 256, 260 (7th Cir. 2010) (“We defer to the Attorney General’s decision in *Silva-Trevino*.”), with *Jean-Louis v. Att’y Gen. of U.S.I* 582 F.3d 462, 470 (3d Cir. 2009) (“We conclude that deference is not owed to *Silva-Trevino*’s novel approach”), and *Olivas-Motta v. Holder*, 746 F.3d 907 (9th Cir. 2013) (holding that *Silva-Trevino* was wrongly decided).

49. See, e.g., WIS. STAT. § 973.015 (2013–14).

50. See *Pickering*, 23 I. & N. Dec. 621, 621 (B.I.A. 2003) (“If a court vacates an alien’s conviction for reasons solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes.”).

51. *Immigrant Justice Clinic*, U. WIS. L. SCH., <http://law.wisc.edu/eji/ijc/forstudents.html> (last visited Feb. 8, 2015).

WSPD.⁵² I then lay out, in some detail, what the proposed immigration clinic would look like and how the collaboration would function.

While Wisconsin's overall noncitizen population is small in comparison to border states or states like Illinois with large immigrant populations,⁵³ its population has grown rapidly in recent decades.⁵⁴ Government, legal, and social services have struggled to adapt to this new demographic. At any given time, upwards of 300 noncitizens find themselves detained by Immigration and Customs Enforcement in one of two contracted jails in Wisconsin.⁵⁵ The nearest immigration court is in Chicago.⁵⁶ Detained noncitizens in the Chicago district appear for most of their hearings via videoconferencing;⁵⁷ family members, witnesses, and attorneys must choose whether to travel to the detention center and appear by video, or travel to Chicago to appear in person before the judge.⁵⁸ There are few private lawyers willing and able to take these

52. *The Wisconsin State Public Defender's Office (SPD)*, WIS. ST. PUB. DEFENDERS, <http://wispd.org/> (last visited Feb. 8, 2015).

53. *Compare Profile of the Unauthorized Population: Wisconsin*, MIGRATION POL'Y INST., <http://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/WI> (last visited Feb. 8, 2015) (showing that Wisconsin has an unauthorized population of 76,000), with *Profile of the Unauthorized Population: Illinois*, MIGRATION POL'Y INST., <http://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/IL> (last visited Feb. 8, 2015) (showing that Illinois has an unauthorized population of 560,000).

54. *See New Americans in Wisconsin*, IMMIGR. POL'Y CENTER (Jan. 10, 2013), <http://www.immigrationpolicy.org/just-facts/new-americans-wisconsin>.

55. *Immigrant Detention Centers*, N.Y. TIMES (Feb. 23, 2010), http://www.nytimes.com/interactive/2010/02/23/nyregion/20100223-immig-table.html?_r=0; *Detention Facility Locator*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/detention-facilities> (select "Wisconsin" under "Search by State"; then follow "Apply" hyperlink) (last visited Feb. 8, 2015).

56. *Immigration Court: Chicago, Illinois*, U.S. DEPARTMENT JUST., <http://www.justice.gov/eoir/sibpages/chi/chimain.htm> (last updated Mar. 2013).

57. *See* Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. (forthcoming 2015) (finding that 84 percent of all televideo hearings occurred in one of 15 locations, including Chicago, and that virtually all detained cases in Chicago are now heard by televideo). *See generally* TRACI HONG & MARY KENNY, AM. IMMIGRATION COUNCIL, LEGAL ACTION CTR., OBJECTING TO VIDEO MERITS HEARINGS (2003), http://www.legalactioncenter.org/sites/default/files/docs/lac/lac_pa_121203.pdf ("The use of video hearings is on the rise. More immigration courts now have the technology and are using it for all types of hearings . . ."); Aaron Haas, *Videoconference in Immigration Proceedings*, 5 PIERCE L. REV. 59 (2006) (surveying the use of videoconferencing technology in United States courts). Video conferencing for immigration hearings is permitted by federal statutes and regulations. 8 U.S.C. § 1229a(b)(2)(A)(iii) (2012); 8 C.F.R. § 1003.25(c) (2014). Some immigration judges have the individual brought to court for the final "hearing on the merits," but this is not required and not universal. *See* 8 U.S.C. § 1229a(b)(2)(A)(iii).

58. *See* Eagly, *supra* note 57; *see also* DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL (2013), http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_review.pdf#page=25.

cases given the complexity of the law and the cost, time, and inconvenience of having to travel to jails and court.⁵⁹ The Executive Office for Immigration Review (EOIR), which oversees all of the immigration courts nationwide,⁶⁰ is required by regulation to maintain a list of free legal service providers for each state and to provide every noncitizen in immigration proceedings with the list of free legal service providers for their jurisdiction.⁶¹ There are no service providers listed in Wisconsin,⁶² and the only nonprofit organization on the list for the Chicago Immigration Court that represents noncitizens in detention is the National Immigrant Justice Center (NIJC).⁶³ NIJC's Detention Project has just four attorneys to serve detainees in three states.⁶⁴ Since 2012, the

59. The Community Immigration Law Center in Madison, Wisconsin, maintains a referral list of local immigration lawyers, along with the types of cases each lawyer handles. E-mail from Grant Sovern, Acting Board President, Community Immigration Law Center, to Stacy Taeuber, Clinical Assistant Professor & Dir. of the Immigrant Justice Clinic, Univ. of Wis. Law Sch. (Apr. 3, 2015, 14:26 CST) (on file with author). None of these lawyers list detained cases. *Id.* The IJC has had very little success in finding private lawyers to take cases that the clinic cannot handle. For more on the lack of legal resources for noncitizens in detention, see STUDY GRP. ON IMMIGRATION REPRESENTATION, ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS 19 (Dec. 2011), available at http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf; NAT'L IMMIGRANT JUSTICE CTR., ISOLATED IN DETENTION: LIMITED ACCESS TO LEGAL COUNSEL IN IMMIGRATION DETENTION FACILITIES JEOPARDIZES A FAIR DAY IN COURT 2010, available at https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023_0.pdf.

60. *EOIR at a Glance*, U.S. DEPARTMENT JUST. (Sept. 9, 2012), <http://www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm>.

61. 8 C.F.R. § 1003.61(a) (2013); see *Free Legal Services Providers*, UNITED STATES DEPARTMENT JUST., <http://www.justice.gov/eoir/probono/states.htm> (last visited Mar. 24, 2015) [hereinafter *Providers*]. There are no legal service providers listed for Wisconsin, *id.*, and the National Immigrant Justice Center is the only listed non-profit organization that represents individuals in detention. See *Free Legal Services Providers List*, CHI. IMMIGR. CT., <http://www.justice.gov/eoir/probono/freelgchlIL.pdf> (last updated Jan. 2015) [hereinafter *Provider's List*]; NAT'L IMMIGRANT JUST. CENTER, <http://www.immigrantjustice.org/> (last visited Feb. 8, 2015).

62. See *Providers*, *supra* note 61.

63. See *Providers List*, *supra* note 61. The Legal Assistance Foundation of Metropolitan Chicago does not represent undocumented individuals in removal proceedings. See *Client Services*, LAF, <https://www.lafchicago.org/get-help/client-services> (last visited Apr. 7, 2015). The University of Wisconsin Law School, in conjunction with the NIJC, has conducted monthly visits to immigration detainees at the nearby jail for at least the last five years. During each visit, anywhere between 50 and 110 intakes are completed. Of those, on average fewer than five will be accepted for representation by the law school or NIJC. NIJC maintains a database of all intakes.

64. *NIJC Staff*, NAT'L IMMIGRANT JUST. CENTER, <https://www.immigrantjustice.org/nijc-staff> (last visited Apr. 7, 2015); *Services for Detained Immigrants*, NAT'L IMMIGRANT JUST. CENTER, <https://www.immigrantjustice.org/services-detained->

University of Wisconsin Law School IJC has been representing detained clients,⁶⁵ but the clinic has a very limited capacity. Although having counsel vastly increases one's chance of success in immigration court, there simply are not enough legal service providers to meet the needs of detained noncitizens who cannot afford a private attorney.⁶⁶ One recent study in New York found that only three percent of detained unrepresented individuals achieved a successful outcome in immigration court compared to nearly 20 percent with counsel.⁶⁷ The two most important indicators of success in immigration court, the study found, were detention status and presence of counsel.⁶⁸

*A. The University of Wisconsin Law School
Immigrant Justice Clinic*

The IJC opened its doors at the University of Wisconsin Law School in the fall of 2012.⁶⁹ The clinic's mission is to serve noncitizens in Wisconsin who are facing detention and removal.⁷⁰ The IJC was the first such law clinic in the state.⁷¹ Law students in the clinic represent noncitizens in immigration court proceedings, participate in monthly visits to ICE detainees in the nearby county jail, and engage in community outreach and education.⁷² During the first year, the clinic reached out to the WSPD to offer assistance to defenders and assigned private bar counsel to provide *Padilla* advisals.⁷³ More recently, the

immigrants (last visited Apr. 18, 2015) (stating that services are offered to detainees in Illinois, Wisconsin, and Kentucky).

65. *Immigrant Justice Clinic*, *supra* note 51.

66. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, U. PA. L. REV. (forthcoming 2016); see also NAT'L IMMIGRANT JUSTICE CTR., *supra* note 59; STUDY GRP. ON IMMIGRATION REPRESENTATION, *supra* note 59, at 19.

67. N.Y. IMMIGRANT REPRESENTATION STUDY, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS 11 (2012), available at http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf.

68. *Id.*

69. See *Immigrant Justice Clinic*, *supra* note 51; *Law Students Launch First Immigration Clinic in Wisconsin*, U. WIS. L. SCH. (Sept. 27, 2012), http://law.wisc.edu/news/Articles/Law_Students_Launch_First_Immigr_2012-09-19.

70. *Immigrant Justice Clinic*, *supra* note 51.

71. *Law Students Launch First Immigration Clinic in Wisconsin*, *supra* note 69.

72. *Immigrant Justice Clinic*, *supra* note 51.

73. E-mail from Stacy Taeuber, Clinical Assistant Professor & Dir. of the Immigrant Justice Clinic, Univ. of Wis. Law Sch., to Catherine Dorl, Trial Div. Dir., and Dorothea Watson, Reg'l Att'y Manager, Office of the State Pub. Defender (Aug. 27, 2012, 16:29 CST) (on file with author); see also *Immigration Practice Group*, *supra* note

clinic has begun representing some clients, like Eduardo, in immigration-related postconviction proceedings.⁷⁴

Most of the University of Wisconsin Law School's clinics, including the IJC, operate year round.⁷⁵ The IJC admits six students each year, and they must enroll for the full year.⁷⁶ Clinic begins with a unique full-time summer semester, for which students receive 7 credits, tuition remission, and a stipend.⁷⁷ This is followed by a 4-credit commitment in each of the fall and spring semesters.⁷⁸ The complexity of crimmigration law, which requires students to have a basic grasp of both criminal and immigration law as well as the interplay between them, would pose a significant challenge for the traditional semester-long clinic. With the yearlong structure, IJC students begin with an intensive "boot camp" training in substantive law and begin taking cases fairly quickly. Having the full year also allows students to see some cases all the way through, from the criminal case through the subsequent immigration proceedings (as explained further below).

Following common law school clinic structure, the IJC has weekly seminars, case rounds, and supervision.⁷⁹ Seminar introduces students to the substantive law and to traditional lawyering skills, such as client interviewing and counseling, case investigation, legal analysis, witness preparation, and other litigation skills. Seminar also provides a place for the exploration of some of the deeper issues surrounding immigration enforcement and criminal justice, including issues of race, power, privilege, cross-cultural understanding, and citizenship. Case rounds enable students to discuss their cases in a group setting, educating and soliciting input from their peers.⁸⁰

17; meeting with Jennifer Bias, Affirmative Action Office & Deputy Trial Div. Dir., Wis. State Pub. Defenders, in Madison, Wis. (Oct. 12, 2012).

74. See *supra* notes 26–34 and accompanying text.

75. See, e.g., *The Economic Justice Institute*, U. WIS. L. SCH., <http://law.wisc.edu/eji/index.html> (last visited Feb. 8, 2015) (discussing civil clinics); *The Remington Center Student*, U. WIS. L. SCH., <http://law.wisc.edu/fjr/students/index.html> (last visited Feb. 8, 2015) (discussing criminal clinics).

76. *Clinical Programs*, UNIV. WIS. L. SCH., <http://law.wisc.edu/clinics/> (last visited Feb. 15, 2015).

77. *Immigrant Justice Clinic*, *supra* note 51.

78. *Clinical Programs*, *supra* note 76; *Immigrant Justice Clinic*, *supra* note 51.

79. See Susan Bryant & Elliott S. Milstein, *Rounds: A 'Signature Pedagogy' for Clinical Education?*, 14 CLINICAL L. REV. 195, 200 (2007).

80. *Id.* at 195 (describing case rounds as "a facilitated peer conversation among clinic students that is focused on their fieldwork").

B. The Wisconsin State Public Defenders

Wisconsin's statewide public defender system was established in 1977 and quickly became a widely recognized and highly regarded model.⁸¹ Currently, the WSPD has 36 trial-level offices and two appellate offices that serve all of Wisconsin's 72 counties.⁸² The WSPD also administers the "Assigned Counsel Division," which handles appointments to approximately 1300 private bar attorneys.⁸³ In 2013, the public defenders handled 60 percent of its cases with the other 40 percent handled by assigned counsel.⁸⁴ Immediately following the *Padilla* decision in 2010, the WSPD was awarded a Training and Technical Assistance Grant from the Bronx Defenders' Center for Holistic Defense to develop a comprehensive plan for the implementation of *Padilla*.⁸⁵ The result was the creation of an "Immigration Practice Group" within the WSPD.⁸⁶ The Immigration Practice Group initially consisted of line defenders who volunteered to receive training in immigration consequences and act as a resource for the more than 300 defenders statewide.⁸⁷ The Immigration Practice Group also facilitated a listserv to which defenders around the state could post immigration questions and receive answers from those in the Immigration Practice Group.⁸⁸ Several crimmigration trainings were given to defenders throughout the state during that first year.⁸⁹

81. *About the Wisconsin State Public Defender's Office (SPD)*, WIS. ST. PUB. DEFENDERS, <http://wispd.org/index.php/about-the-spd> (last visited Feb. 8, 2015). Rodney Uphoff lists the Washington Public Defender Services and the Wisconsin Public Defender Office as systems that are examples of how a well-funded system can provide constitutionally acceptable indigent defense services. Rodney Uphoff, *Broke and Broken: Can We Fix Our State Indigent Defense System?*, 75 MO. L. REV. 667, 669, 674 (2010); see also Judith E. Olingy & Randy Kraft, *Global Justice*, 48 WIS. ACAD. REV. 61, 61-63 (2002), available at <http://digital.library.wisc.edu/1711.dl/WI.v48i2>.

82. *Facts-At-A-Glance*, WIS. ST. PUB. DEFENDERS, <http://wispd.org/index.php/about-the-spd/spd-facts-at-a-glance> (last visited Feb. 8, 2015).

83. *Assigned Counsel Division (ACD)*, WIS. ST. PUB. DEFENDERS, <http://wispd.org/index.php/for-the-legal-practitioner/spd-assigned-council-division> (last visited Feb. 8, 2015).

84. *Facts-At-A-Glance*, *supra* note 82.

85. *The Center for Holistic Defense Training and Technical Sites*, BRONX DEFENDERS (May 2, 2012), <http://www.bronxdefenders.org/the-center-for-holistic-defense-technical-and-training-sites/>.

86. *Immigration Practice Group*, *supra* note 17.

87. Interview with Bradley Schraven, Past Immigration Practice Coordinator, Wis. State Pub. Defenders, in Madison, Wis. (Mar. 11, 2014); see also Interview with Anne Jaspers, Immigration Practice Coordinator, Wis. State Pub. Defenders, in Milwaukee, Wis. (Oct. 13 2014).

88. Interview with Bradley Schraven, *supra* note 87; see also Interview with Anne Jaspers, *supra* note 87.

89. Interview with Bradley Schraven, *supra* note 87.

Through discussions with the WSPD, it became apparent that what would best serve their needs would be for the IJC to work with the private bar attorneys in the Assigned Counsel Division rather than with the public defenders themselves. The staff defenders had a system in place to address immigration issues with the Immigration Practice Group,⁹⁰ but bringing the private bar into the fold and facilitating their compliance with *Padilla* had proved more difficult.

C. The Collaboration

The details of the structure and function of this proposed collaboration between the IJC and the Assigned Counsel Division evolved out of my conversations with the WSPD, conversations with practitioners and clinicians around the country,⁹¹ and from the IJC's first

90. *Immigration Practice Group*, WIS. STATE PUB. DEFENDERS, <http://wispd.org/index.php/legal-resources/specialty-practices/immigration-practice> (last visited Mar. 25, 2015) (“Since *Padilla*, the Wisconsin State Public Defender’s Office (SPD) formed its Immigration Practice Group. . . . The main objective of the Immigration Practice Group is to assist . . . attorneys in understanding the immigration consequences their clients face upon conviction of a crime.”).

91. The idea for a crimmigration clinic is not new, and interest in crimmigration clinics and clinic and defender collaborations has grown dramatically post-*Padilla*. In response to an e-mail request for information on a clinical listserv, I received responses from individuals at more than 20 different law schools. Many law school clinics are experimenting with incorporating various aspects of “crimmigration” law and practice into the clinical experience. Just a few examples include the following: Ingrid Eagly’s criminal defense clinic at UCLA, which has taken on cases at the intersection of criminal and immigration law, see Ingrid V. Eagly, *Criminal Clinics in the Pursuit of Immigrant Rights: Lessons from the Loncheros*, 2 UC IRVINE L. REV. 91 (2012), Philip Torrey recently started a crimmigration clinic at Harvard Law School, *Course Catalog: Crimmigration Clinic*, HARVARD L. SCH., <http://hls.harvard.edu/academics/curriculum/catalog/index.html?o=67537> (last visited Mar. 22, 2015), Michael Kagan and Fatma Marouf, co-directors of the University of Nevada Law School’s immigration clinic, *Immigration Clinic*, UNLV, <http://www.law.unlv.edu/clinic/immigration.html> (last visited Apr. 7, 2015), described their attempts to work with the local public defender during a talk entitled “Clinic as a Partner in the Administration of Justice: Case Study of an Immigration Clinic and a Public Defender” at the 2014 Conference on Clinical Legal Education of the Association of American Law Schools, see ASS’N OF AM. L. SCHS. https://memberaccess.aals.org/eweb/DynamicPage.aspx?Site=AALS&WebKey=7da8c691-ea9f-4dcb-bbfb-14f8d0acf5c8&RegPath=EventRegFees&REg_evt_key=262c8f3c-e018-4562-8e0c-91b67e2ebe78 (last visited Apr. 7, 2015) (notes on file with author), and the University of California, Los Angeles, had a relationship with the Orange County Defenders to assist with noncitizen juveniles caught up in the criminal justice system, but the program ended due to lack of funding, E-mail from Sabrina Rivera, Immigrants’ Rights Fellow, Immigration Clinic, W. State Coll. of Law, to Stacy Taeuber, Clinical Assistant Professor & Dir. of the Immigrant Justice Clinic, Univ. of Wis. Law Sch. (Oct. 20, 2014, 14:43 CST) (on file with author); Telephone Interview with Sabrina Rivera, Immigrants’ Rights Fellow, Immigration Clinic, W. State Coll. of Law (Dec. 10, 2014, 15:00 CST) (notes on file with author).

three years of informal *Padilla* advising. Because of uncertainties about the level of need and student capacity, the proposal is to limit the clinic geographically at first to the counties with jails within 100 miles of the law school. This will allow for students to visit their clients in jail and have a “live-client” experience. As resources permit, the clinic will provide limited *Padilla* advisals in response to requests from assigned counsel in other counties. The following is a brief description of each stage of the process.

1. INTAKE PROCEDURE

An effective *Padilla* plan requires that noncitizen defendants be identified as early in the process as possible, ideally as part of the initial intake interview.⁹² The WSPD already does this, with the initial intake worker asking about citizenship. Noncitizen cases are then flagged by placing a green sheet in the file given to the assigned attorney.⁹³ For all cases to be assigned to private counsel within the designated counties, noncitizens will receive information prepared by the IJC, describing the collaboration and obtaining the clients’ consent. This form and the intake form will be forwarded to the IJC, along with contact information for the assigned counsel. This will facilitate communication between the clinic and assigned counsel and will add a measure of accountability. Once the clinic receives the intake, students will arrange a phone call with the client to complete a basic immigration questionnaire.⁹⁴

2. CASE ASSESSMENT AND ASSIGNMENT

Using the immigration questionnaires, the clinic will screen the cases and separate out those in which the defendant is removable and has no realistic possibility of relief from those in which the defendant’s removability or eligibility for relief from removal depends on the outcome of the current criminal case. As time permits, this screening process would be done with the students during seminar. Over the first years of the clinic, students have found analyzing intakes to be a helpful exercise.⁹⁵ Through the process of repeatedly applying the law to new sets of facts, students become proficient in identifying relevant facts and

92. See Zota & Rubin, *supra* note 34.

93. Meeting with Anne Jaspers, Immigration Practice Coordinator, Wis. State Pub. Defenders, & Jennifer Bias, Affirmative Action Office & Deputy Trial Div. Dir., Wis. State Pub. Defenders, in Madison, Wis. (Feb. 10, 2015).

94. The WSPD has an immigration questionnaire that they use. WIS. ST. PUB. DEFENDERS, IMMIGRATION STATUS QUESTIONNAIRE, available at <http://wispd.org/images/AppellateFolder/templates/forms/ISQ.pdf> (last visited Mar. 26, 2015).

95. Student Clinic Evaluations (May 2013 and 2014) (on file with author).

assessing removability and eligibility for relief. For noncitizen defendants without a viable case, the clinic would notify the assigned counsel, provide counsel with a brief written explanation of the clinic's conclusions, and give counsel an immigration attorney referral list to share with the client should the client desire a second opinion. That would end the clinic involvement in those cases. In the cases in which the outcome of the case matters, the clinic will establish an independent relationship with the client as immigration counsel. These cases would be assigned to student teams, or, if student teams are at capacity, would be handled by the supervising attorney.

3. COLLABORATIVE DEFENSE TEAM

Once assigned to a case, the students and supervising attorney would have an initial discussion with the assigned counsel to establish protocols for communication with the client and with each other, clarify roles and expectations, and set deadlines. Students will work closely with the assigned counsel and will assist with information gathering not only relevant to the defense but also relevant to the client's potential immigration case. All information gathered by the student teams will be shared with assigned counsel in order to facilitate counsel's plea negotiations.⁹⁶ Students may attend hearings and observe negotiations and may in some cases formally participate if permitted and when requested by assigned counsel.

4. CLIENT-CENTERED REPRESENTATION

Student teams would meet with their client as soon as possible after they are assigned a case. If the client is in custody, students would visit the client in jail. Starting with this initial client meeting and throughout the representation, students would be challenged to put into practice what they have learned in seminar about client-centered lawyering.⁹⁷ They

96. Having more complete information regarding a client's full social, educational, family, employment, criminal, and immigration history enables defense counsel to bargain more effectively with the prosecution. *See, e.g.*, Smyth, *supra* note 19, at 151; Smyth, *supra* note 24, at 494–95. In the same vein, Gabriel Chin has argued for the preparation of presentence reports prior to the entrance of a plea, as having the kind of information typically included in a presentence report, including criminal history, family background, work history, etc. will facilitate more just and stable results in the plea bargaining process. Gabriel J. Chin, *Taking Plea Bargaining Seriously: Reforming Pre-Sentence Reports After Padilla v. Kentucky*, 31 ST. LOUIS U. PUB. L. REV. 61, 67–68 (2011). Having the clinical law students gather and share much of this information with the defense early in the case is a step in that direction.

97. Client-centered lawyering places the client at the center of the representation, shifting the focus from the client's narrow legal issue to a "holistic"

would be tasked with learning as much as they can about their client and, where relevant, the client's family.⁹⁸ By taking an open-ended approach, students would learn their client's full story and the context in which that story unfolded. Their clients may come from countries or cultures the students know little about. Their clients may not speak English. Students would have to grapple with issues of communicating across language and culture barriers while fostering trust and respect.⁹⁹ With the client's permission and where appropriate, students would contact family members, employers, community members, social workers, and others in an effort to understand and be able to present the client's whole story.

During the course of their interactions with the client and others related to the case, students may learn of other pressing issues of concern, legal and otherwise, and, in those cases, we would try to make appropriate referrals. As a large state university, we have access to many resources across campus, including other law school clinics, social work and counseling services, and language resources.¹⁰⁰ The clinic has also established relationships with legal and social service providers in the broader community. Our ideal is to provide as holistic a service as possible.

In building relationships with their clients, students must also learn to effectively communicate information to the client. The traditional lawyer-client power dynamic is challenged when one considers that lawyer and client must learn from one another and that each control valuable information. The client is the expert about his or her life and experience, and the students must be open and willing to learn from the client.¹⁰¹ At the same time, the students are the legal experts and have greater access to resources. They must effectively communicate legal information to the client so that the client may make informed decisions about his or her case. Students can also provide information to the client

approach that includes the nonlegal context and concerns of the client as well as the legal. Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 420–21 (2006).

98. See *supra* note 96 and accompanying text.

99. For a discussion of the issues of cross-cultural communication in the clinical context, see Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 35 (2001).

100. In the past, the clinic has worked with students and faculty from the University of Wisconsin Law School Family Court Clinic, the School of Social Work, and the Latin American, Caribbean and Iberian Studies Program. See generally *Immigrant Justice Clinic*, UNIV. WIS. L. SCH., <http://law.wisc.edu/eji/ijc/> (last visited Feb. 21, 2015).

101. See Ian Gallacher, *Thinking like Non-Lawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance*, 8 LEGAL COMM. & RHETORIC: JALWD 109 (2011) (arguing that empathy is a core lawyering skill that should be incorporated into the law school curriculum).

about other available resources. A key goal of client-centered representation is to respect client autonomy by empowering the client to make informed decisions and giving the client access to a wider network of resources.¹⁰²

5. PADILLA ADVISAL AND ADVOCACY

Students would conduct the factual and legal research necessary to determine the immigration consequences of the charges faced by their client as well as the consequences of any plea offer. The students would identify alternative case outcomes that might mitigate or remove negative immigration consequences and would identify any forms of relief from removal that the client might be eligible for in immigration proceedings. All of this information would go into a detailed memo to the supervising attorney, along with the students' summary of their client's story and the priorities that the client has identified. In consultation with the supervising attorney, students would determine how best to share the information in the memo with the defense attorney. Again they would need to see themselves as educators and think strategically about how to impart information most effectively. Some defense attorneys may want a succinct "answer" rather than the inclusive but lengthy memorandum. In some cases, the defense attorney may prefer a meeting with students and the client. Students must also communicate the information, advice, and strategy options to the client and keep the client actively involved in the process.

Once a strategy for the defense case is agreed upon, the students would continue to support the defense attorney as requested, which may include tasks such as preparing a memo for the prosecutor or the court, putting together a packet of materials on the client's background, or outlining future treatment, education, or employment plans for the client.

6. REPRESENTATION IN IMMIGRATION PROCEEDINGS

At the conclusion of the criminal case, the clinic remains as immigration counsel. If the client will be taken into ICE custody and put into removal proceedings, the clinic will represent the client in those proceedings. The student team assigned to the criminal case would then become the client's immigration counsel. The client receives a unique continuity of service from the criminal case, with assigned counsel, through subsequent immigration proceedings, with the IJC. The student team will already be familiar with the case and will have gathered much of the information and established many of the relationships they need to

102. See *supra* note 97.

present the client's case effectively in immigration court. With much of the legwork already done and a well-informed and prepared client, the case will move more quickly through the immigration court, which will in turn minimize the amount of additional time the client must spend in custody.¹⁰³

In the removal proceedings, students act as the lead attorneys, putting into practice the litigation skills they have learned. Under the supervision of the supervising attorney, students develop a case theory and create a case plan. With the client's story as a starting point, they consider how best to present the case to give voice to that story. They prepare and practice direct and cross examination for each of their witnesses, gather any additional evidence needed, write a brief, and conduct the final hearing in court. As the case progresses, they may find themselves negotiating with opposing counsel or interacting with other immigration officials.

CONCLUSION

Padilla promises that noncitizens like Eduardo will be represented by lawyers who understand the immigration consequences they face. The *Padilla* decision also contemplates that well-informed defense counsel will incorporate immigration consequences into the plea bargaining process and will work to negotiate outcomes that do not result in deportation.¹⁰⁴ This promise remains elusive, however, as on-the-ground implementation of *Padilla* has proven slow and difficult. Defender offices across the country continue to struggle to implement *Padilla* given limited budgets, high caseloads, and a lack of attorneys with crimmigration expertise. Law school immigration clinics can support defender offices by providing the needed expertise on the immigration consequences of convictions, assisting in negotiating alternative plea options, and offering immigration representation to noncitizens after the

103. See NINA SIULC ET AL., VERA INST. OF JUSTICE, LEGAL ORIENTATION PROGRAM: EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II, at 11 (2008), available at http://www.vera.org/sites/default/files/resources/downloads/LOP_evaluation_updated_5-20-08.pdf (finding that detainees with access to legal information move through the immigration process more quickly and therefore spend less time in detention than those without).

104. The “negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.” 559 U.S. 356, 373 (2010) (citing *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) and *McMann v. Richardson*, 397 U.S. 759, 770–71 (1970)) (emphasis added). Informed counsel “may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.” *Id.*

criminal case is over. Students will become competent in the complex interplay of criminal and immigration law while gaining in-depth experience in client-centered, holistic representation and exposure to significant and pressing social justice issues. As these students graduate and join the workforce, they will begin to fill the urgent need for criminal and immigration lawyers competent in the world of crimmigration. Leveraging the resources of law school clinics and large universities to work in collaboration with underfunded defender offices can augment the services provided to indigent defendants, moving towards a more holistic ideal.