Where Do We Go from *Padilla v*. *Kentucky*? Thoughts on Implementation and Future Directions

MAUREEN A. SWEENEY*

ABSTRACT

On March 31, 2010, the U.S. Supreme Court held in the landmark case of *Padilla v. Kentucky* that the Sixth Amendment right to effective assistance of counsel in criminal cases includes the right for non-U.S. citizens to be correctly and specifically advised about the likely immigration consequences of a plea agreement. The decision represents an important shift in the way courts have addressed such claims by noncitizen defendants. The Court's decision recognizes a constitutional requirement that defense counsel provide advice in an area of law in which few defense counsel are knowledgeable, and therefore raises important and difficult questions about how counsel can comply with these duties, especially in the face of limited financial and human resources. The Court's analysis may also have broader and equally important constitutional implications for limitations on the imposition of deportation and for the imposition of non-immigration related "collateral" consequences following convictions.

This Article explores some of those questions. It addresses some of the challenges to implementing the Court's decision, including the complexity of the advice and representation it mandates and the realities of limited

^{*}Visiting Assistant Law School Professor, University of Maryland School of Law; J.D., Yale Law School; B.A., Wesleyan University. The author wishes to thank the Symposium organizers and the *Law Review*'s editors, as well as the many colleagues who have contributed to this Article by being part of the vibrant legal community striving to ensure access to some semblance of justice for immigrant defendants in Maryland. Thanks go to Patricia Chiriboga-Roby, Laura Kelsey Rhodes, Jay Marks, Naima Said, Mary Ann Berlin, Jonathon Greene, Michelle Mendez, Chris Flohr, and especially to Maureen Essex, Lisa Marquardt, Paul DeWolfe, and others from the Maryland Office of the Public Defender, who have taught me everything I know about the realities of criminal defense for people of limited means. Many students have also contributed to sustaining this effort over the years, most recently Hillary Scholten and Margot Kniffin, and all the students of the 2010-11 Immigration Clinic. Thanks to all.

financial resources and expertise in the legal community on these issues. It identifies some of the broader doctrinal and analytical questions raised in the Court's analysis, with an eye toward exploring some implications for other possible constitutional limits on imposing removal as a sanction for criminal activity and for the imposition of non-immigration related consequences following convictions. It identifies some ways that thoughtful response to the decision in the short term can lay the groundwork for developing best practices in the long run. Finally, it situates this discussion in the wider question of the most appropriate legal response to criminal activity by noncitizens, concluding that, while *Padilla* represents an appropriate accommodation by the criminal justice system of current immigration law regarding convictions, a better, more just legal framework would return to the immigration system the flexibility and discretion to respond appropriately and proportionately to convictions.

INTRODUCTION

n March 31, 2010, the U.S. Supreme Court held, in the landmark case of *Padilla v. Kentucky*, that the Sixth Amendment right to effective assistance of counsel in criminal cases includes the right for non-U.S. citizens to be correctly and specifically advised about the likely immigration consequences of a plea agreement.¹ The decision represents a fundamental—some say even revolutionary—shift in the way courts have addressed such claims by noncitizen defendants: it went against the precedent of every single circuit court of appeals that had previously addressed the question of whether counsel had an affirmative duty to provide such advice.² By reading the range of defense counsel's duty of competence to include an area of law in which few defense counsel are knowledgeable, the Court's decision raises important and difficult questions about how counsel can comply with these newly recognized duties, especially in the face of limited financial and human resources. The Court's analysis may also have broader and equally important

¹ Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010).

² See Peter L. Markowitz, Deportation Is Different 26-27 & n.114 (Benjamin N. Cardozo Sch. of Law, Working Paper No. 308, 2010) available at http://papers.ssrn.com/sol3/papers.cfm? abstract_id=1666788 (detailing the decisions of ten federal circuits and seventeen state courts that previously held that criminal defense counsel had no affirmative duty to advise about immigration consequences). Among federal appeals courts, only the Second Circuit questioned this outcome but it did not directly decide the issue. See Zhang v. United States, 506 F.3d 162, 167 (2d Cir. 2007); United States v. Couto, 311 F.3d 179, 189-91 (2d Cir. 2002). The New Mexico Supreme Court stood alone in squarely holding that affirmative advice was required for any noncitizen. State v. Paredez, 2004-NMSC-036, ¶ 19, 136 N.M. 533, 101 P.3d 799, 805 (2004). Justice Alito's concurrence in Padilla refers to the majority's "dramatic departure from precedent." Padilla, 130 S. Ct. at 1488 (Alito, J., concurring).

constitutional implications for limitations on the imposition of deportation³ and for the imposition of non-immigration related "collateral" consequences following convictions.

One important aspect of the *Padilla* decision was the Court's refusal to apply the distinction between direct and collateral consequences of a criminal conviction to define the scope of representation required by the Sixth Amendment in the case of deportation consequences.⁴ In other words, the Court recognized the protections of the Sixth Amendment to cover advice by criminal defense counsel about the immigration consequences of a criminal proceeding, regardless of whether those consequences might be characterized as direct or collateral.⁵ The Court attempted to confine the scope of its opinion to "the specific risk of deportation"⁶ because of the "unique nature" of that consequence, referring to its severity, the fact that it has long been "enmeshed" with criminal convictions, and "importantly," that it has become "nearly an automatic result for a broad class of noncitizen offenders."⁷

In reaching this dramatic conclusion, the Court first made a quieter but in some ways equally surprising holding (though it did not arouse the same level of consternation in the concurring or dissenting opinions). The Court held that "as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the *penalty* that may be imposed on noncitizen defendants who plead guilty." In short, the Court recognized deportation for criminal behavior as a penalty that results from criminal proceedings, something the Court had consistently and steadfastly refused to do up until that point. For over one hundred years, the Court had always described deportation as a civil, remedial sanction, designed not to punish, but to remedy an on going violation of

³ Deportation is now referred to in the Immigration and Nationality Act as "removal." *See* Immigration and Nationality Act (INA), 8 U.S.C. § 1229(a) (2006); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), div. C §§ 304, 309(d)(2), 110 Stat. 3009-546, 3009-587, 3009-627 (codified in scattered sections of 8 U.S.C.). However, since "deportation" remains the most commonly understood term to describe the phenomenon, I continue to use it and will use the terms deportation and removal interchangeably in this Article.

⁴ Padilla, 130 S. Ct. at 1481.

⁵ "We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla's claim." *Id.* at 1482.

⁶ *Id*.

⁷ Id. at 1481.

⁸ *Id.* at 1480 (emphasis added) (footnote omitted).

⁹ See, e.g., Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999) ("Even when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act (criminal charges may be available for that separate purpose) but is merely being held to the terms under which he was admitted.").

the civil immigration law.¹⁰ This characterization has been the basis for a number of important decisions limiting the procedural and constitutional rights of respondents in removal proceedings.¹¹ *Padilla*, in acknowledging the penal nature of removal for criminal convictions, represents a significant departure from these prior Supreme Court characterizations of deportation.

These two holdings represent an important and fundamental realignment in the way courts will need to address deportation consequences in the criminal context. They are important because, as the Court itself recognized, the shift brings the law into alignment with the lived reality experienced by many noncitizens that deportation for many crimes is a penalty—an automatic and particularly harsh one.¹² They are also important because of the severity of the deportation penalty and the extent to which its worst impacts are often felt not only by the defendant in a case but also by his or her law-abiding family.¹³ At the same time, as Justice Alito highlighted in his concurring opinion, there are significant questions raised by the *Padilla* decision, notably including the challenges of giving correct advice in an extremely complex area of the law and the

¹⁰ See Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (holding criminal constitutional protections "have no application" in deportation proceedings because those proceedings are civil in nature).

¹¹ See United States v. Balsys, 524 U.S. 666, 700 (1998) (refusing to recognize risk of removal as sufficient for asserting the Fifth Amendment privilege against self-incrimination in deportation proceeding); INS v. Lopez-Mendoza, 468 U.S. 1032, 1039-40 (1984) (refusing to allow suppression of evidence for constitutional violations in deportation context); Li Sing v. United States, 180 U.S. 486, 495 (1901) (same); Fong Yue Ting, 149 U.S. at 730 (refusing to apply the constitutional protections of trial by jury and protections from unreasonable search and seizure and cruel and unusual punishment in deportation proceedings); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) (refusing to apply the prohibition against ex post facto criminal laws to the exclusion context).

¹² Padilla, 130 S. Ct. at 1481. "Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult [to divorce the penalty from the conviction in the deportation context]." *Id.* For those convicted of any of the broad range of offenses now considered "aggravated felonies" under immigration law, there is a conclusive presumption of removability, and the conviction disqualifies them from any discretionary relief in immigration court. 8 U.S.C. § 1228(c) (2006) ("An alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States."); *Id.* § 1228(b)(5) ("No alien [convicted of an aggravated felony] shall be eligible for any relief from removal that the Attorney General may grant in the Attorney General's discretion.").

¹³ Padilla, 130 S. Ct. at 1484; see also Michael Falcone, 100,000 Parents of Citizens Were Deported over 10 Years, N.Y. Times, Feb. 14, 2009, at A16, available at 2009 WLNR 2923612. See generally Int'l Human Rights Law Clinic, Univ. of Cal., Berkeley, Sch. of Law et al., In the Child's Best Interest? The Consequences of Losing a Lawful Immigrant Parent to Deportation (2010), available at http://www.law.berkeley.edu/files/Human_Rights_report.pdf.

broader implications of the decision's holdings and analysis.¹⁴ In short, how can we implement the revolution brought about by *Padilla*?

This Article explores some of those questions. Part I addresses some of the challenges of implementing the Court's decision, including the complexity of the advice and representation it mandates and the realities of limited financial resources and limited expertise in the legal community. Part II identifies some of the broader doctrinal and analytical questions raised by the Court's analysis. It first explores whether an attorney's duty to discuss collateral consequences extends beyond the realm of immigration law that was addressed in Padilla. Part II then focuses on other possible constitutional implications triggered by the Court's use of the term "penalty" in its discussion of removal. Part III identifies some ways that thoughtful response to the decision in the short term can lay the groundwork for developing best practices in the long run. Finally, the Article poses the wider question of what is the most appropriate legal response to criminal activity by noncitizens. It concludes that while Padilla represents an appropriate accommodation of current immigration law by the criminal justice system, a return to more flexibility and discretion in the immigration system itself would be a better, more just way to ensure appropriate and proportionate responses to convictions.

I. The Challenges

A. The Difficulties of Advising Noncitizen Defendants

Given the previously unrecognized constitutional duty of criminal defense counsel to advise about immigration consequences and the fact that most criminal defense attorneys are not familiar with immigration law, it is clear that there is a very large educational task ahead as a result of *Padilla*. Unfortunately, this is not a challenge that can be met with a simple round of continuing legal education seminars. Justice Alito, in his concurring opinion, was certainly accurate in observing that providing advice on the immigration consequences of a particular conviction "is often quite complex." Justice Alito detailed some of the difficulties of categorizing offenses to determine whether they render a defendant statutorily removable or not.16

The task is even more complex than Justice Alito described. Though the most draconian consequences are often quite clear (like the fact that those convicted of drug trafficking like Mr. Padilla are subject to automatic

¹⁴ Padilla, 130 S. Ct. at 1488 (Alito, J., concurring).

¹⁵ Id

¹⁶ *Id.* at 1488-89 (discussing, for example, the struggle to categorize an offense as an "aggravated felony" rather than a "crime involving moral turpitude").

deportation as "aggravated felons"), the implications of a conviction for a "crime involving moral turpitude" or offenses in other categories can vary according to: the current immigration status of a particular defendant; the length of time she has held that status; the ability she might have to adjust to another status; and the availability of relief from removal in immigration proceedings. Even an individual who has never held legal immigration status in the United States might be eligible for various forms of relief in removal proceedings, eligibility that can be virtually extinguished by a criminal conviction.¹⁷ Furthermore, some categories of removable offenses have "triggers" that can be avoided, thus preventing a defendant from becoming removable. For example, an offense of simple assault can be a safe, "immigration-friendly" plea with a sentence of under a year, but a sentence of a year or more transforms the offense into an "aggravated felony" for immigration purposes, 19 resulting in automatic deportation. 20

In addition, a defendant's prior criminal history will affect the consequences she will suffer as the result of a particular conviction. For example, a permanent resident with no prior criminal history could safely plead guilty to a misdemeanor theft offense, such as Maryland's theft less than \$100,21 because although the offense is a crime involving moral turpitude, it fits within the "petty crimes" exception to the ground of removability.22 However, if she had a prior conviction for theft or any other crime of moral turpitude, the conviction would render her deportable under a separate provision for multiple convictions.23 Likewise, certain

¹⁷ For example, an individual with at least ten years of physical presence in the country and who has a U.S. citizen or lawful permanent resident family member who would suffer extraordinary and extremely unusual hardship if the individual were deported is eligible to apply for cancellation of removal under 8 U.S.C. § 1229b(b) but will be disqualified by any of a number of convictions. 8 U.S.C. § 1229b(b)(1)(C). Likewise, an individual who has a well-founded fear of persecution in her home country may qualify for asylum but will be disqualified by a conviction for a "particularly serious crime," a term of art in the Immigration and Nationality Act. *Id.* § 1158(b)(2)(A)(ii).

¹⁸ See, e.g., MD. CODE ANN., CRIM. LAW § 3-203 (LexisNexis Supp. 2010) (defining assault in the second degree).

¹⁹ 8 U.S.C. § 1101(a)(43)(F) (including crimes of violence with convictions carrying a sentence of imprisonment of at least one year in its definition of aggravated felony).

²⁰ See id. § 1228(c) ("An alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States."); see also id. § 1228(b)(5) ("No alien [convicted of an aggravated felony] shall be eligible for any relief from removal that the Attorney General may grant in the Attorney General's discretion.").

²¹ MD. CODE ANN., CRIM. LAW § 7-104(g)(3) (LexisNexis Supp. 2010).

 $^{^{22}}$ 8 U.S.C. § 1227(a)(2)(A)(i) ("Any alien who is convicted of a crime involving moral turpitude . . . and is convicted of a crime for which a sentence of one year or longer may be imposed . . . is deportable.").

²³ Id. § 1227(a)(2)(A)(ii) ("Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude . . . is deportable.").

misdemeanor convictions, such as simple trespass,²⁴ are generally safe pleas, in that they do not fall within the categories of convictions that can result in removability; however, two such convictions would disqualify an individual who was otherwise eligible for Temporary Protected Status (the status granted recently to Haitians following the catastrophic earthquake in their country).²⁵

In addition to knowledge of the complex world of immigration law, the task of taking immigration consequences into account when representing a noncitizen defendant demands that criminal defense counsel have both substantial knowledge of criminal law and considerable creativity. Immigration implications should infuse every aspect of the representation, beginning with what information is gathered at intake. When engaging in plea negotiations and decisions about going to trial, *Padilla* might now require counsel to explore alternative possible pleas that are supported by the facts, including dispositions that may not be considered convictions for immigration purposes and pleas to charges that could avoid immigration consequences, such as regulatory offenses that will not involve "moral turpitude."

Sentencing is another area that provides ample opportunities for constructive lawyering on behalf of a noncitizen client, especially where certain sentences (even if suspended)²⁶ can trigger the "aggravated felony" category and its draconian consequences.²⁷ For example, suppose that during a plea negotiation on an assault charge the state insists on a three-year sentence. If the case involved an altercation with a number of individuals who could be seen as victims, a creative defense attorney could satisfy the state's concerns and avoid the aggravated felony at the same time by proposing a plea deal that stacks three separate charges of assault, each with a sentence of 364 days, to be served consecutively. Alternatively, counsel could recommend that an offer for a longer, suspended sentence be declined in favor of a shorter sentence of "real" time that the defendant will actually serve. These kinds of creative problem-solving strategies demand vast knowledge of possible alternative charges in the criminal code and of the many permutations that can be found in criminal

²⁴ See, e.g., MD. CODE ANN., CRIM. LAW § 6-402 (LexisNexis Supp. 2010).

²⁵ Temporary Protected Status ("TPS") may be granted to nationals of countries where the Secretary of Homeland Security finds that such nationals cannot safely return to that country because of natural disasters, armed conflict, or other "extraordinary and temporary conditions" that make return unsafe. 8 U.S.C. § 1254a(b)(1). Individuals are disqualified from TPS eligibility if convicted of two or more misdemeanors in the United States. *Id.* § 1254a(c)(2)(B)(i).

²⁶ The INA provides that "[a]ny reference to a term of imprisonment or a sentence . . . is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension." *Id.* § 1101(a)(48)(B).

²⁷ For a list of crimes considered to be aggravated felonies, see id. § 1101(a)(43).

sentences. These strategies also require some finesse in negotiation with prosecutors. Postconviction challenges and collateral review of convictions are other areas of specialized criminal practice that are extremely important to noncitizens in the wake of *Padilla*.

Few lawyers possess the requisite knowledge of both the immigration and the criminal justice systems that is needed to represent noncitizen defendants well.²⁸ This does not mean, however, that we should throw our hands up in despair of ever rising to the task, but rather that we need to find ways to bring the expertise of the two bars together—to facilitate collaborative consultation and co-counseling. This is one of the profound challenges of *Padilla*, especially in light of limited financial and human resources.

B. Resource Challenges

The constitutional mandate of *Padilla* is, in a certain sense, the best thing that could have happened to funding for the representation of noncitizen defendants. This could be counterintuitive if *Padilla* is thought of as creating an additional, substantial layer of required work for defense attorneys, additional work that will strain already inadequate defense resources even further. *Padilla* did not create the requirement, but rather recognized an area of law about which defense attorneys already needed to be advising their clients.²⁹ The importance of this advice in providing competent representation has been recognized by bar associations and in other standards for many years;³⁰ the widespread acceptance of these standards was in fact one of the factors the Supreme Court relied on in holding that such advice represented the standard of competent representation in the legal community.³¹ In addition, training materials and educational seminars have been widely offered in recent years.³²

In *Padilla*, however, the Supreme Court raised the standard of giving immigration-related advice in criminal proceedings to the level of a constitutional mandate. What had been seen by many as a "best practice" is now a minimum standard of competent representation. What was "collateral" is now integral to criminal defense of noncitizens. This is

²⁸ Justice Stevens was surely understating the matter in *Padilla* when he stated that "some" criminal defense attorneys "may not be well versed in" immigration law. Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).

²⁹ See id. at 1482-83.

³⁰ See, e.g., ABA SECTION OF CRIMINAL JUSTICE ET AL., ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d ed. 2004); see also Padilla, 130 S. Ct. at 1482.

³¹ See Padilla, 130 S. Ct. at 1482-83.

³² *Id.*; *see also* Brief for the Nat'l Ass'n of Criminal Def. Lawyers et al., as Amici Curiae Supporting Petitioner at app.13a-35a, *Padilla*, 130 S. Ct. 1473 (No. 08-651).

significant for the question of resources because it means that immigration-related advice must be funded like any other aspect of criminal defense. This represents a fundamental shift in the thinking about immigration consequences, and it will likely take some time for the culture and funding of criminal defense to reflect the new reality. The implications of the decision are nonetheless clear: immigration-related advice is required; that advice is complex and will require significant resources be devoted to it; and those resources *must* be devoted.

Obviously, training is required for all legal actors in the criminal justice system. Judges, prosecutors, and defense attorneys need to know the importance and implications of the issue to ensure both that defendants' rights are protected and that guilty pleas remain secure. The Supreme Court itself referred to the proper role immigration considerations could play in the negotiation of a plea agreement.³³ For this to happen, both defense and prosecution must have an understanding of how immigration issues could affect the result for a defendant.

The brunt of the burden, of course, falls on defense counsel, who has the obligation to research and advise her client specifically about consequences, as well as to advocate throughout the representation to achieve the client's express immigration-related goals.³⁴ As I have noted, doing this requires significant resources, which can pose a challenge for both publicly funded defense programs and clients of the private bar.

There are numerous models for instituting immigration advice in public defender ("PD") offices, including training programs, in-house expertise (either centralized or in local PD offices), and variations on a contract model.³⁵ Considerable thought has been given already to the special challenges of providing such advice in the high-volume, low-resource context of a PD office and to many of the practical considerations in doing so.³⁶ There are numerous partners, including local nonprofit organizations, immigration specialty bar organizations, foundations, fellowships, and law school clinics, that can support public defenders in this effort so that strides can be made toward developing programs to ensure full representation for every noncitizen, even in these financially challenging times. Ultimately, though, immigration-related aspects of criminal defense must be funded no more or less than any other

³³ Padilla, 130 S. Ct. at 1486.

³⁴ *Id.* at 1478.

³⁵ Peter L. Markowitz, Protocol for the Development of a Public Defender Immigration Service Plan 10-15 (2009), available at http://www.immigrantdefense project.org/docs/2010/10_Public%20Defender%20Immigration%20Protocol.with%20appendice.pdf.

³⁶ See, e.g., id.; Jennifer Welch, Comment, Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively, 92 CALIF. L. REV. 541, 572-81 (2004).

constitutionally mandated aspect of defense. In state-funded programs, for example, funding for immigration expertise must also be state funded.

Private defense attorneys must also insist on the "funding" of immigration-related representation for—and by—their paying clients. That is to say, they must insist that their clients pay to obtain the immigration expertise they need in order to be properly represented. Such paid immigration expertise would ideally come in the form of a consultation by the defense attorney with an immigration attorney. This format allows the two attorneys to communicate directly about the issues at stake and brainstorm about possible solutions that will satisfy both criminal justice and immigration concerns.

Private clients may also independently consult an immigration attorney, but this does not allow for the best communication between counsel on the legal and strategy questions. Further, this practice runs the risk that some crucial piece of information or advice will be missed, resulting in an attorney giving erroneous advice. Some defense attorneys also cultivate relationships with immigration attorneys whom they can call for a quick, free opinion when an issue arises. This informal model is even riskier than the independent consultation model. It involves a substantial risk that the criminal counsel's desire to keep exchanges brief and not-tooburdensome for the immigration attorney will result in insufficient attention to detail and bad advice. Given the complexity of the factual and legal analysis needed to give good advice about immigration consequences, this is truly an area in which a client is likely to get what he or she pays for. Bar associations and other organizations can play a role in facilitating bridge-building between private criminal and immigration attorneys by providing or facilitating training, networking events, directories, and other tools for collaboration and referral.

Even more than financial resources, there is a crisis of human resources in the need to provide immigration advice to criminal defendants on such a wide scale. Simply stated, there are not enough lawyers in most parts of the country who are knowledgeable about the immigration consequences of crimes to provide all the advice required, even if the financial resources were there to pay for it.³⁷ Many attorneys in both bars have simply avoided wading into this deeply complex area of the law. On the criminal side, courts have told attorneys for years that immigration concerns were "collateral" to the criminal proceedings and that they had no duty to understand or provide advice on those issues. Many have avoided giving

³⁷ See, e.g., Jojo Annobil, Supervising Attorney, Legal Aid Soc'y Immigration Law Unit, Oral Testimony Before the New York City Council Immigration Committee on the State of Immigration Services in New York City 3-4 (May 15, 2006), available at http://www.legalaid.org/media/8633/state_of_immigration_services_in_new_york.pdf (describing the lack of immigrant legal services in New York City).

advice in a laudable effort to avoid giving bad or insufficient advice. Even among immigration attorneys, many avoid the complex area of the law related to convictions. It is interesting to wonder whether part of this aversion on the part of immigration attorneys to dealing with convictions stems from the common demonizing of all immigrants as "law-breakers" in the public political imagination.³⁸ It is certainly simpler to challenge that misconception³⁹ when one does not have to confront clients who actually have broken the law in some way. Whatever the motivation, the reality is that many immigration lawyers have historically avoided cases and clients with criminal involvement.

Clearly, the first step is continuing legal education for both the criminal and immigration bars, so that they can at least spot the issues and know when it is time to call for help. In fact, these trainings are being offered all over the country by national and local organizations and offices.⁴⁰ It is a slow process, however, and such training is more effective at preparing generalists to know when they need to call a specialist than it is at training specialists themselves.

The bar and the legal academy must take the lack of criminal-immigration specialists seriously and begin or expand programs designed to produce attorneys with this expertise. Though there is a growing interest in immigration law in both doctrinal and clinical law school courses, there are currently very few courses around the country focused on the intersection of criminal and immigration law, despite the intersection clearly raising enough complicated and interesting issues to justify a full course. Those of us in the academy must change that. We must increase the offerings of both doctrinal and experiential courses addressing these issues, ideally team-teaching those classes with both criminal and immigration faculty. In so doing, we will clearly be addressing an unmet need for legal expertise in our communities. In addition, given the level of need, we will also be doing our students a good turn, positioning them to step into a growing and challenging area of practice, where they can become highly

³⁸ See, e.g., The Wave (Sharron Angle, Candidate for U.S. Senate Oct. 25, 2010), available at http://www.youtube.com/watch?v=tlkNAA2y4I4 ("Waves of illegal aliens streaming across our border, joining violent gangs, forcing families to live in fear.").

³⁹ There is substantial evidence that immigrants actually have a lower rate of involvement in criminal activity than the U.S.-born citizen population. *See, e.g.,* Kristen F. Butcher & Anne Morrison Piehl, *Crime, Corrections, and California: What Does Immigration Have to Do with It?*, CAL. COUNTS (Pub. Policy Inst. of Cal., San Francisco, Cal.), Feb. 2008, at 2, *available at* http://www.ppic.org/content/pubs/cacounts/CC_208KBCC.pdf (concluding that U.S.-born adult men are incarcerated in California prisons at a rate two and a half times higher than that of foreign-born men and are involved in the broader range of institutions related to criminal activity, including prisons, jails, and halfway houses, at a rate *ten times* higher than the rate for foreign-born men).

⁴⁰ See Brief for the Nat'l Ass'n of Criminal Def. Lawyers, supra note 32, at app.13a-35a.

sought-after experts.

II. Questions About the Scope of the Decision

Padilla has already had a profound effect on the practice of law at the intersection of immigration and criminal law and will undoubtedly continue to do so. It has revolutionized the plea bargaining process for noncitizens, an effect that will surely extend soon to sentencing and other aspects of their representation in criminal courts. What remains to be seen, however, is how far the Padilla revolution will extend and in which directions. The decision includes language and analysis that have the potential to work some fairly dramatic transformations in various areas of the law. It will remain for scholars and courts to work through the decision's implications in the coming months and years.

One question regarding Padilla's scope relates to the possible application of the Court's requirement of advice about consequences traditionally considered "collateral" beyond the area of immigration law. There is longstanding and vigorous scholarship on the broad range of such consequences that can result from criminal convictions.⁴¹ This scholarship has demonstrated that many of these consequences are applied as automatically and without exception as deportation is in the case of aggravated felonies. It also highlights that many consequences are quite serious, such as indefinite civil commitment, loss of custody rights, loss of voting rights, and loss of housing.42 Many commentators have recommended reforms that would reduce the number of such consequences, require notice before the acceptance of a plea agreement, and provide a system for individualized relief from these consequences in appropriate cases.⁴³ The American Bar Association has issued Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualifications, which recommends that all such sanctions be incorporated into and taken into account in the criminal process.44 The Uniform Law Commission has drafted model legislation to do just that.45

It is no surprise that courts have already begun to consider whether

⁴¹ See, e.g., Maureen A. Sweeney, Fact or Fiction: The Legal Construction of Immigration Removal for Crimes, 27 YALE J. ON REG. 47, 55-56 (2010). See generally Michael Pinard, An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals, 86 B.U. L. REV. 623 (2006) (discussing the collateral consequences of a conviction as they relate to the reentry of a formerly incarcerated individual).

⁴² See Pinard, supra note 41, at 635-36, 642.

⁴³ See, e.g., Sweeney, supra note 41, at 87-89.

⁴⁴ ABA SECTION OF CRIMINAL JUSTICE ET AL., supra note 30.

⁴⁵ UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT §§ 5, 6 (2009), available at http://www.law.upenn.edu/bll/archives/ulc/ucsada/2009_final.pdf.

other such consequences are included in the advice that criminal defense counsel must provide to a defendant. The Supreme Court limited its ruling in *Padilla* to immigration consequences and attempted to make a case for the "unique nature of deportation" as a consequence in order to avoid just such an expansion of the decision. Despite this holding, the Court's analysis seems to extend to at least some consequences beyond deportation, where the nature of the consequence is serious, and it attaches to a person automatically with a conviction.⁴⁶ The Eleventh Circuit has already relied on *Padilla* in a case involving erroneous advice by defense counsel on the consequence of involuntary commitment as the result of a sex offense conviction.⁴⁷ It remains to be seen how far into the realm of other "collateral" consequences *Padilla*'s ruling will extend.

Another area that is rich for exploration by scholars and practitioners is the implication of the Court's recognition that immigration consequences can be part of the penalty imposed in a criminal case.⁴⁸ This recognition represents a breach in the wall between proceedings labeled "civil" and "criminal," which has led over the years to the conclusion by many courts that immigration proceedings did not require many of the protections traditionally afforded to criminal proceedings (even when those immigration proceedings are the direct result of a criminal conviction).49 This breach in the wall reveals the conceptual distinction between deportation for violation of civil immigration law and the conditions of admission on the one hand, and for violation of non-immigration related criminal laws on the other hand. The exposure of this distinction, in turn, could lead to a reconsideration of the question of the proportionality of the sanction of removal for relatively minor crimes under the Eighth Amendment, and generally of the question of whether there should be some graduated system of penalties in immigration law analogous to that found in criminal sentencing.50 Likewise, the recognition of deportation as a penalty resulting from a criminal proceeding could affect the analysis of whether a defendant can be subjected to deportation under a provision enacted after she committed or was convicted of the offense, or whether such an application would be considered an impermissible ex post facto application of law.51 Additionally, there could be other implications for the right to counsel in crime-related deportation proceedings under the Sixth Amendment. There is, of course, a long history of courts denying these rights, but that history was grounded on the fundamental principle that

⁴⁶ See Padilla v. Kentucky, 130 S. Ct. 1473, 1481-82 (2010).

⁴⁷ Bauder v. Dep't of Corr., 619 F.3d 1272, 1275 (11th Cir. 2010).

⁴⁸ Padilla, 130 S. Ct. at 1480.

⁴⁹ See supra notes 10-11 and accompanying text.

⁵⁰ See, e.g., Juliet P. Stumpf, Penalizing Immigrants, 18 FED. SENT'G REP. 264 (2006).

⁵¹ See, e.g., Markowitz, supra note 2 at 16-17.

deportation was not a penalty but a remedial, civil sanction.⁵² That foundation has been severely undermined by *Padilla*.

III. Interim Responses Leading to Long-Term Best Practices

As we begin to respond to *Padilla*'s mandate, we should give thought to how our immediate responses can contribute to ensuring best practices for the long-term defense of noncitizens in our criminal courts. Thoughtful response and planning in the short term can help determine whether our long-term response will be restricted by the limits of our current capacities; whether we are able to ensure, ultimately, quality representation that protects noncitizens in both criminal and immigration proceedings; and whether we can approach the value underlying the Court's decision in *Padilla*: that deportation should only be imposed as a just and proportionate response to serious criminal activity.⁵³

Criminal cases involving noncitizen defendants continue to be heard in our courts every day, despite the fact that many public and private criminal defenders are not yet prepared to give adequate advice about immigration consequences. There is a need to represent these clients immediately, even as training and other programs for immigration referrals and consultations are put in place. The greatest likelihood of successful representation of noncitizen clients is with the collaboration of all those partners currently engaged in the various fields, whose expertise is required for this representation.

In recent years several national organizations have developed the specialty of advising about the immigration consequences of convictions. These organizations have developed both the expertise and procedures required to respond to the real-time needs of criminal defense attorneys, and they provide an invaluable resource for individual attorneys and programs trying to establish robust systems for immigration-consequences advice. They include the National Immigration Project of the National Lawyers Guild,⁵⁴ the Immigrant Defense Project,⁵⁵ the Defending Immigrants Partnership,⁵⁶ and the Immigrant Legal Resource Center.⁵⁷ These organizations provide immediate, individualized advice to defense attorneys for the short term and, on a more pro-active level, can help defender programs to think through and plan for integrating immigration

⁵² See Padilla, 130 S. Ct. at 1481-82.

⁵³ Id. at 1480.

⁵⁴ NAT'L IMMIGR. PROJECT NAT'L LAW. GUILD, http://www.nationalimmigrationproject.org/ (last visited Apr. 8, 2011).

⁵⁵ IMMIGR. DEF. PROJECT, http://immigrantdefenseproject.org/ (last updated Mar. 23, 2011).

⁵⁶ DEFENDING IMMIGRANTS PARTNERSHIP, http://defendingimmigrants.org/ (last visited Apr. 8, 2011).

⁵⁷ IMMIGRANT LEGAL RESOURCE CENTER, http://www.ilrc.org/ (last visited Apr. 8, 2011).

expertise into their offices. The Immigrant Defense Project and Professor Peter Markowitz have published an extremely thoughtful protocol that discusses many of the practical implications of trying to integrate immigration expertise into defender offices with limited resources and provides a variety of models for doing so.⁵⁸

Other important partners for responding to this challenge are, of course, local defense attorney organizations and bar sections, local immigration attorney organizations and bar sections, and local immigration nonprofits—especially those with expertise in representing detainees (many of whom have criminal issues). Local chapters of the American Immigration Lawyers Association ("AILA") would be a good place to begin to find attorneys with expertise in immigration consequences, and the chapters' pro bono coordinators may be interested in working with public defenders to ensure access to quality advice.⁵⁹ In addition, the chapters' members, and members of any state bar immigration sections, would clearly have an interest in facilitating consultations and referrals for clients who are able to pay.

Finally, law school immigration clinics could provide useful resources and some interim support while public defenders work to tap into and integrate immigration expertise. The University of California at Davis has a clinic that has been assisting a local public defender office with immigration advice for years. The Immigrant Defense Project also runs a national hotline for defense attorneys that is partially staffed by law students under supervision. The relative flexibility of the structure of most law school clinics (which start with a new staff of law students every semester or year) gives them a kind of nimbleness that could be suited for responding to the sudden challenge posed by Padilla. Law students can serve as a "force multiplier." They can be trained and supervised to give advice directly to defense attorneys, or they can facilitate consultations with pro bono experts from the private and nonprofit immigration sectors by ensuring complete intake information and doing preliminary research (such as identifying the elements of the criminal provision at issue) before passing the case along to the expert.

Once the proper partners for collaboration are identified, it is important to begin to document the demand for services as well as the results of such services. In the case of public defenders, this will require

⁵⁸ MARKOWITZ, *supra* note 35. For another useful treatment of the particular challenges facing public defender offices that try to address this issue, as well as strategic suggestions for meeting those challenges, see Welch, *supra* note 36.

⁵⁹ AILA's Immigration Lawyer Search, AILA.ORG, http://www.ailalawyer.com (last visited Apr. 8, 2011). AILA has a national pro bono office that can be contacted through their website. See AILA—PRO BONO, http://www.aila.org/content/default.aspx?docid=15767 (last visited Apr. 8, 2011).

them to collect information identifying the number of noncitizens among the office's clients and to store this information electronically or in some other easily retrievable form. In most cases, a question utilized to identify those not born in the United States or its territories will be a useful screening mechanism.⁶⁰ From there, an office should develop a more thorough immigration intake questionnaire to identify those needing immigration advice and to gather the information required to ensure that the advice is accurate. At the end of a case, attorneys should compile information on whether they successfully avoided negative consequences or preserved immigration relief. These statistics will be useful in advocating to state or private funders about the need for immigration-related criminal defense services and for the difference those services can make.

Attorneys should also collect more specific information about results of cases where possible, as these represent successful alternative pleas devised by counsel, successful sentencing strategies, and analysis about the consequences of state-specific offenses. This information should be preserved in a form that makes it accessible for future reference by other attorneys. Many states already have charts of the likely consequences of specific state offenses,⁶¹ and this information about alternatives and strategies can be incorporated there to enhance the quality of the charts' information and, presumably, of future advice to the states' defendants. It can also be used in the creation of other state-specific practice advisories and tools for defense attorneys, thus improving the quality of information available to them in their practice.

CONCLUSION: THE QUESTION OF JUSTICE

Amidst the effort to provide good advice to noncitizen defendants about the threat of deportation, it is important to remember that the

⁶⁰ Although this question will not necessarily identify only noncitizens (as it would encompass naturalized citizens, for example), it would identify the foreign-born, for whom further questions should be asked regarding citizenship and immigration issues. There are concerns about the accuracy of information about immigration status gathered by intake workers, but some of these concerns can be allayed by training the intake workers and phrasing the question to introduce the context of ensuring good representation for purposes of protecting noncitizens.

⁶¹ See, e.g., MD. OFFICE OF THE PUB. DEFENDER & UNIV. OF MD. SCH. OF LAW CLINICAL LAW OFFICE, ABBREVIATED CHART FOR CRIMINAL DEFENSE PRACTITIONERS OF THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS UNDER MARYLAND STATE LAW (2011), http://www.law.umaryland.edu/faculty/Msweeney/ImmigrationConsequencesChart.pdf. For a selection of state charts, see IDP Resources—Criminal Justice Advocates, IMMIGRANT DEF. PROJECT, http://www.immigrantdefenseproject.org/webPages/crimJustice.htm (last updated Mar. 8, 2010); Legal Resources, NAT'L IMMIGR. PROJECT, http://www.nationalimmigrationproject.org/legalresources.htm (last visited Apr. 8, 2011).

ultimate concern should be justice in the imposition of immigration consequences. That is, immigration consequences should be imposed to the extent, and only to the extent, that it is just to do so. Ultimately, this requires that immigration consequences be proportionate to any crime committed and that a decisionmaker have the power to consider all factors relevant to the momentous decision of whether to banish an individual from her chosen home and, often, her family and community.

The *Padilla* decision provides an opening to move closer to the goal of bringing the consideration of immigration consequences to the surface of a proceeding designed to provide sanctions for criminal behavior. As such, it represents an opportunity to re-inject a modicum of fairness and common sense into the way our law assigns immigration consequences to criminal behavior. However, it does so by providing an opening for the criminal system to essentially compensate for and sidestep the inflexibility and disproportionate response of our current immigration law to crimes, and it does nothing to remedy the flaws in that law.

Our law of immigration consequences for crime remains drastically out of balance. For example, the current law provides no distinction between the consequences of a conviction for premeditated murder and a conviction for shoplifting, with a suspended sentence of a year.⁶² Both are considered aggravated felonies and make an individual automatically deportable with no relief and no opportunity to return, a kind of immigration "life sentence without parole."⁶³ The range of aggravated felonies defined in the

⁶³ 8 U.S.C. § 1228(c) ("An alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States."). More generally, the law provides that anyone convicted of an aggravated felony is removable. 8 U.S.C. § 1227(a)(2)(A)(iii). The law specifically disqualifies individuals with aggravated felony convictions from seeking virtually any relief under the INA, including:

Form of relief	Defined by:	Aggravated felons prohibited by:
Cancellation of removal for Lawful Permanent Residents (LPR)	8 U.S.C. § 1229b(a)	8 U.S.C. § 1229b(a)(3)
Cancellation of removal for non-LPR	8 U.S.C. § 1229b(b)(1)	8 U.S.C. § 1229b(b)(1)(B)
Special Cancellation of Removal for Central Americans under NACARA	8 C.F.R. § 240.66	8 C.F.R. § 240.66(c)(1)
Voluntary departure	8 U.S.C. § 1229c(a)(1)	8 U.S.C. § 1229c(b)(1)(B)-(C)

⁶² See 8 U.S.C. § 1101(a)(43)(A), (G) (2006) (defining both offenses as "aggravated felonies").

Immigration and Nationality Act is broad indeed, encompassing subsections A through U of § 101(a)(43) of the Act (many of which represent categories of crimes—such as theft offenses or crimes involving fraud or deceit—and many of which have several subparts) and prescribing the same automatic consequences for each of the listed offenses.⁶⁴ Likewise, there is no leeway in the consequences of such a conviction based on the individual and her level of integration into, and connection with, the U.S. community. With an aggravated felony conviction, there is no distinction between an individual who entered the country illegally yesterday and one who is a lawful permanent resident like Mr. Padilla (who has resided in the country for decades and has deep family and community ties here, including honorable military service and discharge); they are equally without recourse or remedy.⁶⁵

Rather than require the criminal system to compensate for this draconian and unforgiving statutory framework of consequences, it would be far preferable to have a system in which the criminal courts are free to focus on the just imposition of traditionally criminal penalties and the immigration courts are granted the discretion to consider traditional factors in determining whether deportation is a proper response to a conviction.⁶⁶ What is needed is reform of our statutory framework for imposing immigration consequences to convictions, reform that would restore to the system the discretion to consider all relevant factors in

Relief under battered spouse provision of VAWA	8 C.F.R. § 240.65(d)(2)	8 C.F.R § 240.65(d)(3)
Naturalization	8 U.S.C. § 1427	8 U.S.C. § 1427(d)
Temporary Protected Status (TPS)	8 U.S.C. § 1254a(a)-(b)	8 U.S.C. § 1254a(c)(2)(B)

The law bars such individuals from humanitarian relief from persecution in the form of asylum and, in many circumstances, the more limited withholding of removal as well. See 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1158(b)(2)(B)(i), 1231(b)(3)(A)-(C).

⁶⁴ INA § 101(a)(43)(A)-(U), 8 U.S.C. § 1101(a)(43)(A)-(U).

⁶⁵ The statute disqualifies an individual with an aggravated felony conviction from cancellation of removal, the relief from removal otherwise generally available to lawful permanent residents and in which a judge may weigh the severity of a criminal offense against the applicant's positive equities. 8 U.S.C. § 1229b.

⁶⁶ Prior to 1996 when it was eliminated, the § 212(c) waiver was used in thousands of cases to waive deportation for individuals who had been convicted of crimes. INS v. St. Cyr, 533 U.S. 289, 296-97 (2001). Like the current remedy of cancellation of removal, the § 212(c) waiver allowed an immigration judge the discretion to weigh positive factors (such as community and family ties, military service, hardship to the individual or family, and character) against the seriousness of the offense for which an individual had become deportable. *See id.* at 294-95. Unlike the current remedy of cancellation, the § 212(c) waiver was available even to those who had been convicted of aggravated felonies. *See id.* at 297.

deciding whether to impose the sanction of deportation.

However, given the toxicity of the current national immigration debate, it seems very unlikely that Congress will be able to address this issue in any constructive way anytime soon. Even the Obama Administration, which supports comprehensive immigration reform, has targeted its enforcement efforts and rhetoric against "criminal aliens." It is hard to imagine that anyone in the current atmosphere will step forward to champion the rights of this most politically powerless and reviled group. For this reason, it will likely continue to fall to the courts to protect noncitizens accused or convicted of crimes. *Padilla* is all the more important in this context, as it and its progeny may identify constitutional mandates that push the legislative branch in a direction that it needs to move but cannot seem to move itself. We will watch with great interest—and hope—to see the reach of *Padilla* in restoring some sense of proportionality and justice to the intersection of our criminal and immigration law.

⁶⁷ See Criminal Alien Program, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, http://www.ice.gov/criminal-alien-program (last visited Apr. 8, 2011). A recent webpage posting by John Morton, Director of Department of Homeland Security, Immigration and Customs Enforcement ("ICE"), sums it up well:

Here at ICE, we are tasked with enforcing immigration policies. But the reality is, we have a limited number of Enforcement and Removal Operations (ERO) officers compared to the millions of individuals here illegally in the United States. That's why ICE, under the Obama administration, has made a shift in its removal strategy. Removing illegal aliens with criminal convictions is our top priority.

John Morton, *Tough*, *Sensible Immigration Enforcement*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT (Nov. 24, 2010), http://www.ice.gov/about/offices/leadership/corner/ (follow "November 24, 2010 | Tough, Sensible Immigration Enforcement" hyperlink).