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## *Gideon's Migration*

**ABSTRACT.** For the past fifty years, immigration law has resisted integration of *Gideon v. Wainwright's* legacy of appointed counsel for the poor. Today, however, this resistance has given way to *Gideon's* migration. At the level of everyday practice, criminal defense attorneys appointed pursuant to *Gideon* now advise clients on the immigration consequences of convictions, negotiate “immigration safe” plea bargains, defend clients charged with immigration crimes, and, in some model programs, even represent criminal defendants in immigration court. A formal right to appointed counsel in immigration proceedings has yet to be established, but proposals grounded in the constitution, statutes, and expanded government funding are gaining momentum.

From the perspective of criminal defense, the changing role of *Gideon*-appointed counsel raises questions about the breadth and depth of immigration assistance that should develop under the defense umbrella. From the perspective of immigration legal services, the potential importation of a *Gideon*-inspired right to counsel requires consideration of the appropriate scope and design for an immigration defender system. This Essay does not attempt to resolve these challenging questions, but rather provides a framework for further reflection grounded in lessons learned from the criminal system's implementation of *Gideon*.

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## ESSAY CONTENTS

INTRODUCTION	2284
I. IMMIGRATION REPRESENTATION OUTSIDE <i>GIDEON</i>	2288
A. Nonprofit Organizations	2290
B. Pro Bono Representation	2291
C. Law School Clinics	2292
II. IMMIGRATION REPRESENTATION INSIDE <i>GIDEON</i>	2293
A. Advising on Immigration Consequences	2294
B. Protecting Against Crime-Based Deportation	2295
C. Defending Against Criminal Immigration Charges	2296
D. Providing Immigration Legal Services	2297
III. <i>GIDEON'S</i> MIGRATION	2300
A. A Right to Appointed Immigration Counsel	2300
B. Building an Immigration <i>Gideon</i> System	2305
CONCLUSION	2314

## INTRODUCTION

Clarence Earl Gideon was a natural-born citizen.<sup>1</sup> During the time when the Missouri native protested the failure of the criminal judge to appoint him counsel, he did not have to worry about the immigration implications of conviction. Yet, even had Gideon been a noncitizen,<sup>2</sup> immigration would not have figured heavily in his case. At the time, a lawful permanent resident charged, like Gideon, with breaking into the local pool hall<sup>3</sup> would not have been subjected to mandatory immigration detention<sup>4</sup> or automatic deportation for that offense.<sup>5</sup> Moreover, the Florida lawyer appointed to represent Gideon at his 1963 retrial would not have been required to advise him regarding the immigration effect of conviction.<sup>6</sup>

Against this historical backdrop of separation between criminal prosecution and deportation, the Supreme Court declared access to counsel in state court

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1. ANTHONY LEWIS, *GIDEON'S TRUMPET* 65 (1964).
  2. According to the limited prison data available from the time of Gideon's trial, only one percent of state prisoners and eight percent of federal prisoners were foreign-born. FED. BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS: CHARACTERISTICS OF STATE PRISONERS 1960, at 38 & fig.5 (1960) ("On December 31, 1960, there were reported 1,483 foreign-born felony prisoners confined in State institutions for adult offenders (excluding California)."); FED. BUREAU OF PRISONS, STATISTICAL TABLES, FISCAL YEAR 1964, at 43 & tbl.D-3 (1964) (reporting 1,114 foreign-born federal prisoners, out of a total of 13,220, in the fiscal year ending on June 30, 1964). Data on noncitizens, as opposed to the broader category of foreign-born, are not available for this time period.
  3. Specifically, Clarence Gideon was charged with "the crime of breaking and entering with intent to commit a misdemeanor, to wit, petit larceny." Brief for Respondent at 2, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155), 1963 WL 105476, at \*2.
  4. CHARLES GORDON & HARRY N. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* § 8.16a, at 868-69 (1959) ("Under current practice, the alien is infrequently arrested during the pendency of deportation proceedings. And those arrested are seldom denied bail.").
  5. In 1963, a single conviction made a lawful permanent resident deportable if the crime involved "moral turpitude committed within five years after entry" and a year or more of confinement. 8 U.S.C. § 1251(a)(4) (1958). However, even if the conviction (alone or in combination with prior offenses) made the immigrant deportable, generous forms of relief from deportation were available. See, e.g., *id.* § 1182(c) (waiver of inadmissibility); *id.* § 1254 (suspension of deportation). In addition, the criminal judge could have issued a judicial recommendation against deportation, which would have bound the immigration court. *Id.* § 1251(b). See generally Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1143-51 (2002) (analyzing the power to prevent deportation once held by criminal sentencing judges).
  6. Not until 2010 did the Supreme Court recognize a Sixth Amendment obligation of counsel to advise a defendant regarding the deportation consequence of his or her conviction. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010).

criminal proceedings “a fundamental right, essential to a fair trial.”<sup>7</sup> In the years that followed, the *Gideon v. Wainwright* decision had profound implications for the development of an institutional criminal defender system, but little practical import for access to counsel in deportation proceedings. Today, although all defendants facing potential incarceration enjoy a Sixth Amendment right to representation at government expense,<sup>8</sup> persons facing deportation have only a privilege to retain counsel at their own expense.<sup>9</sup> While the poor charged with crimes draw on a universal, albeit often-criticized, state-funded system for appointed counsel,<sup>10</sup> in immigration proceedings the majority of the poor procede pro se.<sup>11</sup> While criminal counsel must satisfy a minimum constitutional standard of competency,<sup>12</sup> it is less clear that immigration counsel has a parallel requirement of effective representation.<sup>13</sup> Finally, although *Gideon* has firmly guarded the individual counseling ideal in criminal cases,<sup>14</sup> the indigent counseling system for immigration now incorporates numerous alternatives to traditional full-service representation, including group information sessions,<sup>15</sup> “unbundled” legal services,<sup>16</sup> and

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7. *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963).

8. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

9. 8 U.S.C. § 1229a(b)(4)(A) (2006) (“[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings.”); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554 (9th Cir. 1990) (“Aliens have a due process right to obtain counsel of their choice at their own expense.”).

10. For an introduction to the problems plaguing the notoriously underfunded and overworked public defender system, see Paul Marcus & Mary Sue Backus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006).

11. See *infra* notes 33-35 and accompanying text.

12. *Strickland v. Washington*, 466 U.S. 668 (1984).

13. For a recent argument that constitutional due process provides a right to effective assistance of counsel in immigration proceedings, see Stephen H. Legomsky, *Transporting Padilla to Deportation Proceedings: A Due Process Right to the Effective Assistance of Counsel*, 31 ST. LOUIS U. PUB. L. REV. 43 (2011). See also *infra* notes 158-160 and accompanying text.

14. *Gideon*’s commitment to universal representation is not without its critics. See, e.g., Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461 (2007) (arguing that the appointment of counsel should be curtailed in misdemeanor cases so as to free resources for more serious cases).

15. The use of group orientation sessions for pro se litigants is particularly prevalent at immigration detention centers. See discussion *infra* Section I.A.

16. “Unbundled” legal services refers to the practice of accepting representation for a discrete part of a legal case, such as a single court appearance, rather than the entire case. See generally Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 423 (1994).

nonattorney representation.<sup>17</sup>

In this moment a half century after *Gideon*, however, the once-separate domains of criminal law and immigration law have merged. At the level of everyday practice, criminal defense attorneys now incorporate aspects of what is traditionally defined as immigration law into their work.<sup>18</sup> This shift in practice follows an increasingly complex integration on the ground between criminal prosecution and immigration enforcement.<sup>19</sup> The criminal-immigration integration reflects dramatic expansion in the range of crimes that make noncitizens deportable.<sup>20</sup> It also includes an increased use of jail-based methods for screening the immigration status of persons arrested by local police.<sup>21</sup> So-called “criminal aliens” now receive top priority for deportation<sup>22</sup> and are routinely detained in actual jails or detention centers with prison-like conditions while awaiting their immigration hearings.<sup>23</sup> Today,

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17. In immigration proceedings, legal representation may be provided by nonattorneys, known as “qualified representatives.” 8 C.F.R. § 1292.1 (2013).
  18. In Part II of this Essay, I introduce the varied immigration practices of criminal counsel.
  19. For a sampling of the literature in the nascent field studying the integration between immigration law and criminal law, see Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); and Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).
  20. As the Supreme Court recently explained, “immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation.” *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010).
  21. The government’s newest program is a fingerprint-based screening mechanism that operates in local jails throughout the country. Known as “Secure Communities,” this program compares the fingerprints of individuals arrested by local police and sheriffs to federal immigration databases. When a “match” is found, the federal government issues an “immigration detainer,” requesting to take the individual into immigration custody. See generally Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87 (2013) (analyzing data from the Secure Communities program).
  22. Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, All Chief Counsel, Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local and Tribal Criminal Justice Systems (Dec. 21, 2012), <http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf> (articulating the federal policy of prioritizing convicted criminals for deportation). As I discuss elsewhere, it is important to acknowledge that a significant proportion of noncitizens deported following a criminal arrest are never convicted of a crime, or have only a petty infraction on their record (such as driving without a license). Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. (forthcoming 2013).
  23. RUTHIE EPSTEIN, HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW, at i (2011), <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report>

immigration crime is the largest single category of crime prosecuted by the federal government<sup>24</sup> and noncitizens are over one-fourth of federal prisoners.<sup>25</sup> Even the Supreme Court has acknowledged the close connection between immigration and criminal defense by establishing in 2010 that the Sixth Amendment requires defendants to be advised of the immigration consequences of conviction.<sup>26</sup> The legal landscape in which *Gideon* was born has changed.

This altered landscape presents new challenges for defining the right to appointed counsel for the poor. How far does the obligation of *Gideon*-appointed counsel extend to assist noncitizen criminal defendants with their immigration legal needs? Is there a constitutional or statutory obligation to provide *Gideon*-styled counsel in deportation proceedings? More critically, as the provision of immigration counsel to the poor expands, how should such services be funded, staffed, and allocated?

In this Essay, I do not make a claim concerning the correct resolution of these issues. Nor do I give attention to the related question of the right to appointed counsel in civil matters other than immigration.<sup>27</sup> Instead, my focus

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.pdf (documenting that nearly four hundred thousand persons were held in civil immigration detention in 2011).

24. In the twelve-month period ending September 30, 2012, immigration crimes were forty-three percent of criminal offenses disposed of by federal district and magistrate judges. Thomas F. Hogan, *Judicial Business of the United States Courts: 2012 Annual Report of the Director*, ADMIN. OFFICE OF THE U.S. CTS. tbl.D-4 (2012), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/Do4Sep12.pdf> (showing that, during the twelve-month period ending September 30, 2012, immigration offenses were 27,126 out of 97,445 criminal cases disposed of by district courts); *id.* tbl.M-2, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/Mo2Sep12.pdf> (showing that immigration offenses were 65,642 out of 117,951 petty offenses disposed of by magistrate judges during the same period). For an analysis of the rise in federal immigration crime prosecutions, such as illegal entry, reentry, and alien smuggling, see Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281-82 (2010).
25. *Quick Facts About the Bureau of Prisons*, FED. BUREAU OF PRISONS, <http://www.bop.gov/news/quick.jsp> (last updated Feb. 23, 2013). Available state-level data suggest that the volume of noncitizen defendants has increased from one percent at the time of the *Gideon* decision, *see supra* note 2, to five percent, Heather C. West, *Prison Inmates at Midyear 2009—Statistical Tables*, BUREAU OF JUST. STAT. 5 tbl.2, 23 tbl.20 (2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pimo9st.pdf> (providing the total number of citizen and noncitizen prisoners as of June 30, 2009, as reported by all states except Michigan, Nevada, New Hampshire, Rhode Island, and Wisconsin).
26. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).
27. For a primer on right-to-counsel issues outside the immigration field, see Russell Engler, *Towards a Context-Based Civil Gideon Through Access to Justice Initiatives*, 40 CLEARINGHOUSE REV. 196 (2006) (discussing the civil *Gideon* movement); Margaret Colgate Love, *Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation*, 31 ST. LOUIS U. PUB.

is twofold. First, I identify the current practice of civil and criminal indigent immigration representation, which is not well documented in the academic literature and on which the future system of immigrant representation will be built. In particular, I show that there is a mixed model of civil immigration legal services providers (including nonprofit organizations, pro bono volunteers, and law school clinics), which is increasingly supplemented by appointed *Gideon* counsel providing immigration legal services to criminal defendants (including everything from advising on immigration consequences to actually representing the defendant in immigration court). Second, I draw on the lessons of *Gideon* and the current public defender system to introduce a framework for evaluating alternative approaches for structuring immigration defense services for the poor. Specifically, my framework explores how the goals of equality, efficiency, and efficacy have shaped the nation's provision of indigent criminal defense. How each of these goals is prioritized and defined in building the immigration *Gideon* system, I argue, will shape what that system looks like fifty years from now.

The remainder of this Essay proceeds in three Parts. Part I sets forth the actual practice of indigent immigration representation as it has evolved in the civil system without a universal guarantee to appointed counsel. Part II analyzes four different forms of immigration representation now provided by public defenders in both state and federal courts. Part III turns to *Gideon*'s future migration. Here, I identify a growing movement to import the *Gideon* model directly into immigration proceedings and introduce a framework for evaluating possible delivery systems.

## **I. IMMIGRATION REPRESENTATION OUTSIDE *GIDEON***

The debate over whether *Gideon* extends to civil proceedings is as old as the decision itself.<sup>28</sup> Yet, with few exceptions, a right to counsel at government expense has not been established in the civil arena.<sup>29</sup> As a result, inside the criminal courtroom, defendants receive full-service representation through institutional providers, including public defender programs, contract attorney

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L. REV. 87, 91 (2011) (arguing that the logic of *Padilla* cannot be limited to immigration consequences).

28. See, e.g., Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967).

29. See, e.g., *In re Gault*, 387 U.S. 1 (1967) (concluding that due process requires appointed counsel in delinquency proceedings when the juvenile's family is unable to afford counsel).

agreements, or court appointments.<sup>30</sup> In contrast, outside of *Gideon*, litigants rely on a far more limited pool of free legal services.<sup>31</sup>

As in other areas of civil legal assistance for the poor,<sup>32</sup> the unmet need for immigration counsel is dire. In 2011, nearly half of deportation court proceedings were conducted without counsel.<sup>33</sup> For immigrants in detention or immigrants unable to afford legal counsel, rates of representation are considerably lower.<sup>34</sup> Furthermore, studies have found that those unable to obtain representation are more likely to be deported, demonstrating that the lack of representation seems to matter.<sup>35</sup>

In the discussion that follows, I identify three primary legal services delivery models that currently exist for civil immigration matters: nonprofit organizations, both government and philanthropically funded; pro bono legal services; and law school clinics. This analysis does not provide an exhaustive discussion of all forms of representation. Rather, it familiarizes readers with the most important institutions for providing immigration counsel in order to lay the groundwork for later exploration of alternative designs for expanding the indigent immigration representation system.

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30. See generally Carol J. DeFrances, *State-Funded Indigent Defense Services, 1999*, BUREAU OF JUST. STAT. (2001), <http://bjs.ojp.usdoj.gov/content/pub/pdf/sfids99.pdf> (describing the diverse means of providing appointed indigent defense services in different states).
  31. See generally Rebecca L. Sandefur & Aaron C. Smyth, *Access Across America: First Report of the Civil Justice Infrastructure Mapping Project*, AM. BAR FOUND. (Oct. 7, 2011), [http://www.americanbarfoundation.org/uploads/cms/documents/access\\_across\\_america\\_first\\_report\\_of\\_the\\_civil\\_justice\\_infrastructure\\_mapping\\_project.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf) (documenting state-by-state divergence in civil legal assistance infrastructure).
  32. Less than one-fifth of the civil legal needs of the poor are met by existing legal services. DEBORAH L. RHODE, *ACCESS TO JUSTICE* 106 (2004).
  33. Office of Planning, Analysis & Tech., *FY 2011 Statistical Year Book*, U.S. DEP'T OF JUST. EXECUTIVE OFF. FOR IMMIGR. REV., at G1 (Feb. 2012), <http://www.justice.gov/eoir/statpub/fy11syb.pdf>.
  34. See Study Grp. on Immigrant Representation, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 364 (2011) (finding that detainees were represented only 40% of the time in New York City, 19% of the time in New York outside of New York City, and 22% of the time in Newark, New Jersey).
  35. See, e.g., Jaya Ramji-Nogales, Andrew Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 339-41 (2007) (concluding that asylum seekers represented by counsel were three times more likely to succeed in their asylum claims than pro se applicants); Study Grp. on Immigrant Representation, *supra* note 34, at 363-64, 383-85 (finding, based on data from New York, that the chances of prevailing rise from 3% to 18% for those who are detained and from 13% to 74% for those who are not detained when represented by counsel).



## A. Nonprofit Organizations

A comprehensive catalogue compiled by the Immigration Advocates Network includes 863 nonprofit organizations that provide legal services on immigration or citizenship cases.<sup>36</sup> Across these various nonprofits, client access to services is limited by funding type and office location. In addition, most organizations specialize in select areas of immigration law, such as family-based petitions or asylum.

Some nonprofit organizations providing immigration services receive federal funding from the Legal Services Corporation (LSC) and are therefore subject to especially strict restrictions concerning the types of immigration cases that their attorneys can handle.<sup>37</sup> One area of recent liberalization in federal legal services is funding for immigrant crime victims.<sup>38</sup> As a result, attorneys at programs such as the Legal Assistance Foundation of Los Angeles now specialize in seeking residency for battered immigrants, helping human trafficking victims obtain visas, and representing refugee torture survivors.<sup>39</sup> In practice, however, LSC organizations dedicate only a tiny fraction of their resources to immigration matters.<sup>40</sup>

The unmet demand for services is most acute for immigrants housed in geographically remote detention locations. Many of the nonprofit organizations that do provide legal assistance at detention locations outside urban centers receive funding from the Executive Office of Immigration Review's Legal Orientation Program (LOP), which operates at twenty-five detention centers around the country.<sup>41</sup> In both group orientations and more individualized pro se workshops, LOP attorneys advise detainees about the immigration process, potential relief from deportation, and pro se advocacy

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36. Immigration Advocates Network, National Immigration Legal Services Directory (Jan. 30, 2013) (unpublished directory) (on file with author).
  37. Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 925-26 (2008).
  38. See, e.g., Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 107, 114 Stat. 1464, 1474-80 (codified as amended at 22 U.S.C.A. § 7105(b)(1)(B) (West, Westlaw through P.L. 112-283)) (authorizing representation of immigrant victims of human trafficking).
  39. *Immigration Law*, LEGAL AID FOUND. OF L.A., <http://www.lafla.org/service.php?sect=immigrate&sub=main> (last visited Feb. 7, 2013).
  40. By one estimate, less than one percent of the Legal Services Corporation (LSC) docket is for immigration matters. Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619, 655 (2011).
  41. *Legal Orientation Program*, VERA INST. OF JUST., <http://www.vera.org/project/legal-orientation-program> (last visited Apr. 1, 2013).

strategies.<sup>42</sup> Many programs have developed relationships with pro bono counsel willing to accept referrals of meritorious cases. However, coverage of LOPs remains modest: the program reaches only about half of detained immigrants<sup>43</sup> and funding cannot be used for individual legal representation.<sup>44</sup>

### *B. Pro Bono Representation*

Pro bono services from the private bar are an increasingly integral component of immigration legal services for the poor. According to a recent survey of pro bono programs at major law firms, one hundred percent of respondents included at least one immigration matter in their pro bono dockets.<sup>45</sup> A few law firms have significant institutional commitments to pro bono immigration work. For instance, attorneys at a number of large New York-based law firms have developed expertise in particular types of immigration cases, such as those involving asylum or unaccompanied minors.<sup>46</sup> Small firm and solo immigration practitioners in Los Angeles have formed a volunteer network to provide full-service representation to low-income workers arrested in immigration raids.<sup>47</sup>

Federal judicial circuits that handle the lion's share of immigration appeals

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42. NINA SIULC ET AL., VERA INST. OF JUST., LEGAL ORIENTATION PROGRAM: EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II, at iii, 14-19 (2008), <http://www.justice.gov/eoir/reports/LOPEvaluation-final.pdf>.

43. *Hearing on Improving Efficiency and Ensuring Justice in the Immigration Court System Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Juan P. Osuna, Acting Dir., Exec. Office of Immigration Review), <http://www.judiciary.senate.gov/pdf/5-18-11%20Osuna%20Testimony.pdf>.

44. Memorandum from Steven Lang, Program Dir., Exec. Office of Immigration Review, U.S. Dep't of Justice, to Oren Root, Dir., Ctr. on Immigration & Justice, Vera Inst. of Justice, Legal Orientation Program: Guidelines – Orientation vs. Representation (July 11, 2011) (on file with author).

45. Scott L. Cummings, *The Pursuit of Legal Rights – and Beyond*, 59 UCLA L. REV. 506, 536-38 (2012). A complementary analysis of nonprofit organizations that receive pro bono assistance from major law firms found that thirty percent of law firms worked with at least one immigration-focused nonprofit, and thirty-nine percent worked with at least one human rights organization that handles immigration cases. Steven A. Boutcher, *Lawyerling for Social Change: Pro Bono Publico, Cause Lawyering, and the Social Movement Society*, 18 MOBILIZATION (forthcoming 2013) (manuscript at 34 tbl.2) (on file with author).

46. Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 15 (2008).

47. Marielena Hincapié & Karen Tumlin, *The Los Angeles Rapid Response Network: How Advocates Prepared for and What They Learned from the Recent Workplace Raid in Van Nuys*, NAT'L IMMIGR. LAW CTR. IMMIGRANTS' RTS. UPDATE, June 19, 2008, [http://v2011.nilc.org/immseplymnt/wkplce\\_enfrmnt/iru-2008-06-18.pdf](http://v2011.nilc.org/immseplymnt/wkplce_enfrmnt/iru-2008-06-18.pdf).

are now active in promoting volunteer attorney involvement. In the Second Circuit, Judge Katzmann formed a Study Group on Immigrant Representation that, among other initiatives, established a pilot project to train and recruit pro bono immigration attorneys.<sup>48</sup> In the Ninth Circuit, Judge McKeown established a pro bono project at a San Diego nonprofit and encouraged law firm involvement by guaranteeing volunteers who handle Ninth Circuit immigration appeals a ten-minute oral argument before the court.<sup>49</sup> Most recently, Judge Chagares of the Third Circuit announced a new initiative to address gaps in accessing immigration counsel in New Jersey.<sup>50</sup>

Although still far below the levels needed, this growing involvement of pro bono attorneys in immigration cases is facilitated by a number of additional programs. The Pro Bono Project of the Board of Immigration Appeals assists in finding volunteer counsel for detained individuals with pending appeals.<sup>51</sup> In addition, nonprofit organizations provide essential training and litigation support to pro bono attorneys, many of whom otherwise lack the expertise to provide competent representation in complex immigration cases.<sup>52</sup>

### C. Law School Clinics

Law school clinics are a third important site for immigration legal services.<sup>53</sup> A recent national survey identified 120 distinct immigration clinics across the United States.<sup>54</sup> Immigration clinics can provide a vital service to

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48. Robert A. Katzmann, *Innovative Approaches to Immigrant Representation: Exploring New Partnerships*, 33 CARDOZO L. REV. 331 (2011).
  49. M. Margaret McKeown, *Dialogues on Detention: Loyola University New Orleans: Panel 3*, HUM. RTS. FIRST at 22:30 (Sept. 24, 2012), <http://www.humanrightsfirst.org/wp-content/uploads/audio/DialoguesCA-Panel3.mp3>.
  50. Katharina Obser & Andrea Guttin, *Building Justice—Key Stakeholders Look To Address Legal Representation Gaps for Immigrants in New Jersey*, HUM. RTS. FIRST (Jan. 30, 2013), <http://www.humanrightsfirst.org/2013/01/30/building-justice-key-stakeholders-look-to-address-legal-representation-gaps-for-immigrants-in-new-jersey>.
  51. *Office of Legal Access Programs*, U.S. DEP'T OF JUST., <http://www.justice.gov/eoir/probono/probono.htm> (last updated June 2012).
  52. The Los Angeles Public Counsel Law Center, the Washington Lawyers' Committee for Civil Rights and Urban Affairs, and New York-based Human Rights First are a few such organizations.
  53. See generally Peter H. Schuck, *INS Detention and Removal: A "White Paper,"* 11 GEO. IMMIGR. L.J. 667, 690 (1997) (arguing that law school clinic students "bring both zeal and imagination to the task" of immigrant representation).
  54. Anju Gupta, *Immigration Clinics List* (unpublished list) (on file with author). The current number of immigration clinics in the United States is particularly remarkable given that the first survey of clinical education conducted after *Gideon* found that only UCLA and Loyola

clients, especially in geographic or practice areas with unmet legal needs. For example, the immigration clinic at the University of California at Davis specializes in developing service delivery to remote detention locations and taking on complex conviction-based deportation cases.<sup>55</sup> The University of La Verne's immigration clinic is the only provider of asylum services in California's Inland Empire region.<sup>56</sup> The University of Massachusetts's clinical program expands regional immigration expertise by mentoring recent law graduates in addition to current students.<sup>57</sup> Although clinics provide essential contributions to legal services delivery, they cannot offer the high-volume assistance necessary to meet the growing demand, given the pedagogical goals of the law school environment.

As Part I establishes, access to free immigration counsel is distributed across a mixed model that relies on both public and private funding and offers both full-service and more limited forms of representation. Although immigration legal services have evolved significantly since *Gideon*, they do not come close to meeting the demand for civil representation. Part II turns to the criminal system and the role that *Gideon*-appointed counsel now plays in supplementing the civil delivery system for immigration legal services.

## II. IMMIGRATION REPRESENTATION INSIDE *GIDEON*

A half century after *Gideon*, immigration representation has become inextricably intertwined with criminal defense. Nevertheless, immigration representation within the modern *Gideon* defender system is not yet well defined or understood. In Part II, I identify four dimensions of immigration assistance that currently exist in many state and federal defense programs across the country: advising on immigration consequences, protecting against crime-based deportation, defending clients charged with immigration crime, and providing immigration legal services.

It is important to acknowledge that immigration representation, like other aspects of criminal defense work, is affected by the extreme variability in the

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Law School of Los Angeles had immigration clinical programs. COUNCIL ON LEGAL EDUC. FOR PROF'L RESPONSIBILITY, SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION 1972-73, 1-19 & tbl.1 (1973).

55. Kevin R. Johnson & Amagda Pérez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU L. REV. 1423, 1436-37 (1998).

56. See *Clinical Programs*, U. LA VERNE C. L., <http://law.laverne.edu/academics/clinical> (last visited Feb. 10, 2013) (describing the law school's Justice and Immigration Clinic).

57. Irene Scharf, *Nourishing Justice and the Continuum: Implementing a Blended Model in an Immigration Law Clinic*, 12 CLINICAL L. REV. 243, 262 (2005).

quality and funding of defender programs.<sup>58</sup> Therefore, especially with respect to the last dimension of immigration assistance that I discuss—providing affirmative immigration representation in immigration court—only a few model programs have begun this type of work. Yet, as I explain, the Supreme Court’s move to make immigration advising a constitutional imperative means that all programs must now incorporate a baseline of immigration consultation into their representation. That alone makes *Gideon* lawyers an essential institutional form of immigration defense.

### A. Advising on Immigration Consequences

In *Padilla v. Kentucky*,<sup>59</sup> the Supreme Court concluded that criminal lawyers must advise their noncitizen clients about the immigration consequences of a criminal plea. In doing so, the Court acknowledged that “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”<sup>60</sup> At the very least, *Padilla* requires that lawful permanent residents be accurately advised by their attorneys when the immigration consequence of conviction is clear.<sup>61</sup> Because of the complexity of immigration law, many defender programs have found it necessary to develop a system by which line attorneys can consult with immigration experts on a case-by-case basis.<sup>62</sup>

Public defender offices have adopted different approaches for integrating what is often referred to as “*Padilla* support” into their practice.<sup>63</sup> Some offices

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58. See generally Darryl Brown, *Epiphenomenal Indigent Defense*, 75 MO. L. REV. 907, 909-19 (2010) (identifying significant state-to-state variation in the funding and quality of public defender programs).

59. 130 S. Ct. 1473 (2010).

60. *Id.* at 1480 (footnote omitted).

61. *Id.* at 1483. But see César Cuauhtémoc García Hernández, *Padilla v. Kentucky’s Inapplicability to Undocumented and Non-Immigrant Visitors*, 39 RUTGERS L. REC. 47, 49-52 (2012) (arguing that the *Padilla* ruling only applies to lawful permanent residents); Yolanda Vázquez, *Realizing Padilla’s Promise: Ensuring Noncitizen Defendants Are Advised of the Immigration Consequences of a Criminal Conviction*, 39 FORDHAM URB. L.J. 169, 190 (2011) (raising the concern that *Padilla* advice need only be specific when deportation is certain).

62. See generally Ronald F. Wright, *Padilla and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515, 1518-19 (2011) (predicting that *Padilla* will promote a “more bureaucratic criminal defense” as large defense organizations bring immigration advising in-house).

63. For an excellent practice guide to implementing a public defender immigration services program, see Peter L. Markowitz, *Protocol for the Development of a Public Defender Immigration Service Plan*, IMMIGRANT DEF. PROJECT (2009), <http://www.nysda.org/docs/PDFs/CIDP/Protocol%20for%20the%20Development%20of%20a%20Public%20Defender.pdf>.

have hired in-house immigration specialists to advise line attorneys who encounter noncitizen clients. At the Los Angeles County Public Defender, an attorney in the office’s downtown Appellate Branch offers backup immigration support for defenders in the field.<sup>64</sup> In contrast, public defenders in Brooklyn and the Bronx have adopted what they refer to as an “embedded” approach to providing *Padilla* support.<sup>65</sup> In this model, a staff of in-house immigration attorneys works alongside criminal trial attorneys in courthouses and jailhouse lockups to provide simultaneous immigration and criminal advice from the point of the earliest meeting with a noncitizen client.<sup>66</sup> Other defender programs have partnered with nonprofit organizations specializing in immigration law. For example, the Florence Immigrant and Refugee Rights Project (Florence Project) serves as a statewide backup center for public defenders throughout Arizona.<sup>67</sup> Outside of institutional public defender practice, attorneys from law firms and solo practice accepting court appointments on criminal cases make increasing use of regional trainings on criminal immigration law<sup>68</sup> and develop informal relationships with local immigration attorneys.<sup>69</sup>

### *B. Protecting Against Crime-Based Deportation*

Bartering immigration consequences is now an inevitable part of the plea bargaining process. As Justice Stevens acknowledged in *Padilla*, defense counsel trained in immigration law “may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, principally by avoiding a conviction for an offense

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64. Telephone Interview with Graciela Martinez, Deputy Pub. Defender and Immigration Res. Att’y, Appellate Div., Law Office of the L.A. Cnty. Pub. Defender, L.A., Cal. (Aug. 13, 2010) (explaining that the public defender’s Appellate Branch provides technical and research support for trial attorneys).
  65. Telephone Interview with Marianne Yang, Supervising Att’y, Brooklyn Defender Servs., Brooklyn, N.Y. (Jan. 18, 2013).
  66. *Id.*
  67. Telephone Interview with Kara Hartzler, Criminal Immigration Consultant and Legal Dir., Florence Immigrant & Refugee Rights Project, Florence, Ariz. (Aug. 25, 2010).
  68. One highly regarded seminar is taught throughout the country by criminal defense attorney Norton Tooby, who specializes in the defense of immigrants. *Seminars*, LAW OFFICES OF NORTON TOOBY, <http://nortontooby.com/resources/seminars> (last visited Feb. 25, 2013).
  69. Telephone Interview with Yalila Guerrero, Attorney, Hous., Tex. (Aug. 27, 2010) (describing Houston’s informal practice of immigration attorneys consulting with criminal defense attorneys).

that automatically triggers the removal consequence.”<sup>70</sup> The importance of seeking so-called immigration-safe plea bargains was further elevated by the Supreme Court’s clarification in *Lafler v. Cooper* that the Sixth Amendment right to effective assistance of counsel extends to the plea bargaining process.<sup>71</sup>

On the ground, public defenders are developing increasingly sophisticated understandings of how to protect their noncitizen clients from crime-based deportation. For clients who are lawful permanent residents or who may otherwise qualify for relief, it is sometimes possible to negotiate a plea to an alternative charge that will not trigger deportation proceedings, or otherwise keep open avenues of relief from deportation.<sup>72</sup> The prominence of the immigration concern may also influence clients to go to trial in the hope of an acquittal, rather than accept a plea that would foreclose the ability to remain in the country. Even for clients without current lawful status, appointed counsel can play a role in preventing deportation. For example, to avoid the initiation of deportation proceedings, a defender may negotiate release from custody prior to jail-based screening of her client’s immigration status. Or, the criminal attorney may advise the client regarding available relief from deportation, such as cancellation of removal or asylum.<sup>73</sup>

### C. *Defending Against Criminal Immigration Charges*

Over the past fifty years, federal criminal prosecutions for immigration-related offenses—principally illegal entry, illegal reentry after deportation, and alien smuggling—have expanded exponentially.<sup>74</sup> In the federal districts along the Mexican border, some public defenders have caseloads that are primarily composed of immigration crimes.<sup>75</sup> Even in the state system, immigration crimes are turning up on county-level criminal dockets—such as alien

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70. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

71. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1384, 1388 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials.”).

72. For a pessimistic view that the ability of defense counsel to secure immigration-safe pleas will be quite limited in practice, see Darryl K. Brown, *Why Padilla Doesn’t Matter (Much)*, 58 UCLA L. REV. 1393 (2011).

73. Interview with Rosa Fregoso, Deputy Alternate Pub. Defender, Alternate Pub. Defender of L.A. Cnty., L.A., Cal. (Nov. 18, 2010).

74. Eagly, *supra* note 24, at 1352-53 & fig.4 (charting annual prosecutions of federal immigration crimes from 1923 to the present).

75. For example, in the Southern District of Texas, about two-thirds of all criminal cases commenced in federal district court in 2012 were for immigration crimes. Hogan, *supra* note 24, tbl.D-3, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/Do3DSEp12.pdf>.

smuggling in Maricopa County, Arizona.<sup>76</sup>

The defense attorney's role in immigration crime is one that integrates immigration counsel and advice. For instance, in defending clients charged with illegal reentry after deportation,<sup>77</sup> public defenders must determine whether the defendant's underlying deportation was properly executed.<sup>78</sup> Due process can be violated in a deportation hearing by errors such as ineffective assistance of counsel<sup>79</sup> or failure of the immigration judge to advise the immigrant of available relief from deportation.<sup>80</sup> When the attorney identifies such inadequacies in the underlying deportation, part of the defense may include asking the immigration court or agency to remedy the error. For example, in the process of advising a defendant charged with an immigration crime, counsel may discover that the client is a U.S. citizen rather than an unlawful entrant.<sup>81</sup> In such cases, defense counsel may obtain birth records, pursue DNA testing, and interview relatives to conclusively establish the client's citizenship.<sup>82</sup>

#### *D. Providing Immigration Legal Services*

A few public defender offices now provide representation on immigration matters beyond mere advice, plea negotiation, or defending a criminal immigration charge. The starkest example of this trend is the establishment of full-service immigration legal services projects within public defender offices.<sup>83</sup>

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76. Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749 (2011).

77. 8 U.S.C. § 1326 (2006).

78. *United States v. Mendoza-Lopez*, 481 U.S. 828, 833-42 (1987) (concluding that defendants charged with reentry after deportation may collaterally attack the validity of the predicate deportation on due process grounds).

79. *See, e.g., Magallanes-Damian v. INS*, 783 F.2d 931, 933 (9th Cir. 1986).

80. *See, e.g., United States v. Leon-Paz*, 340 F.3d 1003, 1005-07 (9th Cir. 2003).

81. Political scientist Jacqueline Stevens has found that since 2003 more than twenty thousand United States citizens have been detained or deported by federal immigration authorities. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 608 (2011).

82. *See, e.g., United States v. Thompson-Riviere*, 561 F.3d 345, 349 (4th Cir. 2009) (describing how federal public defenders established, through DNA evidence, that a reentry defendant was the biological son of a United States citizen).

83. Across academic and professional circles, there is increasing support for the provision of civil "supporting services" or "reentry services" for criminal defendants. *See generally* Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 20 N.Y.U. REV. L. & SOC. CHANGE 585, 612-13 (2006).



At Brooklyn Defender Services, an in-house Immigration Unit employs seven staff attorneys who not only advise their clients on “the best possible criminal defense from an immigration perspective,” but also “defend against their immigration detention and deportation in immigration court and with detention officers.”<sup>84</sup> For those clients who might be eligible for citizenship or lawful permanent residency, Brooklyn Defender immigration attorneys assist in obtaining such benefits.<sup>85</sup> Similarly, the Bronx Defenders established a Center for Holistic Defense, which includes comprehensive immigration legal services.<sup>86</sup>

In Los Angeles, one notable form of immigration assistance is provided by county public defenders who counsel juvenile defendants regarding a unique form of immigration relief for unaccompanied minors, known as Special Immigrant Juvenile Status (SIJS).<sup>87</sup> The involvement of public defenders in seeking SIJS relief is facilitated by the fact that federal law authorizes state court judges to certify a child’s threshold eligibility.<sup>88</sup> In practice, some county defenders not only assist their young clients in identifying their eligibility to remain legally in the country, but also fill out and file the necessary paperwork.<sup>89</sup>

Immigrant legal services are also provided by some public defenders in the federal system. Under the Criminal Justice Act (CJA), which governs the use of federal funds for the public defender system, federal judges have the discretion to appoint counsel in several areas that go beyond the core trial function in a criminal case. For example, CJA funds may be used to appoint counsel on certain types of habeas petitions.<sup>90</sup> In this capacity, the federal defender offices in Los Angeles, San Diego, and Seattle are known for their work on behalf of

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84. *About Us: Immigration Unit*, BROOKLYN DEFENDER SERVICES, <http://www.bds.org/aboutus/ImmigrationUnit.aspx> (last visited Apr. 1, 2013).

85. *Id.*

86. *We Stabilize Lives Through Civil Advocacy*, BRONX DEFENDERS, <http://www.bronxdefenders.org/our-work/we-stabilize-lives-through-civil-advocacy> (last visited Apr. 1, 2013).

87. Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1101(a)(27)(J) (2006)).

88. 8 U.S.C. § 1101(a)(27)(H)(i) (2006) (providing that a state court judge, rather than an immigration judge, may make the threshold finding of eligibility).

89. Thank you to Kristen Jackson of Public Counsel for bringing this practice to my attention. See generally Kristen Jackson, *Special Status Seekers*, 4 L.A. LAW., Feb. 2012, at 20.

90. 18 U.S.C. § 3006A(a)(2)(B) (2006) (permitting discretionary appointments for counsel to represent an indigent habeas petitioner in federal court).

noncitizens detained for prolonged periods in immigration custody.<sup>91</sup> In fact, it was two federal public defenders who litigated the landmark Supreme Court case recognizing necessary limits on prolonged immigration detention “in order to avoid serious constitutional threat.”<sup>92</sup> Today, when detainees with final deportation orders are held beyond a reasonable period—generally six months—federal defenders may be appointed to litigate the propriety of the continued detention.<sup>93</sup>

Beyond work representing detainees, some federal public defenders may provide additional immigration legal services on a case-by-case basis. CJA funding specifically allows for the provision of representation on “ancillary matters” necessary for the proper representation of criminal defendants.<sup>94</sup> At times, such ancillary services will include immigration-related concerns. For example, an attorney appointed pursuant to the CJA may need to assist a noncitizen client in obtaining an immigration bond if the client would otherwise remain detained pending the criminal case.<sup>95</sup> Appellate CJA attorneys may discover that trial counsel was ineffective in failing to advise on immigration consequences and may affirmatively move to vacate the earlier conviction.<sup>96</sup> Or, defense attorneys appointed under the CJA to represent

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91. See, e.g., Order of the Chief Judge, *In re Indefinite Detention Cases*, No. CV 98-5016 (C.D. Cal. Aug. 11, 1999) (on file with author) (ordering that the Federal Public Defender be appointed to represent habeas petitioners challenging indefinite detention).
  92. *Zadvydys v. Davis*, 533 U.S. 678, 682, 699 (2001). Jay Stansell of the Federal Public Defender of Washington and Robert Bernard of the Federal Public Defender of the Eastern District of Louisiana represented the respondents.
  93. *Id.* at 699. It is important to acknowledge that similar challenges are currently being brought to establish reasonable limits on pre-final-order mandatory detention. Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention* (SSRN Elec. Library, Working Paper No. 2,176,008, 2012), <http://ssrn.com/abstract=2176008>. A similar right to appointed habeas counsel could apply to detainees seeking release under such orders.
  94. 18 U.S.C. § 3006A(c); see also S. REP. No. 91-790, at 6-7 (1970) (“[T]he express inclusion of ‘ancillary matters appropriate to the proceedings’ will insure that the attorney who spends time and effort to protect a right considered valuable in defending the principal criminal charge can be compensated under the act.”).
  95. See generally Eagly, *supra* note 24, at 1304-08 (describing the disruption that occurs in the normal criminal bail process when immigration authorities lodge what is known as an “immigration detainer”).
  96. Federal appellate attorney Davina Chen recently did just that when she learned that a legal permanent resident was not advised about immigration consequences prior to her guilty plea. Ex Parte Application for Appointment of Counsel for Motion Pursuant to 28 U.S.C. § 2255, *United States v. Obileye*, No. CR 09-662 (C.D. Cal. Sept. 13, 2011) (on file with author) (seeking appointment of conflict-free CJA counsel to “advise and pursue relief” on habeas, pursuant to 18 U.S.C. § 3006A(a)(2)(B)).

material witnesses in smuggling and trafficking cases<sup>97</sup> may assist their noncitizen clients to obtain visas designed to protect crime victims.<sup>98</sup>

In short, the counseling role of criminal defense attorneys now demands significant immigration expertise. While this trend is particularly notable in model defense programs in large urban centers, this shift in practice also reflects an obligation to advise regarding immigration consequences and a dramatic increase in immigration crime prosecution. This transition in indigent criminal defense practice also foreshadows one of the pivotal questions in the field, to which I now turn: Is there a *Gideon* right to appointed counsel for immigration proceedings?

### III. GIDEON'S MIGRATION

Thus far, this Essay's analysis of indigent defense practice demonstrates that appointed defense counsel now constitutes a recognizable form of institutional immigration representation. Identifying this new practice terrain exposes an informal functional migration of the role of *Gideon*-appointed counsel into the role of immigration advisor. Part III builds on this insight by exploring the potential for a legally mandated right to appointed counsel in immigration proceedings. Planning for this possible future migration also requires consideration of how indigent immigration representation ought to be structured, funded, and staffed.

#### A. A Right to Appointed Immigration Counsel

For some time, prominent immigration scholars have dismissed the idea that the Sixth Amendment could require appointment of counsel in immigration matters.<sup>99</sup> According to this view, deportation remains sufficiently

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97. 18 U.S.C. § 3006A(a)(1)(G).

98. See generally Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247, 284-86 (detailing the types of visas available to immigrant crime victims).

99. See, e.g., Legomsky, *supra* note 13, at 58 ("The Sixth Amendment is, after all, expressly limited to 'criminal prosecutions.'"); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1773 (2010) ("The Sixth Amendment to the U.S. Constitution does not support a right to counsel in immigration proceedings, according to long-standing precedent."); Anne R. Traum, *Constitutionalizing Immigration Law on Its Own Path*, 33 CARDOZO L. REV. 491, 547 (2011) (arguing that a *Padilla*-based rationale for immigration counsel "does not appear imminent").

distinct from punishment to make the Sixth Amendment inapplicable.<sup>100</sup> Especially after *Padilla*, however, there is reason to question the conventional rejection of the Sixth Amendment's place in the immigration context.

A concrete example of *Gideon*'s potential to migrate further is the straightforward realization that counsel may now be required in minor criminal cases where immigration consequences are at stake. The Supreme Court has long held that where a criminal conviction will not result in imprisonment, but instead only in a fine, the Sixth Amendment does not require appointed counsel.<sup>101</sup> Yet, even fine-only crimes can result in a noncitizen's deportation.<sup>102</sup> Arguably, therefore, the pool of *Gideon*-funded defense should expand to provide a new form of noncitizen representation—immigration advice on petty criminal charges.<sup>103</sup>

The logic that supports immigration counseling as part of the criminal process mandated by the Sixth Amendment may also require appointment of *Gideon* counsel in other contexts. Some immigration scholars now argue that the Sixth Amendment in a post-*Padilla* world necessitates appointing counsel for immigrants facing deportation based on a criminal conviction.<sup>104</sup> At the very least, as Daniel Kanstroom contends, the Sixth Amendment may require appointed counsel in crime-based deportation proceedings of “long-term permanent residents.”<sup>105</sup> The growing awareness of parallels between immigration detention and criminal punishment supports these arguments.<sup>106</sup>

Apart from the Sixth Amendment, there is also intense interest in

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100. See generally *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry.”).

101. *Scott v. Illinois*, 440 U.S. 367 (1979).

102. See generally Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 298-303 (2011) (highlighting the salience of minor misdemeanors for noncitizens).

103. For further development of this argument, see Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 606-07 (2011).

104. See, e.g., Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1359-60 (2011); Maureen Sweeney & Hillary Scholten, *Penalty and Proportionality in Deportation for Crimes*, 31 ST. LOUIS U. PUB. L. REV. 11, 12 (2011).

105. Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1514 (2011).

106. See, e.g., Beth Caldwell, *Banished for Life: Mandatory Deportation of Juveniles as Cruel and Unusual Punishment*, 34 CARDOZO L. REV. (forthcoming 2013); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 340 n.148 (2000).

establishing a Fifth Amendment due process right to appointed immigration counsel.<sup>107</sup> As the Sixth Circuit held a decade after *Gideon*, deportation counsel for the poor could be constitutionally required if “necessary to provide ‘fundamental fairness—the touchstone of due process.’”<sup>108</sup> Although courts have repeatedly rejected attempts to solidify a right to deportation defense, a number of scholars and advocates now argue that a right to appointed counsel ought to attach to at least some immigration proceedings. Kevin Johnson has made a compelling case for appointed deportation counsel for all indigent lawful permanent residents.<sup>109</sup> Others have presented narrower arguments for appointed counsel at points where rights deprivations are most severe, such as when a lawful resident seeks release from custody<sup>110</sup> or is forced to defend against deportation while detained.<sup>111</sup> Additional due process proposals have focused on the heightened need for appointed counsel among certain vulnerable groups of immigrant clients, such as asylum seekers,<sup>112</sup> children,<sup>113</sup> and the mentally incompetent.<sup>114</sup>

The Supreme Court’s most recent pronouncement on the right to appointed counsel was a disappointment for many civil *Gideon* advocates, but nonetheless could support an expanded right to appointed counsel in some immigration contexts. In *Turner v. Rogers*, the Court considered a father’s request for counsel in a civil contempt proceeding that could have resulted in his imprisonment for failure to pay child support.<sup>115</sup> Although the Court

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107. Such arguments are by no means new. See, e.g., William Haney, *Deportation and the Right to Counsel*, 11 HARV. INT’L L.J. 177, 185 (1970) (arguing that a “functional” due process analysis requires recognition of an “unqualified right to be represented by counsel” in deportation proceedings).
  108. *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6th Cir. 1975) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).
  109. Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394 (2013).
  110. Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 68 (2012).
  111. Michael Kaufman, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 114-15 (2008).
  112. Elizabeth Glazer, Note, *The Right to Appointed Counsel in Asylum Proceedings*, 85 COLUM. L. REV. 1157 (1985).
  113. Linda Kelly Hill, *The Right To Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41 (2011).
  114. Helen Eisner, Comment, *Disabled, Defenseless, and Still Deportable: Why Deportation Without Representation Undermines Due Process Rights of Mentally Disabled Immigrants*, 14 U. PA. J. CONST. L. 511 (2011).
  115. *Turner v. Rogers*, 131 S. Ct. 2507 (2011).

unanimously rejected the noncustodial parent's due process claim to appointed counsel, a five-Justice majority agreed that access to appointed counsel in a civil case where incarceration is at stake requires weighing case complexity, representation status of the parties, and available procedural safeguards.<sup>116</sup> Therefore, under *Turner*, relevant factors in the immigration context include the complicated nature of immigration law, the immigration agency's deployment of lawyers to represent the government in deportation proceedings, and the lack of meaningful safeguards in deportation courts. Arguably, these balancing factors tilt in favor of appointing immigration counsel for the poor, particularly in the detention setting.

To date, the most significant effort to recognize a right to appointed immigration counsel is one brought by a coalition of civil rights groups and pro bono counsel on behalf of a class of unrepresented, mentally incompetent noncitizens in detention. The plaintiffs in *Franco-Gonzales v. Holder* argue that the refusal to provide counsel at government expense for mentally incompetent noncitizens constitutes a denial of due process.<sup>117</sup> Although the suit is ongoing, the district court has issued a preliminary injunction mandating that the detainees be afforded a "qualified representative" to represent them in all phases of their immigration proceedings, including detention hearings.<sup>118</sup> Although the court's reasoning has been grounded in due process logic, the preliminary order to appoint representation is technically based on the statutory requirements of the Rehabilitation Act.<sup>119</sup>

The *Franco-Gonzales* court's reliance on a statutory right to counsel (under the Rehabilitation Act) highlights another important avenue for expanding the poor's access to representation. Regardless of how courts ultimately resolve the constitutional question, all levels of government retain the ability to take legislative action to expand access to appointed counsel. A full-fledged immigration representation program has yet to be enacted, but lawmakers have begun to recognize the enhanced need for counsel with respect to certain categories of immigrant claimants. A prime example is the Trafficking Victims Protection Reauthorization Act of 2008, which requires that the Secretary of

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116. *Id.* at 2518-20.

117. *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1038 (C.D. Cal. 2010) (order granting preliminary injunction).

118. *Id.* at 1061.

119. *Id.* at 1051-56 (citing Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794(a) (2006)). For analysis of the process by which courts use constitutional norms as background to interpret immigration statutes, see Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

Health and Human Services “ensure, to the greatest extent practicable” that “all unaccompanied alien children . . . have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.”<sup>120</sup> Another example is President Obama’s proposed immigration reform bill, which includes language providing that in some cases the government may appoint counsel to represent immigrants in deportation proceedings and establishes a pilot program to provide counsel for children and mentally incompetent immigrants.<sup>121</sup>

At the state level, the broader civil *Gideon* movement has for some time tried to create a statutory right to counsel for the poor.<sup>122</sup> Some state initiatives have been successful. Consider, for example, California’s recent establishment of a pilot project to provide indigent legal services in cases affecting “basic human needs.”<sup>123</sup> The movement to migrate the *Gideon* right into immigration proceedings has similarly included proposals that state governments guarantee immigrant representation in the face of a federal government that has not done so on a meaningful scale. For example, Florida passed a law requiring that poor children throughout the state be provided immigration counsel to obtain SIJS relief.<sup>124</sup> The Boston Bar Association proposed that Massachusetts ensure representation in cases where immigrants are detained, placed in deportation proceedings as a result of a criminal offense, or seeking asylum.<sup>125</sup> More recently, prominent immigration experts called for New York to establish a system to appoint counsel for all detained migrants in the state.<sup>126</sup>

Short of crafting a statutory right for a specific group, discretionary

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120. 8 U.S.C. § 1232(c)(5), (6) (2006).

121. White House Draft Immigration Reform Bill tit. I, § 158 (Feb. 13, 2013), <http://www.nilc.org/document.html?id=853> (“Increasing Access to Legal Services”).

122. See, e.g., Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 LOY. L.A. L. REV. 1087, 1114 (2009) (advocating that future legislation providing for a civil right to counsel be attached to larger legislation aimed at solving wider social problems); Clare Pastore, *A Civil Right to Counsel: Closer to Reality?*, 42 LOY. L.A. L. REV. 1065, 1068-69 (2009) (noting that seven states recently enacted laws expanding the right to counsel in civil cases).

123. *Fact Sheet: Sargent Shriver Civil Counsel Act (AB 590) (Feuer)*, CAL. ADMIN. OFF. OF THE CTS. (Aug. 2012), <http://www.courts.ca.gov/documents/AB-590.pdf>.

124. FLA. STAT. ANN. § 39.5075 (West 2010).

125. Task Force on Expanding the Civil Right to Counsel, *Gideon’s New Trumpet: Expanding the Civil Right to Counsel in Massachusetts*, BOS. B.A. 21-25 (Sept. 2008), [http://www.bostonbar.org/prs/nr\\_o809/gideonsnewtrumpet.pdf](http://www.bostonbar.org/prs/nr_o809/gideonsnewtrumpet.pdf).

126. *Accessing Justice II: A Model for Providing Counsel to New York Immigrants in Removal Proceedings*, STUDY GROUP ON IMMIGRANT REPRESENTATION 1 (Dec. 2012), [http://cardozolawreview.com/content/denovo/NYIRS\\_ReportII.pdf](http://cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf) [hereinafter *Accessing Justice II*].

government funding for indigent representation has been secured in certain types of immigration cases.<sup>127</sup> The most prominent source of current federal funding for immigration counsel is the LOP initiative to advise immigration detainees. At the state level, there are also a few examples, such as the recent award of state funding to hire new immigration lawyers at public defender offices in New York City.<sup>128</sup> The Mexican government has also supplied a pool of funding for representation of its nationals in cases that may lead to lawful status, such as those involving victims of domestic violence and deferred action for early arrivals.<sup>129</sup>

In sum, regardless of the source of the right or funding, the growing consensus among immigration experts is that at least some poor immigrants ought to be provided counsel at government expense. This realization leads to a final crucial question: How should the future system for indigent noncitizen defense be built?

### *B. Building an Immigration Gideon System*

The immigration system now finds itself in the same posture as state criminal courts did at the time of Clarence Gideon's Florida trial. Under the rule of *Betts v. Brady*,<sup>130</sup> state criminal courts were constitutionally required to supply counsel to the indigent only where "special circumstances" were present. In the immigration system today there is a similar due process framework for case-by-case evaluation of the right to appointed counsel. However, because a federal court has yet to find that counsel is constitutionally required if an immigrant cannot afford it, pro bono counsel is, like in Florida at the time of Gideon's trial, only sometimes available.

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127. The United States Department of Justice has confirmed that federal law permits the use of federal discretionary funding for immigration representation. Letter from David A. Martin, Principal Deputy Gen. Counsel, Office of the Gen. Counsel, U.S. Dept. of Homeland Security, to Thomas J. Perrelli, Assoc. Att'y Gen., U.S. Dept. of Justice (Dec. 10, 2010) (on file with author).

128. Press Release, Mayor Bloomberg, Deputy Mayor Robles-Roman, and Chief Policy Adviser John Feinblatt Announce Expansion of Legal Services for Immigrants (Nov. 21, 2011), <http://www.nyc.gov/html/om/html/2011b/pr419-11.html>.

129. The Mexican government's program, known as "Programa de Asesorías Legales Externas en EUA," is implemented through its regional consulate offices. See, e.g., *Protección a Mexicanos*, CONSULADO GENERAL DE MÉXICO EN NUEVA YORK, <http://consulmex.sre.gob.mx/nuevayork/index.php/es/proteccion-a-mexicanos-ny> (last visited Feb. 7, 2013) (describing a consular program to offer free immigration consultations for Mexican nationals in New York, New Jersey, and Connecticut).

130. 316 U.S. 455 (1942).



During the years prior to *Gideon*, some criminal justice experts advocated a universal and high-quality public defender system, whereas others promoted a more limited approach to funding defense counsel in only the most crucial cases and when necessary to preserve the legitimacy of the justice system.<sup>131</sup> As this Essay has shown, similar debates are now active in the immigration system. At one end of the continuum, the future immigrant defender system would require the government to provide a lawyer for every immigrant in every deportation hearing regardless of the noncitizen's immigration claim, detention status, or likelihood of obtaining relief. At the other end of the continuum, counsel could be provided only to ensure fairness in cases in which rights deprivations are most acute.

Deciding between these different approaches invites exploration of three somewhat competing goals that have influenced the current system for indigent criminal defense—equality, efficiency, and efficacy. First, with respect to equality, the Supreme Court's decision in *Gideon* was clearly rooted in the ideal that the division between rich and poor should not predetermine guilt in a criminal case. As Justice Black explained, the “noble ideal” of equality will erode if “the poor man charged with a crime has to face his accusers without a lawyer to assist him.”<sup>132</sup> Accordingly, to preserve equal access to justice, “any person haled into court, who is too poor to hire a lawyer” must be provided counsel.<sup>133</sup> Less explicitly, *Gideon* was also a case about racial equality. Indeed, in a post-*Brown v. Board of Education*<sup>134</sup> world, many of the Warren Court's constitutional criminal procedure decisions can be understood as seeking a level playing field within a society fraught with racial inequalities.<sup>135</sup>

Just as in the 1960s criminal justice system, some modern arguments in favor of expanded access to immigration counsel build on equality ideals. Equality between rich and poor is one important motivator in the immigration

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131. Barbara A. Babcock, *Inventing the Public Defender*, 43 AM. CRIM. L. REV. 1267, 1274-77 (2006).

132. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

133. *Id.* Prominent commentators at the time also stressed the importance of economic equality in the administration of the judicial system. See, e.g., Robert F. Kennedy, *The Department of Justice and the Indigent Accused*, 47 J. AM. JUD. SOC. 182, 182 (1964) (“Equality of justice in our courts should never depend upon the defendant's wealth or lack of resources, but in all honesty we must admit that we have failed frequently to avoid such a result.”).

134. 347 U.S. 483 (1954).

135. See, e.g., Anthony V. Alfieri, *Gideon in White/Gideon in Black: Race and Identity in Lawyering*, 114 YALE L.J. 1459, 1461 (2005) (explaining how the lawyering of Clarence Gideon's case was “tightly fastened” to principles of both economic and racial justice); Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236 (2013) (arguing that, although unsuccessful in this aim, *Gideon* was designed to guard against race discrimination).

*Gideon* movement. One such proposal is that of the ABA, which recently affirmed that “[a]dequate legal representation is a hallmark of a just system of law” and a necessary component of the legitimacy of the immigration system.<sup>136</sup> The consideration of equality across all groups of immigrants, rather than simply lawful permanent residents or those with the strongest claims for relief, is also heard in equality-based calls for appointed immigration counsel. Judge Katzmann’s Study Group on Immigrant Representation has gone so far as to characterize a “universal” system of immigration representation that only screens “for income eligibility” as a “moral imperative.”<sup>137</sup> The American Immigration Council similarly has described a national “guarantee” of access to counsel “at every stage of the removal process” as necessary to comport with “American values of due process and fundamental fairness.”<sup>138</sup>

Equality also has a special meaning in the immigration field, where the federal government has taken a hard line in preserving federal control over immigration.<sup>139</sup> When states become more involved in immigrant defense systems, state-by-state asymmetry in adjudication of immigration cases will necessarily result. Equality in the context of immigration federalism therefore might support a federal solution so as to prevent patchwork implementation of the nation’s immigration laws. Yet, whether the federal government really wants national equality in access to representation remains to be determined. As detained Salvadorans brought to light in a major class action filed in the 1980s, the immigration agency routinely broke their relationships with counsel by transferring them to geographically remote detention locations.<sup>140</sup> Today it remains true that detained immigrants are unlikely to secure counsel when transferred out of major cities to detention centers with few pro bono

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136. Comm’n on Immigration, *Reforming the Immigration System: Proposals To Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, A.B.A. 5-11 (Feb. 2010), [http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba\\_complete\\_full\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf).

137. *Accessing Justice II*, *supra* note 126, at 6, 18.

138. *Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice*, AM. IMMIGR. COUNCIL 1 (Mar. 2013), [http://www.immigrationpolicy.org/sites/default/files/docs/aic\\_twosystemsofjustice.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/aic_twosystemsofjustice.pdf).

139. For example, the federal government sued Arizona to prevent state enforcement of an aggressive immigration law known as SB 1070. *Arizona v. United States*, 132 S. Ct. 2492 (2012).

140. *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1498-1503 (C.D. Cal. 1988), *aff’d sub nom.* *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

resources.<sup>141</sup> A universal system of representation, rooted in ideals of equality, would effectively eliminate the significance of such transfers for accessing deportation counsel.

At the level of practice, one approach to adopting a universal system of appointed counsel for the poor is to situate immigration services within existing public defender offices. The CJA, which funds the Federal Public Defender, already includes a catchall provision that allows for the appointment of federal defenders whenever liberty is at stake and “federal law requires appointment of counsel.”<sup>142</sup> Accordingly, whether a right to immigration counsel is ultimately grounded in the constitution or statute, courts could potentially draw on the existing federal defender system to supply representation. The mentally disabled immigration detainees in *Franco-Gonzales* have made precisely this argument.<sup>143</sup> Moreover, the Federal Public Defender for the Central District of California has agreed to accept representation if requested by the federal court.<sup>144</sup>

Alternatively, a public defender approach fostering the equality rationale could be built outside the criminal justice system. Some years ago, David Martin, former General Counsel of the Immigration and Naturalization Service, suggested that Congress do just that by adopting a “public defender model” with a “permanent staff of government-paid lawyers” to represent asylum seekers in adversarial proceedings.<sup>145</sup> The Study Group on Immigrant Representation has similarly proposed a public defender-type approach that would use a small number of “service provider organizations” with experience in the field.<sup>146</sup>

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141. Study Grp. on Immigrant Representation, *supra* note 34, at 363 (finding that immigrants transferred to detention locations outside of New York City were unrepresented seventy-nine percent of the time).

142. 18 U.S.C. § 3006A(a)(1)(I) (2006). *See generally* H.R. REP. NO. 91-1546 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3955, 3982 (providing that the purpose of the catchall provision was to “obviate[] the need to amend the Act each time the right to counsel may be extended to new situations”).

143. Memorandum of Points and Authorities in Support of Motion for a Preliminary Injunction at 2, *Franco-Gonzalez v. Napolitano*, No. CV 10-2211 (C.D. Cal. filed June 13, 2011) (on file with author).

144. *Id.* at 34 exhibit 158 (Declaration of Federal Public Defender Sean K. Kennedy) (explaining that “the FPDO has determined that the Criminal Justice Act (CJA) would authorize their appointment . . . to represent detained mentally disabled persons facing removal proceedings”).

145. David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1329-30 (1990).

146. *Accessing Justice II*, *supra* note 126, at 20-21.

Efficiency is a second goal that is frequently articulated for the future immigrant defense system. *Gideon* is instructive here as well. Efficiency arguments were often made in support of the early public defender systems. Establishing institutional public defender offices could provide cost effective, high-quality representation. Yet, even in the era immediately after *Gideon*, some proponents supported institutional defender services not for their potential to provide zealous advocacy, but rather for the money they could save counties by facilitating jury trial waivers and speedy plea bargains.<sup>147</sup> Similar issues are seen today, as some counties seek to cut costs by issuing public defender contracts on a competitive basis to the lowest bidder—so-called Walmart-style criminal justice.<sup>148</sup>

An efficiency rationale can already be observed in the nascent immigration defense system. The rapid expansion of LOPs after a successful pilot project at the Florence Project in Arizona was based in part on findings that the orientation program shortened case processing time and reduced nonmeritorious appeals.<sup>149</sup> More recently, Attorney General Eric Holder relied explicitly on the efficiency rationale in promoting the fact that the LOP initiative costs the government only \$100 per detainee, but saves the government “upwards of \$1,300” in court, detention, and other costs.<sup>150</sup>

A focus on efficiency could support a future system built on Congress’s existing commitment to fund LOP-based detention programs. Lindsay Marshall, Executive Director of Arizona’s Florence Project, has stressed the efficiency benefit that LOP-type programs can provide by screening out immigrants who have no potential relief.<sup>151</sup> Peter Markowitz has similarly suggested that, at least for some types of deportation cases, “an impartial entity” could be asked to determine whether a legal or factual issue in the case

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147. Ellery E. Cuff, *Public Defender System: The Los Angeles Story*, 45 MINN. L. REV. 715, 723-24 (1961).

148. Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 300-07 (2009) (concluding that some California counties have adopted “a system whereby processing the ‘presumed guilty’ as cheaply as possible has been made the higher priority than investigating the possibility of innocence”).

149. SIULC ET AL., *supra* note 42, at iv-v, 7-9, 47-68.

150. Eric Holder, Att’y Gen., Speech Addressing the Pro Bono Institute (Mar. 19, 2010) (transcript available at <http://www.justice.gov/ag/speeches/2010/ag-speech-100319.html>).

151. Lindsay Marshall, *Dialogues on Detention: Arizona State University: Panel 4*, HUM. RTS. FIRST at 31:15-33:18 (Oct. 12, 2012), <http://www.humanrightsfirst.org/our-work/refugee-protection/immigration-detention/arizona-state-university> (arguing that if people are going to remain detained, a “hybrid approach” that involves both a LOP-type pro se project and an appointed attorney would “make sense”).

“would warrant appointment of counsel.”<sup>152</sup> In contrast to the traditional public defender system that represents every client regardless of potential case outcome, the efficiency rationale promotes formalized triage to prioritize meritorious and complex cases.<sup>153</sup>

As noted earlier, the efficiency rationale is not entirely foreign to the criminal justice system. Some criminal law scholars would favor screening public defender cases to concentrate resources on the factually innocent<sup>154</sup> or those facing the most severe sentences or consequences.<sup>155</sup> Nonetheless, efficiency as a guiding principle for developing an immigrant defense system is not without its critics. As immigration scholar Margaret Taylor argued at the time the LOP was expanded, it can be “a risky strategy” to rely on efficiency to promote representation for noncitizens in an adversarial setting.<sup>156</sup> While the criminal justice system has shown that efficiency may be achieved when a plea bargain is truly advantageous to the client, effective counsel in an adversarial system also means that some cases will be prolonged by motions, trials, and appeals. Indeed, when Fred Turner represented Gideon on retrial, he spent three days investigating the case and discovered that the prosecution’s star witness was an alternative culprit of the pool hall burglary.<sup>157</sup> The Florida jury’s “not guilty” verdict remains a testament to the profound difference that good lawyering can make.

The concern that promoting efficiency dilutes lawyer worth in an adversarial setting brings into focus the third potential goal of the future immigration defender system: efficacy. Regardless of the breadth of a right to appointed counsel, it will mean little if government-funded immigration attorneys are not given the tools to prevail in litigation where the federal government sits on the other side of the courtroom. Yet, the immigration system has a troubled relationship with the meaning of effective legal representation. In the final months before President Obama took office, Attorney General Michael Mukasey concluded that there is no constitutional

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152. Markowitz, *supra* note 104, at 1358-59.

153. The Migration Policy Institute has also promoted such screening programs in efficiency terms, as an “excellent, lower cost” approach to immigration representation. Donald Kerwin, *Revisiting the Need for Appointed Counsel*, MIGRATION POL’Y INST. INSIGHT 13 (Apr. 2005), [http://www.migrationpolicy.org/insight/Insight\\_Kerwin.pdf](http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf).

154. Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 816-18 (2004).

155. John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1288-91 (1994).

156. Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1707-10 (1997).

157. LEWIS, *supra* note 1, at 237-38.

due process right to effective assistance of counsel in immigration proceedings.<sup>158</sup> The decision was quickly vacated by Attorney General Eric Holder, but nonetheless renewed the debate regarding the immigration system's potential tolerance for representation that fails to meet any minimum bar of competence.<sup>159</sup> The reality is that the current provision of civil immigration legal services is clearly deficient. One in-depth survey found that almost half of immigration representation falls below basic competency standards and about fourteen percent is "grossly inadequate."<sup>160</sup>

As the post-*Gideon* legacy demonstrates, a fair trial requires more than a formal right to an attorney. The dismally low constitutional standard for efficacy later established in *Strickland v. Washington*<sup>161</sup> all but guaranteed an erosion of *Gideon*'s equality ideal. Overworked and underpaid appointed defense lawyers in many states have no time or resources to engage in basic lawyering tasks, such as interviewing clients, conducting legal research, and investigating facts.<sup>162</sup> This dynamic serves as an important reminder of the necessity to preserve at least a basic threshold for evaluating the failings of immigration counsel.

Program design can nonetheless promote efficacy regardless of the legal floor for representation. A recent study of murder cases in Philadelphia found that significantly better outcomes were achieved by institutional public defenders than individual defense attorneys appointed by the court.<sup>163</sup> Clients of the Philadelphia Defender Association, when compared with similarly situated defendants given appointed counsel, were nineteen percent less likely to be convicted of murder and served twenty-four percent less time in prison.<sup>164</sup> In the federal system, the Office of the Federal Public Defender stands out as

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158. *Matter of Compean*, 24 I. & N. Dec. 710 (Att'y Gen. 2009), *vacated*, 25 I. & N. Dec. 1 (Att'y Gen. 2009).

159. The current governing standard for ineffective assistance of counsel claims requires the immigrant seeking to reopen the immigration hearing to fulfill certain requirements, including filing a complaint with the bar association. *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (B.I.A. 1988).

160. Study Grp. on Immigrant Representation, *supra* note 34, at 388-93 (based on data from New York City).

161. 466 U.S. 668 (1984).

162. Stephen B. Bright, *The Right to Counsel in Death Penalty and Other Criminal Cases: Neglect of the Most Fundamental Right and What We Should Do About It*, 11 J.L. SOC'Y 1, 16 (2010).

163. James Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154 (2012).

164. *Id.* at 178-79 & tbl.2.

an exemplary model of high-quality indigent defense.<sup>165</sup> One study found that representation by federal public defenders, when compared with appointed counsel, shortens the average federal prison sentence by about eight months.<sup>166</sup>

Institutional design was a significant issue at the time that the right to criminal counsel was established. Even after *Gideon*, the method for appointing counsel remained ad hoc as the propriety of establishing institutional public defender offices was debated.<sup>167</sup> Similar issues now confront the immigration system. One approach to designing the future system for immigration defense is to grow within existing public defender offices. For example, a national model could be readily achieved using the offices and attorneys of the current federal defender system. Alternatively, a federal defender-type model could be replicated outside the criminal justice system. Like federal defenders, a carefully selected staff of government immigration lawyers could develop institutional expertise in defending similar types of immigration cases.<sup>168</sup> Or, as Judge Katzmann proposes, the United States could establish an “immigration justice corps,” akin to the Peace Corps, that would “recruit and train young lawyers” and deploy them to immigration nonprofits around the country.<sup>169</sup>

Finally, it is important to acknowledge that the immigration *Gideon* movement is coming of age in a moment of intense interest in understanding what effective representation actually means in practice. While some recent research has concluded that full legal representation has a positive influence on case outcome,<sup>170</sup> other empirical testing is more ambiguous about the

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165. Inga L. Parsons, “*Making It a Federal Case*”: A Model for Indigent Representation, 1997 ANN. SURV. AM. L. 837, 868.

166. Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* 3 (Nat’l Bureau of Econ. Research, Working Paper No. 13187, 2007), <http://www.nber.org/papers/w13187>.

167. William M. Beaney, *The Right to Counsel: Past, Present, and Future*, 49 VA. L. REV. 1150, 1157 (1963).

168. Martin, *supra* note 145, at 1329.

169. Kirk Semple, *Judge Proposes a National Lawyers Corps To Help Immigrants*, N.Y.: CITY ROOM (Mar. 19, 2013, 12:49 PM), <http://cityroom.blogs.nytimes.com/2013/03/19/judge-proposes-a-national-lawyers-corps-to-help-immigrants/?src=rechp>.

170. See, e.g., D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013) (concluding that full legal representation, as opposed to “unbundled” legal assistance, did significantly affect outcomes in eviction cases); Rebecca Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51 (2010) (concluding based on an analysis of existing research that represented parties enjoy better outcomes than unrepresented parties).

difference that a lawyer can make on any given case.<sup>171</sup> Citing such concerns, Benjamin Barton and Stephanos Bibas have argued that alternative programs, such as providing nonattorney advocates for pro se litigants and user-friendly court procedures, should play an enhanced role—one that they argue could turn out to be as effective as counsel in some situations.<sup>172</sup> The Supreme Court has issued its own endorsement of “substitute procedural safeguards,” such as pro se court forms or provision of a “neutral social worker,” to promote fundamental fairness for unrepresented litigants.<sup>173</sup> The immigration system’s existing reliance on nonattorney representatives and pro se information sessions reflects a similar orientation.<sup>174</sup> Key efficacy questions for future investigation thus include how much representation is needed in the immigration context to achieve successful outcomes.<sup>175</sup>

As this Essay has shown, quality defender programs increasingly understand the defense role as one that seamlessly integrates criminal and immigration counseling. This realization exposes the difficulty in maintaining immigration proceedings as a domain where the poor are excluded from the right to appointed counsel. Regardless of the future source of an immigration right to appointed counsel, it is vital to carefully consider how the nascent immigration defense system should be structured. This Part has suggested that a more complex discussion of possible delivery systems can be promoted by exploring the values of equality, efficiency, and efficacy that informed the development of *Gideon*’s public defender system.

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171. See, e.g., D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2125 (2012) (finding that “no firm conclusion” could be made regarding whether representation in unemployment benefit hearings affected outcomes).
  172. Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 971, 987-92 (2012).
  173. *Turner v. Rogers*, 131 S. Ct. 2507, 2517-20 (2011).
  174. See generally Erin B. Corcoran, *Bypassing Civil Gideon: A Legislative Proposal To Address the Rising Costs and Unmet Needs of Unrepresented Immigrants*, 115 W. VA. L. REV. 643, 662-73 (2012) (arguing that the crisis in immigration representation should be addressed by expanding access to nonattorney advocates).
  175. For example, one study of nontraditional counseling programs in immigration detention settings found that “intensive” nonrepresentational counseling, as opposed to group-only orientation, resulted in a fourfold increase in grant rate. Jennifer L. Colyer et al., *The Representational and Counseling Needs of the Immigrant Poor*, 78 FORDHAM L. REV. 461, 469 (2009).



## CONCLUSION

For the past fifty years, immigration law has resisted integration of *Gideon's* honorable vision of appointed counsel for the poor. With such resistance now eroding, the next half century is likely to witness a gradual migration of the *Gideon* right to appointed counsel into immigration proceedings. *Gideon's* impending migration brings into focus the enormously important question of how the nascent immigration defender system should be designed. Should the immigration system adopt a universal public defender approach staffed with experienced attorneys or a more limited case-by-case legal services approach that includes nonattorney representatives and group orientation? This Essay provides a necessary framework, rooted in the lessons of *Gideon*, for discussing the contours of the future immigration defense system.