

PADILLA AND THE DELIVERY OF INTEGRATED CRIMINAL DEFENSE

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The traditional starting point for Sixth Amendment jurisprudence is the individual defense attorney, acting alone. Padilla v. Kentucky, however, replaced the image of the lawyer as a heroic and individualistic figure with an image of the lawyer as a team manager consulting with other professionals to provide integrated legal services.

Public defender organizations already experiment with various methods for delivering the best service to clients with potential immigration issues mixed in with their criminal law issues. Some of those methods involve contracting out the immigration work to specialists outside the organization; others entail bringing the immigration expertise inside the organization.

The Padilla holding gives some impetus to the insider strategy. It increases the costs to a defender organization if one of its lawyers fails to recognize a straightforward immigration issue. As a result, in close cases, defender organizations will now become somewhat more likely to bring this function in-house, where it will be easier to monitor the quality of the work. In this way, Padilla tilts the field toward larger defender organizations with greater specialization of function and more coordination of effort among attorneys—in short, toward a more bureaucratic criminal defense.

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INTRODUCTION

The U.S. Supreme Court's opinion in *Padilla v. Kentucky*¹ holds a Rip van Winkle quality.² The opinion reads as if the Court slept through some major changes in criminal justice—some that began decades ago—and is now awakening to observe and comment on those fresh realities. This particular sleeper, however, has the power to transform the world after waking.

One change in criminal justice practice that received attention in *Padilla* was the growing importance of plea negotiations in the work of criminal defense attorneys. While the Sixth Amendment ineffective assistance of counsel cases traditionally focused on the tactical decisions of counsel at trial and in sentencing proceedings,³ trial work does not describe the typical day of the criminal defense attorney today. The creeping growth of guilty pleas requires defense attorneys to spend their time predicting trial outcomes and sentencing during negotiations with prosecutors, rather than actually trying the cases.⁴ *Padilla*, more emphatically than the Supreme Court's prior efforts to define constitutionally adequate counsel, evaluates defense attorneys in light of this central responsibility. The Court shifts its focus from trials and trial preparation to the role of the defense lawyer in preparing a client for plea negotiations.⁵

The *Padilla* Court also awakened to a second longstanding change in the system: the interaction between criminal sanctions and various other civil and regulatory regimes. Asset forfeiture, civil protection orders, and related devices have become, through increased usage, full partners with the criminal courts in

1. 130 S. Ct. 1473 (2010). According to the Court, a constitutionally competent defense attorney must accurately advise a client about the immigration consequences of a conviction when the immigration laws are “succinct and straightforward” and the consequences are “truly clear.” *Id.* at 1483. The defense lawyer who represents a client considering a guilty plea with immigration consequences that are “unclear or uncertain” must “advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” *Id.* Finally, competent counsel is obliged to avoid any affirmative mistakes in describing the immigration consequences of a guilty plea to a client, regardless of the level of difficulty of the immigration question. *Id.*

2. Washington Irving, *Rip Van Winkle*, in *THE SKETCH BOOK OF GEOFFREY CRAYON* (1819).

3. See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984).

4. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005).

5. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. (forthcoming 2011), available at <http://ssrn.com/abstract=1694111>.

responding to violence and other socially harmful conduct.⁶ Traditionally, the Supreme Court has insisted that civil proceedings do not trigger the same procedural protections as criminal proceedings, even when they create similar consequences.⁷ The Court has also said that a criminal defense attorney could serve the client adequately while ignoring this criminal–civil partnership, because those consequences were collateral rather than direct.⁸ *Padilla* suspends the familiar categories of civil and criminal, or collateral and direct, to consider the most important legal consequences for a typical client, and asks what a defense attorney could realistically accomplish for such a client.

While the *Padilla* opinion recognizes the growing scope of duties for defense counsel—expanding from trials to pre-trial negotiations, and from criminal consequences to some civil and administrative actions that the government might take against a client—it considers only obliquely the resources available to defense attorneys required to meet these broader duties. The traditional starting point for Sixth Amendment jurisprudence is the individual defense attorney, acting alone. The attorney’s choices are based on her personal interaction with the client, the prosecutor, and the investigative file. The attorney evaluates the client’s factual situation in light of her own legal research and experiences with judges and other actors in past cases. Whether or not the attorney works in a firm with other lawyers or in solo practice is irrelevant for Sixth Amendment purposes: The courts evaluate the adequacy of the lawyer as an individual.

Padilla weakens this traditional assumption that criminal defense lawyers operate alone. In place of the image of the lawyer as a heroic and individualistic figure, the Court centers on the lawyer’s responsibility to consult others and to create an effective defense *team*. The working image is shifting from the

6. See Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417 (2011); Robert C. Davis & Barbara Smith, *Domestic Violence Reforms: Empty Promises or Fulfilled Expectations?*, 41 CRIME & DELINQ. 541 (1995); Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Pitfalls of Haste*, 58 UCLA L. REV. 1705 (2011); Sandra Guerra Thompson, *Congressional Reform of Civil Forfeiture: Punishing Criminals Yet Protecting Property Owners*, 14 FED. SENT’G REP. 71 (2001); Michael Tonry, *Forfeiture Laws, Practices and Controversies in the US*, 5 EUR. J. CRIME CRIM. L. & CRIM. JUST. 294 (1997).

7. See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1870 (1992); Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1137 (2002).

8. See Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002); Margaret Colgate Love & Gabriel J. Chin, *Padilla v. Kentucky: The Right to Counsel and the Collateral Consequences of Conviction*, CHAMPION (2010); Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry Into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1073 (2004).

individual courtroom brilliance of a Clarence Darrow⁹ to the managerial insight of the leader of a defender organization.

As I discuss in Part I, this evolving conception of the lawyer as a team manager—or as a symphony conductor, if you prefer—is a long-term trend that applies throughout the legal profession. Lawyers in transactional practices, in civil litigation, and in criminal prosecution and defense are working in larger firms and operating in narrower and deeper specialty areas that require coordination with other specialists to serve the client.¹⁰ This growth in the bureaucratization of legal practice has deep implications for legal education, for the funding and organization of criminal prosecution and criminal defense, and for the quality of justice for criminal defendants, victims of crimes, and the public. The trends also shape the quality of the professional life that individual lawyers can expect to lead.

In Part II of this Article, I consider the possible contribution of *Padilla* to these long-term trends in criminal justice toward organizational lawyers who focus on plea negotiations with an awareness of the full range of civil and criminal sanctions facing the client.¹¹ Even before the *Padilla* decision, public defender (PD) organizations experimented with various methods for delivering the best service to clients with potential immigration issues mixed in with their criminal law issues. Some of those methods involved contracting out the immigration work to specialists outside the organization; others entailed bringing the immigration expertise inside the organization, either through placing experts in a single state-level position or by disseminating immigration experts to local offices.¹²

The choice that faces defense lawyer organizations resembles the dilemma that faces any firm deciding whether to expand the organization to encompass a new function or to assign that function by contract to an outsider. The *Padilla* holding gives some impetus to the insider strategy. It marginally increases the costs to a defender organization if one of its lawyers fails to recognize a straightforward immigration issue, or if the lawyer fails to refer the client to an immigration specialist for more complex issues. As a result, in close cases, defender organizations will now become somewhat more likely to bring this function in-house where it will be easier to monitor the quality of the work.¹³ In this way, *Padilla* reinforces long-term trends in criminal defense. It tilts the

9. For a sample of this famous trial attorney's strategies for criminal defense, see Clarence Darrow, *How to Pick a Jury*, ESQUIRE, May 1936.

10. See *infra* Part I.A.

11. See *infra* Part II.B.

12. See *infra* Part II.A.

13. See *infra* Part II.B.2.

field towards larger defender organizations with greater specialization of function and more coordination of effort among attorneys—in short, toward a more bureaucratic criminal defense.

I. GROWTH OF LAWYER ORGANIZATIONS

Padilla v. Kentucky addresses the integration of criminal defense expertise and immigration expertise for clients who face criminal charges. The opinion therefore opens up one of the big questions facing the legal profession in the twenty-first century. The question of how to assemble the expertise of many specialized attorneys into a coherent and useful bundle of services for clients confronts many lawyers in the United States.

A. Growth in Three Types of Law Firm Bureaucracies

The history and traditions of the legal profession in the common law world are profoundly individualistic. For decades, however, lawyers in the United States have been practicing law in larger and larger organizations. The individual lawyer—whether a solo practitioner or a small-firm practitioner with limited access to expertise in the multifaceted issues clients face—is not exactly disappearing but is becoming an exception in many practice areas.¹⁴ This trend applies to criminal practice, just as it does to civil litigation and to transactional work.

1. Private Law Firms

Compared to many other industries, the legal services industry in the United States is relatively low in concentration.¹⁵ Given the historically large number of small law firms, it is difficult to find comprehensive surveys that provide snapshots at different points in time of the distribution of firm sizes among private law firms. Some imperfect measures, however, do emerge from census data that the federal government collects from information about law firms reported to the profession's largest voluntary association, the American Bar Association (ABA), and from voluntary lawyer directories.

The U.S. Census Bureau conducts an economic census every five years that tracks employment statistics and firm size across many economic sectors.¹⁶

14. See Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983).

15. See Kevin Culbert, *Law Firms in the US*, IBISWORLD, Dec. 2010, at 21.

16. See U.S. CENSUS BUREAU, 2007 ECONOMIC CENSUS, http://www.census.gov/econcensus07/www/user_guide.html (last revised Apr. 13, 2011).

Those statistics portray a legal services industry that still includes many small firms, but one that is shifting employment over time toward the largest firms—those that employ over 500 people. Table 1 compares employment statistics for 1998 and for 2008.¹⁷

TABLE 1. Percentage of Employees in U.S. Law Firms,
by Size of Firm, 1998–2008

<i>Persons Employed</i>	1998	2008
1–4	20.8	19.5
5–9	14.9	13.9
10–19	14.0	12.3
20–99	24.1	21.7
100–499	15.0	15.1
500+	11.1	17.5
N =	988,948	1,110,114

Each of the four smallest categories of private law firms lost a small portion of its share of employment over the decade. The percentage employed in the second-largest category, firms with 100–499 employees, increased slightly. The remarkable increase, however, occurred in the largest private law firms, where the employment share jumped from 11.1 percent to 17.5 percent in just one decade.

Several periodic surveys of the legal profession in the United States demonstrate that the average size of the private firm has been growing for many years, not just in the most recent decade of census data. The American Bar Association surveys its membership roughly every ten years. Those surveys portray a steady increase in the average size of the private law firms belonging to the organization. In 1951, individual practitioners comprised 68 percent of all lawyers in private practice.¹⁸ That figure dropped over the years: to 61 percent in 1960, 50 percent in 1970, 49 percent in 1980, and 45 percent in

17. This table is based on employment statistics drawn from Statistics of U.S. Businesses for 1998 and 2008. In particular, I rely on the six-digit North American Industry Classification code 54111 (“Offices of lawyers”). See U.S. CENSUS BUREAU, STATISTICS OF U.S. BUSINESSES, <http://www.census.gov/econ/sub> (last revised June 22, 2011).

18. See AM. BAR FOUND., THE 1971 LAWYER STATISTICAL REPORT, at tbl.5 (Bette H. Sikes, Clara N. Carson & Patricia Gorai eds., 1972).

1991.¹⁹ The proportion of solo practitioners moved back up to 48 percent in 2000²⁰ in what appears to be a short-term pause in a long-term decline.

Meanwhile, according to the ABA survey, the larger private law firms saw marked growth. Firms of more than 20 lawyers accounted for 13 percent of the attorneys in private practice in 1980. By 1991, and again in 2000, those firms employed 18 percent of the attorneys.²¹

Other sources also portray a long-term erosion of the smallest private law firms in favor of the largest firms. A comprehensive analysis of the Martindale-Hubbell legal directory, which approaches a complete census of the legal profession in the United States, shows measurable growth in law firms between 1998 and 2004.²² George Baker and Rachel Parkin found that the average size of a law firm went up from 18 to 20 lawyers. The largest law firms (those with at least 389 lawyers) grew between 1998 and 2004 at the expense of every other category.²³ The largest firms accounted for less than 10 percent of lawyers in 1998, but over 18 percent of lawyers in 2004.²⁴

These changes in the typical organizational setting for lawyers working in law firms combine with long-term growth in the number and size of in-house counsel offices for corporate entities.²⁵ Altogether, an attorney practicing in the nongovernmental sector today is more likely to work in a complex bureaucracy than a similarly situated attorney practicing in 1970 or 1990.

The private law firms that are growing most quickly—the largest firms—do not typically provide the attorneys who represent criminal defendants. Nor do those attorneys usually represent clients on immigration questions outside of the employment context. Some of the same economic and social forces that favor bureaucratization in the private law firm sector, however, operate in similar ways to produce a trend toward larger organizations for those lawyers who do provide services to clients with criminal and immigration questions.

19. *Id.*

20. *Id.*; BARBARA A. CURRAN ET AL., THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S, at 13 (1985); BARBARA A. CURRAN & CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990S, at 25 (1994); CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000, at 29 (2004).

21. CURRAN & CARSON, *supra* note 20. The economic downturn based on the financial industry meltdown of 2008 could reshape attorney-client relationships enough to reverse or slow this growth trend in the largest private law firms. Data are not yet available on this question.

22. See George P. Baker & Rachel Parkin, *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, 84 N.C. L. REV. 1635, 1650 fig.2a, 1659 fig.3 (2006).

23. See *id.* Baker and Parkin divided firms into deciles based on the number of attorneys working in firms of each size in the baseline year of 1998.

24. *Id.*

25. See *infra* Part II.B.1.

2. Prosecutor Offices

The trend toward larger organizations also has taken hold with attorneys employed in the public sector, including prosecutors. Among criminal prosecutors, the size of a typical office increased notably during the 1990s. Between 1992 and 2001, the personnel employed in prosecutors' offices in state court systems went up from 57,000 to 79,000.²⁶ The number of assistant prosecuting attorneys moved up from roughly 21,000 in 1994 to about 24,200 in 2001.²⁷ This nationwide increase in staffing occurred while the total number of state prosecutors' offices remained virtually unchanged.²⁸

The important organizational dividing line among prosecutors' offices rests at the boundary between the smallest offices, which serve jurisdictions with a population below 250,000, and the medium-sized and larger offices. The median staff size for the smallest offices is 10, a figure that includes the chief prosecutor and assistant prosecutors, along with law clerks, paralegals, secretaries, computer specialists, victim advocates, and staff investigators.²⁹ By comparison, the median staff size for the medium-sized offices is 105, and 440 for the largest offices.³⁰ These larger organizations require bureaucratic routines and roles if the chief prosecutor is to have any meaningful control over the work of the office.

26. See Steven W. Perry, *Prosecutors in State Courts, 2005*, BUREAU JUST. STAT. BULL. (2006) (NCJ 213799); Carol J. DeFrances, *Prosecutors in State Courts, 2001*, BUREAU JUST. STAT. BULL. (2002) (NCJ 193441); Carol J. DeFrances & Greg W. Steadman, *Prosecutors in State Courts, 1996*, BUREAU JUST. STAT. BULL. (1998) (NCJ 170092); John M. Dawson, Steven K. Smith & Carol DeFrances, *Prosecutors in State Courts, 1992*, BUREAU JUST. STAT. BULL. (1993) (NCJ 145319). Total staffing was 65,000 in 1994, reached a high of 79,436 in 2001, and declined slightly to 78,000 in 2005.

27. These numbers are based on an estimate of 34 percent of total staff in 1994, 30.5 percent of total staff in 2001, and 31 percent of total staff in 2005 (when the total number of assistant prosecuting attorneys remained at 24,200). See DeFrances & Steadman, *supra* note 26.

28. The BJS surveys reported 2343 offices in 1994, the same number in 1996, 2341 offices in 2001, and 2344 offices in 2005.

29. The median staff size for these offices remained this small throughout the 1990s and 2000s. The median number of total staff in large offices moved from 370 in 1994, to 414 in 1996, to 456 in 2001, and to 440 in 2005. For medium offices, total staff medians were 100 in 1994, 103 in 1996, 112 in 2001, and 105 in 2005. The median number of assistant prosecuting attorneys in large offices moved from 152 in 1994, to 163 in 1996, to 151 in 2001, and to 141 in 2005. For medium offices, the medians were 36 in 1994, 41 in 1996, 36 in 2001, and 34 in 2005. For small offices, the medians remained at 3 throughout this period.

30. The definition of a large office is one that serves a population of 1,000,000 or more; a medium office serves populations of 250,000 to 999,999; small offices serve populations of less than 250,000.

As Table 2 indicates, virtually all of the growth in prosecutors' offices during the 1990s and 2000s involved a shift of offices from smaller categories to larger categories, rather than growth of the typical staff within the categories. In short, a number of prosecutors' offices moved from the small population category to the medium population category. Within each category, the median number of total staff and the median number of prosecuting attorneys remained steady. The total number of offices serving large-population and medium-population jurisdictions, however, increased from 214 in 1994 to 255 in 2005.

TABLE 2. Number of State Prosecutors' Offices Serving Different Population Sizes, 1994–2005

	<i>Large Populations</i>	<i>Medium Populations</i>	<i>Small Populations</i> ³¹
1994	33	181	2129
1996	34	191	2118
2001	34	194	2113
2005	42	213	2089

Although prosecutors in the United States continue to work in a remarkably high number of small offices with a median staff size of 10, a strong majority of prosecutors now work in the medium and large offices.³² The great majority of residents in the United States live in jurisdictions that operate large, bureaucratic prosecutors' offices with a median staff size over 100.³³ The bureaucratization of American prosecutors is happening alongside the shift of the population from rural to urban and suburban areas.

The growth in the size of American prosecutors' offices increases the demand for more active management from the top and is slowly stifling the model of the line prosecutor as an individual free agent. Electoral accountability of the chief prosecutor is supplemented by bureaucratic controls

31. For 2005, smaller jurisdictions include 345 offices serving jurisdictions with populations of 100,000 to 249,999 plus 1744 offices serving smaller populations. For 2001, smaller jurisdictions include 1581 full-time offices and 532 part-time offices. For 1996, smaller jurisdictions include 714 offices serving populations of 50,000 to 249,999 plus 1404 other offices. For 1994, smaller jurisdictions include 1446 full-time offices and 683 part-time offices.

32. I draw this inference by multiplying the median number of attorneys in small offices (3) by the total number of small offices in 2005, producing an estimate that is far less than half of the more than 24,000 at work in the country.

33. See *supra* note 32.

inside the office. The largest prosecutors' organizations in the United States are also the most frequent users of written guidelines and internal review mechanisms.³⁴ The trend toward larger offices will mean that more local prosecutors' offices will take organizational cues from larger operations such as the Department of Justice.³⁵

3. Public Defense Attorney Organizations

For criminal defense attorneys, the organizational story is largely the story of the public defender's office. The Supreme Court's declaration in 1963 of a constitutional right to counsel for indigent criminal defendants gave a critical boost to PD organizations.³⁶ States could satisfy their obligation through any combination of three organizational models: (1) the use of private practice attorneys that the court appoints in individual cases; (2) law firms or non-profit organizations that contract with the government to provide defense services for designated categories of criminal cases; or (3) the creation of government offices staffed with public employees—public defenders.³⁷ Although governments still use all three organizational strategies, the PD model is slowly but steadily displacing the others.³⁸

Legislators faced with an unpopular obligation for public spending have become keenly aware of the cost of providing lawyers.³⁹ Advocates have convinced the legislators in many states and counties that public defenders can

34. See PERRY, *supra* note 26, tbl.9; Ellen Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J.L. & PUB. POL'Y 167 (2004).

35. The treatment of federal sentencing issues within the Department of Justice offers a vivid example of efforts to enforce more uniform outcomes among prosecutors in a large organization. See MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES AND EXECUTIVE MATERIALS* 1129–44 (3d ed. 2007); David Robinson, *The Decline and Potential Collapse of Federal Guideline Sentencing,* 74 WASH. U. L.Q. 881 (1996).

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

37. See Steven K. Smith & Carol J. DeFrances, *Indigent Defense*, BUREAU JUST. STAT. SELECTED FINDINGS (1996) (NCJ 158909).

38. It is not clear whether public defenders or appointed counsel currently represent more criminal defendants; some estimates conclude that appointed counsel still accounts for the largest share of the docket, albeit a diminishing share. My argument relates to the long-term trend, rather than the most common organizational setting for lawyers at the present moment. See Phyllis E. Mann, *Ethical Obligations of Indigent Defense Attorneys to Their Clients*, 75 MO. L. REV. 715, 727 (2010).

39. See Wayne A. Logan, *Litigating the Ghost of Gideon in Florida: Separation of Powers as a Tool to Achieve Indigent Defense Reform*, 75 MO. L. REV. 885, 887–90 (2010) (describing efforts of the Florida legislature to limit costs of indigent criminal defense).

deliver constitutionally adequate representation at the lowest average cost.⁴⁰ As a result, over time the number of PD offices has increased, along with the typical staff size for such offices and the proportion of the criminal docket that those offices handle. In broad terms, this has shifted criminal defense work away from the smallest private law firms (where appointed defense lawyers tend to work) and into somewhat more bureaucratic PD organizations.⁴¹

The majority of public defenders today work in large, complex organizations. According to a 2007 national census, there were 957 PD offices operating in the United States, with 427 offices funded and controlled at the state level, and 530 controlled and primarily funded at the local or county level.⁴² This census is summarized in Table 3.

The size of these offices varies a good bit. A handful of PD offices at the local or county level employ relatively large staffs: a median of 28 attorneys and 19 staff members. The county-directed offices that handle between 2501 and 5000 cases per year also employ a number of attorneys comparable to the medium-sized prosecutors' offices; the same is true for the typical state-controlled office.⁴³ Moreover, these state-level offices operate within hierarchies and guidelines of the overall state organization, which places their attorneys within a larger and more complex bureaucracy than their county-level counterparts, even if the local branch office employs relatively few attorneys.⁴⁴ Only the two smallest categories of county-level PD offices—those handling up to 2500 cases per year—create an environment that approximates a small private law firm.⁴⁵

40. See Rob Nagle, *Public Defender Costs Come Under Scrutiny*, S.F. EXAMINER, May 25, 2010; Ana Yáñez-Correa, *The Public Defender Office: An Effective Indigent Defense System for Urban Counties*, TEX. CRIMINAL JUSTICE COAL., http://criminaljusticecoalition.org/files/userfiles/Fact_Sheet_Promoting_PDO.pdf (last visited July 11, 2011).

41. See Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, BUREAU JUST. STAT. SPECIAL REP. (2000) (NCJ 179023).

42. See Donald J. Farole, Jr. & Lynn Langton, *County-Based and Local Public Defender Offices, 2007*, BUREAU JUST. STAT. SPECIAL REP. (2010) (NCJ 231175); Lynn Langton & Donald J. Farole, Jr., *State Public Defender Programs, 2007*, BUREAU JUST. STAT. SPECIAL REP. (2010) (NCJ 228229).

43. It is interesting to note that the ratio of attorneys to support staff members is considerably higher in prosecutors' offices than in PD organizations.

44. See Carol J. DeFrances, *State-Funded Indigent Defense Services, 1999*, BUREAU JUST. STAT. SPECIAL REP. (2001) (NCJ 188464).

45. For discussion of the characteristics of appointed defense counsel, see Harlow, *supra* note 41.

TABLE 3. Staffing of Public Defender Offices, 2007

Type of Office	Number of Offices	Median Number of Attorneys	Average Full-Time Attorneys	Median Number of Staff
County: All Offices	530	7	19.3	4
County: < 1000 cases	136	2	1.8	1
County: 1000–2500 cases	123	5	4.0	3
County: 2501–5000 cases	103	9	10.0	5
County: > 5000 cases	154	28	52.9	19
State Offices	427	125 ⁴⁶	10.1	85

Given the wide dispersal of PD organizations across all levels of government and the spotty data collection about the structure of PD offices on a national basis, the question of growth trends is hard to address with precision.⁴⁷ There are, however, indications that PD organizations have grown over time. For instance, in the state offices, the total number of attorneys increased by 4 percent between 1999 and 2007, even as their expenditures increased by 19 percent and their caseloads increased by 20 percent.⁴⁸ One additional state started operating its PD offices on a centralized statewide basis between 1999 and 2007.⁴⁹ When state offices displace the smallest county offices, the number of attorneys on staff in a given location might not change, but coordination and access to resources come through a larger organization.

46. The median staff levels reported for the state organizations are for the entire state and not for each of the local offices. *Id.* tbls.11, 12.

47. See Mann, *supra* note 38, at 715–32. The federal government conducted national surveys of indigent criminal defense in the 1980s, 1990s, and 2000s. The 1986 survey data was published in two reports: BUREAU OF JUSTICE STATISTICS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY (1986) (NCJ 94702), and *Criminal Defense for the Poor*, 1986, BUREAU JUST. STAT. BULL. (1988) (NCJ 112919). For an example of the difficulty of comparisons across time, the 1999 survey cycle reported on the 100 most populous counties, while the 2007 survey cycle focused on the 154 largest county offices, making precise comparisons based on the published reports impossible. In 1999, PD offices in the largest 100 counties employed over 12,700 individuals, including over 6300 assistant public defenders, 1200 investigators, 300 social workers, 2700 support staff, and nearly 400 paralegals.

48. See DeFrances, *supra* note 44, at 6; Langton & Farole, *supra* note 42, at 18–19 tbl.16.

49. See DeFrances, *supra* note 44, at 6; Langton & Farole, *supra* note 42, at 18. See generally Darryl K. Brown, *Epiphenomenal Indigent Defense*, 75 MO. L. REV. 907, 909 (2010).

Despite the increased organizational complexity that goes along with a long-term shift to PD offices, those offices remain organized according to plans that emphasize individual responsibility of a single attorney for a single client. In 2007, among the county-based PD offices, 71 percent provided primarily vertical representation for clients in felony, non-capital cases.⁵⁰ Under vertical representation, one attorney represents a single defendant at every stage of the proceedings, rather than assigning specialized procedural stages to different attorneys in the office. Vertical representation typically also involves assignment of the most senior attorneys to the most serious felony charges.

The continued dominance of vertical representation is an indicator that the individualistic ethic is still vibrant in public defense management. It is telling, then, that the use of vertical organizational schemes remains stronger on the public defense side than on the prosecution side. Prosecutors, particularly those in larger offices, rely more frequently on horizontal organization to take advantage of specialized expertise among attorneys.⁵¹ In horizontal organization schemes, different attorneys handle the same case as it moves up through different stages of the criminal process. One attorney might handle the case during preliminary tests of the sufficiency of the evidence or the possible suppression of evidence, another attorney could try the case or negotiate the plea of guilt, and yet another could handle the sentencing hearing.

B. Explanations for Organizational Growth

What could explain this organizational growth that pervades sectors of the legal profession as disparate as private law firms and public entities involved in criminal adjudication? In some ways, after all, the economic incentives facing the lawyers in these various settings are structured quite differently. The attorneys in a private law firm must attract and retain clients who could leave them for another firm offering better services or better prices.⁵² Public defender organizations, on the other hand, represent clients who have limited options for leaving one attorney and retaining another. The court appoints the public defender to represent an indigent defendant, and in the crude but doctrinally

50. See Langton & Farole, *supra* note 42, at 8. In 11 states, a majority of offices offered vertical representation in noncapital felony cases. Offices in 6 states offered a mix of vertical and horizontal representation. *Id.*

51. See AM. PROSECUTORS RESEARCH INST., HOW MANY CASES SHOULD A PROSECUTOR HANDLE? RESULTS OF THE NATIONAL WORKLOAD ASSESSMENT PROJECT 7 (2002) (summarizing results from a survey of fifty-six prosecutors' offices, describing vertical prosecution as an alternative to horizontal prosecution without expressing a preference for one organizational model).

52. See Paul Klemperer & A. Jorge Padilla, *Do Firms' Product Lines Include Too Many Varieties?*, 28 RAND J. ECON. 472 (1997).

accurate phrase of one court, “beggars can’t be choosey.”⁵³ Appointed defense lawyers, therefore, will not lose clients or income if their clients become dissatisfied with the services they receive.

Similarly, criminal prosecutors encounter very little market discipline from the people who benefit from their services. Prosecutors represent the entire public of their jurisdiction. In a formal sense, they answer to the voters. As a practical matter, prosecutors try to satisfy the wishes of victims of alleged crimes and to maintain strong working relationships with police officers. In the end, however, the prosecutor’s accountability to any particular client is attenuated.⁵⁴

Possibly as a result of these distinct client bases, different sectors of the legal services market operate in separate sociological spheres. Lawyers for organizational clients, who predominate in large private law firms, circulate in different professional associations, network with different professional peers, receive compensation according to different salary structures, and in general experience a professional life quite distinct from lawyers who represent individual clients, such as criminal defense attorneys.⁵⁵ This sociological account of lawyers’ work posits two distinct legal professions, each centered on the distinctive needs of their very different client bases. Given the distinct client relationships that tend to develop in different sectors, the growth in lawyer organizations across all the sectors seems a bit mysterious.

Despite these real differences among the client relationships that constrain the work of attorneys in these different market sectors, attorneys across all sectors face similar forces and incentives that do not flow from the particular clients they serve. Organizational growth in each of the three settings is likely a result of increased specialization in legal practice and expertise.⁵⁶ The generalist lawyer is becoming less common, meaning that each individual lawyer knows all there is to know about a smaller and smaller slice of the client’s legal situation.⁵⁷ Working together with other lawyers becomes more important all the time.

The trend toward specialization tells us that lawyers will generally work on narrower pieces of their clients’ problems. But how do the narrower pieces

53. State v. Green, 471 N.W.2d 402, 405 (Neb. 1991); see also MILLER & WRIGHT, *supra* note 35, at 793.

54. See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2009).

55. See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 131 (1982).

56. See Luis Garciano & Thomas N. Hubbard, *Specialization, Firms and Markets: The Division of Labor Within and Between Law Firms*, 25 J.L. ECON. & ORG. 339, 367 (2008).

57. See generally ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993); WILLIAM F. MAY, BELEAGUERED RULERS: THE PUBLIC OBLIGATION OF THE PROFESSIONAL (2001).

interact? What convinces lawyers to work together for a client within a single firm rather than just cooperating on the representation of a client while staying in their separate smaller law firms? Economic theory has dubbed this question the theory of the firm. According to neoclassical economic theory, one can predict when private enterprises will expand to perform new functions and when, in contrast, the firm will outsource the function to some other firm with the relevant competencies.⁵⁸ The driver of this decision is transaction costs, both internal and external.⁵⁹ When the internal transaction costs of creating and running a firm are high, the economic actor gets work done through transactions on the open market, possibly through a contract with another independent actor.

Think, for example, of a business facing a one-time task, such as expanding its physical plant. The business is likely to hire an architect and a building contractor rather than turning to the firm's own employees to perform the specialized work. The costs of moving into an area far removed from the core expertise of the business, together with the costs of hiring and firing an employee in this unfamiliar area, make the internal transaction costs high.

On the other hand, when the external transaction costs become too high, the firm will bring the business in-house. Think here of activities that powerfully affect the reputation of the firm, activities for which close quality control is critical to the firm and difficult to perform because the actor operates outside the firm's normal monitoring structure. For example, consider the growth of in-house counsel offices where attorneys do legal work routinely necessary in the course of business, or those requiring close interaction with firm employees.

The rules of professional ethics have an effect on the internal and external transaction costs of two or more attorneys providing legal services for a single client. The ethics rules, based on concerns about client confidentiality, create a preference for consultation among lawyers within a single firm and make it costly for lawyers in different firms to collaborate in the handling of matters for a single client. For instance, when a criminal defense lawyer plans to consult another attorney regarding an immigration question that might affect a particular client, the consultation is considerably easier when the two lawyers work in the same law firm. If they practice in different firms, the defense attorney must decide how much information about the client to

58. See R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937); Bengt Holmström & John Roberts, *The Boundaries of the Firm Revisited*, 12 *J. ECON. PERSP.* 73 (1998).

59. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. FIN. ECON.* 305-60 (1976).

provide to the immigration attorney, consistent with the confidentiality rules.⁶⁰ The immigration attorney must decide when the consultation amounts to an attorney–client relationship and whether the criminal defendant or the defense attorney is the client. If both attorneys represent the same defendant, both must complete a conflicts check.⁶¹ Framing this collection of dilemmas in economic terms, the regulatory scheme creates fewer transactions costs for expansion of the firm, while driving up the cost of contractual affiliations among separate firms.

A lively debate among labor economists addresses the question of whether a firm’s expansion depends on the wishes of its clients—the demand-driven theory—or instead if the internal needs of the firm itself to monitor the work of its employees drives the decision to expand the firm.⁶² In the legal services field, it appears that forces aside from the wishes of clients—including the requirements of ethical rules and bar authorities, expectations of professional associations, and statements of minimal constitutional duties such as those found in the *Padilla* opinion—are relevant in determining the scope of the law firm. These various sources of professional expectations, rather than the expectations of clients standing alone, explain why lawyer organizations with such different client bases as private law firms, prosecutor offices, and PD offices all experience the same pressure to grow. The lawyers in each of these contexts respond to the increasing complexity and specialization of their fields of expertise. Effective service for many clients in each of these areas requires interaction among a team of lawyers with interlocking expertise, whether or not the client appreciates this fact.

II. PADILLA AS A SPUR TO FURTHER GROWTH IN DEFENSE ORGANIZATIONS

The *Padilla*⁶³ opinion recognizes this new landscape of specialization and growing lawyer organizations, particularly among criminal defense attorneys. The defense attorney’s obligation is no longer simply to prepare for trial and to offer a competent defense at trial. Instead, the attorney must spot affiliated immigration issues and possibly other consequences of a criminal conviction formerly considered collateral.⁶⁴

60. See MODEL RULES OF PROF’L CONDUCT R. 1.6.

61. See *id.* RS. 1.7, 1.9.

62. See Garciano & Hubbard, *supra* note 56, at 340.

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

64. See *id.* at 1482–83; Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. ON REG. 47, 56 (2010).

The majority opinion condemns inaccurate advice from the criminal defense attorney about immigration consequences.⁶⁵ But it goes further to require affirmative accurate advice about a subset of immigration questions, the most “succinct and straightforward” questions that are apparent from reading the statute.⁶⁶ So there are two distinct skills that defense attorneys must provide their clients. First, they must have enough expertise themselves to advise clients correctly about the succinct and straightforward immigration questions. Second, they should be able to spot the more complex immigration issues, which requires enough background knowledge to identify when to refer the client to an immigration expert.

In a world of increasing legal specialization, this is not a novel set of duties for a competent attorney. The criminal defense attorney works on the same footing as a real estate attorney or a trusts and estates lawyer, who must deal competently with the tax issues that arise in the transfer of property. This could happen either through personal mastery of certain recurring tax issues, or based on the lawyer’s ability to spot more complex tax issues for referral to a competent tax attorney.⁶⁷

A. Delivery Models

To what extent will criminal defender organizations respond to *Padilla* by expanding their internal capacity to give immigration advice? How many organizations, alternatively, will create more formal arrangements for immigration advice from specialized attorneys who remain outside the firm structure? Or will criminal defense attorneys make no change at all, continuing either to consult informally with immigration lawyers on the occasional tricky case, or to ignore immigration issues altogether?

The answers to these questions depend, in part, on what PD organizations were doing about immigration questions before the ruling in *Padilla*. These organizations had powerful reasons to address this question before the Supreme Court made any pronouncements in the area. In some states, a criminal defense attorney’s handling of immigration questions was already a relevant factor in determining the adequacy of representation for purposes of the state constitution.⁶⁸ State rules of criminal procedure also addressed the delivery of

65. See *Padilla*, 130 S. Ct. at 1483.

66. *Id.*; see also Yolanda Vazquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 BERKELEY LA RAZA L.J. 31, 34–35 (2010).

67. See MARIANNE M. JENNINGS, *REAL ESTATE LAW* 627 (8th ed. 2008).

68. See, e.g., *State v. Paredes*, 101 P.3d 799, 802 (N.M. 2004).

immigration advice to criminal defendants: Some rules placed an obligation on the judge presiding over the guilty plea hearing.⁶⁹ Several others divided the responsibility between the defense attorney and the judge.⁷⁰ Legal advice about the immigration consequences of a plea of guilty in criminal proceedings was also a topic addressed in several statements from professional associations.⁷¹ The Supreme Court in *Padilla* entered the conversation about minimum legal standards that was well underway.

Just as some jurisdictions required more immigration expertise than others, as a matter of legal standards, some jurisdictions developed a strong tradition of funding defense counsel above the minimum level required by law.⁷² Public defense organizations in those sympathetic jurisdictions could arrange for strong immigration representation if the client base benefits routinely from such expertise, regardless of the minimum requirements of the law.

The legal requirements in different jurisdictions, combined with local traditions of providing public defense above the legal minimum, have produced a handful of cooperation models to define the relationship between criminal and immigration expertise. First, in jurisdictions other than major cities with large populations of foreign-born residents, one often encounters the self-sufficiency model. The individual attorney is expected to consult with the client about the criminal matter before plea negotiation and to identify potential immigration consequences. Such an attorney is not likely to provide post-plea advice regarding immigration matters such as travel or necessary documentation. The attorney develops individual expertise about immigration law through continuing legal education programs and other less formal educational efforts.

69. See, e.g., ALASKA R. CRIM. P. 11(c)(3)(C); CAL. PENAL CODE ANN. § 1016.5; CONN. GEN. STAT. § 54-1j; FLA. R. CRIM. P. 3.172(c)(8); GA. CODE ANN. § 17-7-93(c); HAW. REV. STAT. ANN. § 802E-2; IOWA R. CRIM. P. 2.8(2)(b)(3); MASS. GEN. LAWS ch. 278, § 29D; MINN. R. CRIM. P. 15.01; MONT. CODE ANN. § 46-12-210; N.Y. CRIM. P. LAW § 220.50(7); N.C. GEN. STAT. § 15A-1022; OHIO REV. CODE ANN. § 2943.031; OR. REV. STAT. § 135.385; R.I. GEN. LAWS § 12-12-22; TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4); VT. STAT. ANN., tit. 13, § 6565(c)(1); WASH. REV. CODE § 10.40.200; WIS. STAT. § 971.08.

70. See, e.g., TENN. R. CRIM. PROC. 11(b) (amended 2010).

71. See ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-5.1(a), at 197 (3d ed. 1993); NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL REPRESENTATION § 6.2 (1995); STANDARDS FOR CRIMINAL JUSTICE PLEAS OF GUILTY 14-3.2(f) (1999) ("[D]efense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.").

72. See Andrew Lucas Blaize Davies & Alissa Pollitz Worden, *State Politics and the Right to Counsel: A Comparative Analysis*, 43 L. & SOC'Y REV. 187, 197-99 (2009); see also SPANGENBERG GROUP, STATE INDIGENT DEFENSE COMMISSIONS, at i, 1-6 (2006), http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/defender/downloads/state_indigentdefense_feb07.pdf.

Second, some attorneys supplement the self-sufficiency model with an informal consultation model. They develop a basic understanding of some common elementary immigration issues, along with an ability to identify more complex and uncommon questions. For the latter clients, these attorneys either refer the client or consult informally with an attorney expert in immigration matters, keeping the consultation informal to avoid a fee sharing arrangement.⁷³ The attorney might not give the client's name or a complete biography. As a result, some relevant facts for immigration purposes might not be available for the immigration expert.

Third, one can find PD offices that rely on local in-house experts.⁷⁴ In some larger PD organizations, one local attorney develops the expertise to address the immigration questions relevant to all the clients served in the office. Typically, this person would also have training and experience as a criminal defense attorney. This shared background between the criminal law and immigration law specialists promotes trust and allows a realistic match between the proposed immigration strategies and the capacities and traditions of local criminal justice actors.

A major advantage of this model is its effect on the culture of the office and the routine thinking of the criminal defenders. Defense attorneys who encounter an immigration attorney around the office and the courthouse every so often may evaluate client problems with immigration questions closer to the forefront of their thinking.⁷⁵ The in-house expert model also allows more direct and frequent interaction between the client and the immigration expert.

The downside is the professional isolation of in-house immigration experts, who must maintain an awareness of new developments in their specialty, while sharing office resources, clients, and time with attorneys from a different specialty. The in-house expert model is also expensive, devoting a large proportion of available attorney hours to the clients' immigration needs. The smaller the office, the more costly this model would be; as Table 3 indicates, a large number of PD offices maintain a relatively small staff.

73. Email From Jeremy McKinney to author (Feb. 3, 2011) (indicating that immigration law specialists in North Carolina speak once with defense counsel regarding a particular client's matter without a fee but enter a flat fee arrangement for any subsequent consultations regarding that client). Immigration attorneys have an incentive to provide such consultation without a fee agreement because the defense attorney refers the client to the immigration attorney for any subsequent representation involving the client or the client's family members regarding immigration questions.

74. See Peter L. Markowitz, *Protocol for the Development of a Public Defender Immigration Service Plan*, IMMIGRANT DEF. PROJECT & N.Y. STATE DEFENDERS ASS'N 10–11 (2009), http://www.immigrantdefenseproject.org/docs/2010/10_Public%20Defender%20Immigration%20Protocol.with%20appendice.pdf.

75. Telephone Interview With Sejal Zota, N.C. Inst. of Gov't (Jan. 25, 2011).

A variation on this in-house model involves a sharing of a single position between a PD service and an immigration organization. This shared expert model makes immigration expertise available to smaller PD offices and eliminates the isolation problem for the immigration attorney. But it weakens the influence of the immigration expert on the local office culture.

In more complex PD organizations (particularly state-directed PD services), a central office model for immigration expertise is possible. In this scheme, an attorney in a central location provides immigration expertise for all the criminal defense attorneys working at all the other locations for the organization. There will be no isolation problem in this model, but it will have less effect on PD office culture, and the immigration advice itself may be poorly tailored to the realities of criminal practice in the locality.

Finally, under the contract model, a PD office might agree to pay on a per hour or per client basis for immigration expertise from attorneys affiliated with an organization outside the PD office.⁷⁶ This model affects office culture less, but it allows for flexible changes to costs, based on changing needs. Perhaps the most important advantage of this model is that the contract immigration attorneys can provide access to immigration expertise for appointed counsel outside the PD structure.⁷⁷

B. *Padilla's* Impact on Private and Public Organizations

Each of these organizational models predated the Supreme Court's pronouncement in *Padilla v. Kentucky*. How will the Court's new constitutional definition of minimally effective defense counsel affect the organizational strategies for integrating criminal defense and immigration expertise?

The first possibility is that *Padilla* will have no effect at all on defense organizations, whether they are private firms or PD organizations. Recall that many jurisdictions enacted rules and statutes and interpreted their state constitutions to promote the integration of immigration and criminal defense expertise prior to *Padilla*. The holding in *Padilla* calls for relatively small changes in standard practices in some jurisdictions.⁷⁸

76. *Id.*

77. Markowitz also posits a "Statewide Layered" model that distributes immigration functions between different attorneys in the organization, some working at the state level and others at the local level. Such a model does not commonly operate at this point. See Markowitz, *supra* note 74, at 15–17.

78. For an example of the view that *Padilla* simply requires defense attorneys to access online resources regarding immigration matters, see Laurence A. Benner & Marshall J. Hartman, *Opening Pandora's Box: The Duty to Give Correct Guilty Plea Advice Under Padilla v. Kentucky*, 32 CORNERSTONE, May–Aug. 2010, at 6.

Moreover, the fact that *Padilla* is grounded in the Sixth Amendment will limit its impact.⁷⁹ Public defender organizations generally do not treat the minimum standards of Sixth Amendment doctrine as an acceptable goal. The ineffective assistance of counsel doctrine does not serve the great majority of criminal defendants well, because the need to prove prejudice means that many clients who receive substandard performances from their attorneys will find no relief.⁸⁰

Nevertheless, it seems reasonable to predict that the *Padilla* decision will have at least some effect on the organization of criminal defense, particularly as the Supreme Court in this case is swimming with the social and legislative current rather than against it. The effects of this decision on private law firms and on PD organizations will likely be different.

1. Organizational Effects Among Private Law Firms

If the profit motive truly drives criminal defense choices, we very well might see movement toward larger firms for private defense attorneys who accept court appointments as those private lawyers join forces with immigration attorneys. The *Padilla* decision seems to be spurring some growth in the training opportunities for defense attorneys to learn the basics of immigration law.⁸¹ The specialists who conduct this training appreciate the complexity of immigration law and emphasize the need to involve a qualified expert in all but the simplest immigration questions. The training concentrates on a series of screening exercises that a defense attorney can perform to identify clients with potential immigration consequences, such as asking if the client was born in the United States.⁸² As a result, it seems reasonable to expect that consultations between defense attorneys and immigration attorneys will increase in the aftermath of *Padilla*.

As the volume of immigration questions increases for criminal lawyers, it will become harder to convince their immigration colleagues outside their own

79. See Darryl K. Brown, *Why Padilla Doesn't Matter (Much)*, 58 UCLA L. REV. 1393 (2011).

80. See Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1. But see Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 HOW. L.J. 693 (2011) (detailing how defense counsel could meet the prejudice requirement).

81. See IMMIGRANT DEF. PROJECT, DUTY OF CRIMINAL DEFENSE COUNSEL REPRESENTING AN IMMIGRANT DEFENDANT AFTER *PADILLA V. KENTUCKY* (2010), http://www.immigrantdefenseproject.org/docs/2010/10-Padilla_Practice_Advisory.pdf; Cal. Pub. Defender Ass'n, *Defense Attorney Seminar: Ensuring Immigration Competence After Padilla v. Kentucky*, DEFENDER, Aug. 21, 2010, at 411, available at <http://www.defender411.us/2010/07/defense-attorneys-seminar-ensuring-immigration-competence-after-padilla-v-kentucky.html>; *Padilla v. Kentucky and State v. Sandoval Resources*, WASH. DEFENDER ASS'N, <http://www.defensenet.org/immigration-project/immigration-resources/padilla-v.-kentucky-resources> (last visited May 20, 2011).

82. Comments of Daniel Kanstroom at the UCLA Law Review Symposium, Jan. 28, 2011.

firms to provide free informal advice. A few brief informal consultations could make business sense for an immigration attorney, because criminal defendants and their families may require immigration representation at the end of the criminal case; the initial consultation with the defense attorney would likely lead to a referral and some future paying clients. Immigration attorneys may also perform a few consultations simply as a professional courtesy to colleagues without insisting on a concrete return on the time invested.⁸³ A larger number of informal consultations, however, may convince immigration attorneys in private law firms to draw some limits, either refusing to consult on the case or insisting on fee sharing and a more formal relationship. At that point, a contractual arrangement between the two attorneys is possible, but the negotiation of terms for each new case, together with conflicts checks and other start-up costs involved in a representation could make the collaboration too costly. These external transaction costs would make it attractive for criminal defense attorneys and immigration attorneys to join into a single firm.

Such changes to private law firm structure will not happen quickly. Anecdotal impressions from immigration attorneys suggest that the number of informal consultation requests from private defense attorneys has increased since March 2010, but not dramatically. The modest increase in volume has not yet convinced immigration attorneys to insist on formal contracts or to find other ways to get compensated for their time. It could take many months before the criminal defense bar absorbs the implications of the *Padilla* decision and further months beyond that time before immigration attorneys sort out the impact of the new defense patterns on their own practices.

Thus, when it comes to the private defense attorneys who accept appointed cases, the self-sufficiency model will probably give way to the informal consultation model.⁸⁴ Further down the line, the capacity of the private immigration bar to support the informal model may be taxed, leading to greater usage of a combination of the contract model and local in-house experts through private law firm growth.

2. Organizational Effects Among Public Defender Offices

The effects of *Padilla* will likely play out differently for PD organizations. Those effects might change the overall size of the staff in PD offices, the

83. See Email From Jeremy McKinney, *supra* note 73.

84. See Matt Cameron, *Padilla v. Kentucky: Gift Basket or Dirty Bomb?*, MASS APPEAL BLOG, <http://www.mattcameronlaw.com/2010/03/padilla-v-kentucky-gift-basket-or-dirty-bomb> (last visited July 11, 2011).

relationships among those offices, and the method of assigning attorneys to work with clients.

The total number of public defenders available in a jurisdiction is a product of budget politics at the state and local levels. Some managers of PD organizations now express the hope that *Padilla* will strengthen their hand during negotiations with legislators in the budget process.⁸⁵ The argument will go something like this: Routine access to immigration law expertise is no longer a luxury. There are many aspects of criminal defense—such as meeting the caseload targets of professional associations—that state legislators, county commissioners, and others who set the total criminal defense budget in a jurisdiction feel free to ignore.⁸⁶ Access to immigration advice, however, is now a minimum prerequisite of a valid conviction, the price the state must pay to put away a criminal. The implication of this reasoning is an increase in the total number of PD positions that state and local governments will fund.

The smart money, however, will not be on faster growth in the total number of public defenders as a direct result of *Padilla*. Although the PD sector will probably continue to grow as it draws cases away from private appointed defense lawyers, that growth will happen because of the cost advantage that many jurisdictions attribute to PD offices. There is only a loose connection between constitutional requirements for states to provide adequate defense counsel and the actual budgets that jurisdictions approve and spend for such services.⁸⁷ Many—perhaps most—PD organizations will find it necessary to handle their clients' immigration issues with no overall increase in the number of available attorneys.

While total staffing levels might remain more or less unchanged, *Padilla* could prompt some changes in the relationships among offices within a state. The county-level PD offices may explore affiliations with other PD offices in the same state to share the expense of an immigration staff attorney. In the long run, the increased specialization of the skills necessary for an organization to provide adequate criminal defense could also promote further evolution from

85. See Telephone Interview With Sejal Zota, *supra* note 75. But see *Will the Supreme Court's Recent Decision in Padilla v. Kentucky Further Impact an Already Stressed Criminal Defense and Immigration System?*, EQUAL JUST. WORKS BLOG (Apr. 23, 2010), <http://equaljusticeworks.wordpress.com/2010/04/23/will-the-supreme-court%E2%80%99s-recent-decision-in-padilla-v-kentucky-further-impact-an-already-stressed-criminal-defense-and-immigration-system>.

86. See Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004).

87. See Brown, *supra* note 49; Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751 (1999) (reviewing MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998)).

county-directed PD offices to state-directed offices.⁸⁸ Thus, a move from the self-sufficiency model to the shared expert model among PD organizations is a reasonable prediction.

The enhanced importance of immigration advice to the work of public defenders could affect not only the relationships among different units and offices, but also the internal operations of an individual PD office. Those offices currently operate with a strong preference for vertical representation: One attorney is assigned to a defendant throughout the life of the case, including appeals.⁸⁹

This vertical representation model does not account for the need to bring immigration expertise into the defense effort. A strict vertical assignment system assumes the competence of the attorney to handle all of the client's legal issues; the challenge for the manager is to match the client to an attorney (that is, a single attorney) with the proper skills. For example, it is a common practice for PD offices to assign defendants to attorneys based on the experience level of the attorney.⁹⁰ Immigration issues, however, apply to many types of crimes and criminal defendants. The manager's task in this context is not simply to assign the case to the attorney with the relevant legal skills. Instead, the manager must integrate the skills of different attorneys to the full range of legal issues that a client presents, while recognizing that the client's trust is crucial to effective representation.

This management task of integrating the work of different attorneys is acute in the immigration context, thanks in part to the *Padilla* decision. But the task is not limited to immigration matters. The integration of attorneys and other professionals with complementary skills is already recognized as the manager's central task for the defense of death penalty cases.⁹¹ Moving beyond this specialized area, the management of PD organizations is rapidly becoming more complex, reaching beyond the traditional matching of clients to appropriate attorneys. Managers now must establish more detailed methods of monitoring the caseloads of individual attorneys, subunits of the office, and the entire organization;⁹² they also must assess the quality of attorneys' work and provide for the professional development of new attorneys in the office.⁹³ In a world of increased legal specialization, this expanded list of managerial duties

88. See Mann, *supra* note 38.

89. See Langton & Farole, *supra* note 42, at 8 tbl.5.

90. *Id.*

91. See Betsy Wilson, *Creating a Capital-Defense Team That Is More Than the Sum of Its Parts*, 32 CORNERSTONE, May–Aug. 2010, at 2.

92. See Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771, 786–87 (2010).

93. See Adele Bernhard, *Raising the Bar: Standards-Based Training, Supervision, and Evaluation*, 75 MO. L. REV. 831 (2010).

for chief public defenders must now include the ability to deploy the specialists to the proper aspects of a client's representation.

C. The Impact of *Padilla* From Jurisdiction to Jurisdiction

Just as the *Padilla* opinion will likely produce different effects among private law firms and within PD organizations, it will also have larger and more visible effects in some states than in others. A handful of conditions determine whether a state's environment is amenable to changes in the aftermath of *Padilla*.

The first local condition to consider is the number of criminal defendants who present potential immigration issues. The figure is unknowable, but one crude estimate of the potential presence of immigration issues is to inquire whether a client was born outside the United States—just such a question is a common part of the client intake routine for some immigration attorneys.⁹⁴ Thus, jurisdictions with the largest number of foreign-born residents will probably also produce a pool of criminal defendants with a relatively large number of immigration issues. As of 2009, the jurisdictions with the largest proportions of foreign-born residents (in descending order) were California, New York, New Jersey, Florida, Nevada, Hawaii, Texas, Arizona, Massachusetts, Illinois, Connecticut, the District of Columbia, Rhode Island, Maryland, Washington, Virginia, Colorado, New Mexico, Oregon, and Georgia.⁹⁵

The number of foreign-born residents is only a rough indicator of a client base that will present issues relevant to the *Padilla* duties of attorneys; a more refined estimate might be the jurisdictions with the greatest percentage of lawful permanent residents. Criminal defense clients who are lawful permanent residents present more opportunities for relief from deportation than undocumented clients⁹⁶ and thus present more complex immigration questions where

94. For a discussion of the difficulty of measuring the number of illegal aliens in the criminal justice system, see Rebecca L. Clark & Scott A. Anderson, Urban Inst., *Illegal Aliens in Federal, State, and Local Criminal Justice Systems* (June 30, 1999) (unpublished report funded by U.S. Dept. of Justice, Doc. No. 181049).

95. 2005–2009 *American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=ACS&_submenuId=&_lang=en&_ds_name=ACS_2009_5YR_G00_&ts= (last visited May 21, 2011). The Migration Policy Institute maintains state-by-state data on foreign-born residents in the United States, categorized by immigration status. See MPI Resources on US Immigration Reform: *Characteristics of the Foreign Born in the United States*, MIGRATION POLY INST., http://www.migrationpolicy.org/pubs/US_Immigration_Resources.php#foreignborn (last visited May 21, 2011).

96. The Department of Homeland Security estimates the number of unauthorized aliens in each state. By this measure, which is somewhat more refined than estimates based on the number of foreign-born residents, Arizona, California, Florida, Georgia, Illinois, Nevada, New Jersey, New York, North Carolina, and Texas are the ten states with the highest need for integrated criminal and immigration expertise. See Michael Hofer, Nancy Rytina & Bryan C. Baker, *Estimates of the Unauthorized Immigrant*

sound legal advice could make a bigger difference.⁹⁷ According to estimates from the Office of Immigration Statistics in the Department of Homeland Security, the metropolitan areas that received the largest flow of legal permanent residents in 2009 were Atlanta, Boston, Chicago, Dallas, the District of Columbia, Houston, Los Angeles, Miami, New York, and San Francisco.⁹⁸ A composite of these two different population numbers can help predict which jurisdictions will experience the greatest need for integrated criminal defense and immigration legal services.⁹⁹

A jurisdiction's pre-*Padilla* laws related to a defense attorney's duties to the client on matters of immigration law is a second local condition that helps predict the likely organizational impact of the decision. If statutes or procedure rules in the jurisdiction already imposed an affirmative immigration advice obligation on defense attorneys, *Padilla* simply constitutionalized what was already in theory a required practice. In states with notification rules for immigration consequences already in place—such as California, Connecticut, Florida, Georgia, New York, North Carolina, Ohio, and Texas—the Supreme Court increased the costs of noncompliance, but not dramatically so.¹⁰⁰ These are the states with the strongest legal infrastructure already in place to support a transition to integrated provision of criminal defense and immigration services.

In other jurisdictions, however, *Padilla* creates new duties and the transition will take more time and education. Where *Padilla* adds weight to the views of other legal authorities, any organizational changes necessary to implement the decision will likely encounter less resistance.

A third local condition is harder to measure but is equally important. The preexisting size and structure of PD offices in the jurisdiction can predict the

Population Residing in the United States: January 2008, DEP'T OF HOMELAND SEC. (Feb. 2009), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf.

97. A legal permanent resident client should avoid, if possible, a conviction for an offense that triggers deportability. A secondary goal is to avoid a conviction for an offense that triggers inadmissibility when the client leaves the United States and attempts to reenter. If these two objectives are not possible for a client, the attorney still should seek to avoid a conviction for an aggravated felony, preserving eligibility for administrative cancellation of removal or administrative waiver of inadmissibility. See *Practice Advisory*, IMMIGRANT DEF. PROJECT (revised Apr. 9, 2010), http://www.immigrantdefenseproject.org/docs/2010/10-Padilla_Practice_Advisory.pdf.

98. These ten metropolitan areas accounted for over half of all the legal permanent resident flow in fiscal years 2007 to 2009. See Randall Monger, *U.S. Legal Permanent Residents: 2009*, DEP'T OF HOMELAND SEC., at tbl.5 (Apr. 2010), http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2009.pdf.

99. The Pew Hispanic Center also maintains data sets on the distribution of Hispanic populations among the states that could inform any predictions about the likely need for integrated criminal defense services. See *State and County Databases*, PEW HISPANIC CTR., <http://pewhispanic.org/states> (last visited July 11, 2011).

100. See *supra* note 69 (listing procedural statutes and rules requiring notification to defendant).

reception that *Padilla* will get in that locality. States and localities with larger PD organizations in place will have more options for buying immigration expertise at an acceptable price. Places that operate smaller offices (particularly if they are not organized and funded at the state level) will face a longer transition.

Furthermore, states and counties with larger and more established PD organizations also may have already created a political culture and an expert infrastructure that support innovation and aspirations to provide services above the constitutional minimum.¹⁰¹ States that combine relatively high levels of spending on criminal defense and relatively low budgets for incarceration—including Iowa, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Oregon, Vermont, Washington, West Virginia, Wisconsin, and Wyoming—offer the most promising locations for a positive *Padilla* impact.¹⁰²

A combination of low spending on criminal defense counsel and high per capita spending on incarceration may predict fairly well the states with weaker political environments and expert infrastructures. These states include Alabama, Arkansas, Colorado, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Ohio, Oklahoma, Tennessee, Texas, and South Carolina.¹⁰³

Taken together, these factors—the level of need, the legal infrastructure, and the political and expert environment—indicate the jurisdictions with an atmosphere that promotes growth of high-quality integrated legal services after *Padilla*. States such as California, Massachusetts, New Jersey, and New York combine at least two of the predictors discussed above. Serious efforts to integrate criminal defense with immigration expertise is likely to occur in those states sooner rather than later; they are also likely to become the laboratories for experimentation with different delivery models.

On the other hand, states such as Arizona, Georgia, Texas, and Virginia combine high levels of need for integrated services with limited prior legal developments and poorly developed institutional infrastructure. They will likely lag behind the leading states; nevertheless, the constitutionalization of integrated immigration services for indigent criminal defendants will probably draw these high-need states into the effort earlier than they otherwise might have begun. In such jurisdictions where conditions are less favorable but the need is high, the Supreme Court in *Padilla* lit a slow fuse.

101. See Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. FOR STUDY LEGAL ETHICS 199 (1999); Alissa Pollitz Worden & Robert E. Worden, *Local Politics and the Provision of Indigent Defense Counsel*, 11 L. & POL'Y 401 (1989).

102. See Brown, *supra* note 49, at 919.

103. *Id.*

CONCLUSION

The future of criminal defense belongs to the service manager rather than the brilliant courtroom orator, to the allocator of team resources rather than the heroic soldier standing in the breach. *Padilla*¹⁰⁴ recognizes, and probably reinforces, this long-term trend toward organization-based defense work. But this transformation will arrive in different jurisdictions at different speeds. The immigration demographics of a jurisdiction will now become one of the key determinants of the speed of this transition from individual to organizational defense lawyers.

The growth in the organizations where lawyers work will, of course, shape the quality of the experience for practicing lawyers; it is worth studying because of its effects on the professional satisfaction and prospects for those who enter the profession. In the end, however, this growth of organizational legal practice is less about the lawyers than about their clients. The central social question is the quality of representation the client receives when a team rather than an individual delivers legal services.

There is something attractive about the nonbureaucratic defense lawyer, one individual to champion the defendant rather than a lawyer who appears only as a team member. It stands to reason that an individual lawyer can more easily create a relationship of trust with the individual client. And yet the world is changing quickly enough to make that individualistic vision a very costly conceit. A major challenge for public defense organizations over the next generation will be finding ways to present teamwork in a sympathetic light, both among the lawyers themselves and for their clients.

104. 130 S. Ct. 1473 (2010).