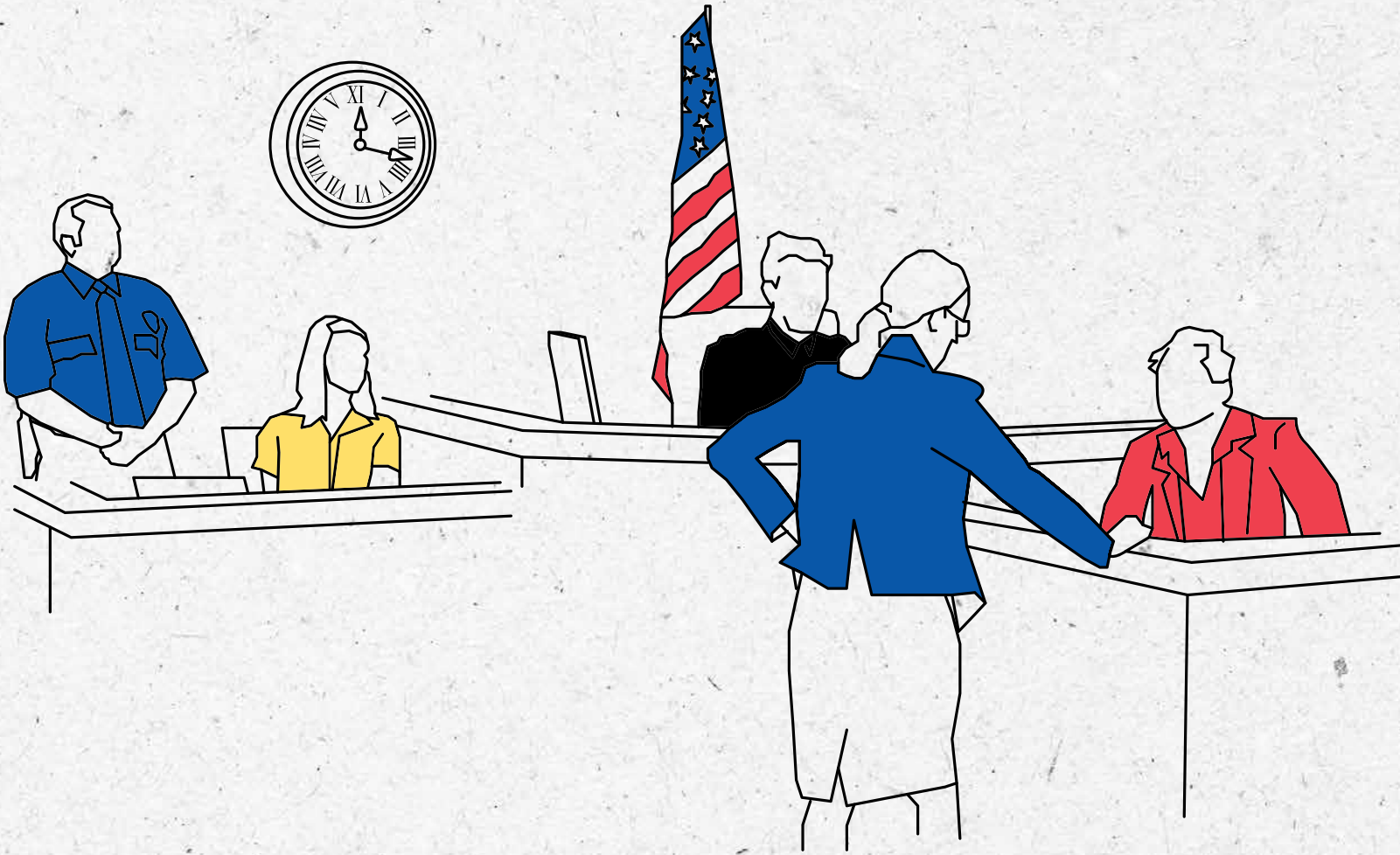


DEFEND L.A.

TRANSFORMING
PUBLIC DEFENSE IN
THE ERA OF MASS
DEPORTATION



Acknowledgments

This report was written by Andrés Dae Keun Kwon, Attorney and Equal Justice Works Emerson Fellow at the ACLU Foundation of Southern California (ACLU SoCal). The report builds on the author's law review piece *Defending Criminal(ized) "Aliens" After Padilla: Toward a More Holistic Public Immigration Defense in the Era of Crimmigration*, 63 UCLA L. REV. 1034 (2016).

Interviews and research for this report were conducted by Ahilan Arulanantham, Andrés Dae Keun Kwon, Jennie Pasquarella, Devon Porter, and Adrienna Wong of the ACLU SoCal; UCLA School of Law students Katrina Landeta, Kelly Miller, Bernadette Rabuy, and Alex Trantham; Emilou MacLean of the National Day Laborer Organizing Network; and Victor Narro of the UCLA Downtown Labor Center.

Editorial assistance was provided by Marcus Benigno, David Colker, Peter Eliasberg, Sandra Kang, Jennie Pasquarella, Geneva Tien, and Adrienna Wong of the ACLU SoCal. Copy editing was conducted by Henry Fuhrmann.

Report design was done by Czarrah Castro, with guidance by Jenna Pittaway of the ACLU SoCal.

The following additional individuals made important contributions to this report: Sarah Deri Oshiro and Alice Fontier of The Bronx Defenders; Robin Steinberg, Jennifer Friedman, Kate Rubin, and Isaac Wheeler, formerly of The Bronx Defenders; Brendon Woods, Raha Jorjani, and Rachael Keast of the Office of the Alameda County Public Defender; Ali Saidi of the Contra Costa County Office of the Public Defender; Daniel DeGriselles of the Law Offices of the San Bernardino County Public Defender; ACLU SoCal law clerks Lizette Ceja and Gaspar Lopez; UCLA School of Law Professors Ingrid Eagly, Jerry López, Hiroshi Motomura, and Noah Zatz; Daniel Sharp of the Central American Resource Center; Caitlin Bellis and Kristen Jackson of Public Counsel; Claudia León and Gabriel Arellano of Esperanza Immigrants' Rights Project; and the dozens of Los Angeles County public defenders who have spoken with us confidentially.

Published May 2018



Methodology

In the fall of 2014, the ACLU SoCal, along with various partner community organizations that work on immigrants' rights and criminal justice reform, began to explore how the Los Angeles County public defender offices could partner with community organizations to better serve the holistic needs of poor noncitizens facing prosecution. Since then, the ACLU SoCal has conducted in-person, telephone, and email interviews with dozens of public defenders—from deputy level I through deputy level IV attorneys, as well as managers. Interviews were also conducted with nonprofit and private immigration and post-conviction relief attorneys. These interviews have been conducted confidentially.

In addition, for the case studies of public defender offices serving large noncitizen populations that have developed more holistic immigration defense practices, the ACLU SoCal conducted interviews with key staff and managers at these offices. These offices include The Bronx Defenders and, in California, the offices in Alameda County, Contra Costa County, and neighboring San Bernardino County. These case studies help shed light on the essential components, structures, and practices of the holistic model of immigration defense.

Part I.

Executive Summary

Los Angeles County has a proud history of providing public defenders to people who cannot afford a lawyer to defend them in criminal court. On January 9, 1914, the county opened the first public defender office in the United States. In addition to being first, this office is the biggest in the nation. The Los Angeles County Public Defender’s Office (LACPD) currently employs about 700 public defenders, who handle approximately 300,000 criminal cases a year.

And yet there is a crisis today in our county’s public defender system. In particular, LACPD has been grossly under-resourced as measured against recommended staffing ratios and compared to other California public defender offices. As a result, LACPD underserves a large and vital segment of the Los Angeles population: the immigrant community.

This report, **Defend L.A.**, examines the failures of the county’s public defender system and demands legal representation that, at a minimum, meets the standards of the Sixth Amendment to the U.S. Constitution for all Los Angeles community members—including immigrants. The report documents many cases in which LACPD’s noncitizen clients pleaded to criminal dispositions triggering severe immigration consequences when more immigration-favorable alternative dispositions were available. Uninformed and unaware, LACPD’s noncitizen clients have pleaded guilty only to face mandatory deportation and permanent separation from family, community, and home—the loss “of all that makes life worth living.”¹

...

Take the real-life case of **Christian P.**, who was brought to the United States in 1992 as a one-year-old and became a lawful permanent resident when he was 15. In 2013, he was charged with driving a vehicle without the owner’s consent. Represented by LACPD, he pleaded guilty and accepted a sentence of 365 days in jail, instead of 364 days.

This day count was of monumental importance. The difference of a single day—a sentence of 365 days or

more—made the conviction an aggravated felony theft offense. Accordingly, Christian’s 365-day sentence subjected him to mandatory deportation, and federal immigration agents initiated removal proceedings against him. If Christian’s public defender had been trained and had received adequate immigration law expert support, he could have negotiated a more immigration-favorable sentence of 364 days or less, with dramatically different consequences.

Luckily, a private post-conviction relief attorney familiar with immigration law notified the public defender of the opportunity to seek a one-day reduction in the sentence. With the expert support of LACPD’s Immigration Unit, the defender was able to get the sentence reduction, and removal proceedings were halted. Christian is now eligible for citizenship.

...

In another case, **Margarita C.** was represented by LACPD in 2012 and pleaded guilty to receiving aid by misrepresentation. She was sentenced to 500 hours of community service and restitution of \$49,000 to the Department of Social Services. At the time, Margarita had a work permit and four U.S. citizen children. She had moved to the United States in 1988 when she was 20 years old.

Federal immigration authorities began removal proceedings against Margarita based upon her conviction. It turned out that her conviction was an aggravated felony because the offense involved “fraud or deceit” for which the restitution exceeded \$10,000. A simple way for Margarita to have avoided an aggravated felony—and mandatory deportation—would have been a plea to an alternate offense, such as grand theft, with the exact same sentence and restitution.

Prior to filing a habeas petition alleging ineffective assistance of counsel, Margarita’s private post-conviction relief attorney contacted LACPD’s

Immigration Unit. LACPD’s immigration experts successfully moved to withdraw the plea and enter a new plea to grand theft with the prior sentence to remain.

• • •

In yet another case, **Norberto S.** was advised in 2015 by his LACPD attorney to plead guilty to possession for sale of methamphetamine. But that conviction, an aggravated felony under immigration law, subjected Norberto to mandatory deportation. Norberto, who had been diagnosed with a learning disability at an early age, had been a lawful permanent resident since he was 3 years old.

Again, it was a private post-conviction relief attorney who made a crucial difference. The attorney filed a successful motion to allow Norberto to “plead upward” to the more serious offense of transportation. This tactic might seem counterintuitive, but the more serious offense did not amount to an aggravated felony triggering mandatory deportation. As a result, removal proceedings were terminated against Norberto.

• • •

As these cases show, criminal proceedings can have devastating consequences for noncitizens. In addition to incarceration, probation, parole, and civil legal consequences that can flow from criminal convictions, noncitizens can face what for many is the most disastrous outcome of all: deportation. Even minor misdemeanor offenses carrying few criminal penalties and often no actual jail time—offenses such as shoplifting, turnstile jumping, public urination, or possessing a small amount of marijuana for personal use—can trigger deportation.

Thus, quality criminal defense is critically important for noncitizens. In *Padilla v. Kentucky* (2010), the U.S. Supreme Court held that noncitizens’ Sixth Amendment right to effective counsel includes receiving affirmative, accurate advice about the immigration consequences of criminal dispositions. The right to effective counsel also includes defense against adverse immigration consequences like deportation through the pursuit of alternative dispositions that avoid or at least minimize such consequences. Defense strategies may include “pleading up” to more serious criminal offenses that have fewer or no immigration consequences.

Such informed legal defense could not be more paramount today, as the Trump Administration expands the

federal government’s reliance on local criminal justice systems to advance its deportation agenda.

Nevertheless, in the entire LACPD staff of more than 1,100 employees, there are just two attorneys designated as immigration law experts. These two attorneys attempt to provide expert support to about 700 public defenders, who annually handle approximately 51,900 cases involving noncitizen clients. A dramatic staffing expansion is urgently needed, not only because of LACPD’s extraordinarily large number of noncitizen cases, but also because of the enormous complexity of the intersection between federal immigration law and state criminal law and increasingly aggressive federal immigration enforcement practices.

LACPD lags far behind many public defender offices in California with respect to the number of in-house immigration experts it employs. With only two immigration experts, LACPD’s ratio of immigration experts to public defenders is about 1:350. LACPD’s ratio is significantly worse than the ratios of offices in neighboring San Bernardino County (1:96), Contra Costa County (1:75), and Alameda County (1:22), as well as the County of Los Angeles Alternate Public Defender Office (APD) (1:100)—which represents the indigent accused when LACPD has a conflict of interest or is otherwise unavailable.

Importantly, each LACPD immigration expert attempts to support defenders on approximately 25,950 noncitizen cases per year. LACPD’s ratio of immigration experts to the annual caseload of noncitizen clients is thus about 1:25,950. Even using outdated standards for public defender offices, LACPD falls far short of the 1:5,000 recommended ratio for offices like LACPD that seek to provide full immigration advice but no direct immigration representation. Indeed, LACPD’s resulting ratio is about *five times* the recommended standard. In comparison, APD and each office profiled in this report abide by the recommended standards.

It is not only with respect to in-house staffing and expertise that LACPD lags far behind—it has also maintained deficient institutional practices. Unlike standard practices in other public defender offices, foundational trainings on immigration law and its intersection with criminal law are not required for all defenders, except for new hires. LACPD’s basic intake sheet contains no entries on immigration status, and defenders are not required to ask key questions to ascertain immigration status when first meeting with

COMPARISON OF CALIFORNIA PUBLIC DEFENDER OFFICES

Public Defender Office	The Office of the Alameda County Public Defender	The Contra Costa County Office of the Public Defender	The Law Offices of the San Bernardino Country Public Defender	The Los Angeles County Public Defender's Office
Annual Criminal Caseload	38,100	19,000	45,000	300,000
Annual Noncitizen Caseload	5,677	2,451	4,995	51,900
Full Time Equivalent of Public Defenders	108	75	120	700
Full Time Equivalent of Immigration Experts	5	1	1.25	2
Ratio of Immigration Experts to Noncitizen Caseload	1:1,135	1:2,451	1:3,996	1:25,950
Ratio of Immigration Experts to Public Defenders	1:22	1:75	1:96	1:350

their clients. It is impossible to adequately advise about, and defend against, immigration consequences if defenders do not even know their clients' immigration status. Further, defenders are not required to consult with their immigration experts when they are uncertain about the immigration consequences of contemplated dispositions or available immigration-favorable alternative dispositions.

As a result, despite the often-heroic work of individual defenders and the two immigration experts, LACPD defenders have systematically lacked the necessary resources, expert support, and institutional structures and practices to provide constitutionally mandated, quality representation to all their noncitizen clients.

It doesn't have to be this way. Other public defender offices serving large noncitizen populations have pioneered more holistic immigration defense practices that strive to meet the radically changed landscape of criminal defense in the twenty-first century. In particular, the holistic model of immigration defense cultivates a culture and practice of seamless integration of criminal and immigration defense whereby public defenders and embedded immigration experts work

closely together to provide high-quality, client-centered criminal-immigration representation. This approach requires an adequate number of in-house immigration experts to correspond to the number of defenders, the noncitizen client caseload, and their overall workload. Further, more holistic offices employ in-house immigration attorneys who provide comprehensive services to meet noncitizen clients' underlying immigration needs—for instance, by ensuring the continued representation of clients who cannot avoid immigration consequences.

First, LACPD can and must be fully equipped and set up to ensure effective representation. To fully comply with *Padilla* and related federal and state law, the office must dramatically expand its Immigration Unit and reform deficient institutional practices. Only then would LACPD public defenders be able to fully defend all their noncitizen clients and prevent, where possible, avoidable criminal convictions that trigger severe immigration consequences.

Further, both LACPD and APD should develop more holistic immigration defense practices. As part of this process, LACPD and APD should build appropriate

in-house capacity to collaborate more closely and systematically with Los Angeles Justice Fund and One California nonprofit providers and thereby complement these innovative programs. If adequately equipped, the immigration units at LACPD and APD could provide nonprofit providers with critical value-added expert support on criminal-immigration legal matters, such as post-conviction relief for noncitizens, in a more systematic way. In addition, LACPD and APD should provide their noncitizen clients with targeted direct immigration representation, starting with particularly vulnerable groups of clients, such as juvenile clients.

Today, as the Los Angeles County Board of Supervisors enters a second year in the search for a qualified, experienced chief public defender for LACPD, it should create a new, bolder, transformative vision for the county's overall provision of indigent defense services. Indeed, the Board of Supervisors has already declared its commitment to create a "holistic, client-based representation model" of public defense.² It should make this commitment a reality. As the historic first to create a public defender office, Los Angeles County should lead again.

Key Recommendations

For the Los Angeles County Board of Supervisors

- ➔ Dramatically expand LACPD's Immigration Unit to provide adequate immigration expert support to public defenders:
 - o Create 15 additional in-house immigration expert budgeted positions. The total additional funding necessary for this expansion would amount to no more than \$3 million—about 1/100 of one percent of the total county budget.
- ➔ Move LACPD and APD toward a comprehensive service model:
 - o Build the capacity of LACPD and APD to collaborate more closely and systematically with Los Angeles Justice Fund and One California nonprofit providers, delivering critical value-added expert support on criminal-immigration legal matters.
 - o Fund in-house immigration attorney positions at LACPD and APD dedicated to the continued representation of particularly vulnerable groups of noncitizen clients, such as juveniles clients.

For LACPD's Leadership and Management

- ➔ Restructure the Immigration Unit strategically:
 - o Create a central supervisorial group of experienced immigration experts.
 - o Embed the additional immigration experts focusing on *Padilla* plea consultations strategically across LACPD's branch offices.
- ➔ Reform deficient institutional practices:
 - o Require and expand foundational criminal-immigration law trainings for all defenders.
 - o Institutionalize a comprehensive intake form and establish a policy requiring defenders, when first meeting with clients, to ask key questions to ascertain immigration status and gather critical information.
 - o Develop and enforce a protocol to ensure that defenders consult with their immigration experts in cases involving noncitizen clients when they are uncertain about immigration consequences or available alternative dispositions.

For Los Angeles County Prosecutor's Offices

- ➔ Fully implement California Penal Code Section 1016.3(b), which created a mandate for all prosecutors to "consider the avoidance of adverse immigration consequences . . . in an effort to reach a just resolution"³:
 - o In the interest of ensuring a just outcome, actively participate in securing immigration-safe dispositions for noncitizens, including by declining to charge, expanding the use of pre-charge and pre-plea diversion programs, and negotiating pleas that avoid or at least mitigate adverse immigration consequences.
 - o Develop formal policies for the meaningful consideration of immigration consequences, pursuant to Section 1016.3(b).

ACLU

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Southern California

aclusocal.org