Give Us Your Huddled Masses Yearning to Breathe Free: A Criminal Defender Resource Guide to Advising the Non-Citizen Criminally Accused

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GIVE US YOUR HUDDLED MASSES YEARNING TO BREATHE FREE:
A CRIMINAL DEFENDER RESOURCE GUIDE TO ADVISING THE
NON-CITIZEN CRIMINALLY ACCUSED

by Rita M. Montoya

Give me your tired, your poor
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tossed to me,
I lift my lamp beside the golden door!

-Inscription at the base of the Statue of Liberty

For a variety of reasons, voluntary and involuntary, some non-citizens find themselves in the United States criminal justice system accused of a myriad of federal, state, or municipal criminal law violations. Though a criminal conviction carries a variety of consequences for those who find themselves in the criminal justice system, a criminal conviction for a non-citizen can affect their very existence in the United States. For some, it may mean simply being returned to a country where family and friends reside. Yet, for others, it results in being returned to a country they have never really known, perhaps to a language they do not speak, or to a place where they may possibly be tortured or killed.

A recent article published in The Atlantic highlights the story of Ronald Sylvain, a longtime permanent legal resident married to a U.S. citizen with whom he has children.1 After a few understandable but unwise traffic ticket-related moves, Mr. Sylvain found himself labeled as an “aggravated felon” by U.S. Immigration and Customs Enforcement (ICE); he now faces the possibility of deportation to a country he does not even know. It is unclear whether Mr. Sylvain had criminal defense counsel or received any general advisement regarding the immigration consequences of his criminal convictions. What is clear, however, is the devastating effect that a criminal conviction can have for non-U.S. citizens such as Mr. Sylvain.

As criminal defense attorneys, we have an affirmative duty to advise our clients about immigration consequences, namely the risk of deportation, for potential criminal convictions.2 Specifically, in Padilla v. Kentucky, the Court found that “when the deportation consequence is truly clear...the duty to give correct advice is equally clear.”3 This begs the important question of what action to take when the law is unclear. According to Padilla, attorneys may simply “do no more than advise a noncitizen client that pending criminal charges may carry

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3 Id. at 369.
a risk of adverse immigration consequences.”

Attorneys who do not engage in this dialogue with clients run afoul of the standard for effective assistance of counsel embedded in the Sixth Amendment of the United States Constitution. While the Padilla Court acknowledges the complex nature of the Immigration Code and the difficulty that non-Immigration-focused attorneys may have in understanding it, the Court maintained that deportation is so entwined with criminal convictions that to consider advisement of a deportation risk outside the scope of effective assistance of counsel would be a grave injustice of constitutional magnitude. And they are correct. But does that make it any more tenable an advisement?

While it may seem fair to the Court that members of the Criminal Defense Bar be required to educate themselves about another area of related law on their personal or professional time, public servants representing indigent individuals accused of a crime oftentimes do not have this luxury. I have known of Public Defenders carrying caseloads between 200-300 misdemeanors or 100-150 felonies at a time. I personally have carried 100 misdemeanor case files to court with me for a single docket day.

These numbers far exceed the American Bar Association guidelines for Public Defender caseloads and make it practically impossible to provide the standard of legal assistance that those clients deserve. The individual Public Defenders know it’s too many; their supervisors know it’s too many; and the clients definitely know it’s too many. Yet, there is simply not enough funding allocated to hire more Public Defenders, leaving them to do the best they can. Still, despite their willingness to regularly work twelve-plus hours, six to seven days a week, Public Defenders struggle to return client phone calls, complete case investigation, file motions, and visit their incarcerated clients for no other reason than that they are stretched thin and there are only twenty-four hours in a day. An environment like this makes a requirement to learn and know an additional (and complex) area of law, such as immigration, a professional nightmare.

Though the Immigration Code is supposed to be user-friendly, such that those affected should not need legal counsel to navigate it, the reality is that it is a complicated and conflicting set of laws. The language is broad and vague with little to no guidance as to what a certain phrase means or what qualifies under a particular provision. Some provisions are even in direct conflict with others and there is no certain resolution. Moreover, interpretation of the provisions often varies from one jurisdiction to another so a non-citizen in immigration court in the Ninth Circuit may face a very different environment than a non-citizen in the Fourth Circuit. Even seasoned lawyers may find themselves unable to provide a clear and definite answer to what may seem like the most basic of legal immigration questions. So where does this leave the indigent non-citizen criminally accused client who needs to know how a criminal conviction could affect his or her right to stay in the U.S.?

While many Public Defender systems do the best they can to provide their staff with training and resources so they can advise their clients appropriately regarding potential immigration consequences, the stark reality is that most are likely not going far enough. Offices such as the Bronx Defenders and Brooklyn Defender Services have been fortunate to be able to create and implement independent immigration units within their offices. These units are staffed with attorneys who are solely immigration focused. They often engage in policy work as well as direct client representation in the immigration law arena. These units serve the clientele in their particular office while working

4 Id.
5 Id. at 369-71.
in tandem with the client’s Public Defender and any other individuals on the client’s team, such as social workers or family advocates.

It is understandable, however, that given a lack of funding, resources, time and staff attorneys, most Public Defender systems, especially statewide systems, simply cannot operate on such a specialized level. Other offices employ immigration attorneys who take residence in select offices across the state so as to provide statewide clientele and their Public Defenders with a resource to assist their immigration needs. Most offices, however, can only provide trainings and written materials to facilitate proper immigration advisement. Presumably, there are also some offices that provide very little in this vein. It is not unheard of for a client to simply be advised that there may be some immigration consequences, but that his or her attorney is not familiar with immigration law and should contact an immigration attorney. This, unfortunately, does not appear to comply with Padilla.

So what is an exhausted and over-burdened Public Defender to do? There are many resources and sources of funding available to criminal defense attorneys and legal advocates in their education and provision of immigration legal services.

I. Practitioner Resources

Many legal and advocacy organizations provide training, resources, advice, and sometimes even direct representation. The Immigration Advocates Network (IAN) maintains a library of substantive materials and manuals as well as trainings, webinars, podcasts, and teleconferences. The National Immigrant Justice Center (NIJC) provides webcasts, practitioner tips, and legal materials. Additionally, the Defenders Initiative, created by NIJC, “provides trainings and responds to e-mail inquiries from criminal defense attorneys who have questions regarding potential immigration consequences that their immigrant defendant clients may face.”

Another valuable resource is the Immigrant Defense Project (IDP), which assists the criminal bar in carrying out their duties pursuant to Padilla by providing a hotline where attorneys can get advice on criminal-immigration issues, request trainings or obtain other support. The IDP also produces practice advisories that are accessible on their website to assist in defending immigrants as well as an essential “Immigration Consequences of Convictions” checklist, specifically for determining whether a criminal offense may be deemed an “aggravated felony” under immigration law and quick reference guides for a limited number of states. The website also contains a link to a strategy guide produced by the Law Offices of Norton Tooby focusing on how to avoid deportation at all stages of a criminal case.

The Immigrant Legal Resource Center (ILRC) provides a variety of resources that criminal defense attorneys may find useful in advising non-citizen clients. There are quick reference guides to California and Arizona convictions, a practice advisory for those considering the Deferred Action for Childhood Arrivals program, and many practice advisories.
ries pertaining to specific court rulings related to immigration consequences of criminal convictions. The ILRC also provides seminars, additional publications, and consultation services to criminal defenders. The Washington Defender Association Immigration Project provides case assistance, immigration attorney referrals, as well as practice advisories and immigration resources including a practice guide for representing juvenile non-citizens, negotiating and crafting pleas for non-citizens and immigration analysis of Washington specific crimes. The National Immigration Project of the National Lawyer’s Guild’s website provides specific guides to understanding immigration detention and defending juvenile non-citizens, among others. Its Legal Resources webpage contains quick reference charts for immigration consequences of criminal convictions in many states.

Defending Immigrants Partnership is a collaborative effort by the Immigrant Defense Project (IDP), the Immigrant Legal Resource Center (ILRC), and the National Immigration Project of the National Lawyers Guild to assist public defender offices and criminal defense organizations in provision of their services. “[T]he Partnership offers defender programs and individual defense counsel critical resources and training about the immigration consequences of crimes, actively encourages and supports development of in-house immigration specialists in defender programs, forge connections between local criminal defenders and immigration advocates, and provides defenders technical assistance in criminal cases.” Its website hosts a list of trainings around the U.S. as well as a members-only library.

II. Academic, Policy, and Funding Resources

The ImmigrationProf Blog provides up-to-date thoughts, opinions, summaries, and reviews of issues in immigration policy. Those looking for funding to support implementation or expansion of an immigration program in their office can start by looking at the website: www.GrantWatch.com. There, practitioners can search for a wide variety of grants including Refugee/Immigration and Justice & Juvenile Justice, among other opportunities. The website also includes tips for writing grant proposals and other resources practitioners may find helpful.

Additionally, if an office is willing to sponsor a legal fellow, there are many existing legal fellowships that an individual could apply for to serve this endeavor. For example, the Soros Justice Fellowship funds “projects that advance reform, spur debate, and catalyze change on a range of issues facing the U.S. criminal justice system,” including immigration-related projects. Projects sponsored by Equal Justice Works can also be tailored to serve the non-citizen criminally accused.

The inscription at the base of the Statue of Liberty welcomes immigrants to the U.S. with the promise of a golden entryway to freedom. For the non-citizen criminally accused, who have no right to court-appointed counsel in immigration proceedings, their last stop before being pushed out of the golden door often lies with a Public Defender office. Despite great strides as a result of relentless self-advocacy, these offices across the U.S. remain overburdened. Adding an imperative duty, such as advisement of immigration consequences upon the already buckling backs of Public Defenders, may appear to be the ultimate straw. But
our backs are strong and with the assistance of others in the legal and public interest community, we can provide our non-citizen clients with the justice they deserve.

Timeline of Immigration Law Regarding Convictions and Deportation/Removal


1891: Congress bars those convicted of felonies or other infamous crimes or misdemeanors involving moral turpitude from entering the United States. Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.


1917: Judicial Recommendation Against Deportation (JRAD) is implemented as a form of judicial relief whereby judges can make a recommendation about whether the noncitizen should be deported. It effectively prevented deportation. There were no automatic deportations. Each decided on case-by-case basis. JRAD codified as amended at Immigration and Nationality Act, 8 U.S.C. § 1251(b)(2) (1988) (repealed 1990).

1952: Immigration and Nationality Act (INA) modified JRAD to be applicable only to crimes of moral turpitude. Id.

1986: Second Circuit finds that failing to seek JRAD relief constitutes ineffective assistance of counsel ruling that convictions and their impact on a noncitizens ability to stay in the United States is a central issue resolved in the sentencing process and not a collateral consequence. Janvier v. United States, 792 F.2d 449 (2d Cir. 1986).


Post 1996: Little relief from mandatory deportation due to criminal conviction; namely, cancellation of removal, asylum, deferral/withholding of removal.

About the AUTHOR

RITA M. MONTOYA is an attorney licensed in the State of Colorado. Born and raised in Sacramento, CA, she is currently pursuing a LL.M. in Public Policy from the University of the Pacific, McGeorge School of Law and is serving as a Volunteer Attorney at the Maryland Office of the Public Defender. Ms. Montoya attended law school at American University in Washington D.C. where she focused on Criminal Defense of underserved communities. As a former Colorado Public Defender, Ms. Montoya had the privilege of representing juveniles and adults, unable to afford a lawyer, who were accused of crimes ranging from traffic and property crimes to violent offenses, including homicide. During her time at the Public Defender’s Office, Ms. Montoya provided legal assistance to thousands of clients in their pursuit of justice and, after only one year as a lawyer, she was chosen to second chair a capital case. Ms. Montoya also wrote a brief for and made oral argument to the Colorado Supreme Court. As a member of the Pacific McGeorge Immigration Clinic, she advocated for non-citizens seeking the protection of the United States, including victims of crimes and those brought to the U.S. as children; she also successfully represented a detained non-citizen in removal proceedings by invoking the Convention Against Torture thereby preventing his torture and execution by the government of his home country. Ms. Montoya strongly believes that educating people about their rights is the first step in ensuring that all people are treated with respect and dignity. She is a firm believer in “liberty and justice for all!”