

Denver Law Review

Volume 92
Issue 4 *Symposium - Crimmigration: Crossing
the Border Between Criminal Law and
Immigration Law*

Article 10

January 2015

Defense Lawyers as Membership Brokers

Stephen Lee

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

Stephen Lee, Defense Lawyers as Membership Brokers, 92 Denv. U. L. Rev. 909 (2015).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Defense Lawyers as Membership Brokers

DEFENSE LAWYERS AS MEMBERSHIP BROKERS

STEPHEN LEE[†]

Twelve years ago, I enrolled in an immigration course as a 2L. I had the good fortune to learn the material from someone who possessed as much compassion for the nation's immigrant communities as he did expertise over the subject matter.¹ Years later, once I entered law teaching, I began gathering my materials for an immigration course of my own. I quickly learned that my old notes were useless. The subject of this symposium explains why. The emergence of "crimmigration" as a body of law—comprised mostly of cases, regulations, and administrative memoranda—has transformed the field of immigration law. Criminal law and procedure is changing as well. This much became clear in 2010 when the Supreme Court decided *Padilla v. Kentucky*,² which held that a criminal defense lawyer's failure to apprise her noncitizen defendant client of the potential immigration consequences of a proposed plea deal could amount to ineffective assistance of counsel under the Sixth Amendment.³

For the uninitiated, Jose Padilla was a Honduran citizen who had been living in the United States for more than forty years.⁴ He was caught transporting a large amount of marijuana. Prosecutors offered Padilla a plea deal for misdemeanor and paraphernalia possession counts and felony marijuana trafficking.⁵ This deal included a ten-year sentence in which only five years would be served.⁶ Padilla's lawyer assured him he faced no adverse immigration consequences given the length of his residence.⁷ This was bad advice. These convictions unambiguously triggered the immigration code's deportation provisions.⁸ Padilla pursued a post conviction challenge arguing that his lawyer's conduct amounted to a violation of the Sixth Amendment guarantee of effective assistance of counsel.⁹ After losing and winning and losing in the state courts,¹⁰ Padilla got the chance to present his case to the Supreme Court, where he

† Stephen Lee, Professor of Law, University of California, Irvine School of Law.

1. Lucas Guttentag, the founding director of the ACLU's national immigrants' rights project, taught the course at UC Berkeley while I was a student. He is currently serving as senior counsel to the United States Citizenship and Immigration Services.

2. 559 U.S. 356 (2010).

3. *Id.* at 366.

4. Brief of Petitioner at 8, *Padilla v. Kentucky*, 559 U.S. 356 (2010) (No. 08-651).

5. *See id.* at 9.

6. *Id.*

7. *Padilla*, 559 U.S. at 359 (quoting *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008)).

8. *See* Immigration and Nationality Act § 101, 8 U.S.C. § 1101(a)(43)(B) (2013); 8 U.S.C. § 1227(a)(2)(A)(iii), (B)(i).

9. *Padilla*, 559 U.S. at 359.

10. *See* *Commonwealth v. Padilla*, 253 S.W.3d 482, 483, 485 (Ky. 2008).

persuaded seven justices that he had a legitimate Sixth Amendment claim.¹¹ Every defense lawyer must now identify and communicate to her noncitizen client potential immigration consequences, at least where such consequences are clear.¹²

Padilla undeniably represents an important intervention,¹³ but now what? What does *Padilla* mean for immigration law's core goal of selecting new members? This brief essay highlights two conversations that have unfolded in separate universes but that, if brought together, could help start answering this question. The first involves legal scholars who have developed a "consumer protection" account of *Padilla* and the provision of criminal defense services. These scholars frame the central regulatory challenge in terms of correcting information asymmetries and vindicating informational rights. Noncitizen defendants, these scholars argue, are entitled to immigration-related information as they advance through the criminal justice system.¹⁴ These informational rights are analogous to the kinds of rights consumers face in markets characterized by information asymmetries.

The notion of criminal defense services as a form of consumer protection stems from the transactional nature of the criminal conviction-generating process. The vast majority of convictions are not the result of a trial with judicial and jury oversight, but rather, the result of a plea bargain, which largely takes place between the prosecutor and the defense attorney.¹⁵ Plea bargains are like contracts, and of course, contracts are the legal mechanism that attracts a significant amount of scrutiny under consumer protection laws. Forum selection clauses, arbitration clauses, false advertising, labeling requirements, negotiation defaults—these are all laws that try to constrain the universe of contracts. And that's what *Padilla* did. It effectively imposed a different set of plea bargaining rules when noncitizen defendants were involved.

This view of criminal defense practice crystallizes the degree to which noncitizen defendants simply cannot make informed decisions about plea offers because of the information asymmetry pervading the plea bargaining process. Jenny Roberts has characterized *Padilla* as es-

11. See *Padilla*, 559 U.S. at 360.

12. *Id.* at 369.

13. Today, criminal courts, and especially state criminal courts, have emerged as key adjudicative bodies for making membership decisions, a power that has traditionally belonged to immigration judges and other federal agency officials and the Executive more generally. While state courts lack the formal authority to enter removal orders to make other immigration-related decisions, they functionally possess the power to do so. See Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 555 (2013).

14. See, e.g., Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1120 (2011); Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 126–31 (2009).

15. See *Padilla*, 559 U.S. at 372.

tablishing an “informational” right.¹⁶ This information must be material to the defendant’s decision-making process. And indeed, this resonates with the *Strickland* inquiry itself.¹⁷ After all, establishing a claim for ineffective assistance of counsel requires demonstrating prejudice, which is simply another way of characterizing information as material to the decision-making process.

A core tenet of transparency and mandatory disclosure laws is that firms, private entities, and other regulatory targets possess information that affects consumers and is difficult or impossible for the public to access.¹⁸ In each of these cases, the regulatory disclosure policy operates by forcing the party in the best position to provide (and oftentimes in sole possession of) information to a consumer.¹⁹ This characterization applies to *Padilla*, but it explains other areas of criminal procedure as well. Consider, for example, *Brady v. Maryland*,²⁰ which established a rule requiring prosecutors to turn over potentially exculpatory evidence to defendants,²¹ or *Miranda v. Arizona*,²² which established the widely familiar set of warnings to arrestees about their constitutional rights pertaining to arrest and interrogation.²³ Prosecutors hold a monopoly over the power to charge defendants with crimes, thus they are in the best position to identify whether exculpatory evidence exists.²⁴ Informational rights as they operate in the context of police serve a slightly different function, though they ultimately improve the decision-making process for would-be criminal defendants as well. *Miranda* established a right to know about your rights, and in that sense, members of the public could in theory learn about their rights in the arrest and interrogation process.²⁵ But encountering the police on the street or in one’s car or in an interrogation room can be intimidating. *Miranda* rights seek to reduce the coercive nature of these situations thus reducing the likelihood that individuals will make decisions based on fear.²⁶ Taken together, *Brady*, *Miranda*, and now *Padilla*, all established rights entitling the targets of law enforcement to know about their rights at critical junctures throughout the criminal justice process.

16. See Roberts, *supra* note 14, at 123.

17. In *Strickland v. Washington*, the Supreme Court articulated a two-step inquiry for establishing an ineffective assistance of counsel: first that the defendant’s lawyer failed to provide “counsel” within the meaning of the Sixth Amendment, and second, that this failure prejudiced the outcome. See 466 U.S. 668 (1984); see also César Cuauhtémoc García Hernández, *Strickland-Lite: Padilla’s Two-Tiered Duty for Noncitizens*, 72 MARYLAND L. REV. 844 (2013).

18. See David Weil et al., *The Effectiveness of Regulatory Disclosure Policies*, 25 J. POL’Y ANALYSIS & MGMT. 155, 156 (2006).

19. See *id.*

20. 373 U.S. 83 (1963).

21. *Id.* at 87.

22. 384 U.S. 436 (1966).

23. *Id.* at 444–45.

24. See *Brady*, 373 U.S. at 86–87.

25. See *Miranda*, 384 U.S. at 444–45.

26. *Id.* at 443.

As a concept, then, criminal defense as consumer protection offers descriptive clarity. It helps organize and make sense of a variety of criminal procedural rights. And in many ways, viewing criminal defendants as consumers has an empowering element. Providing noncitizen defendants with the information they need—that is, information on the immigration consequences of a proposed plea deal—allows those noncitizens to choose their destinies for themselves. Of course, consumer realities are much more complicated. The information a consumer receives can be confusing and overwhelming. It is in this respect that the consumer protection framework resonates with an ongoing discussion among social scientists on immigrant incorporation. Adequately protecting the interests of consumers involves not only establishing a right to obtain certain information but also designing a legal system that pays attention to how and by whom that information should be provided.²⁷ In this vein, markets characterized by information asymmetries often are characterized by intermediaries or brokers providing the information consumers seek. And indeed, much of what defense lawyers must do on behalf of noncitizen defendants involves identifying, communicating, and manipulating sensitive, immigration-related information.

Social scientists have long been interested in immigrant incorporation and the process by which immigrants integrate into their communities. In recent years, scholarly interest has intensified given the high number of unauthorized immigrants residing in the United States and the limited opportunities available to them for regularizing their status. This group of scholars has been particularly interested in how immigrants' tenuous and "liminal" status informs their strategies for securing an array of protections, benefits, and services to which they are otherwise entitled.²⁸ An increasingly influential strand of this conversation has highlighted the degree to which immigrants must rely on brokers and inter-

27. The body of scholarship addressing consumer protection through information disclosure is significant. For a cross-section of this scholarship, see Michael J. Fishman & Kathleen M. Hagerty, *Mandatory Versus Voluntary Disclosure in Markets with Informed and Uninformed Customers*, 19 J.L. ECON. & ORG. 45, 45–46 (2003). See, e.g., Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 353–55 (2011); Samuel Issacharoff, *Disclosure, Agents, and Consumer Protection*, 167 J. INSTITUTIONAL & THEORETICAL ECON. 56, 58 (2011); Weil, *supra* note 18, at 155–56.

28. See, e.g., Leisy J. Abrego & Sarah M. Lakhani, *Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses*, 37 L. & POL'Y 265, 273–76 (2015); Shannon Gleeson, *Brokering Immigrant Worker Rights: An Examination of Local Immigration Control, Administrative Capacity and Civil Society*, 41 J. ETHNIC & MIGRATION STUD. 470, 471 (2015); Paul G. Lewis & S. Karthick Ramakrishnan, *Police Practices in Immigrant-Destination Cities: Political Control or Bureaucratic Professionalism?*, 42 URB. AFF. REV. 874, 874–75 (2007); Helen B. Marrow, *Immigrant Bureaucratic Incorporation: The Dual Roles of Professional Missions and Government Policies*, 74 Am. Soc. Rev. 756, 756–57 (2009); Cecilia Menjivar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOC. 999, 1000 (2006). For a more comprehensive overview, see Stephen Lee, Book Review, *Growing Up Outside the Law*, 128 HARV. L. REV. 1405, 1407 (2015).

mediaries to overcome significant linguistic, information, and economic barriers.²⁹

As used in this literature, brokers are understood to be institutions and actors “possessing ties to businesses, nonprofits, and government agencies rich in resources, which then provide . . . institutions’ patrons with access to these resources.”³⁰ Brokers bring value to immigrants’ lives by shrinking the universe of services and putting those services in reach. They bridge networks and provide access to services typically available only to the mainstream. While brokers themselves may have the capacity to assist noncitizens with their various needs, often a broker’s value resides in its ability to connect noncitizens with other organizations that can meet those needs more effectively and efficiently.³¹ Social scientists have examined this phenomenon across a variety of contexts ranging from childcare centers that serve the poor,³² foreign consular offices that respond to their citizens in the United States,³³ and childhood immigrant arrivals who mediate the needs of their parental counterparts.³⁴

This scholarship has generated important insights about how immigrants can engage in member-like activities despite their tenuous legal status, but often times, it has proceeded from the assumption that membership status is something to be attained or earned. It has left largely unexamined those instances when a noncitizen already possesses insider status and must fight to maintain or preserve it. That is, it has sidelined those instances when a noncitizen with some form of permanent status encounters the criminal justice system and faces the distinct possibility that a trapdoor may open dropping her into the removal pipeline.

Consumers rely on a variety of intermediaries to gather information. In some instances, legislatures and agencies play the role of intermediary by compelling information disclosure.³⁵ In other instances, these public entities apply a softer hand by inviting and encouraging regulated bodies to make voluntary disclosures or to submit to third-party entities for cer-

29. See Marrow, *supra* note 28, at 756–57.

30. Mario Luis Small, *Neighborhood Institutions as Resource Brokers: Childcare Centers, Interorganizational Ties, and Resource Access Among the Poor*, 53 SOC. PROBS. 274, 274 (2006). This definition applies to institutional brokers. Another subject of this conversation has focused on individual brokers such as children. See, e.g., Lucy Tse, *Language Brokering Among Latino Adolescents: Prevalence, Attitudes, and School Performance*, 17 HISP. J. BEHAV. SCI. 180 (1995).

31. See Xóchitl Bada & Shannon Gleeson, *A New Approach to Migrant Labor Rights Enforcement: The Crisis of Undocumented Worker Abuse and Mexican Consular Advocacy in the United States*, 40 LAB. STUD. J. 32, 45 (2015).

32. See, e.g., Mario Luis Small, Erin M. Jacobs, & Rebekah Peeples Massengill, *Why Organizational Ties Matter for Neighborhood Effects: Resource Access through Childcare Centers*, 87 SOC. FORCES 387 (2008).

33. See, e.g., Bada & Gleeson, *supra* note 31, at 32.

34. See, e.g., Abel Valenzuela, Jr., *Gender Roles and Settlement Activities Among Children and Their Immigrant Families*, 42 AM. BEHAV. SCIENTIST 720, 723–25 (1999).

35. See Shameek Konar & Mark A. Cohen, *Information as Regulation: The Effect of Community Right to Know Laws on Toxic Emissions*, 32 J. ENVTL. ECON. & MGMT. 109, 109 (1997).

tification.³⁶ And in still other instances, private actors step into the gap to gather and sort information.³⁷ In a sense, these brokers help workers navigate labor markets filled with precarious work and “bad jobs.”³⁸ In *Padilla*, the Court harnessed the Sixth Amendment to force defense lawyers to serve a similar function for noncitizens traveling through the criminal justice system—that is, to protect them against “bad deals.”

The intermediaries and brokering frameworks help explain post-*Padilla* cases. *Padilla* reoriented defense lawyers to look for and identify immigration-related information. A pair of subsequent plea bargaining cases helped fill out the infrastructure in which defense lawyers could fill the interstitial space connecting the criminal and immigration systems. In *Missouri v. Frye*,³⁹ the Court held that defense lawyers were required to communicate proposed plea deals to their clients.⁴⁰ This type of rule puts pressure on defense lawyers to err on the side of communicating too much rather than too little information. And in *Lafler v. Cooper*,⁴¹ the Court held that one possible remedy for a defense lawyer’s ineffective assistance of counsel was for prosecutors to reoffer the initial plea deal.⁴² This kind of rule creates a remedy for noncitizen defendants who suffer from ineffective assistance of counsel. Without this kind of remedy, noncitizen defendants who prevail on a *Padilla* ineffective assistance of counsel claim would presumably have to proceed to trial. And the inherent uncertainty of trial would mean that a victory on a *Padilla* claim would amount to no victory at all. *Lafler* provides a fix for this by allowing noncitizens who are unhappy with their counsel’s performance to have a clear sense of the road not taken.

Having said all this, it’s important to emphasize that the market for immigration-savvy criminal defense services was not inevitable. Rather, it is entirely the by-product of the expansion of the grounds for deportation and the near elimination of opportunity for equitable relief and mercy in immigration proceedings. Prohibiting a service or product can have the effect of opening up new, black markets.⁴³ Immigration law has witnessed this phenomenon through several changes of law. In 1986, Congress passed the Immigration Reform and Control Act (IRCA), which

36. The organic food-labeling regime is a good example of this. See Julie Guthman, *Back to the Land: The Paradox of Organic Food Standards*, 36 ENV’T & PLAN. 511, 511 (2004) (“The cornerstone of organic regulatory convention is third-party certification, a way to verify that producers grow according to organic standards.”).

37. The National Association of Law Placement is a good example. See Estlund, *supra* note 27, at 384–85. So is YELP. See Daniel E. Ho, *Designing Information Disclosure*, 38 ADMIN. & REG. L. NEWS 13, 14 (2012).

38. See Bada & Gleeson, *supra* note 31, at 33.

39. 132 S. Ct. 1399 (2012).

40. *Id.* at 1409.

41. 132 S. Ct. 1376 (2012).

42. *Id.* at 1391.

43. David Michael Jaros, *Perfecting Criminal Markets*, 112 COLUM. L. REV. 1947, 1948–49 (2012).

conditioned access to work on immigration status—in broad brush strokes, it effectively prohibited visa overstayers, undocumented immigrants, and many other temporary visa holders from obtaining work.⁴⁴ IRCA simultaneously required employers to verify the work authorization status of their employees.⁴⁵ Of course, this did not actually exclude these immigrants from the labor market. Today, eight million of the estimated twelve million unauthorized immigrants are in the workforce.⁴⁶ What happened? IRCA created a black market for work authorization documents—birth certificates, social security cards, and the like. Restricting access to work created new, criminal opportunities for entrepreneurs.⁴⁷ The market for criminal defense services might be thought of as markets in this tradition.

Immigration law's member-selection process has been transformed from the affirmative pursuit of citizenship to the defensive posture of avoiding contact with the police. Naturalization ceremonies no longer represent the iconic cultural moment of becoming an insider.⁴⁸ In 2015, a moment that better reflects member-selection realities would be plea colloquies conducted by sentencing judge in state courts all around the country.

44. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3,359.

45. *Id.* § 101, 100 Stat. at 3,361–63.

46. See *Securing the Border: Defining the Current Population Living in the Shadows and Addressing Future Flows: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 114th Cong. (2015) (written testimony of Jeffrey S. Passel), available at <http://www.pewhispanic.org/2015/03/26/testimony-of-jeffrey-s-passel-unauthorized-immigrant-population/>.

47. Jaros, *supra* note 43, at 1958–59.

48. See Susan Bibler Coutin, *Cultural Logics of Belonging and Movement: Transnationalism, Naturalization, and U.S. Immigration Politics*, 30 AM. ETHNOLOGIST 508, 514–19 (2003).

