2013

Lifting the "Lamp beside the Golden Door": An Argument for Immigration Reform, Advocacy, and Transformation Through Testimonios

Rachael Federico

Follow this and additional works at: https://scholarship.law.berkeley.edu/blrlj

Part of the Law Commons

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38PQ19

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley La Raza Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
LIFTING THE “LAMP BESIDE THE GOLDEN DOOR”: AN ARGUMENT FOR IMMIGRATION REFORM, ADVOCACY, AND TRANSFORMATION THROUGH TESTIMONIOS

Rachael Federico*

INTRODUCTION ............................................................... 1

I. THE CURRENT LEGAL PARADIGM AND FAILED LEGISLATIVE FIXES .............................................................. 7

II. FACING THE PARADOX: UNDOCUMENTED STUDENTS’ STATUS ............................................................................. 13
A. An Education, but Not a Legal Education ................................................. 14
B. An Ephemeral Boundary Based on Age ..................................................... 17
C. Good Moral Character Requirements Under Immigration Law and State Bar Admission ......................................................... 20

III. TESTIMONIOS: BEYOND A SINGLE NARRATIVE .......... 24
A. The Legal Community’s Potential to Transcend Partisan Politics ............ 25
B. Narratives for Broader Legal Reform and the Opportunity for Transformation .................................................................................. 28

CONCLUSION .............................................................................. 33

And let’s also remember that hundreds of thousands of talented, hard-working students in this country face another challenge: the fact that they aren’t yet American citizens. Many were brought here as small children, are American through and through, yet they live every day with the threat of deportation.

—U.S. President Barack Obama, State of the Union Address, 2012

INTRODUCTION

In January 2008, the Florida Board of Bar Examiners (FBBE) adopted a policy requiring all bar applicants to disclose information pertaining to their citizenship or immigration status. The FBBE requires citizens to provide proof of

* J.D. Candidate, Lewis & Clark Law School, 2013; M.A., B.A. I would like to thank Professor Aliza Kaplan for her valuable assistance and generous gift of time. I would also like to thank Matthew Blythe for his keen eye for proof-reading and unconditional patience. Finally, I offer sincere gratitude to my family members and friends for their support, encouragement, and insight.

1. Fla. Bd. Petition for Advisory Op. at 2, Re: Question as to Whether Undocumented...
citizenship through a birth certificate or certificate of naturalization, while non-citizens must provide a photocopy of a document disclosing the bar applicant’s immigration status. In July 2011, Jose Manuel Godinez-Samperio passed the Florida Bar exam. Godinez-Samperio was an American Eagle Scout, graduated from his American high school as valedictorian, graduated from his American college with a distinguished record, received his Juris Doctorate from an American Bar Association-accredited law school in Florida, and registered for the American selective service. The FBBE determined that based on current information provided to the Board, Godinez-Samperio “[was not disqualified from a character and fitness standpoint for admission to the bar.]” However, the prospective attorney could not provide the FBBE with proof of his immigration status. Godinez-Samperio’s family legally entered the U.S. on a tourist visa from Mexico when he was nine years old, and they never returned to their country of origin. Godinez-Samperio awaits an advisory opinion from the Florida Supreme Court that will provide guidance to the FBBE as to whether undocumented immigrants can be admitted to the Florida Bar.

Godinez-Samperio’s situation is not unique. Sergio Garcia, a bar applicant in California, has a similar case pending since passing the bar exam in 2009. Another such applicant, Cesar Vargas, awaits a decision in New York. Such cases have not gone entirely unnoticed or unsupported as the stories have been covered by broad-reaching news organizations. The California Supreme Court invited not only

4. Id. at 2-3.
5. Response to the Applicant’s Motion for an Order Directing the Bd. to Conclude Its Investigation and Notice of Other Proceedings at 7-8, Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Florida Bar, No. SC 11-2568 (Fla. Aug. 6, 2012).
6. Bar Applicant’s Response to the Petition of the Florida Board of Bar Examiners at 1, Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Florida Bar, No. SC 11-2568 (Fla. March 7, 2012).
7. Godinez-Samperio’s hearing before the Florida Supreme Court was held on October 2, 2012. An opinion has not been issued to date of this writing.
8. Sergio Garcia was also born in Mexico and brought to the U.S. as a young child. However, it is important to note that Garcia’s father was a lawful permanent resident and has since naturalized. The importance of this fact cannot be understated—although Garcia is currently without legal status, he does have a path to lawful permanent residency, and he has been waiting for 17 years for his priority date to become current. Opening Brief of the Comm. of Bar Exam’rs of the State Bar of Cal. Re: Motion for Admission of Sergio C. Garcia to the State Bar of Cal. at 1, In re Sergio C. Garcia, No. S202512 (Cal. June 18, 2012). Garcia’s situation is not unusual. USCIS has experienced a devastating “backlog” for many classes of family-based immigrant categories, especially for Mexican citizens. USCIS, Visa Availability and Priority Dates, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/portal/site/uscis/ (search for “Family Preference Category”) (last visited June 27, 2012). Godinez-Samperio’s situation, on the other hand, does not seem to benefit from the availability of a family-based immigration benefit.
11. Id.
the Committee of Bar Examiners and Garcia to submit briefs, but also invited the Attorneys General of California and the U.S. to submit amicus curiae briefs to inform the court’s decision.\(^\text{12}\) The California State Bar ultimately recommended Garcia’s licensure to the California Supreme Court.\(^\text{13}\) However, these stories are without endings. They are stories requiring the attention of the legal community. They are stories that implicate broader immigration concerns. They are stories that beg for not just acknowledgment, but long-term solutions.

This article seeks to illustrate the need to shape legal remedies for non-citizen children of undocumented immigrants, while also demonstrating the way that undocumented students’ stories represent a more profound need for de-politicized immigration reform.\(^\text{14}\) In a narrow sense, the position of undocumented students presents a quandary for the legal community. As Godinez-Samperio’s case suggests, the legal community is constrained to either accept new lawyers who remain in continuous violation of federal immigration law, or to deny otherwise deserving new lawyers access to the legal profession.\(^\text{15}\) Neither outcome is entirely acceptable. On the one hand, admission of undocumented immigrants to state bar associations may be a signal to the public that such individuals are eligible for employment, even though employment of undocumented immigrants is a clear breach of federal law.\(^\text{16}\) On the other hand, rejection of undocumented immigrants signals a punitive response to circumstances outside of applicants’ control and it reveals a profession that is willing to educate—but not license—certain individuals who otherwise possess no available legal remedy.\(^\text{17}\) This result, too, is a bitter one, suggesting that the legal profession promotes ethical responsibility through unduly exclusive measures.\(^\text{18}\) The broader, and perhaps more important conclusion—and the conclusion central to this work—is that neither result leaves individual undocumented applicants with a true remedy to the broader issues affecting the students, their families, and their communities. Therefore, in the broadest and most representative sense, the cases of Godinez-Samperio, Garcia, and Vargas


\(^\text{13}\) In re Sergio C. Garcia, *supra* note 8, at 46. As of this writing, the court has not issued a decision in this case.

\(^\text{14}\) Reform efforts are inherently “political.” However, politicization in this sense refers to an unfortunate entrenching of partisan politics in which sorely needed changes in the law become subject to simple party-based binary opposition.

\(^\text{15}\) Although some scholars and advocates might argue that proof of immigration status simply should not be part of the state bar admission process, such arguments merely ask that the legal community avoid the proverbial elephant in the room. An outcome where undocumented law students are encouraged to hide their immigration status may not only contribute to many students’ fear of being “found out,” or “outed,” but would also lead to a *de facto* “don’t ask, don’t tell” policy. Instead, this article calls for solutions to the underlying problem—that undocumented students have no long-lasting legal remedy at hand and are effectively excluded from higher education.

\(^\text{16}\) 8 U.S.C. § 1324(a) (2006); INA § 274(a) (“In general, it is unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the U.S. an alien knowing the alien is an unauthorized alien.”).

\(^\text{17}\) Kathy Castor, RE: Jose Godinez-Samperio—Support for the Past American Bar Association (ABA) Presidents’ Amicus Brief. No. SC 11-25568 (Fla. March 16, 2012).

\(^\text{18}\) In re Sergio C. Garcia, *supra* note 8, at 38 (“The current state of the law and underlying policy in California supports inclusion, rather than exclusion, of this population.”); *see also* Immigration Reform and Control Act (IRCA).
demonstrate why, regardless of admittance to the legal community, undocumented immigrants will still encounter formidable barriers, which call for long-term changes in the law.

This article proposes that the use of individual narratives is one tool for transcending these difficulties and humanizing national considerations that impact the outcome of individual lives and broader communities. Part I of this article, by way of background, addresses the way current legislative and political treatment of undocumented children, such as Godinez-Samperio, creates an untenable legal paradigm. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) severely limits the ability of undocumented children to obtain a higher education. At the same time, legislative propositions to fix this problem have failed, leaving an undeniable dilemma with no practical solutions and limited long-term legal remedies for most undocumented students. Part II examines three paradoxes facing undocumented students. First, Supreme Court precedent entitles undocumented students to a public school education under the Equal Protection Clause, but it does not currently extend to higher education. This conflict results in a class of educated non-citizens who are prevented by the law from achieving (authorized) professional success. Second, undocumented students encounter a baffling change in the context of immigration penalties with the passage of their eighteenth birthday. In effect, students encounter a policy of leniency under the law that arbitrarily dissolves—leaving few long-term options and sudden consequences of unlawful presence. Third, undocumented students may demonstrate good moral character necessary for bar fitness requirements, as well as for naturalization, yet they likely have no long-term immigration remedy under the law. In Part II, I suggest that even those who exemplify good moral character and fitness are incongruously prevented from accessing material privileges such as the ability to naturalize or gain access to state bar admission.

These three paradoxes—legal results marked by logically inconsistent material effects—draw Godinez-Samperio’s struggle into focus by making the tension between the law and policy visible for undocumented immigrants living throughout the U.S.. Finally, individual students such as Godinez-Samperio simultaneously embody unique individual narratives and communal or group experiences. These narratives provide a greater context and argument for reform by implicating a broader relationship to the law—a legal struggle reaching beyond the exclusion of undocumented students in the legal profession. At the same time, the case of Godinez-Samperio illustrates the stakes of overcoming bi-partisan political


20. The failed Development, Relief and Education for Minors Act (DREAM Act) discussed, infra at note 48, is perhaps the most tortured example of legislative failure to offer relief from removability. Given the state of Congressional inaction, in June 2012, President Barack Obama announced a (limited) policy that offers qualified undocumented immigrants the opportunity to apply for work permits and defers the threat of removal. However, the policy decision is both a temporary and discretionary measure that immediately came under political scrutiny. See Julia Preston & John H. Cushman, Obama to Permit Young Migrants to Remain in the U.S., N. Y. TIMES, June 15, 2012, at A1.

21. See infra notes 88-92 and accompanying text.

22. See infra notes 138-142 and accompanying text.

23. See infra note 177 and accompanying text.
frameworks and overly simplistic understandings of the law.

I. THE CURRENT LEGAL PARADIGM AND FAILED LEGISLATIVE FIXES

Immigration law is controlled primarily through the comprehensive Immigration and Nationality Act (INA), a complex area of legislation addressing issues that range from the removability of undocumented immigrants to requirements for naturalization.\(^{24}\) The law is administered under executive power through the Department of Homeland Security (DHS)\(^{25}\) and its arms—Immigration and Customs Enforcement (ICE),\(^{26}\) Customs and Border Protection (CBP),\(^{27}\) and U.S. Citizenship and Immigration Services (USCIS).\(^{28}\) Congress has passed additional immigration-related acts informing immigration law and policy, such as the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), signed by President Bill Clinton in 1996,\(^{29}\) and the Immigration Reform and Control Act (IRCA), passed in 1986.\(^{30}\) The Supreme Court’s holdings render it unclear as to whether there is implied federal preemption of state or local laws where the state’s legislation conflicts with the INA or other federal regulations.\(^{31}\) However, states continue to enact a multitude of immigration-related regulations,\(^{32}\) such as the intensely debated controls over undocumented immigrants’ ability to obtain drivers’ licenses.\(^{33}\)

For undocumented children, the INA, as modified by IRCA and IIRIRA, creates distinct legal hurdles to living in the U.S.\(^{34}\) Although exact numbers are


\(^{25}\) DEPARTMENT OF HOMELAND SECURITY, http://www.dhs.gov/files/immigration.shtm (last visited June 19, 2012). ("The Department is responsible for providing immigration-related services and benefits such as naturalization and work authorization as well as investigative and enforcement responsibilities for enforcement of federal immigration laws, customs laws and air security laws.").

\(^{26}\) IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/about/overview/ (last visited June 19, 2012) ("U.S. Immigration and Customs Enforcement is the principal investigative arm of the U.S. Department of Homeland Security (DHS) and the second largest investigative agency in the federal government.").

\(^{27}\) CUSTOMS AND BORDER PROTECTION, http://www.cbp.gov/xp/cgov/about (last visited June 19, 2012) ("[Customs and Border Protection] is one of the Department of Homeland Security’s largest and most complex components . . . It also has a responsibility for securing and facilitating trade and travel while enforcing hundreds of U.S. regulations, including immigration and drug laws.").

\(^{28}\) U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/portal/site/uscis at "About Us" (last visited June 19, 2012) ("U.S. Citizenship and Immigration Services (USCIS) is the government agency that oversees lawful immigration to the U.S..").

\(^{29}\) IIRIRA (codified, as amended, in section 8 of the U.S. Code). See supra note 23, and accompanying text.


\(^{34}\) See infra notes 36-40, and accompanying text.
impossible to determine with accuracy, "[t]here are approximately 1.5 million undocumented youth in the U.S. and approximately 65,000 undocumented students graduate from high school each year." Nevertheless, the INA dictates that undocumented immigrants, immigrants present in the U.S. in violation of the law, are removable. Further, the INA provides that violators may be fined and imprisoned. It is also a violation of federal law for persons to hire knowingly undocumented immigrants, thereby effectively creating a barrier for undocumented immigrants to find work. Although children of undocumented immigrants are not prohibited by federal laws from attending school, including higher education, IIRIRA prohibits states from extending in-state tuition to undocumented immigrants unless the same discount is available to all citizens and nationals. Undocumented students are also ineligible for federal financial aid. A handful of the nation's most populous states have flouted IIRIRA's barrier to in-state college discounts through an interesting, although likely illegitimate, exercise of state legislative power. However, the material effect of IIRIRA, in conjunction with the IRCA's prohibition of employment of undocumented immigrants, is that most undocumented students cannot afford the cost of a higher education. Some legal remedies do offer undocumented children a narrow pathway to legal status; however, the vast majority of undocumented children do not have a way of obtaining lawful residency, including citizenship. Given the high-stakes nature of immigration law, scholars and law students throughout the U.S. have

36. 8 U.S.C. § 1227 (2006), INA § 237(a)(1)(B) ("[A]ny alien who is present in the U.S. in violation of this chapter or any other law of the U.S., or whose nonimmigrant visa (or other documentation authorizing admission into the U.S. as a nonimmigrant) has been revoked under section 1201(i) of this title, is deportable.").
39. 8 U.S.C. § 1623(a) (2006) ("[A]n alien who is not lawfully present in the U.S. shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the U.S. is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.").
40. Id.
41. Populous states such as New York, California, and Texas offer in-state tuition to undocumented students in spite of IIRIRA. For an overview of IIRIRA's legislative history and an argument against such state action, see Kris W. Kobach, Immigration Nullification: In-State Tuition and Lawmakers who Disregard the Law, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 473 (2007).
42. See Jessica Sharron, Comment, Passing the DREAM Act: Opportunities for Undocumented Americans, 47 SANTA CLARA L. REV. 599, 612 (2007) (noting that the average difference between in-state and out-of-state tuition can be extreme); see also KoKo Ye Huang, Note and Comment, Reimagining and Redefining the Dream: A Proposal for Improving Access to Higher Education for Undocumented Immigrants, 6 SEATTLE J. SOC. JUST. 431, 433 (2007) (explaining that other financial factors such as an inability to rely on parents for monetary support creates additional barriers for undocumented students).
43. For example, some children may qualify for Special Immigrant Juvenile Status. Victims of trafficking or violent crimes may qualify for T- or U-Visas, or relief under the Violence Against Women Act ("VAWA") through a "battered child" petition. Some families may also have viable asylum claims.
consistently argued that undocumented immigrants brought to the U.S. as children should be treated more leniently than adults. \(^{45}\) In support of this view, scholars have argued that "undocumented children are less likely to understand the ramifications of their illegal status that results from their being brought into the U.S. illegally." \(^{46}\) Other arguments have focused on the misplaced effects that punish the “wrong” individuals for violations of the law. \(^{47}\)

There have been several recent bipartisan legislative attempts at creating a remedy for some undocumented children. The most prominent example entailed multiple versions of the “DREAM Act,” \(^{48}\) a legislative effort that can generally be characterized as an attempt to fulfill two goals: “(1) allowing and assisting undocumented children to attend college; [and] (2) creating a legalization process for the undocumented children.” \(^{49}\) Proponents of the DREAM Act and similar legislation have recognized the pragmatic necessity of creating an exception to the removability of undocumented immigrant children; as one student author eloquently stated, “[T]he idea of deporting all of the undocumented immigrants currently living in the U.S. is a practical impossibility. Even with a $1.9 billion budget, the federal government has only been able to remove a small percentage of the country’s undocumented population.” \(^{50}\) No version of the Act managed to pass both houses of Congress, and it became a “casualty in a series of failed federal legislative efforts to provide a path to citizenship to immigrants brought to the U.S. illegally as children.” \(^{51}\)

In June 2012, in response to congressional inaction, President Barack Obama announced the Deferred Action for Childhood Arrivals (DACA) \(^{52}\) executive

---


\(^{47}\) Elisha Barron, supra note 45 (“Arguments about punishing illegal immigration ring hollow when applied to children who had no control over the decision to come in the U.S. illegally, and often did not even know they were without legal status until they tried to go to college or join the military.”).

\(^{48}\) The “DREAM” acronym stands for Development, Relief, and Education for Alien Minors, as known in the 2005 Senate version of the bill. S. 2075, 109th Cong. (2006). However, it was originally introduced by Senator Orin Hatch as the Development, Relief, and Education for Alien Minors Act. S.B.1291, 107th Cong. (2001). Variations of the bill have been integrated into other (failed) legislation such as the Comprehensive Immigration Reform Act of 2006 (S. 2611) and the Comprehensive Immigration Reform Act of 2007 (S. 1348). Other versions of the bill were introduced and re-introduced in both the Senate and House over several Congressional sessions, without their ultimate passage. See, e.g., S.1545, 108th Cong. (2003); H.R.1684, 108th Cong. (2003); S. 2075, 109th Cong. (2005); H.R. 5131, 109th Cong. (2006); S. 774, 110th Cong. (2007); H.R.1275, 110th Cong. (2007); H.R. 1751, 111th Cong. (2009); S. 729, 111th Cong. (2009); S. 3992, 111th Cong. (2010); and S. 952, 112th Cong. (2011).

\(^{49}\) Lee, supra note 46, at 240.

\(^{50}\) Aimee Deverall, Make the Dream a Reality: Why Passing the Dream Act is the Logical First Step in Achieving Comprehensive Immigration Reform, 41 J. MARSHALL L. REV. 1251, 1272 (2008).

\(^{51}\) Barron, supra note 47, at 623.

policy, offering hope to many young undocumented individuals.\(^{53}\) DACA offers qualified applicants "deferred action" from removal, as well as the opportunity to apply for two-year work authorization.\(^{54}\) DACA echoes the DREAM Act in that it only applies to those undocumented immigrants 30 years of age or younger who entered the U.S. before their sixteenth birthday, have no serious criminal record,\(^ {55}\) and who have earned a high school degree or General Education Development (GED) equivalent, or have received higher education or served in the military.\(^ {56}\)

President Obama explained in a press conference that the measure would allow qualified individuals to apply for temporary work authorization in order to better allocate DHS’s resources and to offer “a degree of relief and hope” for undocumented youth.\(^ {57}\)

Nonetheless, President Obama emphasized that the policy would be limited both temporally and in scope: “This is not amnesty. This is not immunity. This is not a path to citizenship. It’s not a permanent fix. This is a temporary stop-gap measure.”\(^ {58}\) In defense of the proposition, he voiced arguments iterated in legal scholarship.\(^ {59}\) Ultimately, as President Obama’s explanation suggests, he could only promise a policy that would last as long as his presidency.

DACA undoubtedly draws attention to the repeated congressional failure to pass some form of the DREAM Act. In fact, the DREAM Act has been introduced or re-introduced in over a dozen forms in the House and Senate over the past decade, beginning in 2001.\(^ {60}\) Noticeably, the versions of the Act have become less favorable to undocumented students with time by decreasing the number of individuals who would be eligible applicants while also watering down the strength of the immigration benefits provided to those who would qualify.\(^ {61}\) By comparison,
President Obama’s “stop gap” measure provides the least protection of all by not providing any pathway to lawful residency, conditional or otherwise. Furthermore, the act of filing a DACA application effectively exposes the unlawful status of undocumented individuals to the attention of the government without a guarantee of approval. Filling the application requires a leap of faith that applicants and their family members will not subsequently be exploited after coming forward and disclosing personal detailed information. Of course, executive policy measures such as DACA are also subject to change under the direction of future political leaders, making the decision to apply for DACA a bit of a gamble based on the political future of the U.S.. Yet, even if the DACA policy remains in place for those who are currently applying, it will not help future undocumented immigrants, those who arrived in the U.S. after they were sixteen years of age, or those who arrived in the U.S. after June 15, 2012—the effective date for the policy.

DACA does not address the issue of bar applicants, and ultimately, the law governing undocumented immigrants’ status and work authorization remains unchanged. Furthermore, the U.S. government has argued that current federal law prohibits state courts from issuing licenses to practice law to undocumented applicants. Thus, students like Godinez-Samperio may have a temporary reprieve from immediate removability if they qualify for deferred action and work authorization under DACA; however, their future as lawyers continues to hang in the balance, contingent on the outcome of state bar admission cases. Moreover, undocumented students across the nation are still vulnerable to the whims of teetering policy decisions.

Legal immigration scholar Michael Olivas notes that the failure of the DREAM Act follows an overall trend of increasing political tension and partisanship. Olivas’s scholarship also points out that there has been a rise in harsh

---

62. Among other evidence, an applicant must demonstrate that he or she entered the U.S. without inspection prior to June 15, 2012 or held lawful immigration status that expired prior to this date. Instructions for Consideration of Deferred Action for Childhood Arrivals, U.S. CITIZENSHIP AND IMMIGRATION SERVICES. Available at http://www.uscis.gov/USCIS/files/form/i-821dinstr.pdf.

63. Applications that denote certain criminal acts, gang activity, or fraud will result in the applicant’s referral for removal proceedings. Other applicants are considered to be at “low risk” for removal under the government’s policy. The Risks of Removal When Applying for DACA, Immigrant Legal Resource Center (Sept. 9, 2012), http://www.ilrc.org/daca-risks_of_removal_podcast.

64. ILRA, supra note 54.


state-level legislation barbed with anti-undocumented immigrant sentiment, and he argues that much of this state-level legislation is unconstitutional, as well as a flashpoint for general antipathy and fear. Although the DREAM Act was initially a bipartisan political effort, support for the various bills now falls “mostly along party lines.” Initial Republican advocates who sponsored or supported the DREAM Act, such as Senators Orin Hatch and John McCain, have subsequently declined to support its passage. Indeed, McCain further politicized immigration reform in a controversial—and lampooned—2010 Arizona Senate campaign advertisement. Paul Babeu, the Pinal County Sherriff walking with McCain in the advertisement, referred to undocumented immigrants as “illegals,” and McCain implied that a rise in “drug and human smuggling, home-invasions, [and] murder” was tied to immigrants’ unauthorized entries into the U.S.—a problem that McCain proposes can be solved by unironically completing “the danged fence” dividing the U.S.-Mexico border. Other political leaders opposed to the DREAM Act vocalize concern that it incentivizes more unlawful entries into the U.S. or fails to deter future immigrants from breaking the rules.

It is important to contextualize the current absence of federal solutions and immigration reform as a product of complex political and social factors such as “perceived terrorism threats, overburdened locales, well-publicized and highly polarized federal failures in immigration enforcement, [and] an increase in conservative media and advocates flogging the issue (the ‘Lou Dobbs effect’).” In other words, undocumented students have become the unwitting political victims and faces for greater problems and political maneuvering. As scholars such as Olivas have argued, it is impossible to find solutions for undocumented students without also addressing the need for broader immigration reform.

Nevertheless, political justifications for the DREAM Act have maintained
an empathic and ethics-oriented rhetoric.\textsuperscript{77} That is to say, those in favor of the Act have stressed the need to avoid punishment of children who do not choose their current predicament, and who “consider themselves Americans.”\textsuperscript{78} Or, as President Obama succinctly stated, “Because it is the right thing to do.”\textsuperscript{79} Along these lines, some scholars have emphasized the shock that undocumented children sustain when they realize that their sense of “home” is inconsistent with their “status” under the law, as well as the emotional and psychological effects caused by a sense of “unbelonging.”\textsuperscript{80} This scholarship reveals that psychiatrists treating undocumented children note “a disturbing pattern of emotional difficulties that directly result from a young person hearing the news that he [or she] lack[s] lawful status.”\textsuperscript{81} Others have also begun to discuss the material and emotional effects of having children move to their parent’s country of origin post-deportation after the children have already begun their adolescence in the U.S..\textsuperscript{82} This research underlines the high stakes lying perilously in the eye of a (political) storm.

II. FACING THE PARADOX: UNDOCUMENTED STUDENTS’ STATUS

Given the repeated failure of the DREAM Act and the political impasses to meaningful long-term legal changes,\textsuperscript{83} undocumented students, including those hoping to become lawyers, continue to face uncertainty about their futures and receive a stream of mixed messages about their place in U.S.’ society.\textsuperscript{84} Although there are no exact statistics available showing how many undocumented students currently attend law school, or who will in the future, the California State Bar records reveal that since 2005, 1,373 state bar applicants have applied for the social security number exemption to the general reporting requirement.\textsuperscript{85} This statistic suggests that Godinez-Samperio, Garcia, and Vargas are not alone in their struggle to enter the “noblest profession.” Their individual narratives represent broader concerns for undocumented immigrants, and particularly undocumented students, living in the U.S.

\textsuperscript{77} This is not to say that the arguments have been devoid of economic and financial responses, as well. For example, some studies cited by scholars have focused on the high level of economic returns the U.S. could see if undocumented students were able to actively pursue higher education and work in professional fields. See, e.g., Lee supra note 46, at 247-48; Barron, supra note 44, at 646-47 (“[S]tudents impacted by the DREAM Act could add between $1.4 trillion to $3.6 trillion in taxable income to the economy over the course of their careers, depending on how many ultimately gain legal status.”).

\textsuperscript{78} H.R.1582 (“It is the policy of the U.S. Government, supported both by acts of Congress and Supreme Court precedent, to permit undocumented children to attend public schools in the U.S.. This policy is rooted in recognition of the fact that such children often are not in a position to make an independent decision about where they will live, of the vulnerability of children, and by the desire to ensure that such children have an opportunity to become educated while in the U.S.”).

\textsuperscript{79} Obama, supra note 53.

\textsuperscript{80} Shah, supra note 43, at 669.

\textsuperscript{81} Id.

\textsuperscript{82} Damien Cave, American Children, Now Struggling to Adjust to Life in Mexico, N. Y. TIMES, June 18, 2012, at A1.

\textsuperscript{83} See Part I, supra.

\textsuperscript{84} See Part II, infra.

\textsuperscript{85} In re Sergio C. Garcia, supra note 8, at 22 n.12.
Scholar Ragini Shah explains that undocumented children living in the U.S. occupy an uncomfortable and incongruous place between law and practice, thereby creating a great need for immigration reform. Shah illustrates how undocumented children “are unable to ever seek lawful immigration status and are subject to removal from the U.S.” while at the same time, “the federal government recognizes their presence here through protections afforded them by the Constitution and social welfare programs, and does not seek their removal in most cases.” In other words, undocumented immigrants—and especially undocumented children—occupy a liminal state, straddling the fluid concept of what it means to be “American,” while receiving inconsistent messages about their rights as individuals.

A. An Education, but Not a Legal Education

Undocumented children in the U.S. encounter a thorny legal conundrum when it comes to education. As Shah argues, “[t]he ascription of an American identity to these young people by the professionals that work with them is understandable given the legal paradox within which these children are governed.” According to judicial precedent, states cannot deny undocumented children access to a public education, but upon graduation from their secondary schools they are treated differently. IIRIRA prohibits states from offering undocumented students in-state tuition and the federal government from extending financial aid, while the IRCA prevents employers from hiring them. Although a dozen states have flouted IIRIRA’s in-state tuition regulation, at least one author has argued that the inconsistency between states is itself a problem because it confuses students and leads to more “uncertainty among administrators.” Further, while states may be required to permit undocumented law students to sit for the bar if they meet requirements, there is no legal precedent requiring that they be admitted to the bar.

87. Id. at 670.
88. Other authors have also pointed to undocumented students’ paradoxical positions. See, e.g., Annand, supra note 45, at 685 (“[U]ndocumented youth face a painful paradox: the country they call home is also the country that criminalizes their presence.”).
89. Shah, supra note 44, at 670.
91. This is not to say that lawful residents or U.S. citizens do not also experience a shift in regard to the benefits to which they are entitled as they transition out of secondary school. For example, the equal opportunity for public education provided under Bd. of Educ. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954), does not prohibit a rising cost of higher education, which creates a gap to access to higher education based on social class. Nevertheless, undocumented students undoubtedly face additional burdens, such as the inability to receive federal financial aid, as discussed in the previous section.
92. See supra note 39, and accompanying text.
93. Id.
94. See supra note 38, and accompanying text.
97. In Re Griffiths, 413 U.S. at 719 (“[A]dmission to the practice of law in the courts of a State ‘in no sense depends on citizenship of the U.S. It has not, as far as we know, ever been made in any State, or in any case, to depend on citizenship at all.’” (citing Bradwell v. State, 83 U.S. 130, 139 (1872)).
Even where states' highest courts admit undocumented students, at best the new lawyers' work will be likely relegated to pro bono work, and perhaps independent contracts, situations in which they will not be "employees."  

When the Supreme Court unanimously decided *Brown v. Board of Education* in 1954, Chief Justice Warren's opinion ultimately did more than create a legal end to racial segregation in schools, although the justices may not have realized it at the time. The Court held that public education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." What would subsequently become quite important was that the Court made no distinction in the opinion for immigrants, regardless of their status. Quite arguably, the scope of the language left little room for arguments concerning ambiguity: state-provided public education is a "right" for "all." Indeed, the opinion included an eloquent justification for education:

> It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

This word choice seems to emphasize not only the integral nature of an education, but also the very necessity of an education for living, working, and participating in U.S. society. The language powerfully implicated education as engendering proper notions of "citizenship." Ultimately, the Court framed the new "right" as students' gateway to success in adulthood.

The Court's simple turn-of-phrase in *Brown* has had radical consequences for immigrants, as well as for state spending. If there were any doubt about the nature of the "right" of "all" children to a public education (where a state provides it), the Supreme Court settled the issue in 1982 in *Plyler v. Doe*. The class-action in *Plyler* arose after Texas passed an amendment to the state's education code, a "change [that] essentially removed undocumented children from the class of students..."
entitled to school funds and free public education." The issue before the Court was premised on Equal Protection Clause grounds—the equal protection of undocumented students who faced facially discriminatory (and adverse) treatment under the amended statute. The State of Texas argued that the change was the result of financial concerns and the budgetary strain posed by an increasing presence of undocumented students in the public school system. The opinion, penned by Justice Brennan, reviled the situation facing the U.S. (a nation "that prides itself on adherence to principles of equality under law") in which undocumented immigrants occupy a socio-economic "underclass." After applying an intermediate scrutiny test, the Court held that the Texas statute was unconstitutional.

Unsurprisingly, the Court cited the holding in Brown, declaring education "a right," where provided by a state. And although the Court declined to hold that public education is a fundamental right, the majority concluded that the Texas statute "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. . . . By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation." Therefore, undocumented children’s right to a public education was not only legally recognized by the highest Court in the U.S., but was also vindicated as "the right thing to do" as a matter of just public policy.

The holding in Plyler specifically addresses the inclusion and equal protection of undocumented students in public schools, but it is limited in scope. Importantly, the decision re-affirmed Fifth and Fourteenth Amendment protection to undocumented immigrants. Nevertheless, it would seem that Plyler’s protection might reach no further than high school. As student author Jessica Sharron argues, equal rights for undocumented children under federal law are diminished or uncertain once these children grow up. Moreover, while the Supreme Court has

108. Sharron, supra note 41, at 604.
109. Plyler, 457 U.S. at 202 ("The question presented by these cases is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the U.S. or legally admitted aliens.").
110. Id. at 207.
111. Id. at 219.
112. Id. at 230 ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest."). Importantly, in employing an intermediate scrutiny test, the Court also inherently made the decision not to label undocumented immigrants as a "suspect class." This outcome is significant because other laws concerning undocumented immigrants that also raise equal protection concerns are not subject to strict scrutiny.
113. Id.
114. Id. at 222-23.
115. Id. at 223.
116. Id. at 220 ("Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.").
117. Id. at 212 (citing Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).
118. Sharron, supra note 42, at 610 ("The holding of Plyler only addressed the availability of free public education through the twelfth grade, leaving the question of post-secondary education unsettled.").
119. Id. at 618. For example, as Sharron points out, the Supreme Court held that the National
LIFTING THE "LAMP BESIDE THE GOLDEN DOOR"

held that lawful permanent residents who are qualified for the bar are entitled to admission under the Equal Protection Clause,\textsuperscript{120} the holding does not necessarily extend to undocumented immigrants.\textsuperscript{121}

In this way, the "right" to a public education in \textit{Brown} also created a bizarre paradox for undocumented students by entitling them to an "equal" public education, but an "unequal" opportunity for a career thereafter, as exemplified in the case of legal education. Indeed, upon high school graduation undocumented students face limitations such as barriers to attending college and work authorization.\textsuperscript{122} Furthermore, immigrants without work authorization are generally not entitled to a social security number\textsuperscript{123} and must apply for and use an Individual Taxpayer Identification Number (ITIN) in order to comply with federal tax laws.\textsuperscript{124} However, undocumented immigrants cannot receive social security benefits, or receive an Earned Income Tax Credit, leaving billions of unclaimed tax dollars.\textsuperscript{125} Thus, if educational access is indeed a gateway to professional success, it is inconsistent (indeed, paradoxical) that undocumented students would be blocked from lawful employment. If undocumented students such as Godinez-Samperio, Garcia, and Vargas are excluded from becoming members of their states' bar, then \textit{Plyler} and \textit{Brown} stand only to offer students academic preparation for careers that they cannot have.

B. An Ephemeral Boundary Based on Age

The second prominent paradox is the sudden presence-related immigration consequences that undocumented immigrants encounter once they turn eighteen. On the one hand, \textit{Plyler} made it clear that undocumented children are "innocent" parties who should not suffer the actions of their parents or guardians.\textsuperscript{126} However, innocence dissipates when undocumented children transition into adulthood because

\begin{itemize}
  \item Labor Relations Act (NLRA) did not entitle undocumented immigrants to an award for back pay after being fired for involvement with a worker’s union. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140 (2002). ("It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.").
  \item 120. In Re Griffiths, 413 U.S. at 729.
  \item 121. The facts in the case are based on the exclusion of lawful permanent residents, and the Court’s analysis does rely on this status to come to its decision: "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities." Id. at 722 (emphasis added).
  \item 122. While President Obama’s DHS policy will help alleviate some of these problems, unqualified students and students who arrived in the country after June 15, 2012, or who have not had continuous presence in the country for the past five or more years, will not be eligible for deferred action and work authorization. See AILA, supra note 54.
\end{itemize}
at this point “unlawful presence,” as defined in the INA, begins to accrue. Yet again, the material effects of the (sudden and arbitrary) transition are at odds with the effusive language in Plyler. Simply stated, the outcome for undocumented individuals is paradoxical by defying Plyler’s logical conclusion and punishing “innocent” undocumented children for their parents’ actions.

The Supreme Court in Plyler seemed to demonstrate particular concern with the idea that faultless undocumented students would be penalized. The opinion emphasized that preventing undocumented students from receiving an education “raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.” In other words, the Court articulated dis-ease with an outcome in which the market economy encourages undocumented immigrants to remain in the U.S. while punishing their children for being here. Further, the Court cast the undocumented children in a particularly sympathetic (if not paternalistic) light—as “innocent children” who became “victims” of the unconstitutional Texas educational statute. The decision noted that while undocumented children are technically removable from the U.S., removal is not an imminent inevitability given federal discretionary power over immigration; and in the meantime, such children “are present in this country through no fault of their own.” This language is familiar to current justifications for the DREAM Act, as well as the President’s DACA policy justifications.

Consistent with Plyler, undocumented children by definition have “unlawful status,” but they do not begin to accrue “unlawful presence” while they are under the age of eighteen, so long as they do not leave (or get removed from) the country after their initial entry. For the purposes of immigration law, “unlawful presence” is a term of art that essentially refers to immigrants who have entered the country without inspection and who have remained without proper admission or parole, as well as to those immigrants who have entered lawfully with a temporary immigration benefit but who overstayed their benefit’s validity.

127. INA § 212(a)(9)(B); c.f. INA § 212(a)(9)(C). There is an arbitrary nature to the INA’s adoption of Congress’s decision to determine that turning 18 years of age would signify that undocumented individuals would begin to accrue immigration penalties.


129. Id. at 224.

130. Id. at 226.

131. See discussion, supra note 46-59 and accompanying text.

132. “Although these concepts are related [one must be present in an unlawful status in order to accrue unlawful presence], they are not the same.” Interoffice Memorandum from U.S. Citizenship and Immigration Services, 9 (May 6, 2009) available at http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF.

133. 8 U.S.C. § 1182(a)(9)(B)(iii), INA § 212(a)(9)(B)(iii) (“No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the U.S. under clause (i).”).


135. Id. at 6 (“Unlawful presence (ULP) is defined as presence after the expiration of the period of stay authorized by the Secretary of Homeland Security... or any presence without being
exception for minors is important because unlawful presence generally bears on an immigrant's ability to legally re-enter the U.S. in the future by triggering a three- or ten-year permanent bar to lawful admission once she or he has departed or has been removed from the U.S.

Nonetheless, the exception for minors is only applicable when calculating the three- and ten-year bars. The exception does not apply to the accrual of unlawful presence in the context of a permanent bar to admissibility (where an undocumented immigrant unlawfully enters, exits or is removed, and again re-enters the U.S.). This inconsistent exception for undocumented children adds a layer of perplexing accountability for undocumented students. In effect, the law holds undocumented children accountable for trips to and from the U.S., but not the initial entry into the U.S. itself; undocumented minors are not penalized for the more serious immigration violation.

Thus, paradoxically, the blameless nature of undocumented children described in Plyler seems to vanish under immigration law when undocumented students turn eighteen or leave the country and return without inspection. The boundary between innocence and responsibility takes on an ephemeral quality. As the INA clearly states, the unlawful presence exception for minors no longer applies

136. There are some waivers and exceptions to the time bar penalties; however, many immigrants do not qualify for a waiver or fall within an exception, thereby suffering a lengthy period of time during which they must remain outside the U.S. See IMMIGRANT LEGAL RESOURCE CENTER, A GUIDE FOR IMMIGRATION ADVOCATES 3-62-63; 3-78 (17th ed. 2010).

137. 8 U.S.C. § 1182(a)(9)(B)(i)(I), INA § 212(a)(9)(B)(i)(I) (inadmissibility, after April 1, 1997, of "Any alien (other than an alien lawfully admitted for permanent residence) who- was unlawfully present in the U.S. for a period of more than 180 days but less than 1 year ... and again seeks admission within 3 years of the date of such alien's departure or removal.").

138. 8 U.S.C. § 1182(a)(9)(B)(i)(II), INA § 212(a)(9)(B)(i)(II) (inadmissibility, after April 1, 1997 of "Any alien (other than an alien lawfully admitted for permanent residence) who- has been unlawfully present in the U.S. for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the U.S.").

139. 8 U.S.C. §§ 1182(a)(C)(i)(I), (C)(i)(II), INA §§ 212(a)(9)(C)(i)(I), (C)(i)(II) (inadmissibility of noncitizens other than a legal alien who has "been unlawfully present in the U.S. for an aggregate period of more than one year beginning on April 1, 1997, and then enters or attempts to re-enter the U.S. without being admitted" and an individual who "was ordered deported or removed (regardless of how much unlawful presence the person has), and then enters or attempts to re-enter the U.S. without being admitted after April 1, 1997.").

140. In some narrow circumstances, an undocumented immigrant will be able to obtain an immigration benefit from within the U.S. in order to obtain legal status without having to leave the country. See IMMIGRANT LEGAL RESOURCE CENTER, supra note 136, at 3-70.

141. Id. at 3-79 ("While the three- and ten-year unlawful presence bars under INA § 212(a)(9)(B) include an exception for minors, providing that while under the age of 18 they do not accrue unlawful presence, there is no such exception under the permanent bar provisions at INA § 212(a)(9)(C)."").

142. Lichter & Barr, supra note 134.

143. USCIS has justified this difference in treatment under the statute under two theories: "1) The terms of sections 212(a)(9)(B)(iii) and (iv) of the Act refer only to specific subsections of section 212(a)(9)(B)(i) of the Act; and 2) Inadmissibility under section 212(a)(9)(C)(i)(I) of the Act rests on a more serious immigration violation than simply unlawful presence: To be inadmissible under section 212(a)(9)(C)(i)(I) of the Act, the alien must not only have accrued sufficient unlawful presence but also returned or attempted to return to the U.S. without admission." Interoffice Memorandum from U.S. Citizenship and Immigration Services, 28-29 (2009) available at http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF.
after the undocumented immigrant passes his or her eighteenth birthday. For higher-education students over the age of eighteen, this means that every day of their education in the U.S. begins to count against them and begins to bear serious immigration consequences. Further, it is at this age that undocumented students begin to bear the financial weight of their status because they are unable to access in-state tuition in a majority of states and are denied other public assistance benefits that require a Social Security number, such as Temporary Assistance for Needy Families (TANF). Engaging in unauthorized work also generally results in an additional legal barrier to adjusting status to a lawful permanent resident. As these severe consequences suggest, undocumented students are no longer regarded as “innocent” parties under the law once they reach adulthood, and in fact become more criminal by the day, even though for all intents and purposes, all that has changed is their age.

C. Good Moral Character Requirements Under Immigration Law and State Bar Admission

The final paradox central to this article’s discussion is the way in which undocumented students are given the tools to succeed through a public primary and secondary education, but are later differentiated from lawful noncitizens and residents on the basis of their immigration status. Although undocumented students may possess good moral character both for the purposes of immigration law and under state bar requirements, they are not offered the same opportunities to become productive members of the workforce. The outcome is an overall ethic of exclusion that leaves post-secondary students such as Godinez-Samperio as outsiders within

144. INA § 212(a)(9)(B)(iii)(I); Cf. id. at 29.
145. See discussion, supra note 39, and accompanying text.
146. The title of 45 C.F.R. section 205 is “General Administration—Public Assistance Programs;” it is comprised of the codified rules governing programs, including TANF, that control each state’s implementation of the state’s program. Specifically, section 205.52 states: (a) As a condition of eligibility, each applicant for or recipient of aid will be required: (1) To furnish to the State or local agency a social security account number, hereinafter referred to as the SSN (or numbers, if more than one has been issued); and (2) If he cannot furnish a SSN (either because such SSN has not been issued or is not known), to apply for such number through procedures adopted by the State or local agency with the Social Security Administration. If such procedures are not in effect, the applicant or recipient shall apply directly for such number, submit verification of such application, and provide the number upon its receipt.
147. 8 U.S.C. §§1255(c)(2), (c)(8), INA §§ 245(c)(2), (c)(8).
148. Although it can be said that an individual’s relationship to the law changes at the age of 18, generally, such changes most often apply to an individual’s future actions or responsibilities (e.g. voting rights, selective service registration, and autonomy interests). In the context of immigration law, new adults are suddenly held accountable not only for an event that likely occurred many years before they reached adulthood, but also for such past events over which they had little or no control. This outcome is markedly different than, for example, an individual's criminal conduct being processed without the juvenile system if the conduct occurs on or after his or her eighteenth birthday. In other words, in other legal contexts, one's conduct as a minor seldom creates only a temporary exception from legal responsibility only to then count against the individual later on in adulthood. The outcome seems to assume that undocumented eighteen-year-olds can simply exit the country and re-start their lives elsewhere as autonomous adults in order to avoid immigration penalties.
higher-educational institutions. Entrance requirements to the legal profession juxtaposed with naturalization requirements under U.S. immigration law aid in a critical examination of the conflicting and paradoxical standards for undocumented students, regardless of the content of their character.

Each state’s Rules of Professional Conduct work in conjunction with jurisdictional case law to form the admission requirements for bar applicants. In support of these rules for a self-regulating profession, the Supreme Court has held that each state has constitutionally permissible power to determine whether each individual applicant has “the character and general fitness requisite for an attorney and counselor-at-law.” Although “character” and “general fitness” requirements are not outlined in the Model Rules of Professional Conduct (MRPC), state bar associations, as well as some state statutes, have incorporated such criteria as a basis for admission of all bar applicants. Although any single blemish on an applicant’s past may not be enough to prevent admission, transgressions adversely bearing on good moral character include serious or repeat violations of criminal law, tax fraud or evasion, serious mental disorders, bankruptcies and mishandling of financial affairs, and substance abuse. Determinations of good moral character often weigh an applicant’s “candor and completeness” on state bar applications as a foremost factor. The ambiguous nature of what constitutes good moral character and the relatively subjective standard for evaluating the character fitness has led some prominent scholars such as Deborah Rhode to criticize the practice: “As currently implemented, the moral fitness requirement both subverts and trivializes the professional ideals it purports to sustain.” Still, in addition to the good moral requirements, the fitness and character requirements share an implied theme: as the FBBE emphasized in the context of Godinez-Samperio’s case, practicing law is a “privilege” and not a “right.” Thus, those individuals who do not meet the bar requirements necessary to practice law have no legally cognizable right to otherwise gain access to the profession.

Similarly, immigration law includes a “good moral character” requirement

149. See MODEL RULES OF PROF’L CONDUCT R. 5.5 (2011).
156. In re Application of Taylor, 293 Ore. 285, 293 (Or. 1982).
158. See, e.g., In re DeBartolo, 488 N.E.2d 947, 949 (1986); In re Bitter, 969 A.2d 71, 78 (Vt. 2008).
160. Reply to Bar Applicant’s Response to the Board’s Petition for Advisory Opinion at 26, Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Florida Bar, No. SC-11-2568 (Fla. March 29, 2012).
for naturalization161 and some other immigration benefits.162 Good moral character has both statutory163 as well as community-based164 requirements. Bars to good moral character are wide-ranging and include: controlled substance violations, prostitution, human smuggling, gambling, habitual drunkenness, convictions for aggravated felonies, commission of crimes involving moral turpitude,165 multiple non-political offenses leading to an aggregate sentence of five or more years, false testimony to procure immigration benefits, and willful failure or refusal to support dependents, as well as as a "catch-all" provision for other unlawful acts.166 Similar to state bar admission requirements, it would seem that citizenship is considered much more a "privilege" than a "right" for immigrants.167

Therefore, the use of good moral character as a state bar and naturalization requirement suggests that those individuals who demonstrate "good" fitness are rewarded by privileges, while those individuals who lack good moral character are kept out (permanently, or until an applicant has rehabilitated, in certain circumstances). However, contrary to what may be one's initial expectations, even undocumented law students who have good moral character, for the purposes of both state bar admission and immigration purposes, still do not have a pathway to citizenship nor to the practice of law after President Obama's DACA policy decision. Although the U.S.1 Constitution says very little about immigration within its text,168

161. 8 § C.F.R. 316.10(a)(2), INA § 316(e), 8 U.S.C. § 1427.
162. For example, good moral character is one element required to qualify for cancellation of removal relief. See, e.g., 8 U.S.C. § 1229(b)(1)(B), INA § 240(b)(1)(B).
163. Id.
164. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Good Moral Character, 73.6 ADJUDICATOR'S FIELD MANUAL (Redacted Public Version) available at http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-22380/0-0-0-22999.html ("The courts have held that good moral character means character which measures up to the standards of average citizens of the community in which the applicant resides.").
165. A crime involving moral turpitude is a relatively nebulous concept that "refers generally to conduct which is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between man and man, either one's fellow man or society in general." Matter of Flores, 17 I&N Dec. 225, 227 (BIA 1980).
166. 8 C.F.R. § 316.10; see also, INA § 101(f), INA section 316.10 (a)(2) states that:
In accordance with Section 101(f) of the Act, the Service shall evaluate claims of good moral character on a case-by-case basis taking into account the elements enumerated in this section and the standards of the average citizen in the community of residence. The Service is not limited to reviewing the applicant's conduct during the five years immediately preceding the filing of the application, but may take into consideration, as a basis for its determination, the applicant's conduct and acts at any time prior to that period, if the conduct of the applicant during the statutory period does not reflect that there has been reform of character from an earlier period or if the earlier conduct and acts appear relevant to a determination of the applicant's present moral character.
167. The privileged nature of citizenship is reflected in the relatively involved naturalization process, specified in INA U.S.C. 1445, INA § 334. In addition to "good moral character," naturalization requires that immigrants meet other eligibility requirements, file a costly application, prepare for and pass an exam, and take an oath of allegiance to the U.S. However, unlike natural-born citizens, naturalized citizens can be de-naturalized. Catherine Yunsoo Kim, Note, Revoking Your Citizenship: Minimizing the Likelihood of Administrative Error, 101 COLUM. L. REV. 1448, 1448 (2001) (explaining the difference between denaturalization procedure for born citizens and those who have naturalized).
168. The Constitution makes only two direct references to immigration. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the U.S., and subject to the jurisdiction thereof, are citizens of the U.S. and of the State wherein they reside."); U.S. CONST. art. 1 § 8, cl. 4 ("The Congress shall have Power To... establish an uniform Rule of Naturalization.").
it is clear that legislative power controls naturalization procedure and policy. This tension between undocumented immigrants' good moral character requirements and the state of the law is manifest in political debate. As President Obama asserted the day he enacted the DACA policy, "Imagine that you've done everything right your entire life: studied hard, worked hard, maybe even graduated at the top of your class only to suddenly face the threat of deportation to a country that you know nothing about, with a language that you might not even speak." What this rhetoric points out is that good moral character is paradoxically detached from material results for undocumented immigrants. Even those who embody the character of a "good citizen" cannot actually be a citizen or reap the rewards of their educational success.

In In re Griffiths, the Supreme Court heard an Equal Protection challenge to a Connecticut rule that required citizenship for the practice of law. Although Fre Le Poole Griffiths, a citizen of the Netherlands, was eligible for citizenship, she declined to naturalize. The bar association determined that she was qualified for admission "in all respects save that she was not a citizen of the U.S. as required by Rule 8 (1) of the Connecticut Practice Book (1963)." The Court held that states cannot discriminate against lawful residents for purposes of admission. The majority opinion, delivered by Justice Powell, extols the contribution of immigrants, asserting that since the beginning of U.S. history, "[t]heir contributions to the social and economic life of the country were self-evident, especially during the periods when the demand for human resources greatly exceeded the native supply. This demand was by no means limited to the unskilled or the uneducated." It is significant that the Court recognized that immigrants contribute to professional fields, such as the law, and that it upheld a clear application of equal protection to lawful residents in Connecticut.

However, the In re Griffiths Supreme Court holding has not yet extended to undocumented law students, leaving a large gap in equal protection and leading some states to restrict admission to lawful residents. The result is baffling. As at least one other law student, J. Austin Smithson, has noted that "[o]n one hand, the U.S. will educate Plyler students and in many ways encourage them to continue their education; but, at the same time the U.S. will criminalize their immigration status..."
and deport them as punishment." 178  Further, the Supreme Court will recognize the value of immigrants in professional fields, yet undocumented immigrants—regardless of their technical skill, competence, and good moral character—may be excluded. Consequently, many undocumented students are truly stranded in a position in which they symbolize the ideal of American citizenship and professional success but are prevented from materially achieving it. 179

III. TESTIMONIOS: BEYOND A SINGLE NARRATIVE

Godinez-Samperio’s narrative is microcosmic, as both singular and collective. His narrative represents an individual experience, while also offering insight into larger issues facing the legal community and calling for broader immigration reform. In the narrowest sense, Godinez-Samperio’s struggle for inclusion within the legal community points to a localized paradox within the legal community. In a broader sense, Godinez-Samperio is one student whose narrative is representative of many undocumented immigrants who are caught within a paradoxical space as they attempt to access educational equity under current immigration law.

As the preceding part of this article illustrates, undocumented students such as Godinez-Samperio have become unwitting targets of divisive political arguments related to immigration reform and have fallen into the crevice cutting between public policy and the letter of the law. Over 11 million undocumented immigrants are estimated to live in the U.S.; 180 many strive to live relatively clandestinely or as anonymously as possible under the threat of removal. 181 As scholar Rene Galindo argues, undocumented students “remain hostages of the immigration policy debates in spite of Plyler and the history of successful Mexican-American school desegregation cases that sought to achieve educational equity.” 182

However, as this article proposes, the legal community offers a particularly helpful space for undocumented students because members can actively craft and propose long-term legal solutions. Given the arrival of undocumented students such as Godinez-Samperio who seek entry into the legal profession, the legal community stands to benefit from arguments for significant changes in the law. Furthermore,

178. Id. at 90.
179. For example, this situation can be inferred from Godinez-Samperio’s case, as he awaits a decision from the Florida Supreme Court, See, Lorelei Laird, The Dream Bar: Some Children Illegally Living in the U.S. Grow Up to Want to Be Attorneys, ABA Journal (Jan. 1, 2013, 5:00 AM), http://www.abajournal.com/magazine/article/the_dream_bar_some_children_living_in_the_united_states_illegally.
181. Angela S. Garcia & David G. Keyes, Life as an Undocumented Immigrant: How Restrictive Local Immigration Policies Affect Daily Life, Center for American Progress 3 (2012) available at http://www.americanprogress.org/issues/2012/03/pdf/life_as_undocumented.pdf (“Survey respondents spoke of their inclination to ask a documented friend or family member to report a crime on their behalf, to pick up their children, or to buy groceries—all to cope with the need to stay anonymous while still being responsible citizens.”).
Galindo offers hope for undocumented students and demonstrates how students themselves have engaged politically to combat dehumanizing stereotypes and to vocally engage as advocates for broader changes in the law, such as the DREAM Act. This political and organizing work, as Galindo maintains, is a powerful tool and helps to "[deflect] the stigma of undocumented status." As students become visible agents, they are able to challenge marginalized positions and make a convincing claim for "equality of membership," or simply equal protection under the law.

A. The Legal Community's Potential to Transcend Partisan Politics

"Testimonios," as Galindo explains, provide the opportunity for inclusive practices within legal scholarship. Galindo's theory proposes the use of "testimonios," or "the narration of a political struggle by those who have suffered as victims of injustice and the denial of the right to life," while creating "an ethical demand on the audience." Under this theory, the visibility of the narrator's own emotional journey and political struggle also becomes a symbolic bridge for collective voices and communal experience. Testimonios carry the potential to actively engage an audience by demonstrating where institutionalized oppression, such as within the law, exists—again, through the act of illuminating what was previously invisible to hegemonic or privileged identities. Finally, testimonios of undocumented immigrants challenge stereotypes and oppressive constructions of "undocumented immigrants as a subordinate group of anonymous manual laborers who lack the capacity for other types of human action, such as political activity."

The material effect of Galindo's theory is that individuals presenting testimonios offer both an opportunity to incorporate their perspectives in the molding of public policy, as well as a vehicle to move beyond a stagnant or caricaturized debate. It is this transcendent connection that makes individual students such as Godínez-Samperio humanized faces of legal abstractions.

Galindo's theory suggests that undocumented students become visible participants of the political process, while their narratives mark a tangible point of individual agency and inclusion. As an example, Galindo offers the testimonios of three students at a House subcommittee hearing in 2007. She argues that the students became "symbols for the DREAM Act," by providing narratives that simultaneously represented their own struggle in a unique voice while also lending themselves to a more robust understanding of a collective or unifying experience of undocumented students in the U.S. Speaking out was not merely powerful from a metaphoric standpoint, but also as a method of legal reform.

183. Id. at 377-78.
184. Id. at 380.
185. Id. at 382.
186. Id. at 383.
187. Id.
188. Id. at 382.
189. Id. at 384.
190. Id. at 389.
However, the use of *testimonios* is not limited to political spaces; the legal community also provides an important forum for inclusion and visibility of marginalized voices, such as those of undocumented immigrants. One prominent example is the way that law students’ published notes and comments on the DREAM Act and need for immigration reform have integrated *testimonios* into law review journals across the country. By incorporating these voices into academic discourse, law students have demonstrated one way to promote inclusion and humanization of those who are often absent from the profession. Law students’ published notes and comments share some striking similarities with each other that ultimately work to make undocumented immigrants visible participants in the academic dialogue, and encourage readers to weigh the material impact of the law on undocumented immigrants’ lives.

One important similarity in students’ work is an introduction that begins with an undocumented student’s personal narrative. As a general trend, students writing on this topic lead with the story of someone else; for example, “Alex M. was born in El Salvador but has spent the last seven years in the U.S.;” “Elena, an undocumented immigrant student born in Mexico, came to the U.S. on a tourist visa with her mother when she was three years old;” “Dan-el Padilla endured a childhood that included living in homeless shelters, being abandoned by his father and thirteen separate moves from one slum apartment to another;” “In 1999, when Sindy Vasquez was nine years old, her grandmother paid a ‘coyote’ to facilitate her granddaughter’s illegal entry into the U.S.” Such opening narratives abound and form introductions to notes and comments spanning the past decade in law review journals across the country. The narratives form a sympathetic and compelling partnership with the authors’ argument in favor of a resolution to undocumented students’ struggles by presenting humanized accounts of subjugation under the current immigration law paradigm.

The narratives presented in the notes and comments form a metaphorical bridge from a privileged position (that of legal academics working in elite institutions) to a marginalized position (that of undocumented students without legal status). The act of making each narrative center to the academic discourse not only humanizes undocumented students by depicting their individual experiences, but also serves in a similar way to *testimonios*. That is to say, like Galindo’s description of

191. Nor does Galindo suggest that *testimonios* are specific to political action, although her analysis is tied closely to engagement with political activism. This work attempts to expand upon Galindo’s thoughtful construction of *testimonios* and demonstrate its potential within the legal community.
192. See infra, notes 195-199, and accompanying text.
193. This argument should not be read to suggest that other solutions and initiatives are impossible, but rather to focus on a particular tool that can help shape an ethic of inclusion.
194. See infra, notes 195-197.
196. Annand, supra note 45, at 683.
197. Deverall, supra note 50, at 1251.
199. See also, Joshua A. Boggioni, Comment, Unofficial Americans-What to do with Undocumented Students: An Argument Against Suppressing the Mind, 40 U. TOL. L. REV. 453, 453 (2009); Kathleen A. Connolly, Comment, In Search of the American Dream: An Examination of Undocumented Students, In-State Tuition, and the DREAM Act, 55 CATH. U. L. REV. 193, 193 (2005); Sharron, supra note 42, at 599.
the undocumented students testifying in congressional hearings, law students’
descriptions of undocumented students in law review notes and comments become
the forefront presence making “an ethical demand” on the reader. In other words,
the articles render the plight of students who inhabit the paradoxical space between
the law and public policy visible and demonstrate a true need for legal reform.
Undocumented students' struggles are transformed into shared moments with clear
connections to the law. Therefore, one strength of using testimonios as a tool of
inclusion are the narratives' transformative potential—a means of transcending
political impasses toward long-term legal reforms.

Further, as Galindo suggests, testimonios are powerful because they
simultaneously embody individual uniqueness and group commonality. In some
cases, student authors draw explicit connections between individual experience and
collective representativeness; as one student author explained, “Christian and
Mike represent two of the estimated eleven-to-twelve million undocumented
immigrants living in the U.S.” By being identified as individuals within the larger
group, “Christian” and “Mike” serve “a symbolic value” and help humanize a
population that has been dehumanized over time by political debates, public policy,
and the law. This aspect of testimonios allows readers to sense the greater fabric of
undocumented students’ communal experience, even as law review publications
stand alone as individual texts.

Ultimately, students' notes and comments transcend dehumanizing laws and
partisan politics, enabling ethical conversations regarding undocumented students’
paradoxical educational and immigration options. On the one hand, the frameworks
in such notes and comments serve “as politicized narratives of urgency which
function to give voice and create a space for the story of the marginalized and
excluded who are rarely heeded.” Perhaps more importantly, testimonios orient
readers toward the underlying legal problems that pose a great need for reform by

200. Galindo, supra note 182, at 383.
201. As just one example, Boggioni describes a teenager named Mike who lives “‘under the
line’” and chose to drop out of school once he realized that his (il)legal status would prevent him from
joining the military and getting a job. Boggioni, supra note 199, at 454.
202. For instance, Smithson explains how “Amy has professional aspirations to be a lawyer,
but those aspirations came to a standstill when she learned she would be required to submit to a
background check to be able to take a state’s bar exam. After learning of the background check, Amy saw
her dreams and aspirations begin to vanish and subsequently dropped out of law school.” Smithson, supra
note 177. These personal accounts illustrate the jarring reality created by current immigration law for
undocumented students living throughout the U.S..
203. Galindo, supra note 182, at 383 (“Although told in the first-person, ‘testimonios’ express
the experiences and sentiments of a larger similarly situated group and consequently establish a
metonymic relationship between the narrative of an individual and the narrative of a collective; the story
of one echoes the stories of others.”).
204. This pattern of individual representation and collective representativeness take both
explicit and subtle forms. Some authors used the narrative as a point of reference or similarity for general
trends. See, e.g., Annand, supra note 45, at 685 (“Under U.S. immigration and criminal laws, these youth
face deportation and criminal consequences for their immigration status, a status acquired by
accompanying their parents into the U.S. without inspection or, as in Elena’s case, by overstaying a
visa.”).
205. Boggioni, supra note 199, at 454.
206. Galindo, supra note 182, at 384.
207. See supra, notes 51-63 and accompanying text.
208. Galindo, supra note 182, at 379.
drawing a connection between individual stories and shortcomings in immigration law. Not insignificantly, the notes and comments also call on legal professionals to consider the ethical principles underlying the MRPC. 209 As the MRPC succinctly express, "[l]awyers play a vital role in the preservation of society;" 210 embracing an ethic of inclusion in legal writing and advocacy is a remarkable method of supporting this goal. Lawyers, advocates, students, and academics can make thoughtful and inclusive arguments for changing the law and avoid wading into partisan rip-tides and being swept away by the political current.

B. Narratives for Broader Legal Reform and the Opportunity for Transformation

It is important to recognize that, while undocumented students' legal hurdles discussed in the context of this article are quite resolvable by a form of the DREAM Act or similar legislation, other larger immigration-related problems would still remain. 211 The undocumented students' struggles reflected in their testimonios are symptoms pointing to greater ills plaguing U.S. law and society. It would be inaccurate for one to assume that simply granting undocumented students a pathway to citizenship or residency would solve undocumented students' problems "for good." Therefore, the inclusion of undocumented immigrants' testimonios may also help promote understanding of some interconnected issues such as the current backlog in family-based immigrant visas and the separation of children from their parents as a result of removal proceedings.

Testimonios can aid in comprehensive legal reform efforts because they are indicative of problems reaching beyond the immediate impact on students' lives. For example, undocumented students' stories inherently implicate the struggle of their families, and point to the rich fabric of their experiences. 212 Indeed, the U.S.' immigration policy has been designed, at least in theory, to support family reunification, 213 a concept and goal that is neither new nor novel. 214 However, in practice there are limits placed on which family members may qualify as beneficiaries, as well as rigid caps on visa availability that leave family members in

209. MODEL RULES OF PROF'L CONDUCT Preamble 2 (2011) ("As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education.").

210. Id. at 3.

211. See infra, section B.

212. As one poignant example, Sindy's narrative explains how, due to her grandmother's "old age and the increasing gang violence in their Guatemalan town, her grandmother thought it was best to reunite Sindy with her parents in the U.S." Garcia, supra note 96, at 247. The narrative also explains her parents' struggle in deciding not to "smuggle their young daughter into the country with them. Instead, they left Sindy with Mrs. Vasquez's mother until they decided it was safe and legal to bring her into the country." Id. at 247-48.


214. See Fiallo v. Bell, 430 U.S. 787, 811 (1977); Kalinski v. Dist. Dir. of INS, 620 F.2d 214, 217 (9th Cir. 1980).
some parts of the world waiting indefinitely for permission to immigrate.215 These statutory gaps in eligibility prevent many individuals who are able to immigrate as immediate relatives from doing so in practical application.216 The “system” simply does not work for those who wish to use it.

The family-based adjustment of status system suffers from both gaps and limitations. Generally speaking, in order to immigrate to the U.S. through a family-based visa, immigrants must either come as “immediate relatives” or as relatives in a “preference” category.217 “Immediate relatives” are limited to the spouses, children, or parents of a citizen of the U.S.,218 and such “immediate relatives” are offered access to an automatically available visa.219 Definitions for these familial positions are legal terms of art that are actually narrower than they may initially appear to be to the untrained eye, including special eligibility rules for adoptees and stepchildren.220 There are four additional categories221 of family members who may be able to qualify as beneficiaries through a preference-based system.222 Still, families must cope with notable exclusions or gaps in each category.223 For example, none of the categories makes way for grandparents, aunts, uncles, mother or father-in-laws, or cousins to benefit from family-based immigration adjustment of status.224

215. See infra, discussion.
216. For example, an immediate family member’s child—no matter how young—would not be able to immigrate with his or her parent. The effect, in practice, is that individuals who qualify for a visa as “immediate relatives,” but who have children, may be unable to immigrate and take advantage of their familial relationship to a U.S. citizen. It is possible for children who qualify as immediate relatives to opt to wait until they reach the age of twenty-one in order to immigrate through the family-based preference system, instead, because the preference system does permit derivates to accompany a principal visa beneficiary. Nonetheless, immigration through the preference system often comes with very long wait.

217. IMMIGRANT LEGAL RESOURCE CENTER, supra note 134, at 4-16, 4-17.
219. IMMIGRANT LEGAL RESOURCE CENTER, supra note 136, at 4-4 (“Immediate relatives can immigrate very quickly; as soon as the visa petition is approved, the person may begin the application to immigrate because visas are always available for immediate relatives of U.S. citizens.”).

220. A child wishing to immigrate as an “immediate relative” must be both unmarried and under the age of twenty-one. 8 U.S.C. 1101(b)(1), INA § 101(b)(1). Conversely, a parent wishing to immigrate as an immediate relative must have a U.S. citizen son or daughter who is over the age of twenty-one. 8 U.S.C. § 1151(b)(2)(A)(i), INA § 201(b)(2)(A)(i).

221. For example, to meet the definition of the word “child,” at the time of adoption, an individual must be 16 years old or younger, while step-children must be aged 18 years old or younger at the time of their parents’ marriage. 8 U.S.C. § 1101(b)(1), INA § 101(b)(1).


224. The immediate relative category does not include siblings of U.S. citizens. U.S.C. 1151(b), INA § 201(b) (“the term ‘immediate relatives’ means the children, spouses, and parents of a citizen of the U.S.”). The preference-based categories do not include parents of Lawful Permanent Residents. U.S.C. 1151(b), INA § 201(b) (“the term ‘immediate relatives’ means the children, spouses, and parents of a citizen of the U.S.”).

There are additional complications for U.S. citizens' children who get married before immigrating. Further, family members who wish to immigrate to the U.S. from a preference category are subject to strict immigration caps imposed by the INA. The cap is also subject to per-country restrictions in which there is a seven-percent limit on the total annual family-based preferred immigrants.

Restrictive caps on the preferred categories have led to a severe visa gridlock. Unlike "immediate relatives," those who fall into preferred categories for family-based adjustment of status do not have quick access to visas, but rather must wait for one to become available. The U.S. State Department Visa Bulletin announces the dates at which family members can begin the immigration process with their consulate, and applicants must wait for their "priority date," (calculated by the date the application is properly filed with USCIS) to become "current" on the Bulletin. The Bulletin is broken down both by preference category and by country from which the beneficiary is immigrating. However, a devastating USCIS "backlog" affects several of the preference categories and respective priority dates. Years can pass before priority dates can move forward significantly; moreover, the Bulletin is also subject to retrogression. Thus, even if a priority date is "current" in the Bulletin right now, the priority date the following month may backslide.

aunts, uncles, in-laws, and cousins cannot sponsor a relative for immigration.

226. U.S. citizens' children who get married are no longer eligible to immigrate as immediate relatives, and they must wait in the (F3) preference queue if they wish to make use of the family-based immigration system. 8 U.S.C. § 1101(a)(39), 1101(b)(1); INA §§ 101(a)(39), 101(b)(1). Even if married children were permitted to immigrate as "immediate relatives," their spouses would not be able to immigrate with them because the immediate relative category does not include "derivatives," of the beneficiary, such as a beneficiary's spouse or child.

227. The preference categories are limited to a total of 226,000 people per year, not including derivatives of the beneficiary. See USCIS, Visa Availability & Priority Dates, U.S. Citizenship and Immigration Services, http://www.uscis.gov/portal/site/uscis/ (search for "Family Preference Category") (last visited July 21, 2012); 8 U.S.C. § 1153(A), INA § 203(A). Each preference category is also subject to an individual cap. Derivates of beneficiaries are limited to spouses and unmarried children under twenty-one years in age. INA § 203(d).

228. 8 U.S.C. § 1152; INA § 202(a)(2) ("the total number of immigrant visas made available to natives of any single foreign state or dependent area under subsections (a) and (b) of section 203 in any fiscal year may not exceed 7 percent (in the case of a single foreign state) or 2 percent (in the case of a dependent area) of the total number of such visas made available under such subsections in that fiscal year.").


230. Id.

231. Id. China, India, Mexico, Philippines, and "All Chargability Areas Except Those Listed."

232. In particular, the (F1), (F2B), (F3), (F4) categories are terribly backlogged for the Philippines and Mexico. According to the July 2012 Bulletin, for example, the (F4) category for Philippine siblings of U.S. citizens is just now offering available visas based on petitions received on February 1, 1989. Even if the category moved forward without any freezing or retrogression, the wait time would require USCIS to catch up on twenty-three years of backlogged visas for family members in this category.

233. USCIS explains:"Visa retrogression occurs when more people apply for a visa in a particular country or country than there are visas available for that month. Retrogression typically occurs toward the end of the fiscal year as visa issuance approaches the annual category, or per-country limitations." USCIS, Visa Retrogression, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/portal/site/uscis/ (search for “Family Preference Category,” and click on “Visa Availability & Priority Dates,” and then select the hyperlinked text for “visa retrogression”) (last visited July 21, 2012).
excluding individuals who were previously eligible and failed to act quickly enough. For Mexican and Philippine sisters, brothers, and married children of U.S. citizens or lawful residents, reunification in the U.S. is not merely impractical—it may be entirely impossible. If they applied tomorrow, a visa may not become available in their lifetime. 234

Other individuals are unable to use the U.S. family-based adjustment of status system. In particular, same-sex spouses, 235 polygamous families, 236 and “fictive” kin 237 are excluded by falling outside the U.S. construction of “family.” Low-income families are inadmissible if they are likely to become a “public charge,” 238 and are subject to a ground of removability if they become a “public charge” within five years of immigrating to the U.S. 239 These provisions of the INA, added by IIRIRA, strictly enforce immigrants’ promise to financially support themselves, or to receive adequate financial support from their U.S. citizen or lawful permanent resident family members. 240 Ultimately, if an immigrant’s family is impoverished and there are no special humanitarian circumstances, 241 reuniting with

234. Immigrants in some preferred categories have already waited more than two decades for a visa to become available and still are years away from their priority date becoming current. Again, the backlog has resulted from thousands more applicants applying for family-based immigration visas than that which is allotted under the INA.

235. Same-sex partners may not immigrate on the basis of being the spouse of a citizen or lawful permanent resident because the definition of marriage and spouse is currently controlled by the Defense of Marriage Act (DOMA), defining marriage as existing between a man and a woman. See Adams v. Howerton, 673 F.2d 1036,1038 (9th Cir. 1982); Mathews v. Gonzales 171 Fed. Appx. 120, 122 (9th Cir. 2006). Regardless of any hardship, a citizen married to a same-sex partner is likely to have to reunite elsewhere, leaving couples stranded around the world in a state of flux—living and working off of various non-permanent visas. Paloma Esquivel, Same-sex Couples Find Rough Road to Immigration, LOS ANGELES TIMES, June 6, 2011, http://articles.latimes.com/2011/jun/06/local/la-me-gay-immigration-20110606.

236. Polygamous families encounter the same obstacle, even if they are legally wed in their countries of origin, because entering the U.S. to practice polygamy triggers a ground of inadmissibility. 8 U.S.C. § 1182(a)(10)(A), INA § 212(a)(10)(A).

237. Legal scholar Aubrey Holland has commented on the overall lack of consideration for fictive kin, extended family members who are considered “relatives” in an individual’s country of origin, on a cultural basis, but who share no genetic tie. Aubrey Holland, The Modern Family Unit: Toward a More Inclusive Vision of the Family in Immigration Law, 96 CAL. L. REV. 1060, 1074 (2008).

238. 8 U.S.C. § 1182(a)(4)(A), INA § 212(a)(4)(A) (“Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.”).

239. 8 U.S.C. § 1227(a)(5), INA § 237(a)(5) (“Any alien who, within five years after the date of entry; has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.”).

240. An affidavit of support is required for family-based immigrants to avoid becoming a public charge, and thereby inadmissible to the U.S.. 8 U.S.C. § 1182(a)(4)(C), INA § 212(a)(4)(C). See also Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999) (“'[P]ublic charge' means an alien who has become (for deportation purposes) or who is likely to become (for admission/adjustment purposes) primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense. ‘Institutionalization for short periods of rehabilitation does not constitute such primary dependence.’”). To make the determination of whether an immigrant is likely to become a public charge, consular officers are statutorily instructed to consider age, health, family status, assets, resources, and financial status, education and skills, and may consider a family sponsor’s affidavit of support. 8 U.S.C. § 1182(a)(4)(B)(i)(I)-(V) and (B)(ii), INA § 212(a)(4)(B)(i)(I)-(V) and (B)(ii).

241. There are approximately a dozen statutory exceptions to the “public charge” ground of
family members in the U.S. remains a distant goal. There is an "infinite variety of tragic family hardships" as a result of the policy. The long—if not indefinite waits—for immigration visas, as well as significant gaps in statutory eligibility, undermine long-standing family reunification goals and likely fail to provide real incentive for many family members to "play by the rules."

On the other end of the family-based adjustment of status system, the current implementation of removal proceedings has also separated families and resulted in undocumented immigrants losing custody of their children. One recent study based on over 100 surveys of child welfare caseworkers and attorneys determined that over 5,000 children "whose parents are detained or deported are currently in foster care around the U.S." According to the study, immigrants who have been detained or removed are often separated from their children for long periods of time. Since immigrants who are in detention facilities or who have been removed from the U.S. cannot "provide for the basic safety of their children," courts have terminated "the parental rights of deportees and put children up for adoption, rather than attempt to unify the family as they would in other circumstances." The problem is exacerbated by the fact that immigration detention centers do not offer detainees access to programs or services required for parents to complete conditions for custody, as well as the fact that detention centers are often quite far from a detainee's residence.

Finally, undocumented parents who have given birth to children in the U.S. may be removed while their U.S. citizen children are left behind. The children may be too young to voluntarily depart and travel to reunite with their parents. At the same time, parents who have accumulated unlawful presence and have been removed are barred by the INA from lawfully re-entering the U.S. to pick up their children or attend child custody proceedings. As the study reported, many parents

inadmissibility based on humanitarian concerns, including exceptions for refugees, asylees, those with U-visas or Temporary Protected Status (TPS), and individuals who have been granted relief under certain immigration acts. IMMIGRANT LEGAL RESOURCE CENTER, supra note 136, at 3-36.

242. A beneficiary's "sponsor(s)," a person(s) who are financially liable to both state and federal governments by contract, must earn 125 percent above the national poverty threshold before being eligible to support a family member's application. Id. See also, 8 U.S.C. § 1183(a)(1)(A), INA § 213A(a)(1)(A) ("the sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable").

243. Stickney, supra note 213.

244. That is to say that if families are advised that a visa may never become available, or that there simply is no family-based visa to support their passage to the U.S., then they have little to lose by entering unlawfully.


246. Id.
247. Id.
248. Id.
249. Id. For example, such conditions may include parenting or relationship classes or drug or alcohol treatment.
250. Id.
251. Id.
252. See discussion of unlawful presence, supra notes 125-130, and accompanying text.
who have been removed face a "tormented decision" to return to the U.S., at great personal risk, in order to attend the hearings. Yet, "[c]aseworkers around the country said that in many cases, when a parent of a foster child is deported, they are back weeks later to appear in a juvenile courtroom to try and reclaim their children." The result is that undocumented immigrants are actually incentivized to return to the U.S., in violation of the law and in the face of great physical and financial risks posed by clandestine border crossings or human smuggling. Once again, family-based goals are not reflected in the application of immigration law. An absence of "rules" to follow may result in many families' heartbreak and fear that they will never be with their children again. Somewhere between the words written in statutes and the execution of the laws, something vital has been lost in translation. Individual narratives, such as that of Godinez-Samperio, can serve as a metaphorical Rosetta Stone.

Thus, it is undoubtedly significant that the FBBE sought an advisory opinion from the Florida Supreme Court. The Board's request indicates that the issue of undocumented students' access to the legal profession is a general question for which the legal community seeks guidance. Although Godinez-Samperio's case is the one that prompted the Board's question, and it is his attorney who was served with the petition, the issue is not really about Godinez-Samperio, per se. Rather, the issue is about all of the unnamed undocumented students who may soon face an absolute bar from entering the legal profession. Godinez-Samperio tangibly embodies the paradoxes that cannot otherwise be represented.

CONCLUSION

Immigration law and public policy interests present two very disparate narratives. Simply stated, the law as it is written excludes many immigrants and fails many more. This tension is acutely represented by a multitude of undocumented students living in the U.S. who are yet to have a complete and permanent remedy for their shared situation. As Godinez-Samperio's case stands alone awaiting guidance from the Florida Supreme Court, it also stands for many. Godinez-Samperio, and other similarly-situated students, present a compelling need for inclusion, especially in the face of the current political undercurrents that have permitted legislation such as the DREAM Act to flounder and drown. Given these students' experiences, and the broader problems underlying their immigration narratives, more comprehensive reform is imperative if long-term change is to occur.

Testimonios offer visibility to marginalized bodies, but also offer inherent power to humanize complex legal concepts and enhance the treatment of these issues

253. Wessler, supra note 245.
254. Id.
256. Petition for Advisory Opinion at 5, Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Florida Bar, No. SC-11-2568 (Fla. Dec. 13, 2011)("The board seeks the Court's opinion as to whether this applicant and any future similarly-situated applicants are eligible for admission to the Florida Bar") (emphasis added).
within the legal community’s scholarship. Undocumented immigrants’ narratives, such as Godinez-Samperio’s and Garcia’s, aid in returning to a productive national discussion of specific issues within law and policy by straddling the metaphorical boundary between individualized emotion and collective experience. Moreover, testimonios offer concrete examples of the need for changes in immigration law and policy—serving as an educative tool that transcends political ties and speaks specifically to compassion and internalized understandings of the law. Testimonios offer profound opportunities to grasp the meaning of the law as it implicates actual human lives. They are useful because of their power to present ethical dilemmas to an audience of legal professionals (those who, in theory, are trained to fashion legal solutions).

Without critical reforms, the U.S. will only continue to see generations of students who may be educated but who cannot work, families who want to reunite but who cannot be reunited, and individuals who identify as “American” but who cannot become citizens. Many individuals continue to live each day in a paradoxical no-man’s-land straddling both sides of a complex “border.”257 In spite of an unprecedented number of removals under President Obama’s tenure,258 surely more undocumented immigrants such as Godinez-Samperio will continue to seek the illuminated promise that is unforgettably inscribed on the base of the Statute of Liberty: “Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!”259

257. For an in-depth discussion of this theory, renowned author and theorist Gloria E. Anzaldúa’s text Borderlands/La Frontera: The New Mestiza provides an oft-cited testimonio on this topic.