

NOTES

UNDOCUMENTED ATTORNEYS AND THE STATE OF THE BAR

CHRISTOPHER CONNELL*

I. INTRODUCTION

As a new presidential administration begins its tenure, the hot-button topic of immigration—specifically immigration across the United States’ southern border—has once again reared its head. But rather than the conversation revolving around undocumented immigrants “stealing” low-paid jobs, there are scholars, judges, and activists focusing on the effects of immigrants entering the *high-wage* workforce. In 2014, the California Supreme Court faced the question of whether an immigrant who had entered the country illegally could be admitted to the State Bar. The issue was a novel one, in California and nationally.¹ Making the question more difficult was a federal law that disallowed states to issue professional licenses to undocumented immigrants.² The court held that undocumented immigrants could be admitted to the State Bar, but only after the state legislature had passed a law permitting the admission, and opted out of the federal legislation. That same year, Florida’s Supreme Court ruled in a very similar fashion as California’s.³ And in 2015, New York’s highest court was asked the same question and held that the opt-out provision of the federal law was unconstitutional, and that the court itself could decide whether undocumented immigrants could be licensed in the state, rather than the legislature.⁴

* Christopher Connell is a JD Candidate in the Class of 2017 at the University of Southern California Gould School of Law with a Bachelor of Arts in Political Science from California Polytechnic University, San Luis Obispo. The author would like to thank the staff and executive editorial board of the Southern California Interdisciplinary Law Journal for their hard work on this note and Professor Sam Erman for his assistance and guidance.

¹ *In re Garcia*, 315 P.3d 117, 120 (2014).

² 8 U.S.C. § 1621(a)–(d) (2012).

³ Later that year, the Florida legislature enacted 454.021(3), allowing certain undocumented immigrants the ability to be admitted to the State Bar. Fla. Bd. Of Bar Examiners, 134 So. 3d 432, 433 (Fla. 2014).

⁴ *See generally In re Vargas*, 131 A.D.3d 4 (N.Y. App. Div. 2015).

The thematic question running through these cases and the policies surrounding bar admission is: who is deemed socially, morally, and ethically fit to gain the privilege of becoming a lawyer? All states require lawyers to have moral character, which includes: “qualities of truth-speaking, of a high sense of honor, of granite discretion, [and] of the strictest observance of fiduciary responsibility.”⁵ An individual in the United States, possessing undocumented status, adds an unclear wrinkle here. Many states have come to the conclusion that if you pass the admissions test and receive approval from the state bar on your moral character and fitness requirements,⁶ then you are licensable. But do any of these requirements actually require legal residency?

Three of the four largest states by attorney population have addressed the undocumented attorney issue within the last two years.⁷ While there is a widespread general consensus among state bars as to what constitutes moral fitness and good character, unlawful entry is a rare point of disagreement. This paper will focus on the current shifting landscape regarding the legal profession’s stance towards undocumented attorneys and the policy objectives that states are currently juggling. It argues that while the legislatures in California and Florida have made progressive strides by allowing undocumented immigrants the opportunity to become attorneys, New York has produced the most promising model to date by overruling the federal statute disallowing public funds to be spent on undocumented immigrants without an affirmative opt-out by the legislature, but even it has not gone far enough. None of the three states that have considered this issue have denied the applicant a bar license.

However, even once the hurdle of licensure has been solved, there is still the issue of legal employment. A license to practice law does not grant one legal status, and without legal status, one cannot be employed in the United States. To solve this issue, I propose that a new professional visa be issued to undocumented immigrants who have otherwise passed all of the requirements of becoming an attorney.

The paper begins with a case study of the *Garcia* case, which highlights a case of first impression. It will then guide the reader through past and present federal and state treatment of foreign workers. It ends with a look at how post-*Garcia* courts have considered the issue, and the various arguments and counter arguments that should be addressed before coming to a conclusion of what should be done to ensure that undocumented attorneys have fair treatment, for both social and economic reasons.

⁵ *Schwartz v. Bd. Of Bar Examiners of State of N.M.*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring).

⁶ The character and fitness requirements typically look at and flag instances of financial irresponsibility, criminal records, lack of candor, and untreated mental illness or substance abuse. Lori Shaw, *Professionalism: What Does It Take to Satisfy Character and Fitness Requirements?*, AMERICAN BAR ASSOCIATION (2013), http://www.americanbar.org/publications/syllabus_home/volume_44_2012-2013/winter_2012-2013/professionalism_whatdoesittaketosatisfycharacterandfitnessrequire.html.

⁷ *National Lawyer Population by State*, AMERICAN BAR ASSOCIATION (2013), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/2013_natl_la_wyer_by_state.authcheckdam.pdf.

II. BACKGROUND

To properly orient the paper, my initial case study—the one I will focus on the most—details Sergio C. Garcia’s quest for admission to the California Bar. However, Garcia’s story is not typical of many law students. He is an undocumented immigrant who has been living in the United States for close to twenty years. He attended law school, took, and passed the bar exam, but his application was held up during the moral character and fitness test, which each state bar requires its applicants to pass before becoming licensed. Despite being a “model citizen” in all other regards, Sergio Garcia stumped the Bar Association when it was confronted with a federal statute which forbade it from issuing publicly funded professional licenses to undocumented immigrants. The statute prohibited state funds to be used to assist undocumented immigrants unless the state’s legislature had previously enacted legislation opting-out of the bill. When Garcia’s application was initially held up in California, the state had not yet opted-out of the federal statute. Luckily for Sergio, the California Legislature was able to opt-out before the Supreme Court had to rule on his fate, and he was granted admission. But it was not until a year later in New York that a court would set a precedent declaring that the federal government had overstepped its authority when writing the statute, by only allowing the state legislature to opt-out of the prohibition, and not allowing the courts a say in whether an individual may become a licensed attorney.

A. UNDOCUMENTED IMMIGRANT, DEFINED

The federal government delineates numerous categories for noncitizens in the United States.⁸ The broadest category is “alien,” which is “any person not a citizen or national of the United States.”⁹ These can include non-citizens who are lawfully admitted to the United States. There is also a distinction between nonimmigrant aliens and immigrant aliens. The former are noncitizens temporarily admitted into the United States. The latter are all other aliens.¹⁰ The term “Qualified Alien” refers to a category of individuals who may not have citizenship status within the United States, but who have been admitted through: asylum, refugee status, recognition as an alien who was the victim of domestic abuse, having been paroled into the United States for one year, or simply an alien who has been lawfully granted permanent residence.¹¹ These aliens are eligible for Federal public benefits and assistance such as welfare or federal housing.

An illegal or undocumented immigrant is a category assigned to immigrants “without any valid documentation or lawful immigration status.” Illegal or undocumented immigrants are those immigrants who are

⁸ Tara Kennedy, Comment, *Barred From Practice? Undocumented Immigrants and Bar Admissions*, 63 DEPAUL L. REV. 833, 837 (2014).

⁹ 8 U.S.C. § 1101(a)(3) (2014).

¹⁰ Examples of nonimmigrant aliens include: students, tourists, business visitors, foreign government officials, members of the media, and temporary workers. 8 U.S.C. § 1101(a)(15) (2014).

¹¹ 8 U.S.C. § 1641(b) (2008).

unlawfully present in the United States “without any valid documentation or lawful immigration status.”¹² This paper focuses on this last class of individuals and their eligibility to receive *state* public benefits, namely, receiving a license to practice law.

B. IN RE GARCIA

The first case nation-wide to deal with an undocumented immigrant looking to become bar-certified occurred in California. Sergio C. Garcia had applied for bar admission after completing law school and passing the nation’s most difficult bar exam. *In re Garcia* was a notable case of first impression, because it was the first time a state had determined that an undocumented immigrant could become a professionally licensed attorney. While the Garcia case ended up simply deferring to a statute enacted after the case had begun—making the issue moot—the New York Superior Court would later turn to judicial interpretation in granting undocumented immigrants these rights.

Sergio C. Garcia was born into a small, rural town 350 kilometers west of Mexico City on March 1, 1977.¹³ His parents brought him north across the Mexico-United States border when he was seventeen months old without any inspection or documentation by border agents.¹⁴ Garcia and his family called Northern California their home for the next seven years until they moved back to Mexico.¹⁵ The family once again made the move north to America in 1994 when Garcia was seventeen. This time around, Garcia’s father had obtained citizenship. But Garcia entered and remained in California as an undocumented immigrant.¹⁶ His father sponsored him for an immigration visa that year,¹⁷ which would allow Garcia to transition his status from an undocumented immigrant to a “lawful permanent resident” once a visa became available. The United States issues visas based in part on the applicant’s country of origin.¹⁸ Since Garcia was from Mexico, the country which still has the longest backlog of individuals seeking immigration visas, he was told that he would have to sit and wait.¹⁹ As of

¹² Kennedy, *supra* note 8 at 838.

¹³ *In re Garcia*, 315 P.3d at 121.

¹⁴ *Id.*

¹⁵ Christopher Danzig, *Can Illegal Aliens be Lawyers in America? Nope*, ABOVE THE LAW (Aug. 3, 2012, 1:24 PM), <http://abovethelaw.com/2012/08/can-illegal-aliens-be-lawyers-in-america-nope/?rf=1>.

¹⁶ *Id.*

¹⁷ Sergio’s father filed form I-130 on November 18, 1994. I-130 is a petition for an alien relative to become a U.S. citizen.

¹⁸ *In re Garcia*, 315 P.3d at 121–122.

¹⁹ As of November of 2014, there were 1,323,978 Mexican applicants on the waiting list; the next closest country was the Philippines with 428,765 people on the waiting list. The State Department caps the per-country limit of issued visas at 25,900. *Annual Report of Immigrant Visa Applicants in the Family-Sponsored and Employment-Based Preferences Registered at the National Visa Center as of November 1, 2016*, DEPARTMENT OF STATE (Nov. 2016), <http://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingListItem.pdf>.

2015, more than twenty years later, Sergio Garcia is still on that waiting list.²⁰

In the meantime, Garcia graduated from high school, obtained his AA degree from Butte College, received his paralegal certification from California State University, Chico, and received his J.D. in 2009 from California Northern School of Law while taking night classes so that he could work during the day.²¹ Sergio went on to pass the California State Bar Exam on his first attempt²²—a feat that was only accomplished by 70.4% of California test takers that year, and 54% of California test takers from his law school.²³

The California State Bar Committee received and reviewed Garcia's application on which Garcia had indicated that "he [was] not a United States citizen and that his immigration status [was] 'Pending.'"²⁴ After the Committee's thorough vetting of Garcia's background and moral character, they decided that he had far surpassed the requirements for admission to the State Bar.²⁵ The Committee submitted his name to the court for admission. However, the California Supreme Court realized that it had never addressed the question of whether an undocumented immigrant could become a lawyer in California.²⁶ It directed the Committee "to show cause before [the] court why its motion for admission of Sergio C. Garcia to the State Bar of California should be granted."²⁷

C. AUTHORITY

While the federal government has plenary authority over the realm of immigration,²⁸ admission to a state bar is controlled individually by states. Regulating admission to the California State Bar is governed by both the legislature and the California Supreme Court. However, as in every other state in the union, California's Supreme Court has the final word on who does and does not get admitted to the State Bar.²⁹ But since promulgating rules and regulations is an activity that has traditionally been reserved for legislatures, the court still allows for bar admission rules and guidelines to

²⁰ *In re Garcia*, 315 P.3d at 122.

²¹ Paul Elias, *Undocumented Immigrant, Sergio Garcia, Fights to Become a Lawyer in California*, THE HUFFINGTON POST (Sep. 4, 2013, 5:43 AM), http://www.huffingtonpost.com/2013/09/04/undocumented-immigrant-lawyer_n_3865036.html.

²² *Id.*

²³ *General Statistics Report July 2009 California Bar Examination*, The State Bar of California, (Jan. 5, 2010), <http://admissions.calbar.ca.gov/LinkClick.aspx?fileticket=ygWhGoUILWk%3d&tabid=2269>.

²⁴ *In re Garcia*, 15 P.3d at 122.

²⁵ *Id.* at 122 fn. 5 (detailing Garcia's many qualifications for admission to the State Bar).

²⁶ *Id.* at 120–21.

²⁷ *Id.* at 123.

²⁸ *See Arizona v. United States*, 132 S.Ct. 2492, 2498 (2012) ("[the] Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens").

²⁹ *Hustedt v. Workers' Comp. Appeals Bd.*, 636 P.2d 1139, 1142–43 (Cal. 1981) ("In California, the power to regulate the practice of law, including the power to admit and to discipline attorneys, has long been recognized to be among the inherent powers of the article VI courts. Indeed, every state in the United States recognizes that the power to admit and to discipline attorneys rests in the judiciary.").

be passed by representatives as long as they are “reasonable” and don’t take away any of the court’s power of oversight and final say.³⁰ For instance, in 2014 the Florida legislature required bar applicants to pass the bar, prove their moral fitness, and provide a copy of their “citizenship or immigration status.”³¹ If an applicant could not provide proof of citizenship or legal residency, they would be ineligible for bar admission. In the 1970s, the California legislature also attempted to exclude non-United States citizens from State Bar admittance, but the rule was struck down by the California Supreme Court pursuant to its final-say authority.³²

D. THE DECISION

The *Garcia* case largely turned on the wording of a federal statute: 8 U.S.C. § 1621. Subsection 1621(c)(1)(A) declares that “unauthorized aliens”³³ are ineligible for state or local “public benefits,” including professional licenses issued by a state or local government agency “or by appropriated funds of a State [sic] or local government.”³⁴ Sergio Garcia and the California State Bar Commission maintained that law licenses were not covered under the language of the statute³⁵ because subsection (c)(1)(A) applied “only to professional licenses that [are] issued by a state or local *administrative* agency and does not apply to [law licenses, which are] issued by [the] court.”³⁶ Luckily, the court never had to determine whether this argument held water, because Congress had provided an opt-out provision from the act for states that are more accepting to undocumented immigrants. The California legislature acted on this and passed a bill that would allow the state to give public benefits to undocumented immigrants if it so wished to.

As a hot-button policy topic, the *Garcia* case drew considerable attention. Oral arguments began on September 4, 2013, and addressed the issue of whether admitting an undocumented immigrant to the Bar violated federal law, state law, or the policies of either.³⁷ Fourteen amicus curiae briefs—including the California Attorney General’s—were filed to the court in support of Garcia.³⁸ Two individuals and the United States Department of Justice (DOJ) filed amicus briefs opposing the motion to

30 *In re Lavine*, 41 P.2d 161 (Cal. 1935).

31 Fla. Bd. Of Bar Examiners, 134 So. 3d at 433 (Fla. 2014) (holding that “unauthorized immigrants are ineligible for admission to The Florida Bar.”).

32 *Raffaelli v. Committee of Bar Examiners*, 496 P.2d 1264, 1268–75 (Cal. 1972) (holding that a provision limiting admission to the State Bar only to United States citizens violated the equal protection clause of the United States Constitution and could not be applied.).

33 The prohibition on public benefits does not apply to “qualified aliens” (8 U.S.C. § 1641 (2012)), “nonimmigrant aliens” (8 U.S.C. § 1101(a)(15) (2012)), or aliens who have been paroled for less than one year (8 U.S.C. § 1621(d) (2012)).

34 8 U.S.C. § 1621(c)(1)(A) (2008).

35 *In re Garcia*, 315 P.3d at 126.

36 The Commission and Garcia agreed that the issuance of a law license would be a “de minimis” amount of funds expended. *Id.* at 127 (italics added).

37 *Id.* at 123.

38 *Id.* at n. 8.

admit Garcia.³⁹ The briefs in support of admitting Garcia to the Bar accentuated Garcia's personal accomplishments and his stellar reputation in his community, while the briefs against argued that his admission could not be allowed due to federal law and the policy implications of allowing someone who had entered the country illegally to be a custodian of the law. Subsection (d) of the § 1621 provides that a state *may* explicitly allow undocumented immigrants to obtain a state-issued professional licenses through an enactment of state law after August 22, 1996.⁴⁰ While Garcia's case was making its way through the legal system, the California legislature recognized that they could take the guesswork out of the court's final decision by enacting a statute allowing for undocumented attorneys. Thus, section 6064(b) was born.⁴¹ Under this section of the state Business and Professions code, which dictates who can be statutorily admitted to the California State Bar, the legislature explicitly allowed for applicants who are not lawfully present in the United States to be admitted to the bar so long as they are certified by the examining committee.⁴² Sergio Garcia was finally granted his bar license.

III. FEDERAL IMMIGRATION POLICY

In 2012, pundits covering the presidential election made much ado about the influence of Hispanic voters and their increasing share of the American population. Around the same time, groups of Republicans and Democrats agreed that something needed to be done about "immigration reform." However, that was about all that they were able to agree upon. Following gridlock in Congress, the Obama administration took the issue upon themselves to steer federal immigration policy towards decreasing the deportations of children and productive individuals, which was met with great resistance. The country was, and is still, deeply divided between those who stand for expanding immigration rights and those who want to tighten restrictions on ingress across the southern United States border. Even Obama's modest immigration action has been met with fiery rhetoric and congressional reaction.⁴³

The Deferred Action for Childhood Arrivals (DACA) is a federal immigration policy put forth by the Obama administration under the Department of Homeland Security.⁴⁴ It originally allowed for undocumented immigrants, who were thirty years of age or younger, and who came to America before June 2007 and their sixteenth birthday, to

39 *Id.* at 123.

40 8 U.S.C. § 1621(d) (2008).

41 Cal. Bus. & Prof. Code § 6064(b) (2014).

42 *Id.*

43 In 2013, nearly every GOP representative and 3 democrats voted 224 to 201 to defund DACA. However this vote was mostly a rhetorical gesture because DACA is funded by the application fees rather than federal money. Pete Kasperowicz, *House Votes to Defund Obama's Administrative Amnesty for Immigrants*, THE HILL, (Jun. 6, 2013, 2:45 PM), <http://thehill.com/blogs/floor-action/house/303869-house-votes-to-defund-obamas-administrative-amnesty-for-immigrants>.

44 *Deferred Action for Childhood Arrivals*, THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY, (Jul. 17, 2015), <http://www.dhs.gov/deferred-action-childhood-arrivals>.

receive a renewable two-year work visa and exemption from deportation. Application is a somewhat difficult process, with multiple forms to file, a myriad of rules, and a \$485 administrative fee. Furthermore, applicants also had to meet the criteria that they had graduated from high school (or were enrolled at the time of application), had not been convicted of a felony offense, significant misdemeanor, or multiple misdemeanors, and had to be determined, via a biometric background check, to not be a threat to homeland security.⁴⁵ The program was expanded via executive action in November 2014 to include undocumented immigrants over the age of thirty and those who came before 2010—rather than 2007. The 2014 action increased the deferred period from two to three years, and was expected to increase the deferred action eligibility from 1.7 million people to about 2 million people.⁴⁶ But due to conservative opposition, DACA's expansion—and the fate of hundreds of thousands of undocumented immigrants—have been put on hold by the federal judiciary. Its fate is now tied to another November 2014 executive action that Obama proffered in his November address.

This sister policy objective initiated by the Obama administration—the Deferred Action for Parental Accountability program (DAPA)—has come under even greater scrutiny. The executive action was announced by President Obama in November 2014 alongside his DACA expansion in an address from the East Room of the White House.⁴⁷ The action would defer deportation to undocumented *parents* of American citizens or lawful permanent residents, and would grant them renewable three-year work visas. Many political observers saw this executive action as an ultimatum to the congressional Republicans to either accept his action or to pass immigration reform of their own.⁴⁸ Instead, in December of 2014, Texas and twenty-five other states⁴⁹ filed suit to stop the implementation of DAPA and the DACA expansion in the Southern District Court of Texas. In February of 2015, the district court judge handed down an injunction against the two executive actions.⁵⁰ The Department of Justice appealed the

45 *In re Vargas*, 131 A.D.3d at 14.

46 Jeffrey S. Passel & Mark Hugo Lopez, *Up to 1.7 Million Unauthorized Immigrant Youth May Benefit From New Deportation Rules*, PEW RESEARCH CENTER (Aug. 14, 2012), <http://www.pewhispanic.org/2012/08/14/up-to-1-7-million-unauthorized-immigrant-youth-may-benefit-from-new-deportation-rules/>; Jens M. Krogstad & Jeffrey S. Passel, *Those from Mexico will Benefit Most from Obama's Executive Action*, PEW RESEARCH CENTER (Nov. 20, 2014), <http://www.pewresearch.org/fact-tank/2014/11/20/those-from-mexico-will-benefit-most-from-obamas-executive-action/>.

47 Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES (Nov. 20, 2014), http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html?_r=0.

48 *Id.*; Josh Richman, *Obama Immigration Plan, the Details: Border Security, Deferred Action, New Programs*, SAN JOSE MERCURY NEWS (Nov. 20, 2014, 3:00 PM), http://www.mercurynews.com/census/ci_26979815/details-obamas-plan-border-security-deferred-action-and.

49 All states led by Republican governors.

50 The Department of Justice, via an advisory on March 3, 2014, informed the district court judge that between November 20, 2014 and February 16, 2015—the day of the injunction—the Department of Homeland Security had misrepresented the fact that it had issued 108,000 three-year work visas in hearings. They also informed the judge that they had issued about 2,000 three-year work visas the day of the injunction, which they said they would work to turn back into two-year visas. *DAPA*

decision and on November 11, 2015, the Fifth Circuit upheld the lower court's injunction. The DOJ petitioned the Supreme Court for review, and the Court granted certiorari in January of 2016. In June of 2016, the Supreme Court deadlocked in a 4-4 tie, which left the injunction in place without setting any precedent.

The Obama administration clearly had set its sights on implementing policies that would decrease the number of deportations of undocumented immigrants who have been living fruitful lives in the United States for a sizeable period of time. The social policy argument behind this is that we should not be breaking up families who have come to America because of repressive conditions at home, and who have behaved as "model citizens" since arriving. The administration wanted to provide some sort of legal footing for these individuals so that they could obtain a job and continue being productive members of society without worrying that they were about to be sent back to their country of origin.

Despite these progressive policies, deportation statistics under President Obama have skyrocketed, leading some immigration reform activists to label him the "deporter in chief."⁵¹ But, statistics can be misleading. Many of the deportation numbers have come from a new form of counting that was devised during the beginning of Obama's first term in part to appease Republicans who were critical of his stance on immigration. Whereas individuals in the past who were caught in the act of crossing the southern border were turned around and bussed back without any sort of documentation process, deportation statistics now tally and process those individuals before returning them south.⁵² The continuation of this time-consuming process is also aided by the \$600 million that Congress spent on new surveillance technology and the doubling of agents patrolling the border in 2010.⁵³ Furthermore, each year since Obama has been President, there has been a decline of removals ordered by immigration courts and a rising percentage of removal cases ending with the individual being allowed to stay in the United States.⁵⁴ So while the number of recorded deportations has gone up under the Obama administration, the trend can be explained by an increase in the number of border agents who are in turn catching and recording more immigrants crossing the border, rather than the misconception that Immigrations and Customs Enforcement agents

and *DACA: What Happened to President Obama's Executive Action?*, THE NATIONAL LAW REVIEW (Jul. 25, 2015), <http://www.natlawreview.com/article/dapa-and-daca-what-happened-to-president-obama-s-executive-action>.

⁵¹ Brian Bennett, *High Deportation Figures are Misleading*, L.A. TIMES (Apr. 1, 2014, 8:55 PM), <http://www.latimes.com/nation/la-na-obama-deportations-20140402-story.html>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Interior Immigration Enforcement by the Numbers*, BIPARTISAN POLICY TASK FORCE, 2-4 (Jul. 2015), <http://bipartisanpolicy.org/wp-content/uploads/2014/03/BPC-Interior-Enforcement-Numbers.pdf>.

(ICE) are rounding up undocumented workers within the “interior” of the country.⁵⁵

During the Garcia case, the United States Department of Justice (“DOJ”) filed an amicus curae brief with the court, arguing that Sergio Garcia should not be admitted to the State Bar. The DOJ’s disapproval was surprising due to Obama’s general passivity related to undocumented immigrants who have been “model citizens” since arriving, and his recent immigration executive orders and policy initiatives. The DOJ argued that “federal law prohibits an undocumented immigrant who lacks work authorization from engaging in the practice of law for compensation in this country in any capacity, including as an independent contractor or sole practitioner.”⁵⁶

The Obama administration fought for undocumented immigrants to come out of the shadows and obtain the chance to work for the American dream. But if the United States wants to make a lasting statement that will draw welcoming headlines, it should advocate on behalf of the states that are allowing these accomplished immigrants to succeed. To do this, the federal government should continue the legal battle for DAPA and DACA’s expansion, and publically support Garcia, Vargas, and the other undocumented immigrants who have otherwise shown themselves as model citizens, and who have overcome significant obstacles to call themselves lawyers today. There should also be a Congressional push to revise § 1621 to fit more in-line with the policy objectives behind DAPA and DACA—granting further license and employment eligibility to immigrants who live up to federal standards. Garcia’s and Vargas’s stories are the true marking of the American dream, and it would be a shame to see such remarkable talent and inspiration go to waste.

IV. CALIFORNIA IMMIGRATION POLICY

To better understand California’s state policy battles over immigrant rights, it is important to know its history. California’s decision to opt-out of the federal act denying public funds from being spent on undocumented immigrants might seem like a forgone conclusion in today’s California, with pro-immigration Democrat supermajorities in the legislature and a Democrat in the governor’s mansion.⁵⁷ But California was not always so deeply blue. In a way, some of today’s decisions have been the result of the proverbial pendulum swinging back from the days of California as a very anti-immigrant state. The collective ideology of a state—even one as “left”

⁵⁵ The Bush administration’s final year saw 369,000 recorded deportations—36 percent of which were immigrants caught at the border; in 2014, ICE recorded 319,000 deportations, 68 percent of which were immigrants caught crossing the border. *Id.* at 2.

⁵⁶ *In re Garcia*, 315 P.3d at 123.

⁵⁷ As an aside, Jerry Brown in 2015 became the first Governor to call the mansion his home since Ronald Reagan in 1967. Brown previously lived in a small studio apartment near the capitol building. David Siders and Jeremy B. White, *Jerry Brown Plans to Move Into Historic Governor’s Mansion*, THE SACRAMENTO BEE (Oct. 16, 2015), <http://www.sacbee.com/news/politics-government/capitol-alert/article39458778.html>.

as California—is not something that necessarily remains linear. When reading its history, it is important to keep the fluidity of popular opinion in mind before assuming that immigrants’ rights will continue to be furthered in left-leaning states.

In 1890, the California Supreme Court unanimously decided to deny bar admission to Hong Yen Chang because he was not a citizen of the United States.⁵⁸ While Chang *was* a citizen of the United States according to a New York court ruling, the California court held—correctly, unfortunately, under then-prevailing federal law—that the federal Chinese Exclusion Act forbade the issuance of certificates of naturalization to any “persons of the Mongolian race,” which included Chinese peoples.⁵⁹ The court held that only persons who “are citizens of the United States . . . are entitled to be admitted to practice as attorneys and counselors of this court”⁶⁰ The decision was handed down during a time of extreme xenophobia in California’s post-gold rush years, mainly directed towards Chinese immigrants.

In the decades during and after the gold rush, Chinese immigrants steadily began to move from extremely low-wage positions into jobs that were traditionally held by white Americans.⁶¹ This was met with a backlash of court decisions and laws that were explicitly and implicitly “designed to disadvantage Chinese immigrants.”⁶² In the early 1870s, a decade shrouded by an economic downturn in the American west, Denis Kearney rose to power in California politics under the banner of the Workingmen’s Party. Its slogan was “The Chinese must go!” and its goal was to “rid the country of Chinese cheap labor.”⁶³ The party began in San Francisco as a reaction to the railroad strikes in the eastern part of the country that were wreaking economic havoc on the west. The economic protest was quickly overtaken by the louder anti-Chinese sentiment, and rioting and violence ensued.⁶⁴ Dennis Kearney was elected the president of the San Francisco Workingmen’s Party. Its mission was to “take the government out of the hands of the rich and place it in those of the people . . . and to secure the discharge of all Chinese employed in the state.”⁶⁵ The racist sentiment against low-wage Chinese workers that had caught on in the state was

58 *In re Hong Yen Chang*, 24 P. 156 (Cal. 1890).

59 *Id.* at 157.

60 *Id.*

61 *Chae Chan Ping v. United States*, 130 U.S. 581, 594–95 (1889).

62 *See, e.g.*, Stats. 1855, ch. 174 § 1, p. 216 (imposing a license tax on each foreigner who was “ineligible to become a citizen”); Stats. 1862, ch. 339, § 1, p. 462 (creating the “Anti-Coolie Act” which imposed a \$2.50 tax on Chinese immigrants who typically lived on \$3–4 per month); *See In re Yick Wo*, 68 Cal. 294 (1885) (deciding that a prejudicial yet race-neutral law was permissible for public safety reasons) (reversed sub. nom. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)); *People v. Hall*, 4 Cal. 399 (1854) (overturning a murder conviction on the basis that Chinese were excluded from testifying for or against a white man because it would be ridiculous to “allow a race of people whom nature marked as inferior to swear away the life of a citizen . . .”).

63 CHARLES J. MCCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* 79–81 (1994).

64 ELMER SANDMEYER, *THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* 64 (1973).

65 *Id.* at 65.

summed up succinctly in the party's manifesto published in the San Francisco Chronicle:

We have made no secret of our intentions. We make none. Before you and before the world we declare that the Chinaman must leave our shores. We declare that white men, and women, and boys, and girls, cannot live as the people of the great republic should and compete with the single Chinese coolie in the labor market. We declare that we cannot hope to drive the Chinaman away by working cheaper than he does. None but an enemy would expect it of us; none but an idiot could hope for success; none but a degraded coward and slave would make the effort. To an American, death is preferable to life on par with the Chinaman.⁶⁶

After Kearney's rise to power, the party's influence grew across the San Francisco Bay Area and as far south as Los Angeles.⁶⁷ It wasn't until 1880, when the Workingmen's Party was dealt a significant electoral defeat in San Francisco that the party's influence was marginalized; but this did not spell the end of racism against Chinese or other racial minorities in California.⁶⁸ Human history has long been fraught with xenophobia and changes in legislation or electoral defeats will not end this any time soon. In modern times, anti-immigrant worker sentiment still exists, albeit usually in a more facially-neutral manner than it did during the 19th century. Over a century later, though, a demographic, political, and legal sea change has vastly altered the racial landscape in California.

Over the past century, California's stance on immigration shifted from one end of the spectrum to the other. In 2016, the California Supreme Court revisited Hong Yen Chang's case, and posthumously granted him admission to the California Bar while acknowledging "that the discriminatory exclusion of Chang from the State Bar of California was a grievous wrong."⁶⁹ And in the city where Chang had attempted to hang out his shingle, things have changed quite a bit. For the past three decades, San Francisco has actively enforced "sanctuary laws" out of a worry that federal immigration policy treats undocumented immigrants too harshly.⁷⁰ These laws typically call for a moratorium on the use of municipal funds or resources in carrying out federal immigration law against an individual. San Francisco specifically bans city employees and police officers from inquiring about an individual's immigration status, and disallows local authorities from holding "immigrants for immigration officials if [the immigrant has] no violent felonies on their records or current charges."⁷¹

66 *Id.* (quoting San Francisco Chronicle, Oct. 16, 1877).

67 *Id.* at 66.

68 *Id.* at 75.

69 *In re Hong Yen Chang*, 344 P.3d 288, 291 (Cal. 2015).

70 Carolyn Tyler, *San Francisco Supervisors Examine Sanctuary City Policy*, ABC 7 NEWS (Oct. 20, 2015), <http://abc7news.com/news/san-francisco-supervisors-examine-sanctuary-city-policy/1042907/>.

71 Christina Littlefield, *Sanctuary Cities: How Kathryn Steinle's Death Intensified the Immigration Debate*, L.A. TIMES (Jul. 24, 2015), <http://www.latimes.com/local/california/la-me-immigration-sanctuary-kathryn-steinle-20150723-htmlstory.html>.

San Diego and Los Angeles also have similar sanctuary policies in place. California is now one of the most immigrant-friendly states in the union. But the state's pro-immigrant lean might not last forever.

In July of 2015, Kathryn Steinle was fatally shot by Juan Francisco Lopez-Sanchez while walking along the Embarcadero with her father in San Francisco. The unprovoked killing was swept into the national spotlight when it was revealed that the shooter was an undocumented immigrant from Mexico "with a criminal record who had been deported multiple times."⁷² In a local television interview after the killing, Lopez-Sanchez indicated that he had traveled to San Francisco specifically due to its "liberal laws that made it easier for immigrants without documents to fly under the radar."⁷³ Prior to the shooting, Lopez-Sanchez had been in federal prison for re-entering the country after his fifth deportation. He was going to be released to immigration officials but had first been sent to the San Francisco Sheriff's Department on an outstanding warrant that was issued due to drug charges. The Sheriff's Department declined to prosecute and released Lopez-Sanchez without first contacting ICE, following the city's sanctuary protocol.⁷⁴ National politicians from both sides of the aisle took this story and ran with it, calling for stricter immigration policy. Ross Mirkarimi, San Francisco's sheriff, was ousted in the most recent election due, in part, to his department's handling of Lopez-Sanchez.⁷⁵

It was crucial for California to codify § 6064(b) when it did, because the ebb of public opinion regarding immigration seems apt to change in the long-term. Today's California tends to be a pro-immigration state, and thus the legislative step wasn't as politically difficult. But for states where the composition of their legislature is less-likely to enact a bill permitting undocumented attorneys, a New York-style approach, which will be discussed in the next section, would be a better option. Opportunity for hard-working immigrants is an ideal that America has touted (albeit sometimes begrudgingly) throughout its history. This "American dream" should not be subject to petty political decisions. Rather, to attract the world's most talented individuals, and drive our economy, our state "laboratories" should be taking a more inclusive look at these talented individuals who have come here not only for the unparalleled opportunity, but to expand our economic and civic potential.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Mirkarimi had also come under substantial criticism at the beginning of his term as sheriff for his alleged involvement in a domestic violence incident with his wife. This likely influenced the city's voters as well. Valerie Richardson, *San Francisco's Sanctuary City Sheriff Sent Packing on Election Night*, THE WASHINGTON TIMES (Nov. 4, 2015), <http://www.washingtontimes.com/news/2015/nov/4/ross-mirkarimi-san-francisco-sanctuary-champion-tr/>.

V. SUBSEQUENT DECISIONS

The California decision in *Garcia* encouraged other cases about the legality of undocumented attorneys in New York and Florida. The case in Florida was decided along similar lines as the California case—relying on the state legislature to take the reins and enact opt-out legislation. The New York decision went even further and declared the federal section 1621(a) statute unconstitutional. This paved the way for the New York court to create their own precedent on how undocumented immigrant admissions would be considered for their admission process.

A. FLORIDA

Florida's Supreme Court issued an advisory opinion in 2014 discussing the legality of admitting an undocumented immigrant to the Florida Bar. The court determined that (at that time) "unauthorized immigrants [were] ineligible for admission to The Florida Bar."⁷⁶ Numerous *amicus curae* briefs were filed in support of the applicant, including ones by "law professors, the general counsel of his undergraduate institution . . . and past presidents of the American Bar Association . . ." ⁷⁷ Florida's court sided with the logic of California's *Garcia* decision in leaving it up to the state legislature to enact a law that would opt-out of the federal ban on the appropriation of professional licenses to undocumented immigrants.⁷⁸

There had been an argument circulating that because section 1621 was intended to deter the appropriation of state administrative funds to helping undocumented immigrants, and the granting of a law license through the judiciary was a de minimis use of funds, that perhaps the federal law didn't apply in the "undocumented attorney" situation. The court reasoned that even though law licenses come from the judiciary as opposed to a state agency, they were still not allowed to be issued to undocumented immigrants under section 1621 because the judiciary itself is funded through state appropriations.⁷⁹ In 2014, after the advisory opinion was handed down, Florida's legislature enacted a provision allowing undocumented immigrants the ability to be admitted to the State Bar—though with many other requirements attached to the legislation.⁸⁰ After the California and Florida decisions, it looked as though the trend would

⁷⁶ Fla. Bd. Of Bar Examiners re Question as to Whether Undocumented Immigrants are Eligible for Admission to the Florida Bar, 134 So.3d 432, 434 (Fla. 2014).

⁷⁷ *Id.* at 438 (Labarga, J., concurring).

⁷⁸ *See In re Garcia*, 315 P.3d at 127.

⁷⁹ *Id.*

⁸⁰ *See* Fla. Stat. 454.021(3) (2014) (allowing "Upon certification by the Florida Board of Bar Examiners that an applicant who is an unauthorized immigrant who was brought to the United States as a minor; has been present in the United States for more than 10 years; has received documented employment authorization from the United States Citizenship and Immigration Services (USCIS); has been issued a social security number; if a male, has registered with the Selective Service System if required to do so under the Military Selective Service Act, 50 U.S.C. App. 453; and has fulfilled all requirements for admission to practice law in this state, the Supreme Court of Florida may admit that applicant as an attorney at law authorized to practice in this state and may direct an order be entered upon the court's records to that effect.").

continue to disallow undocumented immigrants from securing a bar license without specific state legislation permitting it—an uncertain contingency that rested on the political makeup of the state-in-question’s legislature.⁸¹ However, this trend was shaken up when New York’s Court of Appeals took up the issue this year.

B. NEW YORK

In 2015, the highest New York court was also asked to determine whether undocumented immigrants could become attorneys within the state in *Matter of Vargas*.⁸² The facts were similar to *Garcia* although the applicant, Cesar Vargas, had been covered under DACA relief. The court found that New York had not legislatively opted out of the federal prohibition on issuing professional licenses to undocumented immigrants.

However, rather than leaving it up to the legislature to opt out, the state court declared 8 U.S.C. § 1621(d) unconstitutional. It held that section 1621(d) violated the Tenth Amendment of the U.S. Constitution by usurping the state’s power to decide which branch of the government could decide to opt out of the federal law.⁸³ The court’s reasoning was that *it* was the decision-making body that was tasked with granting or denying law licenses. In quoting Judge Benjamin Cardozo, the majority points out that the judiciary is the appropriate branch to admit attorneys because “an attorney is ‘an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.’”⁸⁴ The court’s holding determines that by designating the legislative branch as the only entity that can override the federal law, Congress went too far in taking away the state’s autonomy. In effect, the decision made it so that in New York, the decision of whether to opt out of the federal law is left to the highest court. Exercising its resultant power, the court decided that as long as an undocumented immigrant has been granted DACA relief and has all of the other requisite qualifications to become a lawyer, his or her immigration status does not play an adverse role in the admission process.⁸⁵ While the possibility that the DACA requirement could be dropped for the *Vargas* approach, it seems unlikely at this time that the *Vargas* court will change its mind about requiring some sort of approval from the federal government.⁸⁶

The decision is a monumental one due to the state’s status as a center for the legal profession and its influence on other state courts regarding bar admission policy. But if permitting the admission of undocumented immigrants turns on whether or not they are recognized under DACA, the

81 Kennedy, *supra* note 8, at 851.

82 See generally *In re Vargas*, 131 A.D.3d 4.

83 *Id.* at 24.

84 *Id.* at 26 (quoting *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470–71 (1928)).

85 *Id.* at 27.

86 The Supreme Court of the United States has made it very clear that the federal government has plenary power regarding immigration, including policy towards undocumented immigrants. See *Arizona v. U.S.*, 132 S.Ct. 2492, 2505 (2012).

holding's coverage may be severely limited or even become moot under an administration that is hostile to Obama's immigration policies.

The holding suggests that DACA coverage—or at the least, a federal body having some sort of say over whether the bar applicant is a worthy candidate for deferring deportation—is indeed crucial to declaring that section 1621(d) is unconstitutional. As noted in the *Vargas* opinion, the court's action might otherwise be construed as incentivizing illegal immigration.⁸⁷ Chapter 14 of Title 8 puts forth the policy of the federal government regarding welfare and immigration. Subsection (2)(B) of this law specifically disallows public benefits to serve as an incentive for unauthorized entry into the United States.⁸⁸ Thus, New York's opinion rests upon the federal government taking the first steps of granting DACA coverage and employment authorization before the state issues a license, so that New York cannot be blamed for violating the spirit of section 1601.⁸⁹

VI. LOOKING FORWARD

States have taken differing approaches to this first impression issue, and as the question reaches new parts of the country, it seems reasonable to expect that we might see even more methodologies for tackling the undocumented attorney issue. I argue that the best solution to this dilemma currently is to take the New York approach, yet leave out the complicated and unreliable DACA requirement for applicants. The DACA requirement may only serve to create quixotic reliance on an administration policy that may vanish as quickly as it appeared. State courts would regain their power to decide who is admitted to the state bar without a federal act directing the authority to the legislature. Another solution which could be enacted is for Congress to create a new category of visa that would allow licensed undocumented attorneys the ability to find legal employment. The decision to allow undocumented immigrants admission to the bar, and their subsequent employment opportunities, should be nonissues so long as they fulfill the same requirements that every other applicant must pass. While there are policy issues that must be considered beforehand, the pros of admitting an applicant who has shown pronounced intelligence and perseverance in the process of becoming an attorney should greatly outweigh the cons.

A. THE MORAL CHARACTER AND FITNESS REQUIREMENT

Once an aspiring lawyer has studied for months to finally pass the bar, there is still another hurdle they need to pass: each applicant must affirmatively prove that they possess the good moral character requisite to become a lawyer.⁹⁰ The requirement for good moral character started in the

87 *In re Vargas*, 131 A.D.3d at 22 n.10.

88 8 U.S.C. § 1601(2)(B) (2015).

89 *In re Vargas*, 131 A.D.3d at 28.

90 Aaron M. Clemens, *Facing the Klieg Lights: Understanding the "Good Moral Character" Examination for Bar Applicants*, 40 AKRON L. REV. 255, 255–56 (2007).

early nineteenth century as a “facially neutral” means of excluding undesirable individuals from practicing law.⁹¹ Today, the requirement is commonly justified as a way for the bar to ensure that members of the public—who are trusting attorneys with their money and private information—are protected from unethical practitioners.⁹²

State bars are often specifically concerned with financial irresponsibility, criminal conduct, mental illness, substance abuse, academic integrity, and lack of candor.⁹³ The American Bar Association has released suggested factors for the state bars to follow when judging an applicant’s moral character: (1) the applicant’s age at the time of the conduct; (2) The recency of the conduct; (3) the reliability of the information concerning the conduct; (4) the seriousness of the conduct; (5) the factors underlying the conduct; (6) the cumulative effect of the conduct or information; (7) the evidence of rehabilitation; (8) positive social contributions since the conduct; (9) the applicant’s candor in the admissions process; and (10) the materiality of any omissions or misrepresentations.⁹⁴ However, there are many problems associated with this approach.

The first problem is assessing “good moral character,” which is a vague term. Its meaning can fluctuate greatly depending on who the examiner is. In fact, some have compared its application to Justice Stewart’s famous quote regarding defining pornography: “I know it when I see it.”⁹⁵ This highly subjective approach has led to inconsistent results in bar admissions cases.⁹⁶ While state bar admission requirements vary from state to state, all fifty have some sort of good moral character requirement which is roughly defined as “qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the law, and respect for the rights of others and the judicial process.”⁹⁷ The obvious issue with this requirement is that by crossing the United States border without the proper authorization, an individual has committed a civil immigration violation—legal disobedience.⁹⁸ But, for the instance when an applicant had crossed over with his or her parents at a young age, Congress has recognized that children lack agency in these situations.⁹⁹ Extrapolating this logic, it would seem unfair to determine that an applicant lacks the requisite moral character for the sole reason that their parent brought them

91 *Id.* at 259–60.

92 *Id.* at 268.

93 *See id.* at 257.

94 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS & NAT’L CONF. OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, viii (1994–1995).

95 Clemens, *supra* note 91, at 256 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

96 Marc Ratcliff, *The Good Character Requirement: A Proposal For a Uniform National Standard*, 36 TULSA L.J. 487, 488 (2000).

97 Raquel Aldana et al., *Raising the Bar: Law Schools and Legal Institutions Leading to Educate Undocumented Students*, 44 ARIZ. ST. L.J. 5, 23 (2012) (quoting CAL. STATE BAR R. 4.40(B) (West 2011)).

98 *Id.* at 25.

99 8 U.S.C. § 1182(a)(9)(B)(iii)(I).

across the border as a child and that they didn't self-deport to a now-foreign country upon adulthood.

Examiners, when judging an applicant's moral fitness, have focused on whether the applicant has previously shown any pattern that may negatively reflect on his or her "honesty, fairness or respect for the rights of others or for the laws of the state and nation."¹⁰⁰ Those who doubt that undocumented immigrants would satisfy the good moral character requirement might argue that if an individual knows that in order to comply with the law they have to self-deport and they instead choose not to, they are voluntarily disobeying the law as an adult with full agency. However, "[r]eformation from past immoral acts can be shown by a subsequent history of good behavior."¹⁰¹ Furthermore, illegal activity is usually looked at based on how long ago it occurred, the applicant's age when the conduct occurred, and whether the conduct involved elements of moral turpitude. If an undocumented immigrant stays in the country without authorization, that is one offense, arguably with relatively small levels of moral turpitude, which can be mitigated by evidence that the applicant has otherwise lived a life of honesty, fairness and respect for others and the law.

Other acts that might cause trouble for undocumented immigrants are financial issues and lack of candor. First, many undocumented immigrants have a difficult time establishing bank accounts simply by way of their legal status. This can lead to difficulty in paying debts, something that, if shown in a habitual pattern, can lead to their disqualification from the bar—even without an undocumented immigrant status.¹⁰² The reason the bar puts so much weight on financial irresponsibility is that lawyers are trusted to manage their clients' money. If they have a history of mismanaging their own money, it raises red flags to an examiner who is looking to protect the public from an attorney who will use their authority to use their clients' money inappropriately. Secondly, a lack of candor can hurt many applicants' chances of admission, but if an applicant has previously broken the law via an undocumented status, it is especially important to come clean to the examiners before they find out for themselves.¹⁰³ Nonetheless, rehabilitation can still be shown, even if an important fact is left out of an undocumented immigrant's application.

Actions, such as murder, that require automatic disqualification from the bar are examples of intentionally flaunting the law and cases of severe moral turpitude.¹⁰⁴ Other acts, such as possession of marijuana or driving under the influence, are instances of intentionally disobeying the law, but

¹⁰⁰ *Konigsberg v. State Bar of California*, 353 U.S. 252, 263 (1957); *Florida Board of Bar Examiners v. G.W.L.*, 364 So.2d 454, 458 (Fla. 1978).

¹⁰¹ *In re Haukebo*, 352 N.W.2d 752, 754 (Minn. 1984) (citing *Application of Gimbel*, 533 P.2d 810 (Or. 1975)).

¹⁰² *Florida Bd. Of Bar Examiners re M.A.R.*, 755 So.2d 89, 91 (Fla. 1994) (noting that the applicant who cannot handle her own finances is viewed as risky).

¹⁰³ *See In re Peterson*, 439 N.W.2d 165 (Iowa 1989) (showing that a lack of candor about previous criminal conduct often results in denial).

¹⁰⁴ *See In re Wright*, 690 P.2d 1134, 1136 (Wash. 1984) (courts will automatically disqualify an applicant who is convicted of murder).

are not necessarily crimes of moral turpitude. While the former is a malicious act that can never be truly remedied, the latter acts are those that our society deem to be unsafe choices, but choices that can be remedied or rehabilitated. Thus, when committing the latter act, the individual is allowed to present evidence to show that they have rehabilitated, and that their good moral character has outweighed their bad acts for a holistic consideration of their admission.¹⁰⁵ Committees should not disqualify an applicant based solely on their undocumented status, and instead consider the complete circumstances surrounding their presence in the United States. Such considerations could include at what age did the individual come to the United States and how practical it was for them to return to their home-country once they reached adulthood.

When confronted with applicants' prior legal offenses, bar committees already consider age and circumstance. Thus, this shouldn't be any different for the offense of staying in the country illegally. It should be up to each state bar committee (pending high court review) to make these subjective determinations, determine the severity of the applicant's illegal conduct, and weigh it against their subsequent good moral character. The more the applicant has subsequently shown a consistent pattern of honesty, candor, fairness, respect, and the like, the more likely the applicant should be able to pass the character and moral fitness requirement. Undocumented immigrant status is something that should be promptly addressed on the bar application, and will likely work against the applicant's good moral character assertion, but this can be addressed and mitigated by a demonstration of commitment to the ideals of the legal profession and personal responsibility.¹⁰⁶

B. EMPLOYMENT CONCERNS

Even if all fifty states were to opt-out of the federal ban on the issuance of professional licenses, there would still be the issue of the undocumented applicant's employment. 8 U.S.C. §1324(a) makes it a federal crime for U.S. employers to hire undocumented workers.¹⁰⁷ States certainly have a valid concern about whether the applicants they admit to their bar will legally be able to find work, and how the public will perceive this license. If an employer unknowingly hires an undocumented attorney, it could put the employer and his or her clients at risk.

Undocumented attorneys like Sergio Garcia understand this problem all too well. Garcia has been waiting for his visa to process for two decades now, without which he cannot be legally employed. Instead, he has gone into solo practice, helping individuals on their personal injury claims in

¹⁰⁵ See, e.g., *In re* Application of VMF for Admission to the Florida Bar, 491 So.2d 1104 (Fla. 1986); *In re* Haukebo, 352 N.W.2d 752 (Minn. 1984) (commenting that the applicant's driving under the influence convictions did not necessarily involve moral turpitude, and that the applicant would be allowed to introduce evidence of his good moral character for admission to the bar).

¹⁰⁶ See *In re Garcia*, 315 P.3d 117; *In re Vargas*, 131 A.D.3d 4.

¹⁰⁷ 8 U.S.C. § 1324(a) (2015).

Chico, California.¹⁰⁸ Creating a dual-class system of lawyers unfairly restricts the rights and abilities of a lawyer who lacks citizenship, yet displays all of the other qualifications and certifications of an able attorney. This should not serve as a model for all of the undocumented attorneys who come after him, some of whom might want to put their skills to work for the government, a firm or a business.

The only other option available to undocumented attorneys is to be eligible for DACA relief, which provides temporary employment eligibility. This would give undocumented immigrants a means of establishing an identity with the government for tax purposes. Some argue that allowing undocumented attorneys would create further law-breaking by incentivizing further illegal immigration. This argument falls short, because it is unfathomable that many people would illegally immigrate to the United States to raise children to become lawyers.¹⁰⁹ But DACA is a temporary solution in the sense that it only provides for two-year coverage (subject to renewal), and because it can easily be thrown out by an administration that disagrees with the policy.¹¹⁰ Furthermore, in states that do not recognize the New York approach,¹¹¹ nor opt-out via legislative action, DACA will not help undocumented immigrants receive a law license because it does not provide actual legal status.¹¹² Becoming an undocumented attorney thus, for the moment, remains a two-step process under the New York approach where the applicant must be granted DACA relief, and apply for bar admission in a state that has opted out of section 1621.

Proponents of barring employment for undocumented immigrants invariably reason that government should not be incentivizing illegal immigration across the borders. These individuals may also point out that the competition for existing legal jobs is already rigorous enough for American citizens without bringing in noncitizens. In fact, the argument that immigrants take jobs away from native-born workers is one that has been ubiquitous over American history. However, as found in a study by Rakesh Kochhar of the Pew Hispanic Center, an increase in foreign-born workers are “not associated with negative effects on the employment of native-born workers.”¹¹³ Not only does an influx of foreign-born workers not cause a reduction of low-skilled work for young, native-born workers, but his analysis found that there was no impact on native-born workers in

108 SERGIO GARCIA LAW, <http://sergiogarcialaw.com/> (last visited Mar. 8, 2016).

109 Kennedy, *supra* note 8, at 860.

110 As noted earlier, Obama’s sister program, DAPA, and the expansion of DACA have been judicially struck down pending further review by the Supreme Court.

111 Holding that the New York Court of Appeals is the governmental body that can decide to opt-out of section 1621, and that New York *does* opt out subject to the applicant passing all of the other requirements for becoming an attorney *and* receiving DACA coverage. *See In re Vargas*, 131 A.D.3d at 24–28.

112 *See Deferred Action for Childhood Arrivals*, THE UNITED STATES DEP’T OF HOMELAND SECURITY (Jul. 17, 2015), <https://www.dhs.gov/deferred-action-childhood-arrivals>.

113 Paula Santonocito, *The Immigration Debate*, EMPLOYMENT ALERT, 23 No. 23 Emp. Alert 3 (2006).

high-wage jobs either.¹¹⁴ Very few undocumented immigrants end up attending college in the United States, let alone law school.¹¹⁵ For those who do, and overcome the huge obstacles in their way to become undocumented attorneys like Sergio Garcia, it would be “a waste of exceptional talent for [the legal] profession” to ban them from admission for protectionist rationales.¹¹⁶

There are also those who argue that an influx of foreign workers (be them legal or undocumented), will drive everyone’s wage rate down. George Borjas, Professor of Economics and Social Policy at Harvard, concedes that in the short term immigration deflates wages by about 3–4 percent, but that over time it self-corrects.¹¹⁷ At the same time that new workers are immigrating, new consumers are as well. This new influx creates a new market, thereby expanding the economy. Nevertheless, the options for work as an undocumented immigrant are few or legally ambiguous. One solution that would solve the issue would be the creation of a new employment visa that would be tailored for undocumented attorneys, and more widely applicable than the standard H-1B visa.

C. INTRODUCING A NEW FEDERAL VISA

A solution that has been discussed would be to introduce a new visa for undocumented immigrants looking to become attorneys, which would take all of the guesswork out of dealing with section 1621. Congress, through the Constitution of the United States, is vested with the ability to establish a uniform rule of naturalization throughout the United States.¹¹⁸ When the states adopted the Constitution, they delegated the power of deciding who can traverse American borders over to the legislative branch of the federal government. This includes the ability to create, regulate, or abolish visas for noncitizens.¹¹⁹ In the Immigration Act of 1990, Congress expanded the number of permanent residency employment-based visas categories from two to five. The Act focused on skilled workers, and allowed 140,000 of these visas to be issued per year. It also expanded the non-immigrant H-1B visa program which was established in the 1960s under the Immigration and Nationality Act.¹²⁰ Rather than granting permanent residency, like the EB visas, H-1B visas allow U.S. employers to temporarily employ the foreign worker who receives one. My proposal is for Congress to create a class of visa that would grant permanent residency (albeit not technically citizenship) and employment eligibility to the undocumented immigrants

114 *Id.*

115 Likely somewhere around 100 attending 12 different law schools. Raquel Aldana et al., *Raising the Bar: Law Schools and Legal Institutions Leading to Educate Undocumented Students*, 44 ARIZ. ST. L.J. 5, 6 (2012).

116 Reply to Bar Applicant’s Response to the Board’s Petition for Advisory Opinion at 6, Florida Bd. Of Bar Examiners re Question as to Whether Undocumented Immigrants are Eligible for Admission to the Florida Bar, 134 So. 3d 432 (Fla.Sup.Ct. 2014) (No. SC11-2568).

117 Santonocito, *supra* note 115.

118 U.S. CONST. art. I, § 8, cl. 4.

119 See Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (1990).

120 8 U.S.C. § 1101(a)(15)(H) (2014).

who have shown their abilities as lawyers by passing law school and the bar exam.

By covering these individuals with a visa, the federal government would be granting legal status to previously undocumented individuals. Thus, section 1621 would no longer apply. The federal government already uses visas to grant legal status to nonimmigrants who come to the United States with certain talents or skills. Among other qualities, America divulges visas to those who show an “extraordinary ability in the sciences, arts, education, business, or athletics . . . and seeks to enter the United States to continue work in the area of extraordinary ability.”¹²¹ In addition, some immigrants are granted visas for employment, and, more specifically, employment which requires advanced degrees.¹²² This category is similar to H-1B visas. These are temporary employment visas, issued to non-immigrants with a specialized skillset.¹²³ Tara Kennedy, writing for the *DePaul Law Review*, recommends that a visa category be created which “would combine the DACA requirements with the approach of 8 U.S.C. § 1101, which provides for a certain number of nonimmigrant visas for professionals employed in ‘specialty occupations.’”¹²⁴ Kennedy advocates that, after satisfying DACA requirements, Congress should create a visa with a preference category for undocumented individuals who have graduated law school, are fit for bar admission, and fit the “specialty occupation” eligibility.¹²⁵ She argues that this would “allow these individuals to put their U.S. education to use without providing any incentives to immigrate illegally.”¹²⁶ While the creation of a new “hybrid” visa with preference for those who have passed law school is certainly a solution that would take care of many legal issues surrounding the fate of undocumented attorneys, I do not agree with attaching the DACA requirements to issuance.

The only reason that attaching the DACA requirements would be necessary would be to eliminate some threat of incentivizing illegal immigration. As mentioned earlier in this section, the likelihood that someone would risk illegally coming to the United States for the sole purpose of raising children to become attorneys is far-fetched at best. It also further restricts and creates ambiguity for individuals who don't perfectly fit into the requirements of DACA, but who possess uniquely specialized skills in the legal field that can benefit our economy and society. The threat of an oversaturation of the legal market by undocumented immigrants is, again, an unfounded argument.¹²⁷ I believe

121 8 U.S.C. § 1101(a)(15)(O)(i) (2014).

122 8 U.S.C. § 1184(j)(3) (2014).

123 H-1B visas provide temporary legal status to individuals in an occupation that requires “(A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.” 8 U.S.C. § 1101(a)(15)(H) (2012).

124 Kennedy, *supra* note 8, at 862.

125 *Id.* at 863.

126 *Id.*

127 *See* Santonocito, *supra* note 115.

the best option is to create a simple H-1B-like provision that would only require three prongs of Kennedy's proposal: (1) have successfully graduated from a U.S. law school; (2) "are otherwise fit to gain admission to the bar;" and (3) "meet the qualification of employment eligibility in a specialty occupation."¹²⁸ This would in turn grant legal status to the—relatively few—individuals without current legal status who have dedicated their lives and skills to the legal profession, and enable them to secure jobs in the legal profession. Without a visa program like this, hard-working attorneys, like Sergio Garcia, will be left with the only option of becoming a sole practitioner.

This option, again, is dependent on political, legislative forces, and would likely require strong lobbying or public sentiment. In a recent Gallup poll, 88 percent of Americans supported "[a]llowing illegal immigrants already in the country the opportunity to become U.S. citizens if they meet certain requirements over a period of time, including paying taxes and a penalty, passing a criminal background check, and learning English."¹²⁹ However, in a question more revealing of whether there is a strong groundswell of support for comprehensive legislation, only 13 percent of respondents polled said they were *strongly* supportive of providing a path to citizenship for undocumented immigrants.¹³⁰ This in contrast to 30 percent polled who *strongly oppose* this option. General anti-immigrant sentiment, and fears that outside competition will lead to a job shortage, is still alive in America. Politicians know this all too well. The fight to grant specialized visas to undocumented attorneys is possible, but faces a steep uphill battle. That is why it is my opinion that the most likely changes will come through the judicial route, where judges—like the ones in *Vargas*—will rightly take bar admission determinations into their own hands.

D. THE *VARGAS* SOLUTION

The court in *Vargas* went down a path untraveled when they held that the federal statute limiting states from providing public funds to undocumented immigrants was unconstitutional. New York took the steps to eradicate one problem, but despite its bold decision declaring the federal law unconstitutional, it did not go far enough. Requiring the applicant to first acquire DACA approval depends too heavily on a policy initiative by an embattled administration in its waning years. Under the current anti-immigration Trump administration, it is becoming ever more likely that we will see many of DACA's protections removed if not eradicated all

¹²⁸ Kennedy also proposes that the prong requiring passing law school can be substituted with passage of any U.S. graduate school for other specialized occupations. Kennedy, *supra* note 8 at 863.

¹²⁹ IMMIGRATION | GALLUP HISTORICAL TRENDS, <http://www.gallup.com/poll/1660/immigration.aspx> (last visited Jan. 24, 2017).

¹³⁰ In a 2011 Gallup poll that asked: "Please say whether you strongly favor, favor, oppose, or strongly oppose Congress doing each of the following this year . . . [p]ass a bill to give some illegal immigrants living in the U.S. a path to legal status," only 13 percent of respondents were strongly in favor. Thirty percent were strongly opposed, and the rest were about evenly split between favor and oppose. *Id.* Strong legislative action is typically accompanied by strong public support or by lobbying. There is not currently a strong, or well-funded lobbying push to legalize undocumented immigrants.

together. In this situation, the New York courts might feel uncomfortable proclaiming outright that undocumented immigrants with no deportation deferrals or legal recognition whatsoever, can become lawyers—as the court in *Vargas* seemed uneasy to do so without prior federal (DACA) permission.¹³¹ Moreover, the employment issue still persists even once fully licensed. Sensible reform must address both of these issues.

Going forward, states should recognize that section 1621(d)'s commandeering of state power¹³² is indeed improper, and leave the bar admission decisions to the state judiciary. They should then conclude that it is unnecessary to apply 1621 to undocumented immigrants seeking bar admission because the appropriated funds necessary to confer a law license are de minimis at most. Instead, state courts should determine that undocumented immigrants are eligible to be rigorously vetted for bar admission alongside their peers. Rather than strip these individuals of their ability to put their skills and professional talents to work, for themselves and for our economy, courts should allow their diligence and dedication to be recognized. But even once these undocumented immigrants are able to become licensed attorneys, there is still the problem that their only place to turn is to solo practice.

While the *Vargas* approach is a reasonable first step, it is not a solution to the overall problem. The problem is the one encountered by Sergio Garcia once he was finally licensed as an attorney—no one would employ him. To ensure that future undocumented attorneys will be able to fully give back to the country that financed their legal education, a solution to licensure *and* employment must come hand in hand. The *Vargas* approach may signal the beginning of a judicial push for equal rights for undocumented immigrants, or it might signal the proverbial hitting of a wall for the movement that has met too much political resistance. This author hopes it is the former for both humanitarian and economic reasons.

VII. CONCLUSION

The last two years of the Obama administration saw incredible progress for undocumented immigrants who have dreamt of becoming attorneys in the United States, but there is still much uncertainty surrounding their futures going forward. Much will depend on states' willingness to provide a legal avenue for these individuals, and the federal government's continued dedication to such immigration reform actions as DACA. Much also depends on creating a legal recognition of undocumented immigrants so that they can obtain employment. Until these individuals have a realistic ability to receive employment eligibility or legal status, they will be stuck in a state of limbo, unable to provide much in the way of productivity. If we

¹³¹ *In re Vargas*, 131 A.D.3d at 22 n.10.

¹³² The federal government dictating how the state makes its policy or legislative decisions is an unconstitutional act of commandeering. *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 288 (1981) (Congress may not “commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”).

want to harness their abilities and skills, the federal government must focus on fast-tracking productive, otherwise law-abiding undocumented immigrants through a visa program that will confer legal status.

Similarly, states must do their part to ensure that these hard working individuals have a way to provide for society. This is an opportunity for states to make a statement that the legal profession is truly open to anyone who works hard and has good moral character. The best way to do this would be to create a visa category similar to the H-1B or specialty occupation visas that are currently awarded to individuals with a unique set of skills and degrees that allow them to work in highly specialized professions. This new visa would apply to those who have successfully graduated from law school and have demonstrated the good moral character requisite to be considered for bar admission. However, this visa runs into the same problems—if not more difficult problems—as relying on the *Garcia* or Florida legislation approaches; politics is not always kind to undocumented immigrants when assistance can be construed as an incentive.

The fallback solution would be to take the *Vargas* approach. This would put bar admission criteria back in the hands of the judiciary. It is unlikely that all fifty states will treat undocumented attorneys as warmly as the New York court did, but at the very least, it is a less tricky route than relying on each state legislature. Hopefully, the state courts will realize that these individuals, who have put everything on the line, are deserving of the chance to become licensed attorneys just as much as any citizen. Hopefully, they will realize that the United States is a country built by hard-working immigrants who came here not only to better their own lives but to better the country and the citizens that live therein.

