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# Training Undocumented Lawyers

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I was a part of the first batch of faculty hired by the founding law faculty at the University of California, Irvine School of Law (“UCI Law” or the “Law School”).<sup>1</sup> Indeed, I was the first entry-level member to join the faculty, which meant that I began my teaching career the same year that our inaugural class began marching towards their legal careers. During my more than ten years at this law school, I have been acutely aware of our identity as a law school at a *public* university. I believe now, as I did when I first got hired, that faculty all across the University of California (UC) are bound by a moral obligation to pursue at least some projects that aim to solve the problems of the communities surrounding our campuses.<sup>2</sup>

This is an essay about how public universities, like the UC, can marshal and redistribute their resources to alleviate at least some of the suffering that pervades the lives of undocumented communities. This is not an academic exercise. The United States is home to 44 million foreign-born residents.<sup>3</sup> An astounding number do not have lawful status. Today, as was the case ten years ago, 11 million—or one in four of all immigrants—are undocumented.<sup>4</sup> California remains home to more

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1. See Erwin Chemerinsky, *The Ideal Law School for the 21st Century*, 1 U.C. IRVINE L. REV. 1, 10 (2011).

2. For examples of such involvement, see WILLIAM WEI, *THE ASIAN AMERICAN MOVEMENT* 24, 140 (1993).

3. See *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POLY INST. (Mar. 14, 2019), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states> [<https://perma.cc/2X4F-KFGC>].

4. See Jeffrey S. Passel & D’Vera Cohn, *As Mexican Share Declined, U.S. Unauthorized Immigrant Population Fell in 2015 Below Recession Level*, PEW RES. CTR. (Apr. 25, 2017), <https://www.pewresearch.org/fact-tank/2017/04/25/as-mexican-share-declined-u-s-unauthorized-immigrant-population-fell-in-2015-below-recession-level/>. [<https://perma.cc/CS6H-7UNN>].

undocumented immigrants than any other state.<sup>5</sup> And with few opportunities to adjust immigration status—which is usually the gateway to finding work in the formal economy—this means millions of people live in a constant state of uncertainty.

This is also an essay about the specific challenges that *law schools* like UCI Law face in attempting to distribute some of these resources to undocumented communities. Lawmakers and university leaders have taken important steps to ensure that educational opportunities remain open to undocumented students, and the Law School has been no exception. But there are idiosyncratic aspects to law practice that have complicated this task. Some of this has to do with federal restrictions on employment, which excludes undocumented law graduates from the most visible and traditionally prestigious labor markets. But this also has to do with obtaining access to the profession itself. Practicing law requires obtaining a law license, and one requirement is for lawyers to prove good moral character. Only a few years ago did the California Supreme Court clarify that undocumented status did not categorically render an individual morally unfit to practice law,<sup>6</sup> but other important questions remain about the reach of that decision.

Ultimately, the continued enrollment of undocumented students at our law school presents us with an opportunity to engage with questions about the legal profession itself, such as who is entitled to practice law? Are there certain types of employment from which undocumented lawyers might justifiably be excluded? More generally, this essay invites the faculty, staff, students, and alumni of our law school to participate in the dialogue about how to reformulate the moral landscape surrounding the lives and livelihood of undocumented lawyers.

This Essay has three parts. Part I briefly recounts the efforts to make educational opportunities available to undocumented residents of California. This story begins with the landmark decision, *Plyler v. Doe*, which prohibited states from excluding undocumented children from primary and secondary school.<sup>7</sup> Many of the modern educational laws passed in California reflect an attempt to expand and extend this *Plyler* principle through state institutions of higher education. Part II then drills down on challenges law schools face in giving expression to this idea in the context of law schools. Part III then points the way to broader considerations that we should discuss in renegotiating the moral economy surrounding the legal education we offer. I then conclude.

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5. U.S. *Unauthorized Immigrant Population Estimates by State, 2016*, PEW RES. CTR. (Feb. 5, 2019), <https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/> [<https://perma.cc/C65N-D4WS>].

6. See generally *In re Garcia*, 315 P.3d 117 (Cal. 2014).

7. See *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

## I. THE PLYLER PRINCIPLE

The undocumented population in the United States has hovered at around 11 million for the last ten years.<sup>8</sup> Most of the noncitizens who make up this pool have limited if any meaningful opportunities to adjust their status. Meanwhile, Congress has continued to pour resources into the enforcement of laws at the border, which has had the effect of “trapping” migrants in the United States.<sup>9</sup> As a result, about one-quarter of all noncitizens residing in the United States live in a state of in-between status.

As a constitutional matter, the Supreme Court has recognized the rights of undocumented noncitizens in only narrow instances. The most significant victory for the undocumented arises within the context of public education. In 1982, the Supreme Court decision held, in *Plyler v. Doe*, that school districts could not exclude schoolchildren on the basis of immigration status.<sup>10</sup> This meant that K–12 schools could support the project of incorporating immigrants into their surrounding communities. More generally, *Plyler* helped to maintain a healthy distance between two legal systems that governed the lives of American communities: educating and training the next generation of leaders and community organizers (which is what K–12 schools and education law more generally tries to do) and identifying and admitting a new generation of residents and citizens (which is what immigration law ostensibly tries to do). *Plyler* established the principle that failure to qualify for immigration benefits, such as long-term or even lawful residence, should not dictate or negatively impact the availability of educational benefits.

*Plyler*'s protections were significant and for a number of years after the decision was handed down, it appeared as if *Plyler* would not endure as a meaningful constitutional right—or put more specifically, that there would soon be no *need* for such a right. The decision was issued in 1982 during a period when the country was undergoing a contentious debate about immigration reform. Ultimately, Congress passed the Immigration Reform and Control Act (IRCA) in 1986, which intensified border enforcement, created an interior enforcement regime focused on employers verifying the immigration status of their workers, and established a mass legalization program to provide a one-time path to citizenship for unauthorized migrants.<sup>11</sup> This last piece of the reform package was key. Any unauthorized childhood arrival who benefitted from *Plyler* would almost certainly have adjusted her status by the time

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8. Passel & Cohn, *supra* note 4.

9. In many instances, migrants prefer to engage in circular migration—that is, traveling between the United States and the sending country as job opportunities open and close. Stricter border security might be deterring the arrival of new unauthorized migrants, but has had a perverse effect on those migrants who are already here: discouraging them from actually leaving the United States for fear of not having a chance to reenter at some future date. See Douglas S. Massey, *America's Immigration Policy Fiasco: Learning from Past Mistakes*, 2013 DÆDALUS 5, 8 (2013).

10. See 457 U.S. 202, 230 (1982).

11. See Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1105 (2009); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 200 (2007).

she got to college thereby obviating the need for any students to invoke *Plyler* in order to gain access to a primary and secondary school education. With only four years separating *Plyler* and IRCA, a migrant could have enrolled in high school as an unauthorized freshman but graduated with temporary lawful status and obtain lawful permanent residence sometime during college.<sup>12</sup> From the vantage point of 1986, many could have reasonably anticipated *Plyler* to be a case of minor practical importance over the long-term given that the Court had established a right to access education for a population that was gaining authorized status through a congressional fix.

More than three decades have passed since IRCA was written into the U.S. immigration code and, as it has turned out, *Plyler* has emerged as a case of major importance for today's unauthorized migrant population. For one thing, the unauthorized population has not shrunk at all. It has grown. In 1986, the national unauthorized immigrant population was estimated to be 3.6 million.<sup>13</sup> Today, the unauthorized population has remained steady at around 11 million.<sup>14</sup> Many advocates, especially from the political left, have made calls for Congress to pass another mass legalization program but have thus far been unable to garner the political support for such an idea. People who oppose such programs do so for a variety of reasons, but even sympathetic opponents seem to think that mass legalization programs provide, at best, temporary relief,<sup>15</sup> making such programs impractical. So *Plyer* continues to protect access to K–12 opportunities for an unauthorized population that remains steady in numbers. Far from receding into our collective memory as a quaint offering to the world of individual constitutional rights, *Plyler* remains a crucial backstop against policies that reflect anti-immigrant sentiment.

In this anti-immigrant environment and moment, it is hard not to fixate on *Plyler's* limits. Most notably, its protections extend only through high school, which means that a generation of undocumented students can graduate from high school with no real guarantee of entry into higher education because colleges and universities continue to have the discretion to exclude people on this basis. Moreover, because IRCA also prohibited employers from hiring unauthorized workers, *Plyer* does nothing to alter the reality that jobs in the formal economy remain out of reach for these noncitizens. *Plyler*, then, created an important but

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12. See 8 U.S.C. § 1255a (a)–(c) (Westlaw through Pub. L. No. 116-47); see also Donald M. Kerwin, *More Than IRCA: U.S. Legalization Programs and the Current Policy Debate*, MIGRATION POL'Y INST. (Dec. 2010), <https://www.migrationpolicy.org/research/us-legalization-programs-by-the-numbers> [https://perma.cc/RC8J-7TT8].

13. See RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL33874, UNAUTHORIZED ALIENS RESIDING IN THE UNITED STATES: ESTIMATES SINCE 1986 5 (2011).

14. *Id.*

15. See Emily Badger, *What Happened to the Millions of Immigrants Granted Legal Status Under Reagan?*, WASH. POST, Nov. 26, 2014; Rachel L. Swarns, *Failed Amnesty Legislation of 1986 Haunts the Current Immigration Bills in Congress*, N.Y. TIMES, May 23, 2006.

limited set of protections for the undocumented. Congress possesses the authority to alleviate this problem by providing statutory opportunities for adjustment of status, but it has thus far declined to do so. Meanwhile, unauthorized college graduates comprise a pool of noncitizens with skills that can neither be developed and refined in higher education nor be compensated and rewarded in a formal job setting.

Nonetheless, the California State Legislature has taken steps to extend the *Plyler* principle in some meaningful ways. A federal immigration law passed in 1996 limited the ability of states to provide postsecondary school benefits to undocumented migrants.<sup>16</sup> In 2001, California took a first step to try to blunt the force of this law by passing AB 540, which allowed undocumented students to qualify for in-state tuition rates for college, provided they could meet the other residency requirements.<sup>17</sup> For years, this created an important but incomplete benefit. While residency status gives unauthorized migrants the benefit of discounted tuition rates, because unauthorized migrants remain locked out of the formal economy under federal immigration laws, even subsidized, in-state tuition rates cannot completely make college affordable for undocumented students.<sup>18</sup> This meant that AB 540 created a benefit that could be enjoyed only by those undocumented students with family members or with access to other networks and resources who could support them through private means.

In 2011, California passed AB 130<sup>19</sup> and AB 131,<sup>20</sup> which lifted restrictions on grants and scholarships originating with private and public sources. These laws are pegged to AB 540 beneficiary status, so qualifying for in-state tuition status opens up a broader array of benefits. And these benefits extended to those enrolled not just in undergraduate programs but also to those pursuing graduate and professional degrees. Over 70,000 undocumented students are enrolled in California's public universities and colleges.<sup>21</sup> Four thousand are estimated to be enrolled in the UC.<sup>22</sup> Recent estimates suggest that 700 of those undocumented students are currently enrolled at UC Irvine.<sup>23</sup>

For its part, the UC also took measures to support undocumented students matriculated at its various campuses. In 2014, UC President, Janet Napolitano,

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16. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 505, 110 Stat. 3009-672 (codified 8 U.S.C. § 1623)

17. See A.B. 540 § 1(a)(4), 2001–02 Leg., Reg. Sess. (Cal. 2001).

18. See Immigration Reform and Control Act of 1986, 8 U.S.C. § 1101 (1986).

19. See A.B. 130 §§ 2(a)(1), 3, 2011–12 Leg., Reg. Sess. (Cal. 2011).

20. See Cal. Leg. Counsel's Dig., A.B. 131, 2011–2012 Leg., Reg. Sess. (Cal. 2011).

21. CAMPAIGN FOR COLL. OPPORTUNITY, <https://collegecampaign.org/undoc-coalition/> [<https://perma.cc/8KAC-X4E6>] (last visited Sept. 19, 2019).

22. Jill Barshay, *Counting DACA Students*, HECHINGER REP. (Sept. 11, 2017), <https://hechingerreport.org/counting-daca-students/> [<https://perma.cc/MUC5-DB49>].

23. See *UCI Students Are Dreaming Big with Dream Scholars*, UCI DIVISION UNDERGRADUATE EDUC., <http://home.due.uci.edu/news/uci-students-are-dreaming-big-with-dream-scholars/> [<https://perma.cc/KE6Y-ZNH4>] (estimating UCI's enrolled undocumented student population to be greater than 700 in Fall 2017).

announced that a legal services center would be housed at UC Davis School of Law, which would provide legal services to undocumented students throughout the UC.<sup>24</sup> While it was initially limited to serving only students at UC campuses that did not have law schools, the program eventually expanded to cover all UC campuses.

All of these laws and initiatives extend the *Plyler* principle. That is, the nature of these interventions is to create as much separation as possible between the eco-systems of higher education and of immigration policy. In extending the *Plyler* principles, California was able to take an idea developed in the context of young schoolchildren and build out a broader infrastructure to support undocumented adults seeking out the most highly prized and best compensated skills in the labor market. But this is as far as California has been empowered to go within a federal system that prohibits the knowing employment of unauthorized or undocumented migrants. Despite all of the equity-related problems that California's higher education laws have addressed, they could only forestall the inevitable downstream problem of helping graduates obtain employment opportunities within the formal economy.

This is an area where the Deferred Action for Childhood Arrivals (DACA) program has made a significant impact. Created in 2012 by the Department of Homeland Security (DHS)—which was then under the leadership of current UC president, Janet Napolitano—the DACA program provided temporary administrative relief to those unauthorized migrants who would have been eligible for the Dream Act. This meant that unauthorized migrants who arrived in the United States as young children, who have continuously resided in the United States, and who do not have records of significant criminal activity, could qualify for temporary relief from removal.<sup>25</sup> Aside from the psychological and emotional benefits of allaying these immigration-related concerns, even temporarily, the program conferred upon DACA beneficiaries the opportunity to obtain work authorization to enter the formal economy. Thus, a complex mix of laws—federal constitutional pronouncements, state statutes, and federal administration actions—have enabled undocumented children to enter into and benefit from the public educational opportunities that California has to offer.

## II. MORAL CHARACTER AND THE PRACTICE OF LAW

It is against this legal backdrop that the Law School has tried to shape its practices on how best to recruit, admit, and support undocumented students. As a whole, UCI Law has worked to foster an environment that is safe and nurturing of attending school under the long shadow cast by immigration law. Different affinity

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24. See *UC to Expand Legal Services to Undocumented Students at Several Campuses*, U.C. OFFICE PRESIDENT (Nov. 21, 2014), <https://www.universityofcalifornia.edu/press-room/legal-services-program-undocumented-students> [<https://perma.cc/U929-QXQR>].

25. Memorandum from Janet Napolitano, Sec'y, Homeland Sec. to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot.; Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Servs; and John Morton, Director, U.S. Immigration and Customs Enft (June 15, 2012).

groups have devoted resources and attention to highlighting the challenges of being undocumented within the Asian American and Latino communities.<sup>26</sup> The Law School offers an Immigrant Rights Clinic as a part of our in-house clinical offerings, which has been supervised and directed by two faculty for much of our school's history.<sup>27</sup> Moreover, the clinic has taken on projects that not only address inequities in individual cases but that also seek to make interventions at the structural level, such as working with a broad coalition of groups to secure a sanctuary ordinance in the City of Santa Ana. In addition, our faculty have engaged in research,<sup>28</sup> taught classes,<sup>29</sup> and have organized events that place front and center questions related to undocumented migrant experiences.<sup>30</sup> Finally, and perhaps most significantly, some of our faculty, at different times, have helped represent some of our students in challenging laws and policies that aim to punish the undocumented community.<sup>31</sup>

Despite our institutional commitment to empowering undocumented migrants during their time as students, the Law School has struggled to build out a robust infrastructure to support them after graduation. This is not for lack of interest but rather because of legal uncertainties surrounding the ability of the undocumented to enter the labor market. DACA has helped by creating opportunities for undocumented graduates to obtain work authorization, but graduates seeking employment as lawyers face an additional hurdle of meeting the requirements for admission into the bar. Our law school exists to train lawyers who must pass a series of exams in order to secure a license to practice law. These exams include a good moral character requirement.<sup>32</sup>

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26. See Symposium, *Race of the Races: Privilege, Exclusion and Inequality Among People of Color in the Law*, U.C. IRVINE SCH. L. (Feb. 10, 2017), <https://www.law.uci.edu/events/student-run/race-of-the-races-2017/> [<https://perma.cc/Q4KG-4L7B>]; see also Denny Chan, Jennifer Chin & James Yoon, *Foreword: Reigniting Community: Strengthening the Asian Pacific American Identity*, 3 U.C. IRVINE L. REV. 801 (2013) (summarizing the vision behind a 2012 symposium organized by APALSA).

27. See IMMIGRANT RIGHTS CLINIC, <https://www.law.uci.edu/academics/real-life-learning/clinics/immigrant-rights.html> [<https://perma.cc/N6NF-9VKB>] (last visited Sept. 14 2019).

28. See, e.g., Annie Lai, *Confronting Proxy Criminalization*, 92 U. DENVER L. REV. 879 (2015); Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. (forthcoming 2019). My former colleagues, Professors Jennifer Chacón and Sameer Ashar, also generated a number of publications and projects during their time at UCI before leaving for UCLA. See, e.g., Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464 (2017); Jennifer M. Chacón, *Privatized Immigration Enforcement*, 52 HARV. C.R. 1 (2017).

29. For example, our course offerings annually include Immigration Law and Policy, Refugee and Asylum Law, Noncitizens in the Criminal Justice System, and Constitutional Rights at the U.S. Border.

30. See, e.g., Symposium, *Persistent Puzzles in Immigration Law*, U.C. IRVINE SCH. L. (Feb. 17–18, 2011).

31. Most notably, one of our current 3L students is a named plaintiff in one of several cases challenging the Trump administration's decision to rescind the DACA program. Former UCI Law Professor Leah Litman helped with the representation.

32. See *Factors Regarding Moral Character Determination*, STATE BAR CAL., <http://www.calbar.ca.gov/Admissions/Moral-Character/Factors> [<https://perma.cc/W7TT-N3SU>] (last visited Sept. 14, 2019).



The uncertainty surrounding bar admission stems in large part from a law that Congress passed in 1996. The Welfare Reform Act limited the ability of unauthorized immigrants to access a host of entitlements.<sup>33</sup> Three provisions in particular are significant here. First, the law excluded unauthorized migrants, not just from federal benefits (something it has long done) but also from “[s]tate and local public benefit[s].”<sup>34</sup> Second, the statute defined this term to include “any grant, contract, loan, professional license, or commercial license” provided by a state entity,<sup>35</sup> thereby covering access to the legal profession, which is governed by state-specific licensing requirements. Finally, the Welfare Reform Act did not completely eviscerate the state’s ability to regulate access to local benefits but rather created a presumption of exclusion. The Act provided that states may overcome this presumption “through the enactment of a State law . . . which affirmatively provides . . . eligibility” to practice law.<sup>36</sup> This statute created a default rule in which unauthorized migrants were presumed to be excluded from licensed profession unless state legislators passed a law stating otherwise.

This is exactly what the California legislature did in 2013 by passing AB 1024, which authorized the California Supreme Court “to admit to the practice of law an applicant who is not lawfully present in the United States,” provided that applicant satisfies the requirements for bar admission.<sup>37</sup> This gave the California Supreme Court the chance to evaluate the bar application of Sergio Garcia. Having graduated from law school and taken and passed the California Bar Exam,<sup>38</sup> Garcia applied for a license to practice law. But his immigration status complicated his application. He was born in Mexico and did not enter the United States with proper documentation. And while his father had since adjusted his status and thereafter petitioned to sponsor Garcia for a green card, an immigrant visa had not yet become available at the time Garcia applied for bar membership. Thus, the Supreme Court had to address whether Garcia’s unlawful presence rendered him ineligible to obtain a law license on moral character grounds. *In re Garcia* held that neither Garcia’s unlawful presence nor the relevant employment restrictions rendered him and other undocumented law school graduates categorically ineligible for bar membership.<sup>39</sup>

*In re Garcia* helped clarify that undocumented law graduates and bar takers could still seek to obtain a California law license despite their immigration status. This decision has aided the Law School’s ability to advise and support our undocumented student population. The Law School can offer not just a world-class legal education, but a clear path towards a meaningful career. In holding that

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33. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 (1996).

34. See 8 U.S.C. § 1621(a) (2012).

35. See 8 U.S.C. § 1621(c)(1)(A) (2012).

36. See 8 U.S.C. § 1621(d) (2012).

37. See Cal. Leg. Counsel’s Dig., A.B. 1024, 2013–14 Leg., Reg. Sess. (Cal. 2013); see also Cal. Bus. & Prof. Code § 6064(b) (West 2014).

38. See *In re Garcia*, 315 P.3d 117, 121–22 (Cal. 2014).

39. See *id.* at 129–33.

unlawful presence did not necessarily disqualify an undocumented bar taker from joining the bar, the court put it this way:

We conclude the fact that an undocumented immigrant is present in the United States without lawful authorization does not itself involve moral turpitude or demonstrate moral unfitness so as to justify exclusion from the State Bar, or prevent the individual from taking an oath promising faithfully to discharge the duty to support the Constitution and laws of the United States and California.<sup>40</sup>

This decision helpfully separates and disentangles the rules governing admission to law practice, which is regulated by state actors and entities, from the rules governing admission to our national political community, which is implemented by federal agencies and officials. In one sense, Sergio Garcia's application presented a straightforward legal issue that predictably was resolved in his favor. The California legislature passed a law that unambiguously rebutted the Welfare Act's presumption that unauthorized migrants should be barred from securing "professional licenses."<sup>41</sup> At the same time, a close reading of the opinion reveals legal tensions inherent to any effort to open up educational and economic opportunities to unauthorized migrants.

First, the court's reasoning illustrates how difficult it can be to reconcile two separate regulatory systems that are both fixated on moral character as a basis for allocating benefits. State bar associations regulate access to the profession on moral character grounds, but a historical review of this gatekeeping requirement suggests that state bar agencies had a clearer understanding *that* moral character ought to play a role in screening law license applicants than it did on *how* exactly moral character figured into the actual practice of law.<sup>42</sup> What is clear is that criminal offenses commonly serve as a basis for denying admission to state bars.<sup>43</sup> Not surprisingly, then, the court in *In re Garcia* tells a story of unauthorized migration as a civil offense. More specifically, the court relies on a civil/criminal distinction as placeholder for the broader idea that unlawful presence by itself does not convey information about the kind of truly serious offense rendering someone ineligible for law practice. Thus, the court explains, while unlawful presence "can result in a variety of *civil sanctions*," such presence "does *not* constitute a *criminal offense* under federal law and thus is not subject to criminal sanctions."<sup>44</sup>

This passage illustrates the degree to which the punitive aspects of criminal law and logic dominate immigration law and policy. The facts surrounding Garcia's journey to the legal profession suggest that he has indeed managed to avoid contact with the criminal justice system. But the line separating civil and criminal activity is

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40. See *id.* at 130.

41. Personal Responsibility and Work Opportunity Reconciliation Act.

42. See Deborah L. Rhode, *Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings*, 43 L. & SOC. INQUIRY 1027 (2018).

43. See *id.* at 1031–35.

44. *In re Garcia*, 315 P.3d at 130 (emphasis in original).

flimsy. For example, it is true that undocumented immigrants who enter on and overstay a visa face only civil penalties, but undocumented immigrants who enter without inspection—the majority of whom comprise the Latino, rather than the Asian American or African diasporic undocumented community—do face criminal penalties.<sup>45</sup> The penalty can be a criminal fine or six months in jail. I raise this point, not to criticize, but rather to contextualize, the court's use of the civil-criminal distinction. In this instance, the court was able to ward off federal intrusion into a state's power to control its law licensing program in significant part because Garcia's factual record was perfect. Had his record been merely "almost perfect"—that is, had Garcia not had a pending application for a green card—the court would have had to confront a more complicated analytical, though arguable a morally indistinguishable, set of facts.

Second, the California Supreme Court also pointed to immigration enforcement realities to bolster its conclusion that Garcia's unlawful presence was an inappropriate basis for denying admission to the state bar. Specifically, the court noted that it would be "extremely unlikely that immigration officials would pursue sanctions against an undocumented immigrant who has been living in this country for a substantial period of time, who has been educated here, and whose only unlawful conduct is unlawful presence in this country."<sup>46</sup> The court explained: "Under these circumstances, we conclude that the fact that an undocumented immigrant's presence in this country violates federal statute is not itself a sufficient or persuasive basis for denying undocumented immigrants, as a class, admission to the State Bar."<sup>47</sup> The court offered this statement about enforcement policies crafted during the Obama administration. To state the obvious, the circumstances have changed under the Trump administration. And while DACA continues to authorize certain classes of undocumented law graduates from obtaining work in the formal economy for now, it is unclear how long this policy will continue to last. The DACA rescission lawsuit has been argued to the Supreme Court and we have little reason to believe that the Court might provide an outcome that is favorable to DACA beneficiaries.<sup>48</sup>

The California Supreme Court also considered whether federal restrictions on employment might also serve as a basis for disqualification from membership. The tenor of the court's analysis here focused on the pragmatic consequences of licensing. Even if Garcia were to obtain a law license, he would still be ineligible to obtain employment given federal restrictions. But federal restrictions on accessing

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45. See 8 U.S.C. § 1325(a) (2012).

46. See *In re Garcia*, 315 P.3d at 130.

47. See *id.* at 130–31.

48. The U.S. Supreme Court recently granted certiorari and consolidated three cases that will decide the lawfulness of President Trump's decision to rescind DACA. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 18-587, 139 S. Ct. 2779 (2019) (mem.); *Trump v. NAACP*, No. 18-588, 139 S. Ct. 2779 (2019) (mem.); and *McAleenan v. Vidal*, No. 18-589, 139 S. Ct. 2779 (2019) (mem.).

employment are ambiguous on the question of whether unauthorized migrants might be able to participate within the labor market as independent contractors,<sup>49</sup> which covers routine economic transactions involving work such as gardening, babysitting, childcare, maintenance, and construction. Some advocates maintain that independent contract work includes the practice of law, a point the federal government opposed as amicus. While the federal government declined to go as far as to argue that an undocumented lawyer could never engage in work as a lawyer, it sought to quell the idea that obtaining a law license automatically entitled the undocumented lawyer to seek out employment.<sup>50</sup>

*In re Garcia* helpfully disaggregated questions of immigration compliance with the kinds of moral character evaluations that state entities like the state bar must engage in on a routine basis. In other words, the California Supreme Court helpfully reaffirmed that the path to securing a green card does not traverse the same path to obtaining a bar card.

Still, the court largely avoided the practical question of how an undocumented lawyer might be expected to engage in the practice of law. Instead, it embraced a view of licensing as involving a set of locally-oriented issues that are complementary to, but separate from, employment restrictions operating at the federal level.<sup>51</sup> This may be right at a conceptual level, but it still does not provide law schools like ours much guidance in how to advise our undocumented students. One purpose of a law school is to prepare graduates for the profession and without a clearly identifiable labor market, it is hard to develop an appropriate curriculum for our undocumented students.

### III. DE-WEAPONIZING MORAL CHARACTER

So far, I have tried to make two points: (1) for almost four decades, the Supreme Court, state legislatures, and federal agencies have tried to find ways to

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49. In particular, the statute prohibits the “employment [of] an alien knowing the alien is an unauthorized alien.” See 8 U.S.C. § 1324a(a)(1)(A) (2012). In a separate section, the statute also provides that anyone using a “contract” or a “subcontract”—that is for purposes of securing the labor of an unauthorized migrant—that is, of an unauthorized independent contractor—knowing that the migrant lacks authorization also violates federal law. See *id.* § 1324a(a)(4); 8 C.F.R. § 274a.5 (2019). The mechanism for enforcing these provisions is requiring employers to verify the immigration status of their employees, but that section does not cover the independent contractor section. See 8 U.S.C. § 1324a(b) (2012). Thus, so long as a person doesn’t know that an independent contractor lacks authorization, the law doesn’t require that person to obtain information from the contractor suggesting otherwise. See also Michael Mastman, *Undocumented Entrepreneurs: Are Business Owners “Employees” Under the Immigration Laws?*, 12 N.Y.U. J. LEGIS. & PUB. POL’Y 225 (2008).

50. See Application and Proposed Brief for Amicus Curiae the United States of America, *In re Sergio Garcia on Admission Bar Misc. 4186*, No. S202512, 2012 WL 3822246, at \*13–16 (2012).

51. The Court observed: “To the extent federal immigration limitations on employment are ambiguous or in dispute, as in other contexts in which the governing legal constraints upon an attorney’s conduct may be uncertain, we assume that a licensed undocumented immigrant will make all necessary inquiries and take appropriate steps to comply with applicable legal restrictions and will advise potential clients of any possible adverse or limiting effect the attorney’s immigration status may pose.” See *In re Garcia*, 315 P.3d at 133.

incorporate undocumented immigrants into our nation's educational systems; and while (2) law schools like UCI Law have similarly embraced principles of inclusion in this regard, the idiosyncrasies of training people for a licensed profession like law have created some challenges to fully implementing these principles within our educational offerings. In this last Part, I offer some thoughts on how law schools like UCI Law might be able to lead the efforts to incorporate unauthorized migrants into the legal profession. As I explain, a central part of our task as educators involves deweaponizing notions of moral character or fitness within the context of bar admission.

In the context of immigration policy, moral character operates as a political weapon meant to divide and not an aspirational goal in the service of consensus. Undocumented students and especially DACA beneficiaries have been hailed as role models for immigrant success.<sup>52</sup> In announcing the DACA program, President Obama had this to say in the White House Rose Garden:

[I]t makes no sense to expel talented young people, who, for all intents and purposes, are Americans—they've been raised as Americans; understand themselves to be part of this country—to expel these young people who want to staff our labs, or start new businesses, or defend our country simply because of the actions of their parents—or because of the inaction of politicians.<sup>53</sup>

Many legal scholars have critiqued this narrative as resting on a false dichotomy between “good” and “bad” immigrants.<sup>54</sup> In many versions of this story, childhood arrivals—undocumented residents who arrived in the United States as children or adolescents—enjoy a favored status both as a matter of law (think Deferred Action of Childhood Arrivals) and as a matter of politics (think of the string of DREAM Act bills that have gone before each chamber of Congress). Programs like DACA reserve membership benefits for the morally innocent.<sup>55</sup> For potential Dream Act beneficiaries—or “dreamers”—this can create a particular form of psychological stress reminiscent of what W.E.B. DuBois famously referred to as “double consciousness.”<sup>56</sup> They are asked to simultaneously represent the best of what America has to offer and reject their parents as a part of that representation. President Obama's observation that DACA recipients are “Americans in their heart, in their minds, in every single way but one: on paper[,]”<sup>57</sup> is really a third-person

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52. *White House to Honor DACA Recipients As Champions of Change*, NBC NEWS (June 16, 2014, 10:40 AM), <https://www.nbcnews.com/news/latino/white-house-honor-daca-recipients-champions-change-n132341> [<https://perma.cc/RQJ2-KW2J>].

53. Barack Obama, Remarks by the President on Immigration (June 15, 2012) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration> [<https://perma.cc/9LQQ-ZE9Z>]).

54. See Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101 (2013); Mariela Olivares, *Narrative Reform Dilemmas*, 82 MO. L. REV. 1089 (2017); Rose Cuison Villazor, *The Undocumented Closet*, 91 N.C. L. REV. 1 (2013).

55. See Stephen Lee, *Growing Up Outside the Law*, 128 HARV. L. REV. 1405 (2015).

56. See W.E.B. DUBOIS, *THE SOULS OF BLACK FOLKS* 3 (1903).

57. See *Transcript of Obama's Speech on Immigration Policy*, N.Y. TIMES (June 15, 2012).

account of what these childhood arrivals might describe as a “sense of always looking at one’s self through the eyes of others, of measuring one’s soul by the tape of a world that looks on in amused contempt and pity.”<sup>58</sup>

A part of the amusement that DACA beneficiaries sometimes see reflected back at them is the belief that they stand on different moral ground than their parents and family members who brought them to the United States. The same program that folds childhood arrivals into the formal labor market dismisses the contributions of their parents as qualitatively different in nature.<sup>59</sup> It is against this backdrop, that our undocumented students must begin to grapple with the legal profession’s moral character requirement. Again, consider *In re Garcia*, in which the Supreme Court defines “good moral character” as something that—

has traditionally been defined as the absence of conduct imbued with elements of moral turpitude. It includes qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the laws of the state and the nation and respect for the rights of others and for the judicial process.<sup>60</sup>

The project of assessing moral character, then, doesn’t happen in the abstract. The court’s choice to focus on moral turpitude creates an opportunity to reveal how the regulation of the legal profession connects to other instances of the law exhibiting an overreliance on moral character. In the immigration context, the term “moral turpitude” is most familiar to lawyers as a “crime involving moral turpitude,” which is ground for expulsion from the United States.<sup>61</sup> Jennifer Koh has argued that the term “moral turpitude” is ripe for challenge under the void for vagueness doctrine.<sup>62</sup> And some notable voices within the federal judiciary has suggested that they would be open to such challenges.<sup>63</sup> Through research and advocacy, our law school should join this growing chorus of skeptics in the use of “moral turpitude” to advance immigration-related goals. Doing so will not only help alleviate the suffering generated by immigration enforcement policies but will also help push back on the restrictive possibilities of the state bar’s moral character requirement.

I also hope the Law School continues to take account of how undocumented law practice fits into broader conceptions of the legal profession. Federal

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58. DUBOIS, *supra* note 56.

59. See HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 181 (2014).

60. CAL. BAR ch. 4, Rule 4.40 Moral Character Determination (B).

61. See 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2012) (listing a “crime involving moral turpitude” as a basis for inadmissibility); 8 U.S.C. § 1227(a)(2)(A)(i) (2012) (listing “crimes of moral turpitude” as a basis for deportation).

62. See Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1177–79 (2016); see also Jennifer Lee Koh, *Crimmigration Beyond the Headlines: The Board of Immigration Appeals’ Quiet Expansion of the Meaning of Moral Turpitude*, 71 STAN. L. REV. ONLINE 267 (2019).

63. Judge Posner explains that the various definitions of the term “approach gibberish.” See *Arias v. Lynch*, 834 F.3d 823, 831 (7th Cir. 2016) (Posner, J., concurring); see also *Islas-Veloz v. Whitaker*, 914 F.3d 1249, 1251 (9th Cir. 2019) (Fletcher, J., concurring); *Barbosa v. Barr*, 919 F.3d 1169 (9th Cir. 2019) (Berzon, J., concurring).

restrictions on employment push undocumented graduates into the labor market, not as employees, but as independent contractors and entrepreneurs.<sup>64</sup> In the context of law practice, this inevitably means small firm and solo practitioner work.<sup>65</sup> In learning that he would finally be able to join the California bar, Sergio Garcia remarked: “There’s a lot to celebrate. I can open my own law firm, and that’s exactly what I intend to do. There’s no law in this country restricting entrepreneurs.”<sup>66</sup>

To help these students succeed means that the approach we take in advising and counseling our students must change. We must move beyond the conventional paths towards law practice. On-campus interviews with large firms provide limited options for undocumented students.<sup>67</sup> Similarly, clerkships and other government lawyering programs are probably not good options for undocumented graduates either. These students will likely find it easier to find work in smaller firms or as solo practitioners. This work is hard but can be rewarding.<sup>68</sup> To help them get there, we must think about how we can, not only train our students to become lawyers, but also to prepare for the business of being a lawyer and running one’s own practice. Life as an undocumented lawyer might mean that conventional displays of advocacy—like showing up to court for oral argument—may not always be a prudent course of action, either because of identification requirements or ICE’s expanded effort to police the interior of the United States.<sup>69</sup> But lawyers can advocate in other ways, like by phone or on paper, or through arrangement with other attorneys in an “of counsel” arrangement.<sup>70</sup>

All of this requires resources. I am not sure how many of our faculty have expertise relating to the business of running a law firm. Graduating undocumented lawyers probably means partnering with organizations and individuals in our surrounding communities. So much of the messaging that UCI Law projects into the world is that we seek to provide a legal education on a global scale. We want to be world-class. But a part of serving as a beacon for others is to model how we

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64. See Cindy Carcamo, *Immigrants Lacking Papers Work Legally—As Their Own Bosses*, L.A. TIMES, Sept. 14, 2013; Tyler Falk, *How Undocumented U.S. Immigrants Can Work Legally: Entrepreneurship* (Sept. 16, 2013), <https://www.zdnet.com/article/how-undocumented-us-immigrants-can-work-legally-entrepreneurship/> [https://perma.cc/GG3N-P7RV].

65. See e.g., Monica Campbell, *How This Undocumented Lawyer Is Breaking More Ground With No Safety Net*, PRI (Mar. 28, 2018, 6:00 PM), <https://www.pri.org/stories/2018-03-28/how-undocumented-lawyer-breaking-more-ground-no-safety-net> [https://perma.cc/69EU-9V8K].

66. See Jennifer Medina, *Allowed to Join the Bar, but Not to Take a Job*, N.Y. TIMES, Jan. 2, 2014.

67. In theory, a law firm would have enough interest in a law student to sponsor her for a greencard, but even that path remains complicated and beset by twists and turns. See Immigration and Nationality Act, 8 U.S.C. § 1255 (2006).

68. See CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS* 79 (1996).

69. See David Brand, *ICE Agents Are Preventing Immigrants From Coming to Court, Report Finds*, QUEENS DAILY EAGLE, April 11, 2019.

70. See Brief of Proposed Amicus Curaie, *In re Sergio Garcia Admission*, 2012 WL 3569737, at 11–13 (July 27, 2012).

believe others should organize and administer their resources. And at UC Irvine, like all UC entities, we owe some obligation to those in our vicinity. In other words, the Law School itself is a resource and our job as faculty involves, in part, making difficult choices about how these resources should be redistributed to others in our communities. But our communities also offer valuable resources. A core challenge is finding ways to unlock and protect the resources offered by our undocumented students within the complicated parameters set by the law.

#### CONCLUSION

Over the course of my more than ten years at UCI Law, I have appreciated the efforts of activists, administrators, students, staff and faculty to convey to our undocumented population that they are valued because of, not in spite of, the actions taken by their family members who have given them a chance to join the UC Irvine community. This includes both the sacrifice and patience of working within a limited labor market that is available to the undocumented community. I realize that some, if not most, of the institutional reforms I hope to see within UCI Law feel like emergency measures or responses to the drastic changes ushered in by the Trump administration. “This too shall pass,” we might be tempted to say to soothe ourselves. As we look ahead to the next ten years, I certainly hope that lawmakers can shrink our undocumented community through more humane reforms to our immigration system, including a mass legalization program. But in the meantime, I hope we at UCI Law can find a way to exalt the moral character of the ideal lawyer while also remaining mindful of how easy it is to turn that ideal into a weapon.



