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Educate then Exile: Creating a Double Standard in Education for Plyler Students Who Want to Sit for the Bar Exam.

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COMMENT

EDUCATE THEN EXILE: CREATING A DOUBLE STANDARD IN EDUCATION FOR *PLYLER* STUDENTS WHO WANT TO SIT FOR THE BAR EXAM

J. AUSTIN SMITHSON*

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* St. Mary's University School of Law, Candidate for Juris Doctorate, May 2009; University of Texas at Austin, B.S. Radio-Television-Film, December 2004. First and foremost I would like to give thanks to God for his blessings and guidance in my life. Thank you to my parents, Jon and Jennifer Smithson, for their endless love, support and encouragement in everything I do. Thank you to my family and friends for all their prayers and constant support. I am especially grateful to Professor Lee J. Terán, Michael A. Olivas, and Arshil A. Kabani for their direction and advice in writing this comment; and to those who helped in the editing process.

I. Introduction

Meet Amy Chen.¹ Amy grew up in New York living the life of the typical American girl from the suburbs.² She graduated high school, finished college and even started law school.³ Sounds like the all-American girl living the American dream, right? There is one small difference that separates Amy from her friends and people her age.⁴ Amy's parents brought her to the United States when they immigrated from Taiwan, and she has been living here illegally ever since.⁵ Amy has professional aspirations to be a lawyer, but those aspirations came to a standstill when she learned she would be required to submit to a background check to be able to take a state's bar exam.⁶ After learning of the background check, Amy saw her dreams and aspirations begin to vanish and subsequently dropped out of law school.⁷

Many undocumented students face the same situation. Fortunately for Amy, she got further along than most. The Urban Institute, a nonpartisan economic and social policy research organization, estimates that approximately 607,000 undocumented immigrants ranging from ages ten to twenty attend primary and secondary schools in the United States.⁸ Moreover, 65,000 of these undocumented immigrant students graduate from public high schools each year.⁹

1. Dina M. Horwedel, *For Illegal College Students, an Uncertain Future*, BLACK ISSUES IN HIGHER EDUC., May 4, 2006, at 1, available at http://www.diverseeducation.com/artman/publish/article_5815.shtml (introducing a twenty-seven year old law school student who was brought to America illegally by her parents as a child, and now wants to take the bar exam).

2. *Id.* (“Amy Chen grew up in New York, living the life of a typical suburban American girl . . .”).

3. *Id.* (“Chen . . . was able to attend high school and even college, [but] her professional aspirations hit a dead end halfway through law school.”).

4. *Id.*

5. *Id.* (“[S]he’s been living in the United States illegally ever since her parents immigrated from Taiwan when she was an infant.”); see also United States Immigration Support, http://www.usimmigrationsupport.org/illegal_immigration.html (last visited June 13, 2008) (showing examples of the terms used to describe these individuals; although, the more politically correct term is “undocumented immigrants”).

6. Dina M. Horwedel, *For Illegal College Students, an Uncertain Future*, BLACK ISSUES IN HIGHER EDUC., May 4, 2006, at 1, available at http://www.diverseeducation.com/artman/publish/article_5815.shtml (“She discovered that in order to qualify to take a state bar exam, she would have to undergo a background check.”).

7. *Id.* (explaining that Amy Chen dropped out of law school after she “no longer saw any reason to continue”).

8. ANN MORSE, NAT’L CONF. OF STATE LEG., TUITION AND UNAUTHORIZED IMMIGRANT STUDENTS (2003), http://www.ncsl.org/programs/immig/Immig_Tuition0603.htm (“402,000 of these [undocumented immigrants] had been in the US for 5 years.”).

9. *Id.* (“Unauthorized immigrant students are children who were brought into the U.S. by their parents.”). Other undocumented immigrant students enter the country le-

As the twenty-fifth anniversary of the Supreme Court's decision in *Plyler v. Doe*¹⁰ is celebrated throughout the country, the issue of whether to extend the decision to postsecondary education becomes more apparent. This comment focuses on whether or not equal protection cases, like *Plyler v. Doe*, should be extended to enable undocumented immigrants, specifically the "Plyler students,"¹¹ to pass background checks in order to take a state's bar exam?¹²

In *Plyler v. Doe*, the United States Supreme Court held that undocumented students have a guaranteed right to a free K-12 education.¹³ Since that landmark decision, the Supreme Court has never extended that right to include postsecondary education. Currently, legislation is pending that would allow *Plyler* students, who graduate from high school and meet a small number of other criteria, to attend college and potentially earn permanent legal status.¹⁴ Aside from federal legislation, states are beginning to provide *Plyler* students with an opportunity to pursue a postsecondary education. More than twenty states recently passed legislation permitting undocumented students to qualify for in-state tuition.¹⁵

gally on a student or tourist visa but choose to stay after their visa expires ("overstay" their visa). *Id.*

10. 457 U.S. 202 (1982).

11. The term "Plyler students," as used throughout the comment, is intended to reference a particular group of undocumented immigrants benefited from the *Plyler v. Doe* decision. This group of undocumented immigrants arrived in the United States at a young age and they were able to attend primary and secondary schools in the United States despite their immigration status.

12. See, e.g., Andrea Elliott, *Caught in a Net Thrown for Terrorists*, N.Y. TIMES, May 24, 2005, available at http://www.nytimes.com/2005/05/24/nyregion/24register.html?page_wanted=1&r=1 (including another example of an undocumented immigrant who is enrolled in law school but will be prevented from taking the bar).

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

14. Development, Relief, and Education for Alien Minors (DREAM) Act of 2007, S. 774, 110th Cong. (2007) (discussing a law that would allow undocumented immigrant students to adjust their status from illegal immigrant to legal immigrant).

15. University of Houston Law Center, State Legislation Concerning Undocumented College Students (Fall 2007), <http://www.law.uh.edu/ihelg/state.html> (last visited July 23, 2008) (illustrating the many states that have passed legislation allowing illegal immigrants to qualify for in-state tuition status). The bills that allow for in-state tuition status are Texas, H.B. 1403, 77th Leg., Reg. Sess. (Tex.2001), amended by S.B.1528, 79th Leg., Reg. Sess. (Tex. 2005); California, A.B. 540, 2001-02 Leg., Reg. Sess. (Cal. 2001); Utah, H.B. 144, 54th Leg., Gen. Sess. (Utah 2002); New York, S. B. 7784, 225th Leg., 2001 Sess. (N.Y. 2002); Washington, H.B. 1079, 58th Leg., 2003 Reg. Sess. (Wash. 2003); Oklahoma, S.B. 596, 49th Leg., 1st Reg. Sess. (Okla. 2003); Illinois, H.B. 60, 93rd Gen. Assemb., Reg. Sess. (Ill. 2003); Kansas, H.B. 2145, 2003-2004 Leg., Reg. Sess. (Kan. 2004); Nebraska, L.B. 239, 99th Leg., 1st Sess. (Neb. 2006), *overriding governor's veto*; New Mexico, S.B. 582, 47th Leg., Reg. Sess. (N.M. 2005). *Id.* See also ANN MORSE, NAT'L CONF. OF STATE LEG., TUITION AND UNAUTHORIZED IMMIGRANT STUDENTS (2003), http://www.ncsl.org/programs/immig/Immig_Tuition0603.htm.

In many states, undocumented students are even attending post-graduate institutions, such as law school.¹⁶

Educating these *Plyler* students through high school, then providing them with opportunities to attend college and even law school creates a contradictory system.¹⁷ The public school system educates and trains undocumented students as “Americans” until they reach the age of eighteen.¹⁸ However, when any undocumented immigrant student turns eighteen that student is then considered “unlawfully present” in the United States under federal immigration law.¹⁹ Since the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), 1996 legislation targeting undocumented aliens, if the student remains in the United States for an extended period of time after high school graduation then voluntarily departs or is deported from the United States, the undocumented immigrant student is automatically barred from qualifying for readmission for a period of three, or even ten years.²⁰ This system has created a double standard. On one hand, the United States will educate *Plyler* students and in many ways encourage them to continue their education; but, at the same time the United States will criminalize their immigration status and deport them as punishment.

Born out of this system are undocumented immigrant students attending or desiring to attend law schools, knowing their undocumented status

16. Dina M. Horwedel, *For Illegal College Students, an Uncertain Future*, BLACK ISSUES IN HIGHER EDUC., May 4, 2006, at 1, available at http://www.diverseeducation.com/artman/publish/article_5815.shtml (providing an example of an undocumented immigrant student who was able to attend law school); see also Andrea Elliott, *Caught in a Net Thrown for Terrorists*, N.Y. TIMES, May 24, 2005, available at <http://www.nytimes.com/2005/05/24/nyregion/24register.html?pagewanted=1&r=1> (recounting the story of a young man who was admitted to law school and received a coveted scholarship, yet still faces possible deportation due to his illegal immigrant status).

17. See Fernando Quintero, *Issue: Coming of Age*, ROCKY MOUNTAIN NEWS, June 15, 2006, at 10A (discussing how under the current system, undocumented immigrant students are educated in the public school system until the twelfth grade and then not given the opportunity to attend a college or university).

18. *Id.* (“You have a system that educates these students to become Americans through the public education system. And they come out of the 12th grade and what do we do with them? We make them un-American.”).

19. 8 U.S.C.A. § 1182(a)(9)(B)(iii)(I) (2006) (“No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States . . .”).

20. *Id.* § 1182(a)(9)(B)(i) (“Any alien (other than an alien lawfully for permanent residence) who . . . has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien’s departure or removal from the United States is inadmissible.”); see also JOSEPH A. VAIL, *ESSENTIAL OF REMOVAL AND RELIEF* 77 (Stephanie L. Browning ed., American Immigration Lawyers Association 2006).

could prevent them from taking the bar exam.²¹ While a state can exclude a person who does not meet moral character and fitness requirements from taking the bar,²² a state cannot restrict admission to only citizens of the United States.²³ Although some states have successfully limited the Supreme Court's decision to resident aliens,²⁴ other states, such as Texas, continue to allow aliens who are not permanent residents an opportunity to sit for the bar.²⁵

In fact, illegal immigrants are sometimes part of preferred minority groups who gain preference in law school admissions.²⁶ Indirectly, *Plyler* students are encouraged to attend law school due to a push by law schools to include minorities in the admission process. The American Bar Association (ABA) is a nationally recognized agency approved by the United States Department of Education that accredits programs leading to a professional degree in law.²⁷ The ABA sets the general admission guidelines for all law schools approved by the ABA.²⁸ The bar admission authorities of most jurisdictions "rely upon ABA approval of a

21. See Dina M. Horwedel, *For Illegal College Students, an Uncertain Future*, BLACK ISSUES IN HIGHER EDUC., May 4, 2006, at 1, available at http://www.diverseeducation.com/artman/publish/article_5815.shtml; see also Deborah Buckley & Erin Stewart, *Education Dilemma for Illegals*, DESERET MORNING NEWS (Salt Lake City), Jan. 29, 2007, at A01.

22. *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 159 (1971) (holding that states have a right to deny persons the right to take the bar if they do not meet a certain standard).

23. *In re Griffiths*, 413 U.S. 717, 725 (1973) ("Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.").

24. See *LeClerc v. Webb*, 419 F.3d 405, 426 (5th Cir. 2005) (upholding the Louisiana Supreme Court Rule that restricts Louisiana Bar admission to citizens and legal permanent residents). Louisiana Supreme Court Rule XVII, Section 3(B) "requires that [e]very applicant for admission to the Bar of this state [of Louisiana] shall . . . [b]e a citizen of the United States or a resident alien thereof." *Id.* at 410.

25. See, e.g., TEX. GOV'T CODE ANN. § 82.0271 (Vernon 2005) (referencing the fact that Texas makes no mention of citizenship as a necessary prerequisite to sit for the bar exam). *But see* Tex. R. Govern. Bar Adm'n IV (West Supp. 2006) (stating that an individual must be a United States citizen to be eligible for admission as a licensed attorney in Texas, unless the individual qualifies under a different category, including the qualification of being an "alien otherwise authorized to work lawfully in the United States").

26. Peter Kirsanow, *Illegal Advantage: Lawbreakers Vault to the Front of the College-Admissions Line*, NAT'L REV. ONLINE, May 10, 2006, <http://article.nationalreview.com/?q=OTUyNzg5YWFiZDU5NjU4ZjY0ZTUyMDMwZWw4NTQ5YzY> ("Illegal immigrants from preferred-minority groups are also preferred in law-school admissions.").

27. ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS (2007-2008), <http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Preface.pdf>.

28. See ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS (2007-2008), <http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%205.pdf>.

law school to determine whether the jurisdiction's legal education requirement for admission to the bar is satisfied."²⁹ Recently, the ABA "sought to compel law schools to grant preferences to certain minorities."³⁰ Otherwise, they could potentially lose their accreditation with the ABA.³¹ Therefore, not only has the Supreme Court ruled that citizenship is not necessary in order to sit for the bar, but the ABA is also indirectly encouraging law schools to admit undocumented students, and subsequently take the bar exam. Whether through precedent set by the Supreme Court or the ABA mandating diversity in law schools across the country, the United States is continually providing a way for undocumented students to become educated in the nation's school system and later pursue a postsecondary degree. If the United States provides a path for undocumented students to educate themselves past high school without aid from the federal government, then why stop them from taking the bar exam?

Many claim there is an "immigration crisis" in the United States,³² and, as a result, immigration is a hot topic in both the political arena and the media.³³ Thus, many issues that undocumented immigrants dealt with over the years are now coming to the forefront. Due to past legislation and previous Supreme Court decisions, the United States created a new subclass of undocumented immigrants: educated undocumented immigrant students, also known as the *Plyler* students. This comment will examine the *Plyler* student's right to sit for state bar exams; expose a number of inconsistencies within the United States legal system that affects this particular minority group; and provide some solutions for a growing problem.

29. ABA SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS (2007-2008), <http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Preface.pdf>.

30. Peter Kirsanow, *Illegal Advantage: Lawbreakers Vault to the Front of the College-Admissions Line*, NAT'L REV. ONLINE, May 10, 2006, <http://article.nationalreview.com/?q=OTUyNzg5YWFiZDU5NjU4ZjY0ZTUyMDMwZWw4NTQ5YzY> (interpreting ABA Standard 211, which is now Standard 212 effective 2007-2008, to mean that law schools are required to give minority students priority in the admission process or they could risk losing their ABA accreditation).

31. *Id.*

32. Maria Pabon Lopez, Comment, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373, 1373 (2005) (discussing the need to educate undocumented immigrants above and beyond high school).

33. Stanley B. Chambers Jr., *Mexico's Fox: Build Bridges, Not Walls*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 18, 2007, at B1 ("Immigration, especially illegal immigration from Mexico, has been a hot topic nationally and locally.").

II. Legal Background

Since the Revolutionary War, almost fifty-five million immigrants from all over the world have immigrated to the United States.³⁴ Today, immigrants account for a significant part of the U.S. population.³⁵ With the large influx of immigrants coming into the United States on a daily basis, the country is also experiencing a continual growth in illegal immigration.³⁶ On January 1, 2006, the Department of Homeland Security estimated that there were over eleven million “unauthorized immigrants” in the United States.³⁷ Many of the eleven million include children of “unauthorized immigrants” who accompany their parents across the border.³⁸

A. *Immigrants Defined*

The Immigration and Nationality Act (INA) defines an alien as “any person not a citizen or national of the United States.”³⁹ The Act goes further in dividing aliens into two distinct subcategories: immigrants and nonimmigrants. “Nonimmigrants” are aliens that are admitted into the United States only temporarily.⁴⁰ Common examples of aliens in this class are students, tourists, business visitors and temporary workers.⁴¹

34. Janice Alfred, *Denial of the American Dream: The Plight of Undocumented High School Students Within the U.S. Educational System*, 19 N.Y.L. SCH. J. HUM. RTS. 615, 619 (2003) (“Since its formation after the Revolutionary War, nearly 55 million immigrants from every continent have come to the United States of America in search of the ‘American dream.’”).

35. *Id.* at 620 (“Immigrants still constitute an increasingly significant segment of the U.S. population.”).

36. *See id.* (discussing the increase in the number of immigrants coming into the United States since the 1990s).

37. OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2006 (2007), http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf.

38. JEFFREY S. PASSEL, PEW HISPANIC CENTER, UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 18 (2005) (estimating that 1.6 million unauthorized children were in the United States as of 2004).

39. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(3) (2007); *cf.* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1–2 (Foundation Press 2005) (1992) (discussing how many feel that the use of the word “alien” connotes dehumanizing qualities and choose to use the word “noncitizen” instead).

40. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 9 (Foundation Press 2005) (1992) (“The INA defines nonimmigrants as those who fall within any of the several specifically enumerated categories of (typically) temporary entrants.”); *see* 8 U.S.C. § 1101(a)(15) (2007).

41. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 9 (Foundation Press 2005) (1992) (discussing the admission of nonimmigrants to the United States).

All nonimmigrants must fall into one of the categories set out in the INA in order to immigrate.⁴² The majority of the nonimmigrant categories require the nonimmigrant to show an intent to leave the United States at the end of his or her authorized time period.⁴³ The number of visas issued for nonimmigrants are typically unrestricted.⁴⁴

If an alien does not fit within any of the nonimmigrant categories, then by process of elimination the INA considers that individual an “immigrant.”⁴⁵ The term “immigrant” includes persons “lawfully admitted for permanent residence” (LPRs).⁴⁶ Similar to nonimmigrants, immigrants must also fit within one of the statutory categories in order to qualify for admission to the United States.⁴⁷ The three main qualifying categories are family-sponsored immigrants, employment-based immigrants, and diversity immigrants.⁴⁸ Each of these categories are subject to “annual numerical limits” called “quotas.”⁴⁹ Immigrants considered “immediate

42. *See id.* (stating that “he or she [the nonimmigrant] must fit within one of the statutory pigeonholes”). The “statutory pigeonholes” are various categories an alien (or non-citizen) must fit within in order to lawfully immigrate to the United States as a nonimmigrant. *Id.* at 238; *see also* 8 U.S.C. § 1101(a)(15) (2007).

43. STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 9 (Foundation Press 2005) (1992) (introducing one of the requirements for nonimmigrant visas); *see also* 8 U.S.C. § 1101(a)(15) (2007).

44. STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 9 (Foundation Press 2005) (1992) (“With some exceptions . . . the admission of nonimmigrants is numerically unrestricted.”).

45. *Id.* at 238; *see also* 8 U.S.C.A. § 1101(a)(15) (2007) (“[E]very alien except an alien who is within one of the . . . classes of nonimmigrant aliens . . .”).

46. 8 U.S.C. § 1101(a)(20) (2007) (“The term ‘lawfully admitted for permanent residence’ means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.”).

47. STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 9 (Foundation Press 2005) (1992) (referring to family-based or employment-based immigration categories). The majority of immigrant visas are issued to aliens wishing to join family members already living in the United States or to aliens who want to work in the United States. *Id.*

48. *Id.* at 241 (describing the three main programs that allow immigrants to qualify for admission to the United States). “Family-sponsored immigrants generally comprise immigrants who have certain family members in the United States.” *Id.* “Employment-based immigrants include those with certain occupational skills, certain investors, and miscellaneous others.” *Id.* at 242. “Diversity immigrants are those who are admitted because they were born in countries or regions from which the United States has received relatively little immigration in recent years.” *Id.*

49. *Id.* at 239 (“Most of the qualifying categories are subject to annual numerical limits. These limits are often called ‘quotas’ even though they are ceilings rather than floors.”).

relatives” are not subject to the general quotas.⁵⁰ Since the demand for immigrant visas is so high, the INA sets out preference categories.⁵¹ The preference categories “describe the different groups of people who qualify . . . and set annual numerical sub-ceilings for each . . . group.”⁵² Some immigrants have a higher preference category than others and can immigrate faster, while others must succumb to longer wait periods. Although immigrant visas have a system of preferences and quotas and are subject to longer wait periods than nonimmigrants, immigrants enjoy far greater freedoms and benefits.⁵³

“Undocumented immigrants” fall under the immigrant classification.⁵⁴ The term “undocumented immigrant” describes “any non-U.S. citizens who are present in the United States without any valid documentation or lawful immigration status.”⁵⁵ These individuals either “enter the United States unlawfully, overstay their nonimmigrant visas, or otherwise violate the specific terms of their admission or some more general provision of the immigration law.”⁵⁶ The rights and privileges of a very specific group of individuals within this classification are the focus of the comment.

In addition to fitting within one of the qualifying categories, both immigrants and nonimmigrants can not fall within one of the grounds of “inadmissibility.”⁵⁷ Criminal convictions or contagious diseases are common grounds of inadmissibility that can prevent an alien from entering the United States.⁵⁸ Qualifying for admission into the United States as an

50. 8 U.S.C. § 1151(b)(2)(A)(i) (2007) (“[T]he term ‘immediate relative’ means the children, spouses, and parents of a citizen of the United States, except in the case of parents, such citizens shall be at least 21 years of age.”).

51. *Id.* at § 1153(a)-(c) (listing the three preference categories for family-based immigrants, employment-based immigrants and diversity immigrants). For example, the unmarried sons and daughters of U.S. citizens are in a higher preference category than the spouses and unmarried sons and daughters of LPRs; aliens in a higher preference category will usually immigrate first. *Id.* at 243–44.

52. STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 243 (Foundation Press 2005) (1992) (describing the purpose of preference categories).

53. *Id.* at 238 (“Immigrants may remain in the United States permanently so long as they refrain from deportable misconduct.”).

54. *Id.* at 9 (“The term [immigrants] includes both those who have been lawfully admitted as immigrants and those who have not.”).

55. *Id.* at 1193.

56. *Id.* at 192.

57. *See* STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 238 (Foundation Press 2005) (1992) (“[T]hose that relate to crime, national security, health, or public assistance . . .”).

58. *Id.* at 410 (“The exclusion grounds cover a wide range of subject matter: communicable diseases, criminal activity, national security, poverty, protection of the work force, the functioning of the immigration system itself, and miscellaneous other concerns.”).

immigrant or nonimmigrant can be a very daunting task that can sometimes take many years.⁵⁹

B. *Paths to College*

Under the current system of government, many undocumented immigrants are provided a path to college and even law school. Although undocumented immigrants are only guaranteed an education through high school, certain states, colleges, and universities provide opportunities for these students to continue their education despite their undocumented status. Many students are able to apply to colleges so long as they have a driver's license as a form of identification.⁶⁰ Some institutions accept undocumented immigrant students as international students, while others do not even ask.⁶¹ In 2002, the governor of New York made it possible for undocumented immigrants to attend colleges that are part of the City University of New York system.⁶²

Furthermore, most undocumented immigrants are able to attend college due to the number of states that provide in-state tuition rates to undocumented immigrants who want to attend college.⁶³ In 2001, Texas was the first state to pass legislation allowing undocumented immigrants to

59. See, e.g., Arshil Kabani, Comment, *Separation Anxiety: Uniting the Families of Lawful Permanent Residents*, 10 SCHOLAR 169, 174–76 (2008) (providing an example of the long wait noncitizens face when attempting to immigrate themselves and their families to the United States).

60. Dina M. Horwedel, *For Illegal College Students, an Uncertain Future*, BLACK ISSUES IN HIGHER EDUC., May 4, 2006, at 1, available at http://www.diverseeducation.com/artman/publish/article_5815.shtml (“[An undocumented immigrant] was able to sidestep the question of her legal status because she had a driver’s license.”); see also Javier C. Hernandez, *For Student Immigrants, a Secret Life*, HARV. CRIMSON, June 7, 2006, available at <http://www.thecrimson.com/article.aspx?ref=513808> (“[C]itizenship status of students is only verified if they apply for financial aid.”).

61. Dina M. Horwedel, *For Illegal College Students, an Uncertain Future*, BLACK ISSUES IN HIGHER EDUC., May 4, 2006, at 1, available at http://www.diverseeducation.com/artman/publish/article_5815.shtml (“Some institutions . . . accept [undocumented immigrants] as international students.”); see also Javier C. Hernandez, *For Student Immigrants, a Secret Life*, HARV. CRIMSON, June 7, 2006, available at <http://www.thecrimson.com/article.aspx?ref=513808> (acknowledging that some admitted Harvard students may actually be undocumented immigrants).

62. Julia C. Mead, *Ticket to Nowhere*, N.Y. TIMES, June 20, 2004, at 14LI (“In August 2002, just in time to help Mr. Barrientos, Governor Pataki signed a law allowing immigrants residing in New York to attend CUNY and SUNY colleges at the cheaper, in-state tuition level, half the cost for out-of-state residents.”).

63. ANN MORSE, NAT’L CONF. OF STATE LEG., IN-STATE TUITION AND UNAUTHORIZED IMMIGRANT STUDENTS (2006), <http://www.ncsl.org/programs/immig/tuitionandimmigrants.htm> (“In April, 2006, Nebraska became the 10th state to enact legislation to allow certain long-term unauthorized immigrant students to become eligible for in-state tuition.”).

pay resident tuition at public universities so long as they graduated from a state high school, had three years residency within the state, and signed an affidavit promising to seek legal status.⁶⁴ Since then, nine other states have enacted similar legislation.⁶⁵ As of 2006, “48 bills have been introduced in 20 states related to education assistance and immigrants or enrollment requirements.”⁶⁶ Despite federal silence, states are taking action to help educate undocumented immigrant students past a secondary education.

Currently, efforts are being made by legislators to provide assistance to undocumented immigrants who want to attend college. The DREAM Act, first introduced in 2005, would allow for certain undocumented immigrants to qualify for federal financial aid and permanent residency.⁶⁷ To qualify for the DREAM Act, an undocumented immigrant must have been brought to the United States before the age of fifteen and have demonstrated good moral character.⁶⁸ After graduation from high school, he or she could then apply for conditional status, which would

64. H.B. 1403, 77th. Leg., Reg. Sess. (Tex. 2001), *amended by* Tex. S.B. 1528, 79th. Leg., Reg. Sess (Tex. 2005); *see also* Leila Fadel, *Tuition Law is Under Attack*, STAR-TEGRAM (Fort Worth), June 23, 2006, *available at* <http://www.uhjfm.org/news.html> (follow “06.23.06 FWST-Tuition Law is Under Attack” hyperlink) (“A 2001 Texas law allows illegal immigrants to pay in-state tuition at public universities as long as they graduated from a Texas high school, have lived in the state for three years and promise to seek legal status when they become eligible.”).

65. University of Houston Law Center, *State Legislation Concerning Undocumented College Students* (Fall 2007), <http://www.law.uh.edu/ihelg/state.html> (last visited June 17, 2008) (demonstrating that many states have passed legislation allowing illegal immigrant to qualify for in-state tuition status); *see also* ANN MORSE, NAT’L CONF. OF STATE LEG., *IN-STATE TUITION AND UNAUTHORIZED IMMIGRANT STUDENTS* (2006), <http://www.ncsl.org/programs/immig/tuitionandimmigrants.htm> (naming the various states that have enacted legislation that allows certain immigrants students to qualify for in-state tuition).

66. ANN MORSE, NAT’L CONF. OF STATE LEG., *IN-STATE TUITION AND UNAUTHORIZED IMMIGRANT STUDENTS* (2006), <http://www.ncsl.org/programs/immig/tuitionandimmigrants.htm> (discussing the number of states that have pending legislation that would aid undocumented immigrant students in attending college). While the various state bills deal with some form of education assistance or enrollment requirements for undocumented immigrants students, the “bills in Connecticut, Florida, Maryland, Mississippi, Nebraska, New Jersey, and Virginia would provide in-state tuition.” *Id.*

67. Development, Relief, and Education for Alien Minors (DREAM) Act of 2007, S. 774, 110th Cong. (2007); *see also* Editorial, *From the Daily: Dream on*, MICH. DAILY, Oct. 29, 2007, *available at* <http://www.media.michigandaily.com/media/storage/paper851/news/2007/10/29/Editorials/From-The.Daily.Dream.On-3061961.shtml> (“The Dream Act, first introduced by Sen. Richard Durbin (D-Ill.) in 2005, would offer permanent resident status to children of undocumented immigrants provided they graduate from high school and complete two years in college or the military.”).

68. Development, Relief, and Education for Alien Minors (DREAM) Act of 2007, S. 774, 110th Cong. (2007).

authorize six years of legal residence in the United States.⁶⁹ The Act would require that participants complete an associate's degree or two years of a four year degree, or serve two years in the military.⁷⁰ At the end of the six year period, the student who met these requirements and maintained good moral character would qualify for permanent residency.⁷¹ In 2007, the U.S. Senate once again voted down the DREAM Act.⁷²

C. Fourteenth Amendment Protection

Due to the increasingly large number of immigrants in the United States, the Supreme Court must decide what types of rights and protections immigrants are entitled to receive. Beginning in 1971, the Fourteenth Amendment of the U.S. Constitution "has been used to prohibit discrimination on the basis of national origin."⁷³ The Fourteenth Amendment prohibits a state from denying "any person within its jurisdiction the equal protection of the laws."⁷⁴ The Supreme Court interpreted the word "person" to include aliens as well as U.S. citizens.⁷⁵

69. *Id.*

70. Editorial, *From the Daily: Dream on*, MICH. DAILY, Oct. 29, 2007, available at <http://www.media.michigandaily.com/media/storage/paper851/news/2007/10/29/Editorials/From-The.Daily.Dream.On-3061961.shtml> ("The Dream Act . . . would offer permanent resident status to children of undocumented immigrants provided they graduate from high school and complete two years in college or the military.").

71. Development, Relief, and Education for Alien Minors (DREAM) Act of 2007, S. 774, 110th Cong. (2007).

72. See Todd J. Gillman, *Cornyn Ends Dream for DREAM Act*, DALLAS MORNING NEWS, Oct. 28, 2007, available at http://www.dallasnews.com/sharedcontent/dws/news/texas-southwest/stories/DN-texwatch_28nat.ART.State.Edition2.42f2300.html ("The death of the DREAM Act forebodes slim chances for other reforms before the new president and Congress take office in 2009.").

73. ANN MORSE, NAT'L CONF. OF STATE LEG., TUITION AND UNAUTHORIZED IMMIGRANT STUDENTS (2003), http://www.ncsl.org/programs/immig/Immig_Tuition0603.htm (reviewing Supreme Court decisions that concern the equal protection of immigrants). In 1971, the Supreme Court handed down *Graham v. Richardson*. *Id.*

74. U.S. CONST. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. *Id.*

75. *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

It has long been settled, and it is not disputed here, that the term "person" in this context encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside. *Id.*

Laws that are challenged on the grounds of the Fourteenth Amendment “are reviewed by courts under varying standards, depending upon the nature of the classification, the rights involved, and countervailing constitutional concerns.”⁷⁶ Courts typically review the validity of state legislation under one of three standards: strict scrutiny, rational basis, or intermediate scrutiny.⁷⁷ The level of scrutiny used by the courts depends on the group facing discrimination.⁷⁸ The Supreme Court created classifications of groups that receive varying degrees of protection under the Fourteenth Amendment. When a state law discriminates against a group that has received special protection from the Supreme Court, the discrimination is “inherently suspect.”⁷⁹ If state legislation affects a “suspect” class or infringes upon “fundamental” rights or interests, the courts normally apply “strict scrutiny,”⁸⁰ and require a “necessary” reason for the discrimination, in order to achieve a “compelling” state interest.⁸¹ Laws that neither affect a “suspect class” nor infringe upon “fundamental rights”⁸² are generally evaluated under a rational basis standard of review. According to this standard of review, the legislative means and ends must be “reasonably related.”⁸³ The test of intermediate scrutiny

76. Nancy J. Brinkac, Comment, *Should Undocumented Aliens Be Eligible for Resident Tuition Status at State Universities*, 23 SAN DIEGO L. REV. 467, 473–74 (1986) (explaining the way in which state laws are evaluated under one of the three levels of scrutiny).

77. See generally *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–54 (1985) (identifying the three levels of scrutiny used by the Supreme Court to evaluate state laws on equal protection grounds).

78. See *id.* at 439–40 (“[T]he courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection.”).

79. Kristen L. Beckman, *Banned from the Bar: Classification of the Temporary Alien in Louisiana*, 51 LOY. L. REV. 139, 142 (2005) (citing *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944)).

80. Nancy J. Brinkac, Comment, *Should Undocumented Aliens Be Eligible for Resident Tuition Status at State Universities*, 23 SAN DIEGO L. REV. 467, 474 (1986) (discussing the level of review under “strict scrutiny”).

81. See KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 641 (Gerald Gunther ed., Foundation Press 2004) (1937) (“Legislation qualifying for strict scrutiny required a far closer fit between classification and statutory purpose . . . [thus,] means had to be shown ‘necessary’ to achieve statutory ends . . . [L]egislation . . . had to be justified by ‘compelling’ state interests . . .”).

82. Nancy J. Brinkac, Comment, *Should Undocumented Aliens Be Eligible for Resident Tuition Status at State Universities*, 23 SAN DIEGO L. REV. 467, 473–74 (1986).

83. See KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 640 (Gerald Gunther ed., Foundation Press 2004) (1937) (“A classification . . . must be reasonably related to the purpose of the legislation.”).

lies in between strict scrutiny and rational basis.⁸⁴ The Supreme Court noted other classifications that are not “suspect,” but still warrant a heightened level of scrutiny.⁸⁵ In *Craig v. Boren*,⁸⁶ the Court developed an “intermediate” standard of review.⁸⁷ Under this level of review classifications must “generally be ‘substantially related to a legitimate state goal’ to survive a constitutional equal protection challenge.”⁸⁸

For over thirty years, the United States Supreme Court has considered alienage as a suspect classification.⁸⁹ In a series of cases starting in 1971, the Supreme Court dealt with the issue of equal protection for immigrants and immigrants’ access to education.⁹⁰ The Court first faced the issue of whether aliens could seek Fourteenth Amendment equal protection in *Graham v. Richardson*,⁹¹ in which the Supreme Court struck down a state law that denied welfare benefits to aliens.⁹² The Court established that “classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny.”⁹³ Aliens are a “prime example of a ‘discrete and insular’ minority” for whom such a heightened standard of

84. Kristen L. Beckman, *Banned from the Bar: Classification of the Temporary Alien in Louisiana*, 51 LOY. L. REV. 139, 144 (2005) (stating that courts typically employ intermediate scrutiny in cases involving gender and alleged unconstitutional state action).

85. Nancy J. Brinkac, Comment, *Should Undocumented Aliens Be Eligible for Resident Tuition Status at State Universities*, 23 SAN DIEGO L. REV. 467, 474 (1986) (discussing the level of review under “intermediate” scrutiny).

86. 429 U.S. 190 (1976).

87. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

88. Nancy J. Brinkac, Comment, *Should Undocumented Aliens Be Eligible for Resident Tuition Status at State Universities*, 23 SAN DIEGO L. REV. 467, 474 (1986) (“Classifications which fall under this intermediate area must generally be ‘substantially related to a legitimate state goal’ to survive constitutional equal protection challenge.”).

89. See *Bernal v. Fainter*, 467 U.S. 216, 219–20 (1984) (holding that a state law that discriminates against aliens must provide a compelling state interest to overcome strict scrutiny); see also Kristen L. Beckman, *Banned from the Bar: Classification of the Temporary Alien in Louisiana*, 51 LOY. L. REV. 139, 146 (2005).

90. See ANN MORSE, NAT’L CONF. OF STATE LEG., TUITION AND UNAUTHORIZED IMMIGRANT STUDENTS (2003), http://www.ncsl.org/programs/immig/Immig_Tuition0603.htm (listing Supreme Court decisions that dealt with the Equal Protection Clause applied to noncitizens).

91. 403 U.S. 365 (1971).

92. *Graham v. Richardson*, 403 U.S. 365, 378 (1971) (“State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government.”).

93. *Id.* at 372 (establishing that alienage is a suspect classification).

review is appropriate.⁹⁴ Two years later, in *Sugarman v. Dougall*,⁹⁵ the Court applied the strict scrutiny standard set forth in *Graham* and held that states can not exclude aliens from holding civil service jobs.⁹⁶ These two cases were the first of many equal protection cases that would later help undocumented immigrants receive protection under the Fourteenth Amendment.

During this time, the Court extended Fourteenth Amendment equal protection in cases concerning education. The same year the Supreme Court heard *Dougall*, it also heard *In re Griffiths*,⁹⁷ where it decided whether a person's alien status could be the sole basis for their disqualification from taking the bar exam.⁹⁸ The Court held that a state may not require *citizenship* as a prerequisite for the practice of law,⁹⁹ and struck down the state court rule as a violation of the Equal Protection Clause by once again classifying alienage as a suspect class warranting strict scrutiny.¹⁰⁰ Therefore, any law precluding an alien from becoming a lawyer would be unconstitutional.¹⁰¹

While these cases make tremendous strides for the rights of immigrants, they only apply to legally resident aliens. Although the protections of the Fourteenth Amendment are not confined solely to citizens,¹⁰² “[u]ndocumented aliens . . . have not been accorded heightened equal protection scrutiny, with the exception of undocumented children barred from attending public school[.]”¹⁰³ “Therefore, a person who chooses to

94. KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 641 (Gerald Gunther ed., Foundation Press 2004) (1937) (citing both *Graham v. Richardson*, 403 U.S. 365, 372 (1971) and *United States v. Carolene Products*, 304 U.S. 144, 153 (1938)).

95. 413 U.S. 634 (1973).

96. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (“We hold only that a flat ban on the employment of aliens in positions that have little, if any relation to a State’s legitimate interest, cannot withstand scrutiny under the Fourteenth Amendment.”).

97. 413 U.S. 717 (1973).

98. *In re Griffiths*, 413 U.S. 717, 723 (1973) (“[T]he sole basis for disqualification is her status as a resident alien.”).

99. *Id.* at 717.

100. *Id.* at 725 (“[T]he arguments advanced by the Committee fall short of showing that the classification established by Rule 8(1) of the Connecticut Practice Book (1963) [which requires citizenship] is necessary to the promoting or safeguarding of this interest.”).

101. *See id.* at 729 (holding that a requirement that applicants for admission to the bar be U.S. citizens violates the Equal Protection Clause).

102. *Yick Wo v. Hopkins*, 118 U.S. 356, 368–69 (1886) (“These provisions [of the Fourteenth Amendment] are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . .”).

103. KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 810–11 (Gerald Gunther ed., Foundation Press 2004) (1937) (pointing to the fact that even though alienage is a suspect classification, undocumented aliens have received very few protections under the Fourteenth Amendment).

enter this country illegally will only receive protection for their basic needs that are necessary to take part in our society.”¹⁰⁴ The only Supreme Court case to extend a heightened standard of protection to undocumented aliens is *Plyler v. Doe*.¹⁰⁵

Plyler v. Doe was a landmark Supreme Court decision allowing undocumented students to attend public primary and secondary schools.¹⁰⁶ The Court examined a state statute that denied illegal aliens the right to a free public education.¹⁰⁷ This case marked the first time the Supreme Court discussed the issue of whether undocumented immigrants should receive Fourteenth Amendment equal protection.¹⁰⁸ The Court in *Plyler* applied an intermediate standard of review based largely on the legal “innocence” of the undocumented children,¹⁰⁹ and found that the state statute did not justify a “substantial state interest.”¹¹⁰ Although *Plyler* made it possible for many undocumented students to partake in mandatory schooling, it remained “silent on the issue of whether the protections extended to the college setting.”¹¹¹ What *Plyler* did show is the Supreme Court’s willingness to extend the Fourteenth Amendment to protect illegal aliens.¹¹² Although the Court in *Plyler* refused to grant suspect classification to illegal aliens because of their undocumented and unlawful status,¹¹³ the majority recognized the need to protect the children of ille-

104. Jennifer L. Maki, *The Three R's: Reading, 'Riting, and Rewarding Illegal Immigrants: How Higher Education Has Acquiesced in the Legal Presence of Undocumented Aliens in the United States*, 13 WM. & MARY BILL RTS. J. 1341, 1342 (2005).

105. *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (“If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.”).

106. *Id.*

107. *Id.* at 206.

108. Michael A. Olivas, *IIRIRA, the DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 443 (2004) (“Prior to *Plyler*, the Supreme Court had never taken up the question of whether undocumented aliens could seek Fourteenth Amendment equal protection.”).

109. Nancy J. Brinkac, Comment, *Should Undocumented Aliens Be Eligible for Resident Tuition Status at State Universities*, 23 SAN DIEGO L. REV. 467, 477 (1986) (discussing the reasoning behind the holding and the level of judicial scrutiny in *Plyler v. Doe*, 457 U.S. 202, 221 (1982)).

110. Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L. Q. 1019, 1043 (1995) (citing the holding in *Plyler v. Doe*, 457 U.S. 202, 230 (1982)).

111. Michael A. Olivas, *IIRIRA, the DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 444 (2004).

112. *Plyler*, 457 U.S. at 212 n.10 (“[N]o plausible distinction with respect to Fourteenth Amendment ‘jurisdiction’ can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.”).

113. *Id.* at 219 n.19 (“We reject the claim that ‘illegal aliens’ are a ‘suspect class.’”).

gal aliens who were brought here through no fault of their own.¹¹⁴ The Court reaffirmed *San Antonio Independent School District v. Rodriguez*,¹¹⁵ which held that education is not a fundamental right,¹¹⁶ but the Court recognized that denying education to an isolated group of children contradicts the protections set forth in the Equal Protection Clause.¹¹⁷

III. Legal Analysis I

While the Supreme Court's decision in *Plyler v. Doe* granted undocumented immigrants unprecedented new rights and protections under the law, the result also created a large degree of uncertainty for the future of these *Plyler* students. *Plyler* not only grants these students a right to receive the benefits of an education, but also encourages them to remain in the United States after graduation. Furthermore, the fact that states around the country provide these *Plyler* students with opportunities to attend college greatly increases the reality of continuing their education in the United States. The conflict lies in the fact that after graduation, all *Plyler* students face substantial obstacles, including the inability to further their education. The current system of laws in the United States allows a *Plyler* student to receive a primary and secondary education, attend college and even law school; but, at the same time the United States criminalizes their immigration status, thus preventing them from fully developing their education and contributing back to the society that raised them. The protections afforded to the undocumented immigrant students in *Plyler* should continue to apply to these same students post-high school. A *Plyler* student who successfully maneuvers through the education system and gains admittance to law school should not then be denied permission to sit for the bar exam because of something in the student's past that he or she had no control over.

114. *Id.* at 220 (“Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”).

115. 411 U.S. 1 (1973).

116. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (citing the holding of the case).

117. *Plyler*, 457 U.S. at 221–22 (“[D]enial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”).

A. *Extending Plyler v. Doe*

Many consider *Plyler v. Doe* the pinnacle of the Supreme Court's decisions dealing with the undocumented immigrant's rights.¹¹⁸ On a larger scale, the decision in *Plyler* answered the question of how the American society will treat alien children within its borders.¹¹⁹ Although the holding in *Plyler* successfully afforded undocumented immigrants greater equal protection under the law, it is now time for the decision to extend past the K-12 setting and into postsecondary education, specifically speaking to an undocumented student's right to sit for a state's bar exam.

Although the Court in *Plyler* recognized the fact that undocumented immigrants are in America unlawfully and not considered a "suspect class" for equal protection purposes,¹²⁰ the Court viewed the children as special members of an alien subclass.¹²¹ Arguably, a state is justified in withholding benefits to a person who elected to enter the United States illegally.¹²² However, undocumented immigrants applying to sit for state bar exams are faced with a similar problem as the undocumented children in *Plyler* who wanted to receive a free public education; they are prevented from furthering their education in America because of their undocumented status.

In recent years, the Supreme Court "has adopted an expanded concept of membership [in the U.S. community] that includes noncitizens among members of U.S. society, entitling them to the same constitutional protections previously afforded only to citizens."¹²³ This expansive view used for determining who is part of the U.S. community focuses more on a person's communal ties to the United States rather than the person's citizenship status.¹²⁴ The Court in *Plyler* recognized the substantial ties the

118. Michael A. Olivas, *Plyler v. Doe, the Education of Undocumented Children, and the Polity*, in *IMMIGRATION STORIES* 197 (Foundation Press 2005) (discussing the holding in *Plyler v. Doe* and the lasting impact the case has on undocumented aliens' rights today).

119. *Id.* ("But [*Plyler v. Doe*] also dealt with a larger, transcendent principle: how this society will treat its alien children.").

120. *Plyler*, 457 U.S. at 219 n.19 ("We reject the claim that 'illegal aliens' are a 'suspect class.'").

121. *Id.* at 219 ("The children who are plaintiffs in these cases are special members of this underclass [of permanent undocumented resident aliens].").

122. *Id.* at 219–20 ("Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct.").

123. Liliana M. Garces, *Evolving Notions of Membership: The Significance of Communal Ties in Alienage Jurisprudence*, 71 S. CAL. L. REV. 1037, 1065 (1998) (analyzing federal alienage cases that discuss the concept of membership within the U.S. community).

124. *Id.* ("An analysis of federal alienage cases, therefore, demonstrates that the Supreme Court, by focusing on the strength of a noncitizen's developed communal ties rather than on formalities, such as citizenship status or lawfulness of residence, has adopted an

Plyler students had already developed to the United States.¹²⁵ The *Plyler* students “virtually grew up in the U.S., speak English and have little or no connection to their native country,”¹²⁶ and the decision encourages these children and their families to remain in the United States. Since many undocumented students have been raised in the United States from a very young age, these same students inevitably become just as “Americanized” as any other child living in the United States.¹²⁷ Now these same undocumented immigrants, educated to “become Americans through the public school system,”¹²⁸ want to sit for state bar exams but are prevented due to their undocumented status.

The Court in *Plyler* clearly stated that “[b]y denying [undocumented students] a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”¹²⁹ Most immigrants view the United States as offering more economic opportunities,¹³⁰ and the Court knew that many of these children would continue to reside in America, either legally or illegally.¹³¹ The Court also knew that these children would be educated in the U.S. school system and grow up to become undocumented adults, joining the “shadow population” of undocumented immigrants that already exists in

expanded concept of membership that includes noncitizens among members of U.S. society[.]”)

125. *Id.* (“[T]he Court recognized the roots these children had already established in this country and emphasized the advantages they would have in U.S. society, as well as how these opportunities would ultimately benefit society as a self-reflection of its most important values.”).

126. Fernando Quintero, *Issue: Coming of Age*, ROCKY MOUNTAIN NEWS, June 15, 2006, at 10A (discussing how these specific groups of undocumented immigrant students are in a unique situation and, therefore, their undocumented status should not prevent them from sitting for the bar exam).

127. See Janice Alfred, *Denial of the American Dream: The Plight of Undocumented High School Students Within the U.S. Educational System*, 19 N.Y.L. SCH. J. HUM. RTS. 615, 616 (2003) (establishing the fact that children raised in America become accustomed to the American way of life and have little relation to their native country).

128. Fernando Quintero, *Issue: Coming of Age*, ROCKY MOUNTAIN NEWS, June 15, 2006, at 10A.

129. *Plyler*, 457 U.S. at 223 (referring to instances in the opinion where Justice Brennan discusses how undocumented immigrant children should be given a basic education so that they, too, can contribute to the American society when they get older).

130. See NPR, HENRY J. KAISER FAM. FOUND. & HARV. UNIV. JOHN F. KENNEDY SCH. OF GOV'T, IMMIGRATION SURVEY 6–7 (2004), <http://www.kff.org/kaiserpolls/upload/Immigration-in-America-Summary.pdf>

131. *Plyler*, 457 U.S. at 222 n.20 (referencing the conclusion by the lower courts that many noncitizens will remain in the United States permanently, while others will eventually become citizens).

the United States.¹³² The decision to extend Fourteenth Amendment protection to *Plyler* students post-high school is the logical next step in light of the Court's reasoning in *Plyler*. Extending protection allows the *Plyler* students to become part of the United States community and "the opportunity to continue developing ties from which society could benefit and which would eventually reflect the values of its members."¹³³

The current system encourages undocumented immigrant students to remain in the United States after graduating from high school, but sharply changes the landscape for those who continue to stay after high school graduation. The students that benefited from the *Plyler v. Doe* decision are now beginning to attend colleges and law schools in the United States.¹³⁴ Although these students succeeded in their education and can excel in college, their immigration status does not change.¹³⁵ These students are educated, but prevented from working or sitting for the bar exam due solely to their immigration status.¹³⁶

Providing undocumented immigrants with a free public elementary and secondary education encourages these students to remain in America; but, later denying these same students further educational benefits leaves them with few, if any, options.¹³⁷ Immigration law targets those unlawfully present in the country. Without a path to legalizing their status, many *Plyler* students are not able to afford college.¹³⁸ Without advanced

132. *Id.* at 219 (alluding to the fact that the Supreme Court was content with the fact that they could potentially be adding to the population of undocumented immigrants living in the United States since they recognized that millions of undocumented immigrants were already living in the United States and still granted this group of undocumented immigrant students protection).

133. Liliana M. Garces, *Evolving Notions of Membership: The Significance of Communal Ties in Alienage Jurisprudence*, 71 S. CAL. L. REV. 1037, 1065 (1998).

134. See Miriam Jordan, *Illegal Immigrants' New Lament: Have Degree, No Job*, WALL ST. J. ONLINE, Apr. 26, 2005, <http://www.online.wsj.com/article/SB111447898329816736.html> ("Ms. Garibay, 24 years old, who came to the U.S. as a child, is an illegal immigrant. She is part of an emerging class of young immigrants facing a new quandary: They are educated, but unable to get work because of their immigration status.").

135. *Id.* ("She is part of an emerging class of young immigrants facing a new quandary: They are educated, but unable to get work because of their immigration status.").

136. *Id.*

137. See Alecia Warren, *Legislation Would Penalize Universities for Letting in Undocumented Immigrants*, COLUMBIA MISSOURIAN, Apr. 4, 2006, available at <http://www.columbiamissourian.com/stories/2006/04/04/legislation-would-penalize-universities-for-letting/> ("We aren't giving these students any options, we're forcing them as a society to either work illegally or work for cash.").

138. Roberto G. Gonzales, *Wasted Talent and Broken Dreams: The Lost Potential of Undocumented Students*, IMMIGR. POL'Y IN FOCUS, Oct. 2007, at 3, available at <http://www.immigrationpolicy.org/index.php?content=f071001> (explaining that many undocumented students cannot afford to attend college since they are not eligible for most forms of financial aid).

education, these students are forced to get a fake social security card and fake driver's license as their only means of obtaining work.¹³⁹ In the alternative, they work menial "off-the-books jobs."¹⁴⁰ Statistics show a large discrepancy in the earning capacity of immigrants with a high school education versus immigrants with a postsecondary level of education.¹⁴¹ Immigrants with no more than a twelfth grade education earn an average of eleven to twelve dollars an hour, while immigrants with a college education or higher can earn more than twice that amount.¹⁴² Furthermore, these *Plyler* students generally excel in school. In fact, many of these *Plyler* students are "honor roll students, athletes, class presidents, [and] valedictorians."¹⁴³ By continuing to limit the *Plyler* decision to only primary and secondary education, the Supreme Court is creating an underclass of undocumented students with a limited education.¹⁴⁴

The holding in *Plyler* has created a double standard for undocumented students' right to education in the United States. The same protections that afforded undocumented students the right to attend elementary and secondary school are lost when it comes to postsecondary education and passing the background check in order to sit for the bar exam. Preventing *Plyler* students from expanding their potential, including sitting for state bar exams, forecloses the possibility of these children using their education to contribute to the nation.¹⁴⁵

139. Fernando Quintero, *Issue: Coming of Age*, ROCKY MOUNTAIN NEWS, June 15, 2006, at 10A ("We turn them into criminals because, not having the opportunity to pursue a higher education, they have to find work. So they get fake Social Security numbers and fake drivers' licenses so they can work, and now they're committing fraud.").

140. Julia C. Mead, *Ticket to Nowhere*, N.Y. TIMES, June 20, 2004, at 13LI ("Many [undocumented immigrant students] have lived here most of their lives and find themselves with nowhere to go after high school but into menial, off-the-books jobs . . .").

141. SANTA CLARA OFFICE OF HUMAN RELATIONS CITIZENSHIP & IMMIGRANT SERVICES PROGRAM, SUMMIT ON IMMIGRANT NEEDS AND CONTRIBUTIONS (2000), <http://www.immigrantinfo.org/borders/educ.pdf> ("There is a significant difference between immigrants with a low level of education and immigrants with a high level of education.").

142. *Id.* (representing the fact that immigrants who do not receive more than a high school education are prevented from earning a decent wage).

143. Roberto G. Gonzales, *Wasted Talent and Broken Dreams: The Lost Potential of Undocumented Students*, IMMIGR. POL'Y IN FOCUS, Oct. 2007, at 10, available at <http://www.immigrationpolicy.org/index.php?content=f071001> (explaining that many undocumented students cannot afford to attend college since they are not eligible for most forms of financial aid).

144. Julia C. Mead, *Ticket to Nowhere*, N.Y. TIMES, June 20, 2004, at 14LI (discussing how undocumented immigrant students raised in America have "nowhere to go" after high school if they are prevented from attending colleges or universities because of their illegal status).

145. See *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (referencing the language Justice Brennan used in the *Plyler* opinion to argue why undocumented students should receive a free primary and secondary education in America).

The current “education and immigration policies send mixed signals” to *Plyler* students.¹⁴⁶ *Plyler* allows students to graduate from high school and “[f]ederal law does not expressly prohibit the admission of undocumented immigrants to U.S. colleges and universities.”¹⁴⁷ As states continue to provide access for undocumented immigrants to receive in-state tuition, undocumented immigrants are further encouraged to remain in the U.S. educational system.¹⁴⁸ At the same time, the federal government continues to pass laws restricting the rights of undocumented immigrants. In 1986, Congress enacted the Immigration Reform and Control Act (IRCA).¹⁴⁹ The purpose of the statute was to attack illegal immigration.¹⁵⁰ IRCA resulted in adding a new section to the INA, which imposed employer sanctions for hiring undocumented immigrants.¹⁵¹ The government continued to pass anti-illegal immigrant statutes and in 1996 passed IIRIRA,¹⁵² which restricted the rights of undocumented immigrants tremendously. In addition to creating the unlawful presence bar, IIRIRA authorized “federal-state cooperation in responding to illegal immigration,”¹⁵³ and restricted undocumented immigrants from being eligible to receive postsecondary education benefits.¹⁵⁴ Simply put, the fed-

146. Roberto G. Gonzales, *Wasted Talent and Broken Dreams: The Lost Potential of Undocumented Students*, IMMIGR. POL’Y IN FOCUS, Oct. 2007, at 2, available at <http://www.immigrationpolicy.org/index.php?content=f071001> (explaining that many undocumented students cannot afford to attend college since they are not eligible for most forms of financial aid).

147. *Id.* at 3 n.4.

148. See Miriam Jordan, *Illegal Immigrants’ New Lament: Have Degree, No Job*, WALL ST. J. ONLINE, Apr. 26, 2005, <http://www.online.wsj.com/article/SB111447898329816736.html> (“[H]igher education is largely a state matter. In 2001, Texas became the first state to pass a law allowing undocumented immigrant students who graduated from a state high school to pay resident tuition at public universities.”).

149. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

150. See STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1209 (Foundation Press 2005) (1992).

151. 8 U.S.C.A. § 1324a (2006) (imposing fines and punishment on employers who knowingly hire an unauthorized alien); see also STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1209 (Foundation Press 2005) (1992); Miriam Jordan, *Illegal Immigrants’ New Lament: Have Degree, No Job*, WALL ST. J. ONLINE, Apr. 26, 2005, <http://www.online.wsj.com/article/SB111447898329816736.html> (“[L]aws that apply to undocumented immigrants make it impossible for businesses to sponsor these youngsters because they have been living in the country illegally.”).

152. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009—546.

153. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1200 (Foundation Press 2005) (1992).

154. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 505(a), 110 Stat. 3009—672 (changing the way in which the United States dealt with illegal immigrants and eligibility for postsecondary education benefits).

eral government is providing disincentives to undocumented immigrants in order to respond to the flow of illegal immigration into the United States. The conflicting laws pose a problem for *Plyler* students once they graduate from high school; “the limitations of their legal status become more acute and barriers multiply.”¹⁵⁵

Many opponents of extending *Plyler* any further would argue that once these children reach eighteen, they become adults and are of age to “remove themselves from the State’s jurisdiction,”¹⁵⁶ or to remain in America and break the law. The reality of the situation is that many of these individuals are not going to leave the United States.¹⁵⁷ Since a large number of these students spent the majority of their formative years in the United States, it is the only culture that they know.¹⁵⁸ In most cases, the opportunities for social and economic advancement offered to individuals in the United States greatly outnumber those offered to these students in their native country.¹⁵⁹ As a result, the decision to stay in the United States illegally or return to the country their parents brought them from is not a decision at all. For many, being poor in America is better than returning to life in their native country.¹⁶⁰

155. Roberto G. Gonzales, *Wasted Talent and Broken Dreams: The Lost Potential of Undocumented Students*, IMMIGR. POL’Y IN FOCUS, Oct. 2007, at 3, available at <http://www.immigrationpolicy.org/index.php?content=f071001> (explaining that many undocumented students cannot afford to attend college since they are not eligible for most forms of financial aid).

156. *Plyler*, 457 U.S. at 220 (referencing the argument that once undocumented immigrants reach the age of eighteen, they are able to remove themselves from the United States and, therefore, no longer qualify as “special members of this underclass”).

157. See NPR, HENRY J. KAISER FAM. FOUND. & HARV. UNIV. JOHN F. KENNEDY SCH. OF GOV’T, IMMIGRATION SURVEY 6–7 (2004), <http://www.kff.org/kaiserpolls/upload/Immigration-in-America-Summary.pdf> (indicating that a large number of immigrants do not want to move back to their country of origin).

158. See Janice Alfred, *Denial of the American Dream: The Plight of Undocumented High School Students Within the U.S. Educational System*, 19 N.Y.L. SCH. J. HUM. RTS. 615, 616 (2003) (“Since they were raised in the United States during their formative years, they consider themselves Americans. In fact, most know no other culture other than that of the United States, as their ties with their native countries were severed years ago when they immigrated to the United States with their parents.”).

159. See NPR, HENRY J. KAISER FAM. FOUND. & HARV. UNIV. JOHN F. KENNEDY SCH. OF GOV’T, IMMIGRATION SURVEY 6–7 (2004), <http://www.kff.org/kaiserpolls/upload/Immigration-in-America-Summary.pdf> (illustrating, via survey, how a majority of immigrants consider the United States to offer better opportunities than their respective countries of origin).

160. Deborah Bulkeley & Erin Stewart, *Education Dilemma for Illegals*, DESERET MORNING NEWS (Salt Lake City), Jan. 29, 2007, at A01, available at <http://deseretnews.com/dn/view/0,1249,655192138,00.html> (referring to a statement made by an undocumented immigrant, brought to the United States by her parents, who does not want to return to Mexico).

Much of the Court's reasoning for protecting the undocumented aliens in *Plyler* focused on the importance of education.¹⁶¹ The Court noted the vital role public schools and education play in preparing individuals to "lead economically productive lives to the benefit of us all."¹⁶² Denying select groups the opportunity to "absorb the values and skills upon which our social order rests," could create significant social costs that America can not afford to bear.¹⁶³ The Court in *Plyler* recognized the importance of educating *all* individuals despite their immigration status. Moving forward without extending the *Plyler* decision to protect this specific group of undocumented immigrant students who want to sit for state bar exams perpetuates the creation of an "underclass" of individuals within America's borders,¹⁶⁴ which is the exact circumstance the Supreme Court sought to avoid.

B. *Applying In re Griffiths to Undocumented Aliens*

In addition to providing equal protection to illegal aliens under the Fourteenth Amendment, the Supreme Court also struck down state laws that exclude aliens from the practice of law based on violations of the Equal Protection Clause.¹⁶⁵ The Supreme Court made clear that "classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny."¹⁶⁶ In *In re Griffiths*, the Court held that Connecticut adopted a suspect classification by preventing resident aliens from practicing law in the state.¹⁶⁷ By applying strict scrutiny, "the Court held that aliens could be lawyers in the United States, and that a law completely precluding them from becoming lawyers would be unconstitutional."¹⁶⁸ Historically, the Court has only applied strict scrutiny to cases dealing

161. *Plyler*, 457 U.S. at 221 ("[E]ducation has a fundamental role in maintaining the fabric of our society.").

162. *Id.* ("In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all.").

163. *Id.* (identifying social costs like: passing along the values ingrained in American society, preserving the United States' democratic system of government, preparing citizens to effectively participate in the United States' open form of political system, and preparing individuals to lead "economically productive lives" to the benefit of America).

164. *Id.* at 219 ("The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.").

165. *In re Griffiths*, 413 U.S. 717, 717 (1973) ("Connecticut's exclusion of aliens from the practice of law violates the Equal Protection Clause of the Fourteenth Amendment.").

166. *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (discussing the level of scrutiny the courts apply to issues that deal with alienage).

167. *In re Griffiths*, 413 U.S. at 721–23 (stating that classifications based on alienage are inherently suspect).

168. Kristen L. Beckman, *Banned from the Bar: Classification of the Temporary Alien in Louisiana*, 51 LOY. L. REV. 139, 149 (2005) (citing the holding in *In re Griffiths*).

with resident aliens and rejected any claims that illegal aliens are part of a suspect class.¹⁶⁹ The Court has already addressed the issue of whether illegal aliens should be able to sit for state bar exams and practice law in two separate cases. In *Plyler*, the Court made an exception for a certain class of undocumented aliens to receive a greater standard of review than rational basis.¹⁷⁰ In *Griffiths*, the Court held that citizenship is not a necessary prerequisite to sit for the bar exam.¹⁷¹ When applying the law from both of these holdings to a *Plyler* student who wants to take the bar exam, the Court should afford them equal protection under the Fourteenth Amendment.

Although the decision in *In re Griffiths* was based on facts involving a plaintiff who was a permanent resident, the Court failed to specifically address this factor in their reasoning.¹⁷² Nowhere in the opinion does Justice Powell suggest that the term “resident alien” is limited to someone who entered the county and remains here only on a temporary or immigrant visa.¹⁷³ The Court simply held that a state can not make a *citizenship* requirement for applicants that want to take the state’s bar examination.¹⁷⁴ The Court’s failure to address the issue relating to the immigration status of the alien leaves room for a broad interpretation of the law in *Griffiths*.

The State Bar Examining Committee (the Committee) argued that, as an officer of the court, a lawyer possesses special duties and responsibilities.¹⁷⁵ Due to the “special role of the lawyer,” both the courts and the

169. See *Plyler*, 457 U.S. at 219 n.19 (“We reject the claim that ‘illegal aliens’ are a ‘suspect class.’ No case in which we have attempted to define a suspect class . . . has addressed the status of persons unlawfully in our country.”).

170. *Id.* at 230.

171. *In re Griffiths*, 413 U.S. at 729.

172. Kristen L. Beckman, *Banned from the Bar: Classification of the Temporary Alien in Louisiana*, 51 LOY. L. REV. 139, 148 (2005) (alluding to the fact that the Court knew that the plaintiff was a citizen of the Netherlands and had no intention of renouncing her citizenship).

173. *Wallace v. Calogero*, 286 F. Supp. 2d 748, 762 (E.D. La. 2003).

Though *Griffiths* was an immigrant alien, the *Griffiths* Court did not use the statutory term “immigrant” in its holding. In fact, the Court only briefly mentioned the Plaintiff’s immigration status in its recitation of the facts and in a footnote. Rather, the Court used the inclusive term “resident alien.” Had the Court intended to rest its holding on the immigration status of the alien, the Court would have used the statutory language. If the Court wished to restrict its holding to immigrant aliens, i.e. permanent resident aliens, it could have used the term “immigrant alien.” The Court did not. *Id.* (footnote omitted).

174. *In re Griffiths*, 413 U.S. at 717–18.

175. *Id.* at 723 (“[A] lawyer is an ‘officer of the court’ As such, a lawyer has authority to ‘sign writs and subpoenas, take recognizances, administer oaths and take depositions and acknowledgements of deeds.’”).

public demand the utmost loyalty, confidence, and respect of persons working in the profession.¹⁷⁶ An alien does not swear allegiance to the United States and, therefore, could possess a conflict of loyalties between his responsibilities as a lawyer and the interest of his native county.¹⁷⁷ Therefore, the Committee concluded that the state of Connecticut was justified in excluding aliens from the practice of law.¹⁷⁸ The Court reasoned that alien lawyers have no conflict of loyalties between their allegiance to a foreign power and faithfully protecting their client's interests.¹⁷⁹ Furthermore, the duties and responsibilities of lawyers are not so unique as to only entrust them to citizens.¹⁸⁰

The Committee also argued that citizenship is simply inherent in the definition of a lawyer¹⁸¹ by reasoning that a lawyer is a public "office holder."¹⁸² The Committee bolstered this argument by noting that aliens are disqualified from holding public office or voting due to their lack of citizenship.¹⁸³ Therefore, since the Committee claimed that a lawyer is also an "office holder," citizenship is a necessary prerequisite for lawyers as well.¹⁸⁴ The Court stated that a lawyer is not a public "office holder,"¹⁸⁵ and "although states may legally discriminate against perma-

176. *Id.* at 723–24 (“[T]he courts not only demand (lawyers’) loyalty, confidence and respect but also require them to function in a manner which will foster public confidence in the profession and consequently, the judicial system.” (citation omitted)).

177. *Id.* at 724 (“[T]he Committee concludes that a resident alien lawyer might in the exercise of his functions ignore his responsibilities to the courts or even his clients in favor of the interest of a foreign power.”).

178. *Id.* at 723 (“[T]he special role of the lawyer justifies excluding aliens from the practice of law.”).

179. *In re Griffiths*, 413 U.S. at 724 (“Certainly the Committee has failed to show the relevance of citizenship to any likelihood that a lawyer will fail to protect faithfully the interest of his clients.”).

180. *Id.* (“It is [sic] no way denigrates a lawyer’s high responsibilities to observe that the powers ‘to sign writs and subpoenas, take recognizances, (and) administer oaths’ hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens.”).

181. *Id.* at 727 (“[L]awyers must be citizens almost as a matter of definition.”).

182. *Id.* at 728 (“Offered in support of the claim that the lawyer is an ‘office holder’ in this sense is an enhanced version of the proposition . . . that he is an ‘officer of the court.’”).

183. *Id.* (“These and numerous other federal and statutory and constitutional provisions reflect, the Committee contends, a pervasive recognition that ‘participation in the government structure as voters and office holders’ is inescapably an aspect of citizenship.”).

184. *In re Griffiths*, 413 U.S. at 728 (concluding that because a lawyer is an “office holder,” like the President or members of Congress, he too should be required to be a citizen in order to practice law).

185. *Id.* at 729 n.21 (“Because the Committee has failed to establish that the lawyer is an ‘office holder,’ we need not and do not decide whether there is merit in the general argument and, if so, to what offices it would apply.”).

ment aliens when they would serve in a governmental capacity, the implication of this decision is that states can not discriminate against aliens who wish to serve as lawyers.”¹⁸⁶ A lawyer is not an officer of the court in the ordinary meaning of the term, nor “so close to the political process as to make him a formulator of government policy.”¹⁸⁷ Based on this reasoning the Court concluded that aliens are not excluded from the practice of law.¹⁸⁸

These same principles can be applied to undocumented immigrants who have been educated in the United States due to *Plyler* and want to sit for the state bar exam. The law handed down in the *Griffiths* decision is not limited to resident aliens. “[I]f the Court meant for *In re Griffiths* to be binding solely on permanent resident aliens, then it would have used language signifying its desire.”¹⁸⁹ While the *Griffiths* case concerns resident aliens and not illegal aliens, it provides a logical line of reasoning that aids in answering the question of whether undocumented students should be able to sit for the bar exam. If an undocumented student was denied permission to take a state’s bar exam, many of the same arguments made in *Griffiths* would arise again.

C. *LeClerc v. Webb*—An Examination of the Issue Through Nonimmigrants

Another case that is fundamentally important to the analysis of the issue at hand is *LeClerc v. Webb*.¹⁹⁰ When examining the holding passed down by the Fifth Circuit Court of Appeals in *LeClerc v. Webb*, it is evident that the court’s reasoning for not allowing nonimmigrants to sit for the Louisiana bar exam could also apply to undocumented aliens as well. Therefore, the *LeClerc* decision is worth analyzing in order to expose the flaws in the court’s reasoning and further show why undocumented aliens, in particular, should qualify to sit for the bar exam.

The plaintiffs in *LeClerc* argued that nonimmigrant aliens are a suspect class under *In re Griffiths* and “state laws affecting them are subject to strict scrutiny[.]”¹⁹¹ The court in *LeClerc* recognized that the Supreme

186. Kristen L. Beckman, *Banned from the Bar: Classification of the Temporary Alien in Louisiana*, 51 LOY. L. REV. 139, 157–58 (2005) (citing the holding in *Wallace v. Calogero*, 286 F. Supp. 2d 748 (E.D. La. 2003)).

187. *In re Griffiths*, 413 U.S. 717, 728 (1973).

188. *Id.* (citing the conclusion of the case).

189. Kristen L. Beckman, *Banned from the Bar: Classification of the Temporary Alien in Louisiana*, 51 LOY. L. REV. 139, 157–58 (2005) (citing the holding in *Wallace v. Calogero* 286 F. Supp. 2d 748 (E.D. La. 2003)).

190. 419 F.3d 405 (5th Cir. 2005).

191. *LeClerc v. Webb*, 419 F.3d 405, 415 (5th Cir. 2005) (advancing the argument that nonimmigrant aliens are a suspect class deserving heightened scrutiny).

Court applies strict scrutiny review to classifications based on alienage and that nonimmigrant aliens have never been differentiated from this specific classification.¹⁹² Despite this recognition of previous Supreme Court rulings, the court refused to grant a heightened level of review to nonimmigrant aliens.¹⁹³

The court in *LeClerc* distinguished alienage classification between immigrant and nonimmigrant aliens due to the transience of nonimmigrants.¹⁹⁴ The court declared nonimmigrants as transient due to the nature of the visas they use to enter the country.¹⁹⁵ Nonimmigrants have to stipulate that they have no intention of relinquishing their citizenship in their home country and are admitted to the United States for a temporary period of time.¹⁹⁶ The court stated that nonimmigrant aliens, compared to immigrant aliens, lacked “legal capacity” due to their temporary connection to the United States.¹⁹⁷ The court used this as the basis for their reason in denying the nonimmigrant alien lawyers the right to sit for the bar.

By making the aforementioned distinction, the court “misconstrues precedent and misapplies equal protection analysis.”¹⁹⁸ In the past, the Supreme Court never differentiated between immigrants and nonimmigrants in deciding whether to provide aliens equal protection of the

192. *Id.* (concluding that the Louisiana rule requiring United States citizenship to qualify for admission to the Bar is subject to rational basis review “[d]espite some ambiguity in Supreme Court precedent”).

193. *Id.* at 419 (“[P]recedent does not support the proposition that nonimmigrant aliens are a suspect class entitled to have state legislative classifications concerning them subjected to strict scrutiny.”).

194. *Id.* at 417 (“[Nonimmigrants’] lack of legal capacity, unlike that of immigrant aliens, is tied to their temporary connection to this country.”).

195. *Id.* at 418–19.

Nonimmigrant aliens are admitted to the United States only for the duration of their status, and on the express condition they have “no intention of abandoning” their countries of origin and do not intend to seek permanent residence in the United States. They are admitted, remain, and must depart at the discretion of the Attorney General. *Id.*

196. *LeClerc*, 419 F.3d at 417 (“[N]onimmigrant aliens—who ordinarily stipulate before entry to this country that they have no intention of abandoning their native citizenship, and who enter with no enforceable claim to establishing permanent residence or ties here—need not be accorded the extraordinary protection of strict scrutiny . . .”).

197. *Id.* (“But their lack of legal capacity, unlike that of immigrant aliens, is tied to their temporary connection to this country.”).

198. Recent Cases, *Fifth Circuit Holds that Louisiana Can Prevent Nonimmigrant Aliens from Sitting for the Bar*, 119 HARV. L. REV. 669, 670 (2005) (“Closer examination reveals a short-sighted and bureaucratic decision that misconstrues precedent and misapplies equal protection analysis.”).

laws.¹⁹⁹ Although, on two previous occasions, the Court found it unnecessary to rule on the equal protection issue in cases involving nonimmigrant aliens asserting equal protection claims,²⁰⁰ the Court did have the opportunity to exclude nonimmigrant aliens from the alienage suspect classification, but chose to remain silent on the issue.²⁰¹ For that reason, the Court created the presumption that nonimmigrant aliens “are part of the alien suspect class and therefore, laws that discriminate against them are inherently suspect and should be subjected to strict scrutiny review.”²⁰²

In addition, the governing case law has downplayed the significance of an alien’s transient nature.²⁰³ In *Griffiths*, the Supreme Court held that an immigrant’s ability to remain permanently in the United States was not a factor.²⁰⁴ The plaintiff in *Griffiths* had no intention of renouncing her citizenship to her native country.²⁰⁵ Her transient ability to leave the United States and return home to her native country was not a concern of the Court.²⁰⁶ It is apparent that “the *Griffiths* Court believed that resident aliens could simultaneously express the desire to retain foreign citizenship and have a highly protected right to serve as an American attorney.”²⁰⁷

Additionally, nonimmigrants know the exact date in which their visa expires and the date that they must leave the country.²⁰⁸ Knowing this information allows nonimmigrant lawyers to prepare for a case around

199. *See id.* (“[T]he Supreme Court never differentiated equal protection review based on status as an immigrant or a nonimmigrant alien . . .”).

200. *LeClerc*, 419 F.3d at 428 (“Twice the Court found it unnecessary to reach the Equal Protection issue.”).

201. *See id.* at 429 (discussing the fact that the Court had the opportunity to distinguish between immigrant and nonimmigrant aliens but declined to rule on the issue in the holding).

202. *Id.* (Stewart, J., concerning in part and dissenting in part).

203. *See Recent Cases, Fifth Circuit Holds that Louisiana Can Prevent Nonimmigrant Aliens from Sitting for the Bar*, 119 HARV. L. REV. 669, 673 (2005) (“[T]he governing cases also appear to downplay the relevance of aliens’ transience.”).

204. *In re Griffiths*, 413 U.S. at 726 n.18 (“We find no merit in the contention that only citizens can in good conscience take an oath to support the Constitution.”).

205. *Id.* at 718 n. 1 (“She has not filed a declaration of intention to become a citizen of the United States . . . and had no present intention of doing so.”).

206. *See Recent Cases, Fifth Circuit Holds that Louisiana Can Prevent Nonimmigrant Aliens from Sitting for the Bar*, 119 HARV. L. REV. 669, 673 (2005) (“The controlling precedent cited by the *LeClerc* court did not highlight alien transience as a concern.”).

207. *Id.* at 674 (summarizing the lack of concern that the *Griffiths* Court had towards immigrants’ transient nature).

208. *See* Kristen L. Beckman, *Banned from the Bar: Classification of the Temporary Alien in Louisiana*, 51 LOY. L. REV. 139, 159 (2005) (“[A]liens know when they are leaving the country.”).

their departure date if they are required to leave the country.²⁰⁹ Therefore, if their departure date poses a conflict, then the nonimmigrants could simply refuse the case.²¹⁰ The transient nature of nonimmigrants is no different than lawyers who plan to change occupations or move to a different state.²¹¹ The Supreme Court did not highlight the transience of immigrants as a concern, and any argument contrary to the Court's holding goes against precedent.

The *LeClerc* case deals with many of the same issues that an undocumented immigrant would face if he or she tried to sit for the bar and was denied due to his or her immigration status. Like nonimmigrant aliens, undocumented aliens could potentially be labeled as transient because they also enter the United States without officially abandoning their native citizenship. *LeClerc* and the arguments contrary to the decision provide a level of insight into how the courts would potentially react to the question of whether an undocumented immigrant should be able to sit for the bar exam.

IV. Legal Analysis II

As a growing number of undocumented immigrants enter the United States each year,²¹² the cry for a solution to the current immigration problems grows louder. For the purposes of this comment, the focus on the current immigration reform is narrowed to issues centering around *Plyler* students who are prevented from furthering their education or finding professional jobs due to their undocumented status. These children represent one of the "most vulnerable groups in the United States."²¹³ Therefore, focusing on solutions that pertain to this specific class of undocumented immigrants provides a unique opportunity to make enormous strides in current immigration reform. For the first time,

209. *See id.* (“[Nonimmigrants] can prepare their clients’ cases around their departure should they choose to leave . . .”).

210. *See id.* (“If a [nonimmigrant’s] case were to conflict with his departure date, he would likely refuse the case.”).

211. *See id.* at 159–60 (“Although lawyers might be reluctant to refuse cases, temporary aliens are no different than lawyers planning to move to a different state.”).

212. *Undocumented Immigrants Close to 11 Million*, MSNBC, Mar. 21, 2005, <http://www.msnbc.msn.com/id/7255409> (“The population of undocumented residents in the United States increased by about 23 percent from 8.4 million in the four-year period . . .”).

213. WALTER A EWING, IMMIG. POL. CTR., *A STUDY IN DISTORTION: FAIR TARGETS IMMIGRANT CHILDREN* (2003), <http://www.immigrationpolicy.org/index.php?content=fc030822> (“FAIR’s attempt to scapegoat immigrant children for the fiscal consequences of the present economic downturn is not only empirically baseless, but comes across as a cynical attempt to cast blame upon one of the most vulnerable groups in the United States.”).

a large number of the undocumented immigrant population, educated in the United States, could now have a legitimate opportunity to “repay the nations investment in their public education.”²¹⁴

Educational opportunities afforded to undocumented immigrants in the United States create a new quandary for these students once they graduate or attempt to sit for the bar exam.²¹⁵ The students that benefited from the *Plyler v. Doe* decision are now beginning to attend colleges and law schools in the United States.²¹⁶ Although these students succeeded in their education and can excel in college, their immigration status does not change.²¹⁷ These students are educated, but prevented from working or sitting for the bar exam solely due to their immigration status. The fact that the current system only provides educational opportunities from kindergarten through college proves to be the heart of this comment.

A. *Fast-track Citizenship*

The best option for finding a solution to the current immigration problem is to substantially increase the number of legal immigrants.²¹⁸ The undocumented immigrant students who were brought to the United States through no fault of their own and educated in the American school system deserve an accelerated path to legal status.²¹⁹ Providing these undocumented immigrants a path to legalization “would not be a hand-out

214. EDUC. SECTOR, REWARD HARD-WORKING IMMIGRANT STUDENTS 16 (2007), http://www.educationsector.org/usr_doc/Idea6_Rewardhard-WorkingImmigrantStudents.pdf.

215. See Miriam Jordan, *Illegal Immigrants' New Lament: Have Degree, No Job*, WALL ST. J. ONLINE, Apr. 26, 2005, <http://www.online.wsj.com/article/SB111447898329816736.html> (“She is part of an emerging class of young immigrants facing a new quandary: They are educated, but unable to get work because of their immigration status.”).

216. See *id.* (“Ms. Garibay, 24 years old, who came to the U.S. as a child, is an illegal immigrant. She is part of an emerging class of young immigrants facing a new quandary: They are educated, but unable to get work because of their immigration status.”).

217. See *id.* (detailing the situation in Texas where a new crop of illegal immigrant students will be graduating from public universities only to face an uncertain future involving few, if any, job prospects due to their illegal status).

218. See Gary Becker, *The Wise Way to Stem Illegal Immigration*, BUS. WEEK, Apr. 26, 2004, available at http://www.businessweek.com/magazine/content/04_17/b3880039_mz007.htm (recognizing an extreme, but straight-forward solution that one journalist offers to the illegal immigration problem in the United States).

219. EDUC. SECTOR, REWARD HARD-WORKING IMMIGRANT STUDENTS 1 (2007), http://www.educationsector.org/usr_doc/Idea6_Rewardhard-WorkingImmigrantStudents.pdf (distinguishing this group of undocumented immigrants from the large population of undocumented immigrants).

or an amnesty but rather an earned opportunity.”²²⁰ These undocumented immigrant students are different than any other class of undocumented immigrants currently present within the United States. They will be able to get professional jobs and “are likely to make a long-term commitment to the country.”²²¹ Furthermore, granting these students legal status gives them an opportunity to repay a nation that already invested in their education.²²² Providing a path to legalization not only enables these undocumented immigrants to finally give back to the nation that educated them, but also presents the government a legitimate opportunity to institute a realistic immigration reform policy. This solution eliminates these students’ undocumented status: the status which prevents them from passing the background check necessary in order to sit for the bar exam.

Since 2001, Congress has tried to pass a similar form of legislation that would potentially grant legal status to these students.²²³ The DREAM Act has been introduced in Congress during the last three sessions, but has failed to pass each time. In the most recent Congress, the Act fell eight votes short of the sixty-vote supermajority necessary for Congress to begin debates.²²⁴ Opponents of the bill argue that it is a form of amnesty and would create an incentive for undocumented immigrants to bring their children into America.²²⁵ Although the DREAM Act continues to be rejected, its presence shows the government’s awareness of a group of undocumented immigrants who are deserving of a path to citizenship.

220. *Id.* (commenting on the fact that this specific group of undocumented immigrants have worked their way to where they are today and enabling them to become legal residents or citizens of the United States would benefit the country).

221. Gary Becker, *The Wise Way to Stem Illegal Immigration*, BUS. WEEK, Apr. 26, 2004, available at http://www.businessweek.com/magazine/content/04_17/b3880039_mz007.htm (“Preference should be given to younger persons who will get jobs and are likely to make a long-term commitment to the country, such as the many men and women who want to study at American universities.”).

222. EDUC. SECTOR, REWARD HARD-WORKING IMMIGRANT STUDENTS 16 (2007), http://www.educationsector.org/usr_doc/Idea6_Rewardhard-WorkingImmigrantStudents.pdf (suggesting that a plan to give expedited legal status to undocumented students would be in the public’s best interest).

223. Fernando Quintero, *Carson GI Fights for American Dream*, ROCKY MOUNTAIN NEWS, Aug. 17, 2007 (indicating that the DREAM Act, a proposal first introduced in Congress in 2001, failed to garner the necessary support in June 2008).

224. Nicole Gaouette & Johanna Neuman, *Senate Rejects Kids Citizenship Measure*, L.A. TIMES, Oct. 25, 2007 (“The vote on the proposal was 52 to 44, short of the 60-vote margin needed to prevent a filibuster and begin debate.”)

225. *Id.* (“Opponents called the bill a form of amnesty and argued that it would create incentives for illegal immigrants to cross the border with their children.”).

B. *Undocumented Student Visas*

The current law makes it very difficult for undocumented immigrant students to become legal and continue their education in the United States after they graduate from high school.²²⁶ Most aliens who wish to study at America's colleges or universities come to the United States on an F-1 student visa. F-1 student visas are given to nonimmigrants who wish to enter the United States temporarily in order to study at the nation's academic institutions.²²⁷ In order to qualify for an F-1 student visa, the alien must prove that he has ties to his native country, in the form of a residence, and that he does not intend to immigrate to the United States permanently.²²⁸ The student must also prove that he or she is able to financially afford the expected tuition for the college or university he or she plans to attend.²²⁹ Meeting these requirements can prove to be virtually impossible for any *Plyler* student. Currently, undocumented immigrant students cannot acquire F-1 student visas because these visas must be acquired from the immigrant's native country. Undocumented immigrants cannot reside in the United States and then apply for a student visa. In order to apply, they will have to leave the United States, and once they leave the unlawful presence bar will apply.

A change in the law is needed in order to encourage more undocumented immigrant students to legalize their status while still allowing them to further their education in the United States. One path of legalization for *Plyler* students, so they may sit for state bar exams, would be to create a new undocumented immigrant student visa. Congress could establish this new visa in recognition of the *Plyler* student's accomplish-

226. Deborah Bulkeley, *Would HB7 Create a Catch-22?*, DESERET MORNING NEWS (Salt Lake City), Feb. 12, 2006, available at <http://deseretnews.com/dn/view/0,1249,635183746,00.html> (“[I]t’s difficult or impossible for an undocumented student to leave the country and obtain a student visa for readmission.”).

227. 8 U.S.C.A. § 1101(a)(15)(F)(i) (2006) (defining a particular class of nonimmigrant aliens).

[A]n alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study . . . and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution *Id.*

228. *Id.*; see also Deborah Buckley & Erin Stewart, *Education Dilemma for Illegals*, DESERET MORNING NEWS (Salt Lake City), Jan. 29, 2007, at A01, available at <http://deseretnews.com/dn/view/0,1249,655192138,00.html> (“[I]n order to qualify for a student visa, she’d need to prove that she has ties to Mexico and doesn’t intend to immigrate.”).

229. See Deborah Bulkeley & Erin Stewart, *Education Dilemma for Illegals*, DESERET MORNING NEWS (Salt Lake City), Jan. 29, 2007, at A01, available at <http://deseretnews.com/dn/view/0,1249,655192138,00.html> (recounting how one particular immigrant student would have to show the financial ability to pay for college to obtain a student visa).

ments in school. Congress recently enacted statutes that added multiple new nonimmigrant visa categories to the list of visas already available.²³⁰ An undocumented immigrant student visa could function similar to the “Z” visa currently before the U.S. Senate.²³¹ This visa should allow undocumented immigrants who have graduated from a high school in the United States to continue their education in American undergraduate colleges or universities. Theoretically, the requirements to obtain this visa could mirror the in-state tuition requirements for undocumented immigrants, such as the requirement that the student must gain admittance to an accredited four-year university.²³² Implementing such a strict requirement encourages these students to excel in the primary and secondary levels of education so they are able to remain in America and attend college. Providing undocumented immigrant students with visas to attend college is a realistic solution that addresses a serious immigration concern in the United States.

C. *Deferred Action*

“Deferred action” is an administrative program “that allows the government to defer or postpone taking action to remove an individual where there is no other relief available to the individual.”²³³ Essentially, it is a policy decision that allows for an “administrative stay of deportation.”²³⁴ Deferred action was first made public when John Lennon, former member of the Beatles, and his wife, Yoko Ono, over-stayed their visitor visa in the United States and were placed in deportation proceed-

230. STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 402 (Foundation Press 2005) (1992) (referencing both the T-visas and U-visas added in 2000). “The T-visas are for victims of ‘a severe form of trafficking in persons’ who are physically present in the United States” *Id.* “The U-visas are for those who have ‘suffered substantial physical or mental abuse’ as a result of several enumerated acts of violence.” *Id.*

231. UNITED STATES IMMIGRATION SUPPORT, http://www.usimmigrationsupport.org/visa_z.html (last visited Aug. 27, 2008) (discussing a new visa that proposes to legalize undocumented immigrants living in the United States).

232. *See generally* ANN MORSE, NAT’L CONF. OF STATE LEG., *IN-STATE TUITION AND UNAUTHORIZED IMMIGRANT STUDENTS* (2006), <http://www.ncsl.org/programs/immig/tuitionandimmigrants.htm> (listing requirements necessary for an undocumented immigrant to qualify for in-state tuition: graduating from a state high school, having two to three years of residency within the state, applying to a state college or university, and signing an affidavit promising to become a legal citizen).

233. JOSEPH A. VAIL, *ESSENTIALS OF REMOVAL AND RELIEF* 254 (Stephanie L. Browning ed., American Immigration Lawyers Association 2006).

234. Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 *SAN DIEGO L. REV.* 819, 823 (2004).

ings.²³⁵ Prior to this, the program was “shrouded in secrecy” and found in unpublished portions of the Immigration and Naturalization Service (INS) Operating Instructions.²³⁶ After the Lennon litigation, the U.S. Attorney for the Southern District of New York “ordered these provisions to be published, and thus the deferred action policy was clarified and formally placed in the public domain”²³⁷ Although deferred action has since been withdrawn from the Operations Instructions, relief through the program is still available.²³⁸

The factors the government may consider are: “presence of humanitarian or sympathetic factors; likelihood of ultimately removing the alien; likelihood of generating bad publicity by enforcing the law; and the person’s membership in a group whose deportation has been given high priority status.”²³⁹ Deferred action is most commonly used in Violence Against Women Act (VAWA) cases; VAWA enables battered spouses to remain in the United States as a lawful permanent resident.²⁴⁰ Under VAWA, the court grants an individual immigration relief through deferred action so that they may seek safety from the abuser and not be forced to remain in a battery situation.²⁴¹ In addition to a permit allowing continued residence in the United States, a major benefit of receiving deferred action in VAWA cases is the grant of work authorization.²⁴²

Deferred action a realistic solution that provides an opportunity for *Plyler* students to remain in the United States under color of law and become eligible for public benefits. This form of relief for *Plyler* students

235. *Id.* at 820 (noting that the Lennons were refused additional time as visitors in the United States and were subjected to deportation proceedings).

236. *Id.*

237. *Id.* at 824 (explaining that the guidelines of the deferred action program were originally contained in the unpublished portion of the INS Operating Instructions, and thus only available to INS personnel).

238. IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK: A COMPREHENSIVE OUTLINE AND REFERENCE TOOL 584 (American Immigration Law Foundation 2000) (1990).

239. *Id.*

240. Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819, 836 (2004) (allowing certain battered aliens to obtain immigration relief and ultimately seek safety and escape from the abuser).

241. See JOSEPH A. VAIL, ESSENTIALS OF REMOVAL AND RELIEF 255 (Stephanie L. Browning ed., American Immigration Lawyers Association 2006); see also Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819, 836 (2004) (providing a method for “immigration relief without the abuser’s assistance or knowledge”).

242. See JOSEPH A. VAIL, ESSENTIALS OF REMOVAL AND RELIEF 255 (Stephanie L. Browning ed., American Immigration Lawyers Association 2006).

could function much the same way it does in VAWA situations. *Plyler* students are similar to individuals in VAWA situations in that they, too, are seeking relief from deportation and are not responsible for the current state of their situation. The majority of *Plyler* students are not coming out of abusive relationships or considered “damaged”; they are educated individuals who can positively contribute to the U.S. community. Furthermore, the granting of work authorization would allow the *Plyler* students to use their education and sit for the bar exam. Deferred action is a pragmatic remedy that allows a stay of deportation so that *Plyler* students can continue to flourish and give back to the community.

D. *Waivers for Grounds of Inadmissibility*

Another viable solution exists in the form of creating a system of specific waivers or exemptions for undocumented immigrant students who try to go the legal route by returning to their native country so they can obtain an F-1 visa and eventually re-immigrate back to the United States.²⁴³ Many undocumented immigrant students who attempt to follow the laws and attend college in America face many difficulties when trying to return to and from their native country.²⁴⁴ Not only could they face a three or ten year ban from the country if they acquire “unlawful presence” before returning to their native country,²⁴⁵ but they also must possess “sufficient ties outside the U.S. to prove they do not intend to immigrate.”²⁴⁶

One suggestion is to waive the inadmissibility status of undocumented immigrant students who stay in America for an extended period of time after they graduate high school. Naturally, any change to the law will still include a limit for how long these students could stay in America after

243. See Deborah Bulkeley, *Would HB7 Create a Catch-22?*, DESERET MORNING NEWS (Salt Lake City), Feb. 12, 2006, available at <http://deseretnews.com/dn/view/0,1249,635183746,00.html> (recounting the story of an immigrant student who attempted to pursue a student visa by returning to his native country only to be denied because his mother had a pending business visa).

244. *Id.* (“But immigrant rights activists who oppose HB7 [which would repeal a 2002 law that allows undocumented students who attend a Utah high school for three years and graduate from college to bypass getting a student visa and to pay in-state tuition] say it’s difficult or impossible for an undocumented student to leave the country and obtain a student visa for readmission.”).

245. 8 U.S.C.A. § 1182(a)(9)(B)(i-iii) (2006) (discussing the statutory requirements for declaring an alien unlawfully present within the United States).

246. Deborah Bulkeley, *Would HB7 Create a Catch-22?*, DESERET MORNING NEWS (Salt Lake City), Feb. 12, 2006, available at <http://deseretnews.com/dn/view/0,1249,635183746,00.html> (discussing the statutes that pertain to undocumented immigrants students who remain in the America after they turn eighteen and international students who try to immigrate to America through F-1 visas).

they graduate, but prematurely declaring this specific class of undocumented immigrants “unlawfully present” negatively affects both these students and the country. Banning these students from the United States for three or ten years only encourages them to remain in the country undocumented. Therefore, it would be reasonable to create a waiver for the unfortunate consequences that these undocumented immigrants could potentially face when they leave the United States.

In addition, the F-1 visa requires that the student show that he resides in a foreign country and has no intention of abandoning that residence.²⁴⁷ The U.S. State Department describes student visas as “temporary, non-immigrant visas, meaning that applicants must ‘show sufficient ties outside the U.S. to prove they do not intend to immigrate.’”²⁴⁸ Proving this requirement is potentially difficult for many undocumented immigrant students. Many of these undocumented immigrant students who are educated in America still have family members living in the United States. Having any family living in the United States creates a strong presumption that the student intends to immigrate.²⁴⁹ In addition, their “ties” to their native country are very few or nonexistent. This proves to be another requirement that would require a waiver in order for an undocumented student to realistically obtain an F-1 visa.

Although this solution would require numerous changes to the current visa procedures and potentially prejudice international students who are not previously undocumented in America, it provides a realistic solution to the problem. Not only would this solution provide *Plyler* students a viable option to continue their education in America but would also encourage these students to comply with current immigration law by returning to their native country and re-immigrate legally.

V. Conclusion

When a group of students were asked if other high school students should be able to pursue their dream of attending college, all the students unanimously answered “yes” to the question.²⁵⁰ When these same stu-

247. 8 U.S.C.A. § 1101(a)(15)(F) (2006) (defining the term “immigrant” and the specific exceptions for certain classes of nonimmigrant aliens, including “an alien . . . having a residence in a foreign country which he has no intention of abandoning”).

248. Deborah Bulkeley, *Would HB7 Create a Catch-22?*, DESERET MORNING NEWS (Salt Lake City), Feb. 12, 2006, available at <http://deseretnews.com/dn/view/0,1249,635183746,00.html> (describing one of the requirements that international students must meet in order to qualify for an F-1 student visa).

249. *Id.* (stressing the high burden imposed on applicants to prove they will actually return to their native country after completing their education in the United States).

250. Michael Bakal et al., *Undocumented Students Deserve Equality and Aid Despite Their Illegal Status*, GUARDIAN, Oct. 15, 2007, available at <http://ucsdguardian.org/index>.

dents were told that the students pursuing this dream were undocumented immigrants, their expressions and answers began to change.²⁵¹ Unfortunately, this is the attitude of many Americans today. With the current state of immigration in the United States, people tend to forget the human element of this complex issue. These students are often just as Americanized as any other citizen of the United States.²⁵²

Under the current law, when the estimated 65,000 undocumented students graduate from high school this year, they will then potentially add to the already staggering number of undocumented immigrants currently in the United States.²⁵³ By continuing under the current law, the problem with illegal immigration is only exacerbated. This comment is not advocating to give 65,000 undocumented immigrants a year amnesty, nor attempting to take any particular side of the immigration debate, but rather exposing an injustice against a group of students that were brought to America through no fault of their own, raised in the public school system, given opportunities to attend college and law school, then denied the right to practice law because of their immigration status. A child raised in the American education system who reaches adulthood and gains admittance to an American college or university should not then be denied social and educational benefits based solely on his or her immigration status.²⁵⁴ Laws affecting this specific group of undocumented immigrants need to be evaluated “on the basis of their moral merits.”²⁵⁵

By denying these undocumented immigrants the right to sit for state bar exams, the government is forcing these well-educated, Americanized students to work illegally, which leaves them with very few options if they

php?option=com_content&task=view&id=142&Itemid=3 (“[M]any students were asked the question: ‘Do you think students have a right to pursue their dreams of higher education?’ There was not one student that answered ‘no’ to the question.”).

251. *Id.* (“But when we would explain to our fellow students that the ones pursuing the dream were unauthorized immigrants, their expressions and even their answers would often change.”).

252. *See generally* Jonathan Casiano, *Undocumented Students Have a Dream Too*, STAR-LEDGER (Newark, N.J.), Apr. 2, 2006, at 24 (discussing how immigrant children are brought to America at a young age, raised in the school system and are essentially American).

253. Fernando Quintero, *Issue: Coming of Age*, ROCKY MOUNTAIN NEWS, June 15, 2006, at 10A (“An estimated 65,000 undocumented students graduate from U.S. public high schools each year.”).

254. Michael Bakal et al., *Undocumented Students Deserve Equality and Aid Despite Their Illegal Status*, GUARDIAN, Oct. 15, 2007, available at http://ucsdguardian.org/index.php?option=com_content&task=view&id=142&Itemid=3 (“[I]t would still be unacceptable to think that education or any social benefit should be denied to a person on the basis of their immigration status.”).

255. *Id.* (“Citizens must start to be critical, and this means evaluating our laws on the basis of their moral merits.”).

remain in America.²⁵⁶ Still, these students would rather stay in America, the country where they were raised, than return to their native country, a place that has little or no significance to them.²⁵⁷ The reality of the situation is that the majority of these students are not going to leave the United States. The current law is making the immigration situation in the United States worse rather than better.

If a change in the law is to take place, then what is the difference between allowing these educated and Americanized undocumented immigrants an opportunity to work in the country legally versus the free-for-all distribution of 55,000 green cards in the “green card lottery?”²⁵⁸ What kind of people do government officials want to let into this country? If the government gives green cards to a portion of these undocumented students, then at least they will know the type of person that they are allowing to come into America and work. Allowing this class of undocumented immigrants to sit for state bar exams provides legislators with a unique opportunity to propose a solution to the current immigration issue.

What is important to keep in mind is that this comment speaks to very specific group of undocumented immigrants. These are children that have been brought to the United States by their parents, educated as Americans, and have worked hard to get to where they are today.²⁵⁹ Most of these immigrants do not come from affluent backgrounds; they are forced to eventually struggle with issues related to poverty.²⁶⁰ Despite the many setbacks these students face, they still prove to excel both

256. Alecia Warren, *Legislation Would Penalize Universities for Letting in Undocumented Immigrants*, COLUMBIA MISSOURIAN, Apr. 4, 2006, available at <http://www.columbiainmissourian.com/stories/2006/04/04/legislation-would-penalize-universities-for-letting/> (“We aren’t giving these students any options, we’re forcing them as a society to either work illegally or work for cash [.]”).

257. *Id.* (“[C]hildren of undocumented workers . . . would rather stay in the United States, where they grew up, than return to the native country that now has little significance for them.”).

258. UNITED STATES IMMIGRATION SUPPORT, <http://www.usimmigrationsupport.org/greencardlottery.html> (last visited Aug. 27, 2008) (discussing the number of green cards available for the Green Card Lottery).

259. Dina M. Horwedel, *For Illegal College Students, an Uncertain Future*, BLACK ISSUES IN HIGHER EDUC., May 4, 2006, at 1, available at http://www.diverseeducation.com/artman/publish/article_5815.shtml (referencing the example of Amy Chen—an educated immigrant student who wishes to take the bar exam and eventually practice law).

260. *The American Dream*, <http://miminyork.blogspot.com/2005/04/american-dream.html> (Apr. 18, 2005, 7:56 EST) (describing this distinct group of undocumented immigrants as the “living embodiment of the American Dream”).

academically and socially.²⁶¹ Now they want to live in and contribute to the country that raised them.

Remember Amy Chen? Amy not only provides a face to this group of undocumented immigrants but also serves as a perfect example of an undocumented immigrant who was raised in America and now wants to legally give back to her community, but can't. As for right now, Amy is forced to work illegally in this country; and, although she still contributes to the American economic system, she is unable to reap the benefits of citizenship.²⁶² Amy's talents and potential are wasted due solely to her immigration status. It is time to make a change and recognize that helping a group of undocumented immigrants find a path to legalization so that they can sit for the bar, could be the start to turning the immigration problem into a solution. The current immigration law fosters and promotes the path to achieve this dream, but later turns around and denies it in the end. Change is necessary in order to keep America on the same path that this great nation started on hundreds of years ago, and the time for change is now.

261. *Id.* ("Most are not from affluent backgrounds, and to have avoided the social problems associated with poverty, not just avoided, but to have proved themselves to be so amazing, both academically and socially, is miraculous.").

262. *Id.*

[Amy] works a forty-hour week, pays for her own Health Insurance since her workplace does not provide this, has a bank account, credit cards, a driver's license (gained before new laws prohibited illegals from gaining such documentation), a social security number (not valid for employment) and is more American than I [the author] could ever hope to be. *Id.*