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PLYLER’S LEGACY: IMMIGRATION AND HIGHER EDUCATION IN THE 21ST CENTURY

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INTRODUCTION

In the Spring of 2008, U.S. voters watched with fascination as the Republican candidates for their party’s Presidential nomination argued over immigration policy, focusing especially on a topic that few had been involved in for many years—whether or not the undocumented should be allowed to attend college and receive resident tuition. Of course, the economy, the wars in Iraq and Afghanistan, trade policy, and other significant issues soon reasserted their primacy and the topic receded again, not even enjoying the full fifteen minutes of fame accorded such topics by the late Andy Warhol. Little has changed in the three years since then: the United


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States Congress still has not enacted either comprehensive immigration reform or the popular DREAM (Development, Relief, and Education for Alien Minors) Act, and, unimaginably, President Obama was heckled in Congress (“You Lie!”) when he discussed health care and immigrants.

Yet, the debate that emerged briefly in 2008 has since become a more sustained controversy: should undocumented students be able to attend public colleges and universities and, if so, should they pay in-state rates? Because this issue is inescapably tied to a Supreme Court decision almost three decades old, Plyler v. Doe, we must first turn to the 1982 holding that undocumented schoolchildren can attend elementary and secondary public schools without regard to their immigration status. As scholars have pored over the many treatments of Plyler, it has become possible to see its kaleidoscopic nature and thus come to appreciate anew its significance.

Justice William Brennan’s majority opinion in Plyler is amber-like, with several elements subsumed into its analysis. First, Justice Brennan held that the children’s illegal status was important, but not determinative. Federal immigration policy thus continued to evolve largely independently.
of educational access issues. After Plyler, not only did many of the undocumented children remain, but there were provisions in federal law that would make their legalization possible. Of course, Justice Brennan could not have foreseen the large scale legalization that would occur within five years of the case through the 1986 Immigration Reform and Control Act (IRCA).\textsuperscript{9} But there had historically been such provisions, through various means, and immigration status was, at the least, not immutable.

Second, he also refuted the more-obvious objections that Texas had raised about the cost and efficacy of undocumented children in school, characterizing these efforts as "ludicrously ineffectual,"\textsuperscript{10} a critique that surely is more apt today when the size of the illegal immigration stream is even more pronounced.\textsuperscript{11} If anything, subsequent federal efforts at curbing unauthorized immigration have failed spectacularly, although not because the efforts were half-hearted, as they surely have not been.\textsuperscript{12} Indeed, these ef-

10. 457 U.S. at 228.
forts have expanded to address the substantial role of employers in this complex transaction.\textsuperscript{13} Prior to the IRCA in 1986 and to other legislation directed at employer sanctions and employment-related restrictions, virtually all the onus of illegality had fallen upon employees and undocumented workers, not upon the corporations, companies, and individuals that actively recruited, hired, and exploited workers.\textsuperscript{14} Further, in several key cases that followed Plymouth, undocumented immigrants were placed outside the traditional protections of civil rights jurisprudence and safety laws, rendering them more vulnerable and employers less accountable.\textsuperscript{15}

Third, Justice Brennan’s equal protection analysis left virtually no role for state, county, or local efforts to deal with these issues outside the law, writ large, or to go after the children without immigration status who were brought by their parents to the United States. Even without invoking the broad contours of the preemption doctrine, he reasoned that equal protection can deny the states and other jurisdictions the authority to differentiate be-

\begin{thebibliography}{99}
\item 14. Id. at 787 (“In 1971, fifteen years before ICRA, California passed a law that prohibited employers from knowingly hiring unauthorized workers and threatened them with civil fines of $200 to $1000 for violation. Ten states and one city soon followed suit, passing similar legislation. In at least eight of those states, however, few cases were ever prosecuted under the laws, largely because employer sanctions cases were considered low law enforcement priority. With the passage of ICRA in 1986, the federal government took the lead.”). Indeed, the Supreme Court upheld Arizona’s employer-focused legislation as recently as May 2011 in Chamber of Commerce v. Whiting, No. 09-115, slip op. at 1 (9th Cir. May 26, 2011).
\end{thebibliography}
tween those citizens and noncitizens with permission to reside in the country and those who had no such permission (which he styled "inchoate permission"). In doing so, he acknowledged the unevenness of federal policy that tacitly encouraged foreign workers to come, even if there were no formal means to do so. This formulation strengthened the hand of the federal government to differentiate, but clearly limited the role of sub-federal governments to do so. It is this turn of events that has played out so surprisingly in the decades since Plyler: Americans' changing, increasingly complicated attitudes about immigrants and immigration have visibly manifested in state and local law as well as in private citizens' actions.

Paradoxically, in the early twenty-first century, there has been a rise in the country's anti-immigrant sentiment, especially in the growing enactment of state and local ordinances, some of which are playing themselves out in courts and legislatures. At the same time, as noted by immigration scholars as divergent in their views as Peter Schuck and Hiroshi Motomura, there have been widespread efforts to incorporate these children and undocumented families into the larger community, and not just in progressive enclaves, but in surprisingly mainstream and heartland areas. When Nebraska or Kansas pass statutes to allow the undocumented to establish resi-

17. Id.
19. Immigration Stories, (Peter Schuck & David A. Martin eds., Foundation Press 2005); Peter Schuck, In Diversity We (Sorta) Trust, AM. LAW. (Dec. 2007), at 83-4; Peter Schuck, Bordering on Folly, AM. LAW. (Oct. 2007).
dency in state colleges, something is afoot. When conservative U.S. Senator Orrin Hatch of Utah co-sponsors a major piece of legislation to provide legalization for undocumented college students, all political calculations and assumptions have to be reexamined. These efforts may be driven by the wider acceptance by citizen families, because community leaders and politicians have seen undocumented children play and study with their own, as they live near them, and employ them. Or, it may just be the emerging evident sense that immigrant communities bring a great deal to the polity, and that efforts to integrate them are better than building chimerical walls and undertaking Canute-like efforts to stem the tide. There may even be a sense that the United States needs new entrants lest we become aging societies like Italy and Japan, demographically imbalanced without replenishment through children and workers.

Since Plyler, we have seen widespread acceptance of the children into civic life, especially after the IRCA legalization of 1986, when so many of these families found themselves eligible for U.S. citizenship. The community has also seen the hot breath of nativists and restrictionists, a number of whom appear to be anti-Mexican, especially at the far end of the spectrum, where racial violence, vigilantism, and xenophobia reside. In between, there are many variations of opinion, as it should be in a large family or in a democracy.

It is evident that there is a large portion of the U.S. community that bears no ill will towards immigrants, even in an attenuated fashion, and accepts that immigration is in the nation’s interests, provided it is done in a lawful manner. We have heard many observers say over the years, “my grandparents came over from Italy, Poland, (insert country here), and they waited their turn and were legally admitted. All these Mexicans, Central Americans, (insert country here) could and should do the same.” However, it is unlikely that their families ever actually suffered numerical restrictions, and even with specific racial or other restrictions that worked against specifi-


24. A collection of public opinion on this topic solicited by major polling organizations over the past year is available at: http://www.pollingreport.com/immigration.htm (including polling data collected by Gallup, Pew, the Wall Street Journal, and others). For example, a December 2010 Gallup Poll asked, “Suppose that on Election Day you could vote on key issues as well as candidates. Please tell me whether you would vote for or against a law that would do each of the following. First, would you vote for or against a law that would allow illegal immigrants brought to the U.S. as children to gain legal resident status if they join the military or go to college?” 54% of respondents indicated they would vote for such a measure, 42% against, and 4% were unsure.
ic groups such as the Chinese in the 1880s, Jews in World War II, or Haitians under current practices, many of these regimes have been abolished or shamed in the cycles of our national immigration and refugee history.

At the same time, there has appeared a coarsening of the public discourse, especially notable is the rise of nativist hate speech and organized racial violence, which has been enabled and spread by restrictionist demagoguery, the internet, cable television, and other media. While there are those who encourage these developments as means of allowing the citizenry to blow off steam, to alleviate their dissatisfaction with increased levels of immigration or with perceptions of failure to assimilate, the counter evidence is strong and lurid—forcing the undocumented deeper into the shadows as they are hunted down, harmed, or deported—in the contexts of employment, civic life, and the larger social community.

This situation has real consequences. Recent episodes of racial thuggery, such as “beaner-hunting” or roving gangs that attack Latinos as outlaw “others” or as “illegals” have shown the degree to which the discourse truly matters, as it devolves into justifications for Anglos to “take back” their


26. Edward S. Shapiro, World War II and American Jewish Identity, 10:1 MODERN JUDAISM, 68-69 (Feb. 1990) (“While Jews learned English and became citizens more rapidly than virtually any other immigrant group, this had not as of 1941 earned them full acceptance as Americans. Jews faced Jewish quotas in the elite universities, restricted job opportunities in fields such as engineering, insurance, and banking, quotas on the number of Jews accepted by the country’s medical schools, and the firm opposition of American public opinion to modifying the country’s immigration laws to admit additional numbers of Jewish refugees. Even the Wagner-Rogers bill, which would have admitted several thousand Jewish children from Germany, could not pass Congress in the late 1930s without crippling amendments.”).


rightful land and domain. For example, Luis Ramirez, a Mexican immigrant and father of two, was beaten to death in Shenandoah, Pennsylvania in a 2008 hate crime. U.S. legal resident and Ecuadorian citizen Marcello Lucero was stabbed to death by Patchogue, New York high school students who racially taunted him as an illegal "beaner," mistaking him both for being undocumented and for being an undocumented Mexican. In March 2004, a group of Mexican American citizens were violently assaulted, detained, and threatened with death by Arizona ranchers acting as vigilantes. In September 2007, the Otero County, New Mexico sheriff and a number of deputies conducted a series of immigration raids against the Latino residents of Chaparral, New Mexico, including warrantless invasions of private homes, stops of pedestrians and drivers without probable cause, and filing of false charges against Latino residents of Chaparral. The contradictory depiction of Latinos as alternately shiftless and lazy, but also too-eager to work and steal jobs, has directly and indirectly led to the rise of restrictionist laws and practices, especially as the United States economy has worsened. Scapegoating foreigners has a long and inglorious history in the United States, a national and paradoxical trait that competes regularly with the country's more benign self-pride as welcoming all the huddled masses.

It is with the many conflicting legacies of and developments since Plyler in mind that this symposium examines current legal and policy debates about immigration and higher education. Considering the increasing mobility of students worldwide, the first article presents the global context for discussions about higher education students with documented status. According to the most recent comprehensive study of student mobility, a World Trade Organization report discussed by Professor Laurel Terry in her article International Initiatives That Facilitate Global Mobility in Higher Education, in 2007 nearly three million college and university students were

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32. Buckley, supra note 30.


pursuing degrees in countries where they were not citizens.\textsuperscript{35} Nearly one-quarter of these three million students attended colleges and universities in the United States, with the next-greatest percentages attending institutions in the United Kingdom (fourteen percent) or Australia (thirteen percent).\textsuperscript{36} The international student population is diverse, although students from East Asia and the Pacific comprise nearly forty percent of it, followed by students from Central and Eastern Europe (roughly thirteen percent) and from South and West Asia (approximately ten percent).\textsuperscript{37} Although the United States, Australia, the United Kingdom, and Western Europe receive large numbers of international students, they send comparatively few students abroad to pursue a degree.

The United States is a crucial part of the global context not only because it receives so many students from other countries, but also because it accepts various “hard law” and “soft law” obligations.\textsuperscript{38} As Professor Terry discusses, the United States federal government has an inter-agency working group whose membership—representatives from more than twenty-five federal departments and agencies—underscores the complexity of legal issues of mobility and higher education, even when students have documented status.\textsuperscript{39} The complexity of these issues arguably is underappreciated by lawmakers and by leaders of many colleges and universities in the United States—as is the dynamic relationship between law and society. As Professor Terry’s account makes clear and as we have seen in the United States, legal regulation does not only facilitate increased mobility for educational purposes, although that is part of the story. Increased mobility for educational purposes also influences legal regulation.\textsuperscript{40}

Having established the global legal framework, the symposium turns to issues much closer to home. The symposium’s next two articles invoke \textit{Plyler} more directly, turning to legal issues unique to the estimated 50,000-60,000 undocumented college and university students in the United States.\textsuperscript{41} These students’ legal rights are largely unclear and untested because \textit{Plyler} does not bind colleges and universities.\textsuperscript{42} However, Professor Danielle Holley-Walker, in her article \textit{Searching for Equality: Equal Protection Clause}
Challenges to Bans on the Admission of Undocumented Immigrant Students to Public Universities, argues that there are good reasons for courts to import Plyler’s reasoning into the college and university setting, including the Supreme Court’s emphasis on the importance of higher education in its recent decisions regarding affirmative action in colleges and universities.\textsuperscript{43} The issue of access for undocumented students is not an abstract one. As Professor Holley-Walker describes, especially since 2008, state legislatures increasingly have required undocumented students to pay out-of-state tuition at public colleges and universities, if not banned them from attending entirely. It appears that this legislative trend is not waning.

Professor Victor Romero’s article, Immigrant Education and the Promise of Integrative Egalitarianism, also explores the legal uncertainty surrounding undocumented students’ access to higher education.\textsuperscript{44} One would think that with the current state of Equal Protection Clause jurisprudence as Professor Romero describes it—a state downright discouraging to many civil rights advocates\textsuperscript{45}—the pending DREAM Act and the California law challenged in the Martinez v. Regents of the University of California\textsuperscript{46} litigation would have little hope of surviving constitutional scrutiny. However, taken together with the promise of Brown and also with Plyler, Professor Romero uses the Court’s recent gay rights jurisprudence, with its focus on limiting a majority’s ability to target an identifiable minority group, to argue in favor of undocumented students’ access to higher education.\textsuperscript{47}

To argue for undocumented students’ rights, the jurisprudence requires the sort of creative approaches taken by Professor Holley-Walker and Professor Romero; the caselaw does not support a more straightforward legal argument. Given how few undocumented college students there are—in the United States, roughly 50,000-60,000\textsuperscript{48}—and how few options they have until a version of the DREAM Act or comprehensive immigration reform is enacted, it is remarkable how much legal attention has been paid to this extremely vulnerable population, both in terms of litigation (state and

\begin{itemize}
  \item \textsuperscript{43} Danielle Holley-Walker, Searching for Equality: Equal Protection Clause Challenges to Bans on the Admission of Undocumented Immigrant Students to Public Universities, 2011 Mich. St. L. Rev. 357.
  \item \textsuperscript{44} Victor Romero, Immigrant Education and the Promise of Integrative Egalitarianism, 2011 Mich. St. L. Rev. 275.
  \item \textsuperscript{45} See, e.g., James E. Ryan, The Supreme Court and Voluntary Integration, 121 Harv. L. Rev. 131, 131-33 (2007) (describing the Parents Involved decision as “in one sense not terribly significant” given the political climate, but also noting that the decision has a larger symbolic impact, and “it is no small thing to dash hope”); Kristi L. Bowman, Pursuing Educational Opportunities for Latino/a Students, 88 N.C. L. Rev. 913, 949-55, 990 (2010).
  \item \textsuperscript{46} 241 P.3d 855 (Cal. 2010), cert. denied, 79 U.S.L.W. 3494 (U.S. June 6, 2011) (No. 10-1029).
  \item \textsuperscript{47} Romero, supra note 44, at 296-301.
  \item \textsuperscript{48} Olivas, The Political Economy, supra note 18, at 1758.
\end{itemize}
federal cases), legislation (almost twenty states have acted in some formal fashion), and substantial legal and policy literature. Proponents and op-


ponents of the DREAM Act and similar state legislation may not agree on much, but they would seem to agree that this polarizing issue is finally receiving the attention it deserves.

In sum, like _Plyler_ many years before, these three articles explore the continually evolving boundaries between "what counts as equality, what counts as inequality, and what is not even recognized as raising a question of equality or inequality," to borrow a phrase from Professor Jack Balkin. Terry describes these boundaries for international college and university students at the level of nation-states and international organizations. Picking up where _Plyler_ left off, Professor Holley-Walker and Professor Romero both argue that denying undocumented college and university students access to public colleges and universities on the same terms as citizen or resident immigrants constitutes unacceptable inequality—it should not be an action that "is not even recognized as raising a question of equality or inequality."

The globalization of higher education, the shrinking of the world, and the preeminent role of the U.S. in the development of the higher education polity all assure that developments in the world will affect the U.S., and reciprocally, that the many complex developments in the U.S. will affect the world's colleges. But these developments are truly reciprocal, and do not naturally flow in the favor of the U.S. Any reasonable assessment of these developments reveals that this country will retain the natural and acquired advantages it has held since the early twentieth century, especially if English remains the language of international academic discourse. Nevertheless, these advantages are not set in concrete and are certainly not permanent, especially as the People's Republic of China, other Asian countries, and the EU hit their stride and invest more heavily in the higher education industry. International students are, by definition, the most mobile and impressionable consumers of higher education, and they will gravitate toward countries and institutions that welcome them and accommodate their ambitions. The papers in this special issue show how complex this entire


53. _Id._


55. See generally Laurel S. Terry, _The Bologna Process and Its Impact in Europe: Much More than Degree Changes_, 41 VAND. J. TRANSNAT’L L. 107 (2008); Laurel S. Terry,
enterprise is, and U.S. legislators, policymakers, and educators ignore the warning signs at their peril.

_from GATS to APEC: The Impact of Trade Agreements on Legal Services, 43 Akron L. Rev. 875 (2010)._