

Caught in the Middle? The Plight of Undocumented Immigrant Children in the United States since *Plyler v. Doe*.

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Non-U.S. citizens are currently fighting a cultural war against state and federal government restrictions upon civic participation in virtually all areas of the United States' societal landscape.¹ Undocumented children, who the Supreme Court has recognized as blameless and present in this country through no fault of their own,² have been unwillingly thrust in the middle of the clash. The recent phenomenon developed despite the decision in Plyler v. Doe, which is considered the high water mark in the Supreme Court's jurisprudence regarding the rights of immigrants in the United States.³ There exists a deep-seeded resentment towards undocumented immigrants based upon the accusation that immigrants sap government resources, engage in criminal behavior, disrupt the labor market by contributing to the lowering of wages, occupy jobs that would have otherwise gone to citizens or legal immigrants, and, the topic of this paper, overcrowd schools and sap their resources.⁴

This paper will examine the challenges facing undocumented children in public education. First, it will introduce the factual history, reasoning and holding of the Plyler case, which creates a Constitutional hurdle to states trying to exclude undocumented children from attending public schools. Next, I will discuss anti-immigrant legislation that emerged both

¹ Maria Pabon Lopez, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 Seton Hall L. Rev. 1373, 1374 (2005).

² *Plyler v. Doe*, 457 U.S. 202 (1982).

³ Mary Carol Combs, Norma Gonzalez, and Nina Rabin, *Understanding Plyler's Legacy: Voices from Border Schools*, 37 J.L. & Educ. 15, 15 (2008).

⁴ Jason Lee, *Unlawful Status as a "Constitutional Irrelevancy": The Equal Protection Rights of Illegal Immigrants*, 39 Golden Gate U.L. Rev. 1, 2 (2008).

immediately following Plyler and more recently, which strive to circumvent the Supreme Court's decision. Finally, I will examine the possible impact that anti-immigration legislation would have on undocumented children, their schools, and the surrounding community.

I. *PLYLER V. DOE*: UNDOCUMENTED CHILDREN AND PUBLIC EDUCATION IN THE UNITED STATES

The decision of the Supreme Court to bar states from limiting access to any child to elementary and secondary education is more than a run-of-the-mill Constitutional decision. It invites analysis of the fundamental assumptions about immigration in the United States outside the law.

However, to understand Plyler, one must first consider Graham v. Richardson.⁵ In this case, the Supreme Court held that under the Equal Protection Clause, classification of legal immigrants by the State receives strict scrutiny review.⁶ The Court reasoned that legal immigrants' lack of ability to vote and directly influence the political process was a prime example of the "discrete and insular minorit[ies] for whom such heightened judicial solicitude is appropriate."⁷ The majority seemed to view legal immigrants as citizens-in-training,⁸ citing that aliens pay taxes, may be called into the armed forces, and contribute to the state and to its economic growth.⁹ Because legal immigrants were a suspect class, and the State could not provide a compelling state interest in their classification, the majority ruled against the State.¹⁰

The case resulted in state legislatures classifying immigrants as "legal" versus "illegal" as

⁵ 403 U.S. 365 (1971).

⁶ *Id.* at 371-72.

⁷ *Id.* at 372.

⁸ Lee, *supra* note 4, at 7.

⁹ Graham, *supra* note 5, at 376.

¹⁰ *Id.* at 382.

they grappled with local immigration policy. Then, in 1975, the Texas legislature passed a law denying local school districts state funding for the education of undocumented children.¹¹ As an alternative, section 21.031 allowed local school districts to charge tuition to children not “legally admitted” to the United States.¹² In essence, the statute allowed school districts to deny enrollment in the public schools to undocumented children who were unwilling to pay the tuition.¹³ The suit was filed on behalf of certain school-age children who could not establish that they were legally admitted into the United States.¹⁴

In contrast to the its provision of strong equal protection rights to legal aliens in Graham, the Supreme Court held that illegal immigrants are not a “suspect class” that require strict scrutiny review.¹⁵ Because their undocumented status was not “constitutionally irrelevant,” this classification was subject to a lower standard of review than the strict scrutiny standard afforded to legal immigrants.¹⁶ In his majority opinion, Justice Brennan began by finding that both undocumented immigrants and the State have mutual obligations: the immigrant is subject to full range of obligations imposed by the State’s civil and criminal laws.¹⁷ Conversely, until he leaves that State’s jurisdiction, he is entitled to the equal protection of the laws that a State may choose to establish.¹⁸ Therefore, illegal aliens fall within the Equal Protection guarantee of the Fourteenth Amendment.¹⁹

Justice Brennan then turned his attention to the children of this permanent caste of undocumented resident aliens, who he acknowledged are ineligible for various benefits the State

¹¹ Tex. Educ. Code §21.031 (Vernon 1975).

¹² *See id.* § 21.031(c).

¹³ *Id.*

¹⁴ Plyler, *supra* note 2, at 205.

¹⁵ *Id.* at 219.

¹⁶ *Id.*

¹⁷ *Id.* at 215.

¹⁸ *Id.*

¹⁹ *Id.*

confers upon its citizens and legal residents.²⁰ He and the majority rejected the State's interests involving fiscal concerns and protection from an influx of illegal immigrants.²¹ He found that there was no evidence on the record that illegal entrants imposed any significant burden on the State's economy.²² In fact, the evidence showed that illegal immigrants underuse public services while contributing their labor to the local economy and tax money to the State.²³ The Court also dismissed the State's argument that undocumented children are appropriately singled out because their unlawful presence in the United States renders them less likely than other children to remain within the State's boundaries that has provided the education.²⁴ It held that the State has no assurance that any child, citizen or not, will remain in the state after their public education.²⁵ The Court pointed out, in fact, that many of these undocumented children will remain in this country indefinitely, and some will become lawful residents and citizens.²⁶ With this knowledge in mind, there is no benefit to creating an illiterate caste of adults.²⁷

The Court then held that although public education is not a right granted to individuals by the Constitution,²⁸ it is not merely some governmental "benefit" indistinguishable from other forms of welfare legislation.²⁹ Education has a fundamental importance in maintaining basic institutions.³⁰ Therefore, the Court granted intermediate scrutiny to the discrimination of

²⁰ *Id.* at 219.

²¹ *Id.* at 228.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 229-31.

²⁵ *Id.* at 230.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35, 93 (1975).

²⁹ *Plyler*, *supra* note 2, at 221.

³⁰ *Id.*

children based on their undocumented status because the children were not morally culpable or responsible for their illegal presence.³¹ Justice Brennan wrote:

“The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”³²

Thus, the classification of undocumented immigrant children was afforded intermediate scrutiny due to the children’s lack of responsibility for their circumstances and the State must justify the classification by showing that it furthers some substantial state interest.³³

II. THREATS TO UNDOCUMENTED CHILDREN’S ACCESS TO EDUCATION SINCE *PLYLER*

Although many state education departments and local school districts have shown themselves willing to comply with the *Plyler* decision,³⁴ some states with the highest levels of illegal immigration (including California, New York and Arizona) have attempted to pass laws that overturn *Plyler*. These states cite the growing burden of the cost of education and health care that did not exist in 1982 when *Plyler* was originally decided.³⁵ California and New York have championed the exclusion of undocumented immigrant children from schools. The citizens of California voted on and passed Proposition 187, while New York boards of education are, more quietly, blocking access to public schools to those who cannot provide documentation of legal immigration status.

³¹ *Id.* at 220

³² *Id.* at 223.

³³ *Id.* at 231.

³⁴ Illinois law, for example, mandates that “the documents required by a school system as proof of residency for a student, when taken together, shall not result in a requirement for proof of legal presence, such as a Social Security number.” 23 Ill. Admin. Code 1.240(b).

³⁵ Jacklyn Brickman, *Educating Undocumented Children in the United States: Codification of Plyler v. Doe through Federal Legislation*, 20 Geo. Immig. L.J. 385, 389 (2006).

A. Proposition 187

After Texas failed to exclude children from its public schools, California attempted to implement similar legislation, which came close to negating *Plyler*. In 1994, California voters narrowly approved Proposition 187, otherwise known as the “Save Our State” Initiative. The key provision of the law required state officials to verify or determine the immigration status of arrestees, applicants for social services and health care, and public school students and their parents.³⁶ If a student was unable to verify their immigration status or U.S. citizenship, the school official could deny that student the ability to attend public school.³⁷ This provision was judicially invalidated in League of United Latin American Citizens v. Wilson (“LULAC”).³⁸

The LULAC litigation was decided in two opinions,³⁹ and both the 1995 and 1997 opinions explicitly reaffirmed *Plyler*. In 1995, the district court found that the exclusion of undocumented children from public school was preempted by federal law under the Supremacy Clause, based upon the Supreme Court’s equal protection analysis in *Plyler*.⁴⁰ In addition, in 1997, the court addressed the remaining sections of the law, requiring that “nothing in this chapter may be construed as addressing alien eligibility for a basic public education as determined by the Supreme Court of the United States under *Plyler v. Doe*.”⁴¹

At the time, most scholars believed that this decision would move up to the Supreme Court, requiring it to reassess its view on undocumented children in the United States.⁴² A majority of these scholars also believed that the Supreme Court would overrule *Plyler* based

³⁶ *League of United Am. Citizens v. Wilson*, 908 F. Supp. 755, 764 (C.D. Cal. 1995) [hereinafter LULAC].

³⁷ *Id.* at 774.

³⁸ *Id.*

³⁹ 997 F. Supp. 1244 (C.D. Cal. 1997); 908 F. Supp. 755 (C.D. Cal. 1995).

⁴⁰ LULAC, 908 F. Supp. at 755.

⁴¹ LULAC, 997 F. Supp. at 774.

⁴² Lopez, *supra* note 1, at 1397.

upon the popular dislike and distrust of undocumented immigrants throughout the country.⁴³ However, the parties in LULAC dropped the case following an agreement to enter into dispute resolution regarding the issues raised in the appeal.⁴⁴ To date, the Supreme Court has not re-examined its decision in Plyler, although the topic remains a primary and divisive issue in American political discourse.

B. The Effects of No Child Left Behind on Undocumented Immigrant Children

Proposition 187 certainly exhibits a deep-seeded resentment towards undocumented immigrants due to the high cost that states bear when educating their children. This resentment has not diminished, particularly in light of the recent economic crisis and federal education mandates. Schools are now faced with a problem that the Plyler majority could not have foreseen: the No Child Left Behind Act (NCLB).⁴⁵ Passed in 2001, it infused accountability into federal public education funding through the use of standardized testing at regular intervals.⁴⁶ All schools are required to report their students' scores on the standardized test, both in the aggregate and in disaggregated scores for certain subgroups, one of which is English Language Learners (ELLs) (which largely consists of immigrant children, both documented and undocumented).⁴⁷ The goal behind the disaggregation is to ensure that no disadvantaged groups of children are "left behind."⁴⁸ Unfortunately, the NCLB's focus on test scores encouraged school personnel to view certain categories of students as those who bring scores down.⁴⁹ While NCLB permits schools to exclude ELLs from reading/language arts testing during their first year

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 20 U.S.C. §6301 *et seq.*

⁴⁶ *Id.* at 53.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

in the United States,⁵⁰ few ELLs can learn enough English in one year to pass their state's reading test.⁵¹ Low Annual Yearly Progress (AYP) affects the amount of funding the school receives from the federal government, which then incentivizes schools to avoid enrolling those students who are at risk of failing the exams.⁵²

In response to the increasing pressure under NCLB, states such as Maryland, Nebraska, New Jersey and New York have school districts imposing restrictions upon school attendance by undocumented immigrants.⁵³ After Plyler, all residents between the ages of 5 and 21 who have no high school diploma, regardless of their immigration status, are only responsible for presenting documents that prove age and residency to attend the local public school.⁵⁴ However, these school districts increasingly require a social security number or, alternatively, a resident alien card that will not be accepted if expired.⁵⁵ In an effort to control the rate of children who may bring their scores down, New York's school code allows districts to require documents that prove age and residency, like birth certificates, rental agreements and utility bills.⁵⁶ It is silent on any additional requirements that would violate Plyler v. Doe.

The effect of NCLB and the recent economic downturn has had a significant impact on attitudes towards undocumented immigrant children. These children are now seen not only as a drain on education resources, but also as a cause for decreased funding under NCLB. Further, state legislatures are cutting funding to education programs in an effort to balance state budgets

⁵⁰ 34 C.F.R. § 200.6(b)(4) (2007)

⁵¹ *Id.* at 54.

⁵² *Id.*

⁵³ Bernstien, *No Visa, No School, Many New York School Districts Say*, NY Times, July 22, 2010, available at http://www.nytimes.com/2010/07/23/nyregion/23immig.html?pagewanted=2&_r=1&hp.

⁵⁴ Rondell Conway, *NY Schools Take "No Visa, No School" Stance*, K!DULT, July 28, 2010, available at <http://www.kidult.com/news/headlines/ny-schools-take-no-visa-no-school-stance>.

⁵⁵ *Id.*

⁵⁶ *Id.*

deficits.⁵⁷ However, what would be the effects upon schools and American society as a whole if these children were no longer admitted into public schools?

III. THE POSSIBLE IMPACT OF DENYING UNDOCUMENTED STUDENTS ACCESS TO PUBLIC EDUCATION

In light of the outcome in LULAC, it is unlikely that the New York statute requiring proof of immigration status would be upheld if taken to court. However, it is extraordinary that after so many years since Plyler, states continue to pursue statutes limiting undocumented immigrants' ability to access free public education. The key question is whether state legislatures have fully examined the consequences that their constituents would face with a large population of undocumented, uneducated immigrants in their state.

If undocumented students were denied access to their local public school, communities would experience a strong negative impact, both upon schools and the student population. In class, we have often discussed the importance of diversity within a classroom, as well as its positive effects. I argue that denying access to public education would severely impact school districts, particularly in states with high immigrant populations.

School personnel have spoken to the positive impact immigrant children bring to the classroom: hard work, richness to the school's culture, a new perspective (particularly in the area of rights and responsibilities that citizen students take for granted), and strengthening school pride.⁵⁸ Unfortunately, the diverse ways in which undocumented students affirmatively enhance

⁵⁷ Nicholas Johnson, Jeremy Koulisch & Phil Oliff, *Most States are Cutting Education*, Center on Budget and Policy Priorities, available at <http://www.cbpp.org/cms/index.cfm?fa=view&id=2220> (last visited May 16, 2011); *States Cut Preschool from Budgets*, USATODAY, August 8, 2010, available at http://www.usatoday.com/news/education/2010-08-08-preschool-preK_N.htm.

⁵⁸ Combs, *supra* note 3, at 32.

the quality of education in their schools is seldom discussed in public debates or is dismissed as irrelevant.⁵⁹

In addition to their value in the classroom, surveyed school personnel believe that enforcement of the reporting requirement and denying access to public education would have a very negative impact on their professional morale.⁶⁰ Administrators resist the idea of schools becoming an arm of the Immigration Department or law enforcement; teachers express concerns over a breach in trust between themselves and the student, stating that their job is to educate, not enforce federal or state law within their classrooms.⁶¹ Overall, the major concerns expressed by schools themselves involved high levels of tension within their walls, the creation of a divide between teachers, the interference with student-teacher relationships, and a split within the student body.⁶²

The final, and potentially the most important, concern is the negative impact of a law denying undocumented students from a public education on the communities that the schools served. If these students were denied access to schools, they would still remain present in their communities. Without school, many would likely turn to gangs and illegal activity, increasing violence and safety concerns within their communities.⁶³ Schools would no longer act as “safety zones” to immigrant children and parents, further alienating the undocumented families from their communities.⁶⁴ Finally, these children will grow into uneducated adults with no options available to them, precisely the concern articulated in Plyler.⁶⁵ Undocumented children did not

⁵⁹ *Id.*

⁶⁰ *Id.* at 39.

⁶¹ *Id.* at 39-40.

⁶² *Id.*

⁶³ *Id.* at 43.

⁶⁴ *Id.*

⁶⁵ *Plyler*, *supra* note 2, at 230.

have a voice in their parents' decision to come to the United States illegally; however, most are likely to stay.⁶⁶ Therefore, in order to protect their communities and to benefit the future economic growth of the United States, these children should be granted access to public education.

IV. CONCLUSION

This paper has tried to highlight the impact of the Plyler v. Doe decision upon undocumented immigrant children, as well as illustrate current political discourse surrounding the education of these children. Although Plyler had the extremely positive impact of guaranteeing an undocumented child's ability to attend school, it has limitations. It cannot prevent a child from being discriminated against based on his or her inability to speak the language. This discrimination is exacerbated by accountability-based testing of ELL students in No Child Left Behind. In addition, states such as New York are tightening their immigration laws, spreading the ideology that allowing undocumented children to attend money-strapped public schools is detrimental to both the students and the community as a whole.

Public education has enabled undocumented students to be productive and engaged members of their schools and communities while enhancing the quality of education in the schools they attend.⁶⁷ This outcome is seldom if ever raised in debates over Plyler's decision, which, in my opinion, it should be. The positive considerations of children attending our public schools far outweigh the negative ones: devastation of morale within schools, division within communities, and costs associated with a sharp increase in gang and illegal activities.

⁶⁶ *Id.*

⁶⁷ *Id.* at 62.

Although Plyler v. Doe is considered to be a high-water mark of immigrant's rights in the United States, it is constantly under fire and is threatened with reversal. This the political discourse surrounding the subject, however, does not seem to include the "whole picture" of undocumented immigrants' place in communities, nor does it include the benefits these individuals bring with them. Until Americans and state and federal representatives are able to conduct an honest discussion about the role of undocumented children in the United States, we will not, as Obama says, "win the future."⁶⁸

⁶⁸ Anne E. Kornblut & Scott Wilson, *State of the Union 2011: "Win the Future" Obama says*, WASHINGTON POST, January 26, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/25/AR2011012504068.html>