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Opening Remarks

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OPENING REMARKS

Shoba Sivaprasad Wadhia[†]

Thank you. I am honored to be here. And there is no more fitting way to honor Michael than around the 40th anniversary of *Plyler v. Doe*.

This case centered on Texas statute § 21.031, which on its face, permitted the local school districts to exclude noncitizen children who entered the United States without immigration status or to charge admission for the same. The questions before the Court were: (1) whether a noncitizen under the statute who is present in the state without legal status is a "person" and therefore in the jurisdiction of the state within the meaning of the Equal Protection Clause of the Fourteenth Amendment; and (2) if yes, whether the statute violates the Equal Protection Clause. The plaintiffs in this case were school-age children of Mexican origin residing in Smith County, Texas, who could not establish that they were legally admitted into the United States.

In a 5-4 opinion, the Court held: "[a] Texas statute which withholds from local school districts any state funds for the education of children who were not 'legally admitted' into the United States, and which authorizes local school districts to deny enrollment to such children, violates the Equal Protection Clause of the Fourteenth Amendment."[1]

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The following remarks were made by Dean Wadhia during the 2022 *St. John's Law Review* Virtual Symposium. The symposium commemorated the 40th anniversary of the United States Supreme Court decision in *Plyler v. Doe* and the late Professor Michael A. Olivas, a leading authority and prolific scholar on U.S. immigration law.

[1] Plyler v. Doe, 457 U.S. 202, 202 (1982).

While the court did not go as far as to call education a "right" it did underscore that "education has a fundamental role in maintaining the fabric of our society."[2]

In his seminal book on *Plyler*, *No Undocumented Child Left Behind* Michael Olivas reflected:

> Getting a case to federal or state court in the first place is a lightning strike, and very few make it all the way through the chute to the Supreme Court. . . . *Plyler v. Doe* always stood for its resolution of the immediate issue in dispute: whether the State of Texas could enact laws denying undocumented children free access to its own public schools. But it also dealt with a larger, transcendent principle: how this society will treat its immigrant children. Thus, for the larger polity, *Plyler* has become an important case for key themes, such as how we treat children fairly, how we guard our borders, how we constitute ourselves, and who gets to make these crucial decisions. To a large extent, *Plyler* may also be the apex of the Court's treatment of the undocumented, a concept that never truly existed until the 20th century.[3]

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To help school districts translate *Plyler v. Doe* on the ground, guidance was crucial. Locally and through a clinic I direct, called the Center for Immigrants' Rights, law students have educated our public school district on *Plyler* and its progeny as well as ways schools can be inclusive.

One important letter is one issued by the Department of Education and Department of Justice in 2014 was a response to districts with student enrollment practices that chill or discourage participation by students based on their perceived immigration or citizenship status or that of their parents. The letter outlines what kind of documents may be used as a basis for enrollment and what type of information may not be used for enrollment purposes. For example, the letter states that a school district may not bar a student because she lacks a birth certificate, nor may it deny enrollment because a student or their parent does not provide a social security number. If a district chooses to request a social security number "it shall inform the individual that the disclosure is voluntary" and to provide a reason why they are seeking the number.

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[2] *Id.* at 221.

[3] MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND, *PLYLER V. DOE* AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN 8 (2012).

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Beyond education, children, regardless of immigration status, do have other rights like the right to due process and the right to legal counsel. However, the scope of these rights does matter. In immigration court, it is legally permissible for a baby or toddler to be scheduled for an immigration court hearing or be detained in a prison. Similarly, the legal right to counsel is limited and does not guarantee representation for children in immigration proceedings.

Importantly, even when there is not a spelled out right or requirement, federal, local, and state agencies can adopt policies that reflect the spirit of *Plyler v. Doe*.

For example, one guideline issued by DHS Secretary Mayorkas in October 2021, immigration enforcement should be avoided in "protected areas." A protected area includes:

> A school, such as a pre-school, primary or secondary school, vocational or trade school, or college or university;
> A place where children gather, such as a playground, recreation center, childcare center, before- or after-school care center, foster care facility, group home for children, or school bus stop.

While some of the guidance issued by the Department of Homeland Security on enforcement discretion is on hold because of litigation, the Protected Areas guidance remains intact and is one that we encourage school districts to showcase.

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Michael was one of my closest mentors and a dear friend. We had a mutual fondness and a profound intellectual admiration for one another and came to know each other because of a shared interest: deferred action. Deferred action is crucial to the story of *Plyler v. Doe* and where we are today. Both amicus briefs filed in *Plyler* and the Court acknowledged how unlikely it was that children would be deported. Why? Because the agency at the time INS had discretionary tools like deferred action it used to place low priorities for enforcement on the backburner. Indeed, deferred action is the kind of protection currently held by recipients of DACA or Deferred Action for Childhood Arrivals. Michael was constant in expressing how *Plyler v. Doe* set the stage for DACA. For decades, children and those of a young age living in the United States have been among treated favorable in the exercise of discretion.

As a mentor, Michael had a power that is hard to pin down. He did not just suggest that you were capable. He *insisted* that you could do the very things that seemed out of reach. During COVID,

we zoomed a lot from his home office in Santa Fe which had a bookshelf in the back and a cover of his most recent book *Perchance to DREAM*.[4] I was grateful to host a book launch in the company of so many beloved friends in the immigration community who love and admire him. This book shows just how much foresight Michael had on the lasting impact of *Plyer* on undocumented kids going to college, the movement leading to DACA and on his own journey.

Said Michael

> Of the sixteen books I have written, this DREAM Act project has been in gestation the longest in all senses of the word, "gestate." First, I moved to Houston in 1982, just as *Plyler v. Doe* was decided by the Supreme Court. I have poured out much of my research, and my heart, in a series of articles reconceived in what became the first full-length book on the case, which appeared thirty years after the decision. . . . But even early on, as I met and watched these *Plyler* kids make their way through the public schools to which they were entitled, I wondered about postsecondary *Plyler* eligibility and sponsored the first national academic conference on the subject in 1986, where it became clear that a number of structural impediments were in the way of their enrollment—unlike that of their citizen classmates whose passages were easy-peazy.[5]

So, what will Plyler teach us in the next decade? In what may have been his final writing project, Michael and I worked together on a *Rewritten Opinion and Response of* Plyler v. Doe which is forthcoming in the *Feminist Judgments: Rewritten Immigration Law Opinions* (Cambridge University Press).

In my rewritten opinion/concurrence, I offered three critiques of *Plyler*:

First, in my view, the Court set up a problematic differentiation between immigrant parents and their children. By casting the plaintiffs as "illegal aliens," the Court creates a presumptively criminal class, which is inaccurate as a legal matter, and dehumanizing as a moral one. Remarkably, the term "illegal alien" appears more than ten times in the Court's opinion, normalizing the troublesome phrase for the reader and leaving an impression that the term is also accurate.

In its framing, the Court also creates a paradigm where the parents are at fault and the children are victims. This narrative

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[4] MICHAEL A. OLIVAS, PERCHANCE TO DREAM, A LEGAL AND POLITICAL HISTORY OF THE DREAM ACT AND DACA (2020).

[5] *Id.* at 137 (footnotes omitted).

is problematic because it labels every parent who entered the United States from Mexico as blameworthy, as having freely chosen to enter the United States unlawfully.

Second, I dispute the conclusion by the Court that plaintiffs are not a suspect class and believe they are an invidious class for which the strict scrutiny standard should apply. There are many forces that make the conditions of undocumented children worthy of a heightened analysis, including the fallacy that the entry of parents to the United States with their children without legal status is a free choice and the ways that alienage is operating as a proxy for national origin discrimination. There are several reasons parents may enter the United States with their children without legal status. Some of these reasons include conditions in their home countries, opportunities for their children in the United States and the absence of legislative reform.

While Congress was successful in ending the discriminatory national origin quotas that pervaded the immigration law for decades, the 1965 amendments had the effect of numerically limiting legal pathways for Mexican nationals. Consequently, rather than placing blame on parents, one must examine the existing statutory framework and the limited opportunities available for this same population to enter the United States through a legal channel.

Further, I believe the Texas statute should be subject to strict scrutiny analysis because education is a fundamental right. While the majority adopts a less rigorous test to conclude that the State of Texas has failed to show how denying public education furthers a legitimate public purpose or substantial interest of the state, I believe the burden on Texas should be to prove that denying public education is a compelling interest, a showing that clearly fails here.

Finally, I elaborate upon the Court's accurate conclusion that most children will never be deported and thus must be treated as if they will remain in the United States permanently. The district court acknowledged this very point when it said, "the illegal alien of today may well be the legal alien of tomorrow." Indeed, status is constantly changing and many of the Plyler kids would later have a legal channel through the existing statute.

An equally important reason that undocumented children would not be deported is prosecutorial discretion. Prosecutorial discretion refers to a choice by the Immigration and Naturalization Service to deport or not deport a person because of

equities and limited resources. Historically, young children, those with tender age or those who are living in the United States and going to school, have been among those protected through prosecutorial discretion. Similarly, undocumented parents caring for children in the United States have also been among those protected. These discretionary protections are inevitable because the government simply lacks the resources to deport every person who is legally eligible to be deported. The plaintiffs in *Plyler* had precisely the qualities that have been traditionally used to shield individuals from deportation. The court could have considered more deeply the scope and role of prosecutorial discretion when interrogating the reasons why undocumented children are here to stay.

Michael wrote a powerful response, offering the final words during his final days and pushed the boundaries of what *Plyler* teaches us. Said Michael in his opening

> *Plyler v. Doe* is a kaleidoscope. The child's toy refracts different light rays by turning the instrument. Of course, Plyler is an immigration case, widely considered the apex of immigrant rights, especially empowering undocumented immigrants by allowing undocumented children to enroll in free public schools. It is a family law case, affecting family choices by parents and their children. The education law dimensions are also foundational, including traditional concepts of conflicts of law, especially interpretations of residency, domiciliary, and durational requirements. Although the case does not explicitly differentiate between immigrant men and women, it can be usefully examined through feminist legal theory.

Thank you again for the opportunity to contribute today.