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Postsecondary Plyler
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Post Secondary Plyler - Why Not?

Introduction

In 1982 the United States Supreme Court in Plyler v. Doe[1] ruled that a Texas statute enabling school districts to charge tuition or exclude undocumented alien students violated the Equal Protection Guarantees of the Fourteenth Amendment to the United States Constitution. In 1991, a number of States[2] continue the practice which was outlawed nine years ago. The sole difference is that the students subject to this discriminatory practice seek admission to a state's higher education system rather than to its elementary and secondary system.

Does the child protected by Plyler lose that protection when she seeks to fulfill her educational destiny by attending College? The states that dishonor Plyler at the post secondary level argue that it only applied to elementary and secondary education. Technically, they are correct, as the statute involved did not purport to effect post secondary education; but that begs the question, which is whether either the level of justification applied by the Plyler court or the actual justifications rejected by that court should be viewed differently when we confront post secondary exclusion of undocumented aliens. The answer, I believe, must be "No".

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[1] Plyler v. Doe 457 US 202 (1982)

[2] Olivas, Plyler v. Doe, Toll v. Moreno, and Post Secondary Admissions: Undocumented Adults and "Enduring Disability," 15 J.L. & Educ. 19, 40-41, nn. 197-98 (1986) (listing twenty-six states whose residency statutes either appear to be or are in conflict with Toll v. Moreno). See also, William O'Connell, College University Attendance by Out-of-Status and Undocumented Students (Feb. 1992) (Survey showing number of colleges and universities in New York which bar admission of out-of-status and undocumented students).

The Legal Backdrop

Equal Protection analysis, whether conducted under the Fourteenth Amendment or under a parallel state provision, basically involves two (2) interrelated considerations. First, one looks to the nature of the interest effected or the characteristics of the discriminatory classifier (e.g., race, alienage, etc.) to determine the level of justification necessary to sustain the classification. Secondly, one looks to the justification for unequal treatment of the Plaintiff group to determine whether it meets the level of justification required.

The level of justification under the Equal Protection Clause is three-tiered. If a fundamental interest or a suspect class is involved, strict scrutiny will be applied. Strict Scrutiny mandates that a classification "advance a compelling state interest by the least restrictive means available."[3] An intermediate level of justification requires that a classification "serve important governmental objections and must be substantially related to achievement of those objectives."[4] The least searching level of justification, stated often as the "rationality" test, requires that "the classification must be reasonable, not arbitrary, and must rest upon some ground of differences having a fair and substantial relationship to the object of the legislation ..."[5]

State Courts have frequently borrowed this analytical framework in construing

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[3] Bernal v. Fainter 467 US 216, 219 (1984)

[4] Craig v. Boren 429 US 190, 197 (1976)

[5] F.S. Royster Guano Co. v. Virginia 253 US 412, 415 (1920)

state equal protection provisions.[6] While a state equal protection clause can impose a higher level of justification on a state scheme than would be required under the Federal Constitution, a State Constitution can not be less protective of minority rights than the Federal Constitution. This might well suggest, as discussed below that challenges to post secondary exclusion of undocumented aliens are best brought in State Court; yet, read correctly such exclusion must be found unconstitutional using no more than the level of justification and analysis applied in Plyler under the Fourteenth Amendment.

Plyler Applied

A. The level of Scrutiny

The first argument of a State seeking to distinguish students from Plyler is to argue that a lower level of scrutiny is to be applied. Given the Court's handling of this issue in Plyler, a state has little to argue. To the contrary, it is possible that a challenge to the State's policy under State Equal Protection might involve a higher level of scrutiny than applied in Plyler.

The Supreme Court in Plyler could find neither a fundamental interest nor a suspect class sufficient to justify strict scrutiny. While articulating the unique importance of education, the Court reaffirmed its holding in San Antonio Independent School District v. Rodriguez[7] that education is not a "Fundamental

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[6] See Williams, Equality Guaranties in State Constitutional Law, 63 Tex L. Rev. 1195 (1985)

[7] 411 US 1 (1973)

Interest" under the Fourteenth Amendment.[8] Similarly, the Court ruled that "undocumented aliens cannot be treated as a suspect class".[9]

A number of state courts have construed state equal protection clauses as granting fundamental status to elementary and secondary education.[10] While few courts have had the opportunity to consider whether post-secondary education might be declared fundamental, good argument can be made in most jurisdictions that a finding of fundamentality at the lower levels must be carried forward to the post secondary level.[11] While each state's constitutional history is unique, it is suspected that outside of the eastern seaboard one would find that early Constitutional debates and provisions assumed that post secondary education was

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[8] 457 US at 223

[9] Id.

[10] Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz.1973) (en banc); Serrano v. Priest, 487 p.2d 1241, 1255-58 (Cal. 1971); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977); Rose v. Council for Better Educ. Inc., 790 S.W.2d 186, 205 (Ky. 1989); Pauley v. Kelly, 255 S.E.2d 859, 878 (W.Va. 1979); Washkie County School Dist. No. 1. v. Herschler, 606 P.2d 310, 333 (Wyo. 1980).

[11] The California Supreme Court has ruled that elementary and secondary education is fundamental. Serrano v. Priest (Serrano I) 5 Cal 3rd 584 (1971). One Court of Appeal in that State rejected the extension of this holding to post secondary education in a case that is far from definitive. In Gurfunkel v. Los Angeles Community College District 121 Cal. App.3 1 (1981) the Court held that for a true non resident, post secondary education could not be deemed fundamental. It left open whether it might be so construed for a bona fide resident or one who had established bona fides but for an unlawful barrier. The Court also noted that no evidence had been presented on this central issue.

part of an unbreakable continuum beginning at the elementary level.[12] While certainly post secondary education has never been compulsory, these debates will often reflect the constitutional fathers consideration of the crucial importance of higher education to the State's welfare. Further, a properly developed record will show that the lack of compulsion at the college level is more a reflection of the adult status of college age students than any determination of the lack of fundamentality of college level schooling. In addition it can well be argued that while in simpler times the basic tools for individual success could be obtained through a secondary or even an elementary education, today's complex society compels the receipt of post secondary training to perform any but the most menial tasks.

The key point however is that the Plyler Court was still able to strike down the exclusionary policy without a finding of fundamentality. A state is thus unable to fall back upon a distinction that the Plyler Court relied upon the "fundamentality" of elementary and secondary education which, it might argue could not be made with respect to post secondary education.

Whether the Plyler Court applied the lowest level of scrutiny or an intermediate level is open to debate. At several junctures the court referred to

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[12] As stated in Piper v. Big Pine School Dist. 193 Cal. 664, 673, "each grade is preparatory to a higher grade, and, indeed affords an entrance into school of Technology, Agriculture, Normal Schools and the University of California. In other words, the common schools are doorways opening into chambers of science, art and the leraned professions as well as into fields of industrial and commercial activities."

"rationality";[13] however in its conclusory sentence to its discussion concerning the level of review, it borrows from both the lower and middle level standards, stating that, "In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State"[14] We thus should shift our focus to whether (a) the "Countervailing Costs" are similar at the different levels of education and (b) assuming that they are, whether the deprivation of post secondary education is a more substantial goal of the state.

B. The Countervailing Costs

The factors that led the Plyler court to cast a wary eye on the policy contained in the Texas statute, or the "countervailing costs", were several in number. While some modest distinction can be made, on the whole, they are present irrespective of the level of schooling we concern ourselves with.

The key factors or costs which made their mark with the Court were the individual and societal consequences of the educational deprivation, and the fact that the deprivation was visited upon persons who had no culpability for their condition.

In discussing the educational deprivation one could focus on the illiteracy occasioned by the denial of basic elementary education. Surely that is a

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[13] See eg. 457 US at 220 "It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States. Yet that appears to be precisely the effect of § 21.031". See also 457 US 224.

[14] Id 457 US at 224.

catastrophic deprivation. However serious the lack of any schooling may be, the fact is that the loss of post secondary opportunities in 1992 dooms the individual to the virtual economic serfdom which the Trial Court found in Plyler.[15] Consider the following: In 1970, hardly the dark ages, a college graduate on average was likely to have 1/3 higher total income than a high school graduate, while in 1988 the gap had widened to more than 1/2 again the income of such a person.[16] Similarly the gap of likelihood of unemployment is large and keeps growing larger. A person with four or more years of college is one third as likely to be unemployed as a person who has only a high school degree. While the gap was large in 1970, it was not so large. You were half (1/2) as likely to become unemployed if you had 4 or more years of college in 1970.[17]

Most telling is the fact that the labor force by becoming more technological has essentially removed those with less than a high school degree from the work place and has relegated the lowest functions to those with a high school degree. Similarly, there has been a dramatic increase in the percentage of persons in the labor force who have some college education. All of this is reflected most dramatically in the fact that in 1970 - again, not such a distant past - 36.1% of the workforce had less than a high school degree. In 18 short years that number had

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[15] The Court found that the denial of education "permanently locked (undocumented children) into the lowest socio economic class" Doe v. Plyler 458 F Supp 569, 577 (1978).

[16] US Dept. of Commerce, Bureau of the Census, trends in income by selected characteristics: 1947-1988, P60 No 167, Table 25.

[17] U.S. Dept. of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics - August, 1989 Bulletin 2340, Table 67.

dropped to 14.7%. The flip side is that while 25.9% of the workforce in 1970 had some college experience, that number had grown to 45.5% by 1988.[18]

What this tells me and should tell a Court is really two things. First, the individual who is thwarted in going beyond high school is being relegated to an economic future which is problematic at best. It should also be understood that the evidence is clear that those on the economic margin suffer a number of societal disabilities ranging from less medical care and consequently higher likely of illness to inability to maintain a stable family environment. Secondly while the gap between those who are educated and those who are not is great, it is fast becoming much greater. Todays college education provides a place in the work force in 1992 with about the same assurance that a high school degree did in 1970 and an elementary degree did at the turn of the century. Thus to think of the impact of education as static is to misread the evidence. If an elementary and secondary education was fundamental for economic security and all that flowed from it in 1970, post secondary education is necessary to achieve this level in 1992.

I have just focused on the loss to the individual by the denial of post secondary opportunities; however it is clear that the loss to society is of equal, if not greater, magnitude. This can be viewed in different ways. First, of course is the loss of taxes from the reduced income of those who are thwarted. Conversely, the greater likelihood of unemployment and poverty increases the drain on taxes. A number of studies reflect that low self esteem and a sense of powerlessness are

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[18] Id. at Table 65.

significant contributors to anti-social behavior. Research reflects an increase in self esteem and a sense of destiny from those who attend college.[19] Those Courts that have found education to be fundamental, often cite its role in creating a politically sophisticated population needed to maintain a democratic system. Approximately 55% of those with a high school degree voted in the general election of 1988 while more than 80% of those with four or more years of college voted.[20]

All of the data I have just cited can be graphed out with a line graph showing that the lesser the education the greater you are to be crippled. Thus those who have not had even a high school education are even more vulnerable than those with a mere high school degree. Both logic and research will tell you that a student, especially a minority student, is more likely to drop out before receiving a high school degree if such a degree is not a stepping stone toward further advancement. A policy which denies undocumented students the ability to go on to college surely will turn off the steam of those students motivated toward college. At a time when there is such a hue and cry over the dearth of hispanic and other minority students in our colleges, states are thwarting one of the most motivated segments. It is hard not to argue that this is irrational.

A very prominent feature of the Court's discussion of "countervailing costs" in Plyler was the fact that the serious harms I have previously discussed were being

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[19] Astin, Four Critical Years: effect of college on beliefs, attitude and Knowledge. Jossey-Bass, 1983.

[20] U.S. Dept. of Commerce, Bureau of Census "Voting and Registration in the Election of November 1988": CPR Series P20, No. 440.

visited on children who had no culpability for their situation. States justifying a policy of exclusion at the post-secondary level might argue that we here, for the post part, deal with adults. While this may be technically true, the reality is that virtually all undocumented applicants for higher education are going to be Plyler children, grown. Most will have been brought here as children, attended school in this Country and for all intents and purposes become persons whose primary family and roots are here in this Country and usually in the state where they seek admission. The fact that the Plyler child turns eighteen does not make him any less innocent for having involuntarily found his most significant ties in this Country and his culture part American; in short the age distinction must be viewed as one without a difference for purposes of constitutional analysis.

The final primary consideration by the Plyler court in weighing the countervailing costs was the evidence that the undocumented student was likely to remain here irrespective of whether the state provided an education; indeed all of the evidence in Plyler reflected that undocumented immigrants overwhelmingly come here for economic reasons, and that education is not a major "pull factor"[21] Though hardly discussed, the court could not have been unaware of evidence presented which reflected that today's undocumented student is not unlikely to be documented tomorrow.

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[21] The Trial Court found a tuition change to be a "ludicrously ineffectual attempt to stem the tide of illegal immigrants" Doe v. Plyler, Supra 458 F. Supp at 585.

While the Immigration Reform and Control Act of 1986 (IRCA)[22] makes it harder for a person to obtain employment while in an undocumented status, there is evidence that it has had little impact on reducing the flow of immigrants into the United States;[23] this being the case, it seems to defy logic that persons who grew up in this Country are likely to leave as a result of IRCA. Thus the policy argument utilized in Plyler that "they will stay and American society will either be better or worse if they are educated," seems equally valid today.

Some might argue that the economic harms visited by a policy of post-secondary denial no longer have such vitality due to the possible fact that the undocumented person will be unable to work, whether or not he or she receives a higher education. Apart from the fact that there is substantial evidence that undocumented persons do find employment,[24] and the likelihood that those with longer stays in the United States and greater education are the least likely to be detected, is the fact that many of those persons who were undocumented yesterday are documented today. Indeed just this month a significant group of family members were granted a measure of legality through the Family Unification provision of the Immigration Act of 1990.[25] Suspension of deportation, marriage to a citizen, the lottery, and myriad of other opportunities still exist as they did at

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[22] 100 STAT 3358 (1986).

[23] Larry Rother, Immigration Law is Failing to Cut Flow From Mexico, N.Y. Times, June 24, 1988, at A1.

[24] Richard W. Stevenson, Jobs Being Filled by Illegal Aliens Despite Sanctions, N.Y. Times, Oct. 9, 1989 at A1.

[25] See 8 U.S.C.A. §1255a(d)(2)(B)(i)(West Supp. 1992).

the time of Plyler. People will remain, many will become legalized and all, including those who enact restrictive college policies will be the losers if these students are not allowed to achieve at the level at which they are capable.

CURRENT STATUS OF LITIGATION AND POLICY INITIATIVES ON BEHALF OF UNDOCUMENTED STUDENTS

There has in fact been little litigation challenging state practices of exclusion or tuition charges for undocumented students. To date suits have been filed in three states. They have all been successful in practice, yet the most prominent one has been thrown into confusion by a backlash lawsuit which has resulted in the only reported decision so far. This latter situation, in California, will be described first.

The first major case was filed against the University of California and the California State University system and is denominated Leticia A. v. Board of Regents of the University of California et al (hereinafter "Leticia").[26] The suit challenged the practice of these two institutions charging out of state tuition to undocumented students and applicants irrespective of other indicia of California residency. Though each claimed it was bound to charge such tuition by Section 68062(H) of the California Education Code, the Plaintiffs argued that the statute, in its ambiguity, was not to blame. The case proceeded as a challenge to Section 68062(H) "As applied".

Following several days of trial the Alameda Superior Court ruled that the

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[26] Superior Court for the State of California, County of Alameda No. 588982-4.

practice of the Defendants violated the California Equal Protection Clause;[27] the Defendants were enjoined "to determine California residence status of undocumented students and applicants for purposes of tuition determination in the same manner and on the same terms as United States citizens.[28]

In reaching its determination, the Leticia court ruled that while it deemed post-secondary education to be fundamental,[29] such a finding was not neccessary to its decision; rather the Court evaluated the justifications advanced for the statute and found them to lack rationality. The first justification advanced was that charging tuition supported federal policy of discouraging undocumented immigration. Relying upon Plyler[30] and Oyama v. California[31] the Court held that a "Classification which adopts a federal immigration standard must rest upon some independent and valid state interest."[32] The second justification advanced was that the policy discouraged employment of undocumented aliens. While the Court questioned whether such a policy existed in California, it found that even assuming it did, the charging of tuition was totally ineffectual, and, indeed, merely threw undocumented persons into the most competitive lower skilled pool of job seekers.

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[27] Cal. Const. art.I, §7(a).

[28] Supra Footnote 28, Judgement filed May 7, 1985.

[29] Id. Tentative decision, filed April 3, 1985 and incorporated into the Statement of Decision (filed May 30, 1985).

[30] Plyler v. Doe, Supra at 226.

[31] 332 U.S. 633, 664-65 (1948) (Murphy concurring).

[32] Statement of Decision at p.5-6 (filed May 30, 1985).

Leticia was not appealed and thus the Leticia Judgment bound the institutions of higher education in California until 1990.[33]

Soon After the Leticia judgment became final, an employee of the University of California, filed a second independent suit seeking a declaration that 68062(H) was constitutional.[34] Without any evidentiary presentation, the trial court ruled in favor of the employee. In a reported decision the California Court of Appeal affirmed.[35] Despite the lack of any record the Court found that post secondary education was not fundamental and that the state had legitimate interests among which were a "prefer(ance) to educate its own lawful residents and not subsidizing violations of the law".[36] The Court did not deign to discuss the authorities cited by the Leticia Court nor did it seem bothered by the circular nature of its reasoning. It distinguished Plyler as dealing with innocent children and more basic educational opportunities.[37] It, of course, had before it none of the evidence presented in

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[33] Though the Community Colleges were not parties to the lawsuit, they voluntarily changed their policy to comply with the Leticia judgment.

[34] This second case probably should have been dismissed due to the prior adjudication, or at least transfered to Alameda County. The University, which was the Defendant in this second suit, failed to request the Court to remove the case to Alameda County, until it had twice asked for a ruling on the merits in the Los Angeles Superior Court; understandably the Court did not embrace such a motion after it had finally ruled on the merits against the University.

[35] Regents of the University of California v. Superior Court, 225 Cal App 3rd 972, 276 Cal Rptr 197 (1990)

[36] 225 Cal App 3rd at 981.

[37] Id.

Leticia and discussed above. Review was denied by the California Supreme Court.

Thus in California there are different authorities binding different institutions of higher education. The latter decision (commonly known as "Bradford" after the Plaintiff) binds the University of California, while Leticia still binds the state university system. Further litigation is underway to resolve the split.

Following the court ruling in Leticia, suit was filed in the Arizona State Courts against the Arizona State University and the Maricopa Community College District.[38] The State University charged tuition to undocumented students while the Community Colleges had a policy of exclusions. Both cases were resolved without any direct Court involvement, with the systems agreeing to admit undocumented aliens on the same terms as citizens.[39]

Similarly in Illinois the issue was resolved through a stipulation. By the terms of the stipulation the trustees of the University of Illinois amended their regulation to specify that

> A person who is not a citizen of the United States who meets and complies with all of the other applicable requirements of these regulations may establish residence status unless the person holds a visa which on its face precludes an intent to reside in the United States.[40]

An undocumented person is, of course a non-citizen who, by definition, lacks a

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[38] Judith A. v. Arizona Board of Regents, Ariz. Superior Ct., Maricopa Co. No. CV 87-21579.

[39] Copies of Agreement are on file at META.

[40] Alarcon v. Board of Trustees of the University of Illinois, Circuit Court of Cook County County Dept. - Chancery Div. No. 87 ch 02858 (Filed July 14, 1987).

visa.

Several institutions have within the past several years changed or reaffirmed their policy to admit undocumented students on the same terms as citizens. These include The City University of New York Systems, and The Middlesex (MASS) Community Colleges.

Conclusion

Most states that create residency or admission barriers for undocumented students at the post secondary level just assume that they can say they are advancing federal policy, and that is the end of the discussion. Plyler made clear that such is not the case. Indeed as stated in Plyler "The State may borrows the federal classification. But to justify its use as a criterion for its own discriminatory policy, the State must demonstrate that the classification is reasonably adapted to 'the purposes for which the state desires to use it.'" (Emphasis in original, citation omitted.)

Plyler made clear that it is not enough to say that the state is saving money by the policy or that it is protecting resources for its "own" people - when all the evidence reflects that undocumented persons may be its "own" people. No other arguments have been advanced by the states for this policy of exclusion. All the legal and policy reasons which the Plyler court relied upon remain intact. State policies that deny equal access to colleges and universities are unconstitutional under Fourteenth Amendment principles, and should well be found unconstitutional under parallel state provisions.