

INTRODUCTION

CELEBRATING MICHAEL OLIVAS

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TABLE OF CONTENTS

I. INTRODUCTION.....	881
II. EDUCATION	882
A. <i>Critique of Higher Education</i>	882
B. <i>Critique of Miseducation</i>	884
III. ENGAGED SCHOLARSHIP	885
A. <i>Expanding Opportunity</i>	885
B. <i>Revealing the Structures of Exclusion</i>	886
IV. CONCLUSION	887

I. INTRODUCTION

When Michael and I began teaching law, eight Mexican American law teachers were in the American legal academy. He used to joke that we should never travel together as an insurance against calamity. Two of the papers in this tribute speak directly to Michael’s role in increasing the number of Latino law professors and highlighting Latino lawyers’ role in the development and evolution of American law. What the papers also illustrate is that the contributions of Latinos spanned a range of legal issues and, in some cases, were transformative.

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All the papers in this tribute illustrate how Michael's critical intelligence drove inquiries and how his intellectual and political courage inspired many. Because we were friends from our first days in the academy, it is difficult to be confident in my critical distance as I write. I say that, not just because we were friends, but because we were intellectual and political confrères. I sat with him as we confronted some of the powers that be—he so much so that he used to joke that he thought his name was “that damned Michael Olivas.” He and I sat with others as we conferred with the late Representative Irma Rangel as she formulated what has come to be known as the Texas 10% plan. Michael's role in that was critical, and in some ways, the product of that effort was more transformative than almost anything else. Almost literally, the face of higher education in Texas was changed in a way that challenged admission specialists to reassess their expertise, and it was a model for other states, too.

So, when I was asked to write the Introduction to this tribute, I did not hesitate. I was admonished to write about his work and not just about him, but the seamless quality of his work and his life make such a separation artificial. Thus, I was thankful that I could reflect on the pieces in this tribute and remember my dear friend.

II. EDUCATION

A. *Critique of Higher Education*

Reviewing the work of Professor Olivas, I was struck by the overlapping nature of his concerns. In many ways, the central question framed in different institutional settings but always inflected by law is how inequality is created, maintained, and justified. Whether he was interrogating higher education, immigration, or the lacunae of legal history, he didn't just document inequality. He probed its genesis, mechanisms, and the legal doctrine that kept it in place. He also demonstrated the limitations of the doctrine in each of those areas, showing that the arguments were as weak as their unexamined premises.

Take, for example, *The Political Efficacy of Plyler v. Doe: The Danger and the Discourse*.¹ In that essay, he combines a critique of higher education policy, immigration policy, and the history underlying the justifications for the attempts to keep

1. See generally Michael A. Olivas, *The Political Efficacy of Plyler v. Doe: The Danger and the Discourse*, 45 U.C. DAVIS L. REV. 1 (2011).

undocumented students from receiving an education. By starting with his description of “Stinky”—a robot designed and constructed by undocumented students from a public high school in Arizona that prevailed in a contest against a well-subsidized entry from MIT—he showed how the discourse of illegality overwhelms justifications for providing nondiscriminatory public education. Status defeats talent.²

He put the decision in *Plyler v. Doe*³ within the broad context of a public education system. He exposed the conflicting imperatives of the intersecting systems of education, immigration, disagreements between levels of government, and the norm of rewarding excellence. He revealed that the narratives that guide our institutional commitments tell conflicting stories about who we are. These stories are embedded in the legal structure that orders institutional activity.

He was prescient in showing how conflicts between levels of government are most likely to emerge where the emotional and political stakes are the highest. Thus, the control over the claims that undocumented children might make on the educational system is transformed into a dispute about whether federal imperatives will impose additional burdens on state and local budgets. He also showed how these clashes could take on a specific legal form. The doctrine in each area did not have to be justified by reference to doctrine in cognate areas, especially if conflicting and powerful political interests were deeply invested in one outcome or another.

Part of his investigation into the barriers to higher education faced by poor or undocumented students was an inquiry into cost. He did not just document the rising cost of post-secondary and tertiary education; he showed how many proposed remedies fail to address the underlying problems.⁴ His essay on the issues facing legal education recognized the virtues of how we educate lawyers and the associated rising costs. However, he suggested that certain proposed responses threaten to throw the baby out with the

2. *Id.* at 1–2.

3. *See generally* *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that absent a substantial state interest, a state cannot bar children of undocumented immigrants from attending public school).

4. *See, e.g.*, Michael A. Olivas, *Undocumented College Students, Taxation, and Financial Aid: A Technical Note*, 32 REV. HIGHER EDUC. 407 (2009) (analyzing the competing claims about the impact of educating undocumented children). This is one of several essays and book chapters where Michael takes on the problem of cost.

bathwater.⁵ Perhaps because of his institutional affiliation with law schools for most of his career, they commonly are the focus of some of his evaluations, whether from the perspective of access or the question of what is being taught. His work on legal history fits firmly with evaluating what law schools have failed to teach.

B. Critique of Miseducation

As part of his critique of higher education, Michael turned his focus to what was not being taught and who was not teaching it. One way to read his legal history, as demonstrated by Dean Johnson, is as a rebuke to those who have given only a partial history of some of the most important cases, including, perhaps especially, those cases that prefigured *Brown v. Board of Education*.⁶ The movement to challenge inequality in education at all levels was part of a sustained strategy, including *Westminster School District v. Mendez*⁷ and *Hernandez v. Texas*,⁸ which, while not an education case, held that Mexican-Americans could not be systematically excluded from service on juries. The principle that excluding groups in a way that resulted in their treatment as less than full members of society protected by the Fourteenth Amendment would not be tolerated. Of course, one of the consequences of these lacunae in treating this evolving constitutional principle is that the robust anti-subordination element of *Brown* is misunderstood as a mere prohibition on racial classification.

Dean Johnson demonstrates that the exclusion of Mexican Americans from the canon distorts our constitutional history, and, Michael would suggest, leads to a diminished understanding of the role Latinos played in our legal history. Contrary to the characterization of immigration as an outwardly facing exercise of federal plenary authority, Michael shows how the fallout from the Mexican–American War and the reconstruction of groups in the conquered territory is tied deeply to managing the population the conquest included. The historical mapping of immigration policy and its implications reverberates to this day.

5. See generally Michael A. Olivas, *Ask Not for Whom the Law School Bell Tolls: Professor Tamanaha, Failing Law Schools, and (Mis)Diagnosing the Problem*, 41 J.L. & POL'Y 101 (2013) (analyzing the rising costs of legal, especially private, education).

6. See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

7. See generally *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947).

8. See generally *Hernandez v. Texas*, 347 U.S. 475 (1954).

The analysis of education, primary and secondary, did not focus solely on the explicit exclusion of Mexican Americans and other people of color; Michael was careful to subject the structure of education to critique. By focusing on the institutional evolution of education, Michael demonstrated how patterns of exclusion and miseducation could be built in and operated independently of malign intent. He then showed how some of the legal remedies would be unavailing. The class dimension of his critique is illustrated in his work exploring higher educational finance. But, as in his review of Tamanaha, Michael was not a ruthless critic. Instead, he praised those parts of our educational infrastructure that were essential for the excellence that American higher education produced.

Of course, the specter of exclusion haunted the investigations of higher education. As I discuss in the next Section, who was being taught and who was teaching were questions that always informed his work. Whether it was the exclusion of Mexican American students or the low number of Latino faculty members, Michael was not just concerned with inequality; to the contrary, he showed how inequality implicated the overall quality of higher education. One of the things he could not be accused of was special pleading because the denominator was always educational excellence.

III. ENGAGED SCHOLARSHIP

A. *Expanding Opportunity*

Professors Román and Professor Bender's contribution adds several important things to our understanding and appreciation of Michael's work. First, his scholarship was never separated from issues that motivated his social engagement. We could look at Michael's work on the DREAMERS, but we could begin as they do with his essay on crop cultivation.⁹ Michael starts with a story in that essay but quickly recurs to data. He demonstrates that, top to bottom, the educational system is not designed to promote success for Latino students. When compounded with poverty, graduation rates and regular movement up the educational escalator are dismal.

What does he do with this data? He uses it not to lament the disparities but to ask questions about what needs to change to reduce

9. See generally, Michael A. Olivas, *The Education of Latino Lawyers: An Essay on Crop Cultivation*, 14 CHICANO-LATINO L. REV. 117 (1994).

or eliminate the observed inequality. Addressing those issues requires a confrontation with the normative structure that supports secondary and post-secondary education. Turning to law school hiring, he shows how the conventional lament about the trickle of acceptable candidates masks the different standards applied to Latino and non-Latino applicants, but not in the way the conventional stories about affirmative action suggest. He does not end with a mere criticism. Instead, he proposes things schools could do to increase the diversity of their student bodies and faculties. As he notes:

These ideas are not revolutionary or even that unusual. Most law schools employ them, or versions of them, when looking for hard-to-find specialists; every law faculty has had to search for a specialized tax or bankruptcy or decedents-estates teacher, all of whom have been less readily available than, say, a contracts or torts teacher. The same diligence should be used in looking for minority law teachers.¹⁰

The most compelling part of his analysis in this article is that he is not proposing the wholesale reimagining of higher education in general or legal education in particular. Rather, he demands reflection on what these institutions say they value. Only by sustained and critical reflection will law schools recognize the critical social roles they play and make the necessary changes consistent with the roles that law serves.

B. Revealing the Structures of Exclusion

Professors Bender and Professor Román also show that Michael's work was not supported by intuition or speculation. While the narrative turn in critical legal studies, especially in critical race theory, is well documented and powerfully criticized, the compelling stories in Michael's work rest on a foundation of data. The data revealed not just outcomes, but why the disparities existed and the map that resulted. Because he rooted his arguments in data, he made his critics respond to the reality the data revealed.

Professor Bender and Professor Román demonstrate that statistical inference techniques strongly supported Michael's arguments. The data sets may have been flawed or weak, but that suggested that the agencies that compiled the data should review their questions. One of the points of Michael's work is that you

10. *Id.* at 136.

only find what you are looking for, but even with that proviso, the data supported the choked pathways that he described.

One of the essential points of Michael's work on education is that he was committed to making the institutions work and not blowing them up. Despite the resistance Michael encountered, his criticisms were always made in good faith. He wanted the promise of higher education to be fulfilled rather than subject the higher education system to a wholesale restructuring.

Whether he was looking at financial aid for students, funding for departments, or evaluation of the mission of the schools he examined, he was asking that each component first be understood independently and then understood in the context of the institution as a whole. He would then place the school in the broader educational ecosystem. He understood education as a system, not a collection of individual actors. The systems thinking he employed was challenging but necessary.

IV. CONCLUSION

Two virtues stand out when you look at the body of Michael's work. First is the rigor. His scholarly rigor gave his work bite and reflected his fundamental scholarly and ethical integrity. Second, his optimism pervades his work. Even when exploring disturbing and problematic issues, he believed in the possibility of reform. He had no illusion that it would be easy, but he believed that if he and those he challenged met each other in good faith, the antagonists could still achieve positive reform. This optimism was reflected in his humor and humanity. His emails or phone calls always began with "*cuaté*" or some related familiar greeting. Okay, sometimes he would use "*cochino*," but I never had any doubt that it was meant with affection. And maybe sometimes I deserved it.

I hope readers of this tribute will come away with an appreciation of his profound impact on the academy and policy. But I also hope you come away with an understanding of why he was not just admired but loved.

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