A Lesson in Equal Protection

The Texas cases that opened the schoolhouse door to undocumented immigrant children

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Early in the morning one long ago September, Laura Alvarez was awakened, bundled up, and piled into the family station wagon with her brothers and sisters. Her father hadn't driven far when he was stopped by the Tyler police.

Humberto Alvarez was a jack-of-all-trades who knew a little about plumbing, carpentry, and electricity, and figured that was enough to support a growing family. He had left Mexico City and crossed the border in 1974, ending up in Tyler, the self-proclaimed "Rose City of America" 99 miles southeast of Dallas. Wife Jackeline and the children followed two years later.

Compared with the noise and chaos of the Colonia Rio Blanco, a working class neighborhood in the Mexican capital where even the parks were gray and concrete, Tyler was another world: deceptively tranquil and generously green. Laura and her siblings began learning English and enrolled in public school. But in the summer of 1977, as the new term rolled around, they were told they could no longer go. They stayed home-first one day and then another and another, until that morning when they all woke up early, packed into the station wagon, and drove off.

Still half asleep, Laura tried to listen as her father explained to the police where the family was headed. Suddenly they were moving again, driving the brick streets of downtown preceded by a police escort. It was still dark when they got to the courthouse; 10-year-old Laura fell back to sleep. Several days later she returned to school.

Many years later Laura learned what happened that day, after she was hustled into the courthouse through a back door.

It was this: After the state of Texas decided it would no longer pay to educate undocumented children, the Tyler Independent School District started charging $1,000 a year in tuition for students like Laura. The children of Humberto Alvarez, who worked at a local meatpacking plant, could no longer go to school. Along with three other families, Humberto and Jackeline filed suit in federal court against Superintendent James Plyler and the local school board. On that September morning, U.S. District Judge William Wayne Justice held a hearing on their case. He would ultimately rule that the Texas statute and local policy were unconstitutional. The U.S. Court of Appeals for the Fifth Circuit affirmed his decision, and the case, along with a similar one from Houston, eventually went to the U.S. Supreme Court. On June 15, 1982, the court ruled 5-4 that the Texas law effectively barred undocumented children from attending public schools, a violation of the Equal Protection clause of the 14th Amendment.

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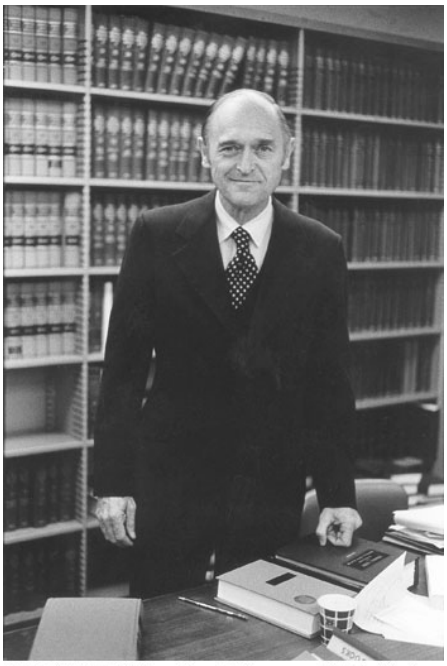

U.S. District Judge William Wayne Justice *photo by Alan Pogue*

The sleepy girl in the station wagon, known as L. Loe in court papers, was a protagonist in a quintessential Texas story that has profoundly affected families and school districts throughout the country for the past 25 years.

Because of *Plyler v. Doe*, hundreds of thousands of children have gone to school who otherwise would not have, says Justice, adding that *Plyler* is the case he'd like most to be remembered for after nearly four decades on the federal bench.

Despite feverish efforts to overturn the ruling in the mid-1990s, it remains the law of the land, and continues to play a role in the nation's never-ending, increasingly rancorous debate over immigration.

Thirty years ago, attorney Larry Daves recalls, "The atmosphere was very similar to what we have now. There was a hysteria about undocumented workers." Now practicing in southern Colorado, Daves spent much of the '70s and '80s doing civil rights and labor law in East Texas. There was more than enough work-particularly for someone not averse to occasionally being paid in kind. In the summer of 1977, a Catholic lay worker contacted Daves at his Tyler office, desperate for someone to represent a group of children who were being told they could no longer go to school.

Until 1975, Texas required school districts to admit students without regard to their immigration status. But in the waning hours of the 1975 legislative session, the Texas Education Code was amended to prohibit spending state funds on students who were not U.S. citizens or legally admitted to the country. The amendment, which also authorized school districts to exclude undocumented students, passed by voice vote, with no debate and no legislative history-no numbers, no studies of how many students would be affected or the amendment's financial impact. To some it was prejudice, pure and simple. Others saw it as one more step in a complex dance involving school finance reform and the state's efforts to obtain federal funding for overcrowded schools, especially along the border. Years later, when questioned by attorneys, a majority of legislators would say that they had no idea what they were voting for.

At first, Tyler school officials ignored the law. "I guess I was soft-hearted and concerned about the kids, not wanting to penalize them for something the parents had done," Superintendent Plyler testified. But fearing that the district would become "a haven" for families moving in to get an education, on July 21, 1977, the board of trustees began requiring parents to pay $1,000 tuition for each undocumented child. "We weren't rich enough that we could enroll youngsters that the state would not reimburse for everyday attendance," Plyler later explained. At the time, fewer than 60 students, out of a total enrollment of 16,000, were undocumented.

After agreeing to represent the families, Daves called the Mexican American Legal Defense and Education Fund. Peter Roos, a MALDEF lawyer specializing in education cases, was already spinning out legal theories for a potential court challenge. He and Daves began preparing a case on behalf of four undocumented families from Mexico: Jose and Rosario Robles, Jose and Lidia Lopez, Felix Hernandez, and Humberto and Jackeline Alvarez. The families had lived in Tyler for between three and 13 years, working in agriculture, meatpacking, foundries, and the city's world famous rose industry. They had rent receipts and car titles; some had income tax statements. The Robles family had bought a house. All had at least one child who was a U.S. citizen. "The main thing I remember," Daves says, "was we were just really terrified these folks were going to get deported."

Judge Justice allowed the plaintiffs to be identified by pseudonyms-Doe, Roe, Boe, and Loe-but made it clear that he was obligated to release information about their identities if the Immigration and Naturalization Service asked him to do so. To ease concerns about media attention and courtroom spectators, however, Justice set the hearing for a preliminary injunction for 6 a.m. on September 9.

Before the hearing, Daves reminded his clients that they were doing something terribly important. There were no guarantees. The law had already been unsuccessfully challenged in state district court; they were going in at their own peril. The families knew that, and had prepared for the possibility that they would be deported that day. They did not know that the U.S. Justice Department had already decided it was more interested in having the case heard then sending the INS to round up a few families in Tyler. In fact, as long as former President Jimmy Carter was in office, attorneys from the Justice Department's Civil Rights Division filed briefs and appeared in court on the side of the immigrant families.

After the hearing, Justice issued a preliminary injunction directing Tyler schools to admit all children living in the district, regardless of their immigration status. He also ordered the Texas Education Agency to release state funds to the Tyler school district for each undocumented child. A two-day trial was held in December, and on September 14, 1978, Justice issued his final ruling. "Already disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable social prejudices," he wrote, "these children, without an education will become permanently locked in the lowest socioeconomic class."

Justice chided the state for using the children to deal, in a backhanded way, with longstanding problems caused by a school finance system based on property taxes. No one disputed that school districts were overburdened and that there were many poor, Spanish-speaking, immigrant students, particularly along the border, he wrote. But testimony indicated that most of them were legal immigrant children. "Bent on cutting educational costs and unable constitutionally to exclude all such 'problem' children, the state has attempted to shave off a little around the edges, barring the undocumented alien children," he wrote. "The expedience of this state's policy may have been influenced by two actualities: children of illegal aliens had never been explicitly afforded any judicial protection, and little political uproar was likely to be raised in their behalf."

Justice had entered new territory in applying the equal protection clause of the Constitution. Part of the Reconstruction-era legislation passed by Congress after the Civil War, the 14th Amendment was designed to officially do away with slavery and caste-based laws. It confers citizenship on those born in the United States and provides that, "No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

There was no INS, no Border Patrol, no restrictions on immigration when the amendment passed. The Supreme Court later ruled that the due process clause applied to illegal immigrants. But when Justice issued his opinion in Plyler, no high court decision had addressed whether the equal protection clause also applied. The case was immediately appealed to the Fifth Circuit.

While Justice's decision applied only to Tyler schools, it inspired a slew of similar cases throughout the state, most brought by young, fairly inexperienced attorneys working with federally funded legal services programs. In Houston, a group of young lawyers from the *Centro para Inmigrantes*, a legal clinic then operated by Gulf Coast Legal Services, became overwhelmed responding to the increasingly chaotic situation. At best, well-meaning principals were flummoxed by the complexity of immigration law. What were they supposed to do, for example, with a girl who had been brought to the country illegally as a baby, whose parents-one a U.S. citizen, the other a permanent resident-had been waiting for two years to obtain birth records from the Yucatan so they could complete their daughter's file?

Church groups, Chicano graduate students, and even the government of Mexico tried to set up makeshift, alternative schools for students denied access to public schools. But the reality for many families of mixed immigration status was that some children could go to school, while siblings were forced to stay home. Centro attorneys were convinced it was time to take the issue statewide. Seventeen lawsuits that had been filed throughout the state were consolidated into a single case known as *In re: Alien Children Litigation*.

Centro lawyers tried to convince MALDEF and Roos to join them in making a statewide case. But the Tyler case was moving swiftly through the appellate system, and Roos was wary of another trial where the state would have a chance to present a stronger case. He discouraged the idea, and tension grew between MALDEF and the statewide team. "MALDEF said 'Don't do this. You're going to mess it up'" recalls former Centro attorney Isaias Torres. "We were saying 'No, we're going to be fine.'"

As Justice's ruling in *Plyler* made its way up the appellate process, the statewide case was set for trial in February 1980 before U.S. District Judge Woodrow Seals in Houston.

Former U.S. District Judge Woodrow Seals *courtesy of Brad Seals*

Born in Bogalusa, Louisiana, Seals came to Texas for law school after serving in what he would always describe as "the second Great War." He settled in Houston and, like his friend Wayne Justice in Tyler, was appointed to the federal bench by Lyndon Johnson at the recommendation of the late U.S. Sen. Ralph Yarborough, patron saint of a generation of Texas liberals. Like Justice, Seals presided over several landmark school desegregation cases. Unlike Justice, whose ostracism by the local community was almost as legendary as the rulings that prompted it, Seals was a gregarious participant in a wide range of community activities. During the trial of the alien school case, he occasionally baffled attorneys with off-the-cuff remarks prompted by outside reading: for instance, engaging a Rice University professor in a discussion of the *Cantos* of Ezra Pound. Most baffling of all was a remark Seals made when a witness was trying to describe how a classroom could be designed so that English-speaking students learned Spanish as Spanish-speakers learned English. Why should English-speaking students want to learn Spanish, Seals asked, when they ought to be learning German, Russian, Chinese, or Japanese? "I don't read the Spanish-language newspaper," he continued, "but I read international reviews that review books that are published in all languages, and I never see anything worldwide published in Spanish of importance." Among the angry letters he received was one from Sister Margaret Rose of Our Lady of Guadalupe church, reminding him that "were it not for the famous (or infamous!) Treaty of Guadalupe Hidalgo of 1848-written in Spanish," he would probably not be presiding over a trial about undocumented school children "in our midst." Seals responded by reading a lengthy, unprecedented mea culpa letter in open court.

The linguistic and literary diversions were somehow in keeping with what became a freewheeling trial about immigration history, demographics, school finance, international law, and federal education programs. Peter Schey, an attorney working with an immigrant rights project in Los Angeles brought in to direct the plaintiffs' case, sought to not only challenge the constitutionality of a portion of the Texas Education Code, but to raise larger issues about federal immigration law and the history and context of Texas' influence on labor and migration patterns. Seals let virtually everything into evidence.

Sociologist Gilbert Cardenas described a long-standing practice of extending employment to Mexican workers, precisely so they could be sent back across the border whenever it was convenient. Leonel Castillo, a former head of the INS, testified that inadequate INS staffing created a "de facto amnesty" because it was unlikely that children kicked out of school would ever be deported. Catholic Bishop John McCarthy likened the law to "the public policy after the Civil War, when we said, we will keep certain people poor in order that we will have somebody to bring the cotton in."

Texas Assistant Attorney General Susan Dasher, working with what she would later describe as "a horrible statute to have to defend," countered with school officials from Dallas and Houston, who decried the lack of bilingual teachers. Brownsville school Superintendent Raul Besteiro described his district's rush to build portable classrooms for increasing numbers of legal immigrant students. Taking the nautical metaphor so often used in the context of immigration (inevitably described in terms of a "flood" or a "wave") to the extreme, state education official Robert Tipton compared the total population of students "to the people on an ocean liner." Imagine we are in a storm, he said, and the liner has gone down. "I am in charge of the lifeboat, and lifeboat holds 40 people," Tipton said. "And there are already 5
people on the lifeboat. … Do I all
w some of those people out there in the water to drown so that I can save these 50 that I already have in the boat?"

The trial lasted nearly six weeks. On July 21, 1980, Seals issued an 87-page opinion that began with a tribute to the public school-"the most important institution in this country" and, like Justice before, concluded that Section 21.031 of the Texas Education Code was unconstitutional. Absent sufficient justification, he concluded, "the Constitution does not permit the states to deny access to education to a discrete group of children within its border." He ordered the state to stop enforcing the law, and all local school districts to admit students without regard to their immigration status. "Texas v. Children," was

the headline the next day in the opinion page of the *Dallas Times-Herald*, while the rival *Morning News* declared, "Illegal Aliens Win Case."

For the next few weeks, the staff in Seals' office learned to ignore the phones during lunch. "It is people like you who will cause the ultimate breakdown of the system of law under which we live and the subsequent return to the law of the jungle," charged one angry letter writer. Another proclaimed that Seals had "placed a socialistic albatross around the necks of the citizens of the United States."

Replying to a congratulatory letter from Yarborough, Seals wrote: "These children still have a long way to go." With an eye toward the upcoming presidential election, he added, "I hate to think what will happen to my decision if Governor Reagan wins the election and appoints four new justices to the Supreme Court. I do not think those children would have much of a chance."

In his first year, President Reagan appointed just one new justice-Sandra Day O'Connor, the Arizona Republican who became the first woman on the court. On the morning of December 1, 1981, the gallery was packed as O'Connor participated in oral argument in one of her first major cases. She sat at the far end of the judicial panel, surrounded by stacks of books. From his vantage point at the counsel table, attorney Isaias Torres was almost close enough to touch her.

The court had combined the *Plyler* and *In re: Alien Children Litigation* cases. Schey and Roos divided their argument time, while Richard Arnett, a Texas assistant attorney general, and John Hardy, the Tyler school attorney, divided theirs. Arnett began with a geography lesson: Texas sat "right on top of the hub" of Mexico's population and was the most vulnerable to an influx in population from Mexico. The Texas Education Code had been amended to protect the Mexican American population along the border, he said. As Torres listened to O'Connor pepper Arnett with questions, he began to think that she just might vote on the side of the children.

Then-Justice William Rehnquist occasionally looked off-kilter, slurring his words as he asked hypotheticals about the law of domicile and Louisianans moving to Texas for an education. Justice Thurgood Marshall, who led the 20-year battle that culminated in *Brown v. Board of Education* before becoming the first black justice, seemed ready to pounce. He asked Hardy, could Texas deny fire protection to illegal aliens?

"Deny them fire protection?" Hardy responded.

"Yes, sir. F-I-R-E. Could Texas pass a law and say they cannot be protected?"

Hardy didn't think so. "Why not?" Marshall shot back. "Somebody's house is more important than his child?"

Much of oral argument revolved around the minutiae of immigration-What was a green card and how did you get one? What was a work permit?-as well as questions about the law of domicile in Texas. What about a Virginian who moved to Texas, intending to stay less than a year? What about a professor from Mexico who moved to Texas to teach? At one point, an exasperated Marshall asked Roos when somebody was going to start arguing the 14th Amendment and equal protection.

If oral argument was lively, the court's private deliberations proved even livelier. In a series of articles published last January in *Slate*, author Jim Newton provided insight into how lively. For decades, Justice William Brennan compiled a series of case memos, chatty and informal summaries of the mood and the meat of weekly deliberations. The memos are archived in the Library of Congress; many had never been made available to the public. A selection of Brennan's case memo for *Plyler v. Doe* was posted online:

TM took sharp exception to WHR's reference to illegal aliens as "wetbacks." When WHR sought to defend his use of the terms as one still having currency in his part of the country, TM reminded WHR that under that theory he used to be referred to as "nigger." But warmer feelings prevailed and TM and WHR returned to the matter at hand.

The Chief began the discussion by arguing that illegal aliens should not be entitled to receive welfare (as if that was the issue), but I was pleased when he conceded that aliens were "persons" within the meaning of the Equal Protection Clause. Still, he continued, whatever level of scrutiny was appropriate it did not entitle illegal aliens to receive welfare or an education.

The swing vote would not be O'Connor, as Torres and others had predicted. Brennan and Chief Justice Warren Burger would be courting Lewis Powell for the fifth vote. Brennan drafted and redrafted the opinion to emphasize the innocence of children and the importance of education. Powell, Harry Blackmun, Marshall, and John Paul Stevens joined Brennan in the majority opinion upholding the rulings by Justice and Seals.

"It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime," Brennan wrote. "It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation."

In his dissenting opinion, which O'Connor, Justice Byron White, and Rehnquist joined, Burger scolded the majority for spinning a "theory custom-tailored" to fit the facts. "I would agree without hesitation that it is senseless for an enlightened society to deprive any children-including illegal aliens-of an elementary education," he wrote. But the "Constitution does not constitute us as 'Platonic Guardian.'"

The *New York Times* editorialized that "the 5-4 vote was too close and the legal rule too narrow to make the case one of liberty's landmarks, yet any other result would have been a national disgrace. It was intolerable that a state so wealthy and so willing to wink at undocumented workers should evade the duty-and ignore the need-to educate all of its children."

The day the opinion was issued, a little-known Department of Justice lawyer co-wrote a memo chastising the U.S. solicitor general for not filing a brief taking Texas' side. Had such a brief been filed, future Supreme Court Chief Justice John Roberts suggested, Powell might have voted differently.

That's me," says Laura Alvarez, flipping through the pages of the *Alcalde*, her yearbook from John Tyler High School class of '87. She points to a photograph of a slender young woman with a thick cascade of dark brown hair, pensive in her cap and gown. "I really liked school."

The children of *Plyler* are now approaching middle age-"fixin' to be 40," as Alvarez described herself last spring. A surprising number-including all her six siblings-remained in the Tyler area, working and raising families. Two years ago, Alvarez married Juan Reyna, a high school classmate who had also migrated to Tyler illegally from Mexico as a child. They're now the parents of a baby boy, Juan Jr. Juan Sr. is a musician whose band plays at Mexican dances throughout East Texas and sometimes travels as far as Kansas.

Although she liked school, what was supposed to happen afterward for undocumented children like her was a little vague. In 1986, Congress passed the Immigration Reform and Control Act, providing for increased border security and sanctions on employers of illegal immigrants. It also created an amnesty program that eventually led to the legalization of about 3 million undocumented immigrants. Among them were Alvarez and other *Plyler* plaintiffs. But legalization-and a green card-was still down the line when Alvarez graduated from high school. She never thought about college. She worked as a teacher's aide with the Tyler Independent School District for 10 years, in charge of Spanish-speaking students. She usually juggled a part-time job and occasional class at Tyler Junior College, thinking she would become a teacher. Discouraged by the low pay, she found a job with the Smith County district attorney, where she worked in victims services until a few months before Juan Jr. was born.

Alvarez had never heard of *Plyler v. Doe*, much less her own role in it, until 1994, when she was contacted by a *Los Angeles Times* reporter. Her parents, who divorced during the case, didn't raise their children to "get into the adult business," she recalls.

But in the mid-1990s, *Plyler* was in the news again. A severe budget crunch and recession caused by massive layoffs in the California's defense industry had combined with a growing sense of alarm over the state's changing demographics. Gov. Pete Wilson needed a winning issue for his flagging re-election campaign. The answer was the "Save Our Schools" ballot initiative, attempting to do what Texas had done nearly 20 years before-and more. The initiative, Proposition 187, passed easily at the polls, but was blocked the next day and suffered a slow death in court. While it wended its way through the state and federal courts, Republican Congressman Elton Gallegly attempted to add an amendment to an immigration reform package, giving states the same option that Texas had offered school districts in 1975 and essentially overturning *Plyler v. Doe*. President Clinton threatened to veto legislation if the so-called "Gallegly Amendment" were attached; Texas' two Republican senators, Phil Gramm and Kay Bailey Hutchison, also spoke out against it, as did then-Gov. George Bush. Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 without the Gallegly Amendment.

Since then, the right of undocumented children to a free public elementary and secondary education has been settled law, despite the best efforts of critics. School officials may not ask students for Social Security numbers or otherwise question them-or their parents-in ways that have a "chilling effect" and discourage school attendance. Although the statistics are murky, an estimated 65,000 undocumented students graduate every year from U.S. high schools.

Still unresolved is the fate of those students after they graduate.

Several high court justices posed that very question to former MALDEF attorney Roos back in 1981. Would Texas have to open the doors to state colleges to undocumented immigrants? Should it admit undocumented students to its graduate or medical schools at in-state tuition? Roos tried to respond with opaque answers. From the beginning, his strategy had been to define the case as narrowly as possible, to assuage the fears of those who saw *Plyler* as the beginning of a host of rights for undocumented immigrants. Finally, he conceded, "You would be dealing with people above the age of majority." The "innocent factor" would not be the same.

By 2001, a steady trickle of stories about undocumented immigrant valedictorians unable to attend college began appearing in the media. That year Texas-the first state to try to exclude undocumented students from its public schools-became the first to offer them in-state tuition at its colleges and universities, provided they attended a Texas high school for three years and earned a diploma or obtained a GED. Since 2001, there have been bipartisan efforts in Congress to pass the Development, Relief, and Education for Alien Minors Act, which would offer a path to legalization to students who grow up in the United States and attend college or join the military. The most recent version of the DREAM Act died last month, along with the vast stew of proposals that went into the Senate immigration bill.

Immigration itself, of course, is never "settled," despite the rhetoric of those who speak about "solving immigration," as if they were discussing a quadratic equation rather than the complex set of forces that cause people to migrate. In increasing numbers, state legislatures and city councils throughout the country have attempted to get into the immigration business. Some proclaim themselves sanctuary cities; others attempt to adopt schemes, such as the one approved last May by voters in Farmers Branch, Texas, that would require landlords to verify the immigration status of their tenants-a variation of what Texas tried to ask principals to do more than 30 years ago and a roundabout method of doing away with *Plyler v. Doe*. If you make them miserable, the theory has it, they will just go away.

Not long ago Laura Alvarez was asked if she followed the immigration debate. "A little bit," she said. "I kind of see it from both sides." But she was certain of one thing: "Don't try to take away education."

Former Observer *editor Barbara Belejack is a 2007 Racial Justice Fellow of the Institute for Justice and Journalism at the Annenberg School of Communication, University of Southern California, which provided funding for this article. To listen to*

the oral argument of Plyler v. Doe *before the U.S. Supreme Court, read the transcript or the decision in the case, see* *http://www.oyez.org/cases*.