



3-24-2022

A Tale of Serrano: Three v. Priest

John E. Coons

Follow this and additional works at: https://scholarsarchive.byu.edu/byu_elj



Part of the [Education Commons](#), and the [Law Commons](#)

Recommended Citation

Coons, John E. (2022) "A Tale of Serrano: Three v. Priest," *BYU Education & Law Journal*: Vol. 2022: Iss. 1, Article 3.

Available at: https://scholarsarchive.byu.edu/byu_elj/vol2022/iss1/3

This Article is brought to you for free and open access by the Journals at BYU ScholarsArchive. It has been accepted for inclusion in *BYU Education & Law Journal* by an authorized editor of BYU ScholarsArchive. For more information, please contact ellen_amatangelo@byu.edu.

A TALE OF SERRANO: THREE V. PRIEST

John E. Coons

“Cultivate Simplicity.”

Letter to Coleridge, 1798, Charles Lamb.

The story of Serrano remains for me, a very personal tale of a trio of lawyers—Bill Clune, Steve Sugarman and myself—who stumbled and blundered into the concept that made the decision possible to the California court and constitution. Of these two, my collaborators and close friends, I will speak more later.

Reader, appreciate that, as I approach 92, my memory of specific events in the 1960s and 1970s could err on detail. This will be an informal story sans footnotes. I assume that younger, clearer heads will execute any necessary corrections.

JEC

It was August 1971. Our older boys and I had just emerged from a week of backpacking high in eastern Yosemite. Heading home, the car radio was scratchy but intelligible; did they really say what I just heard? Yes, the California Supreme Court had decided for John Serrano against the State of California and its public school system. Hallelujah! When we had made it home to Berkeley, there was joyful pandemonium.

At that moment, it seemed for me the end of a part in a play of morality—with a happy final curtain. Over time,

it proved instead to be the first act of an epic whose plot has taken too many turns to justify confidence in my account of every early detail. I shall, of course, try to avoid fiction, and, among these fresh minds, seek correction. From victims of any unintended inventions, I beg understanding—that is, if any of you is still around to complain (and happily, you are, Sid Wolinsky!).

My strange avocation had its seed in 1961. I was, at the time, a member of the law faculty of Northwestern University in its grand Victorian palace on the shoreline campus in downtown Chicago. My office phone rang; it was a federal civil rights agency in D.C. These worthy folk were bent on learning whether the public school systems of certain large Northern cities were engaging in racial segregation or discrimination. The feds had hoped to engage my senior colleague, Willard Pedrick, to report on Chicago schools. Pedrick, or Ped as he was known, was too busy, but knew that my burgeoning family could use the extra income and recommended me for the job. I said yes.

I did so, though at first, I felt ill-prepared to assess the virtues and sins of any public school system. Of my own twelve years of schooling eleven had been spent in Catholic schools with nuns tending to our minds and souls (tuition in the first eight grades was \$2 a month!). Yet, looking back now, my naivete may in fact have been an advantage for this new task; at least I had fewer preconceptions of what constituted a proper public school education.

I also had the peculiar advantage of Marylyn, my late spouse of 62 years, who was an experienced public school teacher with political sophistication as well. I had already committed the Spring of 1962 to two months of research on tribal courts in East Africa. No problem; Marylyn filled in for me in the preparatory meetings of the probing group held at the University of Wisconsin. By the first of May, I was back in Illinois where she

taught me all I would need to know about what the feds expected.

What she could not warn me about was what I was to experience in my introductory session with Chicago's school superintendent, Dr. Willis; it cleared my mind of any naive hope that the project would be all fun. Dr. Willis began our conversation that day by sharing the findings of his detective work directed toward my feeble qualifications to snoop and judge him and his schools. This approach to my work turned out to be his personal style. Over and over, I found barriers and ditches, making research extremely difficult. Paradoxically, this shadow boxing unintentionally taught me much about the actors; it showed enough fear of me as a federal snooper to be instructive. In the end, to no one's surprise, I found that Chicago's Black student population was indeed getting the short end. My report was made public and was sufficiently revealing that the media found it worth describing.

A second flash of fame was to come in the mid-1960s when the U.S. Commission on Civil Rights commissioned me to reappraise Chicago but also—with the same purpose—to invade the two separate elementary and high school districts of Evanston bordering Chicago to the north. A cluster of law professors from Northern universities were to scrutinize a collection of urban school districts from San Francisco to Boston. The whole troop was to meet at Harvard for six weeks under the leadership of the great James Coleman who would later introduce two books of my students and myself on the world of school finance and parental choice. He was a splendid human and a good friend.

But, what, if anything, did all this experience in matters of race have to do with *Serrano*? Just this: My assignments to study specific districts had led me, for some time, to suppose that the dollar inequalities *within* those districts were the primary issue about per pupil

expenditure. It was not until the mid-1960s that I stumbled into the reality of huge differences between and among whole districts—and thus *Serrano* began. My students, Stephen D. Sugarman and William H. Clune, commenced their research for me into the history, structure, taxable wealth, and tax rates of school districts and their effect—state-by-state—upon the per-pupil dollars available district by district. Their findings awakened me to the reality of a world of public schools radically different from one another in available dollars per pupil—in each case depending upon which side of the district boundary little Johnny lived. It was a world of property owners paying at radically different rates because the total of real property within a school district varied so dramatically in value. We three innocents were astounded.

I. COLLABORATION

And who were “We”? This important part of the story returns me to the mid-sixties in Chicago. What I will say here seems implausible in these days of the great rush to law school, but, when I returned from the Army to join the Northwestern faculty, one of my assignments was to squeeze in some time on the road inspiring applications to our school from students soon to receive bachelor’s degrees. With a half-time teaching load in the Fall, I could visit seniors in colleges from the Ivy League to Minnesota, describing the glories of life and mind to be had in our classical medieval edifice on Chicago Avenue. Occasionally, they actually came, often inspired by a proper scholarship (just as I had enjoyed in 1950).

And so it was with Bill Clune and Steve Sugarman—the former from Loyola, the latter Northwestern (I, from Minnesota, Duluth!). Grants from the Russell Sage Foundation supported their interest in the overlap of law with the social sciences (which I shared and taught). By Spring of their first year both

were performing splendidly, and I resolved to monopolize what I could of their intellectual horsepower. That was 66 years ago. I have never been disappointed.

The two of them and I resolved to mine the secrets of school finance and to put in the hands of willing and able lawyers an intelligible volume that might be used for the pursuit of fairness and rationality in school finance before the courts—that is, our story would aim to clarify our conviction that judicial rescue was both needed and possible—if prudently designed. Steve and Bill took separate parts in the research and, in due course, produced pictures of the world of public school finance which, though intricate, were a scheming lawyer's delight.

II. PRE-SERRANO HEROES AND THEIR STRATEGIES

Do not imagine that we three were the only do-gooders interested in macro-reform of school funding through litigation. I believe it was in 1966 that I received a call from one Arthur Wise, a Ph.D. candidate at the University of Chicago, who had heard of our project. He, too, was on the trail of reform through litigation and he wanted to talk; so, the four of us gathered at my office. Wise's thesis would be published in 1968 (by the *U.C. Press*) under the title *Rich Schools, Poor Schools*. It was a galaxy of ideas that Wise, who was not law-trained, thought plausible to inspire the Supreme Court to strike down systems of unequal expenditures by school districts for children of equal need. Wise was, and remains, a well-bred mind and a humane character.

The only trouble was that he tended to suppose that courts could and ought to pitch right in and decide how the money would be raised and spent; he was clear that we could not, as a matter of justice in this society,

have hundreds of school districts in any state acting as separate decision makers able to spend wildly different amounts for the same necessary public purpose. Now, there was nothing silly about that idea of his when understood as a goal of politics and simple justice; however, asking courts to decide how, and how much, the complex world of public schools could be funded, and to order legislators and school executives to take specific steps seemed to our trio a bit of a stretch.

And so did it prove in *McInnis v. Shapiro*, a Wise-inspired complaint presented to a U.S. district court in Chicago in 1968. From the beginning, the case had the aura of a crusade to win compensatory tax dollars for poor and Black neighborhoods in the inner city. The complaint emphasized “needs.” Just what the court was to do was never plain. The judges had no clear standard by which to barge in and redesign the system. *McInnis* went down; the plaintiffs petitioned the Supreme Court but were summarily rejected, despite our own friend of the court brief.

Similar efforts were made in a blitz of litigation among the states in 1968. These reformers were groping for some plausible way for judges to dive in, decide for good sense and fairness, then fund and order a way to fix things. In Michigan, the hopefuls went to state court to inject their vision of justice into the racial tragedies of the mostly Black Detroit system. To their surprise, in *Board of Education v. Michigan*, Detroit’s per pupil expenditures turned out to be higher than those of most of the state’s districts, including many that were predominately White. The plaintiffs here also tried the Supreme Court but were waved away without comment. A sprinkling of like efforts in states across the country met similar fates. Courts were leery of making too radical an intrusion into the complex world of school finance. A decade of experience battling over physical racial segregation was proving tough enough.

III. THE NATURE OF THE BEAST

Somehow this nation's 19th Century designers of public education had constructed systems of taxing and spending for schools that, in our view, lacked bare rationality. Assuming, as all then did, that more dollars were ever useful to improve a child's education, it seemed indefensible as a matter of simple justice. The abyss between those districts with taxable property aplenty and those of relative poverty left this observer curious; just what were those lawmakers thinking, if anything, and why had they for a century left this bizarre scheme largely unmodified?

My reader, if such there be, may have sophistication in such matters. I did not, until my own students taught me. Here was, and in many states remains, the pattern of available dollars per pupil for the enlightenment of little Susie: If she lived in a district with a middling per-pupil property-tax base, one could generally predict a manageable real estate tax-rate which would raise what the children were deemed to need. Meanwhile, the opposite experience could come in either of two forms. First, if your district's property were especially valuable per student, your tax rate could be low, while leaving spending per child at a comfortable level. Any parent living in that city still mysterious to us, Emeryville, California, could be confident that her child would have plenty of dollars spent on schooling, even though the property tax rate was very low. By contrast, the citizens of a district enjoying less property wealth per-child might levy upon themselves a multiple of Emeryville's rate yet raise and spend only half as much. My family was, in 1967, considering moving to neighboring Berkeley, and I was interested in seeing just how beautiful our shoreline neighbor Emeryville must be.

Surprise! That small and intensely industrial city on the mudflats of the Bay did indeed enjoy an enviable

tax base. It also, at that time, had relatively few residents with school-aged children upon whom to lavish its taxable wealth. Here was the living reality of the district tax system. But another Beverley Hills it was not. The students upon whom these blessings fell were virtually all from lower-income Black families.

Would any lawyer with a heart want to threaten their peculiar species of good luck? Yes! That is, “yes, if...” And the “if” would have to come in the years ahead, as districts that were poor in terms of taxable property could be empowered to tax and spend on the same terms. Emeryville would then have to play the same school money game as the rest of the state. Bill, Steve, and I decided to call such a leveling mechanism “district power equalizing”—with which slogan the *Serrano* opinion was to be decorated.

IV. 1967: BERKELEY DAYS BEGIN

By June, 1967, Steve and Bill were about to graduate to freedom from Northwestern and my exploitation; yet, we not only kept on working together, but in a new venue. In August, Marylyn and I, with our children in tow, skipped off to Berkeley, with Steve soon following to insure that justice would be done to the growing manuscript. Bill came whenever his new job in Chicago allowed. An early California discovery of ours was Professor Charles Benson, an economist of education who had left Yale to join the education faculty at Cal. We had read his books on school finance; he now confirmed our critical ramblings and decided that we were up to some good. Charles was a bright, patient man with a voice like a shovel scraping old ice and with a wise and jolly wife Dorothy, who hosted many an evening that was not merely pleasant but useful to us.

The first publication detailing our hope for help from the courts was the account of our preferred constitutional argument in the *California Law Review* of 1969. It drew

various reactions, mostly positive, but two of great importance to us. First, a scout from the Harvard Press asked to see the whole of our manuscript. She succeeded in selling her Ivy establishment on our prospects, and the book (*Private Wealth and Public Education*) appeared in a hurry in 1970. *Serrano* was already on the way, and, to my regret, the book contains no index. It was, nevertheless, chosen as a central source and subject for the annual national college debates.

The other important professional reaction came in a call from UCLA law professor Hal Horowitz who had seen our essay. He had an important revelation. A coterie of lawyers in southern California was about to file lawsuit contesting the state's school finance system. Would I like to see the draft of their complaint? I did so, and they agreed to add an eleventh "cause of action" framed in our terms, which was, roughly, that the state could require and fund the education of a child of any specific age and personal characteristics as it saw fit, so long as the chosen mechanism gave every district (or parent) equal access to the dollars fixed by law to be spent on that particular category of student. It is the heart of *Serrano*. You (district or parent) do not have to spend the same on Susie as you do on kids like George, but you have to have the same capacity and opportunity to do so.

In the trial court the complaint was dismissed as expected. In due course, it arrived at the California Supreme Court. Steve was, by then, long a member of the California state bar. I had never taken the necessary exam, but the Court apparently was interested enough in our book to hear both our voices as "amici curiae." We had also filed an *amicus* brief that some of the judges had clearly read.

Here I should note that the conventional brief and argument of those lawyers who were formally representing *Serrano* were presented with gusto by a young poverty lawyer, Sid Wolinsky, with whom I

happily reconnected on our video call last February. He is still fighting for the poor and they are in good hands.

Wolinsky finished his argument, and then Steve and I had our time. The Court, with one exception, Judge McComb, seemed truly interested; the latter stalked out in the middle of it all, and was to give the only dissent to the eventual majority decision. “I dissent” constituted his opinion.

The lawyers in defense of the school system were unknown to us. No doubt able at their daily roles, they seemed out of their element. One of them imprudently expressed his horror at his discovery that Steve and I had been dabbling in parental choice and vouchers. I could not have asked for a better opening in rebuttal time to repeat and affirm that our proposed theory did not require or even urge the legislature to reform the system in any particular way. It was designed simply to clarify for the Court that it could solve the problem without forcing the legislature to adopt any specific solution. Indeed, state lawmakers could, as Hawaii still does, fund all public schools entirely from the center, kissing the local school tax farewell. Or it might subsidize universal parental choice, public and private.

Serrano prevailed. Six judges declared the system invalid under both state and federal constitutions, a violation of the equal protection guarantee of each by virtue of the state’s unnecessary dependence upon the uneven property wealth of school districts. The child’s interest was “fundamental;” it had been unnecessarily conditioned upon the variant per pupil value of district property wealth, and all this without any justifying state interest in doing so. It was irrational and violated both federal and state guarantees.

The Court’s opinion was a clear and carefully written disapproval of those wealth-based systems that bred substantial per-pupil spending differences for a fundamental service without some rational justification for doing so. However, the judges wanted proof at trial

of plaintiffs' allegations against the system plus a consideration of separate existing subsidies by the state to poorer districts which the defendant claimed to offset most of these differences. The vague suggestion of racial discrimination also remained in the air as *Serrano* headed back to the trial court for proof of plaintiff's claims. There I was soon to hear more than one witness describe the school finance problems in terms that would evoke America's tendency to equate personal poverty with race. The name Serrano was clearly Hispanic, and maybe less evocative of prejudice, but the trial judge was himself Black and, I feared, his presence could evoke the image of yet another race case. He was a fine professional, but somehow made me uneasy. And other witnesses, Black and White, occasionally slipped into language familiar from school segregation disputes, vaguely suggesting a fiscal discrimination that we could not prove—indeed which did not exist. Steve and I, as “expert witnesses,” did our best to keep the court's eye solely on the money.

V. MEANWHILE

During the Harvard summer, (around 1964) I had enjoyed several occasions to rub shoulders with the (mostly) young lawyers of its poverty law program, among them one Mark Yudof, who was especially focused on school affairs. In a year or two, Mark joined the law faculty of the University of Texas, in time to experience the brief and fateful pursuit of the Supreme Court's adoption of *Serrano* as a national constitutional norm.

Sugarman and I had been urged by educators in Texas to help enlist and assist proper legal representation for a would-be plaintiff school district (San Antonio) to undertake *Serrano*-type litigation. The Mexican-American Legal Defense Fund (MALDEF) was the obvious choice. To the surprise of all, MALDEF, for

whatever reason, declined. In the confusion that followed, a fine, but young and inexperienced individual lawyer, call him “Arthur II,” volunteered and was hired by the San Antonio district. It did not seem all bad; after all, he could be aided by my boss to be—the future president of the University of California, the aforementioned thinker Mark Yudof.

Such was the genesis of *Serrano*’s offspring, *Rodriguez v. San Antonio Independent School District*. The complaint was filed in federal court and would be heard before a three-judge panel. Six months or so later, a *New York Times* reporter called to inform me that a unanimous panel had ruled in favor of the plaintiff. My reaction put me in the first line on page one: “‘Hot Ziggety!’ cried the professor.” Such fame!

The case, of course, went directly to its demise in the U.S. Supreme Court. I had flown to Washington to hear the argument. The defendants were represented by the distinguished Charles Alan Rice of the University of Texas faculty; the plaintiffs by Arthur II. We—Steve, Bill, and I—had considered the propriety and prudence of a discrete search for more experienced counsel; there was so much at stake; but, in any case, we refrained. And I sat that day in the high court listening to Charles make hamburger of the poor fellow. On the courthouse steps as we left, my old (and opposed) professor, Phil Kurland, smiled and said, “six to three.” I responded “five to four”— i.e., against the plaintiff. At least I had the satisfaction of predicting the score in our defeat.

Unsurprisingly, the California public school system took *Rodriguez* as the signal of *Serrano*’s demise as state law. In any event they were not far from right. Their plea to dismiss the case had to be argued again to the state Supreme Court which this time included a couple of new faces. *Serrano* survived four to three. Again, Judge Sullivan wrote the opinion, making us (Steve, Bill, and me) proud and relieved as he emphasized the

legislature's broad discretion in designing the new system under a rule of "power equalizing."

Of course, California's opportunity to enact any system that depended upon a redesigned district property tax were soon to be greatly complicated by the triumph of Proposition 13, which I opposed but from which I was personally to benefit over the coming years.

VI. THE BABEL OF THE FALLOUT

A few other state courts understood and adopted the power equalizing rule as their own. Others, like Washington, were to reject it (even after hearing my argument in person!). But the principal response of lawyers and courts around the country was to misunderstand the existing problem in terms of discrimination against the urban poor and to redress that grievance with orders to increase spending. This phenomenon was abetted by the appearance and growth of a class of "expert witnesses," most from university education faculties who were to prosper at this unexpected mission in service of the poor. They helped convert the simple rationality of power equalizing into a constant crusade for more, all—as today—without evidence that more is the answer. Insofar as our efforts in *Serrano* contributed to this burden for American taxpayers, I repent. Happily, for my conscience, those *Serrano* days confirmed the insight of happier possibilities for our hope to improve the lot of not-so-rich parents and their kids.

As the opponent counsel in *Serrano* observed, Steve and I were already on record in the Harvard book as favoring subsidized school choice for poor families. In 1971, as noted, we published a full-scale hundred page model statute and commentary, first in the *California Law Review* and then in a paper-back version by the University's Institute for Governmental Studies. At that point we ceased to be the heroes of the state's teacher

unions which had been inviting us to speak at meetings statewide and local. They had loved *Serrano* and us until it became clear that the decision would allow the state to subsidize poor parents to choose their own child's school. At that juncture I found myself being urgently disinvited from union appearances lest the minds of our young children's teachers be corrupted. The union's terror at such a message has become a settled part of the establishment gospel.

VII. SERRANO BUFFERED

Serrano was soon to be reduced in importance, first by Proposition 13, then gradually by the state and its union gurus, but happily to be followed by the advent of charter schools—a tidbit of respect for the low-income family, at least for those who get lucky in the lottery for their chosen school. Steve and I had by that time co-authored three books, two with model statutes, detailing various ways that, in our view, such (then) imaginary devices might best be designed. The most obvious consequence of the decision was the explosion in the numbers of school personnel of every description. The students from our various social and economic classes—even those from schools with expanding budgets—score on tests about as they did in pre-*Serrano* days. I fear that what we have learned from these fifty years is that, if these scores are the signal of success, something else needs fixing, something that isn't to be measured in dollars.

Of my fifty-years of post-*Serrano* observations, the clearest is that more of the same is not the answer to this society's worst public school problem: our deliberate and unnecessary purging of the legal responsibility and authority of the lower-income parent, the same authority and responsibility so highly valued by the middle class. I could imagine (with distress) a government—another Oregon of 1920—forcing all

children into state schools; I have a distinguished colleague who would alter federal law so as to impose that (long unconstitutional) rule upon every state. At least it would draw no distinction between rich and poor. What my heart and soul cannot accept is our deliberate and unnecessary disempowerment of the unwealthy family to do what the rest of us so value with our own kids.

To this day, *Serrano* remains a clear voice on this shameful scene. California is free under its basic law to honor every parent's federal and state right to choose. Recognizing all parents as the responsible authority over their own children is a "liberal" conception that offers encouragement to engagement in the civil order by the decision-maker, and, in due course, by the child. The idea is *Serrano*-simple. Charles Lamb would applaud.