

Our Colleague Stephen Sugarman: Teacher, Scholar, and Policy Entrepreneur

Daniel Farber* and Mark Gergen**

Steve Sugarman joined the Berkeley faculty nearly fifty years ago. Since then, he has made unparalleled contributions to the law school and to legal scholarship. This Festschrift provides the opportunity to honor someone whose career has contributed enormously to the University of California's missions of teaching, scholarship, and service.

Sugarman's move to Berkeley was an unusual start to what became an extraordinary career. He had never applied or interviewed for an appointment at Berkeley. The roots of his unexpected offer lay in his work with Jack Coons on school finance, which began when Coons was a faculty member at Northwestern and Sugarman was a student.¹ Sugarman continued to work with Coons on school finance after graduating from Northwestern Law School and while working as an associate at O'Melveny and Meyers. Sugarman was testifying in a Congressional hearing on school finance in Washington, D.C., when Jim Kelly of the Ford Foundation approached him. Coons had applied for a \$25,000 grant from the Foundation. Kelly told Sugarman this was far too low a sum for the Foundation to even consider. He recommended Sugarman work with Coons, who was by then at Berkeley, and others, and that they ask for much greater funding to work on education policy. Sugarman put together a team that applied for \$1.5 million, a princely sum then, for what they called the Childhood and Government Project. Ford approved the grant. Sugarman was visiting Berkeley Law to get the project underway when the Dean, Ed Halbach, offered him a position on the faculty.

The teaching load at Berkeley at the time was three courses. Sugarman would teach a seminar on education law named Education Policy and Law.

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1. Sugarman received his undergraduate and JD degrees from Northwestern, both with highest honors.

Halbach told Sugarman he would have to teach a first-year course. Sugarman said he was willing to teach any first-year course except Criminal Law. Halbach asked if he would be willing to teach Torts, where Berkeley had teaching needs. Sugarman agreed.

That turned out to be a fateful decision. Sugarman had taught Torts nearly every year since 1972, when he began teaching, to the present, while producing an impressive body of scholarship on the field. His first major article on tort law proposed abolishing tort law and using other systems to deter and compensate for accidental harm.² (Perhaps he was suffering from buyer's remorse and wished he had been assigned to a different first-year course.)

According to Sugarman, his approach to teaching the course has not changed much over the years. The focus is on policy as well as on legal doctrine. As any reader of Sugarman's scholarship would know, he believes tort law should be understood and evaluated as a system for deterrence and compensation. This gives students a sensible framework for thinking about tort law. Sugarman's students learn alternative systems like workers' compensation and no-fault insurance, as well as tort law. But Sugarman does not stint on legal doctrine. Over the years a number of students had written comments in their course evaluations saying that it was only when they prepared for the exam or talked with students in other sections that they realized how much doctrine they had learned.

Sometimes the goal in teaching legal doctrine is to get the students to understand why a doctrine is wrong or why a rule does not really do the work it is supposed to do. One of these wrong doctrines, according to Sugarman, is assumption of risk.³ Sugarman so despises this particular doctrine that when he introduces assumption of risk, he stands on the table at the podium and tells students he is doing this so they remember the doctrine is wrong. He also tells them one of his law professors at Northwestern did the same stunt and that he vividly remembered the professor standing on the table but could not remember the point the professor was trying to underscore. So, too, for his own students. Ex-students tell Sugarman they remember him standing on a table, but they cannot remember why.

Sugarman says he teaches law in the traditional manner, bringing to mind Professor Kingsfield in *The Paper Chase*. This is misleading. Like Kingsfield, Sugarman rarely lectures. But Sugarman does not browbeat or belittle students. He engages in conversations with students about the materials. When this conversational method works, as students say it often does for Sugarman, it encourages critical thinking and makes for a stimulating class. Law is a conversational practice. A downside (again according to his students) is that

2. See generally Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555 (1985) (arguing the costs of the tort system outweigh its benefits and proposing to replace tort actions for personal injuries with expanded social insurance plans and regulatory schemes).

3. See Stephen D. Sugarman, *Assumption of Risk*, 31 VAL. U. L. REV. 833, 876 (1997).

sometimes a student takes a conversation down an odd path or even a rabbit hole. But (according to Sugarman) this is a price he happily pays because students involved in a conversation are engaged with the materials.

This conversational style of teaching law works well for Sugarman because of his personality. He treats students as peers with genuine regard and respect. He is funny and self-deprecating. He encourages students to express themselves. One tactic he finds helpful to encourage student involvement (which he believes other law professors should emulate) is having students write short papers on a topic. Writing clarifies thinking and expression.

A course named Social Welfare Legislation rounded out Sugarman's teaching load for the first twenty-five years or so of his career. This course had a long tradition at Berkeley. It was created by Stefan A. Riesenfeld and taken over by David Feller. The course covered a panoply of federal and state social welfare legislation, including worker's compensation and health insurance. Sugarman gradually pared the course down to welfare and social security. These were exciting areas of law in the 1970s and early 1980s with a great deal of constitutional litigation, such as equal protection challenges to gender discrimination and due process claims to benefits as entitlements.

As courts became unreceptive to these claims, the course became largely a study of unnecessarily complicated and occasionally cruel statutes and regulations. Sugarman dropped the course in the late 1990s. For the next several years, he taught several courses in the broad area of social welfare law—Elder Law, The Family in Public Policy, and Law and Social Justice—but apparently he decided none were worth repeating. Sugarman's move away from this area reflected a shift in the legal academy as concerns about inequality have trended in other directions.

After a brief sojourn teaching Sports Law,⁴ Sugarman co-created a new course named "Food Law" with Professor Molly Van Houweling. The course examined a gamut of issues involving the regulation of the food industry, including childhood obesity and overconsumption of salt and sugar. A few other law schools offered courses in food law, but they usually focused on FDA regulation.

Sugarman's interest in childhood obesity and related issues like overconsumption of salt and sugar grew out of his work with the nonprofit research organization he established in Oakland. Under the aegis of an umbrella entity, the Public Health Institute, Sugarman founded the research organization

4. Sugarman picked up Sports Law at this time as a matter of serendipity. He was looking for a course to replace Welfare and Social Security in the late 1990s. At the time he was working on a project with Robert Mnookin that involved interviewing personal injury lawyers in the Boston area. When Sugarman was in Boston, Mnookin introduced him to his colleague at Harvard, Paul Weiler, who was creating a course in Sports Law. Sugarman is not a sports fan (other than the Oakland A's). But he became intrigued with a course that focused on an industry and studied different bodies of law. The course kept his interest for almost a decade.

in 1986 to do research on tobacco control. The work was funded by the state of California. He teamed up with Marice Ashe, and their work led to an ordinance in Contra Costa County regulating workplace smoking.⁵ Ashe took this seed and grew it into ChangeLab Solutions, which works on a broad range of issues in community health.⁶ Childhood obesity was among these issues. The Robert Wood Foundation gave Sugarman and Ashe a large grant to work on childhood obesity.⁷ The organization Sugarman launched has continued to do pioneering work on public health issues.

Sugarman's work with Ashe and others on tobacco control and healthy food illustrates how Sugarman has leveraged his talents to improve human welfare across a range of issues. He works with talented collaborators. They identify a social problem, collect and analyze data to better understand the problem, study a range of possible solutions, craft a feasible solution that a public or private entity can actually implement, and then advocate for the solution. In their project on smoking in the workplace, the entity was Contra Costa County, and the solution was a first-in-the-nation countywide regulation of smoking in the workplace.

In retrospect, smoking in the workplace was low-hanging fruit. Banning smoking in the workplace clearly improved human welfare without imposing a significant cost on powerful political interests. Perhaps in future years, reducing childhood obesity, and reducing consumption of salt⁸ and sugar,⁹ will also seem like low-hanging fruit after these problems have been successfully addressed. But some low-hanging fruit is not plucked. An example, at least to date, is what Sugarman describes as one of his better ideas: replace the various existing programs that provide people who are usually employed with income while they

5. See *Our History*, CHANGLAB SOLS., <https://www.changelabsolutions.org/who-we-are/our-history> [<https://perma.cc/2HZ2-6MVS>].

6. For a history of ChangeLab, see *id.*

7. See, e.g., Stephen D. Sugarman & Nirit Sandman, *Fighting Childhood Obesity Through Performance-Based Regulation of the Food Industry*, 56 DUKE L.J. 1403 (2007) (proposing to assign the responsibility to reduce childhood obesity rates to the food industry through financial penalties); Jennifer L. Pomeranz, Stephen P. Teret, Stephen D. Sugarman, Lainie Rutkow & Kelly D. Brownell, *Innovative Legal Approaches to Address Obesity*, 87 MILBANK Q. 185 (2009) (proposing the use of tort litigation, with nuisance law as a litigation strategy, and performance-based regulation to fill gaps in the obesity-prevention regulatory scheme); Stephen D. Sugarman & Nirit Sandman, *Using Performance-Based Regulation to Reduce Childhood Obesity*, AUSTL. & N.Z. HEALTH POL'Y (Nov. 18, 2008), <https://anzhealthpolicy.biomedcentral.com/track/pdf/10.1186/1743-8462-5-26.pdf> [<https://perma.cc/NM69-C8YX>] (arguing for performance-based regulation that holds the food industry responsible for the consequences of its products).

8. See Stephen D. Sugarman, *Salt, High Blood Pressure, and Performance-Based Regulation*, 3 REGUL. & GOVERNANCE 84 (2009) (calling for performance-based regulation of the food industry to address the public health problem of high blood pressure).

9. See Stephen D. Sugarman, Opinion, *The Sugar Fix - Regulation at Retail Level*, SFGATE (June 27, 2012), <https://www.sfgate.com/opinion/openforum/article/The-sugar-fix-regulation-at-retail-level-3668305.php> [<https://perma.cc/NX22-YECF>] (proposing a policy requiring an aggregate reduction in sugar sold by restaurants and supermarkets to address the public health crisis caused by the overconsumption of sugar).

do not work (e.g., unemployment, sick leave, maternity leave, and vacation leave) with a single program that provides income whatever an employee's reason for temporarily leaving work.¹⁰ This would increase individual autonomy while simplifying benefits administration. As this example illustrates, even the most sensible policy proposal must rely on propitious political circumstances in order to advance—something no scholar can control.

But Sugarman has not let strong political headwinds deter him. He has spent much of his career trying to improve elementary and secondary education in the United States. Rachel Moran's contribution to this Festschrift describes Sugarman's contributions in the area of school finance. Sugarman has also made significant contributions in the area of school choice. This takes us back to where we began this essay—to 1972, when Sugarman came to Berkeley, having obtained a generous grant from the Ford Foundation to work on what was called the Childhood and Government Project. One thing that came out of this project was a pathbreaking 1978 book co-authored with Jack Coons, *Education by Choice: The Case for Family Control*. When the book was written, support for a voucher system, in which the state gives parents a voucher to pay a selected public or private school for a child's education, was associated with libertarians, sectarians, and segregationists. The book explained in simple terms why a voucher system could better achieve the goals of public education than the existing public school systems, and it assessed design choices in a voucher system with an eye to minimizing pitfalls such as increasing segregation or supporting religious indoctrination. As Sugarman explained in a 2010 tribute to Jack Coons, the primary aim was “to assure genuine choice to families who are financially disadvantaged, primarily working class and lower-income families.”¹¹

Non-wealthy families now have much greater choice with respect to educating their children than they did in 1978. Sugarman surveyed the changed landscape in 2010:

In the intervening years, the “choice” principle has substantially captured public education. Today, charter schools, magnet schools, alternative schools, intradistrict school transfers, interdistrict transfers, small schools-within-schools, and all-choice public school districts increasingly give families options as to where their children are educated without having to move their place of residence. In short, within the public sector Jack's approach to family choice has been increasingly embraced.¹²

10. See Stephen D. Sugarman, *Income Security When Temporarily Away from Work*, in SHARED RESPONSIBILITY, SHARED RISK 102 (Jacob S. Hacker & Ann O'Leary eds., 2012).

11. Stephen D. Sugarman, Tribute, *Jack Coons: School Choice Champion*, 4 J. SCH. CHOICE 191, 191 (2010).

12. *Id.* at 192.

It is typical of Sugarman that he does not claim a share in any of the credit he gives Coons. That willingness to let others take credit not only is an indication of his modesty and generosity but also has likely increased the likelihood of success by encouraging common efforts.

The school-choice saga illustrates that success takes perseverance. Sugarman has toiled away. There were setbacks. He worked against a California referendum creating a school-choice plan that would have hurt non-wealthy families.¹³ There were roadblocks. As Sugarman explained in the 2010 tribute to Coons, states' refusal to allow public funds to be used for religious schooling was a major roadblock to increasing school choices of non-wealthy families.¹⁴ Some of this resistance was based on state laws that prohibited public funds from being used for religious purposes, including religious schools. Sugarman (often working with Coons) designed and advocated for workarounds using devices such as tax credits and scholarships.¹⁵

A recent turn in the school-choice saga brings us back to where we began this essay and the early 1970s. As Rachel Moran explains in this Festschrift, Sugarman and others used constitutional law as a weapon to challenge a system of local funding of public schools through property taxes that led to gross disparities in spending per student between rich and poor districts. This was a deft weapon to use in the early 1970s in California because the state Supreme Court was quite liberal. The weapon succeeded in *Serrano v. Priest*.¹⁶

Sugarman has been equally willing to deploy conservative legal doctrines to improve educational opportunities for children. In a recent paper, Sugarman argued that the U.S. Supreme Court could find that it would violate the Free Exercise Clause of the First Amendment for a state to preclude faith-based schools from qualifying for charter school funding.¹⁷ This argument was based on a close reading of Supreme Court precedent, in particular a 2004 decision¹⁸ and a decision from the 2016-2017 term.¹⁹ The free exercise argument is a deft weapon to use today because the conservative majority on the current U.S. Supreme Court has been receptive to such arguments. On June 30 last year, the Supreme Court held in *Espinoza v. Montana Department of Revenue* that the application of a no-religious-aid provision in the Montana Constitution to deny

13. See John E. Coons & Stephen D. Sugarman, Opinion, *Vouchers, Prop 38 – and a Populist Hope Betrayed*, SACRAMENTO BEE, Sept. 24, 2000, at J1; John E. Coons & Stephen D. Sugarman, *It's Not a Good Choice for Our Poor Families*, L.A. TIMES, July 27, 2000, at 11.

14. See Sugarman, *supra* note 11, at 192–93.

15. See, e.g., JOHN E. COONS & STEPHEN D. SUGARMAN, MAKING SCHOOL CHOICE WORK FOR ALL FAMILIES (1999); JOHN E. COONS & STEPHEN D. SUGARMAN, SCHOLARSHIPS FOR CHILDREN (1993); Stephen D. Sugarman, *Tax Credit School Scholarship Plans*, 43 J.L. & EDUC. 1 (2014).

16. 487 P.2d 1241, 1244 (Cal. 1971).

17. Stephen D. Sugarman, *Is It Unconstitutional to Prohibit Faith-Based Schools from Becoming Charter Schools?*, 32 J.L. & RELIGION 227 (2017).

18. *Locke v. Davey*, 540 U.S. 712, 719, 725 (2004).

19. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021–24 (2017).

tuition assistance to parents who sent their children to religious schools violated the Free Exercise Clause.²⁰ Chief Justice Roberts's opinion in *Espinoza* echoed Sugarman's arguments for allowing faith-based organizations to operate charter schools.²¹

Pairing *Serrano* and *Espinoza* may seem odd. The first decision is celebrated by liberals and bemoaned by conservatives; the second gets the opposite reaction. Sugarman would be the first to tell you that he does not think the relevant clause in the Constitution, or the existing precedent, required either result. What the two decisions have in common, in his view, is that both cases have the potential to substantially improve educational opportunities for children with non-wealthy parents.

Sugarman's deep concern over the welfare of children is reflected in another area of his scholarship, involving financial support for low-income children²² and a related interest in how the law regulates and recognizes families.²³ Until a Clinton-era effort to "end welfare as we know it," the federal welfare program provided support for single mothers and their children, although the benefits were stingy and the program was structured in a way that discouraged women from working to supplement the benefits. Sugarman proposed an innovative solution that expanded on existing social security

20. 140 S. Ct. 2246, 2252 (2020).

21. Sugarman discussed his article and the case in a three-part podcast. *Podcasted: SUFS President Doug Tuthill Interviews Education Choice Icon Stephen Sugarman*, REDEFINED (Aug. 12, 2020), <https://www.redefinedonline.org/2020/08/podcasted-sufs-president-doug-tuthill-interviews-education-choice-icon-stephen-sugarman/> [<https://perma.cc/8M5A-BS3L>]; *Podcasted: SUFS President Doug Tuthill Interviews Education Choice Icon Stephen Sugarman: Part 2*, REDEFINED (Aug. 19, 2020), <https://www.redefinedonline.org/2020/08/podcasted-sufs-president-doug-tuthill-interviews-education-choice-icon-stephen-sugarman-part-2/> [<https://perma.cc/5SFS-PBEB>]; *Podcasted: SUFS President Doug Tuthill Interviews Education Choice Icon Stephen Sugarman: Part 3*, REDEFINED (Aug. 26, 2020), <https://www.redefinedonline.org/2020/08/podcasted-sufs-president-doug-tuthill-interviews-education-choice-icon-stephen-sugarman-part-3/> [<https://perma.cc/P4YV-DNR6>].

22. See, e.g., Stephen D. Sugarman, *Welfare Reform and the Cooperative Federalism of America's Public Income Transfer Programs*, 14 YALE L. & POL'Y REV. 123, 146–47 (1996) (criticizing the "block grant" approach to welfare as facilitating harsher treatment of poor children); Stephen D. Sugarman, *Welfare Reform Meets Ideological Impasse*, 7 HASTINGS WOMEN'S L.J. 363, 366–68 (1996) (contending that an expanded Social Security for abandoned or single women and their children may bridge the ideological impasse between liberal and conservative visions of welfare reform); Stephen D. Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 VA. L. REV. 2523, 2561–69 (1995) [hereinafter Sugarman, *Financial Support*] (arguing for a "child support assurance" through expanded Social Security); Stephen D. Sugarman, *Reforming Welfare Through Social Security*, 26 U. MICH. J.L. REFORM 817, 817 (1993) [hereinafter Sugarman, *Reforming Welfare*] ("Social Security should provide benefits to children with absent parents on the same basic terms on which it now provides benefits to children with deceased, disabled, or retired parents.").

23. See, e.g., ALL OUR FAMILIES (Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman eds., 2d ed. 2003) (exemplifying Sugarman's interest in how the law recognizes and supports families); Stephen D. Sugarman, *What Is A 'Family'? Conflicting Messages from Our Public Programs*, 42 FAM. L.Q. 231 (2008) (examining the willingness of different public policy programs to recognize family variety).

coverage to the surviving spouses and children of the deceased.²⁴ Alas, “welfare reform” went in the opposite direction. In response to Republican efforts to eliminate the program, Clinton championed legislation that outsourced the programs to the states with few controls and draconian work requirements. Although income inequality has recently emerged as a focus of public debate, the issue of income support for families in poverty has not regained the public spotlight. When it does, perhaps Sugarman’s proposal will find a more receptive audience.

How federal programs define families was another issue that caught Sugarman’s interest. Federal laws relating to poverty, like the legal system in general, judged families against the norm of a married heterosexual couple with children. As Sugarman pointed out, programs have developed to support low-income women and children and embrace broader conceptions of family units, but other parts of the law have been slow to follow.²⁵ Today, the legal system does recognize same-sex marriages, although recognition of other ways in which people form intimate relationships or raise children remains limited.

Sugarman’s career as a scholar has not been severable from his dedication to public service. Rather, his scholarship has provided innovative avenues for legal reform, grounded not on political ideology but on a clear-eyed understanding of social problems. Despite his dedication to legal reform, his scholarship has been sensitive to counterarguments and conflicting evidence. This, like his unwillingness to toe ideological lines, has given his scholarship a nuanced quality often absent in “advocacy scholarship.” His scholarship combines pragmatism with a passionate dedication to social justice.

This combination of pragmatism and dedication to social justice has been the unifying thread in Sugarman’s teaching, scholarship, and policy advocacy. As a teacher, he has aimed to give students the tools to engage in similar quests in pursuit of their own visions of the good society. Like his students, readers of his scholarship find themselves drawn into a humane conversation about how best to advance the interests of society. As colleagues, we too have benefited from many such conversations, making the opportunity to celebrate Sugarman’s contributions in this Festschrift all the more welcome.

24. See, e.g., Sugarman, *Financial Support*, *supra* note 22; Sugarman, *Reforming Welfare*, *supra* note 22.

25. See *supra* note 22.