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Two Brief Responses to Professor Epstein

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One of my favorite moments in the American musical theater is the scene in *Guys and Dolls* when Sky Masterson and Big Julie are shooting craps. Sky is winning and Big Julie produces a new pair of dice. Sky protests that Big Julie's new dice are blank. Big Julie smiles and reassures Sky that he remembers where the numbers are.

I've never heard Richard Epstein sing, but based on his critique of the *Wilder* settlement, he'd make a terrific Big Julie. He fills in the numbers on his dice as he goes along.

In deciding that the *Wilder* settlement was inappropriate, Professor Epstein argues that aggregate utility was diminished by the settlement because the white, in-religion children suffered a greater loss in utility than the black, out-of-religion children gained. There are two glaring holes in the Epstein critique. First, he arbitrarily assigns numerical values to the utility loss and gain experienced by the various players in the *Wilder* scenario, without explaining where the numbers come from. One could, of course, posit a set of numbers that valued the gain by out-of-religion children at a much higher level than the loss by in-religion children. I do not insist that those numbers would necessarily be correct, but they would have as much claim to validity as Professor Epstein's *ex cathedra* attempts to quantify gain and loss.

Second, and even more importantly, there is no room in Professor Epstein's cosmology for the constitutional values of equality before the law, free exercise of religion and separation of church and state that the settlement preserves. Professor Epstein simply refuses to acknowledge the cost to society of a tax-supported foster care system that openly favors white children over black children and Catholic and Jewish children over Protestants, Hindus or the children of atheists. The flaw that runs through much of Professor Epstein's work, like the San Andreas fault, is his inability or refusal to face the fact that the significance of constitutional values is often non-quantifiable and, thus, beyond the realm of economic measurement. It is, of course, a valuable exercise to describe with precision the efficiency consequences of a given set of value choices. It is, however, insupportable to argue that efficiency consequences are absolute trumps, rendering any inefficiency in the

name of deeply felt values improper. In fact, even at the level of efficiency, vigorous protection of constitutional values would be justified, if only Professsor Epstein would factor in the true cost to society of tax-supported racial and religious discrimination. Even if I'm wrong, though, and attempts to enforce values of equality and religious freedom on behalf of the weak lead to economically inefficient outcomes, they would still be worth it. Bread is important; but so are roses.

Burt Neuborne

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As Professor Neuborne and I make clear, the dialogue between us presented here never took place. It is fiction—designed to raise broad general issues for practitioners, professors and students to ponder. Professor Epstein takes, it seems to me, the opposite tack. His critique purports, through its numerical analysis, to represent the real world. But the premises underlying that profferred real world turn out to be based upon a wholly fictional—indeed false—view of the American legal system and legal profession.[1]

My principal purpose in responding is to set out some thoughts on the responsibilities of a lawyer in the real world—and particularly the responsibilities of a government lawyer. But first, I would like to offer a few comments on Professor Epstein's views of the legal merits of the *Wilder* settlement.

Thoughts on the Merits

At times, Professor Epstein actually seems to be writing a brief in favor of settlement. Thus, he characterizes the plaintiff's Establishment Clause claim—which sought to bar the use of government money to support sectarian agencies carrying out a basic government responsibility—as "surely . . . plausible." He then cites recent Supreme Court cases (*Aguilar* and *Grand Rapids*) as lending substantial support to the plaintiffs. Of course, if one starts with the premise that a "plausible" or likely result of a trial could very well be prohibition of any use of the sectarian agencies, it seems sensible to a practitioner to negotiate a settlement that permits the continued use of the sectarian agencies. This is particularly true if one believes, as Professor Epstein does, that they pro-

[1] In saying this, let me make clear my respect for Professor Epstein for not being shy in advocating unpopular ideas that cut against the grain of conventional wisdom on matters such as the value of antidiscrimination laws.

vide a service that is useful to children.

When it comes to the equal access portion of the case, Professor Epstein constructs a numerical world upon which he builds with logic which has some force—until one realizes this world is neither real nor liveable by American standards.

The crucial flaw is that no weight is given to the value of equality itself, or to the harm done by inequality sanctioned and supported by the government. Perhaps it is difficult to attach numbers to constitutional values, but surely they ought to be part of the balance.

The case for the equal access portions of the *Wilder* settlement is rather simple. Where government has legal custody of children and is paying for their care, how can it justify a system that makes access to care depend upon their race or religion? Even under a "market" analysis that attempts to assign numbers to social values, I would have thought that this country's commitment to equality of opportunity, and its prohibition against government systems that deny equal access, would produce positive numbers in favor of the *Wilder* settlement. Absent such weights, Professor Epstein's critique of *Wilder* could just as well serve as an attack upon the Supreme Court's decision in *Brown v. Board of Education.*

THOUGHTS ON THE ROLE OF LAWYERS

To me, Professor Epstein raises much more interesting issues when he indirectly challenges the propriety of a government lawyer entering into a decreee like *Wilder.* Here also, however, he does not confront the world as it is—and I submit should be—seen by a practitioner.

Professor Epstein simply assumes away both courts and clients. Because there are courts, government lawyers (as is true for other lawyers) must assess the risks inherent in insisting upon going to trial. If, by negotiation, the lawyer can reach a result that he or she reasonably believes is better than the result reasonably likely to follow a trial, then it is certainly not inappropriate to do so. Indeed, it would be professionally inappropriate to eschew such an opportunity because—as I sense is the case with Professor Epstein—one believes the result likely to be adopted by the courts is in some way inefficient, or could be characterized as such.

Does this mean a lawyer can simply go ahead and negotiate anything that strikes his or her fancy? Of course not. The ultimate judgment remains with the clients, after a complete explanation from the lawyer.

The same could be said about the responsibilities of lawyers in general. Are there any different factors where government lawyers are involved? Not really as to the basics. You still have a client. You still must try fairly to present to the client the risks of litigation and the terms of the proposed settlement.

I do believe, however, that the government lawyer has a special responsibility to force herself or himself and her or his clients to focus upon the long-term values represented by our Constitution.[2] In addition, government lawyers in particular should guard against the pernicious attitude that "it's wrong, but let the courts take the heat for changing it."

As for whether a government lawyer should allow a decree to bind a successor administration, it is difficult to generalize. Obviously, if one goes to trial and loses, a court will impose a remedy of whatever duration it concludes is appropriate under the circumstances. In the context of negotiation, it follows that there can be no bright-line test for an appropriate time limit to a consent decree's remedial provisions. Certainly it would not be proper to negotiate with the purpose of binding a future administration. This would suggest no legal basis for settling in the first place. In addition, a government's negotiating objective probably should be to agree upon the earliest possible termination date.[3] This is not because one is agreeing to do undesirable things, for one would not agree to any obligations that were improper in principle. Rather, governments should seek to act consistently with the law on their own and not under the direct, continuing supervision of the courts.

If it is fairly clear that governments should be allowed to settle cases by consent decree, does the potential impact of a decree upon third parties mean that governments should be forced to try cases when they believe a bad result is likely at trial and a fair result can be reached through negotiation? To state the question is to answer it.

This does not mean, of course, that the government or the court should ignore the interests of third parties. In negotiating the *Wilder* decree, the City insisted that all the agencies be given an opportunity to challenge the decree or any of its provisions. The City also asked the court to consider any such objections on the merits without drawing any inference from the stipulations of the

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[2] For my thoughts on this and related matters, see Frederick A. O. Schwarz, Jr., Lawyers for Government Face Unique Problems, N.Y.L.J. 25 (May 1, 1984).

[3] See paragraphs 79-81 of the *Wilder* decree (on file with the University of Chicago Legal Forum). Complex as they are, they reflect a vigorous negotiation.

decree's signatories.[4] In fact, the agencies participated extensively in the hearings on the decree, and persuaded its signatories and the court to change numerous provisions in the draft decree.[5] It is also worth noting that, as "interested parties," they have extensive rights under the final decree. All of the agencies were parties in *Wilder*, but liberal intervention rights surely should be granted to third parties who fear their rights are adversely affected by the decree.

Nevertheless, insisting upon due consideration of the rights and interests of third parties does not mean that a government client must turn a deaf ear to its lawyer's warnings of litigation risks; nor does it mean that a government lawyer should fail to try and avoid those risks by agreeing to a fair, negotiated settlement that can be presented to a court for its scrutiny.

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[4] Id. at paragraphs 82-83.

[5] Judge Ward's lengthy opinion, which meticulously analyzes all agency objections, provides a more complete account of the settlement negotiation and approval process. See Wilder v. Bernstein, 645 F. Supp. 1292, 1303-04 (S.D.N.Y. 1986).