

Consent Decrees: Practical Problems and Legal Dilemmas

Legal Forum Editors
LegalForum@chicagounbound.edu

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Recommended Citation

Editors, Legal Forum () "Consent Decrees: Practical Problems and Legal Dilemmas," *University of Chicago Legal Forum*: Vol. 1987: Iss. 1, Article 1.
Available at: <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/1>

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Consent Decrees: Practical Problems and Legal Dilemmas

Consent decrees have become a powerful mechanism for enforcement of statutory and constitutional norms. Schools have been desegregated, prisons reformed, and corporations reorganized pursuant to negotiated judicial orders. The practice is common, yet the theoretical basis for the legitimacy of judicial action based on such orders is disputed. For purposes of interpretation, consent decrees are generally treated as contracts. When determining the scope of a district court's enforcement power, they are treated as injunctions. This treatment of consent decrees as a hybrid of contract and adjudication has given rise to controversy, not only over the scope of judicial authority under such decrees, but also concerning whether they are legitimate at all.

The purpose of this volume of the *University of Chicago Legal Forum* is to help shape the debate by exploring the theoretical basis for judicial action premised on consent decrees and by examining the practical effects of consent decrees. The first three articles discuss fundamental questions regarding the nature and desirability of consent decrees as instruments of dispute resolution. Professor Owen Fiss argues that consent decrees are procedural shortcuts to injunctive relief that allow parties to usurp judicial power by contract. Judge Frank Easterbrook sees consent decrees as a species of contract, and as a useful tool for resolving disputes and implementing the preferences of litigants. Professor Judith Resnik further explores the judicial role in the consent decree process by questioning whether judicial approval of consent decrees provides a sufficient basis for subsequent judicial action.

The hybrid nature of consent decrees creates special problems concerning interested third parties who are excluded from negotiations that ultimately lead to consent decrees. Professor Douglas Laycock and Charles Cooper, Assistant Attorney General, Office of Legal Counsel, take different approaches to these problems. Next, Professor Burt Neuborne and Frederick A. O. Schwarz, Jr., former Corporation Counsel for the City of New York, engage in a dialogue retracing their reasons for considering settlement of *Wilder v. Bernstein*,¹ a dispute over foster care programs involving the City of New York and the American Civil Liberties Union. In a brief response, which applies some of the concerns raised by Professor Laycock and Mr. Cooper, Professor Richard Epstein ques-

¹ 645 F. Supp. 1292 (S.D.N.Y. 1986).

tions both the motives of the litigants in *Wilder* and the wisdom of allowing lawyers to shape social relations.

Professors Peter Shane and Michael McConnell debate the desirability and constitutionality of consent decrees that bind government administrators in their exercise of statutorily granted discretion. Professor Shane concludes that discretion-binding decrees are not necessarily either unconstitutional or undesirable, and that they may be a positive development of the judicial role in administrative lawmaking. Professor McConnell argues that to the extent consent decrees insulate policy decisions from review and modification by future administrations, they interfere with the democratic process and should be rejected.

Finally, the volume includes two articles that explore the use of consent decrees in two areas where they are commonly employed—environmental and antitrust law. Both Professor Robert Percival, formerly Senior Attorney of the Environmental Defense Fund, and Professor Michael DeBow, formerly Special Assistant to the Assistant Attorney General, Antitrust Division, conclude that consent decrees are a useful, if not essential, tool for enforcement of government rules and regulations in these areas.

In addition to these articles, which were presented at the *Legal Forum's* November 15, 1986 symposium on consent decrees, this volume contains a number of student comments written by members of the journal. In general, these focus more closely on the practical effects and implications of consent decrees. Some deal with problems directly related to consent decrees, while others address substantive issues in areas where litigation frequently results in a consent decree. These areas include prison reform, school desegregation, and environmental and antitrust litigation.

The practical importance of consent decrees looms large in our legal system, and the theoretical difficulties associated with such decrees are of a comparable magnitude. This volume should help those grappling with fundamental issues in both contexts.

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The *University of Chicago Legal Forum* (ISSN 0892-5593) is a student-edited law journal published annually at the University of Chicago Law School, 1111 East 60th Street, Chicago, IL 60637.

Yearly subscription rate: \$15.00.

Text and footnotes conform to the *University of Chicago Manual of Legal Citation* (1986). A working draft of the Manual and an appreciation of it by Judge Richard Posner appear in the Fall 1986 issue of the *University of Chicago Law Review*.

The *University of Chicago Legal Forum* is printed by Darby Printing Co., 715 West Whitehall Street, S.W., Atlanta, GA 30310.

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