

The Child's Best Interest?

A challenge to religious and racial matching in foster care.

By Lisa Aschkenasy

ON JUNE 1973 THE NEW YORK Civil Liberties Union filed *Wilder v. Sugarman* on behalf of 10,000 members of a class of black and Protestant children in New York City in need of care outside their homes. The suit was filed against Jules Sugarman, then the New York City Commissioner of Human Resources, all State and City officials in the Child Welfare System, and the 77 voluntary agencies which cared for New York City foster children. The case, brought by Marcia Robinson Lowry, then a children's rights attorney with the NYCLU and the current director of the American Civil Liberties Union's Children's Rights Project, alleged what most people involved in out-of-home care tacitly acknowledged: that the best programs for children in New York and other major cities were run by Catholic and Jewish institutions, that these organizations provided mandatory religious training, and that they discriminated by favoring children of their own faith (Brill 12). The five plaintiffs who had been specifically discriminated against, including named plaintiff Shirley Wilder, and members of their class, sought a declaration that the plan by which New York City funded and relied on the use of voluntary child-care agencies organized according to religion to fulfill a statutory responsibility to provide services for all children in need of care, is unconstitutional on its face as a violation of the First Amendment, and as applied, under the First, Eighth, and Fourteenth Amendments in that it results in, funds, and encourages: (1) a child-care system permeated by religious discrimination, (2) a child-care system permeated by racial discrimination, (3) an absence of adequate services for children most in need of care, and (4) the placement of children in institutions in violation of their right not to be subjected to cruel and unusual punishment (*Wilder* Complaint 5).

Plaintiffs sought injunctions against the

general statutory structure of the child placement system of New York City. This system was established in Article VI, section 32 of the New York Constitution adopted November 7, 1961 and effective September 1, 1962 which states in pertinent part that when a child is placed in an agency or with an individual that the child should be placed by the court

...when practicable, in an institution or agency governed by persons or in the custody of a person, of the same religious persuasion as the child.

Although the state's method of providing for children was motivated by the best of intentions, it has been widely criticized. Instead of caring for abused or neglected children directly, the State chose to use voluntary agencies that are primarily sectarian. A child in need of services was referred by the Family Court to one of the three central referral units, which are operated by the Roman Catholic, Jewish, and Protestant religions. Automatic preference was given to a child of the particular religion's agency. Placement of a child in an agency of a different religion had to be explained in a statement filed with the State. At the time when *Wilder v. Sugarman* was filed, a child whose placement was delayed waited in inadequate shelters or homes and often ended up on the streets (NYU 22).

The children whose placements were being delayed were overwhelmingly Protestant and black. When black children were referred to the voluntary child care agencies and rejected by the Catholic and Jewish agencies on account of their religion, they had to compete for the inadequate number of spaces in the Protestant agencies. Those who did not get spaces were sent to state training schools or temporary shelters where they often became permanent residents (NYU 22).

The system of reliance on voluntary agencies for child welfare services had its origin in the history of New York State. New York provided for poor relief through ecclesiastical bodies as a Dutch colony. Local civil authorities only became involved if there was no religious body to do so. New York assumed

direct control of relief at the time of the American Revolution. The almshouse was the only kind of charitable institution in New York State for dependent children until the establishment of the first orphan asylum in 1806. A second orphanage was established in 1817 as the Roman Catholic Benevolent Society in the City of New York for the care and education of orphans of the Roman Catholic creed. Many special institutions were established under private auspices in the 1830's and most were aided financially by grants from the state or local treasury (Schneider 179-191). In 1853, the Children's Aid Society was organized to place children on farms with Protestant families. The success of this and other programs for Protestants led Roman Catholics and Jews to establish their own institutions. Gradually, the Protestant groups established institutions as well (Rosner 233).

By the period of the Great Depression, Jewish and Catholic agencies had grown in importance because Eastern and Southern European Catholics and Jews made up a greater proportion of the city's poor. Most of the children referred to the sectarian agencies through World War II were whites dispersed among the variety of orphanages, foster homes, or guidance clinics affiliated with the Jewish Board of Guardians, Catholic Charities, and the Federation of Protestant Welfare Agencies. Jewish and Catholic agencies were not required to consider predominantly Protestant African-American children for placement and the white Protestant agencies either excluded them completely or had very limited quotas and relegated the few accepted to segregated accommodations. The few institutions that were reserved for minority children were perpetually overcrowded (Rosner 233).

Until the 1930's, the African American population of the city was relatively small and only three to five percent appeared before the Children's Court for placement in foster care. This changed when African-American migration from the South accelerated during the Depression and World War II.

During the 1950's and 1960's, the vast majority of white foster children were in the voluntary agencies and the majority of African-American children were in public institutions or "training schools." According to plaintiff's exhibit 241, the deposition of Marie Laufer, those voluntary agencies that did accept African-American children did so only when

these children met their own standards. Light-skinned children were selected over darker skinned ones, high achieving children were selected over ones with lower I.Q.s, and well-behaved children were accepted over those with behavioral problems. A particularly horrifying example of the importance of race in placement is the case of the New York Foundling Hospital, whose administrator explained that "color determination" was a central concern of the hospital. As late as 1974, children of indeterminate race were sent to the Museum of Natural History where an anthropologist would inspect skull size, skin tone, facial and other characteristics to determine the foundling's race (Rosner 233).

In the 1970's, when *Wilder v. Sugarman*, was first adjudicated, child welfare systems were still perceived, according to Marcia Robinson Lowry, as benevolent associations. As opposed to prisons where the perception of the public was of decaying, overcrowded buildings policed by sadistic guards, or mental hospitals where it was recognized that people were left to languish in back wards

... child welfare and foster care raised the image of earnest and sincere foster parents patiently bringing the smiles back to the tear-stained faces of adorable little urchins, or kindly nuns patiently tending bruised children in immaculate and verdant surroundings (Lowry 255).

Twelve times in 1972, the matter of Shirley Wilder, a twelve year old black Protestant child in need of placement, came before Family Court Judge Justine Wise Polier. All twelve times the judge was informed that no agency had accepted her. Polier sent Shirley Wilder to a reformatory, acknowledging that she would receive no treatment there and that it was the wrong place for her. The judge declared that Shirley Wilder represented a class of children for whom agencies refused to take responsibility. Polier got Marcia Robinson Lowry involved in the matter (Newsday 33). Marcia Robinson Lowry, a firm believer in the separation of church and state, became concerned about New York's placement system after working for the City of New York for one year (interview with Lowry). She filed *Wilder v. Sugarman*, one of the first system-wide lawsuits. Because the suit was based on well-established legal theories, the religion clauses of the First Amendment and the equal protection clause of the Fourteenth

Amendment, the case was not thrown out of court (Lowry 255).

In *Wilder v. Sugarman*, the plaintiffs did not contend that religion may not be a factor in New York's child placement process but argued that because the statutory system "mandated" placement according to religion the system was unconstitutional. Defendants countered that the statutes specifically stated that religious matching should occur "when practicable" and "so far as consistent with the best interest of the child, and

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where practicable" and were therefore permissive.

The NYCLU alleged, and the district court recognized, that the challenged statutes, at least theoretically, presented a clash between the Establishment and Free Exercise Clauses of the First Amendment which states in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." *Wilder v. Sugarman* challenged the funding of the voluntary agencies which placed children in accordance with their or their parents' religions.

The court deemed it impossible to compartmentalize laws governing placement because all were interrelated and to some extent interdependent. The court stated that it was impossible to ignore that, when New York's religious-matching, funding, and foster care laws were considered as one legislative scheme, they authorized the funding of foster care by religious organizations devoted to the promotion of their respective beliefs. If the challenged statutes were considered as one legislative scheme, the judges decided, then Wilder became "distinguishable in significant and crucial respect" from a previous case, *Matter of Dickens v. Ernesto (Wilder v. Sugarman*

1023). In *Wilder* the statutes funded religious institutions. There was no such provision in *Dickens* which was concerned with the placement of adoptive children by the state without any payment by the state to the adoptive parent. The statutes at issue were those that authorized the state to designate adoptive parents according to religion. *Dickens* was found to be non-controlling because Wilder was concerned with state-funded religious care whereas *Dickens* was concerned with religious matching in adoption and not with a legislative scheme that included the funding of religious agencies.

Wilder was subjected to the test enunciated by the Supreme Court in *Lemon v. Kurtzman* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, a case which challenged state expenditures of funds for non-public schools. The test stated that:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; ... finally, the statute must not foster 'an excessive government entanglement with religion (*Lemon* 2111).

The court found that the statutes governing foster care had as one of their principal objectives the religious education of children in accordance with their parents wishes and that, while state funds were for the most part expended for the child's temporal needs, nothing in the statutes prevented the state from providing for a child's religious needs. In previous cases, such as *Committee for Public Education v. Nyquist* 413 U.S. 756, 935 S.Ct. 2955, 37 L. Ed.2d 948 in which New York's education law authorized that governmental funds might be used for sectarian purposes, the Supreme Court held that even when such laws were enacted for socially laudable goals, they were violative of the Establishment Clause for having

a primary effect that advances religion in that it subsidizes directly religious activities (*Committee for Public Education* 2966).

Such statutes would be violative of the Constitution were they not reasonably essential to the implementation of other, equally important provisions of the Constitution such as the free exercise rights of parents and foster children.

The district court held that, since the religious-matching statutes were enacted in recognition of the rights of parents

and foster children to exercise their beliefs freely, the public interest in free exercise of religion entitled these statutes to be upheld despite their involvement of the state in religion. Under the Constitution, a parent has the right to determine his or her child's religious upbringing. When parents retain custody of their children, the state may not interfere in the children's religious education. However, when a child is separated from his or her parents and cannot be supported, maintained, or educated by them, New York State has assumed the duty to provide the essential maintenance and education of the child including its moral and religious education. Being placed in loco parentis, the state must act as the substitute parent of the child.

The issue posed by the present case arises out of the fact that the state must wear two hats, one as a surrogate parent obligated to enforce the biological parent's individual rights to provide religious direction and the other as a government obligated to refrain from use of its powers to further or inhibit religion. (*Wilder v. Sugarman* 1013).

The state also assumes the duty of fulfilling the child's Free Exercise rights. A literal reading of the Establishment Clause would prevent the state from acting as a surrogate parent.

Therefore, according to the court, the Establishment Clause cannot be literally enforced but must be interpreted to accommodate other fundamental rights. As explained by Chief Justice Burger in *Walz v. Tax Commission* 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697, a case that challenged the constitutionality of tax exemptions for religious organizations,

... rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. ... there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist (*Walz* 669).

The court held that an accommodation between the Religion Clauses, when they are in conflict, is constitutionally permissible. Laws which would otherwise violate the Establishment Clause may be upheld when they are necessary to satisfy Free Exercise rights and do not pose a serious threat to the public. So too, practical accommodation to as opposed to a doctrinaire interpretation of the First

Amendment had previously been used to allow states to employ chaplains and social workers for soldiers and prisoners to allow them to practice their religions.

After establishing that an accommodation between the Free Exercise and Establishment Clauses of the First Amendment is constitutional, the court had to examine whether New York's religious placement laws were reasonable and necessary. The judges recognized that religiously-affiliated child-care institutions had made valuable contributions over their long histories to the housing, clothing, feeding, and education of foster children. The statutory plan based on

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cooperation between state and religious agencies had never been found harmful. Plaintiffs did not contend that the statutes at issue had been used to favor any religion or to favor religion over the absence of religion. Furthermore, no one disputed that government payments had been used primarily to provide for children's temporal needs. In addition, no alternative had been suggested to foster care in religious institutions and homes. The court asserted that, even if non-sectarian agencies were constructed, the state would have to "custom-tailor each child's religious training" (*Wilder v. Sugarman* 1029). This type of government entanglement would constitute an establishment of religion and fail to pass the third prong of the test articulated in *Lemon v. Kurtzman*.

The three judge court therefore held that the challenged New York laws were on their face a fair and reasonable accommodation between the Establishment and Free Exercise Clauses of the Constitution. It left to further proceedings whether one or more of the statutes as implemented deprived the plaintiffs of their First Amendment or other Constitutional rights.

Following this opinion, the parties to *Wilder v. Sugarman* engaged in discovery and motion practice. In March 1978, the New York Civil Liberties Union filed a new action, *Parker v. Bernstein*, 78 Civ. 957 (RJW). They raised similar chal-

lenges to the New York child care system while accounting for changes in the system including changes in personnel in the government and private agencies. The court dismissed this suit and stated that the decision in *Wilder v. Sugarman* would be treated as *stare decisis*.

This complaint was amended and re-introduced on November 16, 1978 as *Wilder v. Bernstein*. In an opinion filed October 1, 1980, plaintiff's motion for class certification was granted and the court granted defendant's motion to dismiss plaintiff's facial attack. The court denied defendant's challenge to the taxpayer plaintiff's standing. A third amended complaint was filed March 23, 1981 and a fourth was filed April 27, 1983 (*Wilder v. Bernstein* 1301).

Plaintiffs asserted that the New York City child care system operated in a racially discriminatory way,

that Catholic and Jewish agencies had been permitted to receive public funds while engaging in a pattern and practice of discrimination against black children in violation of the Fourteenth Amendment. ... that there are disproportionately low black and high white populations in Jewish and Catholic agencies; that the referral of children to voluntary agencies by New York City Special Services for Children (SSC) ... has resulted in racial segregation; that racial discrimination by the agencies has been facilitated by SSC's identification of children for placement by race and/or skin color, and by the agencies' unrestricted right to reject children placed with them by SSC under broad, subjective admissions criteria;... and that some agencies have listed vacancies by race (*Wilder v. Bernstein* 1302).

Plaintiffs argued that as a result, black children waited longer for placement, were more often inappropriately placed, and were disproportionately placed in inferior programs. Plaintiffs also claimed that the New York City child care system operated in a religiously discriminatory manner thereby also violating the Fourteenth Amendment. Among other allegations, plaintiffs contended that Catholic and Jewish agencies cared for a disproportionately large population of children of their own religion, that SSC referred children based on their religion even in cases where the parents had not expressed a religious preference, and that some agencies listed vacancies by religion. As a result, plaintiffs claimed, Protestant children waited longer for placement and were often placed in inferior or inappropriate programs.

Third, plaintiffs argued that the child care system involved government financing of agencies controlled by or responsible to religious organizations. Among other allegations, these associations were accused of having given preference in hiring to those of the same religion, to having offered religious services only to children of their own faiths, to have prominently displayed religious symbols, and of having stated as their purpose the care of children of their own religions. Plaintiffs contended that the purpose of the child care system as implemented by the defendants was to advance religion, to favor some religions over others, and to favor religion over nonreligion. Plaintiffs further contended that New York City's auditing procedure was insufficient to guard against excessive reimbursement of the agencies.

Fourth, plaintiffs claimed that the statutory scheme burdened the Free Exercise rights of Protestant children. Plaintiffs maintained that when Protestant children, who had few agencies of their own, were placed in Catholic and Jewish agencies, they were chilled in the exercise of their own religion by the practices and attitudes of the agency. In addition, children placed in Catholic agencies were being denied access to birth control information and devices and information about obtaining abortions. Fifth, plaintiffs claimed that denial of equal access to child care services for Black Protestant children was a violation of Title VI of the Civil Rights Act of 1964.

Before the trial was set to begin in August 1983, the plaintiffs and the City defendants entered into settlement discussions with the knowledge of the other parties to the case. Beginning August 6, 1984 the district court conducted a hearing on the fairness and adequacy of the proposed settlement. The parties were sparked by the criticism and suggestions of intervenors to propose a second proposed stipulation of settlement which was submitted to the court on January 2, 1985. The stated purposes of the settlement were to ensure that all New York City children whose placement in foster care was the responsibility of the Commissioner of Social Services received services without discrimination on the basis of race and religion and to ensure equal access to good quality services. The stipulation of settlement also purported to ensure that appropriate recognition be given to a statutorily permissible wish for in-religion placement. The signatories stated intent was to resolve

difficult legal issues and to avoid a trial. The stipulation also stated that the settlement was not an implication of wrongdoing.

In the language of the court, the heart of the settlement lay in the provisions governing placement. In order to prevent racial and religious discrimination, the settlement provided that children would be placed on a first-come, first-served basis and that the expression of a religious preference by the parent or a child over 14 would not give that child greater access to a particular program

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over other children whose needs would also be served by that program. The settlement mandated that SSC place children in the program best suited to their needs using a classification system that would be developed by consultants chosen by New York City with participation of plaintiffs' counsel and the signatory and nonsignatory agencies. To ensure parents' rights to raise their children as they wish, the settlement granted parents the opportunity to express a preference for placement in-religion. SSC would place the child in the best available program of that religion provided that it was in the child's best interest and practicable. Placement would not be considered "practicable" if there was no vacancy in or a waiting list for the best in-religion program. In that case, the parent would have the option of having the child wait for a vacancy, having the child placed in the next best in-religion program, or having the child placed in the best out-of-religion program. Exceptions would be made in the first come, first served rule for cases in which religious beliefs and practices pervaded a child's life to such a degree that a particular religious placement was required.

An agency could reject a placement by SSC only if it had no vacancy, did not have a suitable family for the child, or if there was a valid therapeutic reason for not accepting the child into its program. SSC would not identify a child by race or religion unless it had been determined necessary for therapeutic reasons. Under the terms of the settlement, the SSC also had to provide agencies with evaluations of all children requiring placement, provide additional evaluations upon request, and establish waiting lists for agency programs.

In order to ensure the free exercise rights of children in placement, the settlement mandated that each agency provide comparable opportunities for children to practice their religion and to observe holidays. Children in an agency's care would not be obligated to attend observances on its premises or to follow its dietary restrictions (to the extent practicable). SSC also would be required to ensure that all children had meaningful access to family planning information and counseling through an agency, an outside source, or both. Religious symbols would be permitted in a child's room only upon his or her request and the agencies would not display excessive religious symbols.

The stipulation of settlement set record-keeping requirements for SSC, contracting agencies, and a settlement panel. It also honored an agreement between New York State and New York City to review paperwork requirements toward the goal of reducing paperwork for all participants in the system. The settlement committed the City to train SSC staff to comply with its terms. The duration of the stipulation was set at three years after full implementation or five years after entry, whichever came first. New York City or a majority of the signatory agencies could seek modification of the stipulation by negotiation with the other signatories or by petition to the court. If the plaintiffs' counsel believed any defendants were not complying with the terms of the settlement, they would be required to seek voluntary compliance before petitioning the court.

The court raised as a possible constitutional objection the provision that agencies not display "excessive religious symbols." The court was bothered by the vagueness of the term excessive and anticipated that enforcement would be difficult because it could go beyond an inquiry into whether a symbol was part of a system of belief into questions about

the validity of the symbol within a particular religious tradition. Proponents of the stipulation explained during a hearing that the clause was a compromise designed to ensure the Free Exercise rights of children with different beliefs were not chilled by an overbearing display of religious symbols in an agency's common area. The court found this purpose legitimate and conditioned its approval on an understanding that the clause would only be enforced only when plaintiffs could demonstrate that symbols displayed in a common area had an impermissibly chilling effect.

The Court examined whether the settlement was fair, reasonable and adequate. Its purpose in doing so was not to determine whether the compromise was a perfect solution but whether it constituted a fair resolution of the parties' claims and did not detrimentally affect the rights and interests of third parties and the general public. The court also could not approve a settlement which posed a threat to the economic viability of the foster care system or the quality of care. The court concluded that the terms of the stipulation, balancing it compromises and benefits to the plaintiff class against the uncertainties of proving liability and obtaining a meaningful remedy after a trial, was a fair, reasonable, and adequate settlement of the plaintiff class's claims. The City would continue to provide foster care through its contracts with sectarian agencies and SSC would curtail if not eliminate any racial or religious discrimination. Children would be protected against differential treatment because of a different religion or no religion and against interference with their religious practice. In addition, the proposed changes would resolve underlying constitutional concerns without jeopardizing good social work practice.

The court was satisfied that the changes made in the original settlement regarding SSC's selection of consultation, the classification system, the first come, first served principle, provisions on waiting lists on vacancies and waiting lists, and other interests, resolved intervenors concerns. The court held that the settlement substantially achieved several critical and interrelated goals. It reconciled competing constitutional and statutory interests in the foster care system without sacrificing the historically significant contribution of voluntary agencies to the child care system or the professional expertise of administrators and clinicians in the agencies. The court also highlight-

ed opportunities the stipulation presented for improvement in the child care system. Consultants were authorized to make recommendations for improving any or all aspects of the foster care scheme. The commitment of New York State and New York City to reduce the paperwork burden was also mentioned as an important step.

The court conditioned its approval of the settlement on assurance that New York City had the resources to fund the consulting and monitoring positions created in the settlement and to hire qualified caseworkers, supervisors, and clinicians. The court approved the settlement after these conditions had been met.

In a case where few agree on anything it is not surprising that there are different perspectives on why the parties agreed to a settlement. According to Judith Kramer, the assistant attorney general at the time of the settlement, parties were willing to settle because the facts of the case had changed dramatically between 1973 and 1988. While she admits that originally the statutory system as applied was racially and religiously discriminatory, she claims that due to reduced numbers of children in need of foster care, agencies had already begun accepting all kinds of children simply to fill their available spaces. The ACLU settled, according to Kramer, because it knew that circumstances had changed too much for them to win the case (interview with Kramer). Chris Hansen, an attorney who worked on Wilder and currently a member of the American Civil Liberties Union's Legal Department, disagrees with Kramer's analysis. "We could have won the case, the problem had not disappeared," Hansen said. According to Hansen, the Catholic agencies were accepting all kids but were sending Catholics to some programs and others to inferior ones. The Jewish agencies were still openly discriminating (interview with Hansen). According to Anne Murdaugh, an attorney with the ACLU's Children's Rights Project who has litigated Wilder for the past two years, the ACLU settled the case because by settling the provisions of the stipulation applied to all children in the foster care system. Had the case been decided by a trial, only the named class, black Protestant children in foster care, would have been affected (interview with Murdaugh). Chris Hansen agreed and added that New York City agreed to the settlement because it was embarrassed that its system was racially and religious-

ly discriminatory (interview with Hansen).

Unfortunately, **21 years after Wilder v. Sugarman was filed and five years after the settlement was upheld on appeal, the story is not yet over. The Wilder Settlement Panel, made up of three expert panelists still meets and the round of meetings with and reports to the federal court continue unabated. Advocates of the as yet unfulfilled consent decree argue that the case still goes to the heart of a system that damages the children that it is supposed to save. They blame the panel and the judge for allowing the city to get away with failure and repeated delays. In 1989, plaintiffs hired Theodore Stein, a professor of social welfare, to examine 50 cases chosen randomly and to interview caseworkers. The report outlined a chaotic system and an untrained staff. This report became part of a 1990 ACLU motion to find New York City in contempt. Federal court judge Robert Ward requested that the motion be withdrawn in order to give the Dinkins administration a chance (Newsday 77)**

Abuses in the system abound. According to the Stein report, foster care agencies routinely ask about a child's skin shade and turn some down for being "too dark." As of September 1993, New York City workers were still including references to race and skin tone in their referrals. When the Wilder panel attempted to verify the number of children placed by New York City in March 1992 they received four separate reports from the child welfare agency. After spending over \$1 million dollars and five years, the City has failed to fulfill the provisions of the settlement (Newsday 77).

The American Civil Liberties Union asked federal court judge Robert Ward to take over the city Child Welfare Administration in July of 1993 in order to force it to comply with settlement decree. The motion asked Judge Ward to find the city in contempt citing noncompliance by Child Welfare Association and harm to children from their failure. The motion says that New York City has failed to provide information necessary to monitor its compliance with the consent decree, has failed to evaluate all but a fraction of the children placed on an emergency basis and is not making placements on a first come, first served basis (Newsday 33). It is sad to report that the case has no conclusion. With hope, it will be resolved before a new

generation of children matures in the foster care system. 89

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Technology

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come, but, as with Microsoft, one can use the ruling as a paradigm to see the problems that occurred when science and law interacted. The rift that divides scientists from judges and lawyers seems to be, in this case, the source of our problem. A judge does not offer a decision as a scientist just as a diligent scientist researches with an eye towards the truth and not the potential legal ramifications of a discovery. In this sense, separatism is a good thing. Neither field should be compromised by having the other monitor or unduly influence it. The Supreme Court may have gone too far in its decision. While the decision looks to enforce the integrity of judges, it indirectly undermines it. A judge has the capacity to bring his/her own conceptions about

theories into the courtroom when deciding on evidence. If, for example, a judge knows little about molecular biology, a crafty group of expert witnesses could persuade him/her to dismiss otherwise reliable genetic evidence. A scientist, or perhaps an extremely well rounded judge, might not have even considered dismissing the evidence.

If anything seems clear, it is that, in both examples, the Justice Department and the Supreme Court have gone about things the wrong way. Cases which involve science and technology cannot be handled like any other case. They have properties which separate them. Even if Microsoft committed any wrongdoing, the Justice department would have had to act seven or eight years ago to have made a difference. Microsoft was ahead of justice. The wall which has to be torn

down is the one that the legal system has built between itself and the sciences and the one which the scientific community has sheltered itself in. Only through cooperation between the two sectors can meaningful progress be achieved. Clearly, the burden should not be the responsibility of only a judge or only the scientific community but collaboration on the part of both of them. With science and technology growing faster by the second, if the legal system does not keep up, then as with Microsoft, by the time it catches on it will be to late. The only way to avoid this is through joint efforts. This way people will experience more of the benefits faster, rather than viewing potential progress as a threat. •

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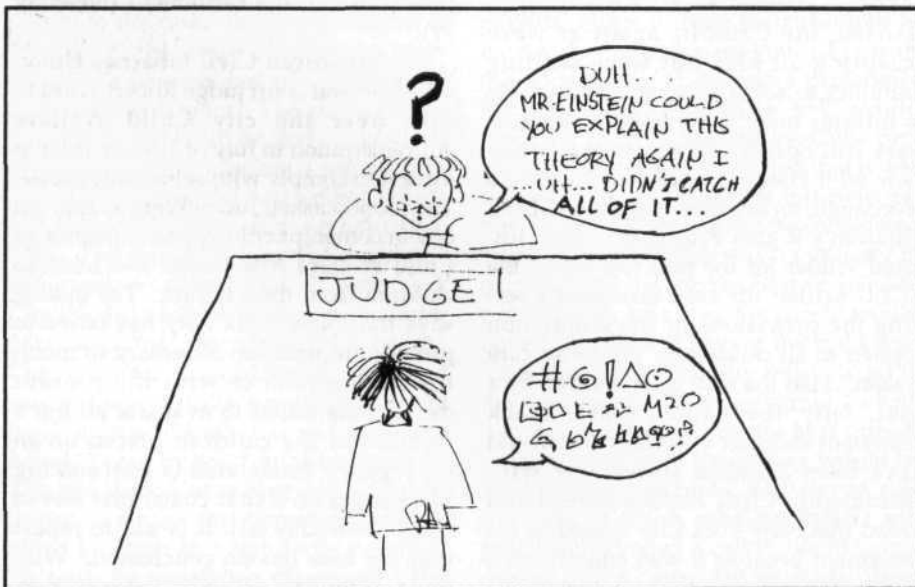
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Cartoon by Raul Aviles