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Wyman v. James: The Epitome Of A Judicial "Red Herring"

INTRODUCTION

"Law is a matter of rights and duties and not simply the discretion of officials."*

The American legal system faces a great task today while its body of administrative law undergoes a fundamental transformation. This transformation can be seen through the bifurcated application of administrative discretion. The transformation, from its inception, is largely due to the "handiwork of federal judges".¹

It is this dual approach upon which this note will focus. Utilizing *Wyman v. James*² as a touchstone; emphasis will be given to the possible remedies—both judicial and administrative—that are available to ameliorate the effects of this approach and thereby avoiding future decisions like *Wyman*.³

Wyman was decided on an anomalous visitation/search distinction, and seemingly predicated on administrative convenience coupled with a species of the eroded right-privilege concept.⁴ I propose to illustrate that the decision in *Wyman* is counter-productive given the pattern it (the courts) previously set and that there are other viable alternatives that do not abridge fundamental liberties.

BACKGROUND

Administrative law seeks to reconcile the fundamental proposition of the liberal state that only intrusions in compliance with the legislative process are allowed to interlope upon private liberty and property interests.⁵ This is the approach of the "traditional model" of adminis-

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1. Stewart, *Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

2. See 400 U.S. 309. *Wyman* was a section 1983 Civil Rights action by a recipient of state aid to families with dependent children for declaratory and injunctive relief. It was alleged that no consent was given and the state did not procure a warrant for official entry into recipients home. The State of New York appealed the district court's judgment and decree holding invalid and unconstitutional as applied Section 134 of the New York Social Services Law, McKinney's Consolidated Laws, ch. 5 Section 175 of the New York Policies Governing the Administration of Public Assistance, and Sections 351.10 and 351.21 of Title 18 of New York Code of Rules and Regulations. The Supreme Court held that the home visitation was a reasonable administrative tool and does not violate the fourth or fourteenth amendments.

3. *Id.*

4. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

5. Stewart, *supra*, 1669-76.

trative law.⁶ The regulation of private businesses in the latter part of the nineteenth century became so vast that a set of principles were needed to harmonize private interests with the ever increasing governmental power. This doctrine has been termed the "traditional model".⁷ The doctrine is widely criticized for its limitations on protections to newly recognized property and liberty interests. Critics state that such interests are at least, if not more, entitled to protections from underserving infringements as traditionally recognized interests.⁸

Historically, the only interests that received constitutional protections, in response to governmental interference, were those protected during the early common law era.⁹ The interest in the eligibility for a gift, or the opportunity to work for a given employer¹⁰ did not receive the same constitutional safeguards.¹¹ These unguarded interests were considered "privileges" or "gratuities" and therefore not rights protected by legal sanction.¹² The right-privilege distinction, drawn in the early law, was based on the contractarian view of the state as espoused by Rousseau and Locke.¹³ The government analogized itself with a private philanthropist.¹⁴ The rationale, was that an intrusion by a private party would be judicially determined by the existence or non-existence of a contract giving consent. In the area of administrative law, one duly elects government officials who decide on the acceptable procedures for administrative action—consent was therefore implied.

INCONSISTENT PATTERNS: JUDICIAL DECISIONS

The use of arbitrary governmental power conferred by this contractarian view became "less and less tolerable" as the role of government expanded and dependence in the social sphere mushroomed. This intolerable situation gave rise to decisions prohibiting the termination of statutory entitlements such as welfare payments, without a prior adjudicatory hearing before the agency.¹⁵ In *Escalera v. N.Y. Housing Au-*

6. *Id.* 1671-74, for a list of the four elements in the "traditional" model; and to secure a broader understanding of the underlying theory.

7. *Id.*

8. Davis, *DISCRETIONARY JUSTICE*, 4 (1969).

9. See *Londoner v. Denver*, 210 U.S. 373 (1908); *Southern Ry. v. Virginia*, 290 U.S. 190 (1933).

10. See *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892).

11. Compare, cases cited in note 9 *supra*, with *Fleming v. Nestor*.

12. Reich, *New Property*, 73 *YALE L.J.* 733 (1964).

13. See *The Meaning of the "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 *CALIF. L. REV.* 590 (1930). See also *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1778).

14. See *Thompson v. Gleason*, 317 F.2d 901, 906 (D.C. Cir. 1962). See also *Lynch v. U.S.*, 292 U.S. 571 (1934). Accord n.2 *supra* at 319.

15. See, *Goldberg v. Kelly*, 397 U.S. 234 (1970).

thority¹⁶ the court found tenancy in low-income housing worthy of constitutional protection. In *Graham v. Richardson*¹⁷ where the equal protection clause was asserted to rectify the discriminatory allotment of welfare funds to three female aliens, the Court said the statutes of Arizona and Pennsylvania created classifications based on alienage and were therefore unconstitutional. Moreover, Justice Blackmun paradoxically¹⁸ states that characterization of governmental benefits as a "right" or "privilege" is not determinative of constitutional rights.¹⁹ This pattern of decisions before and after *Wyman* illustrates how the Court's protective arm shields individuals from abusive governmental power in these areas of "new property".²⁰

The inconsistency of *Wyman* can also be shown in the area of searches and seizures, where *Wyman* is considered to be a visit and not a search because of its benevolent rather than investigative character. This distinction is questionable at best.

In 1959 the Court decided its first case, *Frank v. Maryland*,²¹ involving a warrantless administrative search, where no violation of the defendant's fourth amendment rights were found. The Court said that the warrantless health inspection was based on probable cause. The defendant was fined twenty dollars after being convicted of violating the Baltimore City Code by not allowing the Health Commissioner into his home without a warrant. The Court ruled that in light of the continuous pattern (emphasis added) of health inspections without a warrant and in view of the modern health needs, the warrantless inspection, based on probable cause, was not violative of the fourth amendment.²² It was only eight years later that the Court overruled the *Frank* decision.²³ The new ruling stated that administrative searches without a warrant by municipal health and safety inspectors constitute an intolerable encroachment upon the right to privacy. The Court decided this issue through companion cases.²⁴ The *Wyman* decision thereby

16. 425 F.2d 853 (2nd Cir. 1970), cert. denied, 400 U.S. 853 (1970).

17. 403 U.S. 344 (1971).

18. Justice Blackmun, five months earlier, delivered the opinion in *Wyman*.

19. See n.17 *supra* at 374.

20. See generally n. 12 *supra*. Reich, defines "new property" as all forms of government largesse: defense contracts, welfare subsidies, governmental payrolls, etc. Although the cases mentioned in nn.15-17 are distinguishable on the facts, they all include the protection of the lowly indigent when his constitutional guarantees are at stake. The interests in *Wyman* should therefore not receive any less protection than in *Graham*, *Goldberg* or *Escalera*.

21. 359 U.S. 360 (1959).

22. *Id.*

23. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

24. See *v. City of Seattle*, 387 U.S. 541 (1967), was decided during the same term of Court as *Camara*. *Accord*, *Terry v. Ohio* where Justice Harlan said the fourth amend-

plugged the expansion of welfare rights and signified a retreat from traditional fourth amendment standards. The decision exhumes the 19th century's ghostly right-privilege²⁵ status distinction, that informed society on the advantages of a legal background versus that of a pool hall.²⁶

INCONSISTENT PATTERNS: ADMINISTRATIVE

The incongruence of *Wyman* is not solely limited to judicial decisions. A cursory view of the political and administrative history reveals a smattering of its "red herring" traits also. The full impact of welfare administration in particular, and social legislation in general, cannot be fully appreciated unless there is some understanding of its history.

The "traditional model" was actually designed to curb agency power. The fact that an agency fails to fulfill a legislative directive or preserve the collective interests²⁷ that administrative regimes are formed to serve—is not the concern of the "traditional model."²⁸ We find the roots of our problem growing out of too much discretion within the administrative agencies. While the administrative powers were kept within workable parameters²⁹ the problem of discretion could be curtailed. It was the New Deal Era that swept in this administrative breath of strength. This seemingly uncontrolled discretion was the catalyst for

ment applies to all intrusions by the government where the sanctity of a man's home is concerned. The decision of *Camara and See* exemplifies the posture that the courts have taken concerning administrative intrusions on the liberties of business interests. Mr. Justice Douglas, (dissenting) in *Wyman* categorically states that the fourth amendment's proscriptions should be applied to the socialistic state that we are approaching and should not be considered exclusive to capitalism; *supra* n.2 at 334.

25. Notwithstanding the visitation search distinction noted by the Court, the essential difference between *Camara, See* and *Wyman* is the economic-social interest. The receipt of largesse in *Wyman* was being conditioned upon the assertion or non-assertion of Mrs. James' fourth amendment rights.

26. Compare *Commonwealth v. Kinsley*, 133 Mass. 578 (1882) ("keeping a pool table for hire" considered a privilege) with *Ex Parte Robinson*, 86 U.S. 505 (1873), where an attorney's means of a livelihood were considered more respectable and therefore not a right. An interesting comparison of judicial logic.

27. The overall goal should be the protection of private rights without the intrusion of unauthorized government conduct.

28. See n.1 *supra* at 683. Professor Stewart comments on some agencies that employ the "devil theory". He also remarks on the partiality of agencies to regulated and client firms. See also, Jaffe, *Two Days to Save the World*, 24 OKLA. L. REV. 17 (1971).

29. "[W]orkable parameters" refers to the economic forum for which the "traditional model" was conceived. The New Deal Congresses, in introducing their social agencies, demanded a broad range of discretion, asserting that this "free hand" would enable the agencies to restore health to the economy. There is talk in the literature that "broad discretion" can be substituted for "expertise". The New Deal defenders used this concept of public administration to emphasize their position. The position that these agencies were advocating needed this breadth of discretion. Since they were not professionals, there would be a certain trial and error process. Stewart, *supra* n.1 at 1676-81.

the economic-social split in administrative policy. The defenders of these New Deal agencies thought it unwise to follow rigid procedures.³⁰ The courts, however, were of a different school of thought and turned to the Administrative Procedure Act's history and instituted a method of controlling the exercise of this discretion. They established a trilogy of requirements:³¹ more substantiality of the evidence supporting the agencies factfinding, with more procedural safeguards;³² that choices made be reasonably consistent and persuasively justified, especially where one's expectation interests were involved;³³ and a plain showing of a legislative purpose as a means of restraining agency discretion when civil liberties were at stake.³⁴

These judicial safeguards were considered by many administrators to be an abundance of caution. Nevertheless, they did serve to temporarily trim agency discretion and protect the interests of the regulated with same hand. Through the skillful use of this "caution" emerged an amicable relationship between the administrators and the judges.

Why then are the states presently able to enter a welfare recipients home without a warrant? Why does the judicial system's hierarchy sanction such a disrespectful and whimsical act? Why haven't the courts instituted their "caution" in this sphere as it has in others? Many scholars maintain that the once amicable relationship has vanished and that these agencies have realized a new emergence of strength that the judiciary—through the conventional means—cannot restrain.³⁵ The judiciary, now on the defensive, speaks of "balancing the various factors" that effect not only the interest groups, but the public's interest as well.³⁶

Professors Reich and Stewart maintain that this abusive use of discretion affects the area of social welfare more than others.³⁷ Their position is buttressed by the well settled opinion that agencies, in implementing

30. *Id. see generally*, Landis, *THE ADMINISTRATIVE PROCESS* (1938).

31. *See* n.1 *supra*.

32. *Universal Camera Corporation v. NLRB*, 340 U.S. 474 (1951).

33. *Citizens Association of Georgetown v. Zoning Commission*, 477 F.2d 402 (D.C. Cir. 1973).

34. *See* *Kent v. Dulles*, 357 U.S. 116 (1959) and *Greene v. McElroy*, 360 U.S. 474 (1959). Although they concerned issues of national security, the fundamental rights that were being asserted are sufficiently analogous to *Wyman*.

35. *See generally*, n.31 *supra*.

36. *See* n.29 *supra*. *See also*, Reich, *Law of a Planned Society*, 75 *YALE L.J.* 1227, where he labels this "public interest" jargon a myth used to camouflage the mode of dispensing benefits. It has also been termed an "admission of legislative inability to resolve hard questions of choice." The doctrine of separation of powers is the real obstacle that prevents the judiciary from being too harsh on the agencies; especially where they are within a "liberal" interpretation of their legislative directives.

37. Reich *supra*, n.12. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*. 74 *YALE L.J.* 245 (1965). *Compare*, New York's laws with HEW Handbook; *see* n.2 *supra* and n.62 *infra*.

legislative directives, are unduly favorable to organized interests.³⁸ If this position has any significant degree of merit, the regulated businesses and other organized groups are no match for the scattered interests of the poor.

OTHER JUDICIAL ALTERNATIVES

The central issue that is raised in situations such as *Wyman*, is whether the state may condition an individual's receipt of government largesse on the waiver of a constitutional right. The intimidating structure of the welfare system will probably hinder any organized type of resistance. The very foundation of individuality is the power to control a portion of one's prosperity and welfare. In a society that honors material "well-being," the importance of this power is beyond question.³⁹ The dependence, and the ever lurking threat of denial, revocation, or suspension, forces the recipients into uncertain positions. The welfare mother who must be embarrassed by unreasonable intrusions into her home is only one example of this pendulum of uncertainty that hangs on reliance.

Justice Blackmun, writing for the majority in *Wyman*, impliedly acknowledges that Mrs. James is receiving a "privilege" from the government.⁴⁰ Albeit, the judiciary still possesses a few effective ways of clipping agency discretion and also avoiding the "harsh consequences of the right-privilege distinction."⁴¹

UNCONSTITUTIONAL CONDITIONS VERSUS CONSTITUTIONAL PROTECTIONS

"The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."⁴² The erosion of right-privilege gave rise to conditioning the privilege upon the waiving of one's constitutional rights. In *Barsky v. Board of Regents*,⁴³ for example, a physicians license was suspended because he had invoked the fifth amendment privilege before an investigating body. The Court in *Barsky* stated:

The practice of medicine in New York is lawfully prohibited by the State except upon conditions it imposes. Such practice is a privilege

38. Cramton, *The Why, Where, and How of Broadened Public Participation in the Administrative Process*, 60 *GEORGETOWN L.J.* 525 (1972).

39. See generally Reich, *supra* n.12.

40. See n.2 *supra*.

41. See n.4 *supra* at 1445.

42. Justice Holmes' famous epigram from McAuliffe *supra*, n.10. The quote, in essence, means no one has a constitutional right to government largesse.

43. 347 U.S. 442 (1954).

granted by the State under its substantially plenary power to fix the terms of admissions.⁴⁴

Do recipients of largesse have any rights? The *Barsky* decision would lead one to believe that there are rights protected by the Constitution, but they are not exercised at the citizen's discretion. The idea of unconstitutional conditions is centered on the position that state and federal legislatures can control private conduct by conditioning the extension of benefits upon the surrender of some constitutional right. The position has been stated in syllogistic terms: "if the legislature may withhold a particular benefit it may grant it in a limited form since the greater power of withholding absolutely must necessarily include the lesser power of granting with restrictions."⁴⁵

Hence, there is no deprivation of a right, since the recipient may retain the right by not accepting the benefit.⁴⁶ The overwhelming number of government regulatory agencies and welfare programs, coupled with the rapid expansion of government contracts, increase the "potential erosion" of fundamental liberties by use of these unconstitutional conditions.⁴⁷

In essence, the Unconstitutional Conditions Doctrine prohibits the government from doing indirectly what an express constitutional provision forbids it doing outright.⁴⁸ In *Sherbert v. Verner*,⁴⁹ the Doctrine was invoked to prevent South Carolina from discontinuing unemployment benefits because the recipient refused Saturday employment for religious reasons. It has been applied in balancing the privilege of school attendance with the acceptance of summary dismissals.⁵⁰

The Doctrine is a packaged remedy in the manner which it sustains judicial objectivity. The Court can avoid the appearance of acting as a "super-legislature"⁵¹ because the test is simply whether or not the government is conditioning its largesse on the waiver of some constitutional right. The Doctrine also rescues the judiciary from those very close cases where the evidence is scant and agency discretion appears to have been the only guideline. The protection afforded by this Doctrine seems

44. *Id.* 451.

45. *Unconstitutional Conditions*, 73 HARVARD L. REV. 1595 (1960).

46. *See generally* n.2 *supra*.

47. *See generally* nn.4 and 46 *supra*.

48. *See, Frost and Frost Trucking Co. v. R.R. Commission*, 271 U.S. 583 (1948). *Accord, Van Alstyne supra* n.4.

49. 374 U.S. 398 (1963).

50. *Dixon v. Alabama*, 294 F.2d 150, (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

51. *See generally*, n.38 *supra*. The doctrine of separation of powers prevents the judiciary from forcefully using any other means except constitutional safeguards (i.e. the trilogy of requirements in theory are almost useless when the separation of powers doctrine is considered).

to be the strongest shield recipients of largesse have. A petitioner need only show that the condition complained of is unreasonable because it abridges the exercise of a right guaranteed by the Constitution.⁵²

CHILLING EFFECTS

Perhaps a literal application of the Unconstitutional Conditions Doctrine begs the question. The concept of "indirect effects," however, has been mentioned by one legal scholar as another effective means of protecting an individual's fundamental liberties.⁵³ A court, in deciding that a particular regulation or prevalent administrative practice "chills" a constitutional right,⁵⁴ can simply invalidate it. The test is whether these rights of the affected class outweigh the involvement of the regulation and significant state interests.⁵⁵

*Shelton v. Tucker*⁵⁶ provides a classic illustration of how these "indirect effects" on constitutional rights can be invalidated. In *Shelton*, a state statute required an annual affidavit from every teacher listing each organization of which he was a member or contributed to for the past five years. The Court ruled that such a statute had a "chilling" effect on the freedoms of association and speech which are protected by the first amendment.⁵⁷ An absolute right of non-disclosure was not found.⁵⁸ Instead, it projected the probable effect such a statute would have on discouraging the exercise of the absolute right of association and concluded that the state could find another alternative to protecting its interests. The setting of *Wyman v. James* can also have a "chilling" effect if the recipient's consent is due to the probable suspension of the aid. Moreover, in the welfare area, the congressional directives provide other viable alternatives for acquiring the needed information.⁵⁹

52. See, n.4 *supra* at 1448, where Van Alstyne criticizes the doctrine based on Holmes' opinion in *McAuliffe*.

53. See n.4 *supra*.

54. See generally n.25 *supra* at 109. An action under the Civil Rights Act, section 1983, is a means of relief for deprivations not only of rights guaranteed by the Constitution, but also of "any rights, privileges, or immunities secured by the . . . laws of the United States." 42 U.S.C. § 1983 (1964). The Social Security Act does not confer a "right" per se, because no state is obligated to participate or provide state aid of any kind. Section 1983 does, however, create the right, in any state which has elected to benefit from the program, for individuals to be treated in compliance with the Act. See n.27 *supra* at 85-110.

55. See n.4 *supra*.

56. 364 U.S. 479 (1960).

57. See n.4 *supra*.

58. See generally n.59 *supra*.

59. See n.2 *supra* at 342, 343, 347. See also the H.E.W. Handbook of Public Assistance Administration, part IV section 2200(e)(1). *Accord*, Dershowitz and Ely, note 68 *infra* at 1206 n.40.

ABSTENTION UNDER SECTION 1983 ACTIONS

When a case represents a question of state law and the possibility of the federal courts deciding a constitutional issue unnecessarily, the doctrine of abstention has been invoked.⁶⁰ Essentially, the doctrine provides for the federal court to refuse to exercise jurisdiction when: the state law is unclear on an issue and it seems proper for a state court to decide the issue, thereby avoiding a constitutional decision; state public policy is concerned—the state should then handle the matter to avoid friction with the federal judiciary; the state court can issue a remedy that protects the plaintiff from irreparable injury and safeguards his constitutional claim.⁶¹

The decision in *Harrison v. NAACP*⁶² epitomizes the conflict with abstention in section 1983 actions. The Supreme Court decided that the district court should have abstained in this action, which questioned the constitutionality of several Virginia statutes prohibiting solicitation of litigation concerning racial integration. The three dissenting justices argued that section 1983 actions are never apposite for abstention. The Court has not required abstention in section 1983 actions since *Harrison* was rendered.⁶³

The practical effects of abstaining in section 1983 actions presents a persuasive argument for deciding the issue on the merits. Even though the welfare plaintiff would suffer immediate financial injury while the issue was being decided, the most persuasive position seems to be the “chilling” effect the threat to the fundamental right would have during the interim period.⁶⁴

Some legal scholars have suggested that somehow the Court should have abstained or declined jurisdiction in *Wyman*.⁶⁵ However, the practical effects welfare recipients would suffer outweigh all arguments in favor of abstention.

CONCLUSION

Wyman v. James is a very good example of the gap between law-in-theory and law-in-action. Using Professors Reich and Stewart's opin-

60. See, *R.R. Commission v. Pullman*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

61. See n.27 *supra*.

62. 360 U.S. 167 (1959).

63. See n.27 *supra*, 67 COLUM. L. REV. 84, for an excellent discussion on abstention in section 1983 actions.

64. *Dombroski v. Pfister*, 380 U.S. 479, 483-490 (1965).

65. For an excellent discussion on the soundness of the *Wyman* decision see, Dershowitz and Ely, *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1204-1206, and 1224-1226 (1971). *Wyman* is most appropriately termed “a textbook example of reaching out prematurely to decide a broad and novel issue of constitutional law”.

WYMAN V. JAMES

413

ion⁶⁶ as a postulate, one can readily conclude that the traditional model of administrative law is in dire need of reformation and/or expansion. The ability of the traditional model to control governmental power has been seriously undermined by the present use of broad agency authority as shown by *Wyman*. Admittedly, to reach the effective equitable representation of the collective choice, seems beyond our practical grasp. However, this new type of interest representation may generate a new unified desire to avoid the abusive practices of the present.⁶⁷ But, if steps are not taken to curb this discretion, agency solicitude with regard to regulated or private firms will probably continue.⁶⁸ *Alyeska Pipeline Service Company v. Wilderness Society*⁶⁹ suggests that full realization of interests representation is not in the near future.

What then is the remedy? The judiciary must be the source once again. After all, it was the "handiwork of federal judges"⁷⁰ that checked the initial agency actions. However, the attempt by the judiciary must have more force and effect than the original trilogy of requirements. The Doctrine of Unconstitutional Conditions and "chilling" effects surely provide a beginning. Conceivably, their actions, to be effective, must encompass a degree of "discretionary control over social and economic decisions".⁷¹ Whatever judicial means are finally employed to subdue agency discretion and to protect the interests of the "lowly poor"⁷² surely must not follow the inconsistent posture of *Wyman v. James*.

The Court, referring to the benevolent purpose of inspection visits, relied very strongly on the exercise of administrative discretion. This partiality toward the state administrative agency denied Mrs. James the protection of a fundamental liberty. The minor premise of the social compact in American government ". . . was created to secure to the individuals the enjoyment of life, liberty and property."⁷³ If the idea of liberty in the constitutional sense has any remaining meaning, it must cover "personal and family affairs".⁷⁴

JOSEPH KIRK MYERS

66. See nn.38-40 *supra*.

67. See n.24 *supra*.

68. Stewart *supra* n.1, 1789.

69. 43 U.S.L.W. 4561 (1976).

70. Stewart, *supra* n.1.

71. *Id.* at 1789-1790. ". . . decisions that [are] greater than our traditions would readily countenance".

72. *Supra*, n.2, Justice Marshall's dissent.

73. See, 18 CALIF. L. REV. p. 583.

74. See *Poe v. Ullman*, 367 U.S. 497 (1967) (Harlan, J., dissenting).

