JUDGING THE JUDGES: A CASE STUDY IN JUDICIAL RESPONSIBILITY

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I. INTRODUCTION

Scholarly and professional perceptions of the role of the judiciary, and hence of the responsibility of judges, have undergone radical change since the early 1900's, and judicial opinions have both reflected and been influenced by those perceptions. At the turn of the century, conceptual abstraction and logical consistency held sway.¹ Formalism, however, gave way to Legal Realism in the 1920's and 30's. Of the many important contributions that Realism made to the way we think about law, the most fundamental was its recognition that formal rules do not mechanically govern the resolution of legal disputes. This insight, however, led some theorists to the conclusion that the role of legal standards is peripheral at best.² Under this conception, the dominant factor influencing the outcome of litigation is the personality and psychology of the individual judge. To the practicing attorney, this meant that the key to success in litigation lay in “psyching out” the judge and designing trial tactics to elicit the desired psychological response from the bench. From the point of view of the judge, however, skepticism about

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1. Thus Professor Zane of the University of Michigan Law School faculty wrote in 1918:

   Every judicial act resulting in a judgment consists of a pure deduction. The figure of its reasoning is the stating of a rule applicable to certain facts, a finding that the facts of the particular case are those certain facts and the application of the rule is a logical necessity . . . .

   Now it must be perfectly apparent to anyone who is willing to admit the rules governing rational mental action that unless the rule of the major premise exists as antecedent to the ascertainment of the fact or facts put into the minor premise, there is no judicial act in stating the judgment. The man who claims that under our system the courts make law is asserting that the courts habitually act unconstitutionally.

Zane, German Legal Philosophy, 16 Mich. L. Rev. 287, 338 (1918).

2. See, e.g., Frank, What Courts Do In Fact, 26 Ill. L. Rev. 645 (1932).
the relevance of legal standards was not much help. The judge who faced a difficult choice in a close case could only conclude that his or her personal conception of the underlying values must be the guide. This view was tempered in the postwar era by the concept of "reasoned elaboration." This concept presumably placed a limit on judicial freedom by requiring that opinions not simply give reasons supporting the outcome, but that they rely upon those reasons in justifying the outcome through rational evaluation of legitimate legal standards. Contemporary jurisprudence continues to wrestle with the problem of identifying criteria for ascertaining judicial legitimacy in individual cases. Clearly, giving deference to legislative policy choice is legitimate, while acting on the basis of personal prejudice is not, yet there is a wide gap between these extremes.

In working toward an articulation of criteria for judging the legitimacy of legal reasoning, we should be able to find guidance in the primary data: judicial opinions. As Herbert Wechsler pointed out over 20 years ago, "the question [of identifying judgmental criteria is] the same one for the Court and for its critics." "Good" opinions, of course, reflect legitimate use of legal argument; however, poor opinions can be instructive as well. By specifying why a given justification is inadequate or identifying those concerns which were improperly taken into account as well as those that should have been taken into account, we can begin to generate objective criteria for judging the judges. A recent decision of the Washington State Supreme Court provides fertile ground for this approach.

II. WYMAN v. WALLACE—SUMMARY OF OPINIONS

Plaintiff brought an action for alienation of his wife's affections and obtained a judgment against the defendant in 1974. Two years later, the court of appeals per curiam held that the

action for alienation of affection of a spouse was abolished.\(^7\) In 1979, the supreme court reversed the court of appeals in a five to four decision, but granted reconsideration.\(^8\) Upon reconsideration in 1980, the court vacated its prior decision and affirmed the court of appeals’ abolition of interspousal “rights” to “affection.”

The court of appeals based the abolition of the cause of action on several policy grounds which were summarized by the majority opinion in Wyman II as follows:

The Court of Appeals explained that the action should be eliminated for the following reasons: (1) The underlying assumption of preserving marital harmony is erroneous; (2) The judicial process is not sufficiently capable of policing the often vicious out of court settlements; (3) The opportunity for blackmail is great since the mere bringing of an action could ruin a defendant’s reputation; (4) There are no helpful standards for assessing damages; and (5) The successful plaintiff succeeds in compelling what appears to be a forced sale of the spouse’s affections.\(^10\)

The majority in Wyman I was not persuaded by the lower court’s reliance on these factors because in its view they lacked evidentiary support: “Judicial abolition of a long-standing cause of action, however, should be supported by clear reasons and an evident factual basis.”\(^11\) In the absence thereof, “any determination to abolish the action for alienation of a spouse’s affections as an anachronism incompatible with contemporary mores or opinion, should be made by the legislature.”\(^12\)

The majority opinion in Wyman I also responded to Wyman’s reliance on two recent Washington statutes: The Dissolutions of Marriage Act\(^13\) and the Equal Rights Act.\(^14\) With regard to the Dissolution Act, the court stated that while it “made sweeping changes in the law regarding the relationship between spouses . . . it did not purport to modify the rights of a

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10. Id. at 105, 615 P.2d at 455.
11. Wyman I, 91 Wash. 2d at 319, 588 P.2d at 1134.
12. Id. at 320, 588 P.2d at 1135.
spouse against a third party." Similarly, the Equal Rights Act was not relevant since the cause of action for alienation of affections was available to both men and women.

Subsequently, the Wyman II court identified its inherent power to modify or abolish a common law rule in light of changed circumstances as a justification for abrogating the cause of action. In response to Wyman I's concern about the lack of evidence regarding the asserted policy considerations, the court relied on its ability to "take notice of 'legislative facts'—social, economic, and scientific facts that 'simply supply premises in the process of legal reasoning' . . . . Under this doctrine a court can take notice of scholarly works, scientific studies and social facts." Asserting the appropriateness of relying upon such "legislative facts" when rendering a policy grounded decision, the opinion stated that the court of appeals "based its decision on judicial notice of the realities of a marital relationship." Further quoting from the court of appeals' decision, the supreme court affirmed that "a viable marriage is not one where the "mental attitude" of one spouse towards the other is susceptible to interference by an outsider." After citing a United States Supreme Court decision and a Washington Supreme Court decision as authority for taking judicial notice of such social facts, the opinion ended with the above quoted listing of policy reasons relied upon by the court of appeals.

III. Wyman v. Wallace—Evaluation

Both the substantive issue and the case's procedural posture raise questions relating to the legitimate modes of substantive justification for court decisions and to the appropriate role of the judiciary in our system of government. The determinative nature of social policy issues in a decision to abolish the common law action for alienation of affections highlights the borderline between appropriate judicial resolution of individual controversies and inappropriate judicial legislation on broad social policy issues. The confusing procedural history of the Wyman case represents a failure of substantive consistency in judicial decisions.

15. Wyman I, 91 Wash. 2d at 321, 588 P.2d at 1135.
16. Wyman II, 94 Wash. 2d at 102, 615 P.2d at 454 (citations omitted).
17. Id. at 104, 615 P.2d at 455 (quoting Wyman I, 15 Wash. App. at 400, 549 P.2d at 73-74).
Initially, these two issues will be analyzed separately, although, as will appear, questions of substance and questions of process ultimately cannot be resolved independently of one another.

A. Wyman II and the Judicial Process

The doctrine of stare decisis reflects professional concern for consistency in resolutions of similar legal issues. Consistency, however, is not an end in itself, but a reflection of more fundamental social values. The maxim "treat like cases alike," for example, requires judicial consistency, but reflects a conception of justice which assumes that all persons are equal before the law. Similarly, our commitment to a "government of laws, and not of men" requires that judicial decisions be based upon legal standards rather than upon the personal preferences of individual judges. Thus, while stare decisis may serve professional and internal institutional purposes, its fundamental importance derives from its serving broader social goals. Whenever a court considers a major departure from established doctrine, it should weigh carefully the effect of such a departure on these underlying goals and purposes in addition to evaluating the substantive issue before it. The underlying interests include equality of litigants, public reliance upon existing laws, stability in legal standards, judicial efficiency, and public confidence in the system of justice. While equality and reliance relate to the accomplishment of justice in individual cases, stability and efficiency are concerned with the ongoing administration of justice through time. The image of justice can be affected at both levels.

Equality, which is central to our notion of justice, requires that similarly situated litigants be accorded similar treatment. Differences in treatment can only be justified on the basis of legally relevant factors. A litigant whose claim is legally identical with one that was adjudicated yesterday has a right to expect that his claim will be decided the same way today. On the other hand, factual identity ought not to be controlling where the prior claim was adjudicated in a long past era on the basis of

20. See Mass. Const. pt. 1, art. XXX:
In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers or either of them: to the end it may be a government of laws and not of men.

presently obsolete underlying values. Such, arguably, was the case in Wyman. 22 Fundamental changes in social attitudes and values often provide the justification for not applying outdated legal doctrines, and an argument for "equal treatment" in that context is merely an appeal to formalism.

Public reliance on pre-existing law, however, is also protected by stare decisis. As in the case of equality, however, a party's reliance must be substantial and not merely formal. In property and commercial transactions, for example, actions are consciously undertaken with regard to attaining a particular legal result and reliance upon the recognized means of doing so must be respected. 23 On the other hand, torts is an area of law largely designed to provide redress for harm resulting from conduct undertaken without conscious attempt to achieve a particular legal result. Actual or theoretical reliance on pre-existing doctrine in many cases is simply nonexistent. For example, it is difficult to imagine that the plaintiff in Wyman conducted his marital relationship in reliance on the expectation of judicially coerced reparations should he lose his wife's affections to another man. Furthermore, courts should hold litigants to constructive notice of our legal system's socially responsive nature, and, therefore, disregard reliance on a formal rule where generally recognized contemporary values contradict its continued viability.

Equality and reliance, then, do not require adherence to prior law in Wyman because the plaintiff cannot justifiably assert those interests in the circumstances of this case. At the institutional level, however, the decision in this case has ignored stare decisis' remaining purposes: doctrinal stability and judicial efficiency.

Stability in the law is clearly in society's interest. While a high level of predictability incidentally facilitates the attorney's work, stability's primary purposes must be justified in terms of the client's interests. Accordingly, judicial consistency serves the client's interests by bringing a socially desirable degree of continuity to the fulfillment of justiciable expectations arising out of interpersonal relationships. This factor argues against the decision in Wyman II. In Wyman I, the supreme court refused

22. See notes 33-44 infra and accompanying text for the analysis of the substantive issue in this case.
to abolish the action for alienation of a spouse's affections, and in reliance on that decision the court of appeals subsequently refused to abolish the common law action for criminal conversation.\(^\text{24}\) In Wyman II, the supreme court vacated its prior decision and abolished the action for alienation but specifically refused to comment on the continued viability of the related action for criminal conversation.\(^\text{25}\) Besides creating legal uncertainty in a significant area of family law, this evasiveness stimulates conjectural distinction between these two realistically inseparable torts, and thus deprives community relations of the benefits of predictable legal regulation of social issues.

This chronology also suggests that judicial efficiency has been sacrificed. Not only will resolving the issue of criminal conversation require subsequent appellate litigation, but further uncertainties have been created as well. For example, the majority relied upon the court of appeals' contention that there are no helpful standards for assessing damages.\(^\text{26}\) Yet as Justice Hicks pointed out in his dissenting opinion, the gravamen of this cause of action is interference with consortium\(^\text{27}\) and the court had recently held that loss of consortium may be compensable in an action for personal injury.\(^\text{28}\)

Such inconsistencies in supreme court opinions hardly inspire public respect for our legal institutions. Not only do they undermine the stability and certainty which the public expects in the law, they undermine public confidence in the judiciary. Taking contradictory positions from case to case kindles support for the Realist conception of judges deciding on the basis of personal preference and simply rationalizing the outcome ex post facto. Worse yet, this is a relatively obscure point in comparison with the remaining blows which have been dealt the image of justice by the decision in this case.

While unusual, it is not unprecedented for a court to vacate its own decision on rehearing. In this case, however, the vote each time was five to four and the change in result followed the replacement of one member of the court.\(^\text{29}\) The new justice's


\(^{25}\) Wyman II, 94 Wash. 2d at 105 n.2, 615 P.2d at 455 n.2.

\(^{26}\) Id. at 105, 615 P.2d at 455.

\(^{27}\) Id. at 107, 615 P.2d at 456.


\(^{29}\) Justice Williams replaced Justice Hamilton and joined the four judges who were
vote transformed the original minority into the majority on rehearing. Furthermore, the case was decided in the absence of a record of the trial court proceedings, and on the basis of the briefs which had been submitted to the court of appeals and simply re-submitted to the supreme court in Wyman I.

Standing alone, none of these factors would be decisive against the court's abolishing the action for alienation of affections. The court might appropriately have done so in Wyman I on the basis of a persuasive substantive analysis. Nonetheless, the cumulative effect of these factors in Wyman II made the court's decision singularly inappropriate, if for no other reason than it conveys to the public the sense that its supreme court has asserted a right to make abstract policy choices for the citizens of Washington rather than confining itself to the orderly resolution of legal controversies. In effect, the supreme court has chosen to act as a legislative organ and in so doing has ignored its basic function as a court of law by disregarding the doctrinal goals and purposes fundamental to stare decisis.

B. The Substantive Justification

As noted above, the court's justification for abolishing the action for alienation of a spouse's affections consisted of three points. The first, that the court has the inherent power to abolish a common law doctrine, is hardly conclusive of the question whether it ought to do so in this case. The preceding discussion of stare decisis suggests that the court ought not to have exercised that power. The court's assertion of the inherent power to control developments in the common law, however, may have been designed as a response to Justice Hicks' dissenting position

in the minority in Wyman I to make them the majority in Wyman II.

30. The court in Wyman II was admittedly deciding on "policy grounds," and therefore apparently was not troubled by the lack of a trial record. Wyman II, 94 Wash. 2d at 102-05, 615 P.2d at 454-55. One wonders, however, whether different policies might be relevant to different factual circumstances. Might it be relevant, for example, whether defendant had knowledge of the marriage? Whether the spouses were living together or had separated? Whether defendant was motivated by malice against the plaintiff? Whether defendant was a paramour as opposed to a close relative of the alienated spouse? Inasmuch as the court asserted the right to make an abstract policy choice without the benefit of factual evidence, one wonders why they did not decide to abolish the action for criminal conversation as well. Ironically, on that issue the court appealed to the principle of judicial restraint by observing that this case "does not present [that] analogous question." Id. at 105 n.2, 615 P.2d at 455 n.2.

31. See, notes 33-44 infra and accompanying text.
that the court should defer this choice to the legislature. If so, it nonetheless misses the point that the issue is not whether the court can abolish, but whether it ought to. Furthermore, Justice Hicks' concern stemmed from the lack of a trial record. His position can thus be summarized as reflecting his conception of the appropriate role of the court: the court ought not abolish the cause of action in the absence of a trial record containing substantial justificatory evidence, especially if the proposed abolition is merely based upon a judgment about contemporary attitudes toward extra-marital sexual relations. In other words, the legislature, a representative governmental body, is best equipped to evaluate whether attitudes have in fact changed and to make the appropriate social policy choice.

The second point urged by the majority, however, does go to the question of evidence. Asserting that the decision in this case is a matter of policy choice, the majority opinion relied upon the "legislative fact" doctrine and found support for it in a prior decision of the court, a decision of the United States Supreme Court, and the federal and state rules of evidence. Once again, however, the argument fails to convince because it fails to address the salient issues: having accepted the legislative fact doctrine, the court must specify the facts it relied upon and justify identifying those facts as "legislative facts." As Justice Stafford points out in his dissent, "The majority opinion never explains, however, what 'legislative facts' it relies on."32

It may be that the majority conceived the policy grounds relied on by the court of appeals to be legislative facts appropriate for judicial notice. Inasmuch as these grounds constitute the third and final justification for its decision, one would expect some minimal evaluation of them rather than a mere listing. For example, the opinion asserts that "the underlying assumption of preserving marital harmony is erroneous."33 This seems to be a restatement of the earlier assertion of the "social fact that 'a viable marriage is not one where the "mental attitude" of one spouse towards the other is susceptible to interference by an outsider.'"34 This assertion raises the question of what is meant by the term "viable marriage." Such a statement might be valid with respect to marriages "made in heaven," but it seems ques-

32. Wyman II, 94 Wash. 2d at 108, 615 P.2d at 457.
33. Id. at 105, 615 P.2d at 455.
34. Id. at 104, 615 P.2d at 455 (quoting the court of appeals).
tionable with respect to a relationship between ordinary mortals whose daily lives include the normal stresses associated with modern living, such as career pressures, child rearing, taxes, inflation, and so forth. The honeymoon does end; the real issue therefore is whether the potential deterrent effect of legal sanctions ought to be maintained in furtherance of maximizing the opportunity for marital partners to work out difficult problems in their relationship. If by a "viable marriage" the court refers to one in which the partners never experience such difficulties, the concept is purely fictional; if not, then the ramifications of the court's decision are considerably more fundamental than the majority opinion suggests. In either event, the point asserted by the court hardly corresponds to the level of certainty customarily associated with the term "fact."

Ironically, abundant evidence supports the proposition that in fact there is a public policy favoring individual freedom of choice in this context. Objective indications suggest that the legal system has already institutionalized a social choice not to overtly encourage the continuation of marital relationships even where only one partner is less than fully satisfied with it. The most obvious indicator is the legislative adoption of "no-fault" divorce whereby either spouse can unilaterally obtain a dissolution of marriage solely on the basis of a sworn statement that the marriage is "irretrievably broken." 36 While a single statute is not conclusive evidence of a broad public policy, such a policy is reflected in a number of statutory and judicial determinations that taken together form a persuasive web of authority that would have fully justified judicial abolition of the action for alienation of a spouse's affections.

Of arguably greater relevance to this issue than the no-fault divorce statute is the statutory abolition of the crime of adultery. 37 While the act of intercourse by a third party with one's spouse is directly actionable under the tort of criminal conversation, 37 such conduct may rationally be presumed to have occurred where the spouse's affections have been alienated to a

paramour. On this assumption the abolition of the crime of adultery appears to be relevant; standing alone, however, it too is inconclusive. On the one hand, one might speculate that in abolishing the crime of adultery, the legislature relied upon the continued existence of the civil actions for alienation of affections and criminal conversation to provide the appropriate level of deterrence. Conversely, one can argue that the judicial abolition of these civil actions would be consistent with the legislative policy choice to abolish the crime. In the absence of an express legislative statement in this regard, the court should initially evaluate the controversy by examining relevant legislative and judicial actions in analogous areas, and then strive to render a just and consistent decision in light of that context.

Thus, while there is no evidence supporting the former position suggesting legislative reliance upon the deterrent effect of civil actions, the latter position is supported by its consistence with a conceptual nexus among the adoption of no-fault divorce, the abolition of adultery by the legislature, and recent judicial pronouncements regarding interspousal rights, privileges, and immunities. In 1980, the United States Supreme Court overturned the privilege against adverse spousal testimony in the federal courts, holding that such testimony is permissible if the witness spouse chooses to testify. Again, the rational presumption is that such testimony would tend to undermine any marital harmony which may exist, yet the right of the spouse to make that choice has now been established. Similarly, this right is reflected in the Supreme Court's holding that spousal consent to abortion may not be legislatively mandated and in the Washington Supreme Court's abolition of the doctrine of interspousal tort immunity.

The latter holding illustrates the importance of principled

38. This was apparently the case in Wyman, although the various opinions do not reveal the underlying factual circumstances. It should be pointed out that the action for alienation of a spouse's affections frequently is brought against intermeddling relatives. See Bearhouser v. Merry, 266 N.W. 2d 128 (Iowa 1978) (refusing to abolish the cause of action for alienation of affections); W. Prosser, HANDBOOK OF THE LAW OF TORTS 876 (4th ed. 1971).

39. See Trammel v. United States, 445 U.S. 40 (1980). The court in Trammel relied on the "legislative fact" that "[w]hen one spouse is willing to testify against the other in criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair . . . ." Id. at 52.


consistency in our conception of legitimate judicial decision making. While one might rationally speculate that removing the bar to interspousal tort recovery permits compensation for spousally caused injury through liability insurance, this would not be a legitimate reason for the decision. The irrelevance of insurance protection reflects our commitment to the principle of fault as the basis for liability in tort, and our belief that financial status is irrelevant to the issue of fault. Conversely, the court did expressly recognize the individuality of each spouse and relied upon the argument that if litigation threatened their relationship, they alone had the responsibility to choose. Having enunciated these principles, the court must be expected to consider them in other cases to which they are relevant. Their relevance to the issue in Wyman is clear, although their conclusiveness is not. Nonetheless, when considered together with the previously discussed legislative and judicial indications of public policy respecting the right to freedom of choice in the context of a marital relationship, it appears that the requirement of principled consistency fully supports the abolition of alienation of affections. Furthermore, viewing the issue in this perspective reveals that, contradictory as it seems, consistency in this case mandates change. The contradiction is dispelled, however, by the fact that the formal rule which permitted the action for alienation of affections had become inconsistent with prevailing public policy.

Thus, while principled consistency supports the result in Wyman II, the majority opinion fails to justify the result on that basis. Furthermore, the court's shotgun approach has left several important matters open to serious doubt. As pointed out above, the opinion includes among its reasons for abolishing the action that there are no helpful standards for assessing damages, yet the court recently held that interference with rights of consortium may be compensable in an action for personal injury. Does Wyman cast doubt upon that holding? Principled consistency would suggest that if such damages are too speculative to provide a useful standard in one case, they ought to be similarly regarded in others. To the extent that the court does not so regard their stated reasons, the very concept of stare decisis is

42. Id. at 185-87, 500 P.2d at 773-74.
43. Id. at 187, 500 P.2d at 774.
thrown into doubt. It is in this regard that one ultimately cannot maintain the analytical distinction between a court's substantive reasoning and the question of its appropriate institutional role: an appellate court simply ought not to render a decision for which it is unable to articulate a principled justification that it will stand by in future decisions. Failure to articulate a principled justification will result in a decision that fails to achieve legitimacy either because its reasoning is faulty or because it is based upon premises which do not address the factors which ought to be controlling. Either way, the image of justice is tarnished and the nightmare of Realism\textsuperscript{45} comes a step closer to reflecting the reality of contemporary judicial behavior.

IV. Conclusion

This evaluation of Wyman v. Wallace has not attempted to analyze the doctrine of alienation of affections from the point of view of its substantive role in the field of domestic relations law. Instead, it has focused upon the procedural posture of the case and the reasoning by which the majority opinion supports the result. The former aspect of Wyman suggests that the court ought not to have undertaken to render this decision whatever the substantive merits. The latter analysis reveals the inadequacy of the court's substantive justification and goes on to argue that a sound argument does nevertheless support the result.

While a single case study cannot provide the basis for a comprehensive theory, the analysis of Wyman does suggest two analytically distinguishable, though substantively interrelated, general criteria. A threshold requirement that applies whenever a fundamental change in legal doctrine is being made is that the court evaluate the costs and benefits in terms of the purposes served by the doctrine of \textit{stare decisis} and of the appropriate role of the judiciary in establishing public policy. The second fundamental requirement revealed by the analysis is that of principled consistency. There are two aspects to this concept. On the one hand, a court should not rest its opinion on policies or principles it is unwilling to apply in future decisions. On the other hand, policies and principles that are relied upon must be shown to fit consistently into the general body of legal standards.

established in legislative enactments and prior judicial pronouncements. Observance of this criterion will not eliminate uncertainty regarding the outcome of particular cases, but it will contribute to enhanced predictability in the law through the articulation of trends and policy directions that will guide the resolution of future decisions.

Public confidence in the law must ultimately be based upon the perception that legal decisions are reached through rational processes that transcend the personal biases and prejudices of the individuals sitting on the bench.