Supplementary Material

Chapter 10: The Reagan Era—Foundations/Scope/State Action

Blum v. Yaretsky, 457 U.S. 991 (1982)

William Yaretsky was a patient at the American Nursing Home, which had been designated by Medicaid as a "skilled nursing facility." In 1975, following a statutorily mandated review of his condition, the staff at American Nursing determined that he should be transferred to a facility with less extensive and expensive care. Yaretsky sued Barbara Blum, the commissioner of the New York State Department of Social Services. Yaretsky insisted that, given the influence of Medicaid policies on his transfer, the due process clause of the Fourteenth Amendment entitled him to a hearing before he was forced to accept a lower level of benefits. Both the federal district court and Court of Appeals for the Second Circuit Court agreed with those contentions. Blum appealed to the Supreme Court of the United States. The National Citizens Coalition for Nursing Home Reform submitted an amicus brief supporting Yaretsky. That brief claimed that the history of Medicaid

> *shows that level of care determinations made by nursing homes and physicians are not part of any historical practice in long-term care, but rather, are statutory terms that were invented by Congress and enacted for purposes of fiscal control. It indicates that level of care determinations are made solely because of statutory directive and not because of traditional health care practice.*

The Supreme Court by a 7-2 vote reversed the lower federal court decision. Justice Rehnquist's majority opinion held that no state action existed because government officials did not encourage nursing homes to transfer patients without hearings. Blum v. Yaretsky *is a good example of how different justices understand the welfare state. Both Justices Rehnquist and Brennan agreed that nursing homes are heavily regulated. Nevertheless, they drew different conclusions about how those regulations influenced decisions about whether to transfer patients. Based on both the opinions and, perhaps, your experiences, which opinion better describes how decisions are actually made in nursing homes? How does the answer to that question influence your belief about whether state action was present in this case?*

JUSTICE REHNQUIST delivered the opinion of the Court.

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Faithful adherence to the "state action" requirement of the Fourteenth Amendment requires careful attention to the gravamen of the plaintiff's complaint. In this case, respondents objected to the involuntary discharge or transfer of Medicaid patients by their nursing homes without certain procedural safeguards. They have named as defendants state officials responsible for administering the Medicaid program in New York. These officials are also responsible for regulating nursing homes in the State, including those in which respondents were receiving care. But respondents are not challenging particular state regulations or procedures, and their arguments concede that the decision to discharge or transfer a patient originates not with state officials, but with nursing homes that are privately owned and operated. Their lawsuit, therefore, seeks to hold state officials liable for the actions of private parties, and the injunctive relief they have obtained requires the State to adopt regulations that will prohibit the private conduct of which they complain.

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. . . [A]lthough it is apparent that nursing homes in New York are extensively regulated,

> "[t]he mere fact that a business is subject to state regulation does not, by itself, convert its action into that of the State for purposes of the Fourteenth Amendment."

Jackson v. Metropolitan Edison Co. (1974). . . . The complaining party must also show that

> "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."

. . . The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains. . . .

. . . [O]ur precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. . . . Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment. *See . . . Jackson v. Metropolitan Edison Co.* . . .

. . . [T]he required nexus may be present if the private entity has exercised powers that are "traditionally the exclusive prerogative of the State." *Jackson v. Metropolitan Edison Co.* . . .

Analyzed in the light of these principles, the Court of Appeals' finding of state action cannot stand. . . . The decisions about which respondents complain are made by physicians and nursing home administrators, all of whom are concededly private parties. There is no suggestion that those decisions were influenced in any degree by the State's obligation to adjust benefits in conformity with changes in the cost of medically necessary care.

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Respondents next point to regulations which, they say, impose a range of penalties on nursing homes that fail to discharge or transfer patients whose continued stay is inappropriate. One regulation excludes from participation in the Medicaid program health care providers who "[f]urnished items or services that are substantially in excess of the beneficiary's needs." . . . As we have previously concluded, however, those regulations themselves do not dictate the decision to discharge or transfer in a particular case. Consequently, penalties imposed for violating the regulations add nothing to respondents' claim of state action.

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. . . Respondents argue that state subsidization of the operating and capital costs of the facilities, payment of the medical expenses of more than 90% of the patients in the facilities, and the licensing of the facilities by the State, taken together, convert the action of the homes into "state" action. But, accepting all of these assertions as true, we are nonetheless unable to agree that the State is responsible for the decisions challenged by respondents. As we have previously held, privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Burton*. . . . That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.

We are also unable to conclude that the nursing homes perform a function that has been "traditionally the exclusive prerogative of the State." . . .

We conclude that respondents have failed to establish "state action" in the nursing homes' decisions to discharge or transfer Medicaid patients to lower levels of care. Consequently, they have failed to prove that petitioners have violated rights secured by the Fourteenth Amendment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

If the Fourteenth Amendment is to have its intended effect as a restraint on the abuse of state power, courts must be sensitive to the manner in which state power is exercised. In an era of active government intervention to remedy social ills, the true character of the State's involvement in, and coercive influence over, the activities of private parties, often through complex and opaque regulatory frameworks, may not always be apparent. But if the task that the Fourteenth Amendment assigns to the courts is thus rendered more burdensome, the courts' obligation to perform that task faithfully, and consistently with the constitutional purpose, is rendered more, not less, important.

In deciding whether "state action" is present . . . the ultimate determination is simply whether the . . . defendant has brought the force of the State to bear against the . . . plaintiff in a manner the Fourteenth Amendment was designed to inhibit. Where the defendant is a government employee, this inquiry is relatively straightforward. But in deciding whether "state action" is present in actions performed directly by persons other than government employees, what is required is a realistic and delicate appraisal of the State's involvement in the total context of the action taken.

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. . . [T]he level of care decisions at issue in this case, even when characterized as the "independent" decision of the nursing home, . . . have far less to do with the exercise of independent professional judgment than they do with the *State's* desire to save money. . . .

The fiscal underpinning of the level of care determinations at issue here are apparent from the legislative history of the "intermediate care" concept. In 1967, Congress was concerned with the increasing costs of the Medicaid program. Congress' motivation in establishing a program of reimbursement for care in intermediate care facilities flowed directly from these fiscal concerns. . . .

To implement this cost-saving mechanism, the Federal Government has required States participating in the Medicaid Program to establish elaborate systems of periodic "utilization review." With respect to patients whose expenses are not reimbursed through Medicaid, these attempts to assign the patient to one of two mutually exclusive "levels of care" would be anomalous. While the criteria used to determine which patients require the services of "skilled nursing facilities," which require "intermediate care facilities," and which require no long-term institutional care at all, obviously have a medical nexus, those criteria are not geared to the specific needs of particular residents as determined by a physician; the level of care determination is *not* analogous to choosing specific medication or rehabilitative services needed by a nursing home patient. The inherent imprecision of using two broad levels to classify facilities and residents has been noted by the commentators. The vigor with which these reviews are performed in the nursing home context . . . is extraordinarily *un*medical in character. From a purely medical standpoint, the idea of shifting nursing home residents from a "higher level of care" to a "lower level of care," which almost invariably involves transfer from one facility to another, rarely makes sense. . . .

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. . . The responsibility the State assigns to nursing home operators to transfer patients to appropriate levels of care is, of course, designed primarily to implement the State's goal of reducing Medicaid costs. . . . As the court below noted: "The state has, in essence, delegated a decision to . . . reduce a public assistance recipient's benefits to a private' party" by assigning to that private party the responsibility to determine the recipient's need. But we should not rely on that fact alone in evaluating the nexus between the State and the challenged private action. Here the State's involvement clearly extends to supplying the standards to be used in making the delegated decision.

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There can . . . be little doubt that, in the vast majority of cases, decisions as to "level of treatment" in the admission process are made according to the *State's* specified criteria. That some deviation from the most literal application of the State's guidelines is permitted cannot change the character of the State's involvement. . . . [E]ven with respect to these exceptional cases, the admissions procedure is administered through bodies whose structure and operations conform to state requirements, and whose decisions follow state guidelines—albeit guidelines somewhat more flexible than the DMS-1, in allowing some "psychosocial" factors to be taken into account. . . .

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. . . As a fair reading of the relevant regulations makes clear, the State (and Federal Government) have created, and administer, the level system as a cost-saving tool of the Medicaid program. The impetus for this active program of review imposed upon the nursing home operator is primarily this fiscal concern. The State has set forth precisely the standards upon which the level of care determinations are to be made, and has delegated administration of the program to the nursing home operators, rather than assume the burden of administering the program itself. Thus, not only does the program implement the State's fiscal goals, but, to paraphrase the Court, "[t]hese requirements . . . make the State responsible for actual decisions to discharge or transfer particular patients." . . . Where, as here, a private party acts on behalf of the State to implement state policy, his action is state action.

The deficiency in the Court's analysis is dramatized by its inattention to the special characteristics of the nursing home. Quite apart from the State's specific involvement in the transfer decisions at issue in this case, the nature of the nursing home as an institution, sustained by state and federal funds, and pervasively regulated by the State so as to ensure that it is properly implementing the governmental undertaking to provide assistance to the elderly and disabled that is embodied in the Medicaid program, undercuts the Court's sterile approach to the state action inquiry in this case. The private nursing homes of the Nation exist, and profit, at the sufferance of state and federal Medicaid and Medicare agencies. The degree of interdependence between the State and the nursing home is far more pronounced than it was between the State and the private entity in *Burton v. Wilmington Parking Authority* (1961). . . The State subsidizes practically all of the operating and capital costs of the facility, and pays the medical expenses of more than 90% of its residents. And, in setting reimbursement rates, the State generally affords the nursing homes a profit as well. Even more striking is the fact that the residents of those homes are, by definition, utterly dependent on the State for their support and their placement. For many, the totality of their social network is the nursing home community. Within that environment, the nursing home operator is the immediate authority, the provider of food, clothing, shelter, and health care, and, in every significant respect, the functional equivalent of a State. . . .

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