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Civil Rights - Racial Discrimination - Municipal Services - Hawkins v. Town of Shaw, 437 F.2d (5th Cir. 1971); Hanging Together: Equality in an Urban Nation - William L. Taylor - New York: Simon and Schuster, 1971

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FACULTY COMMENT

CIVIL RIGHTS — RACIAL DISCRIMINATION — Municipal Services — *Hawkins v. Town of Shaw,* 437 F.2d 1286 (5th Cir. 1971); HANGING TOGETHER: EQUALITY IN AN URBAN NATION. William L. Taylor. New York: Simon and Schuster, 1971. Pp. 348. $3.95 (Paperbound).

The format of Professor Merson's brief article is distinct in its combination of case analysis with literary review. The object of combining traditionally separate law review units is to roughly juxtapose elements which together form an analysis of interdisciplinary flavor. The central value of the combined format is its capacity for bridging traditionally exclusive research systems: the law library and the social science library. The upshot is, we feel, a fresh and healthy direction which offers a new perspective of the proper role of law in dealing with contemporary social problems.

IN January of 1971, the United States Court of Appeals for the Fifth Circuit decided the case of *Hawkins v. Town of Shaw.*[1] If permitted to stand, *Hawkins* may well augur a new round of litigation every bit as significant as the desegregation cases of the fifties and the reapportionment cases of the sixties. *Hawkins* may, if broadly interpreted, presage the wholesale entry of the judiciary into the labyrinth of municipal services, at least to the extent that there are perceived inequities in the rendering thereof. Indeed, the overriding issue raised by *Hawkins* is the nature and degree of involvement of the judiciary in municipal decisionmaking of the most particularistic sort, *i.e.,* who receives what, when and how. It is the efficacy and propriety of judicial action of this sort that is the subject of this comment and review.

The circuit court decision in *Hawkins* is the result of litigation commenced by a group of Shaw's Negro citizens to challenge inequities in Shaw's rendering of municipal services, such as street paving, street lighting, sanitary sewers, drainage, and water, as being based on race and economic class.[2] The degree of discrimination in Shaw is dramatically illustrated by the undisputed evidence that nearly 98 percent of all homes

[1] 437 F.2d 1286 (5th Cir. 1971), *rev'g* 303 F. Supp. 1162 (N.D. Miss. 1969).
[2] Discrimination based on wealth was not alleged on appeal.

fronting on unpaved streets in Shaw were occupied by blacks, and that while 99 percent of white residents were served by a sanitary sewer system, nearly 20 percent of the black population was not so served. The plaintiffs sought injunctive relief under title 42 United States Code section 1983,[3] but were denied it by the trial court on the following rationale:

> If actions of public officials are shown to have rested upon rational considerations, irrespective of race or poverty, they are not within the condemnation of the Fourteenth Amendment, and may not be properly condemned upon judical review. Persons or groups who are treated differently must be shown to be similarly situated and their unequal treatment demonstrated to be without any rational basis or based upon an invidious factor such as race.[4]

The circuit court reversed on the ground that the trial court erred in applying the "traditional" equal protection standard when, in the face of the plaintiffs' prima facie case of racial discrimination, "a more stringent standard" of review was required.[5] Invoking the test of *Loving v. Virginia*,[6] the circuit court held that a prima facie case of racial discrimination may be overcome only by proof of a *compelling state interest*. After examining the uncontroverted evidence of gross disparities in the provision of municipal services between the black and white areas of Shaw, the circuit court determined "that no such compelling interests could possibly justify the gross disparities in services between black and white areas of town that this record reveals."[7]

By limiting its consideration to statistical evidence of significant disparities, the court found it unnecessary to determine whether or not they resulted from the discriminatory intent of those who govern Shaw. The focus was upon results, not motives. In thus resting its decision upon data demonstrating racial inequities in the quantity and quality of municipal services, the circuit court appears to have shed the protective cloak of judicial restraint heretofore characterizing court scrutiny of municipal action. In other words, the data alone are permitted

[3] 42 U.S.C. § 1983 (1964).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[4] Hawkins v. Town of Shaw, 303 F. Supp. 1162, 1168 (N.D. Miss. 1969).

[5] 437 F.2d at 1288.

[6] 388 U.S. 1 (1967).

[7] 437 F.2d at 1288.

to overcome the usual presumption of validity attaching to the exercise of a municipality's "police power" — data in many ways comparable to that previously used to establish inequities between the educational opportunities of black and white children[8] and inequities in population among congressional[9] and state legislative districts.[10]

The remedy of the circuit court also borrows from desegregation and reapportionment cases. The court fashioned its remedy not by deciding in the first instance upon a court-ordained distribution of services, but by requiring the municipality to "submit a plan for the court's approval detailing how it proposes to cure the results of the long history of discrimination which the record reveals."[11] In its concluding sentence, the court, perhaps tongue-in-cheek, asserts its confidence "that the municipal authorities can, particularly because they so staunchly deny any racial motivation, propose a program of improvements that will, within a reasonable time, remove the disparities that bear so heavily on the black citizens of Shaw."[12]

It would not be surprising if the stringent equal protection standard applied in *Hawkins* were to precipitate a probing judicial review of the multitude of disputes which rage daily within county boards and city councils about appropriate apportionment of municipal services. Judicial intervention of this sort, however, may be no more likely to produce an equitable redistribution of municipal services than to elevate the quality of education for black children or to generate more responsive state legislators. In short, the courts appear to be embarking upon the same storm-tossed sea which they have encountered before and from which they have received a very considerable battering.

The practical impact of *Hawkins* may also be limited by its facts — the grossness of the discrimination found in the town of Shaw. Consider the possibility of applying *Hawkins* to the more sophisticated context of a large urban area. The court would then be confronting more than one minority group and a governmental bureaucracy whose decisionmaking apparatus is significantly more complicated than that in a rural town of 2,500. Even if a court should successfully sift through the far greater mass of data before it, and conclude, as in *Hawkins* that inde-

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[8] Brown v. Board of Educ., 347 U.S. 483 (1954).
[9] Baker v. Carr, 369 U.S. 186 (1962).
[10] Reynolds v. Sims, 377 U.S. 533 (1964).
[11] 437 F.2d at 1293.
[12] *Id.*

fensible inequities exist, the fashioning of a remedy would pose far more serious problems.

The problems of understanding discrimination within a complex urban society and of designing an effective remedy for it are carefully explored by William L. Taylor in his recent book *Hanging Together*.[13] The author exposes the critical linkages which bind the kind of inequities confronted in *Hawkins* to the social, cultural, and political phenomena which are their inevitable concomitants. He states his thesis quite simply:

> All of our efforts against racial injustice will fail unless we are willing to restructure our urban system and its institutions to provide freedom and mobility and to allocate to all citizens a share of the responsibility for overcoming deprivation and discrimination. . . .
>
> [I]t is possible to establish racial and social justice and to create livable cities, but only if both challenges are faced together . . . .[14]

Thus, the urban crisis and the racial crisis are seen by Taylor as one Gordian knot whose strands are to be untangled concurrently or not at all.

In addition to identifying the inadequacies of our prior civil rights efforts and of the economic and social programs currently pursued to erase glaring discrepencies between black and white, Taylor injects the new element of suburban/inner-city conflict. He correctly demonstrates that "Affluent suburban areas are still left free to accept large government subsidies for highways, sewer lines, and other community facilities without accepting any responsibility for alleviating any portion of the poverty and discrimination that afflict the area as a whole."[15]

After painting a bleak picture of what the future holds should the trends of today go unchecked, Taylor gives us his own prescription for channeling existing discontent among both whites and blacks into a force for positive change. Finding significant disaffection of white city dwellers together with a growing alienation of middle-income suburban whites, Taylor argues that "[F]rom these feelings there may evolve new definitions of community, new forms of political organization of cities in which suburban citizens would accept some of the costs of dealing with poverty and racial discrimination in return for a share of control over a larger environment."[16] In effect, Taylor

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[13] W. TAYLOR, HANGING TOGETHER (1971).
[14] *Id.* at 10.
[15] *Id.* at 154.
[16] *Id.* at 217.

is suggesting that if the shoe pinches both black and white feet severely enough, the momentum for change may well be sufficient to produce a spirit of compromise in moving toward equality.

There remains nevertheless a gnawing sense that all this has been suggested before, and that without a far greater national commitment to the solution of these problems Taylor's proposals will remain just that. Perhaps *Hanging Together* is most useful as an articulate statement of the liberal dilemma: wanting to believe the best of the future, but finding little evidence to support such a belief. In particular Taylor finds little reason to hope that the judicial system will be able to effect significant change:

> It is clear, however, at least in retrospect, that the court decisions alone could not bring out the fundamental changes needed to create equality of opportunity for the mass of the Negro poor. Measured against this goal, they were subject to a number of important limitations, some inevitable, others not.
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> The rulings had little direct application in the North....
>
> The rulings could not by themselves redress economic and social injustice....
>
> ....
>
> The rulings were widely ignored and violated....[17]

Thus, it appears that Taylor would view the remedy prescribed by the circuit court in *Hawkins* as wholly inappropriate to an urban setting.

What then, is the appropriate role, if any, of the courts in righting racial inequities, especially in the realm of municipal services? Has the Fifth Circuit evolved a role which may make more effective the administrative and legislative tools Taylor and others committed to racial justice seek? Or will the court merely be sinking deeper into a quagmire of bitter controversy and political hostility? The answer, I think, lies in the kind of case the courts will be called upon to decide.

If the court, as in *Hawkins*, must intervene, unaided by any prior legislative pronouncements or administrative policies, it risks the fate we have earlier suggested of stormy public reaction. That fate is manifest in desegregation rulings which have produced an arousal of community feeling hardly matched in the past decade by any other issue of local interest. In Denver, for example, U.S. District Judge William E. Doyle,[18] confronted

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[17] *Id.* at 86-87 (italics omitted).

[18] Judge Doyle was subsequently appointed to the Tenth Circuit Court of Appeals on April 26, 1971.

with overwhelming statistical evidence demonstrating a gross inequality of educational opportunity for black children in Denver's inner-city schools, found an incontrovertible violation of equal protection and thus required the development of a much more agressive desegregation plan by the Denver School Board.[19] School board elections before and after Judge Doyle's decision had demonstrated a dominant public sentiment against any further desegregation of the Denver public schools. Although Judge Doyle may have had no choice but to rule as he did, his decision resulted in a direct confrontation between the judiciary and a hostile school board.[20] In this instance, the court had virtually no allies, administrative or legislative. Both the mayor and city council had clearly demonstrated their antipathy toward the desegretation effort. The court's decision, in fact, became a rallying cry for those who vowed most fiercely to resist mandatory desegregation.[21] The school board which had previously contained one representative of the black community now has none. This vilification, not only of Judge Doyle, but impliedly of the entire judicial system, bodes ill for the progeny of *Hawkins v. Town of Shaw.*

If, however, the court intervenes as handmaiden to an administration which is acting to carry out a clear legislative mandate to promote racial equality, it is far more likely to meet with success. The court's proper role is to adjudiciate, and it can do that best if the issues are narrowed from a broad constitutional question to one of statutory interpretation. But how will this be accomplished if we apprehend no national commitment to racial justice? The answer is suggested somewhat obliquely by Taylor when in the closing pages of his book he suggests that the easiest way of dealing with racial issues is to merge them with the general issue of economic deprivation, both black and white. He thus appears to retreat from the implications of his original thesis that one cannot attempt to remedy the problems of urban poverty without dealing directly with the accompanying problem of racial discrimination, asserting that, "What is needed is a set of national ground rules

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[19] Keyes v. School Dist., 313 F. Supp. 90 (D. Colo. 1970), *rev'd,* 445 F.2d 990 (10th Cir. 1971) *cert. granted,* 40 U.S.L.W. 3329 (U.S. Jan. 17, 1972) (No. 507).

[20] *See* Denver Post, May 13, 1971, at 44, col. 1; Denver Post, May 14, 1971, at 1, col. 1.

[21] Lewis, *Parent Group Concerned Over Busing Effects,* Denver Post, June 5, 1971, at 12, col. 1.

establishing the basic conditions of justice and equality under which local government can be made to work for everyone."[22]

What Taylor appears to be suggesting is a concept quite familiar to constitutional lawyers, namely, the doctrine of procedural due process. Without requiring an explicit commitment to *racial* equality, one might find considerable popular support for processes at the local level which afforded citizens *generally* the right to participate fully in the conduct of their government. While cases of the posture of *Hawkins* inevitably place courts in political jeopardy, a case calling for the court to enforce national guidelines guaranteeing the right of a town's 1,500 black and 1,000 white citizens to participate more fully in the apportionment of municipal services would not only better insulate the court from political tempests but enable it to perform a function for which it has more familiar and far more widely accepted standards.

Courts are traditionally called upon to enforce standards which relate to the procedural attributes of public proceedings. Thus, at all levels of government, we have tried to insure that the decisionmaking process incorporates notice to all interested parties and an opportunity for them to be heard prior to the rendering of a decision. These procedural safeguards are often overlooked at the local level, however, so that only a pitifully small proportion of the citizenry is given an adequate opportunity to be heard and to participate in the decisionmaking process. By requiring adequate notice and the undertaking of affirmative efforts to inform the citizenry of forthcoming decisions, and by securing participation in the decisionmaking process by all affected members of the community, federal guidelines could restore to the political arms of government the primary responsibility for insuring equality in the rendering of public services. Local government officials would then have an affirmative duty to seek out the opinions of all interest groups within a community before a decision could be accorded judicial recognition. Instead of confronting a municipal decision within the broader framework of public policy, the court would decide the simpler, and largely factual, issues of compliance with the procedural guidelines relating to public participation. Thus the complex decision of how to distribute municipal services would be made by legislators — not judges.

Without legislative direction, however, there is little doubt that when a case assumes the stance of *Hawkins* the court

[22] W. TAYLOR, *supra* note 13, at 289 (italics omitted).

must in good conscience decide as fairly as it can in accord with its constitutional mandate. But as this analysis has indicated, in a typical urban setting discrimination may simply be too subtle to document, an effective remedy virtually impossible to fashion, and any aggressive judicial solution thwarted by public hostility. Ironically, it is the irresponsibility of the political branches of government which makes necessary the court's entry into these dangerous uncharted waters. The very least that can be done, both for the cause of racial justice and for the court, is a legislative declaration which assures procedural due process in local governmental decisionmaking to all citizens. To advocate procedural fairness as a solution to racial imbalance necessarily runs counter to the thesis that racial problems must be confronted as a separate issue, but the frustrations of the past decade must convince us that judicial enforcement of procedural safeguards rather than a wide-ranging vindication of substantive rights is more likely to produce an effective and permanent response.

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