Harvard Civil Rights-Civil Liberties Law Review

Volume 6, Number 3 May, 1971

BEYOND THE WRONG SIDE OF THE TRACKS: MUNICIPAL SERVICES IN THE INTERSTICES OF PROCEDURE

by Daniel Wm. Fessler and Charles M. Haar†*

Across the landscape of urban life racial, social, and economic ghettos often receive less adequate and less than adequate municipal services from America's cities and towns. In the context of Hawkins v. Town of Shaw, *the authors develop the procedural bases for litigation attacking unequal provision of municipal services. In describing the restructured determinations regarding burdens of pleading, production, and persuasion to be borne by litigants in municipal service equalization suits, this article explores the dimensions of presumptions, prima facie concepts, and the range of potential defenses to be engaged in the expanding effort to raise the quality of life on "the wrong side of the tracks."*

As presented by Andrew Hawkins in his Civil Rights suit, the figures clearly spoke; Judge Elbert Parr Tuttle affirmed the obligation of courts to listen. As a result, the town of Shaw, Mississippi must now present for the approval of a federal judge a plan designed to "equalize" both the quantitative and qualitative rendition of its municipal services.[1] *Hawkins*

*Acting Professor of Law, King Hall, The Law School of the University of California, Davis.

†Professor of Law, Harvard University; Chairman of the Joint Center for Urban Studies, MIT–Harvard. Professors Fessler and Haar participated as attorneys for the Joint Center for Urban Studies as amicus curiae on behalf of appellants in Hawkins v. Town of Shaw, No. 29013 (5th Cir. Jan. 28, 1971). The authors wish to express their gratitude to Mark A. Chertok, J. D. Harvard Law School, 1970, for his valuable assistance in the research which ultimately culminated in this article.

[1]Plaintiffs' complaint, filed in the United States District Court for the Northern District of Mississippi, sought to obtain jurisdiction over the town of Shaw, its mayor and aldermen, under 28 U.S.C. § 1343 (1964). Alleging that they were "poor adult Negro citizens of the United States and of the State of Mississippi," plaintiffs articulated their purpose in the second paragraph of the complaint:

"This is an action in equity, authorized by 42 U.S.C. section 1983, which seeks injunctive relief against the deprivation of rights, privileges, and immunities secured and protected by the Fourteenth Amendment to the United States Constitution. It is a proceeding for a preliminary and permanent injunction to restrain defendants from

v. Town of Shaw[2] has already been hailed, touted, and doubted in the popular media. The detached analysis which one anticipates from the profession's journals and reviews soon can be expected to appear. Having functioned as advocates on the appeal, it now seems appropriate to pause to advance some of the critical questions raised by Judge Tuttle's opinion. In this context, we shall add out thoughts to the growing speculation concerning the "next step" in litigation efforts to secure meaningful equality in what we have previously termed the "immediate environment."[3]

In the discussion which follows, we will examine the dimension of the breach which *Shaw* has opened in the walls of indifference and legal doubt which have heretofore insulated the "wrong side of the tracks;" describe the restructured procedural determinations regarding the burden of pleading, proof, and preponderance which must be born by the litigants in a municipal service equalization suit; and comment briefly upon the defenses which may be anticipated as a litigation campaign gathers momentum.

I. THE SCOPE OF THE DECISION

Given the dimension of its ultimate theoretical premise, *Hawkins,* represents a broad-ranging factual attack predicated upon a narrow legal foundation. A general battery of those municipally provided services which combine to structure the immediate environment were included within the complaint.[4] Thus the Fifth Circuit found itself dealing directly or indirectly with street surfacing and maintenance, street lighting and

---

continuing their policy, practice, custom, and usage of providing municipal facilities and services on a discriminatory basis, and to require defendants to remedy the effects of their past policy and practice in this respect."

[2]No. 29013 (5th Cir., Jan. 28, 1971).

[3]Fessler & Forrester, *The Case for the Immediate Environment,* 4 CLEARINGHOUSE REV. 1, 49 (1970).

[4]Among the fairly typical municipal services which were *not* included within the *Hawkins'* complaint were garbage and refuse collection, recreational facilities, fire-fighting services, and police patrols. This list is not exhaustive. *See* Fessler & Forrester, *supra,* at 2.

Recreational facilities in municipal parks were the subject of an equalization decree in Hadnott v. City of Prattville, 309 F. Supp. 967 (M.D. Ala. 1970). In *Hadnott* the plaintiff's theory was one of racial discrimination. Discrimination on the basis of ethnic ancestry is alleged as the underlying basis for comparative lack of recreational facilities in San Francisco's Chinatown in Woo v. Alioto, Civ. No. 52100 ACW (N.D. Cal., filed Nov. 16, 1970). Classifications predicated on ancestry have been condemned as constitutionally suspect in Korematsu v. United States, 323 U.S. 214, 216 (1944).

traffic control, storm and sanitary sewer installation and maintenance, and water for domestic consumption and fire-fighting services. In this context, the equalization decree covers a subject matter sufficient to form a precedent for virtually any service which a municipal government sees fit to finance from its general tax revenues. Totally untouched by *Hawkins* are problems which would be encountered if the municipal services are financed by special user fees or betterment assessments. Also untouched is the discrete topic of how one might compel a municipal corporation to undertake the provision of a service—no matter how desirable or common in other localities—which it currently renders to no one within the municipal entity. The focus in *Hawkins* was exclusively upon the qualitative and quantitative *equalization* of existing services financed by general revenues.

But for the virtually unprecedented application of the fourteenth amendment's equal protection clause, *Hawkins v. Town of Shaw* could be considered a rather garden variety racial discrimination decision. While the original complaint posited the theory that the discrimination complained of was constitutionally suspect because it was based on *"race* and *poverty,"* it was the question of racial discrimination which engaged Judge Keady in the District Court.[5] Further, the element of poverty was abandoned on appeal.[6] Judge Tuttle recognized the familiar dimension of the battle lines as he observed that: "[w]hile there may be many reasons why such areas [the 'wrong side of the tracks'] exist in nearly all of our cities, one reason that cannot be accepted is the discriminatory provision of municipal services based on race. It is such a reason that is alleged as the basis of this action."[7]

It was in an effort to structure the lines of a "suspect classification" that the plaintiffs adduced exhaustive statistical evidence establishing the nearly total segregation of the races which prevailed in Shaw. A more convincing showing would be difficult to imagine. As confirmed by the Court of Appeals, the unchallenged statistics revealed that of the 451 dwelling units occupied by black citizens, 97% (439) were located in neighborhoods in which no whites were resident.[8]

Unlike the District Court which sought to escape the inference created when statistical evidence contrasted the qualitative and quantitative difference in the rendition of services in the white and black neighborhoods, the Court of Appeals acknowledged the presence of "a

---

[5]Plaintiffs' Complaint at ¶ VI, Hawkins v. Town of Shaw, 303 F. Supp. 1168 (N.D. Miss. 1967).

[6]Hawkins v. Town of Shaw, No. 29013, at 2 n.1 (5th Cir., Jan. 28, 1971).

[7]*Id.* at 1-2.

[8]*Id.* at 4.

prima facie case of racial discrimination."[9] Having identified the presence of a classification scheme which the Supreme Court has branded " 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose,"[10] Judge Tuttle passed without further hesitation to an application of the "strict" or "stringent" standard of equal protection review.[11] The defenses which survive the "most rigid scrutiny" accorded at this rarified elevation are few, and the town of Shaw's attempts to demonstrate promotion of a "compelling governmental interest" did not escape this common fate.

Once the strict review standard has been attained, by a demonstration that the governmental discrimination is founded either upon "suspect criteria" or trenches upon a "fundamental personal interest" of the disfavored citizens, the compelling interests which would sustain such governmental action seem to exist only in theory. The most obvious–conservation of the public fisc, and system efficiency and planning–were given a hostile reception by the Supreme Court less than two years age.[12] In *Shapiro v. Thomson,* the majority declared that "[defendants] must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification."[13] While not suffering the fate of an out-of-hand rejection, the defenses that residency requirements were necessary for orderly planning and efficient administration were rejected on the grounds that, when closely scrutinized, the record failed to sustain that they were, in fact, relied upon as operative justifications. Clearly, the Court was requiring demonstration of actual and consistent reliance upon an asserted justification, rather than merely a theoretical rational relationship between the classification and a permissible (if only

---

[9] *Id.* See the opinion of the District Court, 303 F. Supp. 1168-69.

[10] McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964). For a general discussion of the strict standard of equal protection review, see *Developments in the Law–Equal Protection,* 82 HARV. L. REV. 1065, 1087-1132 (1968).

[11] The "strict scrutiny" doctrine seems to have originated in Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). In Reynolds v. Sims, 377 U.S. 533, 561-62 (1964), the Court announced that in the presence of the strict standard the governmental classification must be "carefully and meticulously scrutinized."

There are two independent roads to the strict standard. A pattern of discrimination which is either predicated upon a "suspect classification," McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969), or trenches upon a "fundamental personal interest" of the disfavored citizens, Reynolds v. Sims, 377 U.S. 533 (1964), is invidious, and a violation of the equal protection clause is established unless the defendant can justify its conduct as "necessary to promote a *compelling* governmental interest." Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis in original).

[12] Shapiro v. Thompson, 394 U.S. 618, 633-34 (1969).

[13] *Id.* at 633.

hypothetical) governmental objective.[14] Because the record failed to show actual and consistent reliance or use, the Court found it unnecessary to pass upon their ultimate ability to stand as "compelling."

In *Shaw*, once the Court of Appeals had determined the presence of a prima facie case of racial discrimination, predicated upon the plaintiff's statistical evidence of segregated residential patterns and the disparate quantitative and qualitative levels of existing municipal services, an immediate reassessment of the record was undertaken for evidence of "compelling state interest." The court did not remand for the defendants to directly confront what had now been evaluated as a prima facie case. Since the plaintiffs' complaint in the District Court rested expressly upon allegations of a course of conduct and custom on the part of the defendants which resulted in a denial of "equal protection of the laws," the Court of Appeals had the power to undertake an independent appraisal of the evidence. Indeed, in this type of case the Supreme Court has indicated that even at the ultimate level of appellate review there is a "responsibility to appraise the evidence as it relates to this constitutional right [denial of equal protection]."[15]

The results of that independent examination are significant in that the Court was never forced to reject any of the proffered defenses as per se incapable of rising to the level of "compelling state interest." Rather, they fell seriatim on the ground that the record could not support consistent and evenhanded use of the asserted criteria by the city in its decisions regarding the provision of services. Taken in context with *Shapiro*,[16] the appellate disposition in *Shaw* suggests that the "actual and consistent use" requirement may be as dispositive in rejecting proffered policies or practices as the more sweeping per se disqualification. A brief review of the different attitudes and conclusions of the District and Circuit Court decisions in *Shaw* illustrates this point.

Regarding street paving, the plaintiffs' statistics demonstrated without contradiction on the record that 97% of all those who live in homes fronting on unpaved streets were black. Only 3% of the homes similarly disadvantaged were white occupied, and the greater part of this much

[14] A theoretical rational relationship between the classification under attack and a hypothetically permissible governmental objective is sufficient to save the plan from condemnation under the equal protection clause in the absence of the strict review standard. *See, e.g.*, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911); McGowan v. Maryland, 366 U.S. 420, 426 (1966).

[15] Smith v. Texas, 311 U.S. 128, 130 (1940), *citing*, Chambers v. Florida, 309 U.S. 227, 228 (1940); Pierre v. Louisiana, 306 U.S. 354, 358 (1939); Norris v. Alabama, 294 U.S. 587, 590 (1935). *See* Coleman v. Alabama, 389 U.S. 22, 23 (1967) ("On our independent examination of the record, we are unable to discover any evidence adduced by the State adequate to rebut petitioner's prima facie case.").

[16] 394 U.S. 618 (1969).

smaller number consisted of whites who were residents of a new development then awaiting street paving. The District Court met these figures with a two-pronged response. First, it found as a matter of fact that the "paving actually done in the municipality was on the basis of general usage, traffic needs and other objective criteria."[17] As an ancillary conclusion, the court noted that some remaining "Negro neighborhoods" in which there had been no paving projects could be explained on the grounds that the " . . . existing dedicated streets are too narrow to permit surfacing . . . ."[18] Reviewing the identical record, the Court of Appeals rejected the first conclusion as clearly erroneous, for there was no evidence of consistent and actual reliance upon the criterion of vehicular traffic. Regarding the physical impediment alleged to arise from the narrow width of streets in black neighborhoods, the Court of Appeals concluded that the fact that streets of similar dimension in white neighborhoods had been surfaced denuded this factor of any operative significance. Recapitulating the Fifth Circuit's position, Judge Tuttle declared: " . . . even if we assume that such criteria as traffic usage, need, and width constitute compelling state interests, they were not applied equally to both black and white residents."[19]

While doubtless correct in its result, the analysis needs to be brought into sharper focus. In future cases, it would appear that factors such as physical impediments should be evaluated not as potential compelling state interests–terminology which suggests an overriding state objective under the police powers–but as proffers of alternative rationales for the existing pattern of inequality. Under this analysis, if a court were to accept proof of invincible physical impediments as the rationale for the pattern of inequality, the operative effect would be to dispel the prima facie presence of a suspect basis or criteria.

II. THE PRIMA FACIE CASE[20]

A subject most critical to the successful prosecution of future service equalization suits was not articulated in the opinion of the District Court, and was established without elaboration by the panel of circuit judges. It

[17]Hawkins v. Town of Shaw, 303 F. Supp. at 1164.

[18]*Id.* at 1165 n.5.

[19]Hawkins v. Town of Shaw, No. 29013, at 6 (5th Cir., Jan. 28, 1971). Physical impediments were also advanced with regard to surface water drainage. Again, the fact that substantially similar difficulties had been surmounted in efforts to provide services to white residents was cited by the Court of Appeals in rejecting such a defense.

[20]*"[I]t is plain that where the burden of proof lies may be decisive of the outcome."* Speiser v. Randall, 357 U.S. 513, 525 (1958).

has previously been noted that the Fifth Circuit recognized the establishment of a prima facie case of forbidden discrimination by statistical proof of segregated residential patterns and the corresponding inequality of municipal services between those sectors. A detailed analysis of the elements of that case and its impact upon the trial court's obligation to apportion the burdens of proof and preponderance was omitted by Judge Tuttle as his opinion passed, without hesitation, to a search for "compelling state interest." Yet future litigation strategists should observe that there may be many procedural obstacles which must be surmounted before the attainment of this ultimate posture. The dynamics of the prima facie case deserve examination.[21]

For the purpose of this discussion, it will be assumed that potential litigants are armed with a legal command—constitutional, statutory, or common law—which either forbids discrimination or affirmatively requires equality of access or opportunity. Given such a legal mandate, a successful prima facie case can be constructed with the introduction of statistical evidence of objectively discernible facts which, if accepted by the trier, would remove the essential element of factual inequality from mere speculation and conjecture so as to bring the conclusion of forbidden discrimination within the realm of legitimate inference.[22]

It is submitted that at this juncture the burden of proceeding with the evidence should shift from the plaintiff to the defendant who, if the entry of an adverse judgment is to be avoided, must meet this prima facie case by advancing along one or more of three lines.[23] Defendant may first

[21] As a further prefatory note, it must be acknowledged that certain of the terms employed—including "prima facie case"—have variegated meanings acquired over generations of inconsistent use. In each instance, the definition offered will be that which is in concert with our proffered scheme or functional analysis.

[22] This functional definition of a prima facie case seems to have been first enunciated in Burghardt v. Detroit United R.R., 206 Mich. 545, 547, 173 N.W. 360, 361 (1919), where the court declared: " . . . where the circumstances are such as to take the case out of the realm of conjecture and within the field of legitimate inferences from established facts . . . at least a prima facie case is made." With only slight modifications it has been employed by a number of courts. National Biscuit Co. v. Litzky, 22 F.2d 939, 942 (6th Cir. 1927); Kelly v. Walgreen Drug Stores, 170 S.W.2d 34, 37 (Sup. Ct. Ky. 1943); Hembree v. von Keller, 119 P.2d 74, 78 (Sup. Ct. Okla. 1941). Gadde v. Michigan Consol. Gas Co., 377 Mich. 177, 121-22, 139 N.W.2d 722, 724 (1966) (reviewing authorities).

[23] The functional impact of the prima facie case in shifting the burden of proceeding from plaintiff to defendant has achieved wide judicial recognition. "A prima facie case is that which is received or continues until the contrary is shown, and one which in the absence of explanation or contradiction constitutes an apparent case sufficient in the eyes of the law to establish the fact, and if not rebutted remains sufficient for that purpose." *In re* Hoadland's Estate, 253 N.W. 416, 419 (Sup. Ct. Neb. 1934). *See also* Miller v. Balknap, 266 P.2d 662, 665 (Sup. Ct. Idaho 1954);

challenge the scope or legal sufficiency of the mandate for equality which the plaintiff has invoked.[24] Second, defendant may challenge the accuracy or completeness of the plaintiff's statistics in portraying a valid profile of service distribution or enjoyment. Finally, while conceding the validity of the plaintiff's statistics, the defendant may offer proof of a rationale for their existence which, if credited by the trier, would overcome the established inference of legally forbidden discrimination. Upon production of such evidence by the defendant, the burden to perponderate on all contested factual issues shifts back to the plaintiff.

Having thus distributed the burdens of pleading, proof, and preponderance, our discussion suggests two corollary propositions which are required to preserve the integrity of this analysis. First, it is contended that in the face of a prima facie case the trier of fact should be foreclosed from engaging in presumptions of regularity and constitutionality which would normally assist the defendant in the discharge of his burden of affirmative response. The second proposition is that general denials of either the intention or the fact of discrimination are insufficient to rebut a prima facie case, and that neither local history nor tradition may be utilized by the trier to discharge this burden. While an observance of this procedural scheme will not assure the fair prosecution of every municipal service equalization suit, any marked deviation from it will almost invariably cast the litigation into a "mold . . . [which] puts emphasis on the wrong things, burdens on the wrong parties."[25]

An analysis of the district court's opinion in the *Shaw* case is illuminating. The plaintiffs posited their cause of action upon an asserted inequality in the rendition of municipal services arising from discrimination predicated on the "basis of race and poverty" and thus within the proscription of the equal protection clause of the fourteenth amendment. To this complaint, plaintiffs joined evidentiary proof, almost exclusively statistical, of the near total residential segregation of the white and black races and the disparate quantitative and qualitative levels of municipal services afforded black and white townspeople. It was plaintiffs' contention—accepted by the Court of Appeals—that, at this point, they had established a prima facie case of constitutionally forbidden discrimination. The District Court clearly understood this contention.[26] Yet under the analysis adopted by the trial court an affirmative response to the plaintiffs' case was neither forthcoming nor required.

Gilmore v. Modern Bhd. of America, 171 S.W. 629, 632 (Mo. App. 1914); Copeland v. Hunt, 434 S.W.2d 156, 158 (Tex. Ct. Civ. App. 1968).

[24]Proof of an overriding governmental justification, or of "compelling governmental interest," would fall under this strategy as an attack upon the sufficiency of the mandate for equality.

[25]United States v. Board of Educ., 396 F.2d 44, 48 (5th Cir. 1968).

[26]303 F. Supp. at 1167-68.

Notwithstanding the presence of plaintiffs' undisputed statistical evidence, the District Court deemed itself free to adopt " . . . all legitimate deductions to be made from the evidence running counter to statistical racial disparity."[27] The court, at least expressly, did not find fault with the evidence, nor did it challenge its accuracy or completeness in portraying a valid profile of service distribution and enjoyment. Rather, it embraced the defendant's evidence of the city's static population which historically had shown little popular interest in modern improvements; reliance upon a cautious fiscal policy and limited finances; and lack of modern sanitary and zoning codes requiring individual property owners to prepare their premises for the reception of some municipal services. Without attempting to explain, or indicating any effort on the part of the defendants to explain, how all of these impediments had been substantially overcome in efforts to bring services to white neighborhoods, the trial court held itself at liberty to discern "rational considerations, irrespective of race or poverty, . . . [which] are not within the condemnation of the Fourteenth Amendment, and may not be properly condemned upon judicial review."[28]

Having assumed this liberty, the District Court found it unnecessary to challenge the scope and remedial sufficiency of plaintiffs' legal mandate. On the contrary, Judge Keady acknowledged that discrimination in the provision of municipal services can be attacked in a civil rights suit and is subject to review under the equal protection clause of the fourteenth amendment.[29] With regard to the allegation of racial discrimination, the court conceded that "[w]here racial classifications are involved, the Equal Protection and Due Process Clauses of the Fourteenth Amendment 'command a more stringent standard' in reviewing discretionary acts of state or local officers."[30] Yet in the wake of these concessions, it found in the proferred "business judgment" and municipal history explanations sufficient "facts [to] negative plaintiffs' assertions of racial and economic discrimination."[31] Thus, the court was able to indulge in presumptions of regularity and plausible alternative rationales in order to "negative" what was at least a prima facie case of racial discrimination. None of these presumptions or rational alternatives would have been sufficient to prevail in the face of demonstrated racial discrimination.[32] Yet the District Court

---

[27] *Id.* at 1168.

[28] *Id.*

[29] *Id.*

[30] *Id., citing,* Jackson v. Godwin, 400 F.2d 529, 537 (5th Cir. 1968). *See also* Hunter v. Erickson, 393 U.S. 385, 392 (1969); Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964).

[31] 303 F. Supp. at 1169.

[32] McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964).

utilized them to defeat plaintiffs' claim at the critical stage of identifying the criteria underlying the classification.

As illustrated by the fate of Judge Keady's opinion on appeal, this pattern of aggressive permissiveness in testing for the racial basis of the admitted inequality in *Shaw* is reversible error. Squarely framed on appeal was the question: in the face of a prima facie case of racial discrimination predicated upon statistical evidence of substantial racial disparity coupled with an allegation of longstanding historical inequality, what burden devolves upon defendants if they are to avoid the conclusion that their classification scheme is "invidious" within the proscription of the rigorous standard of the fourteenth amendment's equal protection clause?

While the Fifth Circuit was unyielding in its conclusion that the "undisputed statistial evidence" of the plaintiffs "clearly made out a prima facie case of racial discrimination," the opinion did not articulate procedural guidelines on the various burdens for future trial couts. This omission can be explained on the ground that the court elected to exercise a power of independent review over the record rather than to remand the cause with instructions for a new trial. Yet these guidelines must be articulated with some particularity for the benefit of trials anticipated in the near future, and it is in that interest that the following analysis is offered as a supported response, both from the vantage point of function and the criteria of precedent.

For an answer to the critical question of allocating the burdens of pleading, proceeding, response, and preponderance, other areas of the law have been drawn upon wherein courts have had extensive experience in evaluating a prima facie case of racial discrimination based upon statistical evidence. From these cases a rule emerges directly applicable to at least those service equalization suits which rest upon a showing of racial discrimination. By functional extension, the pattern may be broadened for application to any evidentiary demonstration of discrimination falling, prima facie, within the proscription of substantive legal mandate. In the face of a prima facie case of racial discrimination predicated upon statistical evidence coupled with an historical pattern of inequality, the trial court must—if it is to avoid a finding of a suspect criterion—require of the defendants positive evidence which goes directly to the plaintiffs' statistical proofs and allegations. Having directly confronted this prima facie case, it must either refute the statistical showing or establish an alternative explanation which warrants a conclusion that racial discrimination is not the rationale for the disparity. Upon the production of such adequate positive evidence by the defendants, the burden shifts back to the plaintiffs to preponderate upon any contested factual issues.[33]

[33]If the defendant's response has taken the form of a proferred compelling

A leading precedent supporting this view is the Supreme Court's opinion in *Patton v. Mississippi*.[34] *Patton* dealt with alleged racial discrimination in the exclusion of Negroes from jury service. Like Hawkins, the plaintiff in *Patton* offered statistical evidence "which showed without contradiction that no Negro had served on the grand or petit criminal court juries for thirty years or more. There was evidence that a single Negro had once been summoned during that period but for some undisclosed reason he had not served, nor had he even appeared."[35] In reply, the defendant officials denied that racial discrimination was the underlying rationale of the plaintiff's statistical evidence (which they did not contradict), and offered as alternative explanation the fact that in Mississippi a party otherwise qualified for jury service could be excluded because of "commission of crime, habitual drunkenness, gambling, inability to read and write or to meet any other or all of the statutory tests . . . ."[36] Both the trial court and the Supreme Court of Mississippi elected to focus narrowly upon the composition of the venire from which the jury that tried the petitioner was selected, to disregard the broader statistical evidence and the alleged factor of long-standing history of discrimination, and to speculate that matters of individual disqualification accounted for the absence of Negro jurors.[37]

The Supreme Court of the United States reversed in a unanimmous opinion. Speaking through Mr. Justice Black, the Court assessed the efforts of a plaintiff to make out a racial basis of classification. Unlike the Mississippi courts which had chosen to ignore it, the Court placed great stress upon the petitioner's allegation that the pattern of discrimination complained of had been habitual history "for a period of thirty years."[38] This allegation, combined with petitioner's statistical data, "created a very strong showing that during that period Negroes were systematically excluded from jury service because of race. *When such a showing was made, it became a duty of the State [respondent] to justify such an exclusion as having been brought about for some reason other than racial discrimination.*"[39] In its discussion and citation of precedent, the Court was emphatic that the defendants could not discharge this burden on the strength of the presumption that other rational and permissible factors accounted for the statistics which the petitioner had entered into

governmental interest, he would have the burden of qualifying the defense as a value of transcending import, and of establishing it factually.

[34] 332 U.S. 463 (1947).

[35] *Id.* at 464-65.

[36] *Id.* at 468.

[37] Patton v. State, 201 Miss. 410, 416-20, 29 So. 2d 96, 98-99 (1947).

[38] 332 U.S. at 468.

[39] *Id.* (emphasis added) (footnote omitted).

evidence.[40] The state was put to positive proof. "But whatever the precise number of qualified colored electors in the county, there were some; and if it can possibly be conceived that all of them were disqualified for jury service by reason of the commission of crime, habitual drunkenness, gambling, inability to read and write, or to meet any other or all of the statutory tests, *we do not doubt that the State could have proved it.*"[41]

The decision articulated in *Patton* is not an isolated reaction to this problem.[42] In repeated cases judicial insistence upon direct or affirmative evidentiary response reappears. "We thought, as we think here, that had there been evidence obtainable to contradict the inference to be drawn from this testimony, [which established the plaintiff's prima facie case of racial discrimination] the State would not have refrained from introducing it . . . ."[43] The most recent decisions of the Supreme Court also reveal no tendency to compromise the position that statistical evidence is fully capable of making out a prima facie case which must then be directly confronted by the defendants.[44]

---

[40] *See* Neal v. Delaware, 103 U.S. 370, 397 (1881), discussed *infra.*

[41] 332 U.S. at 468 (emphasis added) (footnote omitted).

[42] In a seminal case alleging a denial of equal protection through the exclusion of jurors based upon racial discrimination, the Court observed that a prima facie case had been made out by statistical evidence of Negro exclusion. It then made pointed reference to the fact that " . . . we think that the *definite testimony* as to the actual qualifications of individual Negroes, *which was not met by any testimony equally direct,* showed that there were Negroes in Jackson County qualified for jury service." Norris v. Alabama, 294 U.S. 587, 592 (1935) (emphasis added). As a later passage in his opinion for the Court, Mr. Chief Justice Hughes again averred to this point: "As we have seen, there was testimony, not overborne or discredited, that there were in fact Negroes in the county qualified for jury service. That testimony was direct and specific. After eliminating those persons as to whom there was some evidence of lack of qualifications, a considerable number of others remained. The fact that the testimony as to these persons, fully identified, was not challenged by evidence appropriately direct, cannot be brushed aside." *Id.* at 594-95. *See also* Avery v. Georgia, 345 U.S. 559, 563 (1953) (" . . . when a prima facie case of discrimination is presented, the burden falls, forthwith, upon the State to overcome it."); Arnold v. North Carolina, 376 U.S. 773 (1964) (per curiam); Eubanks v. Louisiana, 356 U.S. 584 (1958). *But see* Swain v. Alabama, 380 U.S. 202, 222-28 (1965).

[43] Hill v. Texas, 316 U.S. 400, 405 (1942); *accord,* Smith v. Texas, 311 U.S. 128, 131 (1940); Pierre v. Louisiana, 306 U.S. 354, 361 (1939).

[44] In Whitus v. Georgia, 385 U.S. 545 (1967), the Court's insistence that statistical evidence be directly confronted by the defendant's proof is clearly articulated. "Indeed, the disparity between the percentage of Negroes on the tax digest (27.1%) and that of the grand jury venire (9.1%) and the petit jury venire (7.8%) strongly points to this conclusion [forbidden discrimination] . . . . The State offered no explanation for the disparity between the percentage of Negroes on the tax digest and those on the venires . . . [and] failed to offer any testimony indicating that the 27.1% of Negroes on the tax digest were not fully qualified. The State, therefore, failed to meet the burden of rebutting the petitioners' prima facie case." *Id.* at 542.

Though relatively numerous, the volume of Supreme Court decisions discussing the use of statistics and the functional impact of a prima facie case pales when contrasted with the record of the United States Court of Appeals for the Fifth Circuit. To its great credit, that tribunal has exhibited a consistent and functionally alert dedication to the premises enunciated in high court precedents from *Neal* to *Coleman.*[45] Indeed, the decisions of the Court of Appeals articulate two clarifications of great utility. First, it has been settled that the mere fact that some individuals within the potential ranks of the disadvantaged group benefit from the reception of some of the services involved in an equalization case does not destroy the prima facie case of discrimination made out by statistical evidence of a very substantial over-all disparity in the level of services.[46] Second, the rules devised in *Smith, Patton, Norris,* and *Neal* have been applied to govern suits involving prima facie showings of racial discrimination in areas other than jury exclusion.[47]

See also Turner v. Fouche, 396 U.S. 346, 360 (1970). *But see* Swain v. Alabama, 380 U.S. 202 (1965).

In Coleman v. Alabama, 389 U.S. 22 (1967), the Court unanimously reversed the Supreme Court of Alabama's determination that petitioner's statistical evidence of racial disparity had been "explained by a number of other factors". *Id.* at 23. The Court, exercising an "independent examination of the record," *id.*, concluded that petitioner's statistics coupled with his allegation of systematic exclusion had " 'made out a *prima facie* case of the denial of equal protection which the Constitution guarantees'." *Id.*, quoting with approval from Norris v. Alabama, 294 U.S. at 591. The Court then held that "[i]n the absence of evidence adduced by the State adequate to rebut the prima facie case, petitioner was therefore entitled to have his conviction reversed." *Id.* Again, exercising its responsibility to make an independent appraisal of the Constitutional claim, the Court concluded that the "factors [relied upon by the Supreme Court of Alabama] were not . . . sufficient to rebut the petitioner's prima facie case." *Id.*

Hoyt v. Florida, 368 U.S. 57, 68-9 (1961), has erased any doubt that it is the stain of racial discrimination, and not the spectre of criminal punishment, which has compelled the doctrine of independent review of the facts and the insistence that the plaintiff's prima facie case be met with "equally direct" evidence which is "adequate to rebut." In *Hoyt,* petitioner–appellant was a woman alleging denial of equal protection because the jury which convicted her of murder did not contain any women.

[45]Neal v. Delaware, 103 U.S. 370 (1881); Coleman v. Alabama, 389 U.S. 22 (1967) (per curiam).

[46]Goins v. Allgood, 391 F.2d 692, 697 (5th Cir. 1968); United States *ex rel.* Seals v. Wiman, 304 F.2d 53, 66-67 (5th Cir. 1962).

[47]Alabama v. United States, 304 F.2d 583, 586 (5th Cir. 1962) (voter registration); United States v. Ramsey, 331 F.2d 824, 836-38 (5th Cir. 1964) (Rives, J., dissenting in part, view prevailing on rehearing) (voter registration); United States v. Board of Educ., 396 F.2d 44, 46 (5th Cir. 1968) (education).

The Fifth Circuit has not been alone. *See, e.g.,* Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189 (4th Cir. 1966) (education); Gautreaux v. Chicago

The acute sensitivity of the Fifth Circuit to the power of statistical evidence to make out a prima facie case of racial discrimination has been repeatedly affirmed.[48] Having considered the nature of the statistical disparity between the Negro population of Carroll County, Mississippi, and the number of Negroes there registered to vote, the court in *United States ex. rel. Goldsby v. Harpole*[49] squarely defined the burden of response. If the defendant officials were to avoid the conclusion of racial discrimination which had been tentatively established by the "strong prima facie case developed by the appellant," they would have to bear the affirmative burden of directly refuting the plaintiff-appellants' case by the introduction of facts which "rested more in the knowledge of the State."[50] Further decisions have made it abundantly clear that in civil rights suits alleging racial discrimination "the important finding relates to the result of the operation,"[51] for "[f]igures tell the best, if not the whole, story."[52] Thus the position of the Fifth Circuit was crystalized in the apt phrase of Chief Judge Brown quoted with approval in *Shaw:* "figures speak and when they do, Courts listen."[53]

A clear application of rules of decision evolved in this line of cases is to be found in Judge Wisdom's opinion for the court in *Labat v. Bennett.*[54] "In the interest of achieving uniformity in decision on the exclusion of Negroes from juries, this Court sat en banc on *Labat-Poret* and six other cases .... In each case this Court found that the *petitioner had made a prima facie case, chiefly on the great disparity between the percentage of Negroes in the parish and the percentage of Negroes shown to have been included on the general venires. In each case the state failed to furnish a constitutionally acceptable explanation for the disparity."*[55]

Housing Authority, 296 F. Supp. 907, 913 (N.D. Ill. 1969) (housing); Coppedge v. Franklin City Bd. of Educ., 273 F. Supp. 289 (E.D.N.C. 1967), *aff'd,* 394 F.2d 410 (4th Cir. 1968) (education).

[48] *E.g.,* Labat v. Bennett, 365 F.2d 698, 711-12 & n.23 (1966) (en banc, collecting cases).

[49] 263 F.2d 71 (5th Cir. 1959).

[50] *Id.* The imposition of such a burden upon the defendant is both fuctionally advantageous to the trier and "fair," for as was observed by the Court of Appeals of New York, "... where the defendant has knowledge of a fact but slight evidence is requisite to shift on him the burden of explanation." Griffen v. Manice, 166 N.Y. 188, 193, 59 N.E. 925, 926 (1901).

[51] 304 F.2d at 65.

[52] United States v. Mississippi, 229 F. Supp. 925, 974, 993 (S.D. Miss. 1964) (Brown, C.J., dissenting). These points have not been lost on defendants. *See* Whitus v. Balkcom, 333 F.2d 496, 500 (5th Cir. 1964).

[53] The phrase was coined by Chief Judge Brown in Brooks v. Beto, 366 F.2d 1, 9 (1966); it was reasserted in United States v. Board of Educ., 396 F.2d 44, 46 (1968).

[54] 365 F.2d 698 (5th Cir. 1966) (en banc).

[55] *Id.* at 711 (emphasis added). *See* Scott v. Walter, 358 F.2d 561, 568-73 (5th Cir. 1963).

Of special significance was the court's refusal to read *Swain v. Alabama*[56] as limiting the power of statistical evidence to establish a prima facie case of racial discrimination. Since *Swain* "specifically approved the inference of discrimination drawn in *Patton* and *Norris* as 'determinative absent sufficient rebuttal evidence,' "[57] Judge Wisdom found no reason to revise the course the Fifth Circuit had been following. The Supreme Court's subsequent opinion in *Coleman v. Alabama*[58] confirmed the correctness of the court's view.

Applying the direct teachings of these Supreme Court and Fifth Circuit authorities to the opinion of the District Court in *Shaw,* the summary reversal assumes a clearer focus. It is evident that the unflinching requirement that the plaintiffs' direct evidence of racial disparity be met by the defendants' equally direct evidence of rebuttal or an alternative explanation had been substantially ignored.[59] Plaintiffs adduced uncontroverted evidence of substantial deprivation in both qualitative and quantitative rendition of municipal services to residents in Shaw's black neighborhoods. These figures clearly "spoke." But the trial court failed to listen.

Rather than requiring the defendants to focus upon these figures and "furnish a constitutionally acceptable explanation of the disparity," the trial court indulged in "all legitimate deductions to be made from the evidence running counter to statistical racial disparity."[60] That evidence, aside from repeated protestations that defendants intended no discrimination, consisted of recitations concerning the absence of sanitary codes and the conservative approach taken by the town of Shaw in the

[56] 380 U.S. 202 (1965) (upholding conviction of a black by an all-white jury despite a showing that blacks were under-represented on the jury panels and that blacks have been totally excluded from petit juries through the use of peremptory challenges). Judge Wisdom read *Swain* as merely increasing the burden of proving a prima facie case where black representation on jury panels is "not extremely disproportionate" to the black population in the jurisdiction and as refusing to "woodenly" apply the rules of proof of racial discrimination to cases where the diiscrimination mechanism was the process of peremptory challenge. Labat v. Bennett, 365 F.2d 698, 712 (5th Cir. 1966).

[57] *Id.*

[58] 398 U.S. 22 (1967) (per curiam) (reversing conviction on showing that "few, if any" blacks had served on juries in the county in which petitioner was convicted).

[59] It cannot be said that the trial judge was totally ignorant of the existance of at least some of these authorities. The decisions in *Coleman v. Alabama* and *Brooks v. Beto* were cited to the court in sections IB and II of the "Argument" in Brief for Plaintiffs, Hawkins v. Town of Shaw, 303 F. Supp. 1168 (N.D. Miss. 1967). The opinion rendered by the trial court evidences an awareness not only of the fact that these authorities exist, but also their functional significance in civil rights suits predicated on racial discrimination. 303 F. Supp. at 1167-68 n.10. No explanation is given for the failure to accord them operative weight.

[60] 303 F. Supp. at 1168.

construction and financing of municipal services. Having ignored the advice that "figures tell the best, if not the whole, story," it is not surprising that the District Court failed to focus upon the "result of the operation" which the Court of Appeals had deemed so vital.[61] But the vice in the trial court's approach went beyond the failure to follow precedent. Nothing in the evidence attempted to explain the phenomenon that all of this hesitation and alleged difficulty had been substantially overcome when it came to the question of providing these services in white neighborhoods. Notwithstanding both fiscal and physical infirmities, only 3% of the white residents in Shaw were consigned to dwell on an unpaved street. Rather than adhere to the letter or spirit of the cited precedents, the trial court found comfort in deductions, inferences, presumptions, and benign speculation. Since the pursuit of a likeminded course could vitiate future prima facie showings of any functional vigor, it is vital that this tactic be firmly checked.

III. DEFENSES: MOTIVE, HISTORY, AND THE MEANING OF EQUALITY

A fair reading of the District Court's opinion yields no other conclusion but that the defendants were exempted from the burden of directly confronting the plaintiffs' statistical proof of gross disparity in the services accorded the black and white citizens of Shaw. Had the mandate emanating from the numerous decisions thus far reviewed been followed, the defendants would have been required to meet the plaintiffs' prima facie case by "appropriately direct" evidence calculated to rebut the asserted disparity or to account for it under a rationale which would negate the tentatively established proposition that the defendants and their predecessors had pursued a course of conduct which resulted in racial discrimination.[62]

The error which inheres in Judge Keady's analysis is not merely one of form. It lies in leaving totally unexplained the unchallenged fact that, whatever the difficulties, the past and present history of the provision of municipal services in Shaw is branded with a grossly disproportionate allocation of benefits purchased out of general funds among neighborhoods differing neither in expectations nor need, but only in racial composition. An examination of the constituent factors given weight by the trial court will demonstrate that they are individually and in combination either irrelevant or unavailing.

---

[61] United States *ex rel.* Seals v. Wiman, 304 F.2d 53, 65 (5th Cir. 1962).

[62] Norris v. Alabama, 294 U.S. 587, 592-96 (1935).

The trial court began its legal analysis with the proposition that there exists a presumption that the defendants have discharged their governmental offices in a regular manner, and exercised such discretion as inheres in those offices without offense to the Constitution.[63] Through this means, the court allowed itself to become ultimately convinced that plaintiffs' assertions of racial and economic discrimination had been negated.[64] Thus it would appear that the total picture evaluated by the trial court was infected with this presumption of regularity which could only be overcome by "clear evidence" of bad faith or abuse.

To the extent that the trial court allowed itself to draw any adverse conclusion from the failure of the plaintiffs to adduce "clear evidence" of the defendants' bad faith, it was in error. The motive or intention of the defendants was a question totally irrelevant to any issue which was before the court. In a civil rights suit alleging racial discrimination in contravention of the fourteenth amendment, " . . . it is not necessary to go so far as to establish ill will, evil motive, or absence of good faith . . . objective results are largely to be relied on in the application of the constitutional test."[65] It is the result of the governmental policies and practices, and not their motivation, which is of concern to the courts. The immateriality of this factor stems from the "positive, affirmative"[66] "constitutional duty"[67] of town officials to provide municipal services in a way which would not "result . . . [in] racial discrimination."[68] Their failure to do so, however motivated, is actionable.[69]

A corollary of the premise that motive is not an issue in a service equalization suit is the rule that mere protestations of the defendants that

---

[63] 303 F. Supp. at 1167.

[64] *Id.* at 1169.

[65] United States *ex rel.* Seals v. Wiman, 304 F.2d 53, 65 (5th Cir. 1962).

[66] *Id.* at 66.

[67] Avery v. Georgia, 345 U.S. 559, 561 (1963).

[68] Cassell v. Texas, 339 U.S. 282, 289 (1950) (Opinion of Reed, J., announcing the judgement of the court). This point was squarely affirmed by Judge Tuttle who quoted with approval the Second Circuit which had, in turn, repeated the apt language of Judge J. Skelly Wright: "[E]qual protection of the laws means more than merely the absence of governmental action designed to discriminate; . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disasterous and unfair to private rights and the public interest as the perversity of a willful scheme." Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931 (2d Cir. 1968).

[69] To borrow the language of the Supreme Court, Andrew Hawkins and the other black citizens of Shaw " . . . are entitled to require that those who are trusted with [the allocation of community resources] shall not pursue a course of conduct which results in discrimination in the [provision of municipal services] on racial grounds." Akins v. Texas, 325 U.S. 398, 403 (1945); *accord,* Eubanks v. Louisiana, 356 U.S. 584, 587 (1958); Jackson v. Godwin, 400 F.2d 529, 538-40 (5th Cir. 1968).

they had no intention to discriminate, and that they had exercised their governmental responsibilities in good faith, are unavailing in the face of a prima facie case.[70] This point was most cogently asserted in *Brooks v. Beto:* "[f]or once again, against the historical pattern and the 90/10 racial composition of the county, all there would have been is the repeated protestation, unctuous or otherwise, of Judge and Jury Commissioners that the selections were made in good faith without regard to race or color. But judicial history demonstrates that such protestations would simply not destroy the prima facie case based on the historical statistics."[71] The reason for this rule had been articulated by Mr. Chief Justice Hughes as early as 1935. "If, in the presence of such testimony as defendants adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification . . . , the constitutional provision—adopted with special reference to their [black citizens'] protection—would be but a vain and illusory requirement."[72]

To the extent that speculative deductions or presumptions of ultimate validity were utilized in assisting the *Shaw* defendants in surmounting their evidentiary requirement, the court was in error. This technique of supplying by presumption the critical conclusion in controversy has not survived appellate scrutiny. In *Neal v. Delaware,* the Supreme Court emphatically stated that the defendants could not discharge their burden of response and explanation on the strength of judicial presumptions that they had executed their offices in a regular manner, and that other rational and permissible factors accounted for the statistics which the petitioner had entered into evidence. Speaking for the majority, the first Mr. Justice Harlan declared:

> The showing thus made . . . [predicated upon population statistics] presented a *prima facie* case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution and laws of the United States. It was, we think, under all the circumstances, a violent presumption which the State court indulged, that such uniform exclusion of that race from juries, during a period of so many years, was soley because, in the judgment of those officers,

---

[70] Sims v. Georgia, 389 U.S. 404, 407-08 (1967) (per curiam).

[71] Brooks v. Beto, 366 F.2d 1, 10 (1966).

[72] Norris v. Alabama, 294 U.S. 587, 598 (1935). This rule is articulated and followed in: Smith v. Texas, 311 U.S. 128, 132 (1940); Patton v. Mississippi, 332 U.S. 463, 469 (1947); Hernandez v. Texas, 347 U.S. 475, 481-82 (1954); Eubanks v. Louisiana, 356 U.S. 584, 587 (1958); United States *ex rel.* Seals v. Wiman, 304 F.2d 53, 65 (5th Cir. 1962); Scott v. Walker, 358 F.2d 561, 573 (5th Cir. 1966).

> fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries.[73]

Though not emphasized by the Court of Appeals, the evaluation by the District Court in *Shaw* reveals indulgence in an equally violent presumption: that the protracted experience of the plaintiffs in their receipt of a consistently inferior measure of existing municipal services was solely because, in the judgment of the defendants (and their predecessors) fairly exercised, the black race in Shaw was utterly disqualified by want of need, desirable location, or convenient depletion of municipal assets to receive a measure of community services approaching that which was enjoyed by white townsmen.

Another prominent factor in the trial court's decision was the use of history. It was acknowledged in the opinion of the District Court that the plaintiffs claimed to "have made out a prima facie case of racial and economic discrimination by showing long-continued statistical disparities between white and black neighborhoods in the services provided by the town . . . ."[74] Judge Keady made no express finding in response to this allegation: his use of historical data was directed exclusively to the slow pattern of development in Shaw.[75] Much weight was placed upon the fact that the customary approach taken toward the provision of municipal services in Shaw was quite conservative, and "[t]hat was, apparently, the kind of local government preferred by Shaw's citizens."[76]

If by this assertion the trial court was indicating that either history or custom can legitimize a course of conduct which would otherwise offend the fourteenth amendment, it ran counter to prevailing reasoning. The point was squarely faced and rejected in *Eubanks v. Louisiana.*[77] "It may well be, as one of the parish judges recently stated, that 'the selection of grand juries in this community throughout the years has been controlled by a tradition and the general thinking of the community as a whole is under the influence of that tradition.' But *local tradition cannot justify failure to comply with the constituional mandate requiring equal protection of the laws.*"[78]

---

[73]Neal v. Delaware, 103 U.S. 370, 397 (1881); *accord,* Patton v. Mississippi, 332 U.S. 463, 468 (1947); United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71, 78 (5th Cir. 1959) ("We cannot assume that Negroes, the majority class in Carroll County, had en masse, or in any substantial numbers, voluntarily abstained from registering as electors . . . . The burden was on appellee, as State's representative, to refute the strong prima facie case developed by the appellant.").

[74]303 F. Supp. at 1167.

[75]*Id.* at 1168.

[76]*Id.*

[77]356 U.S. 584 (1958).

[78]*Id.* at 588 (emphasis added).

As noted, history failed to explain the fact that the cummulative record of Shaw's lethargic expansion was the gross disparity in service levels accorded black and white residents. Of more immediate consequence, however, was the failure of the trial court to recognize that in a civil rights case alleging racial discrimination, the added allegation that the present pattern or policy is reflective of a long-standing history of inferior treatment introduces a ground for heightened judicial concern.[79]

The need for and effect of this heightened concern can be demonstrated by the differing treatments given to the defendants' explanation of the allocation of sanitary sewers. The unchallenged statistics revealed that "[w]hile 99% of [Shaw's] white residents are served by a sanitary sewer system, nearly 20% of the black population is not so served." The explanation which the District Court credited as denuding this condition of actionable significance went to the essence of planning priorities, and can be expected to recur in future litigation.[80] At trial, the defendants introduced testimony to the effect that they had adopted a "firm policy" to extend the sewer system into all newer subdivisions at the time of their annexation. While it was alleged that this "policy" extended the benefits of sanitary sewers to new residential additions regardless of their racial composition, the older areas of the city which were thus subordinated to some distantly future improvement were, admittedly, almost exclusively black.[81]

The broad issue thus framed is whether a municipality burdened by a record of non-evenhanded rendition of its services can leapfrog the underserved established areas in pursuit of an aggressive policy designed to capture new "additions" with their presumably higher tax base.[82] By its

[79]Norris v. Alabama, 294 U.S. 587, 596 (1935) ("We think that the evidence that for a generation or longer no Negro has been called for service on any jury in Jackson County . . . established the discrimination which the Constitution forbids."); United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71, 77 (5th Cir. 1959) ("It can no longer be doubted that proof of long-continued exclusion of Negroes from jury service make a 'strong prima facie case.' "); Patton v. Mississippi, 332 U.S. 463, 469 (1947) (Any plan which " . . . operates in such a way as always to result in . . . long-continued exclusion of any representative [of] . . . any racial group . . . cannot stand."); Hernandez v. Texas, 347 U.S. 475, 480-82 (1954); Eubanks v. Louisiana, 356 U.S. 584, 587 (1958).

[80]303 F. Supp. at 1165-66.

[81]To the extent that the individuals brought within the corporate limits are "new citizens," the discriminatory impact of this policy would be precisely the reverse of that condemned in Shapiro v. Thompson, 394 U.S. 618, 632-33 (1969). "Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services." (footnote omitted).

[82]It must be emphasized that this question is posed in the context of a fiscal

ruling, the District Court took the position that such a "policy," if non-discriminatory in its current application, is sufficient to immunize the municipality against enforceable equalization claims by those not previously served and now, in effect, left behind.

The Circuit Court entertained no such notion. While questioning the existence of such a "firm policy," the Tuttle opinion holds that in the face of a strict review standard, " . . . the fact that extensions are now made to new areas in a non-discriminatory manner is not sufficient [to withstand the equal protection challenge] when the effect of such a policy is to 'freeze in' the results of past discrimination."[83] Thus we may assume that a subdivision capture policy—while assuredly a legitimate goal—does not constitute a compelling justification for the continued toleration of past neglect. In concert with this value judgment, it would seem that a newly adopted finance policy which would shift the provision of municipal services from the realm of general tax revenues to the plateau of betterment assessments or compensatory user charges would be unacceptable if its effect would be to "freeze in" the results of past discrimination.

The defendants' response to the allegations of unequal street lighting raised another issue likely to be present in future municipal service suits. Plaintiffs' unchallenged statistics revealed that while the town had deployed a significant number of medium and high intensity mercury vapor fixtures in a "second generation system," all of the new units had been installed in white neighborhoods. Those black neighborhoods favored with municipally provided street lighting contained only bare bulb incandescent fixtures. In Judge Keady's opinion, such an undisputed condition was not actionable absent a furtner showing that the bare bulb fixtures were " . . . practically inadequate or that an insufficient number of such lights ha[d] been erected, or that detriment of any kind ha[d] been sustained."[84] In so holding, the District Court raised the fundamental issue as to whether judicially enforceable "equality" assumes the dimension of equal provision of minimally adequate performance or the apparently more ambitious claim of absolute equality at the level services are being provided in favored neighborhoods.[85] Under the theory

policy which features the provision of the services in question out of general tax revenues.

[83]Hawkins v. Town of Shaw, No. 29013, at 8 (5th Cir., Jan. 28, 1971), *citing,* Henry v. Clarksdale School District, 409 F.2d 682, 688 (5th Cir. 1969).

[84]303 F. Supp. at 1165.

[85]A related issue is whether provision of services is to be measured by the efforts of the city (input) or the benefit to the citizens (output). If the equality is to be determined as equal enjoyment of the same functional level of service, it will require a larger expenditure of input effforts to produce that result in a crowded and physically deteriorating neighborhood than will be necessary to achieve an identical

espoused by Judge Keady, if a bare bulb fixture is adequate to attain the functional advantage of dispelling the danger of accident or crime, then it is a matter of indifference to the judiciary that the town fathers have elected to augment the facilities beyond the requirements of functional need in one section of the community.

The attitude of the Court of Appeals is squarely to the contrary. Declaring that "...*improvements* to existing facilities provided in a discriminatory manner may also constitute a violation of equal protection...", Judge Tuttle ruled that "[t]he fact that there was no specific showing that lighting was not adequate is not significant. What is significant is that it is clear that all of the *better* lighting that exists in Shaw can be found *only* in the white parts of the town."[86] While the court volunteers the assumption that modern high intensity lighting fixtures are *"more* adequate from the fact of their use by the town",[87] the Fifth Circuit neatly sidesteps entanglement with any judicial formulation of functional minima. Whether insufficient or excessive, the black citizens of Shaw are entitled to service facilities identical to those established in the white neighborhoods of their town. Nothing more can be required under the court's theory; nothing less is acceptable in the face of their constitutional claim.

Within the institutional context of litigation, the strength of a theory which insists upon input equality cannot be over-emphasized. Any theory founded upon articulation of substantive minimal entitlement to certain–presumably more crucial–services enjoys the surface attraction of being less demanding upon the resources of a given community. Yet the price of this "lower level of demand" is the nearly impossible task of determining the dimensions of the bare minima. In a case such as *Shaw,* which is bottomed upon the demonstration of racial classifications and the municipal provision of the services from the proceeds of general tax revenues, the requirement that as to all citizens similarly situated in terms of need there must be equality of governmental efforts has the virtue of both simplicity and immediate plausibility. By definition, the court is dealing with already attained levels of effort in the favored neighborhoods.

---

output level in an area or sector featuring low density premium structure homes. Police patroling is an example that comes most immediately to mind. Equality of "security"–the output goal–may well necessitate a disproportionate concentration of police personnel in high density areas. A level of municipally provided trash or refuse collection which may attain the health and safety goals in a low density residential area may be woefully inadequate to produce that same output level of miniminzation of disease and accident threats in a small-lot or attached multiple dwelling unit neighborhood. The examples could be multiplied.

[86] Hawkins v. Town of Shaw, No. 29013, at 7 (5th Cir., Jan. 28, 1971).

[87] *Id.*

There is a need for caution, however, in approaching cases where the "suspect" basis of the classification cannot be demonstrated, and the attempt to attain the strict review standard rests upon an articulation of "fundamental personal interest." It is in the context of defining fundamental personal interests that a court is asked to come closest to issues of substantive due process through the designation of levels of minimum entitlement. In the somewhat analogous area of public assistance benefits, the practical impediments to judicially undertaking the task, coupled with the less than reassuring record compiled during the era of substantive due process, combined to arrest what had been a string of notable victories.[88]

IV. BEYOND *SHAW*

In looking behind the appellate disposition of *Hawkins v. Town of Shaw*, it is our intention to indicate the areas of strong precedent which, by analogy, should govern the distribution of the burdens of pleading, proof and preponderance in future service equalization suits. In the exposition of these functional guidelines—which serve to define the roles of the trier as well as those of the parties plaintiff and defendant—we have proceeded on the firm assumption that the burden of proof frequently, if not always, is dispositive of the eventual judgment. Until these tactical questions are settled, an abstract discussion of substantive "rights" and actionable "wrongs" remains of only theoretical concern. Surveying the precedents which have been marshalled, it is clear that in addition to the clear reliance upon the use of statistical proofs and the focus upon governmental discrimination, the authorities share an element which is not featured in all incidents of service discrimination; with few exceptions, they are founded on a premise of racial discrimination, a criterion which enjoys the constitutional odium of an "irrelevancy" to almost any

[88]Dandridge v. Williams, 397 U.S. 471, 484-85 (1970). *Dandridge* came down only two weeks following the Court's decision in Goldberg v. Kelly, 397 U.S. 254 (1970). Read together, *Dandridge* and *Kelly* can be harmonized only along the theory that the Court will take a firm line in protecting the procedural due process rights which restrain the *way* in which government benefits—once voted—are administered and allocated; but, with regard to the substantive question of *"what"* is appropriated, courts are not to interfere with the "statutory discrimination . . . if any state of facts reasonably may be conceived to justify it." *Dandridge, supra* at 485; *citing,* McGowan v. Maryland, 366 U.S. 420, 426 (1966).

In addition to *Kelly*, attacks upon the procedural facets of the public assistance scheme had proved successful in Shapiro v. Thompson, 394 U.S. 618 (1969); and King v. Smith, 392 U.S. 309 (1968). Another notable "poor peoples' victory" was achieved in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

conceivable legitimate governmental interest. Yet the "wrong side of the tracks" is a social and physical blight which sweeps beyond the incidents of clearly defined racial discrimination. As the habitat of the social, economic, and political inconsequentials, these targets of less than benign neglect must command the assistance of a variety of substantive legal norms if reform is to be accomplished. An immediate focus of "second generation" service equalization suits must firmly anchor the use of statistical evidence and the dynamics of the prima facie case to the anti-discrimination commands arising from statutory and common law.[89]

Neither precedent nor reason support the restriction of these rules of procedure to cases alleging a denial of equal protection predicated on racial discrimination. The concept of the prima facie case is a creature of the common law. Granting a plaintiff who has advanced a prima facie case the right to a direct evidentiary response should not be confined to any particular class of cases. Indeed, though less numerous, there is significant authority which condemns the reduction of such a prima facie showing upon the basis of suspicion and speculation as "foreign to our concepts of justice."[90] In *Gatchell v. United States,*[91] the court applied the functional benefit of rules upholding the integrity of a prima facie case to the non-constitutional claim of a draft registrant. Speaking through Judge Hamley, that court declared: "[i]n our view, the reasoning upon which this rule is based precludes resort to suspicion and speculation to justify disregard of an undisputed factual representation made in an effort to present a prima facie case on behalf of a registrant."[92]

In the very near future, we may anticipate municipal service equalization suits featuring an attempt to reach the "strict review" standard of equal protection analysis on the premise that "wealth" is a "suspect" criterion or classification. Though yet to form the exclusive basis for a high court decision, such a proposition has received impressive support in dicta.[93] As yet untested is the dictum in *Shapiro v. Thomson* declaring that the equal protection clause prohibits an apportionment of governmental services according to the past tax contributions of its

---

[89]*See generally* Fessler & Forrester, *The Case for the Immediate Environment – Part II,* 4 CLEARINGHOUSE REV. 49 (1970).

[90]Dickinson v. United States, 346 U.S. 389, 397 (1953).

[91]378 F.2d 287 (9th Cir. 1967).

[92]*Id.* at 292. *Accord,* Batterton v. United States, 260 F.2d 233, 237 (8th Cir. 1958); Kessler v. United States, 406 F.2d 151, 156 (5th Cir. 1969); United States v. James, 417 F.2d 826, 831-32 (4th Cir. 1969) (collecting authorities).

[93]A discussion of "wealth" as a suspect criteria in the context of municipal services litigation with authorities may be found in Fessler & Forrester, *supra* note 3, at 9-10.

citizens.[94] Still other cases will avoid the federalism battles by filing service equalization complaints in state courts. Such efforts can be expected to rely upon the common law requirements of "equality" and "adequacy" in the rendition and "reasonableness" in the pricing of public or communal services or facilities.[95] Much has been, and more will be, said regarding the relative advantages and disadvantages of state versus federal forums and constitutional versus common law theories.[96] The peculiar circumstances of each individual case will dictate the exercise of an informed professional judgement. Those judgements having been taken, our purpose will have been served if litigants combine the selected substantive basis with the dynamic advantages of the prima facie case strategy. Courts, whether state or federal, should receive this claim with the realization that in constructing a prima facie case the citizen-suitor from the wrong side of the tracks will, like fabled Kansas City, have gone about as far as he can go!

---

[94]Shapiro v. Thompson, 394 U.S. 618, 632-33 (1969). *But see,* Boddie v. Connecticut, 91 S.Ct. 780 (1971). In *Boddie,* the majority may have arrested the development of "wealth" as a suspect criteria for equal protection purposes by treating the claims of indigent petitioners who were unable to pay state court fees to file for divorce as violative of *due process.* The concurring opinions of Mr. Justice Douglas and Mr. Justice Brennan express grave concern over the majority's refusal to decide these claims under an equal protection analysis.

[95]Fessler & Forrester, *supra* note 89, at 49.

[96]Fessler & Forrester, *supra* note 3, at 4 (collecting authorities).