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The Wrong Side of the Tracks: A Revolutionary Rediscovery of the Common Law Tradition of Fairness in the Struggle Against Inequality

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THE WRONG SIDE OF THE TRACKS: A REVOLUTIONARY REDISCOVERY OF THE COMMON LAW TRADITION OF FAIRNESS IN THE STRUGGLE AGAINST INEQUALITY. By *Charles M. Haar* and *Daniel W. Fessler.* New York: Simon and Schuster. 1986. Pp. 336. $18.95.

Black citizens in Dade City, Florida, recently brought suit seeking to eliminate disparities in the way the municipality provides street paving services and water drainage facilities to black and white residential areas.[1] The problem of unequal access to essential municipal services — such as electricity, sewerage, and water — is pervasive, afflicting disadvantaged people living "on the wrong side of the tracks." Charles M. Haar[2] and Daniel W. Fessler[3] maintain that the solution to this problem has been available for centuries: the ancient common law doctrine that all people similarly situated deserve equal access to adequate, reasonably priced community services. In *The Wrong Side of the Tracks,* these authors explore both the origins of the "duty to serve," imposed by the common law on monopolistic providers of essential community services, and the principle of equality in the

1. *See* Ammons v. Dade City, 594 F. Supp. 1275, 1277 (M.D. Fla. 1984), *affd.*, 783 F.2d 982 (11th Cir. 1986).

2. Charles M. Haar is Louis D. Brandeis Professor of Law at Harvard University and was the first Assistant Secretary for Metropolitan Development in the U.S. Department of Housing and Urban Development. Haar also served as an urban affairs advisor to Presidents Johnson and Carter and currently heads the Land Policy Roundtable of the Lincoln Institute.

3. Daniel W. Fessler is the William and Sally Rutter Distinguished Professor of Law, King Hall School of Law, University of California at Davis. He has also been a consultant to the U.S. Department of Health, Education and Welfare on the provision of legal services to the disadvantaged.

provision of public services which animates that duty. They then detail how the Anglo-American common law courts preserved that notion of equality in the face of drastic social and technological change. Haar and Fessler conclude that state courts today can use these common law principles more effectively than modern constitutional theories for the purpose of ensuring equal access to essential public services.[4]

The authors turned to the common law because recent Supreme Court equal protection analysis presents barriers to municipal services equalization suits brought under the fourteenth amendment. In the late 1960s, public-interest lawyers "were convinced that a logical extension of the successful battle to desegregate schools and public facilities involved a constitutional assault upon the living conditions of people on the wrong side of the tracks" (p.31). Some successful equalization suits have been brought under the fourteenth amendment.[5] However, two crucial Supreme Court pronouncements preclude widespread use of the equal protection clause as a weapon against municipal services discrimination. First, the Court has refused to include classifications based on poverty in the group of suspect classifications triggering strict scrutiny. Second, it adopted a discriminatory intent requirement in *Washington v. Davis,*[6] eliminating claims alleging only discriminatory impact. While not all neighborhoods that suffer from inadequate municipal services are inhabited solely by racial minorities, the affected citizenry is usually poor. Yet because classifications based on poverty are not suspect, many instances of municipal services discrimination will be subject only to minimal scrutiny and will easily survive constitutional attack (pp. 43-47). Even where the effects of the unequal distribution of public services fall disproportionately on minorities, the requirement that plaintiffs demonstrate discriminatory intent in equal protection claims based on race makes the success of fourteenth amendment equalization claims very uncertain (p. 53). Discouraged by these limits on effective use of the federal Constitution, Haar and Fessler looked to the common law for an alternative remedial theory.

The authors found a common law solution — the duty of equal and adequate service — and located its origin in the thirteenth-century jurisprudence of Henry de Bracton.[7] Bracton asserted that the King was the source of all privileges held by individuals. Once the King put

4. "Our purpose, above all, is to provide a potent means, through traditional common law doctrine, of addressing major aspects of poverty and inequality in our time." P. 20.

5. *See* Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971); Ammons v. Dade City, 783 F.2d 982 (11th Cir. 1986).

6. 426 U.S. 229 (1976).

7. P. 60. Bracton was a prominent jurist who advocated greater royal authority. His theory is contained in *De Legibus et Consuetudinibus Angliae* (circa 1250), in which he attempted to set out the common law principles and customs then existing.

privileges such as monopoly operation of a ferry or local mill in private hands, those privileges entailed an obligation to all of society. Thus, anyone in possession of such a privilege could lose it through abuse or nonuse. These ideas, included in legislation during the reign of Edward I,[8] "conveyed an express mandate to the judiciary to assume both the jurisdiction and responsibility for balancing private right against public advantage" (p. 65).

Judges activated this legislation when mill and bakery monopolists, the holders of private privilege, brought suit for competitive injury against rival operators. These monopolies were analogous to today's local public utilities: the seller totally dominated the market in providing essential community services (pp. 67-69). Courts were not enthusiastic about these suits and would allow them to go forward only if the monopolist could demonstrate that he had discharged his corresponding duties to the commonwealth. Unless the monopolist proved he had provided "full use (access for all)" without any "abuse (rendition of a service of reasonable quality and price)," his suit would not succeed (pp. 74-75).

These judicial attempts to maintain equal access to essential public services are the basis of the "duty to serve" which Haar and Fessler carefully trace through the subsequent five hundred years. The authors, using transportation as an example of a public service, discuss the application of this duty in England both to ferry monopolies of the seventeenth and eighteenth centuries and to railroad interests of the nineteenth century.

> Two themes unite the narrative: society's continuing need for an evolving transportation matrix and a judicial insistence that the matrix at all times be afforded to all citizens on terms calculated to serve the greatest number at the minimum cost. The tale reveals many factual twists, but few ideological turns. [p. 106]

By the late nineteenth century the "duty to serve" was firmly entrenched in American law and its continued vitality seemed certain. The authors quote an 1869 state court decision that reflects this acceptance: "The [railroads] derive their chartered right from the State. They owe an equal duty to each citizen. . . . *Such is the common law on the subject.*"[9] The authors use this historical discussion to demonstrate that equality in the provision of public services has been an enduring and fundamental concern of common law judges.

Haar and Fessler's historical exposition culminates in a description of judicial application of the "duty to serve" to modern utilities and

8. The legislation, enacted in 1285, was entitled "A Statute on the Form of Confirmation of Charters." P. 64.

9. P. 131 (quoting New England Express Co. v. Maine Cent. R.R., 57 Me. 188, 196-97 (1869) (emphasis added by Haar and Fessler)). *See also* p. 119 (" 'The general principle of equality is the principle of the common law.' ") (quoting McDuffee v. Portland & R.R.R., 52 N.H. 430, 456 (1873)).

the municipality itself. From early in this century, courts have found it relatively easy to compel private gas, electric, water and sewage, and communications utilities to provide equal services, since these utilities exhibit many characteristics of entities historically subject to the common law duty: they provide essential services, they are usually monopolies, and they operate under a franchise from the state or municipality (p. 143). According to the authors, the "duty to serve" approach that has been applied in utilities regulation can be particularly relevant to the problem of contemporary municipal services discrimination, since the typical municipality is also a monopolistic provider of essential services.

The role of common law judges in contemporary controversies over utility extensions and abandonments is also relevant to service discrimination by municipalities. As communities grow, courts require privately owned utilities to make all reasonable additions to service within the area they were chartered to serve; an extension of service is reasonable so long as the utility receives an overall fair rate of return (pp. 175-77). A number of recent decisions apply that rule to publicly owned utilities.[10] Haar and Fessler favor further extension of this principle by judicial mandate to municipalities whose communities suffer from inequity in the distribution of public services.

The application of these common law rules to municipal governments may conflict with the doctrine of sovereign immunity. The authors briefly discuss this problem but do not believe it presents a major obstacle to their theory (pp. 189-92). Sovereign immunity generally does not protect the municipality when it is providing gas, water, or electricity to residents. In providing these services, the government is acting so much like a public utility that a duty to provide equal access readily applies to the municipality. Although traditional sovereign immunity doctrine protects municipalities from liability when they engage in functions that are peculiarly governmental, such as providing fire hydrants, street lights, and paving,[11] the authors argue that this distinction between types of services may now be nothing more than a "semantic veil" (p. 189). Because sovereign immunity "has fallen from judicial favor . . . [and] only a retrograde and dwindling minority

10. *See* Robinson v. City of Boulder, 190 Colo. 357, 547 P.2d 228 (1976); Johnson v. Reasor, 392 S.W.2d 54 (Ky. 1965); Reid Dev. Corp. v. Parsippany-Troy Hills Tp., 10 N.J. 229, 89 A.2d 667 (1952); State v. East Shores, Inc., 154 N.J. Super. 57, 380 A.2d 1168 (Ch. Div. 1977), *modified*, 164 N.J. Super. 530, 397 A.2d 368 (App. Div. 1979). *Cf.* City of Greenwood v. Provine, 143 Miss. 42, 108 So. 284 (1926) (refusal to extend services permissible only where extension unreasonable under the circumstances). *But see* Town of Wickenburg v. Sabin, 68 Ariz. 75, 200 P.2d 342 (1948) (extension of service is within the municipality's discretion and may not be compelled by the courts). Many judges remain reluctant to involve themselves so extensively in local affairs. Pp. 181-85.

11. *See* 12 E. McQUILLEN, MUNICIPAL CORPORATIONS § 35.35, at 581-83 (rev. 3d ed. 1986); 18 E. McQUILLEN, MUNICIPAL CORPORATIONS §§ 53.22-53.59, at 242-378 (rev. 3d ed. 1984).

of jurisdictions retain it" (p. 190), the authors conclude that the doctrine is no longer a barrier to relief.

Haar and Fessler identify several advantages in using the common law duty of equal and adequate service to attack municipal services discrimination. First, although equalization suits have broad political consequences and ideally should be decided under principles embodied in our basic political document, the Constitution, the common law duty of equal service is the product of centuries of reasoned political and legal reflection. Moreover, the continued vitality of much of the venerable common law is part of our constitutional framework. Second, action through state common law courts is more desirable than resort to federal judicial decree, because it allows local and state governments to solve their own problems creatively rather than subjecting them to the stifling uniformity of federal commands. Finally, the common law doctrine provides broader relief than is available through constitutional adjudication, because it does not require proof of intentional racial discrimination. The problem of unequal municipal services afflicts the poor of all races. Thus, "[t]he common law doctrine, paying no heed to origin or color, has a greater sweep for relief once the inequality of treatment is proven" (p. 233).

The Wrong Side of the Tracks advocates an innovative and useful approach to municipal services discrimination.[12] Subjecting municipalities that are monopolistic providers of essential community services to the common law duties of equal access provides an effective legal means for attacking municipal services discrimination. Further, this book effectively and carefully documents the legal history in this field. The authors' historical survey highlights the richness and continued relevance of the common law tradition by illustrating how the fundamental notion of equal access to essential services has endured through seven centuries of Anglo-American law. These common law principles, refined over the centuries, constitute a humanistic social doctrine that has retained its central meaning and moral vision while adapting to various political and technological changes (p. 19).

Yet one wishes the authors would have devoted more attention to serious problems that could arise if courts apply common law duties to force expansion of municipal services. The authors recognize and discuss only briefly the potential for tension between the courts and the more political executive and legislative branches over sensitive issues

12. Elsewhere these authors have approached the municipal services discrimination problem in a more conventional manner. *See* Fessler & Haar, *Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure,* 6 HARV. C.R.-C.L. L. REV. 441 (1971) (discussing procedural and evidentiary aspects of fourteenth amendment equalization suits in the wake of *Hawkins v. Town of Shaw*). *See also* Rossum, *The Rise and Fall of Equalization Litigation,* 7 CURRENT MUN. PROBS. 58 (1980); Note, *Title VI: The Impact/Intent Debate Enters the Municipal Services Arena,* 55 ST. JOHN'S L. REV. 124 (1980) (discussing an equalization suit alleging racial discrimination in violation of Title VI).

of resource scarcity and allocation (pp. 239-45). Use of this common law strategy may draw courts into areas of fiscal and administrative policy making where society does not want them to operate. For example, cities reluctant to raise taxes may be forced to decide which worthy program to cut in order to finance a court-ordered expansion of some other service. Such a dilemma could require a painful reordering of priorities by local officials and their constituents. While troublesome questions regarding the potential consequences of the authors' proposals remain unanswered, Haar and Fessler should be commended for injecting fresh meaning into the ancient common law "duty to serve."

— *Gregory A. Kalscheur*