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TRAVEL: THE EVOLUTION OF A PENUMBRAL RIGHT

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Freedom of mobility is a fundamental right, and the importance of this right is coming more and more into the foreground in our modern fluid society. This right to move freely has always been thought to be and is now more than ever inextricably linked with the right to associate, converse, and assemble with others. Even though some courts find this objectionable, it is nonetheless accorded the same protection as preferred freedoms. The right is shielded against oblique infringement as well as direct interference and restrictions on the right are permissible only when an overriding interest is shown. As significant as the right to travel is, there has been no homogeneity of opinion as to its source, nature or scope.

SOURCE OF THE RIGHT

The right to travel emerged in Anglo-Saxon times at least as early as the Magna Carta. Article 42, a result of the reaction against royal restriction of free mobility, allowed every free man to leave England except during time of war. Keeping in mind that many of the civil liberties as we know them today —the freedom of speech, worship and assembly—are not enumerated in the Magna Carta, it is notable that mobility was considered so significant.[1] This strong and steadfast desire of Englishmen for freedom of movement was carried to the colonies and bitter resentment was created when it was frustrated by the distant government in London.[2] One of the potent motivations for independence was the determination of Americans to be masters of their own freedom of movement.[3] Article IV of the Articles of Confederation provided that "the people shall have free ingress and regress to and from any other state . . . ." This right finds no explicit mention in the Constitution, perhaps because a liberty so basic was conceived to be a necessary concomitant of the stronger union the Constitution created.[4]

Despite the absence of specific mention in the Constitution, the right to travel received early and recurrent recognition by the courts as a constitu-

1. Jaffee, *The Right to Travel: The Passport Problem*, 35 FOREIGN AFFAIRS 17, 19 (1956).

2. Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 187 (1956).

3. *Id.*

4. *Id.* at 185. It has been suggested that such liberty was viewed as an unquestionable right and that something was assumed rather than rejected. Gould, *The Right to Travel and National Security*, 1961 WASH. U.L.Q. 334.

tional right. Although there is no conflict over the existence of the right, there has been little accord as to the specific provision supporting it. The sources that have been proffered are the privileges and immunities clauses of article IV and the fourteenth amendment, the due process clause of the fifth amendment, the commerce clause of article I and a general unwritten premise of the Constitution.

The first judicial recognition of the right to travel in the United States was by way of dictum in *Corfield v. Coryell*.[5] The court characterized the right of free ingress and regress as one of the fundamental privileges and immunities of citizens under Article IV, Section 2 of the Constitution.[6] The *Passenger Cases*,[7] which involved taxes levied on alien passengers arriving in the United States, was the first opportunity for a member of the Supreme Court to approach the subject. Chief Justice Taney, while not considering this an appropriate instance to apply the right to travel principles, pointed out in his dissent that the right to travel was inherent in the Constitution.

> For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.[8]

In *Crandall v. Nevada*,[9] the Court, in its first attempt to deal directly with the right to free movement, invalidated a Nevada tax on every person leaving the state by common carrier because it interfered with the right to travel. Taney's statements in the *Passenger Cases* accorded with the inferences this Court drew from the Constitution, and the right to travel was again attributed to the privileges and immunities clause of article IV.[10] Later the Court

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5. 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).

6. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. . . ." U.S. CONST. art. IV, § 2.

> The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . . may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental . . . .

Corfield v. Coryell, 6 F. Cas. 546, 552 (No. 3230) (C.C.E.D. Pa. 1823). However, the court held that this right did not preclude a state from statutorily excluding persons from another state to rake for oysters since the oyster beds belonged to the state of New Jersey.

7. 48 U.S. (7 How.) 283, 12 L. Ed. 702 (1849).

8. *Id.* at 492, 12 L. Ed. at 790 (dissenting opinion). Noting that the Constitution was designed to "secure the freest intercourse between the citizens of different States," Taney also felt that article IV, section 2 was the source of this right. *Id.* at 492, 12 L. Ed. at 790; *accord,* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180, 19 L. Ed. 357, 360 (1869).

9. 73 U.S. (6 Wall.) 35, 18 L. Ed. 745 (1868).

10. *Id.* at 43-44, 18 L. Ed. at 747; *accord,* Hague v. CIO, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939); Maxwell v. Bugbee, 250 U.S. 525, 40 S. Ct. 2, 63 L. Ed. 1124 (1919); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 20 L. Ed. 449 (1871).

acknowledged that the purpose of the privileges and immunities provision of Article IV of the Articles of Confederation and the purpose of Article IV, Section 2 of the Constitution were the same.[11] Even though Article IV of the Articles of Confederation specifically mentioned various privileges and immunities, including the right of free ingress and egress, whereas Article IV, Section 2 of the Constitution merely contained a general reference to the privileges and immunities of citizens of the several states, the privileges and immunities intended were identical.[12]

Other decisions referring to the right to travel as a privilege and immunity base its constitutional origin on the fourteenth amendment.[13] As stated by the Court in *Williams v. Fears*:[14]

> Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.[15]

Justice Douglas stated in *Edwards v. California*[16] that a citizen's right to migrate from place to place is an unlimited one based on the fourteenth amendment. In his concurring opinion he remarked:

> [W]hen the Fourteenth Amendment was adopted in 1868, it had been squarely and authoritatively settled that the right to move freely from State to State was a right of *national* citizenship. As such it was protected by the privileges and immunities clause of the Fourteenth Amendment against state interference.[17]

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11. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 75, 21 L. Ed. 394, 408 (1872).

12. *Id.* Other cases have recognized that the privileges and immunities clause of article IV, section 2 secures the right of citizens of one state to pass through or reside in another state for purposes of trade, agriculture, professional pursuits or otherwise without being subjected to treatment more onerous than the citizens of that state. Hess v. Pawloski, 274 U.S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927); Shaffer v. Carter, 252 U.S. 37, 40 S. Ct. 221, 64 L. Ed. 445 (1920).

13. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . .
U.S. Const. amend. XIV, § 1.

14. 179 U.S. 270, 21 S. Ct. 128, 45 L. Ed. 186 (1900).

15. *Id.* at 274, 21 S. Ct. at 129, 45 L. Ed. at 188; *accord,* Colgate v. Harvey, 296 U.S. 404, 430, 56 S. Ct. 252, 259, 80 L. Ed. 299, 311 (1935), *overruled on other grounds,* Madden v. Kentucky, 309 U.S. 83, 60 S. Ct. 411, 84 L. Ed. 590 (1940); Twining v. New Jersey, 211 U.S. 78, 97, 29 S. Ct. 14, 19, 53 L. Ed. 97, 105 (1908), *overruled on other grounds,* Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1963).

16. 314 U.S. 160, 62 S. Ct. 164, 86 L. Ed. 119 (1941) (concurring opinion).

17. *Id.* at 179, 62 S. Ct. at 169, 86 L. Ed. at 128 (court's emphasis). Douglas relied on this opinion in Aptheker v. Secretary of State, 378 U.S. 500, 519, 84 S. Ct. 1659, 1671, 12 L. Ed. 2d 992, 1005 (1964) where he again insisted that the right to move freely was a privilege and immunity of national citizenship. Justice Jackson felt that the Court in *Edwards* should

> hold squarely that it is a privilege of citizenship of the United States, protected

The right to travel has at times been considered secured by the commerce clause of article I, section 8,[18] subject to control by Congress but free from impairment by the states. In *Edwards* the majority held that a California law, which prohibited assistance to nonresident indigents entering the state, was unconstitutional in that it impeded free interstate passage of the indigent.[19] The Court in *United States v. Guest*[20] said that it is well settled that "the federal commerce power authorizes Congress to legislate for the protection of individuals from violations of civil rights that impinge on their free movement in interstate commerce."[21]

The word "liberty" in the due process clause of the fifth amendment has also been cited as the source of the right to mobility.[22] The Supreme Court recognized in *Kent v. Dulles*[23] that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be denied without due process of law . . . ."[24] Both the majority and dissenting opinions in *Aptheker v. Secretary of State*[25] affirmed the principle that freedom of travel is an inalienable right guaranteed by the due process clause by stating that the freedom to travel outside the United States is a liberty protected by the fifth amendment.[26]

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from state abridgment, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing at all.

Edwards v. California, 314 U.S. 160, 183, 62 S. Ct. 164, 171, 86 L. Ed. 119, 130 (1941) (concurring opinion); *accord*, Oregon v. Mitchell, 400 U.S. 112, 285, 91 S. Ct. 260, 345, 27 L. Ed. 2d 272, 374 (1970) (concurring opinion).

18. "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . . ." U.S. CONST. art. I, § 8.

19. Edwards v. California, 314 U.S. 160, 62 S. Ct. 164, 86 L. Ed. 119 (1941).

20. 383 U.S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966).

21. *Id.* at 759, 86 S. Ct. at 1178, 16 L. Ed. 2d at 250. Other opinions have relied on the commerce clause as the source of the right to travel. *E.g.*, Helson v. Kentucky, 279 U.S. 245, 251, 49 S. Ct. 279, 281, 73 L. Ed. 683, 687 (1929); Bowman v. Chicago & N.W. Ry., 125 U.S. 465, 480-81, 8 S. Ct. 689, 695-96, 31 L. Ed. 700, 705 (1888); Philadelphia & S.S.S. Co. v. Pennsylvania, 122 U.S. 326, 329, 7 S. Ct. 1118, 1121, 30 L. Ed. 1200, 1203 (1887).

22. "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

23. 357 U.S. 116, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958).

24. *Id.* at 125, 78 S. Ct. at 1118, 2 L. Ed. 2d at 1210, *citing* Edwards v. California, 314 U.S. 160, 62 S. Ct. 164, 86 L. Ed. 119 (1941); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 18 L. Ed. 744 (1867).

25. 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964).

26. *Id.* at 505-06, 525, 84 S. Ct. at 1663, 1674, 12 L. Ed. 2d at 997, 1009. Justice Harlan, dissenting in Shapiro v. Thompson, 394 U.S. 618, 671, 89 S. Ct. 1322, 1350, 22 L. Ed. 2d 600, 637 (1969), relied on the language in *Kent*, which was echoed in *Aptheker*, and concluded that the right to interstate travel is a fundamental right which has its source in the due process clause of the fifth amendment. This viewpoint has been recently restated in Woodward v. Rogers, 344 F. Supp. 974 (D.D.C. 1972) where a federal district court held that the mandatory requirement that all applicants for United States passports swear to or affirm an oath of allegiance violated the right of travel protected by the fifth amendment. *See also* Zemel v. Rusk, 381 U.S. 1, 14, 85 S. Ct. 1271, 1279, 14 L. Ed. 2d 179, 188 (1965).

The mode of defining the right to travel has varied almost from case to case. Many decisions, especially the recent ones, have either suggested that freedom of mobility rests on an unwritten premise of the Constitution or have considered it unnecessary to base the right on any particular constitutional provision.[27] It was recognized in *Guest* that the right to free ingress and egress to and from any other state found no explicit mention in the Constitution, but nevertheless was a basic right under our Constitution.[28] In *Shapiro v. Thompson* the Court stated that

> the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.[29]

However, the Court specifically refused to ascribe the source of the right to travel to any particular constitutional provision.[30] It was stated in *Oregon v. Mitchell*[31] that for more than a century the Court had recognized that all citizens have the constitutional right to unhindered travel. The existence of this right and its fundamental importance to our federal union was said to have been established beyond question, but again the Court did not rely upon one particular constitutional provision.[32] Freedom of mobility has been so firmly established and repeatedly recognized that its specific origin is

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27. Perhaps this is the best approach. Since the right to travel has been repeatedly recognized by the Supreme Court, the question of its source may be purely academic.

28. Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists.

United States v. Guest, 383 U.S. 745, 759, 86 S. Ct. 1170, 1179, 16 L. Ed. 2d 239, 250 (1966).

29. Shapiro v. Thompson, 394 U.S. 618, 629, 89 S. Ct. 1322, 1329, 22 L. Ed. 2d 600, 612 (1969).

30. *Id.* at 630, 89 S. Ct. at 1329, 22 L. Ed. 2d at 612. Likewise the Court in Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972), cited a host of cases which have upheld the right to travel as a constitutionally protected right but did not attribute this right to any specific provision of the Constitution. *Accord,* Graham v. Richardson, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971), *aff'g* 313 F. Supp. 34 (D. Ariz. 1970).

31. 400 U.S. 112, 237-38, 91 S. Ct. 260, 321, 27 L. Ed. 2d 272, 346 (1970) (concurring opinion).

32. While Justice Black announced the judgments of the Court in an opinion expressing his own views, there was no majority opinion in *Oregon v. Mitchell.* Justice Harlan called the right to travel a nebulous judicial construct. *Id.* at 216, 91 S. Ct. at 310, 27 L. Ed. 2d at 333. Justices Brennan, Marshall and White do not attach the right of interstate travel to any specific constitutional provision. *Id.* at 237-38, 91 S. Ct. at 321, 27 L. Ed. 2d at 346; *accord,* Griffin v. Breckenridge, 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971). Justice Douglas, dissenting in Palmer v. Thompson, 403 U.S. 217, 233, 91 S. Ct. 1940, 1949, 29 L. Ed. 2d 438, 449 (1971) recognized that the right to travel from state to state, though not specifically mentioned in the Constitution, had been deemed so elementary to our way of life that it had been labeled a basic right.

evidently unimportant. The right to travel has been protected regardless of what was said to be its basis because "whatever the source, the right exists."[33]

NATURE OF THE RIGHT

There is a common understanding that the concepts of liberty and citizenship embraced the right of freedom of movement, the effective right to travel freely.[34] Controversy has loomed regarding the nature of this right, as well as its origin, but even so, the last 15 years have seen a growth in its significance.

Association with Preferred Freedoms

Perhaps the greatest amplification of the right to travel was its association with first amendment freedoms. The Court took the initial step in *Kent v. Dulles*[35] where it was recognized:

> Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be . . . as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.[36]

The next step was *Aptheker v. Secretary of State*[37] where the Court, following *Kent*, directly related travel to first amendment freedoms.

> Since freedom of association is itself guaranteed in the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association.[38]

Furthermore, this right of mobility "is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful . . . ."[39]

Since travel was said to be closely related to other personal liberties protected by the first amendment, it inherited the same special protection.[40]

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33. Evansville—Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707, —, 92 S. Ct. 1349, 1359, 31 L. Ed. 2d 620, 633 (1972) (Douglas, J., dissenting).

34. Whatever is the nature of this right, aliens lawfully within this country may enter and abide in any state on an equality of legal privileges with all citizens. Graham v. Richardson, 403 U.S. 365, 377-78, 91 S. Ct. 1848, 1855, 29 L. Ed. 2d 534, 545 (1971). However, nonresident, unadmitted aliens have no constitutional right of entry to this country as a nonimmigrant or otherwise. Kleindienst v. Mandel, 408 U.S. 753, —, 92 S. Ct. 2576, 2581, 33 L. Ed. 2d 683, 691 (1972).

35. 357 U.S. 116, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958).

36. *Id.* at 126, 78 S. Ct. at 1118, 2 L. Ed. 2d at 1210.

37. 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964).

38. *Id.* at 507, 84 S. Ct. at 1664, 12 L. Ed. 2d at 998.

39. *Id.* at 520, 84 S. Ct. at 1671, 12 L. Ed. 2d at 1006 (concurring opinion).

40. It has been said that in *Aptheker* the right to travel was *accidentally* made a corollary to preferred freedoms since there were questions regarding first amendment liberties involved. Shapiro v. Thompson, 394 U.S. 618, 649, 89 S. Ct. 1322, 1339,

Thus a more potent doctrine was created since, as a result, a restriction on travel may be challenged on its face.

Assertion Against Private Citizens

Freedom of mobility was further defined in *United States v. Guest*[41] where the Court specifically allowed enforcement of the right against private citizens. Stating that travel is a freedom that the Constitution itself guarantees, the majority included in this freedom the right to preclude interference from private individuals. Pointing out that the cases they had relied on in their decision dealt with

> governmental interference with the right of free interstate travel, their reasoning fully supports the conclusion that the constitutional right of interstate travel is a right secured against interference from any source whatever, whether governmental or private.[42]

As a result of *Guest*, there is a federally guaranteed right to be free from private interference with interstate transit.[43]

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22 L. Ed. 2d 600, 624 (1969) (dissenting opinion); Zemel v. Rusk, 381 U.S. 1, 16, 85 S. Ct. 1271, 1280, 14 L. Ed. 2d 179, 190 (1965). Therefore travel should not receive the same protection as first amendment rights. *Id.* at 16, 85 S. Ct. at 1280, 14 L. Ed. 2d at 190. However, in the concurring and dissenting opinions in *Aptheker*, reference was made to travel and first amendment freedoms. Justice Douglas said that the right to travel is within the penumbra of the first amendment. Aptheker v. Secretary of State, 378 U.S. 500, 520, 84 S. Ct. 1659, 1671, 12 L. Ed. 2d 992, 1005 (1964) (concurring opinion), and Justice Clark based his dissent on the premise that travel did not require the same protection as preferred freedoms. *Id.* at 522, 84 S. Ct. at 1672, 12 L. Ed. 2d at 1007. Furthermore, in *Zemel*, Justice Goldberg, who had written the majority opinion in *Aptheker*, explained his previous opinion and defined travel as an "activity closely connected with the First Amendment . . . ." Zemel v. Rusk, 381 U.S. 1, 38, 85 S. Ct. 1271, 1292, 14 L. Ed. 2d 179, 202 (1965) (dissenting opinion). Therefore it seems highly unlikely that the association was an accident.

41. 383 U.S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966).

42. *Id.* at 759 n.17, 86 S. Ct. at 1179 n.17, 16 L. Ed. 2d at 250 n.17. It was also mentioned that "[w]hile past cases do indeed establish that there is a constitutional 'right to travel' between States free from unreasonable *governmental* interference, [this] decision is the first to hold that such movement is also protected against *private* interference . . . ." *Id.* at 763, 86 S. Ct. at 1181, 16 L. Ed. 2d at 252 (dissenting opinion) (court's emphasis).

43. *Id.* *See also* Griffin v. Breckenridge, 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971) which involved a conspiracy to prevent Negroes from exercising their rights to travel the public highways without restraint in the same manner as white citizens in Mississippi. *But see* United States v. Wheeler, 254 U.S. 281, 41 S. Ct. 133, 65 L. Ed. 270 (1920) where the Court affirmed a judgment quashing an indictment for violation of a federal statute making it a crime to injure, oppress, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. The indictment charged that the defendants had held 221 persons in a boxcar in Arizona until they were transported out of the state and released in New Mexico and warned never to return. The Court concluded that the right of free ingress and egress was protected *solely from governmental action and not from private action.* *Id.* at 298, 41 S. Ct. at 135, 65 L. Ed. at 275 (emphasis added). In *Guest* the Court stated that *Wheeler* involved an alleged conspiracy to compel residents of Arizona to move out of that state and

Protection as a Preferred Freedom

Kent, Aptheker, and *Guest* are significant because they extended the *force* of the right to travel doctrine; *Shapiro v. Thompson*[44] is important because it further stressed the *quality* of the right. The Supreme Court in *Shapiro* relied on the right to interstate travel as the basis for its decision to strike down statutes which denied welfare benefits to persons who had not been domiciled in the state for 1 year preceding application for benefits. The majority held that the 1-year waiting period discouraged poor people from moving into the state and that the "purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible."[45] The Court rejected the argument that showing a rational relationship between the waiting period and state objectives would suffice to justify denying welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction.

> [I] moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.[46]

Shapiro has made it clear—whether or not the right to travel is analogous to first amendment freedoms, it will receive the same protection. Since the classification of welfare applicants according to whether they had lived in the state for 1 year touched on the fundamental right of interstate movement, its constitutionality was judged on whether it promoted a *compelling* state interest.[47] This was the first time that the Supreme Court made compulsory the compelling governmental interest test where a particular regulation places a penalty on the right to travel. This standard requires that, upon a prima facie showing of a burden on the exercise of a fundamental right, the

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Wheeler was restricted to its own facts. United States v. Guest, 383 U.S. 745, 759 n.16, 86 S. Ct. 1170, 1179 n.16, 16 L. Ed. 239, 250 n.16 (1966). However, it seems that *Guest* effectively overruled *Wheeler.*

44. 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969).

45. *Id.* at 631, 89 S. Ct. at 1329, 22 L. Ed. 2d at 613.

46. *Id.* at 634, 89 S. Ct. at 1331, 22 L. Ed. 2d at 615 (court's emphasis).

47. The test ordinarily applied is whether or not the restriction bears a rational relationship to the accomplishment of a permissible objective. *See* Turner v. Fouche, 396 U.S. 346, 362, 90 S. Ct. 532, 541, 24 L. Ed. 2d 567, 580 (1970); McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S. Ct. 1101, 1104-05, 6 L. Ed. 2d 393, 398-99 (1961). The challenged law is entitled to a presumption of validity and is allowed to stand unless it is shown that there is no rational basis for the means selected. Bullock v. Carter, 405 U.S. 134, —, 92 S. Ct. 849, 855-56, 31 L. Ed. 2d 92, 99-100 (1972). But where the right involved is a fundamental personal liberty, the restriction is measured by a more rigid standard. The burden is on its proponents to show that the restriction imposed is "necessary to protect a compelling and substantial governmental interest." Dunn v. Blumstein, 405 U.S. 330, 341, 92 S. Ct. 995, 1002, 31 L. Ed. 2d 274, 283 (1972). The challenged law must be precisely tailored to the objective. *Id.* at 360, 92 S. Ct. at 1012, 31 L. Ed. 2d at 294.

government justify the regulation imposing the burden with more than a rational relation to a legitimate governmental interest. It is not sufficient to show that the particular legislation furthers a very substantial state interest. In pursuing that important interest, the government cannot choose means which unnecessarily burden the right to travel.[48] If there are other reasonable ways to achieve these goals with a lesser restriction on constitutionally protected activity, these must be chosen instead of the way of greater interference.[49] Those classifications (legislative or otherwise) susceptible to strict scrutiny under the compelling governmental interest test involve "suspect" areas—race, religion, color, and fundamental rights—marriage and procreation, voting, first amendment rights, and as a result of *Shapiro*, travel.[50]

Protection Against Indirect Infringement

Prior to *Shapiro*, the right to travel was constitutionally protected but the panoply accorded was against direct impingement thereon, not against encroachment which was indirect and incidental. In *Shapiro* there was no absolute proscription, but an indirect requirement was imposed in order to receive welfare once a person was within the state. A person was not prohibited from moving into the state because of the residency requirement, but he was penalized because of his recent move. The decision in *Shapiro* did not rest upon a finding that denial of welfare actually prevented travel. Nor had other right to travel cases before the Supreme Court always relied on the existence of actual restraint.[51] The compelling state interest test will be triggered by "any classification which serves to *penalize* the exercise of that right."[52] The Court's use of the right to travel in invalidating public welfare residency requirements expanded the scope of the doctrine in that previous travel cases had been more directly concerned with travel itself. The compelling interest test may be invoked if there is an oblique infringement of the right to travel, not just when there is direct infringement. Justice Warren objected to this extension of the right.

48. Shapiro v. Thompson, 394 U.S. 618, 631, 89 S. Ct. 1322, 1330, 22 L. Ed. 2d 600, 613 (1969).

49. Shelton v. Tucker, 364 U.S. 479, 488, 81 S. Ct. 247, 252, 5 L. Ed. 2d 231, 237 (1960).

50. *See* Comment, *The Right to Travel and Its Application to Restrictive Housing Laws*, 66 NW. U.L. REV. 635, 647 (1971).

51. *E.g.*, Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 18 L. Ed. 744 (1868) where the tax levied on persons leaving Nevada by commercial carrier was only $1—a minimal deterrent to travel. The Court declared the tax unconstitutional and reasoned that "if the State can tax a railroad passenger one dollar, it can tax him a thousand dollars." *Id.* at 46, 18 L. Ed. at 748.

52. Shapiro v. Thompson, 394 U.S. 618, 634, 89 S. Ct. 1322, 1331, 22 L. Ed. 2d 600, 615 (1969) (emphasis added). It has been made clear that the penalty does not have to reach any specific level of deterrence to require application of the compelling interest test. Carter v. Gallagher, 337 F. Supp. 626, 631 (D. Minn. 1971).

> The Court's decision reveals only the top of the iceberg. Lurking beneath are the multitude of situations in which States have imposed residence requirements including eligibility to vote, to engage in certain professions or occupations or to attend a state-supported university. Although the Court takes pains to avoid acknowledging the ramifications of its decisions, its implications cannot be ignored.[53]

RECENT DEVELOPMENTS

Since the *Shapiro* decision, courts have applied the right to travel to a variety of fact situations which often only secondarily concern travel, but in some fashion hamper the mobility of the population. The general issues to be resolved are whether the restriction impedes or chills the right to travel and, if so, whether there is a compelling interest to justify this limitation. The difficult part of the puzzle that the courts must solve is what constitutes a penalty on travel and what does not constitute a compelling governmental interest.

It is firmly established that freedom of mobility is constitutionally protected as an implicit right which is assertable against private as well as governmental interference.[54] Travel within the United States has been restricted by riot statutes, curfews and other regulations employed during periods of domestic upheaval. These have been upheld as sufficiently necessary for the general welfare[55] but ordinarily the exercise of police power may not unreasonably infringe upon freedom of movement or freedom of association. The liberty of every American citizen to come and go freely must not be directly limited or suspended unless extraordinary or perilous conditions exist.[56] This has recently been reemphasized where international travel was prohibited.[57] The court held that given the necessity of passports for foreign travel, the mandatory requirement that all applicants swear to or affirm an oath of allegiance is an unconstitutional abridgement of the right to travel.[58]

It has been made clear that it need not be shown that a restriction was intended to prevent mobility or that it in fact had that effect. The penalty

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53. Shapiro v. Thompson, 394 U.S. 618, 655, 89 S. Ct. 1322, 1342, 22 L. Ed. 2d 600, 627 (1969) (Warren, J., dissenting).

54. Griffin v. Breckenridge, 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971); United States v. Guest, 383 U.S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966).

55. *See, e.g.*, United States v. Chalk, 441 F.2d 1277 (4th Cir.), *cert. denied*, 404 U.S. 943 (1971); United States v. Matthews, 419 F.2d 1177 (D.C. Cir. 1969); United States v. Hoffman, 334 F. Supp. 504 (D.D.C. 1971); Davis v. Justice Ct., 89 Cal. Rptr. 409 (Dist. Ct. App. 1970).

56. Zemel v. Rusk, 381 U.S. 1, 25, 85 S. Ct. 1271, 1285, 14 L. Ed. 2d 179, 195 (1965) (Douglas, J., dissenting).

57. Woodward v. Rogers, 344 F. Supp. 974 (D.D.C. 1972).

58. *Id.* at 989.

does not have to rise to any ascertainable level of deterrence to require application of the compelling governmental interest test.[59] In attempting to delineate the scope of the right to travel, the courts, in recent decisions, have had greater problems in determining whether or not something *indirectly* impairs the right to travel. Since the majority in *Shapiro* implied no view of the validity of other residency requirements,[60] there were many questions left unanswered. *Shapiro* did not outlaw all residency requirements, but neither did it provide criteria for determining requirements which are valid and those which are not. Numerous decisions and dissenting opinions have referred to the right to travel in challenging such residency requirements as those imposed for voting, welfare, occupations and education.

Many actions have been brought challenging state durational residency laws for voters. Vermont's 1-year residency requirement was held to penalize recent arrivals from other states and hamper their right to interstate travel.[61] Likewise Massachusetts' additional 6-month residency requirement preceding elections violated the equal protection of persons who moved to Massachusetts between 6 months and 1 year preceding a congressional election. The statute was held unconstitutional as no compelling state interest is served by singling out interstate movers as a class of persons for whom an additional 6 months is mandatory.[62] A statute providing that no elector shall be deemed to have gained a residence while a student at any institution of learning in Michigan placed a burden on the right of students to vote and was held unconstitutional.[63] The court noted that it is unconstitutional to deny the right to vote to students who exercise their right to travel and leave for the summer.[64]

The Supreme Court considered Tennessee's residency requirement for voting and held the durational requisites unconstitutional.[65] The requirements

59. Carter v. Gallagher, 337 F. Supp. 626, 631 (D. Minn. 1971).

60. Shapiro v. Thompson, 394 U.S. 618, 638 n.21, 89 S. Ct. 1322, 1333 n.21, 22 L. Ed. 2d 600, 617 n.21 (1969).

61. Kohn v. Davis, 320 F. Supp. 246 (D. Vt. 1970), *aff'd*, 405 U.S. 1034, 92 S. Ct. 1305, 31 L. Ed. 2d 576 (1972).

62. Burg v. Canniffe, 315 F. Supp. 380, 385 (D. Mass. 1970); *accord*, Woodsum v. Boyd, 341 F. Supp. 448 (M.D. Fla. 1972); Andrews v. Cody, 327 F. Supp. 793, 795 (D.N.C. 1971); Blumstein v. Ellington, 337 F. Supp. 323 (M.D. Tenn.), *aff'd*, 400 U.S. 816, 91 S. Ct. 67, 27 L. Ed. 2d 44 (1970); Keppel v. Donovan, 326 F. Supp. 15, 19 (D. Minn. 1970), *aff'd*, 405 U.S. 1034, 92 S. Ct. 1304, 31 L. Ed. 2d 576 (1972); Hadnott v. Amos, 320 F. Supp. 107, 114 (M.D. Ala. 1970), *aff'd*, 401 U.S. 968, 91 S. Ct. 1189, 28 L. Ed. 2d 318 (1971); Bufford v. Holton, 319 F. Supp. 843 (E.D. Va. 1970); Lester v. Board of Elections, 319 F. Supp. 505 (D.D.C. 1970); Affeldt v. Whitcomb, 319 F. Supp. 69 (N.D. Ill. 1970). *Contra*, Fontham v. McKeithen, 336 F. Supp. 153 (E.D. La. 1971); Ferguson v. Williams, 330 F. Supp. 1012 (N.D. Miss. 1971); Piliavin v. Hoel, 320 F. Supp. 66 (W.D. Wis. 1970); Howe v. Brown, 319 F. Supp. 862 (N.D. Ohio 1970); Cocanower v. Marston, 318 F. Supp. 402 (D. Ariz. 1970).

63. Wilkins v. Bentley, 189 N.W.2d 423 (Mich. 1971).

64. *Id.* at 426 n.11.

65. Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972).

classified bona fide residents on the basis of recent travel, penalizing those persons, and only those persons, who had gone from one jurisdiction to another during the qualifying period. This, the Court said, was a direct encroachment on the right to travel.[66] The Court did give some guidance for the proper application of the compelling state interest test. Pointing out that *Shapiro* did not rest upon a determination that denial of welfare actually deterred travel, the Court reiterated that a law did not have to preclude or restrain a right to be unconstitutional.[67] The two individual interests affected by the durational residence requirements are affected in different ways: "Travel is permitted, but only at a price; voting is prohibited. The right to travel is merely penalized, while the right to vote is absolutely denied."[68] These differences were said to be irrelevant since the Supreme Court had already made it explicit:

> It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution . . . "Constitutional rights would be of little value if they could be . . . indirectly denied . . . ."[69]

The right to travel is then " 'an *unconditional* personal right.' "[70] Durational residency laws impermissibly condition and penalize the right of mobility by disenfranchising only those persons who have recently exercised that right. Absent a compelling government interest, the right to travel may not be burdened in this way. While dictating that courts decide whether the relationship between the laws and legislative classification is too attenuated to justify the burden upon fundamental rights, the Court noted that appropriately defined and uniformly applied bona fide residence requirements for would-be voters were not necessarily invalid if the state shows an overriding interest.[71]

It should be noted that in the Federal Voting Rights Act,[72] Congress specifically stated that a durational residency requirement denies the inherent right of citizens to enjoy free movement. The Supreme Court has used the constitutionally protected right to travel to uphold the validity of the federal voting rights statute enjoining states from disqualifying persons from voting

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66. *Id.* at —, 92 S. Ct. at 1001, 31 L. Ed. 2d at 282.
67. *Id.* at —, 92 S. Ct. at 1002, 31 L. Ed. 2d at 283.
68. *Id.* at —, 92 S. Ct. at 1002, 31 L. Ed. 2d at 284.
69. *Id.* at —, 92 S. Ct. at 1002, 31 L. Ed. 2d at 284, *quoting* Harman v. Forssenius, 380 U.S. 528, 540-41, 85 S. Ct. 1177, 1185, 14 L. Ed. 2d 50, 58 (1965).
70. Dunn v. Blumstein, 405 U.S. 330, —, 92 S. Ct. 995, 1003, 31 L. Ed. 2d 274, 284 (1972) (court's emphasis).
71. *Id.* at — n.13, 92 S. Ct. at 1003 n.13, 31 L. Ed. 2d at 284 n.13. One case interprets "travel," as discussed in *Dunn*, to mean "migration with intent to settle and abide, not mere movement. Accordingly, a residency requirement where only the right to travel is involved might not require the application of the compelling interest test." Wellford v. Battaglia, 343 F. Supp. 143, 147 n.9 (D. Del. 1972).
72. 42 U.S.C. § 1973aa-1(a)(2) (1970).

in presidential elections because of failure to meet state residency requirements.[73] Although the majority did not agree on an opinion, Justice Brennan, joined by Justices White and Marshall, stated that by definition, a state's imposition of a durational residency prescription penalized only those persons who had exercised their constitutional right of interstate migration.[74] The state is required to show that the burden imposed was necessary to protect a substantial governmental interest and that no less intrusive means would adequately protect compelling state interests. In an opinion by Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, it was stated that the objective of the voting rights statute was a legitimate one, and Congress could justly conclude that the imposition of durational residency requirements unreasonably burdened the privilege of taking up residence in another state.[75]

Since *Shapiro*, the lower courts have consistently struck down all forms of attempts to establish durational residency requirements for state and local welfare. The first decision to follow *Shapiro* was *Morrison v. Vincent*[76] wherein the court very unwillingly declared unconstitutional a 1-year residency requirement for eligibility to receive welfare assistance. There is an understandable fear of runaway expenditures for welfare relief, but the attempt to erect fences to bar movement of people flies squarely in the face of the Constitution which established the idea of one nation and one people. It is quite clear that the public fisc is not sufficient grounds to authorize a residency statute which also has the effect of limiting the right of certain citizens to travel freely throughout the United States.[77]

Residency requirements for medical aid to indigents have been closely scrutinized and provisions which deny free medical care to indigents solely on the basis that they had not resided in the county for a certain period have been found unconstitutional.[78] In light of *Shapiro*, an Arizona court held unconstitutional a statute basing eligibility for nonemergency hospitalization or out-patient relief upon residency in one county for the preceding 12 months.[79] This decision was vacated as moot but was directly followed by a

73. Oregon v. Mitchell, 400 U.S. 112, 91 S. Ct. 260, 27 L. Ed. 2d 272 (1970).

74. *Id.* at 238, 91 S. Ct. at 321, 27 L. Ed. 2d at 346 (concurring in part, dissenting in part).

75. *Id.* at 286, 91 S. Ct. at 345, 27 L. Ed. 2d at 375.

76. 300 F. Supp. 541 (S.D.W. Va. 1969); *accord,* Demiragh v. De Vos, 337 F. Supp. 483 (D. Conn. 1972); Gaddis v. Wyman, 304 F. Supp. 717 (S.D.N.Y. 1969), *aff'd,* 397 U.S. 49, 90 S. Ct. 813, 25 L. Ed. 2d 38 (1970); Lopez v. Wyman, 329 F. Supp. 483 (W.D.N.Y. 1971), *aff'd,* 404 U.S. —, 92 S. Ct. 736, 30 L. Ed. 2d 743 (1972).

77. Besaw v. Affleck, 333 F. Supp. 775 (D.R.I. 1971); Rivera v. Dunn, 329 F. Supp. 554 (D. Conn. 1971).

78. *E.g.,* Arnold v. Halifax Hosp. Dist., 314 F. Supp. 277 (M.D. Fla. 1970); Crapps v. Duval County Hosp. Authority, 314 F. Supp. 181 (M.D. Fla. 1970).

79. Board of Supervisors v. Robinson, 457 P.2d 951 (Ariz. Ct. App. 1969), *vacated as moot,* 463 P.2d 536 (Ariz. 1970).

federal district court's construction of the same statute.[80]

Recent cases regarding admission requirements for public housing have involved significant utilizations of the right to travel. *King v. New Rochelle Municipal Housing Authority*[81] and *Cole v. Housing Authority*[82] were two very similar public housing cases which held residency requirements unconstitutional in light of *Shapiro*. The waiting periods for public housing were imposed solely because the applicants had recently migrated into the state. Such domiciliary requisites have been found to constitute a very real inhibition upon the right to travel. It was stated that the residency requirement

> tends directly to inhibit freedom of movement and indirectly to diminish familial and consensual associations of persons. It has long been recognized that the basic human right to geographic mobility, either in pursuit of preferred associations and opportunities or merely seeking a change in environment, is constitutionally protected.[83]

Another federal district court refused to use the travel doctrine to invalidate a durational residency for public housing because of the insubstantiality of the impact of the classification on the right to travel.[84]

The courts have found that the reasoning in *Shapiro* may be equally applicable to residency requirements relating to employment or the practice of a profession or trade. For example, the North Carolina rule requiring a person to have a been a bona fide citizen and resident of the state for 12 months before he can take the bar examination was declared unconstitutional as imposing a burden on the right to interstate travel without being necessary to promote a substantial state interest.[85] Other states have upheld rules re-

80. Valenciano v. Bateman, 323 F. Supp. 600 (D. Ariz. 1971). However, a different result was reached in a later case which held that the residency requirement for nonemergency treatment in a county hospital does not interfere with interstate travel. Maricopa County v. Superior Court, 498 P.2d 461 (Ariz. 1972). Another statute permitting hospital superintendents to return nonresident inmates of a state hospital to states of their residence was held unconstitutional in its deterrence of the right to travel despite the fact that it did not *require* a return and had been administered benevolently. Vaughan v. Bower, 313 F. Supp. 37, 42 (D. Ariz. 1970), *aff'd*, 400 U.S. 884, 91 S. Ct. 139, 27 L. Ed. 2d 129 (1970). The court held that *Shapiro* was dispositive of the situation in that an invidious classification was created which penalized the right to travel and no compelling state interest was shown. *But see In re* Reitz, 191 N.W.2d 913 (Wis. 1971) where a statute authorizing removal of a dependent person who is receiving relief elsewhere was upheld.

81. King v. New Rochelle Mun. Housing Authority, 314 F. Supp. 427 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 646 (2d Cir. 1971).

82. Cole v. Housing Authority, 312 F. Supp. 692 (D.R.I.), *aff'd*, 435 F.2d 807 (1st Cir. 1970).

83. Cole v. Housing Authority, 312 F. Supp. 692, 701 (D.R.I. 1970).

84. Lane v. McGarry, 320 F. Supp. 562 (N.D.N.Y. 1970).

85. Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970) where the court noted:

> Although the Fourteenth Amendment is but a centenarian, the concepts of equal treatment for recent arrivals is at least as old as the Mosaic Law. "One shall be to him that is homeborn, and unto the stranger that sojournth among you." *Exodus* 12:49 (King James).

quiring durational residency before admission to the bar since they did not unduly penalize the right to interstate travel.[86]

Residency requirements for certain occupations have also been challenged as impinging on the right to travel. The New Hampshire Supreme Court held invalid a Manchester ordinance that required school teachers to be residents of that city.[87] This prescription was said to require a surrender of the fundamental constitutional right of a citizen to live where he chooses and to travel freely not only within the state but also across its borders.[88] Another state statute providing that the registration of a real estate broker shall be revoked if the registrant has become a nonresident was held invalid since the right of citizens to be free to travel may be restricted only for a compelling state interest.[89] However, not every interference with the right to travel necessitates voiding the occupational regulation. A statute which required a policeman or fireman to surrender his constitutional right to travel in exchange for his job was found to be justified by a substantial and a compelling regulatory scheme.[90]

A city charter provision requiring a 2-year residency in the city as a prerequisite of eligibility to hold elective office penalized the right to travel without furthering the city's interest and was therefore held unconstitutional.[91] However another county charter's 5-year residency requirement for candidates for office of county supervisor does not constitute a violation of the potential candidate's constitutional right to travel.[92] One court mentioned that the prerequisite that one own property in order to be a political candidate possibly runs afoul of the right to travel.[93] A person desiring to be free to travel and not encumbered by the restraints of property ownership may still meet all the requirements of residency.

Various other residency requirements have been said to infringe upon the right to travel. A 4-month residency requirement as a prerequisite to ob-

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Id. at 1358 n.10; *accord,* Smith v. Davis, 350 F. Supp. 1225 (S.D.W. Va. 1972); Potts v. Honorable Justices of Supreme Court, 332 F. Supp. 1392 (D. Hawaii 1971); Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971); Webster v. Wofford, 321 F. Supp. 1259 (N.D. Ga. 1970).

86. *E.g.,* Suffling v. Bondurant, 339 F. Supp. 257 (D.N.M. 1972), *aff'd sub. nom.,* Rose v. Bondurant, 41 U.S.L.W. 3287 (U.S. Nov. 21, 1972); Application of Brown, 191 N.E.2d 812 (Va. 1972); Application of Titus, 191 N.E.2d 798 (Va. 1972).

87. Donnelly v. City of Manchester, 274 A.2d 789 (N.H. 1971).

88. *Id.* at 791; *see* Purdy v. Fitzpatrick, 79 Cal. Rptr. 77 (1969) (invalidating a statute prohibiting employment of aliens).

89. Hall v. King, 266 So. 2d 33 (Fla. 1972). *See also* State v. Johnston, 456 P.2d 805, 814 n.4 (Hawaii 1969) (dissenting opinion).

90. Krzewinski v. Kugler, 338 F. Supp. 492 (D.N.J. 1972).

91. Green v. McKeon, 468 F.2d 883 (6th Cir. 1972); *accord,* Wellford v. Battaglia, 343 F. Supp. 143 (D. Del. 1972).

92. Zeilenga v. Nelson, 90 Cal. Rptr. 916 (Dist. Ct. App. 1970) where the court nonetheless invalidated the residency requirement.

93. Sorenson v. Bellingham, 496 P.2d 512 (Wash. 1972).

taining a therapeutic abortion under the North Carolina abortion statute unconstitutionally limited the right to travel.[94] A residency requirement for divorce in Wisconsin has been invalidated since it is impermissible for a state to attempt to chill an individual's constitutional right to travel by seeking to deter individuals with marital problems from entering the state.[95] Apparently statutes which require a person to live within a particular state will not be allowed. A California provision which punished nonsupporting fathers who remain out of the state for more than 30 days as felons while only punishing nonsupporting fathers who remain within the state as misdemeanants was invalidated. This classification was held to be violative of equal protection rights in that it penalized the exercise of the fundamental right to travel.[96] Such a goal—to cause individuals to move into or remain in a state —lacks constitutional sanction because it violates the person's right to choose his own domicile and to travel freely throughout the country.

The right to travel has been discussed in situations other than those where durational residency requirements were challenged and the freedom of mobility has been safeguarded by the same standard. The right to travel encompasses intrastate movement as well as interstate since there appears to be no valid distinction between interstate and intrastate travel. To the extent that the right to mobility arises from our consitutional concepts of personal liberty, it does not hinge on the crossing of state lines, but encompasses movement within a state as well. It would be senseless to acknowledge the right to travel between states as a fundamental tenet of personal liberty and not to acknowledge a correlative constitutional right to travel within a state. "The right of any person to travel *interstate* irrespective of race, creed or color is protected by the Constitution. Certainly his right to travel *intrastate* is as basic.[97]

The constitutional right to travel from one state to another and necessarily use the highways and other instrumentalities in doing so occupies a position fundamental to the concept of our federal union.[98] The right to drive an automobile is integrally bound up in the right to travel guaranteed by the Supreme Court's interpretation of the Constitution and an action which required suspension of a driver's license without the privilege of review was held unconstitutional.[99] The right of a citizen to drive on a public street without interference from the police, unless he is engaged in suspicious

94. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

95. Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971). *Contra,* Whitehead v. Whitehead, 492 P.2d 939 (Hawaii 1972); Coleman v. Coleman, 291 N.E.2d 530 (Ohio 1972).

96. *In re* King, 90 Cal. Rptr. 15 (1970), *cert. denied,* 403 U.S. 931 (1971).

97. Bell v. Maryland, 378 U.S. 226, 255, 84 S. Ct. 1814, 1830, 12 L. Ed. 2d 822, 875 (1964) (citations omitted) (court's emphasis).

98. United States v. Guest, 383 U.S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966).

99. Miller v. Depuy, 307 F. Supp. 166, 172 (E.D. Pa. 1969).

conduct associated with criminality, is a fundamental constitutional right which must be protected by the court.[100] However, the right to travel does not include an unlimited right to drive upon highways.[101]

Once a transgression of a constitutional right has been found, the compelling interest test almost assures a finding of unconstitutionality.[102] However, in some cases residency requirements and other restrictions have been upheld because they do not infringe on the right to travel or because they further compelling governmental interests.

It is thus seen that the compelling government interest test, an approach traditionally used in first amendment cases, is also applied to a freedom *not* mentioned in the Constitution—the right to travel. This test can be satisfied by showing that there is an overriding interest even though the right to travel is infringed upon. The fact that a freedom may not be restrained without due process of law does not mean that it can never be restricted.[103] For instance, areas devastated by flood, fire or epidemic can be quarantined when it can be demonstrated that unlimited travel to the area would jeopardize the safety and welfare of the area or the nation as a whole.[104] International travel may be similarly restricted. Regardless of whether it is in the national interest of the United States to provide its citizens with the greatest freedom of world-wide movement, during periods of international hostilities or national emergency this freedom may be reasonably inhibited.[105]

"Travel, once tainted by illegality, loses any constitutional significance."[106] Congress may proscribe the use of interstate facilities to effect an illegal purpose.[107] When travel involves the use of an interstate facility for illicit purposes, the constitutional right of mobility is subordinated to the congressional

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100. People v. Horton, 92 Cal. Rptr. 666 (Dist. Ct. App. 1971); *see* Medrano v. Allee, 347 F. Supp. 605 (S.D. Tex. 1972) where a statute making it an offense to willfully obstruct any public street or highway was upheld over charges that travel is permitted only at the whim of officers.

101. One may be prevented from driving while intoxicated. *E.g.*, People v. Brown, 485 P.2d 500 (Colo. 1971). There is also no constitutional right to flee the scene of an accident to avoid the possibility of legal involvement. California v. Byers, 402 U.S. 424, 91 S. Ct. 1535, 29 L. Ed. 2d 9 (1971).

102. *See* Note, *Shapiro v. Thompson: Travel, Welfare and the Constitution*, 44 N.Y.U.L. REV. 989, 1004 (1969).

103. Woodward v. Rogers, 344 F. Supp. 974, 986-87 (D.D.C. 1972).

104. Zemel v. Rusk, 381 U.S. 1, 15-16, 85 S. Ct. 1271, 1280, 14 L. Ed. 2d 179, 189 (1965).

105. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965).

106. United States v. Gerhart, 275 F. Supp. 443, 451 (S.D.W. Va. 1967) (citation omitted).

107. Turf Center, Inc. v. United States, 325 F.2d 793 (9th Cir. 1964); *see* United States v. Johnson, 149 F.2d 53 (7th Cir.), *cert. denied*, 326 U.S. 722 (1945) (affirming a conviction for supplying dentures through interstate commerce without a license); Hoke v. United States, 227 U.S. 308, 33 S. Ct. 281, 57 L. Ed. 523 (1913) (affirming a conviction for transporting prostitutes); Champion v. Ames, 188 U.S. 321, 23 S. Ct. 321, 47 L. Ed. 492 (1903) (lottery case).

power of regulation of interstate commerce.[108] Accordingly a statute making it an offense to travel in interstate or foreign commerce or to use any facility in that commerce with the intent of furthering unlawful activity does not violate the constitutional right to travel.[109] This statute interferes only with travel and speech which aid unlawful activities and not at all with travel for legitimate purposes. A statute prohibiting a person from engaging in an illegal gambling business does not unconstitutionally intrude on a gambler's right to travel from a state in which gambling is legal into an anti-gambling state without a loss of his profession.[110] Similarly a statute making it unlawful to travel interstate with the intent to organize, promote and participate in a riot does not violate the right of freedom to travel throughout the union.[111]

Curfew laws may restrict movement even within a person's own neighborhood. Individuals may reasonably fear that the exercise of the right to use the public streets to obtain food, to go to work or to locate their families will expose them to arrest on a serious criminal charge.[112] A citywide curfew imposed by the mayor because of racial disturbance was attacked by militants because it restricted citizens' right to travel. The court agreed that the curfew was restrictive; but freedom of travel like freedom of speech may be subject to reasonable limitations as to time and place.[113] Other courts have recognized that curfew laws interfered with the right to travel but that their purpose of preventing violence was a justifiable compelling interest.

> It is true that a curfew, restricting as it does the right of free movement, does interfere with what ordinarily is a right of the citizenry. Obviously, the right to free movement cannot be interfered with unless extraordinary and perilous conditions exist, such as a riot, and perhaps only one of formidable dimensions . . . .[114]

Even though vagrancy statutes place a limitation on the right to travel, they have generally been upheld as a proper utilization of police power. In a prosecution for violation of a statute providing that a person is guilty of loitering when he remains or wanders in or about a place without apparent

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108. Hoke v. United States, 227 U.S. 308, 320-23, 33 S. Ct. 281, 283, 57 L. Ed. 523, 526-27 (1913); United States v. Johnson, 149 F.2d 53 (7th Cir.), *cert. denied*, 326 U.S. 722 (1945).

109. United States v. Corallo, 281 F. Supp. 24 (S.D.N.Y. 1968); Gilstrap v. United States, 389 F.2d 6 (5th Cir.), *cert. denied*, 391 U.S. 913 (1968).

110. United States v. Bally Mfg. Corp., 345 F. Supp. 410 (E.D. La. 1972).

111. United States v. Hoffman, 334 F. Supp. 504 (D.D.C. 1971).

112. United States v. Matthews, 419 F.2d 1177, 1193 (D.C. Cir. 1969) (dissenting opinion).

113. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), *cert. denied*, 404 U.S. 943 (1972).

114. Davis v. Justice Court, 89 Cal. Rptr. 409, 414 (Dist. Ct. App. 1970). A District of Columbia riot statute which imposed a curfew was upheld over constitutional challenges even though it interfered with movement within the community. United States v. Matthews, 419 F.2d 1177 (D.C. Cir. 1969).

reason and under circumstances which justify suspicion that he may be about to engage in a crime, the statute was said to be a reasonable restriction in that it was related to the public good.[115] But the exercise of police power may not unreasonably infringe upon freedom of movement nor freedom of association. Where an effort to prophylactically stamp as criminal what has not yet erupted into a crime affects freedom of movement and expression, the state will be denied the restriction. Thus a New Jersey statute prohibiting persons from going to or being present at a place within the state for unlawful purposes was held void.[116]

While many courts have disallowed durational residency requirements, as previously mentioned, some have specifically permitted them. Those decisions upholding durational residency requirements generally avoided following *Shapiro* by relying on a footnote to the case:

> We imply no view of the validity of waiting-period *or* residence requirements in determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.[117]

Ohio's residency requirement for voter eligibility was held not to impinge upon the constitutional right to move freely interstate.[118] Louisiana's statute imposing a 1-year residency requirement for voting was afforded the presumption of constitutionality, and this presumption was not overcome by the plaintiff's assertions that the statute restricted the right to travel and to vote.[119] The court did not follow *Shapiro* because it felt that durational residency requirements could not realistically be regarded as an attempt to penalize the free movement of voters. Other courts have refused to use the compelling interest test and have upheld their states' traditional residency requirements since they satisfied the rational relation standard.[120]

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115. People v. Taggart, 320 N.Y.S.2d 671 (Dist. Ct. 1971); *see* Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972).

116. Karp v. Collins, 310 F. Supp. 627 (D.N.J. 1970).

117. Shapiro v. Thompson, 394 U.S. 618, 638 n.21, 89 S. Ct. 1322, 1333 n.21, 22 L. Ed. 2d 600, 617 n.21 (1969).

118. Howe v. Brown, 319 F. Supp. 862 (N.D. Ohio 1970).

119. Fontham v. McKeithen, 336 F. Supp. 153, 157 (E.D. La. 1971).

120. *E.g.*, Ferguson v. Williams, 330 F. Supp. 1012 (N.D. Miss. 1971); Piliavin v. Hoel, 320 F. Supp. 66 (W.D. Wis. 1970); Cocanower v. Marston, 318 F. Supp. 402 (D. Ariz. 1970). *Contra,* Woodsum v. Boyd, 341 F. Supp. 448 (M.D. Fla. 1972); Andrews v. Cody, 327 F. Supp. 793 (M.D.N.C. 1971); Blumstein v. Ellington, 337 F. Supp. 323 (M.D. Tenn.), *aff'd,* 400 U.S. 816, 91 S. Ct. 67, 27 L. Ed. 2d 44 (1970); Keppel v. Donovan, 326 F. Supp. 15 (D. Minn. 1970), *aff'd,* 405 U.S. 1034, 92 S. Ct. 1304, 31 L. Ed. 2d 576 (1972); Kohn v. Davis, 320 F. Supp. 246 (D. Vt. 1970), *aff'd,* 405 U.S. 1034, 92 S. Ct. 1305, 31 L. Ed. 2d 576 (1972); Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970), *aff'd,* 401 U.S. 968, 91 S. Ct. 1189, 28 L. Ed. 2d 318 (1971); Bufford v. Holton, 319 F. Supp. 843 (E.D. Va. 1970); Lester v. Board of Elections, 319 F. Supp. 505 (D.D.C. 1970); Affeldt v. Whitcomb, 319 F. Supp. 69 (N.D. Ind. 1970); Burg v. Canniffe, 315 F. Supp. 380, 385 (D. Mass. 1970).

A residency requirement for divorce has been upheld in Hawaii under the strict standard applicable when a statute impinges upon the right to travel.[121] Likewise, Ohio's requirements that the plaintiff in a divorce proceeding be a resident of the state for 1 year prior to the filing of a complaint does not unconstitutionally penalize the right to free travel.[122] The privilege of obtaining a divorce is not a basic need nor supported by any urgent necessity and there is no evidence that the residency requirement prevents persons wanting a divorce from entering the state.

Some courts have upheld the constitutionality of statutes that impose durational residency requirements for relief benefits since they promote a state interest of an overriding nature.[123] It has also been held that a claimant's right to travel was not unreasonably violated by a provision conditioning eligibility for unemployment benefits on his being available (within the state) for work.[124] The claimants had moved to Puerto Rico and had requested that their relief benefits be mailed to them. The court held that the state had an overriding interest and could therefore impose this restriction on the claimant's mobility.[125] A federal court refused to invalidate a durational residency requirement for public housing because the right was not penalized to any great degree. The court decided that just because someone or a few persons might refrain from traveling because of it, the classification does not necessarily result in a penalty being imposed upon the exercise of the right of interstate travel.[126]

The New Mexico Supreme Court upheld a rule requiring a 6-month residency before admission to the bar since it did not unduly penalize the right to interstate travel.[127] Similarly the Virginia rule that requires attorney-applicants to be permanent residents of the state and avow the intention to

121. Whitehead v. Whitehead, 492 P.2d 939 (Hawaii 1972).

122. Coleman v. Coleman, 291 N.E.2d 530 (Ohio 1972). *Contra,* Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971).

123. Maricopa County v. Superior Court, 498 P.2d 461 (Ariz. 1972); *accord,* Pease v. Hansen, 483 P.2d 720 (Mont. 1971), *rev'd per curiam,* 404 U.S. 70, 92 S. Ct. 318, 30 L. Ed. 2d 224 (1971). *But see* Demiragh v. De Vos, 337 F. Supp. 483 (D. Conn. 1972); Lopez v. Wyman, 329 F. Supp. 483 (W.D.N.Y.), *aff'd,* 404 U.S. —, 92 S. Ct. 736, 30 L. Ed. 2d 743 (1972); Valenciano v. Bateman, 323 F. Supp. 600 (D. Ariz. 1971); Vaughan v. Bower, 313 F. Supp. 37 (D. Ariz. 1970), *aff'd,* 400 U.S. 884, 91 S. Ct. 139, 27 L. Ed. 2d 129 (1970); Arnold v. Halifax Hosp. Dist., 314 F. Supp. 277 (M.D. Fla. 1970); Crapps v. Duval County Hosp. Authority, 314 F. Supp. 181 (M.D. Fla. 1970); Gaddis v. Wyman, 304 F. Supp. 717 (S.D.N.Y. 1969), *aff'd,* 397 U.S. 49, 90 S. Ct. 813, 25 L. Ed. 2d 38 (1970); Morrison v. Vincent, 300 F. Supp. 541 (S.D.W. Va. 1969); Board of Supervisors v. Robinson, 457 P.2d 951 (Ariz. Ct. App.), *vacated as moot,* 463 P.2d 536 (Ariz. 1970).

124. Patino v. Catherwood, 327 N.Y.S.2d 638 (1971); Abreu v. Levine, 326 N.Y.S.2d 104 (1971).

125. Patino v. Catherwood, 327 N.Y.S.2d 638 (1971); Abreu v. Levine, 326 N.Y.S.2d 104 (1971).

126. Lane v. McGarry, 320 F. Supp. 562 (N.D.N.Y. 1970).

127. Suffling v. Bondurant, 339 F. Supp. 257 (D.N.M. 1972), *aff'd sub. nom.,* Rose v. Bondurant, 41 U.S.L.W. 3287 (U.S. Nov. 21, 1972).

practice full time in the state does not abridge the right to travel.[128] This rule was challenged as violating the applicant's freedom to travel, but the court refused to apply the compelling state interest test. It was stated that the Supreme Court had invalidated only the waiting period of residency and did not eliminate the basic meaning of residence defined in terms of intent to remain in the jurisdiction.[129]

College students have asserted the right to travel to no avail in challenging regulations which deny certain educational benefits on the basis of residency. Rules requiring a specified residency before being able to qualify for resident tuition have been found not to be an infringement of the fundamental right to travel, the constitutionality of the statute being judged upon the basis of whether the distinction drawn by the regulation has some rational relation to a legitimate state interest.[130] In a California case, the 1-year residency requirement for lower tuition at a state university was held not to infringe on the right to travel.[131] The court denied that travel had been penalized as in *Shapiro* since charging higher tuition fees to nonresident students apparently cannot be equated with the granting of basic subsistence to one class of needy residents while denying it to an equally needy class of residents. Furthermore the domiciliary requirement did not deter any appreciable number of persons from moving into the state.[132] Similarly, parietal regulations of state-supported institutions of higher education requiring undergraduates to live on campus was not held unconstitutional as a result of a class action suit even though it was an apparent restraint on the rights of students to come and go as they please.[133] A 1-year residency requirement for loans has also been upheld under attacks that denial of a loan based on a durational residency requirement impairs students' constitutionally protected right to travel.[134] Apparently, since assistance for education does not constitute such a fundamental aspect of basic survival and subsistence, its denial is not considered of sufficient magnitude as to discourage or prevent interstate travel. However, a high school student was successful in having a rule of an Indiana high school association declared invalid. The provision denied participation in interschool athletics until a 1-year residency requirement had been met and it was declared to be an unconstitutional burden on the right to travel.[135]

128. Application of Brown, 191 S.E.2d 812 (Va. 1972); Application of Titus, 191 N.E.2d 798 (Va. 1972).
129. Application of Titus, 191 S.E.2d 798, 800 (Va. 1972).
130. Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985, 91 S. Ct. 1231, 28 L. Ed. 2d 527 (1971); *accord*, Thompson v. Board of Regents, 188 N.W.2d 840 (Neb. 1971).
131. Kirk v. Board of Regents, 78 Cal. Rptr. 260 (Dist. Ct. App. 1969).
132. *Id.* at 266.
133. Pratz v. Louisiana Polytechnic Inst., 316 F. Supp. 872 (W.D. La. 1970).
134. Clark v. Hammer, 342 F. Supp. 855 (D. Conn. 1972).
135. Sturrup v. Mahan, 290 N.E.2d 64 (Ind. Ct. App. 1972).

Other regulations which seem to promote overriding governmental interests have been upheld since the effect on the right to travel is negligible. Freedom of mobility is said not to be significantly impeded by: a statute which regulates the sale of firearms to a nonresident;[136] exclusion of piecework farm laborers from coverage under Workmen's Compensation;[137] a city ordinance making it unlawful to rent to anyone under age 18;[138] a local airport authority's use and service charge of $1 for each passenger boarding commercial aircraft.[139] The fact that a child was committed to an institution within the state, after he was found to be dependent and delinquent, did not abridge the privilege of the mother to move freely from state to state even though she had moved to the state only 2 months prior to the juvenile hearing.[140]

CONCLUSION

While *Shapiro* added definition to the recurrent discussion of freedom of mobility, unanimity is lacking in recent decisions regarding the significance and range of the right to travel. Still, a majority of the courts have employed the compelling interest test and have zealously guarded the right to travel. There is a common understanding that freedom of movement is a personal liberty that should not be restricted except in exigent circumstances.

> The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it . . . . Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.[141]

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136. United States v. Lebman, 464 F.2d 68 (5th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3229 (U.S. Oct. 24, 1972).

137. Gallegos v. Glaser Crandell, 192 N.W.2d 52 (Mich. Ct. App. 1971).

138. Ames v. City of Hermosa Beach, 93 Cal. Rptr. 786 (Dist. Ct. App. 1971).

139. Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972). *Contra,* Northwest Airlines, Inc. v. Joint City-County Airport Bd., 463 P.2d 470 (Mont. 1970).

Justice Douglas pointed out that *Evansville* was governed by Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 18 L. Ed. 744 (1867), which struck down a state law levying a $1 tax on every person leaving the state by common carrier. He said that *Crandall* must be overruled in order to uphold the $1 tax in *Evansville.* Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707, —, 92 S. Ct. 1349, 1358, 31 L. Ed. 2d 620, 632 (1972) (dissenting opinion).

140. *In re* Henderson, 199 N.W.2d 111 (Iowa 1972).

141. J. MILL, ON LIBERTY 12-13 (1859).