CONSTITUTIONAL LAW—RESIDENCE REQUIREMENTS—ONE YEAR WAITING PERIOD HELD TO BE INVIDIOUS DISTINCTION BETWEEN CLASSES OF PERSONS ENTITLED TO AID TO FAMILIES WITH DEPENDENT CHILDREN UNDER EQUAL PROTECTION CLAUSE. *Shapiro v. Thompson* (U.S. 1969).

Miss Vivian Thompson,[1] unwed and pregnant with her second child moved from Massachusetts to Connecticut to live with her mother. Two months later, when her mother was no longer able to support her, she moved to her own apartment. Miss Thompson's pregnancy made her unable to work or to enter a work training program. She applied for assistance under the Aid to Families with Dependent Children program[2] (AFDC) and was denied assistance because she had not resided in Connecticut for one year prior to her application. She brought her action in the District Court for the District of Connecticut. The Federal District Court[3] found that the Connecticut statute[4] which denied her aid was unconstitutional. On appeal to the United States Supreme Court, *held*, affirmed: the one-year residence requirement was restrictive of Miss Thompson's right to travel uninhibited between the states and was furthering constitutionally impermissible state objectives. *Shapiro v. Thompson*, 89 S. Ct. 1322 (1969).

I. FUNDAMENTAL RIGHT TO TRAVEL

The state argued that the one-year waiting period was designed to limit immigration of people who need or may need welfare assistance.[5] The Supreme Court disapproved this objective

1. *Shapiro v. Thompson* combines three cases from the Federal District Courts of Pennsylvania, the District of Columbia, and Connecticut and affects a total of eight appellees. One appellee died during the interim between trial in the district court and the final decision by the Supreme Court. The Connecticut case alone is treated in this article for clarity. The fact situations are similar in all three cases. All but one of the appellees applied for assistance under the Aid to Families with Dependent Children program. The other applied for Aid to the Permanently and Totally Disabled. Only two of the appellees were pregnant at the time of application. One of them was in ill health besides. It does not appear that any appellee made her interstate move for any reason other than to be with her family. The same arguments are made in all three cases except as noted in footnotes to this article.

2. Aid to Families with Dependent Children was established by the Social Security Act of 1935, is found in 42 U.S.C. § 301 *et. seq.*, and is hereinafter referred to as AFDC except in direct quotes from other authorities.

3. Thompson v. Shapiro, 270 F. Supp. 331 (D.C. Conn. 1967).

4. CONN. GEN. STAT. REV. § 17-2d (1966), now § 17-2c.

5. 89 S. Ct. 1322 at 1328.

as improper.[6] All persons have a fundamental right to travel between the states which is not derived from any particular section of the Constitution, but is nevertheless protected from private and governmental interference.

The development of the right to travel started with the dicta of Chief Justice Taney[7] in the *Passenger Cases* of 1849[8] and continued through *Edwards v. California*[9] to *United States v. Guest*.[10] The issue in the *Guest* case was the freedom of an individual of any race to use the roads of a state for interstate travel without physical interference from private persons. The fundamental right to travel freely from state to state was the foundation of the remedy given the United States for the victim deprived of that right against the wrongdoer.[11]

In *Shapiro* there was no showing of any real interference with

6. *Id.* at 1328-29.

7. Chief Justice Taney said: "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. 48 U.S. (7 How.) 283, 492 (1849).

9. 314 U.S. 160 (1941).

10. 383 U.S. 745 (1966).

11. The *Guest* opinion is used by both the majority and the dissenting opinions in *Shapiro v. Thompson*. The majority opinion says that although there is no specific mention of the right to travel in the Constitution it is a fundamental right inhering in all persons in the United States. Justice Stewart in his concurring opinion cites *Guest* to say that the right is protected from private and governmental interference. There are two dissenting opinions in *Shapiro*, those of Justice Harlan and the Chief Justice [Justice Black with him]. On the basis of *Guest*, Justice Harlan concluded that: "[T]he right to travel interstate is a 'fundamental' right which . . . should be regarded as having its source in the Due Process Clause of the Fifth Amendment."

The Chief Justice, in his dissenting opinion, denies that *Guest* offers controlling principles in *Shapiro*, looking instead to Aptheker v. Secretary of State, 378 U.S. 500 (1964). *Aptheker* is a case in which the Supreme Court set aside a congressionally imposed restriction on the right to travel. The argument was that Aptheker faced a choice which gave no alternative, that is, a choice between his right to travel and his right to freedom of association. This was combined with a flat prohibition on travel. It was the lack of alternative which led the Court to set aside the restriction imposed by Congress.

The *Shapiro* Court cites with approbation United States v. Jackson, 390 U.S. 570 (1968). The *Jackson* Court stated its view of governmental restrictions on personal freedom: "If the provision had no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." *Id.* at 581. The *Jackson* test of such a law is: "The question is not whether the 'chilling' effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive." *Id.* at 582. Apparently the *Shapiro* Court chose not to use it.

the right to travel. Miss Thompson had accomplished her travel. She had made the trip to be with her mother, not to seek welfare benefits. If she sought only her mother's support rather than her society, there was no reason to remain when her mother could no longer support her.

If the one year waiting period was unacceptable to her, she could have traveled to another state instead of another apartment. Though the State of Connecticut extends partial assistance to new residents,[12] there are eight states and three territories which have no waiting period at all, including adjacent New York and Rhode Island.[13]

Additionally it was not shown that the waiting period was a major consideration in Miss Thompson's decision to travel or choice of destination. However, the Supreme Court said that even if she had entered the state only to seek higher welfare payments, the state had no right to fence her out.[14]

II. FENCING OUT THE INDIGENTS

The inclusion of a one-year waiting period in the Connecticut statute created a distinction between the claimants who had been in the state for one year and those who had not when both were otherwise eligible for AFDC payments. Need was not taken into consideration.

The state argued that the waiting period was necessary to preserve the fiscal integrity of its welfare program by limiting welfare benefits and apportioning state services to those who had contributed to the state through their taxes.[15] The "fence out the indigents" objective ascribed to the waiting-period rather than the waiting period itself was proscribed as being violative of the right to travel between the states.[16]

The state did not show how persons who had resided in the state for a long period were making any greater present contribution to the state than recent arrivals when both were eligible for welfare benefits nor did it show a difference between

12. CONN. GEN. STAT. REV. § 17-2c.
13. 89 S. Ct. at 1334 n.22.
14. 89 S. Ct. at 1330.
15. *Id.*
16. *Id.* at 1329.

apportioning welfare benefits and apportioning other benefits and services on the basis of past tax contributions.[17] Thus a distinction made between new and old residents needing welfare on the basis of the waiting period was found to be invidious and could not be upheld.

III. Constitutionally Permissible State Objectives

In addition to the limiting of immigration and the fiscal integrity of the state welfare budget, the state argued that the waiting period promoted (1) limiting of expenditures and facilitated planning of the welfare budget, (2) prevention of fraud, (3) early entry into the labor force, and (4) an objective test for residence.[18] The argument proceeded that since there was a rational relationship between these objectives and the waiting period, the distinction set up by that waiting period is permissible. The Supreme Court dismissed that contention. Since the distinction between persons eligible for benefits created by the welfare entitlement statute touches on the individual's freedom to travel between the states, the standard is more rigid. The distinction must promote a compelling state interest, and none was shown.[19]

The waiting period requirements of the state were overturned

17. Welfare benefits therefore stand on equal footing with fire and police protection, public schooling or use of parks and libraries. It would seem eminently unfair to attempt to apportion the use of those facilities of the state. They are provided from tax monies on a continuing basis for all regardless of need. But need and eligibility must be determined for welfare payments. *See* 89 S. Ct. at 1330.

18. 89 S. Ct. at 1331. Connecticut did not join this argument.

19. 89 S. Ct. at 1331. The "compelling governmental interest" test (as such) is mentioned only in the introductory material and as a make-weight after all the arguments had been disposed of under the Equal Protection Clause by comparison with the evidence. The test was invoked because the classification of persons eligible for aid under AFDC touched on the right of interstate travel. But it was not applied. And it was not needed.

The Court considered the arguments of purpose for the state statute to be without weight. The state could not show any method of using the waiting period for budgetary planning. The prevention of fraud could be accomplished by investigation, letter or phone call. Early entry into the labor force should be applied to both new and longtime residents and the waiting period is applied only to the new residents. Residence and waiting period were shown to be separate and district prerequisites for AFDC payments under the state laws.

The Court considered it well settled that residence is included in an established place of abode within a state with the intention to remain there permanently and deemed that a declaration system could be used to determine the intention of the applicant to remain in the jurisdiction.

as being violative of the Equal Protection Clause.[20] The objectives were perfectly acceptable to the Court under the Constitution, but the one-year waiting period was not tailored to accomplish any of the objectives nor did it actually do what the state claimed it did.[21] State welfare legislation must be designed and used as a scalpel to separate the deserving and undeserving potential welfare beneficiaries. The waiting period of one year sought to perform that same operation with a blunderbuss.

IV. WELFARE PROGRAMS PRIOR TO SHAPIRO

The Supreme Court, holding that the extension of welfare benefits is a privilege and that no one receives such benefits as of right[22] from a state,[23] found that when a state undertakes to extend welfare aid, it must do so in consonance with the Equal Protection Clause.[24]

Prior to *Shapiro*, the waiting period requirements of the states were being examined in the federal courts. Interstate compacts had the effect of waiving the one-year waiting period for welfare recipients moving between the signatory states.[25]

Federal contribution was available to prevent destitution of children and to provide living arrangements for them so long as the states seeking federal matching for such aid already had emergency assistance provisions in their statutes.[26]

In 1968 Public Law 90-248 was enacted to spur the states into expediting a work incentives program.[27] Included was a section limiting or "freezing" federal funding of AFDC; if more persons were entitled to aid than the federal quota, they would be paid from state funds or not be paid at all.[28]

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20. 89 S. Ct. at 1333.

21. *Id.* at 1335.

22. One legal writer explains welfare entitlement in the following terms: "The idea of entitlement is simply that when individuals have insufficient resources to live under conditions of health and decency, society has obligations to provide support and the individual is entitled to that support as of right." Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1256 (1965).

23. 89 S. Ct. at 1327 n.6. *See also* Smith v. King, 277 F. Supp. 31 (D.C. Ala. 1967), *aff'd*, 392 U.S. 309 (1968).

24. 277 F. Supp. at 40.

25. CONN. GEN. STAT. REV. § 17-21a (1968).

26. 42 U.S.C. § 606 (e) (1968).

27. U.S. CODE CONG. & AD. NEWS No. 7 of August 20, 1969, 1031.

28. PUB. L. No. 90-248 § 208 (b) provides:

(b) Section 403 of such Act [Social Security Act of 1935 as amended] is

Recommendations for the repeal of the freeze section of Public Law 90-248 had been given twice before the *Shapiro* decision and at least one federal district court decision[29] and two legislative bodies, the Senate Committee on Finance and the House Ways and Means Committee, were awaiting the final judgment of the Supreme Court.

V. THE SHAPIRO DECISION IS ANNOUNCED

After *Shapiro*, the purpose of the freeze was more difficult to attain and the cost burden on the states was higher than Congress was willing to permit. The freeze section of Public Law 90-248 was repealed by Public Law 91-41 on July 9, 1969, less than eighty days after the announcement of *Shapiro*.

The thrust of the *Shapiro* case is the expansion of welfare entitlement by elimination of restrictions which may deny claimants the equal protection of the laws. The Supreme Court noted the existence of the interstate compacts without objection, using them to show the irrelevance of the one-year wait to the planning of the welfare budget.[30] The need for reciprocal agreements of this nature may have been obviated by the waiting period. It could be anticipated that the state legislatures, viewing the equal protection problem in drafting legislation on the subject of residence and waiting period requirements, will sedulously review the agreements also since they constitute exceptions to the existing statutes. Repeal or annulment of those agreements might be in the offing.

In *Shapiro*, the state contended that Congress had approved a one-year waiting period requirement in the Social Security Act.[31]

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further amended by adding at the end thereof the following new subsection:

(d) Notwithstanding any other provision of this Act, the average monthly number of dependent children under the age of 18 who have been deprived of parental suyport or care by reason of the continued absence from the home of a parent with respect to whom payments under this section may be made to a State for any calendar quarter after June 30, 1968, shall not exceed the number which bears the same ratio to the total population of such state under the age of 18 on the first day of the year in which such quarter falls as the average monthly number of such dependent children under the age of 18 with respect to whom payments under this section were made to such State for the calendar quarter beginning January 1, 1968, bore to the total population of such state under the age of 18 on that date.

29. Essex County Welfare Board v. Cohen, 299 F. Supp. 176 (D.C. N.J. 1969).

30. 89 S. Ct. at 1332.

31. *Id.* at 1333. The District of Columbia did not join in this argument.

After denying that the Social Security Act had any restrictive effect, the Court said in its dicta that the provision of the Social Security Act "insofar as it permits the one-year waiting-period requirement would be unconstitutional."[32] If the section were truly unconstitutional, Congress would have to amend it in order to perpetuate the federal funding of the AFDC program and the states would have to respond with their own legislation.

For instance, the Connecticut statute on emergency assistance[33] sets the maximum period of payment of such assistance at "the federal maximum." If this refers to the federal maximum period of emergency assistance, then the period is 30 days in any calendar year. If it refers to the maximum federal waiting-period requirement for AFDC, there is no such period. The question might seem absurd except that the Court used the fact of temporary partial assistance given to some new residents to dismiss the relevance of the one-year waiting period to state planning of the welfare budget.[34]

Although a one-year waiting period may not be arbitrarily imposed, the federal requirement is that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals."[35] Reasonable promptness has not yet been defined. However, the state must determine need and investigate the potential welfare claimant before paying benefits under AFDC. If emergency assistance has been commenced and investigation has not been completed before termination of emergency aid payments, or if a state did not have emergency assistance as part of its AFDC administration system, other litigation might arise with the claimant arguing the invidious distinction made between federal and state assistance provisions in the same program.

VI. Modifications After Shapiro

Nine days after the *Shapiro* decision, the President sent a message to Congress proposing Presidential authority to consolidate federal grants-in-aid programs.[36] The proposal had

32. 89 S. Ct. at 1335.
33. Conn. Gen. Stat. Rev. § 17-2e (1966) now 17-2d.
34. 89 S. Ct. at 1332.
35. 42 U.S.C. § 602 (a) (10) (Supp. IV, 1969).
36. U.S. Code Cong. & Ad. News No. 4 of May 20, 1969, 540-41.

among its purposes to benefit "[s]tate and local governments, which now have to contend with a bewildering array of rules and jurisdictions."

On the 11th day of August, 1969, the President sent a message to Congress proposing a welfare reform program.[37]

> Under the present welfare system, each State provides "Aid to Families with Dependent Children," a program we propose to replace. The Federal Government shares in the cost but each State establishes key eligibility rules and determines how much income support will be provided to poor families. The result has been an uneven and unequal system. . . . The new system would do away with the inequity of very low benefit levels in some States, and of State-by-State variations in eligibility tests, by establishing a Federally-financed income floor with a national definition of basic eligibility.[38]

The Federal Government, under the guise of providing adequate guidelines to the states for the administration of welfare benefits, has already gained expanded amounts of indirect control over the state welfare machinery. One example of such indirect control by additional guidelines is the right of the Federal Government under Public Law 90-248 to define terms. In a section making federal matching of funds available under AFDC to children of unemployed fathers,[39] the Secretary of Health, Education and Welfare is empowered to prescribe standards governing state definitions of unemployment. The context of the law makes the standards applicable to AFDC, but a state could not operate AFDC under one definition of unemployment and unemployment compensation under another definition even slightly different without stimulating litigation on invidious distinction grounds.

The balance between the interests of the states as protected by their legislatures and the efficiency of the federal grants-in-aid in the welfare area is being resolved on the federal side to the detriment of the states.

> As grant-in-aid programs have proliferated, the problems of delivery have grown more acute. States, cities, and other recipients find themselves increasingly faced with a welter of

37. 167 CONG. REC. H7239-41 (daily ed. Aug. 11, 1969).
38. *Id.* at H7240.
39. 42 U.S.C. § 607 (Supp. IV, 1969).

> overlapping programs, often involving multiple agencies and diverse criteria. This results in confusion at the local level, in the waste of time, energy and resources, and often in the frustration of the *intent of Congress.*[40]

VII. FUTURE OF WELFARE

Although neither federal nor state government has completely accepted the theory that support is an obligation upon society and a right for the individual, federal expansion of entitlement could be precipitated in the near future under the President's Welfare Reform Program. The future of the welfare system as a whole appears to be a completely open question. Regardless of the legislative enactments to come from the President's proposal, the initiative is moving away from the states, leaving them with little more than expense. Establishment of a national income floor might remove, by application of the Equal Protection Clause, the one drastic final option left to them—withdrawal from the jointly-funded program. Drawn between *Shapiro* and the new welfare reforms proposed, the state capitals must watch and wait.

EDWARD I. MEARS

CRIMINAL LAW—ARREST—RESISTING AN UNLAWFUL ARREST PUNISHABLE AS A MISDEMEANOR UNDER CALIFORNIA PENAL CODE SECTION 834A. *People v. Curtis* (Cal. 1969).

The defendant was arrested on the street at night by a police officer in uniform. The officer was investigating a report of a prowler and had received a brief, general description of the suspect as a male Negro, about six feet tall, wearing a white shirt and tan trousers. The defendant matched this description. After telling the defendant that he was under arrest and would have to come with him, the officer reached for the defendant's arm. The defendant attempted to back away and a violent struggle ensued in which both men were injured. The defendant was subdued and taken into custody by several other officers. In the Superior Court, the defendant was acquitted of a charge of burglary, but was convicted of a battery upon a peace officer, a felony.[1] The Court

40. See note 36, *supra* [emphasis supplied].

1. CAL. PENAL CODE § 243 (West Supp. 1968):
A battery is punishible by fine of not exceeding one thousand dollars